UNITED STATES - ANTI-DUMPING MEASURES ON CERTAIN HOT-ROLLED STEEL PRODUCTS FROM JAPAN

Report of the Appellate Body
WT/DS184/AB/R

Adopted by the Dispute Settlement Body on 23 August 2001

United States, *Appellant/Appellee*
Japan, *Appellant/Appellee*
Brazil, *Third Participant*
Canada, *Third Participant*
Chile, *Third Participant*
European Communities, *Third Participant*
Korea, *Third Participant*

Present:
Taniguchi, Presiding Member
Feliciano, Member
Lacarte-Muró, Member

I. INTRODUCTION

1. The United States and Japan appeal certain issues of law and legal interpretations in the Panel Report, *United States - Anti-Dumping Measures on Certain Hot-*

Rolled Steel Products from Japan (the "Panel Report").[1] The Panel was established to consider a complaint by Japan with respect to anti-dumping measures imposed by the United States on imports of certain hot-rolled flat-rolled carbon-quality steel products ("hot-rolled steel") from Japan.

2. On 15 October 1998, the United States Department of Commerce ("USDOC") initiated an anti-dumping investigation into imports of hot-rolled steel from, among others, Japan.[2] USDOC determined that it was not practicable to examine all known Japanese producers and exporters and, therefore, conducted its investigation on the basis of a sample of Japanese producers. USDOC selected Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") for individual investigation.[3] USDOC calculated an individual dumping margin for each of these companies. USDOC also established a single rate of anti-dumping duty applicable to all those Japanese producers and exporters not individually investigated (the "all others" rate). The "all others" rate was calculated as the weighted average of the individual dumping margins calculated for KSC, NSC and NKK.[4] On 6 May 1999, USDOC published its final affirmative dumping determination.[5] On 23 June 1999, the United States International Trade Commission (the "USITC") published its final affirmative determination of injury to the United States' hot-rolled steel industry.[6] On 29 June 1999, USDOC published an anti-dumping duty order imposing anti-dumping duties on imports of hot-rolled steel from Japan.[7] The factual aspects of this dispute are set out in greater detail in paragraphs 2.1 to 2.9 of the Panel Report.

3. The Panel considered claims by Japan that, in imposing the specific anti-dumping measures on hot-rolled steel, the United States acted inconsistently with Articles 2.1, 2.2, 2.3, 2.4, 3.1, 3.2, 3.4, 3.5, 3.6, 4.1, 6.1, 6.6, 6.8, 6.13, 9.3, 9.4, 10.1, 10.6, and 10.7 and Annex II of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"); and with Article X:3 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"); and claims that certain provisions of United States' anti-dumping laws, regulations, and administrative procedures are inconsistent with Articles 2.1, 2.2, 2.4, 3.1, 3.2, 3.4, 3.5, 3.6, 4.1, 6.8, 9.4, 10.1, 10.6, 10.7 and Annex II of the *Anti-Dumping Agreement*. Japan asked the Panel to recommend that the Dispute Settlement Body request the United States to ensure, in accordance with Article XVI:4 of the *Marrakesh Agreement Establishing the World Trade Organization*

1 WT/DS184/R, 28 February 2001.
2 Panel Report, para. 2.3. The United States International Trade Commission had already instituted an injury investigation. (Panel Report, para. 2.2)
3 These three companies accounted for more than 90 per cent of all known exports of hot-rolled steel from Japan during the period of investigation. (Panel Report, para. 2.3)
4 Panel Report, para. 2.6.
5 USDOC established the following margins of dumping: 67.14% for KSC; 19.65% for NSC; and 17.86% for NKK. The "all others" rate was 29.30%. (Panel Report, para. 2.7; Notice of Final Determination of Sales at Less Than Fair Value: Hot-Rolled Flat-Rolled Carbon-Quality Steel Products From Japan ("USDOC Final Determination"), United States Federal Register, 6 May 1999 (Volume 64, Number 87), Exhibit JP-12 submitted by Japan to the Panel, p. 24329 at 24370)
6 Panel Report, para. 2.8.
7 *Ibid.,* para. 2.9.

(the "*WTO Agreement*") and Article 18.4 of the *Anti-Dumping Agreement*, the conformity of the specified provisions of its anti-dumping laws, regulations, and administrative procedures with its obligations under the *Anti-Dumping Agreement*.[8]

4. In its Report, circulated to Members of the World Trade Organization (the "WTO") on 28 February 2001, the Panel concluded:

(a) that the United States acted inconsistently with Articles 6.8 and Annex II of the AD Agreement in its application of "facts available" to Kawasaki Steel Corporation (KSC), Nippon Steel Corporation (NSC) and NKK Corporation;

(b) that section 735(c)(5)(A) of the Tariff Act of 1930, as amended, which mandates that USDOC exclude only margins based entirely on facts available in determining an all others rate, is inconsistent with Article 9.4 of the AD Agreement, and that therefore the United States has acted inconsistently with its obligations under Article 18.4 of the AD Agreement and Article XVI:4 of the Marrakesh Agreement by failing to bring that provision into conformity with its obligations under the AD Agreement; and

(c) that the United States acted inconsistently with Article 2.1 of the AD Agreement in excluding certain home-market sales to affiliated parties from the calculation of normal value on the basis of the "arm's length" test. In addition, in light of the findings above, we conclude that the replacement of those sales with sales to unaffiliated downstream purchasers was inconsistent with Article 2.1 of the AD Agreement.[9]

5. The Panel further concluded:

(a) that the United States did not act inconsistently with its obligations under Articles 10.1, 10.6 and 10.7 of the AD Agreement in determining the existence of "critical circumstances". We further find that sections 733(e) and 735(a)(3) of the Tariff Act of 1930, as amended, concerning the determination of critical circumstances are not inconsistent with Articles 10.1, 10.6 and 10.7 of AD Agreement;

(b) that section 771(7)(c)(iv) of the Tariff Act of 1930, as amended, the "captive production" provision, is not inconsistent with Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement. In addition, we further conclude that the United States did not act inconsistently with its obligations

[8] Panel Report, para. 3.1. Japan also asked the Panel to recommend that: (i) if the Panel determined that the imported products were not dumped or did not injure the domestic industry, that the DSB further request that the United States revoke its anti-dumping duty order and reimburse any anti-dumping duties collected; and (ii) if the Panel determined that the imported products were dumped to a lesser extent than the duties actually imposed, that the DSB further request that the United States reimburse the duties collected to the extent of the difference.

[9] Panel Report, para. 8.1.

under Articles 3.1, 3.2, 3.4, 3.5, 3.6 and 4.1 of the AD Agreement in applying that provision in its determination concerning injury to the US industry;

(c) that the United States did not act inconsistently with Articles 3.1, 3.4 and 3.5 of the AD Agreement in its examination and determination of a causal connection between dumped imports and injury to the domestic industry; and

(d) that United States did not act inconsistently with Article X:3 of GATT 1994 in conducting its investigation and making its determinations in the anti-dumping investigation underlying this dispute. [10]

6. The Panel concluded that, to the extent the United States had acted inconsistently with the provisions of the *Anti-Dumping Agreement*, it had nullified or impaired benefits accruing to Japan under that Agreement. [11] The Panel recommended that the Dispute Settlement Body ("DSB") request the United States to bring its measure into conformity with the *Anti-Dumping Agreement*. [12]

7. On 25 April 2001, the United States notified the DSB of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to paragraph 4 of Article 16 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*"). On 7 May 2001, the United States filed its appellant's submission. [13] On 10 May 2001, Japan filed an other appellant's submission. [14] On 21 May 2001, Japan and the United States each filed an appellee's submission. [15] On the same day, Brazil, Canada, Chile, the European Communities and Korea each filed a third participant's submission. [16]

8. The oral hearing in the appeal was held on 1 and 2 June 2001. The participants and third participants presented oral arguments and responded to questions put to them by the Members of the Division hearing the appeal.

[10] Panel Report, para. 8.2. At para. 8.3 of its Report, the Panel explained that it did not consider the remaining claims made by Japan, either because it had found that those claims fell outside the Panel's terms of reference, or for reasons of judicial economy.
[11] *Ibid.,* para. 8.4.
[12] *Ibid.,* para. 8.8. At paras. 8.5-8.14 of its Report, the Panel declined to make more specific suggestions regarding implementation.
[13] Pursuant to Rule 21 of the *Working Procedures*.
[14] Pursuant to Rule 23(1) of the *Working Procedures*.
[15] Pursuant to Rules 22 and 23(3) of the *Working Procedures*.
[16] Pursuant to Rule 24 of the *Working Procedures*.

II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. Claims of Error by the United States - Appellant

1. Article 6.8 of the Anti-Dumping Agreement: the Use of "Facts Available"

1. The United States claims the Panel erred in finding that the use of facts available in determining the dumping margins for NSC and NKK was not consistent with the requirements of Article 6.8 of the *Anti-Dumping Agreement*.[17] The United States interprets Article 6.8 as allowing an investigating authority to enforce reasonable, pre-established deadlines for data submission. Since, in the view of the United States, this is a permissible interpretation of the relevant provision, and since NSC and NKK failed to provide the relevant weight conversion factors within USDOC's reasonable deadlines, the rejection of this data was consistent with the *Anti-Dumping Agreement.*

2. The United States underlines that the enforcement of reasonable, pre-established deadlines for the submission of requested information is consistent with the terms of Article 6.8 and Annex II and with the object and purpose of the *Anti-Dumping Agreement*, and ensures a rules-based, transparent, and predictable administration of anti-dumping law. The Panel's interpretation, however, precludes enforcement of reasonable deadlines, wrongly reads the requirement of "timeliness" out of paragraph 3 of Annex II of the *Anti-Dumping Agreement*, and ignores Article 6.1.1 of the *Anti-Dumping Agreement*, which specifically provides for the use of deadlines for questionnaire responses. The United States adds that, since NSC and NKK were given 87 days to submit weight conversion factors, the deadlines established by USDOC in this case were reasonable.

3. The United States asserts that the Panel further erred in finding that an unbiased and objective investigating authority evaluating the evidence before USDOC could not reasonably have concluded that KSC failed to "cooperate" in providing requested information.[18] According to the United States, the Panel engaged in "sheer speculation"[19] when it concluded that any action by KSC to obtain the requested information from its United States affiliate, California Steel Industries Inc. ("CSI"), "would have inevitably disrupted the on-going business relationships" of the companies.[20] The Panel also drew unreasonable inferences from the facts that were on the record in concluding that, because CSI was a petitioner, it had interests opposed to those of KSC.[21] As USDOC found, it was not clear that CSI's interests were opposed to those of KSC. Furthermore, there is *no* evidence on the record that KSC ever sought any assistance from Companhia Vale de Rio Doce ("CVRD"), its joint venture partner in CSI, or that CVRD would have been uncooperative. Thus, the United States reasons, even if the Panel might itself have reached a different conclu-

---

17 Panel Report, paras. 7.57 and 7.59.
18 *Ibid.,* para. 7.73.
19 United States' appellant's submission, para. 72.
20 Panel Report, para. 7.73.
21 *IbIbid.*

sion in the first instance, the evidence on the record does not support its conclusion on review that an objective and unbiased authority could not have found KSC to be uncooperative. Accordingly, the United States requests the Appellate Body to reverse the Panel's finding on this issue and to find that USDOC's application of facts available to KSC was not inconsistent with Article 6.8 and Annex II of the *Anti-Dumping Agreement*.

2. *Article 9.4 of the Anti-Dumping Agreement: Calculation of the "All Others" Rate*

4. The United States contends that the Panel erred in finding that the United States' statute providing for the calculation of the "all others" anti-dumping rate does not constitute a permissible interpretation of Article 9.4 of the *Anti-Dumping Agreement.* In the view of the United States, the Panel adopted an interpretation that is not supported by the text, context, or object and purpose of Article 9.4, in requiring the exclusion from the "all others" rate of *any* margin containing even the *smallest* amount of facts available. In particular, the Panel wrongly interpreted the phrase "margins established under the circumstances referred to in paragraph 8 of Article 6". In the view of the United States, margins "established" on the basis of facts available are margins that are "founded" upon facts available, but *not* margins that include only *minimal amounts* of facts available.

5. In support of its argument that only margins based "entirely" on facts available must be excluded, the United States points out that Article 9.4 also excludes *overall* zero and *de minimis* margins - not "portions" of margins, from the "all others" rate. The United States also observes that the use of some amount of facts available is a common necessity in the establishment of a dumping margin, and that such facts available will not necessarily be adverse to the exporter concerned. Therefore, the United States insists, the Panel's interpretation, which requires the exclusion from the "all others" rate of *all* margins containing *any trace* of facts available (even when those margins are based predominantly on data submitted by respondents and duly verified), would render it impossible to calculate an "all others" rate in most cases, and, for that reason, frustrates the purpose of Article 9.4.

3. *Article 2.1 of the Anti-Dumping Agreement: the "Ordinary Course of Trade"*

6. The United States argues that the Panel erred in finding that USDOC's "arm's length" or 99.5 percent test, which is used to determine whether home market sales to affiliated customers were made "in the ordinary course of trade", was not a permissible interpretation of Article 2.1 of the *Anti-Dumping Agreement*.[22] It is generally recognized that sales to affiliated customers may be outside "the ordinary course of trade". The Panel found that USDOC's test was impermissible because it excluded only sales to affiliates paying, on average, *below* arm's length prices. However, the *Anti-Dumping Agreement* does not compel investigating authorities to use the *same* test to determine whether different categories of sales, such as those above and those

[22] Panel Report, para. 7.112.

below arm's length prices, are outside "the ordinary course of trade." As regards sales to affiliates at artificially *high* prices, USDOC does not address them unless a respondent makes an allegation that they are outside "the ordinary course of trade." The United States points out that, in this case, the Japanese respondents never sought to have USDOC exclude any such high-priced sales.

7. According to the United States, the 99.5 percent test does not "skew" normal value upward; to the contrary, the test simply removes the distortion that would otherwise be caused if artificially low-priced sales to affiliates were included in the calculation of normal value. The United States argues that the Panel, in its reasoning, failed adequately to take into account the argument of the United States that sales which might be outside the ordinary course of trade for *other* reasons could be addressed by *other* tests, just as, for example, sales *below cost* are addressed by a different test to determine whether they are outside the "ordinary course of trade".

8. The United States also submits that the Panel erred in finding that the replacement of excluded sales to affiliates with the sales by those affiliates to downstream purchasers in this case was inconsistent with Article 2.1 of the *Anti-Dumping Agreement*.[23] Article 2.1 of the *Anti-Dumping Agreement* requires that normal value be based on "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." Since downstream resales by affiliates meet these criteria, nothing in Article 2.1 prevents use of these sales. Furthermore, the United States' practice is consistent with the preference, expressed in Article 2.2 of the *Anti-Dumping Agreement*, that normal value be calculated using actual sales in the home market, rather than third country sales or constructed normal value. The Panel, however, erred in construing Article 2.1 in light of the unrelated provisions of Articles 2.3 and 6.10 of the *Anti-Dumping Agreement*. The Panel also ignored that many other WTO members also calculate normal value using sales by companies other than the producer or exporter for which the margin is calculated. Lastly, the United States contends that the Panel erred in finding that USDOC made "no attempt to make allowances for costs, including duties and taxes, incurred between the original sale to the affiliated purchaser and the first resale to an independent buyer".[24] The United States asserts that the Panel record contradicts the Panel on this point, and makes clear that: there were no "duties" incurred because the merchandise did not leave Japan; home market taxes were removed; and, although USDOC received no request for a level of trade adjustment, it nevertheless conducted the necessary analysis and concluded that this was not an appropriate case for a level of trade adjustment.

B. Arguments of Japan - Appellee

1. Article 6.8 of the Anti-Dumping Agreement: the Use of "Facts Available"

9. Japan requests the Appellate Body to uphold the Panel's findings that, in using the facts available, the United States acted inconsistently with Article 6.8 and

[23] Panel Report, para. 7.118.
[24] *Ibid.*, para. 7.117.

Annex II of the *Anti-Dumping Agreement*. Japan notes that the United States' appeal of the Panel's findings regarding USDOC's application of facts available involves issues of both law and fact. In seeking to justify its use of facts available for NSC and NKK, the United States improperly asserts that mechanical deadlines eliminate any need to consider the facts and circumstances of a case. The Panel, however, properly interpreted Article 6.8 and Annex II of the *Anti-Dumping Agreement*, and recognized that the treaty text balances the interests of authorities and respondents, with the goal of ensuring that authorities calculate margins that are accurate and fair, and are based, whenever possible, on actual data. According to Japan, the interpretation of these provisions suggested by the United States is not permissible because it is not supported by their text, context or object and purpose, and would upset this balance.

10. Japan underlines that the *sole* basis for the United States' appeal on this issue is that NSC and NKK had 87 days in which to respond to USDOC's requests for information. Japan recalls a number of other relevant facts which, in its view, demonstrate the weakness of the United States' position. Japan notes, for instance, that the weight conversion factors were minor in relation to the information submitted by NSC and NKK within established timeframes, that the weight conversion factors were submitted well before verification, that USDOC in fact verified NKK's weight conversion factor, and that USDOC rejected the weight conversion factors submitted by NSC and NKK but accepted all other corrections submitted by NSC and NKK before or at verification. Japan adds that Article 6.1.1 of the *Anti-Dumping Agreement* imposes obligations on investigating authorities regarding the *minimum* time that must be given to respondents to provide requested information, but does not authorize authorities to ignore data actually provided without any regard to the overall circumstances.

11. Japan urges the Appellate Body to uphold the Panel's finding that KSC cooperated with USDOC. Japan submits that the United States' interpretation of the word "cooperate" in paragraph 7 of Annex II of the *Anti-Dumping Agreement* is unreasonable because, as the Panel correctly found, "USDOC's conclusion that KSC failed to act to the best of its ability to comply with the request for information in this case went far beyond any reasonable understanding of any obligation to cooperate".[25] The question of whether an objective and unbiased investigating authority could reasonably have concluded that KSC did not cooperate does not depend on whether KSC took every conceivable step to obtain the data from CSI. Instead, this question turns on whether an objective and unbiased investigating authority could reasonably have concluded that KSC was not *in fact* working together - "cooperating" - with USDOC to obtain the data from CSI. Japan submits that the Panel's finding that an objective and unbiased investigating authority *could not* have reached such a conclusion was a *factual* determination not subject to review by the Appellate Body. In any event, KSC went to great lengths to cooperate with USDOC, while USDOC, in stark contrast, failed to cooperate with KSC. In Japan's view, USDOC also failed to take account of Article 6.13 of the *Anti-Dumping Agreement*, which requires investigating

[25] Panel Report, para. 7.73.

authorities to provide assistance to an interested party experiencing difficulties in providing requested information.

2. *Article 9.4 of the Anti-Dumping Agreement: Calculation of the "All Others" Rate*

12. Japan urges the Appellate Body to uphold the Panel's findings as regards the "all others" rate. The United States' suggested interpretation of Article 9.4 of the *Anti-Dumping Agreement* is not permissible because it ignores the text, context, and object and purpose of that provision. Article 9.4 requires authorities to disregard margins that incorporate the use of facts available in the calculation of the "all others" rate. Although Article 6.8 makes no distinction between "entire" or "partial" facts available, the United States' statute requires USDOC to disregard only those margins based "entirely" on facts available. The Panel, therefore, correctly found the United States' statute, on its face, and as applied in this case, to be inconsistent with Article 9.4 of the *Anti-Dumping Agreement*. Japan highlights the effects of USDOC's actions in this case, where the inclusion of KSC's dumping margin in the calculation of the "all others" rate dramatically inflated that rate. Finally, Japan dismisses the United States' contention that the Panel's approach makes it "impossible" to calculate an "all others" rate. Before the Panel, Japan suggested a possible alternative method to calculate the "all others" rate without violating Article 9.4, namely to use a composite, consisting of those portions of the investigated companies' margins that were *not* based on facts available.

3. *Article 2.1 of the Anti-Dumping Agreement: the "Ordinary Course of Trade"*

13. Japan urges the Appellate Body to uphold the Panel's finding that the 99.5 percent test applied by USDOC to respondents' sales to affiliated customers, is inconsistent with Article 2.1 of the *Anti-Dumping Agreement*. As the Panel found, USDOC's test is skewed to make more likely a finding of dumping or a higher margin of dumping. This bias is further revealed through the "test" USDOC uses to discern whether high-priced sales are outside the ordinary course of trade. The "aberrationally high" test for high-priced sales is flexible and lax, whereas the 99.5 percent test excludes nearly all low-priced sales in a mechanical and strict fashion. The combined effect of the two tests is to inflate the dumping margin in a manner that is contrary to Article 2.1. Japan adds that, if the Appellate Body disagrees with the Panel that the 99.5 percent test contravenes Article 2.1, then it should find the test to be inconsistent with Article 2.4 of the *Anti-Dumping Agreement*, since the test used by USDOC operates systematically to exclude sales that tend to reduce the dumping margin and to include sales that tend to inflate the margin, thus resulting in an unfair comparison.

14. Japan also requests the Appellate Body to uphold the Panel's finding that USDOC's replacement of low-priced sales to affiliates with downstream sales by those affiliates was inconsistent with Article 2.1 of the *Anti-Dumping Agreement*. It is clear from Article 2, read as a whole, that investigating authorities are to focus on sales made by the individual exporters under investigation. As the Panel found, Article 6.10 of the *Anti-Dumping Agreement* clarifies that dumping margins for an indi-