

UNITED STATES - IMPOSITION OF ANTI-DUMPING DUTIES
ON IMPORTS OF SEAMLESS STAINLESS STEEL HOLLOW
PRODUCTS FROM SWEDEN

Report of the Panel
(ADP/47)

1. INTRODUCTION

1.1 On 14 July 1988 Sweden and the United States held bilateral consultations under Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereafter in this Report referred to as "the Agreement") regarding the imposition of anti-dumping duties by the United States on imports of seamless stainless steel hollow products from Sweden. When these consultations failed to lead to a mutually satisfactory solution, Sweden requested on 9 September 1988 that a special meeting of the Committee on Anti-Dumping Practices (hereafter in this Report referred to as "the Committee") be held for the purpose of conciliation under Article 15:3 of the Agreement. This meeting took place on 5 October 1988 (AD/M/23).

1.2 In a communication dated 1 December 1988 Sweden requested that a special meeting of the Committee be convened to establish a panel under Article 15:5 of the Agreement (AD/40). On 16 January 1989, the Committee agreed to establish a panel in the dispute referred to the Committee by Sweden in document AD/40 and authorized the Chairman of the Committee to decide, in consultation with the two parties to the dispute, on the terms of reference of the Panel and to decide, after securing the agreement of the two parties, on the Panel's composition. At the same meeting the delegation of Canada reserved its right to present its views on this dispute to the Panel (AD/M/25).

1.3 On 14 April 1989 the Committee was informed by the Chairman in document AD/43 that the terms of reference and composition of the Panel were as follows:

Terms of Reference:

"To examine, in the light of the relevant provisions of the Agreement on Implementation of Article VI of the General Agreement, the matter referred to the Committee by the delegation of Sweden in document AD/40 concerning the determinations of injury and dumping made by the United States' authorities in an anti-dumping duty investigation of imports of stainless steel pipes and tubes from Sweden and to make such findings as will assist the Committee in making recommendations or in giving rulings."

Composition

Chairman: Mr. Jacques Bourgeois

Members: Mr. Crawford Falconer
Mr. Didier Chambovey

1.4 The Panel heard the parties to the dispute on 25 and 26 May and on 20 and 21 July 1989. On 25 May 1989 the delegation of Canada appeared before the Panel and presented the views of Canada on this dispute. The Panel submitted its findings and conclusions to the parties to the dispute on 25 July 1990.

2. FACTUAL ASPECTS

2.1 On 17 November 1986 a notice was published in the United States Federal Register by the United States Department of Commerce of the initiation of an anti-dumping duty investigation of certain stainless steel hollow products from Sweden.¹ The decision to open this investigation followed the receipt by the Department of Commerce on 17 October 1986 of a petition from the Specialty Tubing Group and each of its member companies which produced stainless steel hollow products, allegedly filed on behalf of the domestic industry producing stainless steel hollow products. This petition alleged that imports of certain stainless steel hollow products from Sweden were being, or were likely to be sold in the United States at less than fair value within the meaning of section 731 of the United States Tariff Act of 1930, as amended, and that these imports materially injured, or threatened material injury to, the domestic industry in the United States producing the like product. After examining this petition, the Department of Commerce concluded that it met the requirements laid down in section 732(b) of the Tariff Act, as amended, and accordingly decided to initiate an anti-dumping duty investigation.

2.2 The products subject to investigation were defined in the notice of the opening of this investigation as "certain stainless steel hollow products including pipes, tubes, hollow bars and blanks therefor, of circular cross-section, containing over 11.5 per cent chromium by weight."²

2.3 On 28 November 1986, the United States International Trade Commission (USITC) determined after a preliminary investigation that the products subject to the investigation by the Department of Commerce constituted two separate like products (welded pipes and tubes and seamless pipes and tubes, including redraw hollows) and that there were two corresponding domestic industries in the United States and further determined that there was a reasonable indication that the imports of seamless and welded stainless steel pipes and tubes were causing material injury to the respective domestic industries.³

2.4 On 9 February 1987 the petition filed by the Specialty Tubing Group was amended to include the United Steel Workers of America (USWA) as a co-petitioner.

¹Initiation of Anti-Dumping Duty Investigations; Certain Stainless Steel Hollow Products from Sweden, 51 FR 41514 (17 November 1986)

²Ibid. In the preliminary and final determinations of sales at less than fair value, the Department of Commerce noted that these products were classifiable under Harmonized System item numbers 7304.41.00, 7304.49.00, 7306.40.10 and 7306.40.50. See respectively, Certain Stainless Steel Hollow Products from Sweden; Preliminary Determination of Sales at Less than Fair Value, 52 FR 19369 (22 May 1987) and Final Determination of Sales at Less than Fair Value; Stainless Steel Hollow Products from Sweden, 52 FR 37810 (9 October 1987).

³Stainless Steel Pipes and Tubes from Sweden: Determination of the Commission in Investigation No. 731-TA-354 (Preliminary) under the Tariff Act of 1930, Together with the Information Obtained in the Investigation, USITC Publication 1919 (December 1986). In this Report the product description used by the respective agencies in the United States is followed. Thus, when reference is made to the investigation by the Department of Commerce, the products subject to investigation are described as (certain) stainless steel hollow products; where reference is made to the investigation by the USITC, the products are described as stainless steel pipes and tubes.

2.5 A notice of a preliminary affirmative determination by the Department of Commerce of sales at less than fair value was published in the Federal Register on 22 May 1987.¹ This determination was based on data on export prices and normal values during the investigation period (1 May 1986-31 October 1986) of two Swedish firms, Sandvik AB and Avesta Sandvik Tube AB, which accounted for virtually all of the exports to the United States during this period of the products in question. As a result of this preliminary determination, the Department of Commerce instructed the United States Customs Service to suspend the liquidation of all entries of stainless steel hollow products from Sweden which were entered, or withdrawn from warehouse, for consumption on or after 22 May 1987 and to require a cash deposit or the posting of a bond equal to the margins of dumping preliminarily determined by the Department of Commerce.

2.6 A final affirmative determination by the Department of Commerce of sales at less than fair value was published in the Federal Register on 9 October 1987.² With respect to Sandvik AB, the Swedish exporter of seamless stainless steel hollow products, the Department had determined that there had been sufficient home market sales of hollow bar (also known as mechanical tubing) to form the basis of comparison. However, there had been insufficient sales in the home market of seamless redraw hollows and finished pipes and tubes to be used as a basis for determining foreign market value. For these products, the foreign market value was calculated on the basis of sales by Sandvik AB to the Federal Republic of Germany. On the basis of this final affirmative determination the Department of Commerce instructed the United States Customs Service to continue to suspend the liquidation of all entries of stainless steel hollow products from Sweden which were entered, or withdrawn from warehouse, for consumption on or after 9 October 1987 and to require a cash deposit or the posting of a bond on all such entries equal to the margins of dumping found by the Department in its final determination.

2.7 On 19 November 1987 the USITC made a final determination under section 735(b) of the Tariff Act of 1930, as amended, in its investigation of imports of stainless steel pipes and tubes from Sweden.³ The USITC determined (1) that an industry in the United States was materially injured by reason of imports from Sweden of seamless stainless steel pipes, tubes, hollow bars, and blanks therefor, all the foregoing of circular cross section, which had been found by the Department of Commerce to be sold in the United States at less than fair value, and (2) that an industry in the United States was not materially injured or threatened with material injury, and the establishment of an industry in the United States was not materially retarded, by reason of imports from Sweden of welded stainless steel pipes, tubes, hollow bars, and blanks therefor, all the foregoing of circular cross section which had been found by the Department of Commerce to be sold in the United States at less than fair value. The full text of these determinations is contained in USITC Publication 2033 (November 1987): Stainless Steel Pipes and Tubes from Sweden: Determination of the Commission in Investigation No. 731-TA-354 (Final) under the Tariff Act of 1930, together with the Information Obtained in the Investigation.

¹Certain Stainless Steel Hollow Products from Sweden; Preliminary Determination of Sales at Less than Fair Value, 52 FR 19369 (22 May 1987). On 10 March 1987 the Department of Commerce had decided, at the request of the petitioners, to postpone its preliminary determination from 30 March to 15 May 1987.

²Final Determination of Sales at Less than Fair Value; Stainless Steel Hollow Products from Sweden, 52 FR 37810 (9 October 1987).

³See, for the notice in the Federal Register of this final determination, Stainless Steel Pipes and Tubes from Sweden, 52 FR 45256 (25 November 1987).

2.8 On 3 December 1987, the Department of Commerce published in the Federal Register an anti-dumping duty order and an amendment to its final determination of sales at less than fair value with respect to certain stainless steel hollow products from Sweden.¹ The Department changed the average weighted margin of dumping for Sandvik AB from 26.46 to 20.47 per cent; this change reflected a correction of certain clerical errors which had been brought to the attention of the Department by the petitioners and by Sandvik AB subsequent to the publication of the final affirmative determination. Furthermore, based upon the negative determination by the USITC with respect to welded products, the Department excluded imports of welded stainless steel hollow products from the scope of the anti-dumping duty order. Based on this anti-dumping duty order the Department instructed the United States Customs Service to assess, upon further advice by the Department, anti-dumping duties equal to the amount by which the foreign market value of the product exceeded the export price to the United States for all entries of seamless stainless steel hollow products from Sweden provided for in items 610.5130, 610.5202, 610.5229 and 610.5230 of the Tariff Schedules of the United States Annotated. These duties were to be assessed on all unliquidated entries of seamless stainless steel hollow products entered, or withdrawn from warehouse, for consumption on or after 22 May 1987, the date of publication of the preliminary determination by the Department of Commerce. Furthermore, the Department instructed the Customs Service to require, at the same time as importers would normally deposit estimated duties on seamless stainless steel hollow products, a cash deposit of 20.47 per cent for imports from Sandvik AB and all other Swedish producers and exporters. With respect to welded stainless steel hollow products, the Department instructed the Customs Service to terminate the suspension of liquidation for all entries of these products from Sweden, provided for in items 610.3701, 610.3727, 610.3741, 610.3742 and 610.5231 of the Tariff Schedules of the United States Annotated, which had been entered, or withdrawn from warehouse, for consumption on or after 22 May 1987, the date of publication of the preliminary determination by the Department of Commerce. The Department also instructed the Customs Service to cancel all bonds and to refund estimated anti-dumping duties which had been deposited with respect to imports of welded stainless steel products.

3. MAIN ARGUMENTS

General

3.1 Sweden requested the Panel to find that the determinations by the relevant authorities of the United States which had led to the imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden were not in conformity with the provisions of the Agreement and that, consequently, the imposition of these duties had resulted in nullification or impairment of benefits accruing to Sweden under the Agreement.

3.2 Sweden considered that the following aspects of the investigation by the United States Department of Commerce were inconsistent with the Agreement. Firstly, the opening of the anti-dumping investigation had been inconsistent with Article 5:1 because the Department had not verified whether the petition had been filed on behalf of the domestic industry producing the like product. Secondly, a violation of Article 2:6 of the Agreement had resulted from the fact that the Department had not made due allowances for differences in quantities - in that connection Sweden argued that account should have been taken of differences in level of trade - and for exchange rate changes. Thirdly, the treatment by the Department of sales by Sandvik AB to an unrelated distributor in a third country had been inconsistent with Article 2:3 of the Agreement.

¹Anti-Dumping Duty Order and Amendment to Final Determination of Sales at Less than Fair Value: Stainless Steel Hollow Products from Sweden, 52 FR 45985 (3 December 1987).

3.3 With respect to the determination of injury by the USITC regarding seamless stainless steel pipes and tubes, Sweden considered that this determination was not in conformity with Article 3:4 of the Agreement in that the USITC had failed to show a causal relation between the imports from Sweden subject to investigation and the material injury to the domestic industry in the United States. This violation of Article 3:4 resulted from three factors. Firstly, the findings of the USITC on the volume of imports and price undercutting by these imports were inconsistent with Articles 3:1 and 3:2 of the Agreement. Secondly, the determination did not contain any evidence of factors relating to the imports from Sweden other than the volume of and the price undercutting by these imports which explained how the imports had caused material injury to the domestic industry in the United States. Thirdly, the analysis of the impact of the imports subject to investigation on the domestic industry was inconsistent with Articles 3:3 and 3:4 of the Agreement in that the USITC had not adequately taken into account data for non-integrated firms known as "redrawers" and the fact that during the period covered by the investigation one important integrated producer had ceased production of the like product for reasons which were not related to competition by imports from Sweden.

3.4 Sweden requested the Panel to examine the above mentioned objections on the basis of the facts and conclusions contained in the final determination of dumping by the United States Department of Commerce and in the final determination of injury by the USITC.

3.5 The United States considered that the actions of the United States Department of Commerce and the USITC in the conduct of their respective investigations and the two agencies' respective determinations were fully in accord with the language, drafting history and spirit of the Agreement and, therefore, requested the Panel to find that the imposition by the United States of anti-dumping duties on seamless steel hollow products from Sweden was consistent with the obligations of the United States under the Agreement.

3.6 In specific, the United States considered that the initiation of the investigation by the Department of Commerce was fully consistent with Article 5:1, in that the petition on its face supported initiation of an investigation and there was no opposition expressed at the time of the initiation of the investigation by any domestic producer. Further, facts obtained by the Department and the USITC during the investigation supported the Department's initial conclusion in favour of initiation.

3.7 The United States considered that it had provided Sandvik with ample opportunity to demonstrate its eligibility for price allowances, that Sandvik had failed to present evidence supporting the granting of such allowances and that the Department had, therefore, denied them consistent with obligations of the United States under Article 2:6. Finally, the United States' treatment of sales by a third country distributor was fully consistent with Article 2:3.

3.8 The United States also considered that the USITC had demonstrated a clear causal relationship between the dumped imports and material injury suffered by the domestic industry and that the evidence in the record strongly supported the agency's determination. Therefore, that determination was fully consistent with Article 3. In specific, the existence of a causal relationship was supported by evidence of (i) the volume of Sandvik's imports throughout the period of investigation, particularly from 1985 to 1987, (ii) significant price undercutting by the imports and (iii) other factors enunciated in Article 3, including significant price suppression or depression. In addition, the USITC's determination contained a thorough analysis of the impact of the imports on the domestic industry.

Terms of Reference of the Panel

3.9 The United States expressed the view that the issues raised by Sweden with respect to the injury determination by the USITC included issues which were not within the scope of the terms of reference of the Panel, as defined in document AD/43. In document AD/40 Sweden had identified two specific

objections to the determination of injury by the USITC: firstly, a failure to show a significant increase of the volume of the dumped imports and, secondly, a failure to show significant price undercutting by the dumped imports. In the proceedings before the Panel Sweden had raised a number of additional issues which had not been mentioned in the request for the establishment of a Panel and were, therefore, outside the scope of the terms of reference of the Panel: firstly, the analysis of data relating to the condition of certain domestic producers known as "redrawers"; secondly, the consideration by the USITC of data for one integrated domestic producer which had left the industry during the investigation period; thirdly, the examination of evidence probative of price suppression and price depression, and fourthly, the examination by the USITC generally of the impact of the imports on the domestic industry. While some of these issues had been raised by Sweden in its request for conciliation under Article 15:3 of the Agreement¹, they had not been discussed by Sweden and the United States subsequent to the conciliation meeting in October 1988 and had not been mentioned in the request by Sweden for the establishment of a panel. The United States had, therefore, believed that Sweden would not raise these issues in the proceedings before this Panel. The decision by Sweden to raise these issues before the Panel called into question the usefulness of the conciliation procedure during which the United States had provided detailed responses to the questions by Sweden;² furthermore, the United States had been prejudiced by its inability to address in its first submission to the Panel all the issues presented by Sweden. The United States, therefore, requested the Panel to limit its examination of the issues raised by Sweden with respect to the injury determination by the USITC to the two specific objections mentioned by Sweden in the request for the establishment of a panel in this dispute.

3.10 Sweden argued that the request for the establishment of a panel made it clear that, with respect to the injury determination by the USITC, the principal objection of Sweden concerned the failure of the USITC to establish a causal relation between the imports subject to investigation and the material injury to the domestic industry in the United States. Consequently, the Panel's mandate was not limited to the examination of the analysis by the USITC of the volume of imports and price undercutting by these imports.

Standard of Review

3.11 The United States considered that a central and novel question which had to be addressed in this dispute was what was the appropriate standard by which the Panel should review the determinations made in this case by the United States Department of Commerce and the USITC. In the investigations and determinations challenged by Sweden (as in most anti-dumping duty investigations) the investigating agencies had been confronted with hundreds of decisions and judgement calls in the conduct of the investigation and preparation of the determination. The dispute settlement mechanism of the Agreement could be applied to accomplish a variety of objectives, ranging from the examination of each of the many administrative decisions or judgement calls on one hand to a broader, systemic analysis of the consistency with the Agreement of determinations by investigating authorities on the other. The first approach most closely resembled de novo review while the second approach reflected the type of systemic review traditionally undertaken by a court of appeal. A review of anti-dumping duty determinations in the context of a dispute settlement procedure under the Agreement was most appropriately conducted in accordance with the second, systemic type of review. The United States recognized, however, that any mechanism for review of anti-dumping determinations must necessarily include a consideration of issues of fact as well as of issues of law. The relevant question, therefore, was what was the appropriate level of scrutiny that a reviewing body should apply to a consideration of the factual findings made by the national investigating authority which had compiled the administrative record. In the case of the determinations challenged by Sweden, the United States authorities had been reasonable

¹Doc. AD/38 (20 September 1988)

²Doc. ADP/W/187 (18 October 1987)

in the manner in which they had investigated and obtained data, analyzed these data and reached their respective conclusions concerning dumping and injury. On this basis the Panel should conclude that these determinations had been made in full conformity with the applicable provisions of the Agreement. Absent evidence that an investigating authority deliberately acted in a way which would prejudice the outcome of an investigation in favour of one party or was seriously negligent in the manner in which it conducted the investigation, it was appropriate that a judicial body reviewing the results of an investigation accord some deference to the judgement of the investigating authority. The only alternative was to examine under a microscope each aspect of an investigating authority's investigation. To do so would lead the work of panels in new directions and would essentially convert the rôle of a panel from a reviewing body to a supra-investigative authority. This would be inconsistent with the intentions of the drafters of the Agreement.

3.12 Sweden explained that it was not contending that the United States authorities had in this case deliberately acted in a way which had prejudiced the outcome of the investigation in favour of one party or that they had been seriously negligent in the manner in which they had conducted their investigations. What Sweden contended was that the conclusions drawn by the United States authorities were not in conformity with the Agreement. With respect to the question of the rôle of the Panel in reviewing issues of fact, Sweden considered that a review by the Panel of the issues in dispute in this case must necessarily involve an examination of the factual information on which the United States authorities had based their determinations in order to analyze whether these determinations had been made in accordance with the provisions of the Agreement. It was, therefore, difficult to avoid a detailed analysis of certain factual aspects of these determinations.

Initiation of the anti-dumping duty investigation (Article 5:1)

3.13 Sweden considered that the opening of this investigation by the Department of Commerce had not been in conformity with Article 5:1 of the Agreement as a result of the failure of the Department to verify whether the petition had been filed "on behalf of" the relevant affected domestic industry in the United States. Article 5:1 of the Agreement laid down certain requirements with respect to the procedure for the initiation of anti-dumping duty investigations. These requirements had to be met before an investigation could be opened. This followed from Article 6:6:

"When the competent authorities are satisfied that there is sufficient evidence to justify initiating an anti-dumping investigation pursuant to Article 5, the Party or Parties the products of which are subject to such investigation and the exporters and importers known to the investigating authorities to have an interest therein and the complainants shall be notified and a public notice shall be given."

Article 5:1 required that an anti-dumping duty investigation normally be initiated upon a written request by or on behalf of the industry affected and provided that the term "industry" had to be interpreted in accordance with the definition of this term in Article 4, i.e. "the domestic producers as a whole of the like products or () those of them whose collective output of the products constitutes a major proportion of the total domestic production of these products." It followed from Article 5:1, read in conjunction with the definition of the term "industry" in Article 4, that, prior to the opening of an investigation, investigating authorities were obliged to satisfy themselves that a request for the initiation of an investigation had the support of the domestic producers as a whole of the like products or of those of them whose collective output of the products constituted a major proportion of the total domestic production of the like products. The practice of the Department of Commerce to rely on a petitioner's representation that the petition had, in fact, been filed on behalf of the domestic industry until it was affirmatively shown that this was not the case, was inconsistent with this obligation. In the investigation of stainless steel hollow products from Sweden this approach had been formulated by the Department as follows:

"Neither the Act nor the Commerce Regulations requires a petitioner to establish affirmatively that it has the support of a majority of a particular industry. The Department relies on petitioners representation that it has, in fact, filed on behalf of the domestic industry until it is affirmatively shown that this is not the case. Where domestic industry members opposing an investigation provide a clear indication that there are grounds to doubt a petitioner's standing, the Department will review whether the opposing parties do, in fact, represent a major proportion of the domestic industry. In this case, we have not received any opposition from the domestic industry."¹

Thus, while the Agreement required that there be an indication of support of a petition by the domestic producers as a whole, or by those of them accounting for a major proportion of the domestic production of the like products, before the opening of an investigation, the Department of Commerce would consider the issue of the representativeness of a complaint only if there was an expression of opposition to the opening of an investigation by members of the domestic industry representing a major proportion of the domestic production of that industry. This shift of the burden of proof was a severe disadvantage for exporters and inconsistent with the text of Articles 4 and 5 of the Agreement.

3.14 Sweden was of the view that the failure of the Department of Commerce to examine on its own initiative the representativeness of a petition deprived exporters of the protection afforded by the Agreement, and Article 5 in particular, against frivolous investigations. Anti-dumping duty investigations were expensive and time-consuming and the mere opening of such investigations could have an effect on trade. The practice of the Department of Commerce not to examine on its own initiative whether a petition had sufficient support from the domestic industry increased the risk of the filing of unfounded petitions. A domestic firm, faced with competition from foreign producers, could create uncertainty for such producers by filing an anti-dumping duty petition. The practice of the Department created a danger that investigations could continue for several months before the Department became aware that the petitioner did not represent the relevant domestic industry and could lead to situations in which, in the absence of an expression of opposition to the investigation by a majority of members of the domestic industry, definitive anti-dumping duties were imposed. It was more demanding for a domestic producer to oppose a petition than to remain silent and the absence of express support of a petition by members of a domestic industry could be seen as tacit disapproval of the petition. As a result of the refusal by the Department of Commerce to verify the representativeness of a petition, exporters could find themselves in a situation where, several months after the opening of an investigation, it turned out that the investigation should not have been initiated because of a lack of representativeness of the petition. In such a situation the exporter had incurred a considerable amount of expenses for which no compensation was granted by the authorities of the United States or by the petitioners. The opening of frivolous investigations, which was possible as a result of the Department's practice, constituted a form of "harassment" which was contrary to one of the objectives of the Agreement, as defined in the preamble, which was to ensure "that anti-dumping practices should not constitute an unjustifiable impediment to international trade." Since it appeared that a relatively high percentage of anti-dumping duty investigations in the United States did not result in the application of definitive measures, it could not be ruled out that investigations were indeed initiated as a tool of "harassment".

3.15 Sweden further pointed out that in two previous investigations the USITC had treated welded and seamless stainless steel pipes and tubes as two different like products. In light of this distinction made by the USITC, the Department of Commerce should have verified whether the petitioners were representative of, respectively, the domestic industry producing welded stainless steel hollow products and the domestic industry producing seamless stainless steel hollow products. Given that only two of the thirteen producers of seamless stainless steel hollow products in the United States had been among

¹Final Determination of Sales At Less Than Fair Value; Stainless Steel Hollow Products From Sweden, 52 FR 37810 (9 October 1987), at 37812.

the petitioners, the acceptance of the petition by the Department of Commerce was inconsistent with the Agreement. Even if one defined the relevant domestic industry as comprising both the producers of welded and the producers of seamless stainless steel products, there still was an obligation under the Agreement on the Department to verify whether the petitioners were representative of this broadly defined domestic industry.

3.16 The United States considered that the determination by the Department of Commerce that the petition filed by the Specialty Tubing Group had been properly filed on behalf of the domestic industry was consistent with Articles 4 and 5 of the Agreement. In this case, the petition filed by the Specialty Tubing Group on its face supported the initiation by the Department of Commerce of an investigation on behalf of a domestic industry in the United States. The petitioner, Specialty Tubing, included producers of welded as well as seamless products. One seamless petitioner was one of the largest producers in the United States of seamless pipe and tube while a second also occupied a significant position in the United States market. The United States provided, at the Panel's request, aggregate percentages of the domestic producers in favour of, neutral toward and opposed to the petition. The United States was unable - consistent with its obligations to protect confidential information under the Agreement and under its domestic legislation - to provide market share data for the two seamless producers who were members of the Specialty Tubing Group. Such data would disclose individual firm data of a highly proprietary nature. In addition, there was no indication of opposition by any domestic producer. Moreover, the facts obtained by the Department of Commerce and the USITC during their respective investigations supported the Department's initial conclusion that the petition had been properly filed, regardless of whether the relevant industry was defined to include both welded and seamless producers (as the Department of Commerce had initially found for the purpose of the opening of the investigation) or seamless producers only (based on the definition of the domestic industries by the USITC). Thus, on its face, the petition had been properly filed on behalf of the domestic industry(ies) and the decision taken by the United States authority to initiate an investigation was entirely consistent with Article 5 of the Agreement. Under Article 5 of the Agreement a petition for the opening of an anti-dumping duty investigation could be filed either by or on behalf of the industry affected. From the definition of the term "industry" in Article 4 it followed that a petition did not necessarily have to be filed on behalf of producers accounting for 100 per cent of domestic production of the like product. This understanding of the standard for the initiation of investigations under Article 5 of the Agreement was supported by a draft text on priority anti-dumping issues submitted by a number of Parties to the Kennedy Round Anti-Dumping Code to the Committee on Anti-Dumping Practices in November 1978.¹ In this draft text the Committee had concluded that under the Kennedy Round Anti-Dumping Code a country could initiate an investigation based upon a request submitted or supported by firms whose production did not represent more than 50 per cent of the total industry production. According to this text, a problem would arise only if:

"the production of that part of an industry on whose behalf the request is submitted constitutes a relatively small proportion of total domestic production. Authorities must take special care, in such situations, to ensure that initiation does not constitute an abuse of the Code standard."²

The procedures followed by the United States authorities in the initiation of the anti-dumping duty investigation of stainless steel hollow products from Sweden fully ensured that the initiation of this investigation did not "constitute an abuse of the Code standard".

¹Priority Issues In the Anti-Dumping Field - Submissions by Some Delegations, Doc. COM.AD/W/83 (17 November 1978).

²Ibid. at 9-10.

3.17 The United States provided the following description of procedures under its domestic law to evaluate whether a petitioner had properly filed on behalf of an industry. In general, anti-dumping duty investigations in the United States were initiated in response to a petition filed by a domestic interested party or parties. A petition must be filed with both the Department of Commerce and the USITC so that both agencies could proceed simultaneously. The Department of Commerce conducted the investigation of sales at less than fair value while the USITC conducted the injury investigation. The Department determined the adequacy of the petition within twenty days after the filing of a petition. Thus, in deciding whether the petition alleged the elements necessary for the opening of an investigation, the Department determined the sufficiency of petitioner's representations in respect of the affected like product and industry in the United States. As part of the petition requirements, a petitioner had to qualify as an "interested party" which filed "on behalf of an industry". According to section 771(9) of the Tariff Act of 1930, as amended, persons who might qualify as an "interested party" included:

- "(C) a manufacturer, producer, or wholesaler in the United States of a like product,
- (D) a certified union or recognized union or group of workers which is representative of an industry engaged in the manufacture, production, or wholesale in the United States of a like product,
- (E) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States,

[and]

- (F) an association, a majority of whose members is composed of interested parties described in subparagraph (c), (d) or (e) above with respect to a like product."¹

The United States explained that the USITC obtained information concerning the positions of members of the domestic industry through responses to questionnaires mailed to each member of the domestic industry within two to three days of the receipt of an anti-dumping petition. The front page of every USITC questionnaire to a domestic producer contained a box which the domestic producers could check (in confidence) to indicate whether they supported or opposed the petition. If members of a domestic industry opposing an investigation provided to the USITC (again, in confidence) a clear indication that there was sufficient reason to doubt the standing of a petitioner, the USITC would on its own initiative provide to the Department of Commerce aggregate information derived from the confidential submissions of the United States industry. The Department in turn would poll the opposing parties to ascertain whether they represented a major proportion of the domestic industry and terminate an investigation if they did.

3.18 The United States drew the Panel's attention to the fact that the circumstances surrounding collection of data in the preliminary investigation by the USITC of imports of stainless steel pipes and tubes from Sweden had been unusual because of the fact that the petitioners had filed a countervailing duty petition with respect to the same products only six weeks before the filing of the anti-dumping petition.² The USITC had completed its preliminary determination in the countervailing duty

¹The United States referred here to section 771 (9) of the Tariff Act of 1930 as it stood prior to the entry into force of the Omnibus Trade and Competitiveness Act of 1988.

²Initiation of Countervailing Duty Investigations; Certain Stainless Steel Hollow Products from Sweden, 51 FR 35018 (1 October 1986). The products subject to this investigation were defined in this notice of the initiation of a countervailing duty investigation in the same manner as the products subject to the anti-dumping duty investigation.

investigation only three days after the anti-dumping petition had been filed. Therefore, the USITC had not sent out questionnaires to producers in connection with the preliminary anti-dumping investigation as it would have been requesting in virtually every respect data identical to that just received in the earlier (countervailing duty) investigation. The sequence of key events in the countervailing duty and anti-dumping duty investigations of stainless steel hollow products from Sweden had been as follows:

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| 5 September 1986: | Filing of the countervailing duty petition. |
| 25 September 1986: | The Department of Commerce initiated a countervailing duty investigation and USITC questionnaires, mailed to the industry almost three weeks earlier, were due back. |
| 17 October 1986: | Filing of the anti-dumping petition. |
| 20 October 1986: | The USITC issued a preliminary affirmative determination in the countervailing duty investigation. |

From this sequence of events it was evident that the industry would seem to have had better than normal awareness of the existence of the unfair trade complaints and opportunity to voice opposition for two reasons. Firstly, the countervailing duty questionnaires had been back at the USITC for almost two months before the Department initiated the anti-dumping duty investigation. Secondly, not only had producers in the United States been on notice that a petition had been filed with respect to stainless steel hollow products from Sweden but, in fact, one case had already been initiated and the USITC had issued an affirmative injury determination in that investigation. In the United States such determinations were extensively reported in the trade press, which industry members were likely to read.

3.19 The United States further noted that on 4 December 1986 the USITC had made a preliminary determination of injury in which it had found that there were two "like products" (seamless pipes and tubes and welded pipes and tubes) and two corresponding domestic industries. The USITC had found that there was a reasonable indication that imports of each type of pipes and tubes from Sweden had caused material injury to the corresponding domestic industry. The domestic industry had never provided any indication that it was opposed to the petition. On 24 November and 17 December 1986 the USITC had received letters from two domestic firms which were stated in general terms and did not express outright opposition to the investigation. These two letters, standing alone, did not provide sufficient reason either for the USITC to alert the Department of Commerce to poll the domestic industry or for the Department of Commerce to do so on its own initiative. Moreover, the two firms from which these letters had been received collectively accounted for a very small portion (less than 10 per cent) of domestic consumption in the United States of seamless pipes and tubes.

3.20 The United States also pointed to the fact that, at approximately the same time as the USITC received the two letters referred to in paragraph 3.19, the USWA, representing a preponderance of workers throughout the welded and seamless stainless steel pipe and tube industry(ies), had informed the Department of Commerce not only of its support of the petition but of its intention to join Specialty Tubing as co-petitioner. This action had demonstrated additional strong support of the original petitioner's position. On 9 February 1987 the anti-dumping duty petition had been amended to include the USWA as a co-petitioner. The draft text of November 1978 explained that:

"the carefully drafted wording of the Code ... has provided sufficient flexibility to permit initiation where the request has been made by other persons properly speaking on behalf of the affected industry."¹

USWA represented a preponderance of workers throughout both the seamless and welded pipe and tube industry(ies). Thus, as the principal union representative of the industry(ies), USWA had qualified as a co-petitioner whose joinder had provided further support for Specialty Tubing's petition and had cured any alleged defect in Specialty Tubing's standing to file the anti-dumping duty petition on behalf of the domestic industry(ies).

3.21 The United States pointed out that the Department of Commerce had the authority, throughout an anti-dumping duty investigation, to consider the validity of the investigation. Upon further investigation and in light of new evidence that the Department had not had at the time of the opening of the investigation it could conclude that lack of support now demonstrated that a petitioner was not representative of an industry. Thus, it was hypothetically possible for an initiation to appear defective at some point subsequent to initiation during the course of the investigation, and either for that apparent defect to be cured or, if not, for the investigation to be terminated. After the opening of an investigation members of the domestic industry could voice opposition to the investigation, thereby throwing into question the petitioner's assertion that it spoke for the industry. The appearance of other members of the industry expressing their support for the investigation, would, in such a case, provide the "cure" for the purported defect in initiation unless members of the industry subsequently changed their position regarding the petition and the investigation. By leaving open the possibility to members of the domestic industry to assert their support or opposition throughout an investigation, the United States provided ample opportunity for interested parties to state their positions. If elements of the domestic industry opposed a petition, they would not remain silent. Likewise, if the petitioner's representation of the industry became an issue, proponents of the investigation would speak out in support. In the case of the anti-dumping duty investigation on stainless steel hollow products from Sweden, events subsequent to the opening of the investigation had confirmed the validity of the decision by the Department of Commerce to open an investigation. Any defect of initiation had been cured when the USWA had informed the Department of its intention to join the Specialty Tubing Group as a co-petitioner.

3.22 The United States argued that the Department's decision to open an investigation had not involved an obligation to determine with absolute certainty how the USITC might ultimately decide to define the domestic industry, particularly since the petitioner included both seamless and welded producers. Article 5 of the Agreement did not contemplate that, at the preliminary stage of initiation of an investigation, a final resolution should be reached as to the precise extent to which the domestic industry supported an investigation when it was apparent from the petition that it enjoyed broad support and clearly had not been filed by producers accounting for a "relatively small proportion of total domestic production".

3.23 The United States drew a distinction between the question of whether a party had the standing to file a petition and the question of whether that party filed a petition on behalf of the affected domestic industry. The term "standing" was a legal term meaning that the party which complained must itself be harmed and, therefore, entitled to relief. It was an axiom of jurisprudence that no one could be heard by a court if he had not been injured by the act or action complained of. In the context of an anti-dumping investigation the standing requirement meant that only a person who had been injured by the allegedly dumped imports (i.e. who was directly affected by the outcome of the investigation) was entitled to seek relief. In the case of the initiation of the investigation of stainless steel hollow products from Sweden there had been no such defect in standing. No firm in the United States, either

¹Doc. COM.AD/W/83, at 9-10.

during the investigation or since, had challenged the standing of the petitioner. The evidence before the Department of Commerce and the USITC had indicated that the Specialty Tubing Group was unquestionably comprised of manufacturers of both seamless and welded stainless steel pipes and tubes. Thus, the question before the Panel was not whether there was a defect of standing of the petitioners but whether there was a defect in the initiation of the investigation by the Department of Commerce. This had not been the case because the facts demonstrated that a substantial proportion of the industry had affirmatively supported the petition from the outset. The United States considered that one purpose of the requirement in Article 5:1 of the Agreement that a petition be filed "by or on behalf of" the affected domestic industry was to ensure that only an interested party who produced a product which was like the allegedly dumped imported products and who could legitimately claim to be materially injured by those imports of a product like the product which it produced (or which its members produced) was able to request relief. Before this requirement was codified, it was possible that a person with no stake in the outcome of an investigation could file an anti-dumping duty petition. Article 5 of the Agreement clarified that the right to seek relief was limited to representatives of the affected industry. The Kennedy Round Anti-Dumping Code had provided that a petition had to be filed "on behalf of ..." the domestic industry, omitting the words which now appear in Article 5:1 of the Agreement, "by or ...".¹ Those words had been added to clarify that persons other than the management of domestic companies were entitled to file a petition, such as a trade union or trade association, a majority of whose members engaged in production of a like product.²

3.24 With respect to the arguments of the United States on the interpretation of the standard for the initiation of investigations under Article 5:1, Sweden considered that the draft text on priority anti-dumping issues referred to by the United States could not be considered an authoritative source of interpretation of the Agreement and that this text should not be taken into consideration by the Panel. This document was only a working document submitted by some delegations and there had been at least two addenda to this document. The first page of the document indicated that its purpose was to facilitate discussions in the Committee on Anti-Dumping Practices and that, although the texts in this document had been agreed upon by the delegations involved (which did not include the delegation of Sweden), these texts were without prejudice to the position of any delegation. Thus, the document was intended to facilitate discussion and it reflected the opinions of some delegations at a pre-negotiation stage. Furthermore, the issue before the Panel was not the interpretation of the meaning of the expressions "the domestic producers as a whole" or "a major proportion" in Article 4:1 of the Agreement; what percentage of domestic production constituted "a major proportion" was irrelevant to the objections raised by Sweden to the initiation of the investigation of stainless steel hollow products. Relevant to this case were the discussions which had taken place during the negotiation process of the Kennedy Round Anti-Dumping Code on the question of the standing to file a petition for the opening of an anti-dumping duty investigation. The Report of the Panel established by the Committee on Subsidies and Countervailing Measures in a dispute between the EEC and Canada regarding the imposition by Canada of countervailing duties on boneless manufacturing beef from the EEC³ had discussed the drafting history of the provisions in the Kennedy Round Anti-Dumping Code on the initiation of investigations as follows:

"Governments agreed ... to require that complaints must normally be filed on behalf of the relevant industry as a whole, and not, as advocated by the United States and Canada, by any party which considered itself injured. The US and Canadian view favoured giving every complainant a chance to prove its case. The opposing view, which prevailed, was expressed by the delegation of the United Kingdom:

¹See Article 5(a) of the Kennedy Round Anti-Dumping Code.

²Doc. COM.AD/W/83, at 10

³Canada - Imposition of Countervailing Duties on Imports of manufacturing Beef from the EEC
- Report by the Panel, Doc. SCM/85 (13 October 1987).

The conditions governing the initiation and acceptance of applications for anti-dumping action determine to a large extent the number of anti-dumping cases which arise and the number which are eventually dismissed because full investigations show that action is not justified. In the view of the United Kingdom, therefore, it is of crucial importance that these conditions should be such as to reduce to the minimum the number of unnecessary anti-dumping investigations, and thereby prevent unjustifiable disruption of trade."¹

Thus, the drafting history of the Kennedy Round Anti-Dumping Code showed that petitions normally should be filed on behalf of the relevant industry as a whole and that, consequently, the initiation of an investigation upon receipt of a petition from producers accounting for only "a major proportion" of domestic production should take place only in special circumstances. It was evident from this drafting history that the negotiators had been well aware of the importance of the standing issue and that it had been their intention to reduce the number of unnecessary anti-dumping duty investigations to a minimum. Sweden considered in this respect that the current position of the United States was the same as the position adopted by the United States in the negotiating process of the Kennedy Round Anti-Dumping Code. While the Panel Report referred to by Sweden had not yet been adopted by the Committee on Subsidies and Countervailing Measures it was, nevertheless, of importance to the issues before the present Panel because it provided evidence of the intentions of the drafters of the Agreement with respect to the interpretation of Articles 4:1 and 5:1.

3.25 Regarding the description given by the United States of the provisions of the anti-dumping legislation of the United States on the evaluation of the admissibility of petitions, Sweden argued that it had not contended that the United States legislation as such was inconsistent with the Agreement. What Sweden criticized, in light of the requirements of the Agreement, was the passive rôle of the Department of Commerce with respect to the question of the standing of a petitioner. If the Department did not, on its own initiative, examine whether a party was an "interested party", and had filed a petition "on behalf of" the affected domestic industry, this meant that these requirements were meaningless at the initiation stage of an investigation.

3.26 Sweden also questioned the contention by the United States that the petition filed by the Specialty Tubing Group on its face supported initiation of an investigation by the Department of Commerce. In response to the argument of the United States that, when the Department had opened the investigation, it had not received indication from any domestic producer that it opposed the petition, Sweden pointed out that under the anti-dumping procedures of the United States domestic producers who were not among the petitioners and who were possibly opposed to the opening of an investigation did not have the opportunity to express their views until the Department gave formal notice of the opening of an investigation in the Federal Register. It could never have been the intention of the drafters of the Agreement that investigating authorities should passively wait for opposition by domestic producers. The text and drafting history of the Agreement made it clear that investigating authorities were under an obligation to examine on their own initiative whether the requirements of the Agreement with respect to the initiation of an investigation were met. The Department of Commerce had only twenty days to examine a petition in order to determine whether the petition had the support of the domestic producers as a whole, or of producers accounting for a major proportion of domestic production of the like product. This was a very short period given the importance of this determination and given the fact that other conditions laid down in Article 5:1 also had to be verified during this period. Sweden argued in this context that the responsible authorities in Canada, Australia and the EEC verified the representativeness of a petition before deciding to open an investigation.

¹Ibid. at 17-18.

3.27 With respect to the argument of the United States that members of a domestic industry had the possibility to express opposition to an investigation in replies to questionnaires received from the USITC, Sweden argued that it was not consistent with the Agreement to start an examination of the representativeness of a petition only at the stage of the preliminary injury investigation. The fact that a countervailing duty investigation had been opened concerning the same products only a few weeks before the anti-dumping complaint had been filed did not detract from the obligation of the Department of Commerce to satisfy itself that there was sufficient evidence to justify the opening of an anti-dumping duty investigation, including evidence of industry support of the petition. Sweden further questioned whether it was appropriate to accept a co-petitioner in the course of an investigation. In case where the Department of Commerce had its doubts as regards the standing of the original petitioner, a co-petitioner could be called upon to "save" the situation. It was easier for a trade union to act as a co-petitioner than for a company; a trade-union had nothing to lose by acting as a co-petitioner while a company had always to take into account its business relations and might, therefore, not want to give its support to a petition. Sweden more in general considered that there was no support in the Agreement for the view that a defect in the initiation of an investigation could be cured at a later stage of the investigation.

3.28 Sweden explained that it was not arguing that there had, in effect, been a defect in the initiation of the investigation by the Department of Commerce. The reason why Sweden objected to the practice of the Department not to verify the representativeness of a petition was precisely that, as a result of this practice, it was impossible to know whether there had been a defect in the initiation of an investigation. What was known regarding the investigation of stainless steel hollow products from Sweden was, firstly, that no opposition to the opening of an investigation had been expressed during the twenty days between the filing of the petition and the opening of the investigation; secondly, that available evidence had indicated sufficient standing and, thirdly, that in the view of the United States the facts demonstrated that a substantial proportion of the industry had supported the initiation of the investigation from the outset. This was, however, not sufficient to satisfy the requirements of the Agreement that there be positive evidence to justify the opening of an investigation and that an investigation normally be initiated only upon a written request by, or on behalf of, at least a major proportion of the industry affected.

3.29 Sweden considered that the purpose of the requirement in Article 5:1 of the Agreement that a petition be filed by or on behalf of the affected domestic industry was to ensure that only the industry which was injured by the allegedly dumped product was allowed to file a petition. In addition, this requirement made it clear that the industry also must produce the like product in the importing country. Article 5:1, read in conjunction with Article 4:1, required that a petition be filed by the domestic industry as a whole or by a major proportion of the domestic industry. The drafting history of the Agreement explained that petitions should normally be filed on behalf of the relevant domestic industry as a whole.¹ From the word "normally" it followed that a petition filed by producers accounting for a major proportion of domestic production could be accepted only under special circumstances. The words "by or on behalf" in Article 5:1 meant that a person or legal entity could act as a petitioner provided that there be evidence that they acted on behalf of the relevant domestic industry. If the requirements of Articles 4 and 5 were met, a federation representing the domestic industry could also act as a petitioner.

3.30 The United States considered that Sweden presented a distorted view of the rôle of the Department of Commerce in ascertaining whether a petition had been properly filed and that Sweden's claim that the Department's procedures somehow 'shifted the burden of proof' from a petitioner to those opposed to the petition was without merit. Sweden had argued that this shift occurred because (1) the Department relied on a petitioner's representations that it had filed on behalf of a domestic industry until (2) it

¹Doc. SCM/85, at 17-18

was affirmatively shown that this was not the case. On the first point, the United States pointed out that under its domestic law, regulations and practice, a petitioner must provide sufficient evidence in the petition of each of the elements of dumping and injury as well as of the fact that the petitioner had filed on behalf of an industry, including a listing of members of the industry, a demonstration of sales at less than fair value, and injury data. The Department of Commerce was also required to scrutinize a petition before an investigation could be opened.¹ Thus, the Department relied on petitioner's representations, but only after examining those representations with great care. On the second point, the United States considered that the practice of the United States provided an opportunity for those opposed to a petition to present a clear indication that there was sufficient reason to doubt a petitioner's standing, which would prompt the Department to review whether the opposing parties represented a major proportion of the domestic industry and terminate an investigation if they did.

3.31 In response to the argument of Sweden that the mere initiation of an investigation could disrupt the market for the product in question, the United States pointed out that Sweden was apparently suggesting that the authorities in the United States should substantially lengthen the time for initiation of an investigation so that the market share of the petitioner and other pertinent information, such as the definition of the like product and domestic industry, could be obtained. However, Article 6:9 of the Agreement anticipated that an investigating authority would proceed expeditiously to initiate an investigation. Stretching out the initiation period until the entire domestic industry could be polled would cause just as much disturbance to trade flows, because the filing of the petition itself was the first event which might cause a disruption to trade. Furthermore, the first actual disruption of trade flows did not occur either at the time of the filing of the petition or the time of initiation of the investigation but at the time of the imposition of provisional measures. The United States denied that, as alleged by Sweden, it was more demanding for a domestic producer to oppose a petition than to remain silent and that the mere refusal to join a petition might be seen as tacit disapproval of that petition. Any domestic producer who opposed a petition could simply so indicate in a letter to the Department of Commerce or in confidence in its response to the USITC questionnaire. The silence of a member of the domestic industry with respect to a petition was, therefore, more likely to signal passive acceptance of an investigation than disapproval. Regarding the assertion that the mere refusal to join a petition might be seen as tacit disapproval of the petition, the United States considered that this assertion was legally incorrect. There was no obligation under the Agreement that an entire industry join in the filing of a petition. Indeed, if such a requirement had existed, it was not clear how it could be squared with the Agreement's direction that a petition might be filed "on behalf of an industry".

3.32 The United States argued that the supposition that it was easy to file "on behalf of" an industry in the United States ignored the realities facing a petitioner. Assembling information and filing a petition was costly. The petitioners must recognize that they would have to provide support for an injury determination and take a large measure of the responsibility for imposing a substantial burden on the rest of the domestic industry, in terms of the time and expense of filling out a USITC questionnaire, preparing for an appearance at a hearing, and making further submissions. Cost was a real deterrent to a petitioner who filed in the face of industry opposition. In addition, there were several opportunities for a case to be terminated or an investigation rescinded by the Department of Commerce. For example, the USITC could reach a negative preliminary determination less than two months into the investigation and before any provisional measures were taken. At that point it was the domestic industry, not importers, which had incurred the lion's share of the cost while exporters had not yet been required to complete their responses or send them in. In addition, the Department of Commerce had continuing authority to rescind an investigation before issuing an anti-dumping duty order. The United States denied that, as suggested by Sweden, rescission of an investigation by the Department of Commerce

¹19. C.F.R. 353.36(1) and (2).

because of lack of industry support might occur with some regularity.¹ On the assertion by Sweden that the initiation of an anti-dumping duty investigation could constitute a form of harassment and that a rather high percentage of initiated investigations never led to the imposition of definitive measures, the United States argued that the fact that many investigations did not result in definitive measures was evidence of the thoroughness and impartiality of the United States' authorities in conducting anti-dumping duty investigations, and not evidence of lack of a valid basis for investigating. The comments by Sweden on this point also suggested that Sweden confused the circumstances in which a domestic firm lost on the merits of a case and those in which the firm was not entitled to file a petition on behalf of an industry and have the investigation undertaken in the first place. For example, the USITC clearly could reach a negative preliminary or final determination in a case without that case having been filed "frivolously" or for the purpose of harassment. Finally, "sham" anti-dumping petitions could constitute a violation of the anti-trust laws of the United States for which a petitioner could be prosecuted by the United States Federal Trade Commission.

3.33 The United States considered that it was inconsistent to argue, as Sweden did, that the Panel should not take into account the drafting history of the Agreement contained in a consensus document prepared in November 1978 but that it should take into account the drafting history of the Kennedy Round Anti-Dumping Code. Sweden was incorrect in its view that the current practice of the United States reflected the position taken by the United States in the Kennedy Round negotiations. Firstly, both under the Agreement and United States domestic law domestic firms must have a stake in the outcome of an investigation and not merely be able to show injury and dumping. Secondly, the United States and Sweden agreed that a petition should be filed by or on behalf of an industry. The United States considered as misplaced the reliance by Sweden on the drafting history of the Kennedy Round Anti-Dumping Code cited by the boneless manufacturing beef Panel² to bolster its view that the drafting history displayed a preference for petitions filed on behalf of the relevant industry as a whole. A review of statements by the United Kingdom, the EEC, Canada and the United States from June 1965 through February 1967 revealed that the introduction of the term "by or on behalf of" the domestic industry was intended to discourage two practices: firstly, the filing of complaints by any individual or company which considered itself to be injured, regardless of whether it produced a like product, and, secondly, the initiation of investigations at the initiative of investigating authorities. With respect to this second aspect the United States quoted the following passage from a Kennedy Round secretariat document:

"Most members of the Group held the view that not only should investigations not be initiated, except in rare circumstances, otherwise than on the basis of complaint by the industry affected but that in taking action on the basis of such request from the industry the authorities concerned should do so only when the request was supported by evidence both on injury and dumping. Such members also argued that governments should, in special but rare circumstances, be able to initiate themselves anti-dumping investigations."³

¹The United States noted that this had happened only once.

²Document SCM/85, at 17-18.

³Document TN.64/NTB/W/11/Rev.1 (29 July 1966) at 4.

3.34 The United States denied that domestic producers first became aware of the existence of an anti-dumping petition when an investigation was initiated. Domestic producers almost invariably became aware of the possibility of an investigation when a petition was filed and questionnaires were sent out by the USITC to domestic producers. To illustrate this point, the United States provided to the Panel data concerning five recently initiated anti-dumping investigations showing for each investigation the date on which the petition had been filed, the date on which the USITC had sent out questionnaires, the date on which these questionnaires had been returned, and the date on which the Department of Commerce had formally opened the investigation. These data illustrated that the USITC mailed questionnaires to all known members of the domestic industry within two to three days of receipt of a petition and that, therefore, those firms commonly learned of the filing of a petition within a very short time of the actual filing.

3.35 With regard to the procedures for the initiation of anti-dumping investigations in Canada, the EEC and Australia, the United States considered that it was evident that its practice resembled the practices of these Parties in a number of respects. For example, the United States imposed precisely the same requirements on petitioners as Canada did, in that petitioners were required to include in their petitions the names and addresses of other producers in the United States of the like product and the petitioner's own volume and value of production. The USITC employed many of the research methods used by Revenue Canada in studying the domestic industry. In determining what constituted "a major proportion" of total domestic production the United States applied a threshold of 50 per cent whereas Canada required a lower percentage.¹

3.36 The United States rejected Sweden's criticism of the propriety of a trade union joining as a co-petitioner. Firstly, there was no prohibition in the Agreement against co-petitioners and there was also no prohibition against labour unions participating in investigations as petitioners or co-petitioners.² Secondly, it was not correct to argue that unions had nothing to lose by joining a petitioner in an anti-dumping duty investigation. Unions increasingly represented workers at foreign-owned, as well as at US-owned plants, and thus unions were likely to consider the ramifications of supporting a petition very carefully. In addition, support for petitions might have an impact on the union's ability in the future to represent workers at the foreign-owned facilities, which caused union leadership to be cautious about indicating support.

Differences in quantities (Article 2:6)

3.37 Sweden requested the Panel to examine whether the refusal by the Department of Commerce to make allowances for quantity differences between export sales and foreign market sales was consistent with Article 2:6 of the Agreement which provided that:

¹McCulloch of Canada Ltd. v. Anti-Dumping Tribunal, 1 F.C. 222 (1978).

²Doc. COM.AD/W/83, at 10.

"Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability."

During the investigation by the Department of Commerce the Swedish exporter, Sandvik AB, had presented data to the Department which clearly showed that Sandvik's prices increased as order volume declined. Therefore, Sandvik had requested the Department to match export sales and foreign market sales of comparable quantities. The Department had, however, matched individual sales prices in the United States with weighted average sales in Sweden and the Federal Republic of Germany which had resulted in a systematic overstatement of the margin of dumping. In the final determination of sales at less than fair value, the Department had explained its refusal to grant a quantity adjustment as follows:

"We have reviewed the respondent's pricing practices and determined that no clear correlation between prices and quantities has been demonstrated. While internal price lists (which include quantity related prices) are used in setting prices, it is impossible to measure their final impact on the negotiated prices ... Therefore the claim has been denied."¹

Thus, the Department had argued that it had reviewed Sandvik's pricing practices but that it had been impossible to measure the final impact of Sandvik's internal price list on the negotiated prices. However, the data presented to the Department by Sandvik included actual price data which had made it possible for the Department to make due allowance for the quantity differences. Sandvik had provided full documentation on actual sales prices which had clearly indicated an inverse relationship between prices and quantities. This was normal in markets where prices were negotiated between sellers and buyers and not determined on the mere basis of price lists and published rebates. The Department of Commerce had refused to consider these data, although they had been presented on computer tapes.

3.38 Sweden explained that the overstatement of the margin of dumping had to do with the fact that the Department of Commerce had compared export sales and foreign market sales at different levels of trade. In the United States the major part of sales of pipes and tubes by Sandvik was made to distributors. In Sweden and the Federal Republic of Germany, Sandvik was its own distributor for most of its sales. Consequently, sales to the United States had taken place in larger volumes per order than sales in Europe. Sweden provided a number of examples to illustrate how the method used by the Department of Commerce to match individual export sales prices and weighted averages of foreign market sales prices had resulted in a systematic overstatement of the dumping margins. The first example was a case in which an exporter sold 1,000 kilos of a product in the United States at a price of US \$3 per kilo which was matched with the weighted average price of three sales of identical merchandise in Sweden which were made at the following prices:

¹Final Determination of Sales At Less Than Fair Value; Stainless Steel Hollow Products From Sweden, 52 FR 37810 (9 October 1987) at 37814.

<u>Quantity</u>	<u>Unit price</u>
100 kg.	\$3.60 per kg.
500 kg.	\$3.40 per kg.
1,000 kg.	\$3.20 per kg.

The weighted average unit price of these three sales was \$3.29 per kg.¹ and if this weighted average was compared to the price of the sales to the United States, the dumping margin was 9.7 per cent.² However, if the sale in the United States had been matched with a sale in Sweden of a comparable quantity there would have been a dumping margin of only 6.7 per cent.³ A second example given by Sweden was a case in which Sandvik sold 150 kilos of a product in the United States at a price of \$3.11 per kilo and made three sales of identical merchandise in Sweden as follows:

<u>Invoice date</u>	<u>Quantity</u>	<u>Unit price</u>
21 October 1986	72 kg.	\$4.89 per kg.
8 July 1986	162 kg.	\$3.06 per kg.
14 May 1986	57 kg.	\$8.86 per kg.

In this example the weighted average unit price was \$4.65 per kilo and the margin of dumping 50 per cent.⁴ However, if the sale in the United States of 150 kilos had been matched with a sale in Sweden of a comparable quantity (162 kilos) there would have been a "negative" dumping margin. Sandvik's claim for quantity adjustments had never been based solely on price list information. The primary grounds for this claim had been the difference in levels of trade between the export sales and the foreign market sales and the fact that Sandvik's prices generally increased as order volume declined, with the largest increases normally occurring on orders of quantities of less than 100 kilos. On these grounds Sandvik had requested the Department to match sales of comparable quantities. To facilitate the work of the Department of Commerce, Sandvik had provided the Department with data on computer tapes on all its sales.⁵ This had made it possible for the Department to match correct quantities in its computer. Sandvik had recommended that the Department match sales in the United States of less than 100 kilos to sales of the same quantities in Sweden and the Federal Republic of Germany and match sales of 100 kilos and above in the United States to sales of the same quantities in Sweden and the Federal Republic of Germany. Sweden explained in this context that in a few instances comparable quantity matches could not be made. In these cases the Department of Commerce could and should have made adjustments for quantity differences which should have reflected the price increases which occurred when sales were made in quantities of less than 100 kgs. The Department had all necessary data on sales by Sandvik in Sweden and the Federal Republic of Germany on data tapes to make these adjustments. In addition, in its questionnaire responses Sandvik had grouped its sales in the Federal Republic of Germany into four volume categories and had identified the price declines associated with the larger volumes. In each case there had been a clear price break at 100 kgs. In response to a question by the Panel, Sweden provided the Panel with an excerpt of a document which had been submitted to the Department of Commerce by Sandvik in the course of the investigation and which purported to show the effect of quantity on price with respect to sales by Sandvik in the Federal Republic of Germany. This information had been supplemented by additional analysis of prices of four quantity

¹(100 X 3.60) c:\dw4-note\ (500 X 3.40) c:\dw4-note\ (1000 X 3.20)

² $\frac{3.29}{3.00} = 1.097$

³ $\frac{3.20}{3.00} = 1.067$

⁴ $\frac{4.65}{3.11} = 1.50$

⁵Sweden provided to the Panel information on the contents of these computer tapes.

groups of Sandvik's sales in Sweden. This analysis had also revealed a price break at 100 kgs. Sweden also provided to the Panel a document containing an analysis for five quantity groups of the effect of quantity on price with respect to sales by Sandvik in the Federal Republic of Germany in the period May-October 1986.

3.39 The United States considered that it had met its obligations under the Agreement by providing the Swedish exporter, Sandvik AB, with full opportunity to demonstrate differences affecting the price comparability of export sales and foreign market sales, by considering Sandvik's arguments and by granting or denying allowances based upon the merits. Article 2:6 of the Agreement provided that, in order to effect a fair comparison between the export price and the domestic price in the exporting country or country of origin:

"due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability."

The Agreement's direction that an allowance be considered in each case "on its merits" indicated plainly that an exporter seeking an allowance must, through the presentation of at least a minimum threshold of evidence in response to a questionnaire, demonstrate how differences in conditions and terms of sale affect price comparability. The draft text submitted in November 1978 to the Committee on Anti-Dumping Practices established under the Kennedy Round Anti-Dumping Code¹ supported this understanding of the standard for allowances relating to price comparability. This text explained that adjustments might be necessary to render prices comparable because products frequently were not sold in the home market and in the export market in the same quantities. The burden to prove such allowances, though, rested squarely with the party claiming the adjustment. This had been expressed in the draft text as follows:

"the party claiming an allowance has the burden of proof which is not satisfied unless adequate justification is provided and proper verification is permitted."²

The responsibility of exporters to justify claims for allowances was also evident if one compared the text of Article VI:1 of the General Agreement with the text of Article 2:6 of the Agreement. Article VI:1 of the General Agreement provided that:

"due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability."

Article 2:6 of the Agreement repeated this provision word for word, but explained that an allowance must be made only when demonstrated "on its merits". As explained in a Report of a Group of Experts on Anti-Dumping and Countervailing Duties, adopted in 1961:

"The Group recognized that, while it was logical and reasonable to make adjustments to take account of different quantities and that countries should follow the general principle of adjustments in each case, difficulties might nevertheless arise in securing the necessary information on which such adjustments should be based. Furthermore, it was thought that each case had to be considered on its merits in the light of the objective of comparison of like quantities."³

¹Doc. COM.AD/W/83

²Ibid. at 7

³Anti-Dumping and Countervailing Duties, Report Adopted on 13 May 1959, BISD 8S/145-153, at 147.

Thus, a comparison of Article VI of the General Agreement and Article 2:6 of the Agreement revealed that the drafters of the Agreement had added the explanatory phrase "on its merits" to Article 2:6 in order to make clear the exporter's obligation to provide sufficient evidence of differences affecting price comparability. It was apparent that the drafters of the Agreement had been aware of the difficulties of obtaining information completely within the control of a foreign party and responded by providing that, absent sufficient evidence, due allowance for purported differences affecting price comparability need not be made. Article 6:8 of the Agreement supported the conclusion that an exporter claiming an allowance carried the burden of proof:

"In cases in which any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available."

Thus, if an exporter who claimed an allowance failed to provide evidence sufficient to demonstrate that an allowance should be made on its merits, the investigating authority concerned had no choice but to make its decision upon the facts available.

3.40 The United States considered that the procedures of the Department of Commerce for the submission and consideration of evidence in anti-dumping duty investigations comported with the requirements of Article 6 of the Agreement, and in particular Article 6:1, and allowed interested parties sufficient opportunity to justify differences affecting price comparability. In making its determinations, the Department relied primarily upon questionnaire responses and information obtained at verification. All interested parties were given an opportunity to present written and oral evidence during the course of an investigation, and the Department would provide, upon request, a forum for discussion and debate of the evidence. All non-confidential information and adequate summaries of confidential information were made available to interested parties. Confidential information was made available to an authorized representative of an interested party under an administrative protective order. Still, it was the responsibility of the party which submitted responses to a questionnaire to allege the adjustments it considered necessary for proper price comparability and to support such allegations during verification through independent source documents and records prepared in the ordinary course of business. These procedures had allowed Sandvik more than an adequate opportunity, as required by Article 6 of the Agreement, to justify on the record differences affecting price comparability, as required by Article 2. Under the anti-dumping regulations of the Department of Commerce in effect in 1987¹, quantity adjustments normally were not made unless the exporter (1) granted during the period of investigation quantity discounts of at least the same magnitude with respect to 20 per cent or more of such or similar merchandise in the home market in the ordinary course of trade, or (2) demonstrated that the quantity discounts were warranted on the basis of cost savings attributable to the production of the different quantities. The Department would not adjust prices for differences in quantities unless the party alleging the adjustment demonstrated that it granted the discount on all sales of comparable quantities. These criteria for quantity adjustments were consistent with Article 2:6 of the Agreement and with the provisions on quantity adjustments in the draft text of November 1978.²

3.41 The United States argued that in the investigation of stainless steel hollow products from Sweden Sandvik had not been able to show that the amount of any price differential it claimed was wholly or partly due to differences in quantities sold. Firstly, Sandvik had failed to establish that it adhered to a quantity discount schedule in its negotiated prices. Sandvik had admitted that for sales in the home market or to third countries "no quantity discounts, per se, have been given by Sandvik although quantity, terms of delivery and customer status all are factors that play a rôle in setting terms of sale."

¹19 C.F.R. 353.14

²Doc. COM.AD/W/83, at 6

Secondly, Sandvik had failed to establish that the quantity discount it claimed was given on all sales of comparable quantities. For example, in response to a questionnaire sent out by the Department on 20 February 1987, Sandvik had failed to provide any documentation that differences between prices were based solely upon differences in quantities sold. Whatever documentation which did exist was not published or used in the sale of the product under investigation and was, according to Sandvik, "generally meaningless since most pipe and tube are sold to order". This point had also been underscored by officials of Sandvik in the Federal Republic of Germany who admitted during verification that "no fixed quantity discount policy was in effect during the period of investigation". Thirdly, Sandvik had failed to establish that the discount it claimed was a function of the quantities sold. Evidence of record had revealed instances where the sales price for small quantities of merchandise was lower than the sales price for large quantities of identical merchandise. Finally, Sandvik had never sought a quantity adjustment based upon cost savings, the second option under the regulations of the Department. Thus, the denial by the Department of Commerce of Sandvik's claimed quantity adjustment was supported by the Agreement because Sandvik had failed to prove that such an allowance should be made.

3.42 The United States denied that the Department of Commerce had declined to examine certain data provided by Sandvik. The Department had considered all evidence submitted by Sandvik during the investigation, informed Sandvik when its responses had failed to respond adequately to the questions of the Department and had even provided additional opportunities for Sandvik to supplement its submissions. It was only after these steps had been taken and Sandvik had not satisfactorily responded that the Department had denied the requested quantity adjustment. For example, following Sandvik's response to the questionnaire, the Department had sent a letter to counsel for Sandvik on 17 March 1987 which stated:

"As a result of a thorough analysis of your February 20, 1987 questionnaire response, submitted on behalf of Sandvik AB, AB Sandvik Steel and Sandvik Steel Company ... we have found deficiencies and areas where clarification is needed and have listed them in the enclosure. In order to make an accurate and complete assessment of your client's selling practices for our preliminary and final determinations, it is vital that you supply us with this missing information ..."

In this letter the Department had specifically requested Sandvik to answer all questions with respect to adjustments for rebates and discounts. Subsequently, following the submission of computer tapes by Sandvik, the Department had sent a letter to counsel for Sandvik on 27 May 1987 which stated:

"As a result of a thorough analysis of your February 20, 1987 and April 13, 1987 computer tapes, and the data contained thereon, submitted on behalf of Sandvik AB, AB Sandvik Steel and Sandvik Steel Company, ... we have found deficiencies and areas where clarification is needed and have listed them in the enclosure. In order to make an accurate and complete assessment of your client's selling practices for our final determination, it is vital that you supply us with this missing information which is requested following the same format as our original questionnaire."

Finally, a letter submitted on 23 September 1987 by counsel for Sandvik publicly acknowledged the Department's plan to conduct a computer analysis of Sandvik's data:

"On behalf of our clients, Sandvik AB, AB Sandvik Steel, and Sandvik Steel Company, ... we are submitting the following statement for the administrative record concerning corrections to the report dated 8 September 1987 on the verification which was conducted at Sandvik's facilities in Sweden and Germany. We understand from our telephone conversations that these matters have already been corrected for purposes of the Department's computer analyses."

Therefore, contrary to the allegation by Sweden, the evidence of record conclusively demonstrated that the Department of Commerce had considered all data submitted by Sandvik in support of its claimed quantity adjustment.

3.43 Sweden noted that the United States had explained that under the anti-dumping duty law of the United States quantity adjustments normally were not made unless the exporter (1) granted during the period of investigation quantity discounts of at least the same magnitude with respect to 20 per cent or more of such or similar merchandise in the home market in the ordinary course of trade, or (2) demonstrated that the quantity discounts were warranted on the basis of cost savings attributable to the production of different quantities. The United States had argued that Sandvik had failed to establish that the amount of any price differential it claimed was wholly or partly due to differences in the quantities sold because, firstly, Sandvik had failed to establish that it adhered to a quantity discount schedule in its negotiated prices and, secondly, Sandvik had failed to establish that the quantity discount claimed was given on all sales. Sweden considered that, regardless of whether the requirements under United States domestic law with respect to claims for quantity adjustments were in accordance with the Agreement, Sandvik had actually fulfilled the first requirement since orders of the product subject to investigation in Sweden and the Federal Republic of Germany in excess of 100 kilos had constituted more than 20 per cent of the total sales of the pipes and tubes covered by the investigation. In the view of Sweden the requirement that discounts be granted on all sales of comparable quantities was extremely restrictive. This requirement was meaningless for products normally sold to order. The requirement to strictly adhere to a quantity discount schedule in effect amounted to a denial to adjust prices in the face of a commercial reality which could easily have been checked by the Department of Commerce. Sandvik's pricing practices had been entirely in accordance with the normal pricing practices in the market for seamless stainless steel pipes and tubes. In response to the argument of the United States that Sandvik had failed to establish that the discount it claimed was a function of the quantities sold and that there had been instances where sales prices for small volumes were lower than sales prices for large volumes, Sweden pointed out that the data on computer tapes provided by Sandvik demonstrated that prices increased as order volumes declined. Consequently, it was quite evident that the prices were a function of the quantities sold. The fact that there were isolated cases where prices for small volumes of sales were lower than sales prices for large volumes did not contradict the existence of this relationship. There could be perfectly rational commercial reasons to deviate from normal pricing practices in a few cases. In response to the argument of the United States that Sandvik had provided no documentation to demonstrate that differences between prices were based solely upon quantity, Sweden argued that, while the responses by Sandvik might perhaps not have demonstrated price differences based solely upon quantity, Sandvik had presented full documentation on its actual sales prices which clearly indicated that prices varied inversely to quantities. Given that Sandvik had provided to the Department actual price information on all its sales, the Department could have disregarded the question of whether there was a 100 per cent concordance between list prices and actual sales prices. All that the Department had to do was to match comparable quantities in its computer (i.e. to match sales of less than 100 kilos and sales of 100 kilos or more separately) and make adjustments on the basis of available information in those few cases where matches could not be made.

3.44 Sweden considered generally that the criteria under the anti-dumping law of the United States for quantity adjustments had been applied in the case of the investigation of stainless hollow steel products from Sweden in a too restrictive manner which was inconsistent with the obligations of the United States under the Agreement. The first criterion applied by the Department, that the exporter, during the period of investigation must have granted quantity discounts of at least the same magnitude with respect to 20 per cent or more of sales in the home market in the ordinary course of trade, was not in accordance with Article 2:6 of the Agreement because it did not take into consideration the commercial realities of the market for the product under investigation. Even if one considered that this criterion was not inconsistent with Article 2:6, it had been applied too narrowly in this particular case. With respect to the second criterion for quantity adjustments under the anti-dumping law of the United States, i.e. that

it must be demonstrated that the quantity discounts are warranted on the basis of cost savings attributable to the production of different quantities, Sweden considered that this requirement was virtually impossible for any company to meet, as a company normally acted on the basis of what was rational in broad economic terms, rather than merely on the basis of cost savings in its production. Finally, with respect to the argument of the United States that the rules on quantity adjustments laid down in the regulations of the Department of Commerce were consistent with the views expressed in the draft text of November 1978, Sweden reiterated that this document could not be used as a source of authoritative interpretation of provisions of the Agreement.

3.45 Sweden considered that, as quantity discounts resulted from decisions made by individual firms it was reasonable to require that a firm claiming a quantity adjustment provide the necessary information to substantiate this claim. However, in this case Sandvik had provided sufficient evidence to justify its claim for a quantity adjustment. Sweden summarized its objections to the denial by the Department of Commerce of this claim in the following three points: firstly, the rules on quantity adjustments on the basis of which the claimed adjustment had been denied were without support in the Agreement and were virtually impossible to satisfy, at least in markets where products were sold to order. These rules effectively excluded the possibility of quantity adjustments other than on the basis of evidence of adherence to a quantity discount schedule or evidence that differences between prices were based solely upon differences in quantity. Consequently, Sweden could not agree with the conclusion of the United States that the United States had met its obligations under the Agreement when it had provided Sandvik full opportunity to demonstrate differences affecting price comparability and when it had considered Sandvik's arguments. Secondly, the Department of Commerce had compared prices in Europe to end-consumers to prices in the United States to distributors. The failure to make an adjustment for this difference in levels of trade was inconsistent with Article 2:6 of the Agreement which required that prices be compared at the same level of trade. Thirdly, the Department had not granted Sandvik's request that sales of comparable quantities be matched and had calculated the dumping margin by making comparisons between individual sales prices of large volumes to the United States and an average of foreign market prices.

3.46 The United States considered that it was not clear what Sweden was arguing with respect to quantity adjustments. If Sweden was claiming a quantity discount, that would require a calculation to adjust for discounts given for large volume sales where sales in the home market or in third countries were typically in smaller quantities than sales in the United States. However, Sandvik had failed to establish on the record that the amount of any price differential it claimed was wholly or partly due to a difference in quantity sold. Indeed, data presented by Sandvik to the Department showed that the company negotiated each sales price individually and that some large sales of over 100 kilos had been made at higher per unit prices than some small sales. It had been impossible to quantify the extent to which quantity *per se*, had affected price differences. It was irrelevant that average prices fell as quantities rose, because quantity was only one variable in the negotiated prices. Sellers and customers had negotiated prices instead of using price lists in order to take advantage of individual circumstances.

3.47 The United States argued that if, on the other hand, Sweden was proposing that the Department of Commerce should have matched sales of more than 100 kilos in Sweden and the Federal Republic of Germany to large sales in the United States, that would constitute an unwarranted exception to practice. The Department always calculated a single foreign market value, normally based on a weighted average of home market or third country sales made in the normal course of trade. The Department would deviate from this practice when in one market all or a disproportionate number of sales were made in large quantities while sales in the other market were made only in smaller quantities. For example, if sales in the United States were made in quantities of 100, 200, 400 kgs. and sales in the foreign market were made in quantities of 40, 60 and 100 kgs., the Department might disregard the smaller, non-comparable foreign market sales and use only the foreign market sales in quantities of 100 kgs.

for comparison to individual sales in the United States.¹ Where sales in both markets were comparable in size, whether large, small, medium or a combination of different volumes, the Department used a single weighted average foreign market value. This practice was fully consistent with the requirement in Article 2:6 of the Agreement for due allowance in each case, on its merits, for the differences in conditions and terms of sale. A weighted average foreign market value did not overstate margins of dumping. Indeed, a weighted average by definition accorded greater significance to large volume sales. For example, given that the Department of Commerce had based foreign market values on the weighted average sales prices for each of the 150 to 350 products investigated, a sale of a large quantity had played a more pivotal rôle in the determination of that product's normal value than a sale of a small quantity. Thus, even though Sandvik had failed to establish on the record that the amount of any difference in price was wholly or partly due to a difference in quantity sold, the use by the Department of a weighted average to calculate foreign market value had actually taken into account sales of different quantities.

3.48 Regarding the examples given by Sweden in support of its view that the Swedish exporter had been disadvantaged by the use of weighted average foreign market values, the United States argued that these examples were self-serving. In the comparisons used by Sweden, only the lowest priced sales were used. The examples would apply only to the extent that the lowest prices were consistently charged for the highest quantities and *vice versa*. The record of the Department, however, demonstrated that this had not been the case in the investigation challenged by Sweden. Regarding the information provided by Sweden to the Panel regarding the relationship between prices and quantities of Sandvik's sales in the Federal Republic of Germany in the period May-October 1986 (the document mentioned at the end of paragraph 3.38) the United States considered that this document did not represent a fair presentation of the data appearing on the computer tapes provided by Sandvik to the Department of Commerce during the investigation. Firstly, this document appeared to aggregate data pertaining to hundreds of seamless stainless steel tubular products. The computer tapes, on the other hand, had provided discrete information for a number of product categories and for between 150 and 350 products per product category in either the home or third country markets. The Department had matched each product group with such or similar comparison groups sold in the United States according to specific standards established during the investigation. Dumping margins had been calculated for each comparison group, not on the aggregate basis presented in the document provided to the Panel by Sweden. This was done to ensure that the comparisons were made on a specific, fair and accurate basis. Secondly, the document arbitrarily established different quantity groupings without explanation or justification. Finally, the document presented by Sweden had not been submitted by Sandvik to the Department of Commerce during the investigation.

3.49 The United States argued that the question of differences in levels of trade, referred to by Sweden in support of its view that the Department should have made a quantity adjustment, had not been raised by the Swedish exporter, Sandvik, during the investigation and should therefore be disregarded by the Panel. In addition, this argument was also specious on its merits. The existence of different levels of trade could never demonstrate a claimed quantity adjustment. The first sentence of Article 2:6 of the Agreement provided that:

"to effect a fair comparison between the export price and the domestic price in the exporting country ... the two prices shall be compared at the same level of trade ..."

An allowance for a difference in quantity, however, originated from the second sentence of Article 2:6, providing that:

¹See e.g. Hydrogenated Castor Oil from Brazil, 50 FR 51725 (1985) and Steel Jacks from Canada, 50 FR 42577 (1985).

"due allowance shall be made in each case, on the merits, ... for the other differences affecting price comparability."

Thus, to demonstrate that the export price to the United States had to be compared with the foreign market value at the same commercial level of trade, a fact neither alleged nor proven by Sandvik in the investigation by the Department, bore no relationship to the question of an adjustment for difference in quantities. The argument of Sweden that orders of the product in question in excess of 100 kilos in Sweden and the Federal Republic of Germany had constituted more than 20 per cent of the total sales of the pipes and tubes bore no relationship to the relevant rule in the Regulations of the Department of Commerce that discounts be granted on 20 per cent or more of sales, not that 20 per cent or more of all sales be large sales. In fact, the sales of over 100 kilos had been nearly as likely to be sold at high prices as at low prices. The United States further noted in this respect that the Department of Commerce had made an adjustment for actual cash discounts and a volume rebate provided by Sandvik.

Exchange rate changes (Article 2:6)

3.50 Sweden argued that, in making comparisons between export prices to the United States and sales prices to the Federal Republic of Germany,¹ the Department of Commerce had not made due allowance for relevant exchange rate changes which had occurred during the investigation period (May- October 1986). This failure to make an adjustment for exchange rate changes was inconsistent with Article 2:6 of the Agreement which required inter alia that due allowance be made for "other differences affecting price comparability". During the investigation period the dollar had depreciated vis-à-vis the krona by 4 per cent while the mark had appreciated vis-à-vis the krona by 7 per cent. At the end of this period, the mark had appreciated by 12 per cent vis-à-vis the dollar. This meant that, in order to avoid an affirmative determination of dumping, Sandvik would have had to continuously adjust its prices in both the German market and in the United States. It was obvious that it was not possible for a company to do this, when there were such rapid exchange rate changes in opposite directions during a short period of time, given that the use of published price lists and the existence of commitments to customers limited the ability of companies to change prices at short notice. The Department of Commerce should, therefore, have made adjustments for exchange rate changes which Sandvik had no chance to avoid, in particular to take account of the rise of the German mark, as Sandvik could not be expected to change its prices in Germany in order to avoid dumping in the United States.

3.51 The United States argued that, while Article 2:6 of the Agreement required that due allowance be made for differences affecting price comparability, the party which claimed an allowance had to be able to justify the claimed adjustment and permit verification of the information on the basis of which the claim was made. In the investigation of stainless steel hollow products, Sandvik had never requested that an allowance be made for fluctuations between the krona and the dollar on the one hand, and the krona and the German mark on the other hand. To the contrary, Sandvik had suggested that, with respect to the conversion of German marks to dollars and krona to dollars "the average of the rates certified by the Federal Reserve Bank of New York for the third and fourth quarters of 1986" would be appropriate. The suggestion that an average rate constituted an appropriate measure of an exchange rate over time clearly demonstrated that Sandvik had never considered the fluctuation in the daily exchange rate to be of any significance. Whereas Sandvik had never alleged that the Department should adjust prices for fluctuations in exchange rates, Avesta, the Swedish exporter of welded pipes and tubes, had requested the Department to use the exchange rate in effect prior to the date of purchase based upon significant fluctuations in that rate. The Department had given careful consideration to this request

¹As explained in paragraph 2.6, for some products exported by Sandvik AB, the foreign market value had been determined on the basis of sales to the Federal Republic of Germany.

based on the facts in the record of the investigation. Had Sandvik made a similar allegation, the Department of Commerce would have considered whether the facts on record established the need for an exchange rate adjustment. Because Sandvik had failed to make such an allegation, the resulting failure to consider the alleged adjustment rested entirely with Sandvik. The United States considered with respect to the arguments of Sweden on the exchange rate changes, that it had met its obligations under the Agreement by providing Sandvik full opportunity to demonstrate differences affecting price comparability, by considering the arguments of Sandvik presented during the investigation and by granting or denying allowances based upon the merits.

3.52 Sweden pointed out that Article 2:6 of the Agreement provided that:

"due allowance shall be made in each case, on its merits, ... for the other differences affecting price comparability".

Thus, it was clear from the text of Article 2:6 that investigating authorities were obliged to make appropriate adjustments, irrespective of whether there was a claim for adjustments by exporters subject to investigation. Under the Agreement respondents were entitled to investigations in which due allowance was made, inter alia, for fluctuations in exchange rates, especially where investigating authorities compared export prices with prices of sales to third countries. Sweden disagreed with the view of the United States that the words "on its merits" in Article 2:6 meant that it was the responsibility of the exporter who sought an allowance to demonstrate how differences in conditions and terms of sale affected price comparability;¹ this simply meant that decisions on adjustments needed to be made on a case-by-case basis. Exchange rate changes could affect dumping margins independently from decisions taken by firms subject to investigation. As such, the issue of allowances for exchange rate changes was distinguishable from the issue of allowances for other factors affecting price comparability, such as quantity differences, which resulted from a firm's own decisions. It was, therefore, reasonable that the responsibility for making allowances for exchange rate changes rested with the investigating authority. In response to the argument of the United States that Sandvik's suggestion that an average of the rates certified by the Federal Reserve Bank of New York for the third and fourth quarters of 1986 be used indicated that Sandvik had never considered the daily exchange rate fluctuations to be of any significance, Sweden made the following points. Firstly, Sandvik's suggestion had probably not been made independently from the views of the Department of Commerce on this issue. Secondly, the choice of average rates for the third and fourth quarters rather than for the second to the fourth quarter (as the period of investigation encompassed the period May-October 1986) demonstrated some awareness of the impact of exchange rate fluctuations during the period of investigation. As the rates established by the Federal Reserve Bank of New York were quarterly rates established in advance and based on transactions at the end of each previous quarter, it was possible that the rates for the third and fourth quarters constituted a more appropriate measure of the average exchange rate for the period of investigation than the rates for the 2nd to the 4th quarter. Furthermore, this argument of the United States did not address the question of whether an adjustment should have been made to the "technical dumping" which Sandvik had no possibility to avoid. The Regulations of the Department of Commerce provided that manufacturers, exporters and importers were expected to act within a reasonable time period to take into account price differences resulting from sustained changes in prevailing exchange rates.² However, in this case Sandvik had not had the chance to avoid the "technical dumping" which occurred due to the rapid fall of the dollar during the investigation period. That Sandvik had never requested the Department of Commerce to make an allowance for exchange rate changes was explained by the fact that all information on prices and

¹Supra, paragraph 3.39

²Sweden referred here to section 353.56(b) of the Regulations of the Department of Commerce in effect in 1987.

costs had been provided by Sandvik in local currencies and that it was, in the view of Sandvik, the responsibility of the authorities of the United States to determine the appropriate exchange rates and to consider the impact of exchange rates on local prices.

3.53 The United States explained that the exchange rates used by the Department of Commerce when making currency conversions were those published by the United States Customs Service and in effect on the date of sale of the product subject to investigation. These exchange rates were certified by the United States Federal Reserve Board. The rates were set quarterly, unless the daily exchange rate fluctuated by more than 5 per cent from the quarterly rate. The Department made special allowances when an exporter could demonstrate that it had made a real effort to follow exchange rates in its pricing. Sandvik had made no such effort. Sweden misstated the standard in the Agreement for anti-dumping investigations by trying to place a burden on the investigating authority to scout out the proper adjustments and allowances and grant them regardless of whether a respondent requested that such adjustments and allowances be made. The correct standard was laid down in Article 6 and in particular Article 6:1, 6:2 and 6:5, which demonstrated that it was the exporter who must produce evidence to support its claims. No Party to the Agreement which had an anti-dumping law unilaterally granted unclaimed adjustments; all Parties required exporters to claim adjustments and to support such claims with verifiable evidence. The United States objected to the suggestion by Sweden that Sandvik's proposal on the use of an average of the certified exchange rates for the third and fourth quarter of 1986 had been made under influence from the Department of Commerce. It was understandable that Sweden entertained this suggestion because Sandvik's proposal actually worked to its detriment. When the United States dollar dropped against a foreign currency, an exporter should logically prefer to go back as early as possible because then its prices converted to fewer dollars. Sandvik appeared to have reversed its argument. In any case, the supposition by Sweden was unfounded, because the United States authorities had not advised or influenced Sandvik or its counsel in any way.

Sales by Sandvik AB to an unrelated distributor in a third country (Article 2:3)

3.54 Sweden pointed out that Article 2:3 of the Agreement dealt with cases where products were not imported directly from the country of origin, but exported to the importing country from an intermediate country. When calculating the margin of dumping, investigating authorities were directed by this Article to compare the export price from the intermediate country with the comparable price in the country of export; however, Article 2:3 also provided that:

"comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export."

In the investigation of stainless hollow steel products from Sweden, the Department of Commerce had used this second possibility. In one case it had compared Sandvik's export price to an unrelated third country reseller with the export price to customers in the United States. Sweden considered that the Department should have compared the price charged by the distributor in the third country to customers in the United States with the price charged by Sandvik to its customers in the United States. The method applied by the Department meant that prices were compared at different levels of trade and had resulted in an overstatement of the margin of dumping in a manner inconsistent with Article 2:3.

3.55 The United States explained that on 9 June 1987 Sandvik had corrected an earlier submission concerning sales to an unrelated distributor. Sandvik had stated on this occasion that these particular sales had not been made to a company in the United States, but instead to that company's parent located in a third country. The contract between Sandvik and the parent company, however, had required the parent company to sell the material only in the United States. The contract also required the parent company to use its best efforts to promote the sale of these products in the United States. The

Department of Commerce had decided to include Sandvik's sales to the third-country company among its sales to the United States for the purpose of price comparison because, by the terms of Sandvik's contract with the third country party, Sandvik knew and, in fact, expressly provided that the products were to be sold only in the United States. Under section 772(b) of the United States Tariff Act of 1930, as amended, the "United States purchase price" was defined as

"the price at which merchandise is purchased, or agreed to be purchased, prior to the date of importation, from the manufacturer or producer of the merchandise for exportation to the United States."

The legislative history accompanying this provision indicated that, when a producer knew that a product was intended for sale to an unrelated purchaser in the United States under terms of sale fixed on or before the date of importation, the producer's sale price to an unrelated middleman should be used as the "United States purchase price" for purposes of price comparability. Thus, for sales to a third-country middleman, "United States purchase price" equalled the price agreed upon between the foreign producer of the merchandise being exported to the United States and the initial purchaser of that merchandise, not the price agreed upon between the initial purchaser of the merchandise and any subsequent buyer. The reasoning underlying the provision in section 772(b) of the Tariff Act, as amended, was analogous to that reflected in Article 2:3 of the Agreement. Thus, based on evidence presented by Sandvik as to its relationship with the third-country reseller, the Department had properly decided to include Sandvik's shipments to the reseller among the company's sales to the United States for price comparison purposes.

3.56 Sweden noted the argument of the United States that the Department had decided to treat Sandvik's sales to the third-country distributor as sales by Sandvik to the United States because, by the terms of Sandvik's contract with the third-country party, Sandvik knew and, in fact, expressly provided that the product was to be sold only in the United States. However, the products in question had not been merely trans-shipped through the intermediate country. In this regard Sweden referred to a comment of the United States in its responses to points raised by Sweden at the conciliation meeting held in October 1988:

"Indeed, the promotion, marketing, sale and distribution in the United States of Sandvik's hollow bar was the reseller's principal undertaking in its sales agreement with Sandvik."¹

The method used by the Department of Commerce meant that the costs incurred by the reseller for promotion, marketing and distribution of the products in the United States had been disregarded and that, consequently, the calculation of the margin of dumping had not been made in a fair manner.

3.57 The United States considered that the arguments of Sweden regarding the question of the sales to the third country distributor were confused. Sweden seemed to be objecting to the Department's failure to account for differences in level of trade or perhaps for circumstances of sale, but it also seemed to argue that, because expenses were incurred by the third-country middleman, the export price should be the price from the middleman. In response to the latter argument, the United States argued that the products in question had indeed been "merely trans-shipped" in the sense of Article 2:3. There had been no further processing and the goods had not been sold for use in the third country. "Mere trans-shipment" did not mean that the only expenses which could be incurred were shipping costs. Regarding the apparent claim for a level of trade adjustment, the United States pointed out that Sandvik had never alleged during the investigation that a level of trade adjustment was appropriate and had not provided evidence, as required by Article 6 of the Agreement. Finally, Sweden was incorrect

¹Doc. AD/W/187, at 10

in suggesting that the Department of Commerce had not adjusted for differences in circumstances of sale; the Department had made adjustments for such differences for all of the sales to the United States where such adjustments had been claimed and proven.

Issues Relating to the determination of injury by the USITC (Article 3)

3.58 Sweden contested the consistency with the Agreement of the injury determination of the USITC principally on the ground that the USITC had not demonstrated a causal relationship between the allegedly dumped imports from Sweden and the material injury to a domestic industry. This failure to demonstrate a causal relationship was the result of (1) the USITC's failure to meet the requirements of the Agreement with respect to the analysis of the volume of the dumped imports, (2) the USITC's failure to demonstrate significant price undercutting, (3) the absence in the USITC determination of factors related to the imports from Sweden other than volume and price undercutting which explained how the imports had caused material injury and (4) an inadequate analysis of the impact of the imports upon the domestic industry.

3.59 The United States considered that the USITC had demonstrated a clear causal relationship between the dumped imports and material injury suffered by the domestic industry and that the evidence in the record strongly supported the agency's determination. Therefore, that determination was fully consistent with Article 3 of the Agreement. In specific, the existence of a causal relationship was supported by evidence of (i) the volume of Sandvik's imports throughout the period of investigation, particularly from 1985 to 1987, (ii) significant price undercutting by the imports and (iii) other factors enunciated in Article 3, including significant price suppression or depression. In addition, the USITC's determination contained a thorough analysis of the impact of the imports on the domestic industry.

(1) Volume of the imports

3.60 Sweden drew the attention of the Panel to the following statement in the determination of the USITC:

"... the significant volume of seamless pipe and tube from Sweden and the high import penetration throughout the period of investigation, combined with the pattern of underselling of these imports and the revenue lost to the domestic industry, demonstrate that these LTFV imports have caused injury to the domestic industry."¹

Sweden contested the consistency with the Agreement of the analysis by the USITC of the volume of the imports on the following grounds. Firstly, Article 3:2 provided that, as regards the volume of imports, consideration should be given to "whether there has been a significant increase in dumped imports ..." The factors mentioned in the USITC Report ("the significant volume" and "the high import penetration") were not consistent with this requirement. Secondly, data in the USITC Report concerning

¹Stainless Steel Pipes And Tubes From Sweden: Determination of the Commission in Investigation N° 731-TA-354 (Final) under the Tariff Act of 1930, Together With The Information Obtained In The Investigation, USITC Publication 2033 (November 1987), at 15. Pages 1-20 of this Publication contain the text of the determinations and views of the USITC. Pages A-1-A-104 contain the "information obtained in the investigation." Hereafter in this Report the determinations and views of the USITC will be referred to as "USITC Determination". The "information obtained in the investigation" will be referred to as "USITC Report".

the volume of imports of seamless stainless steel pipes and tubes from Sweden during the investigation period provided no evidence of a significant increase of the volume of these imports, neither in absolute nor in relative terms. Sweden provided to the Panel the following statistics on the evolution of the volume of imports from Sweden during the investigation period:^{1,2}

TABLE 1

<u>Apparent Consumption, US Shipments, Imports and Market Shares of Stainless Seamless Pipes and Tubes</u>								
	Total App. cons. sh. t.	US shipments* sh. t %		Imp from Sweden sh. t %		Imp fr other countries sh. t %		
1984	28,005	8,010	28.6	5,726	20.4	14,269	51.0	
1985	30,693	7,985	26.0	4,592	15.0	18,116	59.0	
1986	27,194	6,681	24.6	4,866	17.9	15,647	57.5	
1986	15,017	3,988	26.6	2,527	16.8	8,508	56.7	
1987	11,175	3,680	32.9	1,827	16.3	5,668	50.7	

*Excluding redrawers

Sweden interpreted the data in this table as follows. Firstly, during the investigation period the volume of imports from Sweden, in absolute terms, had declined by 20 per cent from 5,726 tons in 1984 to 4,592 tons in 1985; subsequently, the imports increased slightly by 6 per cent to 4,866 tons in 1986. Imports in the first six months of 1987 had declined by 28 per cent compared to the level of imports in the first six months of 1986. Secondly, the Swedish market share (imports as percentage of total apparent domestic consumption) had declined from 20.4 per cent in 1984 to 15 per cent in 1985 and increased to 17.9 per cent in 1986. This market share in the first six months of 1987 was 16.3 per cent compared to 16.8 per cent in the first six months of 1986. Thirdly, while the Swedish market share declined by more than 4 per cent from 1984 to the first six months of 1987, the market share of integrated producers in the United States (shipments as percentage of total apparent domestic consumption) had increased by about the same amount over this period. Finally, the imports from Sweden as percentage of the production of domestic integrated producers³ in the United States had declined from 74 per cent in 1984 to 62 per cent in 1985. This share increased to 70 per cent in 1986.

¹Sweden explained that these statistics were based on tables appearing on pages A-20, A-23 and A-52 of the USITC Report.

²Sweden was of the view that the statistics on domestic shipments of United States producers of seamless stainless steel pipes and tubes (page A-23 of the USITC Report) did not include shipments by redrawers.

³Sweden mentioned as the source of the data on the evolution of production by the United States integrated producers of seamless stainless steel pipes and tubes Table 3 on page A-22 of the USITC Report.

In the first six months of 1987 this share had been 43 per cent compared to 48 per cent in the first half of 1986. Sweden considered in light of these data that the relevant imports had showed a decreasing trend in absolute terms as well as relative to production or consumption in United States during the investigation period. Sweden also considered that imports from third countries had not been adequately taken into consideration by the USITC in its determination of injury.

3.61 The United States argued that Sweden was incorrect on the facts when it alleged that the USITC had not found a significant increase of the volume of dumped imports. In its determination, the USITC had made a number of observations on the level and significance of the volume of Swedish imports during the investigation period. Firstly, the USITC had noted that these imports had risen to a record level during 1984, the first year of the investigation period.¹ In fact, the USITC had emphasised that import levels during 1984 were 60 per cent higher than during the previous year, increasing from approximately 3,551 ST in 1983 to a record 5,726 ST during 1984.² In terms of market share, the USITC had observed that Sandvik's import volume represented a penetration level of 20.4 per cent in 1984. Secondly, the USITC had noted that imports had declined temporarily in 1985, to 4,592 ST and rebounded sharply in 1986, climbing to 4,866 ST even as US apparent consumption fell by more than 10 per cent. Thus, Sandvik's import volume had risen by almost 20 per cent to 17.9 per cent in 1986, the last full year of the investigation period.³ Thirdly, the USITC had observed that import penetration by value had risen from interim 1986 to interim 1987. Although it had noted that import penetration in volume terms had fallen slightly over that period, it had not found this slight decline significant in light of evidence that it "nearly coincided in time with the imposition of the preliminary dumping margins" by the Department of Commerce and, therefore, resulted at least in part from the anti-dumping investigation.⁴ Finally, the investigation of the USITC had revealed that, as one Commissioner emphasized, import penetration relative to domestic production (one of the criteria explicitly identified in Article 3:2) had also been higher (as a percentage of all domestic shipments) during the last full year of the investigation period than during the full three-year period.⁵ Thus, the evidence obtained by the USITC had indicated that: (1) the volume of the dumped imports throughout the period had been significantly higher than in the year immediately preceding; (2) the import levels over the last two full years of the period, 1985 and 1986, had increased substantially in all respects (in absolute terms and relative to both apparent consumption and production in the United States); and (3) import penetration relative to domestic production in the United States had been higher in 1986, the last full year of the investigation period than it had been, on average, during the period 1984 to 1986. Accordingly, there had been ample ground for the USITC to conclude that in view of the high levels of import penetration and increases during the period (examined together with the price undercutting, price declines and lost revenues) the dumped imports had caused material injury to the domestic industry.

¹USITC Determination, at 13 and footnote 47.

²Id.

³USITC Determination, at 13-14.

⁴USITC Determination at 14 and footnote 50.

⁵USITC Determination at 14, footnote 52. The United States explained that the term "production" as used by USITC referred to the quantity produced in a given period. The term "shipments" referred to that quantity produced which had left the factory and was en route to a customer, *i.e.*, production which was out the factory door and paid for. In relating "production" to "shipments", the following equation could be used: production = shipments + change in inventory. Thus, the term "shipments" used in footnote 52 of the USITC Determination referred to production which had left the factory and which had been paid for. However, shipments were the key element in examining the evolution of production and provided the most immediate measure of a firm's level of output.

3.62 The United States further pointed out that Sweden's claim that the imports had demonstrated a decreasing trend in absolute as well as in relative terms over the investigation period was supported by only one isolated fact: a temporary drop in import levels which had occurred during 1985, following the record import volume of 1984. However, it was notable that even during 1985, the lowest year of the period, import levels had been almost 30 per cent higher than they had been in 1983. Moreover, to the extent that import levels in 1986 had been lower than in 1984, the USITC had noted that decline could be attributed to the fact that the base year, 1984, had been a year with exceptionally high import levels.¹ In light of these facts it had been entirely reasonable for the USITC to accord limited weight to the temporary decline in 1984-1985.

3.63 The United States also considered that Sweden sought to capitalize on the fact that imports from that country had surged to a record level in the first year of the investigation period. Sweden, in effect, asked the Panel to discount all of the other evidence relating to the significant increase in import penetration levels from 1985 to 1987 (whether expressed in volume or value terms, in absolute numbers or as a percentage of consumption or production in the United States) and the fact that imports throughout the investigation period had been significantly higher than they had been before. For the USITC to have analysed the volume data of record in the manner suggested by Sweden would have been to deny the economic reality of the significantly increased presence of Swedish imports in the United States market. The argument of Sweden that in this case the USITC could not, consistent with the Agreement, have relied on the pattern of import penetration to support its determination, would lead to a perverse result in this and other cases, a result obviously inconsistent with the language and intent of the Agreement. Firstly, by Sweden's reasoning, the USITC would have had to have focused solely on the fact that the peak penetration year happened to occur during the first or second year of the investigation period rather than during the last and, therefore, would have had to have discounted all the other evidence relating to the significant increase in Sandvik's imports throughout the investigation period. Sweden was, in effect, arguing that, regardless of the other information obtained in the investigation, the fact that Sandvik's imports had surged to an unprecedented record level during the investigation period supported the view that these imports did not cause injury. This reasoning was illogical, inequitable and contrary to the language and intent of the Agreement. In addition, Sweden's argument reflected a fundamental misunderstanding of the concept of injury and causation as provided for in the Agreement. The Agreement directed a national authority such as the USITC to determine whether the volume and price effects of imports had caused material injury to a domestic industry, not to ascertain whether one piece of evidence, when isolated from all the others, could support a finding of injury. In this case, the pattern as well as the levels of Sandvik's import penetration (punctuated by two surges, an increase of 60 per cent from 1983 to 1984 and an increase of 20 per cent from 1985 to 1986) had had clear and direct consequences on the domestic market. This was illustrated by the fact, that within three business quarters of the first surge in volume, one major United States producer, Babcock and Wilcox, had ceased production of the like product and exited the industry. Then, within one quarter of Babcock's discontinuing production, Swedish imports had again surged by 20 per cent, which had caused key indicators such as production and employment for the remaining producers to continue to decline.

3.64 The United States explained that the USITC's determination indicated that it had considered data on the volume of imports of seamless stainless steel pipes and tubes from Sweden in 1983 in order to emphasize the fact that the import volume in 1984 had been exceptionally high, indeed a record year. By noting the data for 1983, import volume for the entire period of investigation had been put in its proper context. While the USITC in general followed an administrative practice of examining three years of data, in this case to ignore the extraordinary increase in import volume from 1983 to 1984 in both absolute terms and as a share of apparent consumption in the United States and the fact that 1984

¹USITC Determination, at 13.

was a record year would have been to blind the USITC to the economic and business reality of the presence and trend of Sandvik's imports in the United States marketplace. The statements in the Determination of the USITC with reference to the 1983-84 increase demonstrated that the USITC had concluded that 1984 had been an exceptionally high year and not that 1983 had been an exceptionally low year. The information in the record of the USITC's investigation in this case provided strong support for that conclusion. In making mention of the data for 1983, the USITC had referred to its Determination and Report in the preliminary phase of this investigation. In the Report accompanying its preliminary determination the USITC had stated that:

"imports of seamless stainless steel pipes and tubes from Sweden rose sharply from 3,551 short tons in 1983 to 5,726 short tons in 1984".¹

In the preliminary determination the USITC had repeated this language and added that this sharp rise "represented an increase of 61 per cent".² In addition, the Reports of the USITC accompanying its preliminary and final determinations in the countervailing duty investigation of the same products³ contained precisely the same language on the 1983-84 increase. Sandvik, thus was not once but thrice on notice that the USITC considered the 1983-84 increase significant. At no point in the anti-dumping and countervailing duty investigations had Sandvik asserted that the 1983-1984 increase had simply been a return to normal levels rather than a sharp increase to a record level, as the USITC had found.

3.65 The United States made the following observations on the figures mentioned by Sweden relating to the volume of imports of seamless stainless steel pipes and tubes from Sweden relative to production in the United States of integrated producers. Firstly, it rejected Sweden's comparison to production only by integrated producers and pointed out that the USITC in its determination⁴ discussed data for both domestic integrated producers and redrawers. Sandvik's imports as a percentage of the domestic industry's shipments and production during the investigation period had been as follows:

¹Stainless Steel Pipes and Tubes from Sweden: Determination of the Commission in Investigation No. 731-TA-354 (Preliminary) under the Tariff Act of 1930, together with the Information obtained in the Investigation, USITC Publication 1919, at A-36

²Ibid. at 16

³Stainless Steel Pipes and Tubes from Sweden: Determination of the Commission in Investigation No. 701-TA-281 (Preliminary) under the Tariff Act of 1930, Together with the Information Obtained in the Investigation, USITC Publication 1903 (October 1986); Stainless Steel Pipes and Tubes from Sweden: Determination of the Commission in Investigation No. 701-TA-281 (Final) under the Tariff Act of 1930, Together with the Information Obtained in the Investigation, USITC Publication 1966 (April 1987)

⁴e.g. USITC Determination, footnote 52.

TABLE 2

Imports of Seamless Stainless Steel Pipes and Tubes
as Percentage of Domestic Shipments and Production

Integrated Producers and Redrawers

	<u>Shipments</u>	<u>Production</u>
1984	51.06%	52.07%
1985	40.41%	42.45%
1986	48.07%	46.88%
Int/1986	43.00%	42.26%
Int/1987	33.99%	32.87%

Integrated Producers Only

	<u>Shipments</u>	<u>Production</u>
1984	71.49%	73.79%
1985	57.51%	62.27%
1986	72.77%	70.52%
Int/1986	63.37%	63.40%
Int/1987	49.65%	48.44%

Several conclusions could be drawn from these figures. Firstly, Sandvik's import penetration relative to domestic producers' shipments and production had been high throughout the period of investigation, growing sharply in the last full year of the investigation period and dropping off, as the USITC had found, only after provisional duty deposits began to be collected by the United States authorities. Secondly, the pattern of import penetration relative to domestic producers' shipments and production reflected the pattern of import penetration relative to United States apparent consumption. Thus, the USITC had considered the presence of imports in the United States market in each of the three ways mentioned in Article 3:2 of the Agreement: "... in absolute terms or relative to production or consumption".

3.66 Sweden argued that under Article 3:1 of the Agreement a determination of injury should be based on "positive evidence". In the case of the investigation by the USITC of seamless stainless steel pipes and tubes the evidence on which the USITC had based its findings was contained in the Report accompanying its final determination. The arguments advanced by United States regarding the manner in which the USITC had considered the increase of the volume of imports did not appear in the final determination of the USITC or in the accompanying Report. The United States had claimed that the USITC had observed that import levels throughout the period of investigation represented a significant increase over earlier levels and that the USITC had noted that the imports had risen sharply to a record level during 1984, the first year of the investigation period and had been 60 per cent higher in 1984 than during the previous year. These arguments, however, were not reflected in the final determination of the USITC or in the accompanying Report and could therefore, not be regarded as "positive evidence" on which the USITC had based its findings. For example, the statement that the USITC had observed that import levels throughout the investigation period represented a significant increase over earlier levels was factually incorrect. The USITC had concluded in its determination that:

"... the volume of imports, and the market penetration of seamless pipe and the tube remained significant throughout the period of investigation".¹

The USITC had at no point made a comparison of the import volume during the investigation period with "earlier levels". The statement that the USITC had observed that import levels in 1984 had been 60 per cent higher than in 1983 was also factually incorrect. The figure of 60 per cent was not even mentioned in the determination and the USITC had not drawn any conclusions based on the changes in import volume from 1983 to 1984. The determination of the USITC had been based exclusively on data relating to the period 1984-June 1987. Consequently, on the basis of the data gathered by the USITC, no conclusions could be drawn with respect to any period other than the period 1984-June 1987, and the USITC had, in fact, not drawn such conclusions. Accordingly, the arguments of the United States concerning the increase of imports from 1983 to 1984 were irrelevant. Even if data relating to import volume in 1983 were considered relevant, such data would not support the arguments of the United States. The volume of imports of seamless stainless steel pipes and tubes from Sweden as share of total United States consumption of those products was approximately 17 per cent in 1983.² This was roughly equivalent to the market share of these imports during the period 1985-June 1987. Finally, the allegation by the United States that from 1985 to 1986 the volume of imports from Sandvik had risen by almost 20 per cent was incorrect. This volume had risen by only 6 per cent from 1985 to 1986.

3.67 With respect to the allegation of the United States that import penetration relative to production in the United States had been higher during 1986, the last full year of the investigation period, than it had been, on average, during 1984 to 1986, Sweden made the following observations. The footnote in the determination of the USITC on which this statement was based referred to shipments and not to production.³ The evolution of the Swedish imports as a percentage of shipments of United States integrated producers and redrawers during the period 1984-June 1987 was as follows:

1984	51%
1985	40%
1986	48%
Int/1986	43%
Int/1987	34%

Different conclusions could be drawn from these figures by calculating an average value and comparing that value with the figure for a specific year. For example, by using this method it was possible to show that import penetration had been considerably higher in 1984, the first full year of the investigation period, than it had been, on average, during the period 1984-1986. In addition, the period of investigation defined by the USITC was 1984-June 1987; it was, consequently, inconsistent with this definition of the investigation period to put emphasis on data for the last full year of the investigation period. The USITC itself had defined as the investigation period the period 1984-June 1987; the Report accompanying the final determination had, consequently, not made any reference to data on import volume in 1983; while the determination itself referred once to import volume in 1983⁴, this isolated figure could not be the basis of valid conclusions if it was not analysed in conjunction with

¹USITC Determination, at 13.

²Sweden mentioned as the sources of this information: Stainless Steel Pipes and Tubes from Sweden: Determination of the Commission in Investigation N° 701-TA-281 (Final) Under The Tariff Act of 1930, Together With The Information Obtained In The Investigation, USITC Publication 1966 (April 1987) at A-16, and USITC Determination, at 13.

³USITC Determination, footnote 52.

⁴USITC Determination, footnote 47.

other economic indicators. For example, domestic consumption of seamless stainless steel pipes and tubes in the United States had been low in 1983, compared to the level of consumption in 1984. Thus, the absolute increase of the volume of imports from 1983 to 1984 had to a large extent been the result of increased domestic consumption. There had been no reason for Sandvik to deviate from the investigation period as defined by the USITC. All questions to which the company had been requested to answer had related only to the period 1984-June 1987. In order for a respondent to have adequate opportunities to defend its interests, it was important that investigating authorities base their findings only on data relating to the investigation period defined by such authorities. In addition, the determination of dumping of the United States Department of Commerce had been based on an investigation covering the period May-October 1986. If data for 1983, i.e. three years before the alleged dumping had taken place, were to be considered relevant, this would certainly be questionable as there was no evidence on the existence of dumping at that time.

3.68 The United States considered that Sweden was incorrect in arguing that the USITC had not emphasized in its determination that Sandvik's import levels throughout the investigation period had been substantially higher than they had been before and had been more than 60 per cent higher in 1984 than in 1983. The USITC had emphasized the increase in imports levels during 1984, 1985 and 1986 by noting the record penetration as compared with levels in 1983 and by referring to the Report prepared in connection with its preliminary investigation. That the USITC had discussed the "record" level in the text and presented the citation to the earlier Report in a footnote was of no substantive consequence. Sweden was also incorrect in arguing that data for 1983 were irrelevant to this case. These data were highly relevant and had been discussed in three Reports and two determinations of the USITC to which Sandvik had had ample time to respond. Sweden at certain points emphasized import market share and on other points referred to absolute import volume to attempt to demonstrate the allegedly benign presence of the Swedish imports in the United States market. However, either set of data supported the determination of the USITC. The United States provided the Panel with the following data drawn from the USITC's reports in the investigation:

Table 3: Volume of imports, market share of Swedish imports and United States apparent consumption of seamless stainless steel pipes and tubes

	<u>Volume</u> (in short tons)	<u>Market share of</u> <u>Swedish imports</u>	<u>U.S. Apparent</u> <u>consumption</u>
1983	3,551	-	21,057
1984	5,726	20.4%	28,005
1985	4,592	15.0%	30,693
1986	4,866	17.9%	27,194
Int. 1986	2,527	16.8%	15,017
Int. 1987	1,827	16.3%	11,175

(2) Price Undercutting (Article 3:2)

3.69 Sweden drew the Panel's attention to the following statement in the determination of the USITC:¹

"As the record reveals, there were eleven orders of seamless pipe and tube placed from 1985 to 1987, that were reported by purchasers during this investigation and the final cvd investigation and that involved competition between the domestic product and the imports from Sweden. Of these, seven were awarded to Sandvik. In these seven orders, the price of the Swedish imports were 8 to 15 per cent below the quoted domestic prices."

Given that each year approximately 13,000 orders were placed in the United States for the purchase of seamless stainless steel pipes and tubes from Sandvik, the number of orders on which the USITC had based its finding of price undercutting had been extremely limited and not representative of the exports of Sandvik. In addition, a close examination of the data in the USITC Report revealed that (1) the USITC had based its finding of price undercutting on price comparisons for a product which was not representative of Sandvik's exports and (2) the USITC had ignored that the available evidence did not demonstrate a pattern of price underselling.

3.70 With respect to the product for which price comparisons had been made, Sweden noted that the evidence relied upon by the USITC in its finding of price undercutting consisted of seven instances of underselling out of eleven orders of mechanical tubing. This product accounted for a minor part of Sandvik's total shipments and had never accounted for more than 10 per cent of Sandvik's total shipments in the United States of stainless seamless pipes and tubes covered by the anti-dumping duty investigation. Furthermore, mechanical tubing was a product clearly distinguished from the other products subject to investigation (redraw hollows and finished pipes and tubes). Mechanical tubing was not a substitute for redraw hollows and was not used in the manufacturing of finished pipes and tubes. While the USITC had determined that redraw hollows and finished seamless pipe and tube constituted one single "like product", it had not discussed the question of whether mechanical tubing was "like" redraw hollows and finished seamless pipes and tubes. The USITC Report had explicitly identified mechanical tubing as "one distinct type of seamless stainless steel pipes and tubes".² With respect to the factual evidence on the basis of which the USITC had made its finding of price undercutting, Sweden pointed out that the USITC had used three types of information: (1) questionnaire response data from United States producers and importers of the product from Sweden reporting average prices during the period January 1984-June 1987;³ (2) questionnaire response data provided by purchasers of the competing Swedish and domestic products for the period January 1985-June 1987;⁴ (3) bid price information from purchasers for the period 1985-1987.⁵ The first type of information showed that for most seamless products prices of United States producers had been fairly stable while United States importers had registered increasing prices. Prices of United States producers for mechanical tubing had fallen while import prices of this product had fluctuated or increased. The second type of information had not provided any evidence at all of price undercutting by Sandvik. Finally, the bid price information from purchasers consisted of data pertaining to eleven orders of redraw hollows and eleven orders of mechanical tubing. Seven of these eleven orders of mechanical tubing had been awarded to Sandvik. Purchasers had cited lower prices as one, but not the only reason for buying Sandvik's products. Among the eleven orders of redraw hollows, Sandvik had been awarded the order in three cases. In these inquiries of purchaser prices the USITC had not been able to find any

¹USITC Determination, at 14-15

²USITC Report, at A-4

³Ibid., at A-61-65

⁴Ibid., at A-66-69

⁵Ibid., at A-69-72

competition between many of the imported and domestic products. The USITC had ignored this lack of competition, despite Sandvik's claim that it did not compete with domestic producers in the United States over a large range of products. Sweden made a number of observations in support of its view that the evidence on the basis of which the USITC had arrived at its finding of price undercutting related to non-competing imports. Firstly, the products in question were expensive, as demonstrated by the fact that price quotations were in kgs., not in tons. Thus, these products were not standard products. A number of the products sold by Sandvik were proprietary grades. Secondly, it was clear from the information collected by the USITC that price was not the only factor determining purchasers' choices of supply. Lead time was also a very important, and perhaps decisive, factor.¹ Thirdly, it was clear from the information obtained in the course of this investigation that prices of imported products had to be lower than those of domestic products in order to compete.

3.71 With respect to the USITC's analysis of the information on bid prices, Sweden pointed out that the USITC had requested bid price information on the two largest volume purchases of mechanical tubings and redraw hollows which involved competition between the domestic and Swedish producers. Three purchasers had reported receiving delivered price quotes for eleven orders of mechanical tubings and three purchasers had reported delivered price quotes for eleven orders of redraw hollows. The finding of price undercutting had been based solely on data regarding mechanical tubing. However, these data did not provide any evidence of significant price undercutting. The data consisted only of the two largest bids reported by three of thirty-six purchasers who had been surveyed from January 1985- June 1987. The other thirty-three purchasers obviously had never found Sandvik in competition with any domestic producer. Moreover, the three purchasers had only reported their two largest bids which had been small compared to the volume of sales of Sandvik in the United States.

3.72 Sweden concluded in light of the above-mentioned arguments that on the basis of the available evidence the USITC should have drawn the conclusion that (1) the product coverage and the number of comparisons did not permit a finding of price undercutting; (2) there had been little competition between imported and domestically produced products; and (3) price was only one of the factors determining purchasers' choices of supply.

3.73 The United States argued that the findings of the USITC of significant price undercutting and significant price depression and suppression by the imports were consistent with Article 3:2 of the Agreement. Under this provision an examination of price effects of dumped imports should be carried out either by considering whether there had been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country or by considering whether the effect of such imports was otherwise to depress prices to a significant degree or to prevent price increases, which otherwise would have occurred, to a significant degree. In its investigation of seamless pipes and tubes from Sweden the USITC had found both significant price undercutting and significant price depression and suppression. The United States noted that Sweden had challenged only the first of these two findings. The price comparison data used by the USITC in its consideration of the issue of price undercutting²ad revealed the following facts. Firstly, there had been eleven orders of seamless pipe and tube placed from 1985 to 1987 which had been reported by purchasers and which involved competition between the domestic product and the product imported from Sweden.³ Secondly, in nine of the eleven instances (i.e., in more than 80 per cent of the comparisons) the Swedish product had undersold the domestic product by margins of between 8 and 15 per cent. Thirdly, in seven of the nine instances of underselling, the order had been awarded to Sandvik. Fourthly, purchasers had indicated in these instances that the lower price of the Swedish product was one reason they chose

¹Ibid., at A-72-73

²USITC Report., at A-65-76

³USITC Determination, at 14

to buy it.¹ In addition, the investigation had revealed that the Swedish product had also undersold the domestic product in eight out of the eleven instances reported relating to orders of redraw hollows. However, the USITC had not relied on this information in reaching its determination.²

3.74 Regarding the number of price comparisons made by the USITC, the United States argued that Sweden was factually incorrect in suggesting that the USITC had in fact investigated a larger number of comparisons than described in the Report. Table 26 of the Report and the accompanying text described all of the reported bid price comparisons obtained by the staff of the USITC from purchasers and the Report described fully and precisely the data sought and obtained by the USITC from purchasers.³ The USITC had sought from large purchasers in the United States bid price information from which to make price comparisons.⁴ It had requested bid price data for the two largest volume purchases made during 1986 and 1987 of two different kinds of seamless pipes and tubes - mechanical tubes and redraw hollows - which involved competition between the imported and domestically produced products. These two products had been selected in order to obtain data for transactions on the basis of which accurate and reliable price comparisons could most likely be made which would permit compilation of the largest and most reliable data base. Specifically, data on these products had been sought because they represented more than one third of the production of either domestic producers, the Swedish exporters or both. Six large purchasers had responded to the USITC's questionnaire, collectively reporting twenty-two orders (eleven for mechanical tubing and eleven for redraw hollows) for which delivered price quotation comparisons were possible and each of which involved a purchaser's two largest purchases of the products.⁵ Not all of the purchasers had reported price data for all products or all (quarterly) time periods during the investigation and some of the reported information had not been complete. Therefore, to ensure that the price comparisons reported were reliable, not all information obtained could be used. The USITC had, however, sought pricing data on a range of products and from purchasers accounting for a relatively large share of both domestic and imported product shipments. It would have been impossible for the USITC to obtain information on all of the orders placed by purchasers or filled by domestic producers or importers. Thus, the USITC collected information on as many orders as possible; these orders were selected so as to be representative of a larger number of transactions in the market place. Although, in this case the number of orders had been small relative to the total, the volume represented by the orders relied upon had been much larger relative to the total volumes shipped by Sandvik and the domestic firms. Moreover, the key to developing a reliable sample was not only size but the representativeness of the sample.

3.75 The United States explained that the USITC had requested Sandvik and the domestic producers to provide a list of their ten largest selling products.⁶ The products on which various pricing data had been requested had been drawn directly from these lists. The USITC could not and did not promise any producer that it would obtain purchaser bid data on any particular product. However, it could and did maximize the chance that data were representative by preparing its questionnaires in consultation with counsel for the parties and with purchasers. Since the information reported to the USITC on the precise percentage of Sandvik's and domestic firms' sales with respect to each type of pricing data was proprietary business information which had been submitted in confidence, the USITC had not reported that information to the public. Similarly, the percentage of total reported domestic shipments of the various types of pipe and tube products bought by purchasers to whom questionnaires had been sent and who had responded was also business proprietary. Thus, it was not possible to state with

¹Ibid., at 14-15 and footnote 58

²USITC Report, at A-72

³Ibid., at A-69, footnote 1.

⁴Ibid., at A-65-76.

⁵USITC Report, at A-65-69 and A-70-71

⁶Ibid., at A-59

precision the amount of sales accounted for by each of the products on which data had been obtained. It was clear, however, that the USITC had sought the relevant information in an objective manner and through consultation with the parties.

3.76 With respect to the argument of Sweden that it had been improper for the USITC to rely on the bid price comparisons because purchasers had not indicated that price was the only factor in their decisions to purchase the product, the United States argued that the Agreement directed national investigating authorities to examine whether there was significant price undercutting by the imports but nowhere imposed a requirement that such undercutting could be found only if purchasers stated that the price of a product was the only reason for purchasing a particular product from a particular supplier. Not only was there no support for reading such a requirement into the Agreement but, in fact, to do so would be inconsistent with commercial reality. Consumers rarely made a purchase decision based only on one factor, whether that factor be price, quality, service, convenience or any other consideration.

3.77 The United States explained that the USITC had used data on net weighted average f.o.b. selling prices (unit value price series data) from producers and suppliers to evaluate price trends in the domestic market during the period of investigation, evidence probative on the issue of whether the subject imports had caused significant price depression or price suppression.¹ The USITC had found on the basis of these data that:

"during the period of investigation, prices of domestic seamless pipes and tube generally declined for both hot-finished and cold-rolled products".²

Sweden had maintained that the price trend data were inconsistent with the finding of the USITC on price undercutting. In fact, these price trend data were irrelevant to the USITC's conclusion with respect to price undercutting. The USITC had not relied on the price trend data for price comparison purposes. Sweden had also asserted that the price trend data had been fairly stable. In fact, the data showed that for two products, domestic producer prices over the three-and-one-half-year period had dropped 12 to 14 per cent and that for the remaining three products prices over that period had virtually remained unchanged. Both indications were fully consistent with a finding of significant price depression (the two price declines) or suppression (the three stagnant price series).

3.78 With respect to the time period for which price information had been sought by the USITC, the United States explained that the USITC had obtained net weighted average selling prices from producers and importers, and price bids and purchaser delivered price comparison data from purchasers. The producer and importer pricing data, which the USITC had used to gauge price trends in the United States market, had covered the full three-year period of investigation. Bid and net weighted-average delivered price comparison data obtained or sought from purchasers, however, had been requested for only the last two-and-one-half years of the period of investigation for two principal reasons. Firstly, the USITC had found that buyers usually kept less complete records of their individual purchase decisions than sellers, particularly as the time of purchase grew more distant. In addition, the USITC requested information not only on the price and the amount of a purchase but also on the reasons why a purchase had been made from a particular supplier and other suppliers whose bids or offers had been rejected. Consequently, in order to obtain not only complete but also reliable data, the USITC, in general, did not request data from purchasers for the first year of the investigation period. Finally, requests for purchaser data could impose a burden on buyers who were not interested parties to the investigation. Thus, the USITC sought to minimize that burden while still conducting a thorough investigation.

¹USITC Report, at A-61-65

²USITC Determination, at 15 and footnote 59

3.79 The United States also pointed out that in its investigation the USITC had properly found that the imports subject to investigation (stainless steel pipes and tubes) corresponded to two like products produced by the United States industries: seamless stainless steel pipe and tube and welded stainless steel pipe and tube. In defining the "like product" in this investigation, as in many other investigations, the USITC had examined the characteristics and uses of the products, including the following factors: (1) physical appearance; (2) end uses; (3) customer perceptions; (4) common manufacturing facilities and employees; (5) production processes; (6) channels of distribution; and (7) interchangeability of the product. Neither Sandvik nor the Government of Sweden had challenged the definition by the USITC of the "like product" in this case. The United States argued that, despite the apparent acceptance by Sweden of the "like product" definition of the USITC, Sweden was now asserting that the USITC should have excluded from its analysis of import volume what Sweden described as "non-competing imports." By "non-competing imports" Sweden apparently meant those imports from Sweden of specific pipe and tube alloys which had been included within the scope of both the definition by the Department of Commerce of the products subject to investigation and the definition by the USITC of the seamless "like product" but which, according to the Report of the USITC, had no precise US produced equivalents. The United States considered that the argument of Sweden was both factually and legally flawed. The Agreement provided that national investigating authorities should examine the existence of injury to the domestic industry producing the like product. Among the factors the national authorities were directed to examine was "the volume of the dumped imports". Neither the Agreement nor its drafting or interpretative histories indicated that the investigating authorities were to include in the analysis of "import volume" only those imports which had precise domestically-produced equivalents. Sandvik had not sought to have excluded from either the definition by the Department of Commerce of the subject imports or the definition of the "like product" by the USITC Sandvik's imported seamless alloys which Sweden now claimed were not competing with products of United States producers. In fact, Sandvik had encouraged the USITC to find that Sandvik Steel (Sandvik's wholly-owned United States redrawer subsidiary) as well as other redrawers be included in the definition of "domestic industry" and that their products, therefore, be included within the definition of the "like product". Sandvik Steel produced some of the proprietary alloys in respect of which Sweden claimed that they did not compete with the US made proprietary alloys.

3.80 The United States further considered that Sweden's argument on the question of competition between imported and domestic products was not supported by the facts obtained in the investigation by the USITC. For example, the record did not support Sweden's assertion that its proprietary alloys did not, in fact, compete with US made products. The presence in the market of a volume of dumped imports might have an impact on sales of domestically-produced alloys which were not precisely equivalent, particularly in the case of commodities similar to steel pipes and tubes which were relatively interchangeable in use with other similar products. The investigation had revealed that there were a large number of different seamless products and that most seamless producers manufactured some but not all of these products. Sandvik had not demonstrated to the USITC and Sweden had not demonstrated in the proceeding before the Panel that, in fact, there was not a high degree of interchangeability among the various seamless alloys and that purchasers would switch from one to another based on differences in price, availability or other factors. That was precisely what the USITC had found (and what neither Sandvik nor Sweden had contested) in its conclusion that seamless pipes and tubes constituted one "like product". Thus, Sweden had not shown that imports for which there might not be precise US made equivalents were, in fact, "non-competing" imports and the record of the investigation did not support any such inference. Indeed, the opposite inference was the more plausible one: i.e., that two products similar in characteristics and uses did compete, even though they might not be precise equivalents. For example, Coca-Cola was a proprietary cola soft drink which nevertheless competed vigorously not only with Pepsi-Cola and numerous other proprietary cola drinks but also with 7-Up and many non-cola forms of carbonated beverage. Yet, neither Coke and Pepsi nor Coke and 7-Up were precise equivalents. Sweden had not shown that purchasers in the United States did not, in fact, consider a variety of alloys in deciding which one to buy. Instead,

Sweden relied on the label "proprietary alloy" to argue that the Commission should have drawn the inference that such alloys did not compete. The record of the investigation did not support that inference.

3.81 Regarding the argument of Sweden that the number of price comparisons made by the USITC demonstrated that Sandvik's imports rarely competed with domestic products, the United States pointed out that, by using this argument, Sweden was suggesting that if a price comparison could not be reported for two products, they did not compete. The United States contested the implication of Sweden's argument that a sufficient number of price comparisons had not been presented by the USITC. The pricing data sought and obtained by the USITC were ample. Moreover, a price comparison had been reported only when the two products for which the comparison was made were as nearly identical as possible or were in fact identical. In contrast, competition between products could and did occur if the products were both "like products", i.e., if they were similar in characteristics and uses, but not identical. Thus, the two concepts were very different and should not be equated. Price comparison data were reported only if a precise product-to-product match could be made. Otherwise the comparison would be meaningless. Competition between products in the market place was a much broader concept. In effect, Sweden's criticism on this point created a no-win situation for the USITC. If the USITC was careful in reporting comparisons, Sweden would argue that there was no competition. If the USITC reported comparisons on products which were not precisely the same, Sweden would argue that the price comparisons were meaningless.

3.82 With respect to the explanation by the United States of the analysis of bid price information by the USITC, Sweden argued that, while United States used the term "seamless pipes and tubes", in fact the product for which this information had been obtained (mechanical tubing) had never accounted for more than 10 per cent of Sandvik's shipments in the United States market and was clearly distinguishable from the other products covered by the investigation. In its description of this bid price information the United States had argued that the imported Swedish product had undersold the domestically produced product in nine of the eleven cases by 8 to 15 per cent. It was interesting that Sandvik had won the order in only seven of these cases and had lost the order in two cases although in those cases the prices of the domestic product had been 10 and 14 per cent higher than the prices of the Swedish product. This raised the question of whether undercutting margins of 8 to 15 per cent were significant or were normal margins of undercutting for imported stainless steel pipes and tubes. In the Report accompanying the final determination of the USITC numerous examples had been given which showed that there were factors other than price which determined the choice by purchasers of their suppliers of seamless stainless pipes and tubes.¹ These factors had, however, not been adequately taken into consideration by the USITC.

3.83 In response to the arguments of the United States that mechanical tubings and redraw hollows had been selected in order to obtain data for transactions on the basis of which accurate and reliable comparisons could be made and that these two products had represented more than one third of shipments of seamless products in 1986 of domestic producers, the Swedish exporter or both, and were therefore most likely to be representative of a larger number of transactions, Sweden provided the following data on the share of mechanical tubing and redraw hollows in Sandvik's total volume of sales of seamless stainless steel pipes and tubes in the United States:

¹USITC Report, at A-72-75

<u>Year</u>	<u>Percentage</u>
1984	13%
1985	17%
1986	15%
1987	9%

If the USITC had wanted to select data which were representative, it was difficult to understand why it had ignored that the bulk of Sandvik's sales in the United States did not consist of the selected two products and had relied on data relating to a product which accounted for less than 10% of Sandvik's shipments of seamless pipes and tubes covered by the investigation. Sweden noted the argument of the United States that data had been requested by the USITC on the basis of objective criteria and in consultation with the party to the investigation. There was no doubt that the USITC had indeed sought this information in an objective manner and that it had had very good knowledge of the representativeness of the products on which information had been requested. This meant that the USITC must have realised that the data which it had obtained were insufficient to prove the existence of significant price undercutting. In response to the comment of the United States that, although the number of orders for which bid price comparisons had been made had been small relative to the total, the volume represented by these orders had been much larger relative to the total volumes shipped by Sandvik and domestic competitors, Sweden argued that for each product for which bid price comparison had been made only three purchasers had reported bid price data. In the case of mechanical tubing, the product on which the USITC had based its finding of significant price undercutting, thirty-six purchasers had been surveyed, but only three purchasers had reported data. For redraw hollows it was not known how many purchasers had been surveyed; it was reasonable to assume that this number had been greater than three. However, even if six purchasers had reported bid price data on their two largest purchases, it was obvious that the volume of sales represented had not been large compared to the total volume of sales the United States.

3.84 Sweden confirmed that Sandvik had not contested the USITC's "like product" definitions in this investigation. However, clear distinctions between segments of a like product should not be disregarded. The Report of the USITC had made such distinctions between relevant segments and had characterized mechanical tubing as "one distinct type of seamless stainless pipes and tubes". Furthermore, data had been provided in the tables in the Report for each segment separately.¹

3.85 With respect to Sweden's suggestion that the USITC had not given adequate consideration to the importance of certain non-price factors as factors influencing buyers' choices of supplier, the United States considered that this suggestion was plainly contradicted by the Report of the USITC.² Information on non-price factors had been fully and clearly described in the Report of the USITC and was completely consistent with the evaluation by the USITC of the pricing data and the determination of the USITC. The information obtained indicated clearly that those non-price factors did not play a determinative rôle in purchaser's decisions. The USITC had not found it necessary to reiterate that information in its determination.

(3) Price suppression and price depression

3.86 The United States argued that Article 3 of the Agreement made it clear that the focus of the causation and injury inquiry by domestic authorities was whether a causal link existed between the imports and injury to the domestic industry, not whether price undercutting or any other factor identified

¹USITC Report, at A-63-64

²Ibid., at A-73-76

in that Article should be accorded greater or less weight in an individual case. Article 3 provided that, in examining a causal link, the investigating authorities should examine a number of factors and that "no one or several of these factors can necessarily give decisive guidance." In conducting its analysis in the investigation at issue, the USITC had followed the framework established by Article 3. It had not only examined the volume of imports and evidence pertaining to the existence of price undercutting, but also declining prices, lost revenues and the impact of the imports on the domestic industry. In this case, evidence relating to all of these factors strongly supported the final determination of the USITC. For example, the USITC had examined the net weighted-average f.o.b. selling prices (unit value price series data) from producers and importers in order to evaluate price trends in the domestic market during the period of investigation, information probative on the issue of whether the subject imports had caused significant price depression or prevention of price increases.¹ The USITC had found on the basis of these data that:

"during the period of investigation, prices of domestic seamless pipe and tube generally declined for both hot-finished and cold-rolled products".²

Thus, regardless of whether the evidence obtained by the USITC on price undercutting was sufficiently representative, the evaluation by the USITC of the volume and price effects of the imports under Article 3:2 was supported by the reported declining prices, evidence probative on the question of price depression and prevention of price increases caused by the imports.

3.87 Sweden pointed out that, on the basis of Table 24 in the Report of the USITC and the comments by the staff of the USITC on that Table, it could be concluded that domestic prices had been fairly stable. However, irrespective of whether the price trends for domestic products had been declining or had been stable, the determination of the USITC had not involved any analysis of the question of whether the subject imports had caused significant price depression. As demonstrated by the description in the Report of importer price trends³ and the data on the basis of which Table 24 had been compiled, Sandvik's prices of finished pipes and tubes and redraw hollows had increased while prices of mechanical tubing had either increased or fluctuated. Even if it might be true that there had been a stagnation of prices of United States producers during the period of investigation, Sandvik's prices had increased for the majority of its products.⁴ Consequently, Sandvik could not be found to have caused price suppression or price depression.

(4) Other factors related to the imports of Sweden

3.88 Sweden considered that, in the absence of evidence of a significant increase of the volume of the imports subject to investigation and of significant price undercutting by these imports, it should have been demonstrated that there were other factors related to the imports from Sweden which had a negative impact upon the condition of the domestic industry in the United States. However, the USITC had failed to demonstrate that such other factors existed.

3.89 The United States argued that the analysis and injury determination by the USITC was based upon a proper examination of the volume, price effects - including price undercutting and price depression and suppression - and impact on the domestic industry of the Swedish imports and was consistent with Article 3:2.

¹USITC Report, at A-61-65

²USITC Determination, at 15 and footnote 59

³USITC Report, at A-65

⁴Sweden considered that this price increase was reflected in the decline of the volume of imports from interim 1986 to interim 1987.

(5) Impact on the domestic industry (Articles 3:1; 3:3 and 3:4)

3.90 Sweden argued that Article 3:1 of the Agreement required that a determination of injury involve an examination of the impact of imports on the domestic producers and that, according to Article 3:3, this examination must take into account all "relevant economic factors." Article 3:4 recognized that "there may be other factors which at the same time are injuring the industry" and provided that "the injuries caused by other factors must not be attributed to the dumped imports". The analysis by the USITC of the impact of the imports of seamless stainless steel pipes and tubes from Sweden had been conducted in a manner inconsistent with Article 3 because (1) the USITC had not given adequate consideration to the condition of those domestic producers known as "redrawers"¹ and (2) the USITC had not considered injuries caused by factors other than the imports from Sweden.

5.1 Condition of the domestic industry

3.91 Sweden was of the opinion that the USITC had based its conclusions on the condition of the domestic industry exclusively on data relating to integrated producers and had not considered the condition of the redrawers who accounted for approximately one third of total domestic production in the United States of finished seamless pipes and tubes. While the section of the USITC determination entitled "Condition of the domestic industry" included some data on redrawers in footnotes, the USITC had not attempted to include the relatively positive trends in the data concerning redrawers in its analysis of the condition of the domestic industry. By failing to include the data in the development of production by domestic redrawers in its analysis, the USITC had understated the market share of the domestic industry and overstated the decline of this share in the period 1984-86. The USITC had not paid any attention to the figures on the production by domestic redrawers, despite the fact that it had defined the relevant domestic industry as including the redrawers.² Capacity developments of domestic producers had been discussed in the determination of the USITC only with respect to integrated producers.³ Capacity utilization also seemed to be discussed in the determination only with respect to integrated producers although the text of the determination was ambiguous on this point.⁴ Furthermore, the discussion by the USITC of the development of domestic shipments and employment also referred exclusively to integrated producers.⁵ The USITC had concluded with respect to the condition of the domestic industry:

"On the basis of the sharp declines in capacity, production, shipments employment and net sales, we determine that the United States seamless pipe and tube industry has suffered material injury."⁶

Footnotes in the determination indicated that the production by domestic redrawers had increased during the period 1984-1986 by 7.5 per cent and that their production capacity had increased during the same period by 1.8 per cent. During this period shipments and capacity utilization of redrawers had also increased while employment had remained stable.⁷ Sweden concluded in light of this information on various economic indicators of the condition of domestic redrawers that the USITC had based its conclusion on the condition of the domestic industry on data relating to only a part of that domestic industry.

¹The USITC had defined the term "redrawer" as "a company that purchases a hollow tube (i.e., a redraw hollow) and cold-works it, reducing the outside diameter and wall thickness". USITC Determination, at 8, footnote 21.

²USITC Determination, at 8 and 11, footnote 32.

³Ibid., at 11.

⁴Ibid., at 11, footnotes 35 and 36, and USITC Report, at A-21-22

⁵USITC Determination, note 59, at 12 and footnotes 40 and 41.

⁶Ibid., at 13.

⁷Ibid., at 11-12 and footnotes 32, 34, 37 and 44.

3.92 The United States argued that Article 3:2 of the Agreement directed that the impact of the imports subject to investigation be assessed "on domestic producers of such products". In its examination of the impact of the imports, the USITC had explicitly considered economic indicators of the condition of the domestic industry mentioned in Article 3:3 in relation to both redrawers and integrated firms. The following economic indicators of the condition of the domestic redrawers had been explicitly described by the USITC in its determination: production¹, capacity and capacity utilization², shipments³, year-end inventories⁴ and employment.⁵ Thus, the USITC had examined for the redrawers each of the indicators with respect to which it had also examined data obtained from integrated producers. In addition, the USITC had considered data on two other indicators which included data for both redrawers and integrated producers: (1) domestic shipment data by value⁶ and (2) net sales and profit-and-loss data.⁷ The record demonstrated that the USITC had considered redrawer data and integrated producer data seriatim rather than in aggregate in order to avoid a potential problem of double counting shipments by integrated firms to redrawers and by redrawers to end-users (see infra, paragraph 3.93). During the investigation, the Swedish producer, Sandvik itself had explicitly urged the USITC to avoid this same double-counting problem as to shipments by Sandvik's U.S. subsidiary. Thus, it was apparent from the determination that the USITC had not excluded redrawer data. The "market share" of United States producers and the decline in that share had not been misdescribed. The USITC had discussed the market share of the domestic industry at only one point.⁸ In that discussion, it had explicitly considered the market share of domestic producers to include redrawers.

3.93 The United States considered that the decision taken by the USITC to examine data for redrawers and integrated producers seriatim was reasonable and consistent with the way in which it had discussed data in other investigations involving finished as well as semi-finished products. The Report described shipment data in two forms, by unit and by value. The unit shipment data had been presented seriatim rather than in aggregate for two reasons. Firstly, the data had been presented separately in order to avoid double-counting shipments. Integrated producers shipped redraw hollows to redrawers of semi-finished pipes and tubes. Redrawers shipped finished pipes and tubes. To count in a single analysis both shipments to redrawers and shipments by redrawers would exaggerate their production as part of the total production of the domestic industry.⁹ Secondly, the unit shipment data had been presented seriatim so as to enable the staff of the USITC to report a number as close as possible to 100 per cent of actual domestic unit shipments.¹⁰ This methodology had not resulted in a distortion of the position of redrawers, unlike the methodology which had been proposed by Sandvik for the tabulation of shipments by unit. The USITC had carefully explained its methodology.¹¹ The USITC had in its determination also explicitly considered shipment data by value. In the case of these data, it had examined aggregate data including both the value of shipments by integrated producers and the

¹USITC Determination, at 11, footnote 32.

²Ibid., at 11, footnote 34.

³Ibid., at 12, footnote 37.

⁴Ibid., at 12, footnotes 40 and 41.

⁵Ibid., at 12, footnote 44.

⁶Ibid., at 12.

⁷Ibid., at 13

⁸Ibid., at 14, footnote 52.

⁹To illustrate the potential problem of double-counting, the United States gave the example of an integrated firm which shipped 100 short tons of redraw hollows to a redrawer. The redrawer then refined the pipe and sold it to the end-user. In such a case the total amount of pipe fabricated and shipped to end-users was 100 short tons. However, under the method proposed by Sandvik, the total amount of pipe shipped to end-users would be incorrectly reported as 200 short tons.

¹⁰USITC Report, at A-21, footnote 1

¹¹USITC Determination, at 11, footnote 32

value added by redrawers.¹ Indeed, the USITC had noted that redrawer value added was substantial.² Thus, neither the staff nor the USITC had ignored data for redrawers; in fact, such data were explicitly considered. In order to be consistent, the USITC staff had chosen to present data for other economic indicators of the domestic industry (e.g. employment, production, capacity and capacity utilization) in the same manner as the unit shipment data, i.e., data for redrawers had been presented back to back with data for integrated producers.³ On its face, such an approach was logical because it permitted the USITC to compare different economic indicators such as employment or the level of capacity utilization for the two groups of producers from a common data base. If these data had been presented seriatim for unit shipments and in aggregate for other economic indicators such as production and employment, the USITC would have had to factor out redrawer unit shipment data in order to make a meaningful comparison among the various indicators.

3.94 In response to Sweden's challenge to the USITC's consideration of domestic industry data, the United States discussed the way in which the USITC considered information on three key economic indicators: (1) shipments; (2) production, and; (3) profitability. The USITC had examined unit shipment data for integrated producers, unit shipment data for redrawers and shipments by value of both integrated producers and redrawers (including redrawer value added). The data had shown that unit shipments by integrated firms had declined during each year of the period of investigation, that redrawer unit shipments had risen by approximately 7 per cent from 1984 to 1986, had fallen by almost 10 per cent from interim 1986 to interim 1987, and that shipments by value (incorporating data from both sets of firms) had also declined during the period. Moreover, the sharp increase in the rate of decline was particularly significant in light of the fact that data for Babcock and Wilcox had had no impact on the interim comparison because that firm had ceased production of the like product in 1985.⁴ With regard to production, the USITC had observed that production by integrated producers had declined by 11 per cent from 1984 to 1986 and by an additional 5 per cent in interim 1987 over interim 1986.⁵ It had further observed that production by redrawers had first increased by 7.5 per cent during the period 1984 to 1986 and had then dropped sharply by more than 10 per cent in interim 1987 over interim 1986.⁶ Moreover, while redrawer production had increased during 1984 and 1985, between interim 1986 and interim 1987 redrawer production had dropped sharply by 10 per cent, thus wiping out the entire rate of production increase for 1984 and 1985, and then dropping an additional one-third. The USITC had examined all of these data, including the sharp redrawer decline, and had found that production had decreased sharply during the period. Finally, with respect to the profitability of the domestic industry, the USITC had made three observations in its determination. Firstly, it had stated that "the decline in net sales was reflected in the industry's generally low profitability over the period". Secondly, it had stated that "the increase in profitability in 1986 is partially attributable to the departure from the industry of Babcock and Wilcox" and, thirdly, the USITC had observed that "operating profits declined sharply in interim 1987 as compared with interim 1986".⁷ Each of these comments was firmly grounded in the evidence of record on the subject investigation. The USITC Report indicated that net income (or loss) as a percentage of net sales had been negative 12.5 per cent in 1984, had risen to 3.1 per cent in 1985 and to 6.2 per cent in 1986. Subsequently, it had dropped to 5.2 per cent in interim 1986 and had dropped even more sharply, by more than 50 per cent, to 2.4 per cent in interim 1987.⁸ Thus, operating profits as a share of net sales had reached a peak of 6.2 per cent in 1986,

¹Ibid., at 12; USITC Report, at A-23

²USITC Determination, at 8

³Ibid., at 13; USITC Report, at A-33, 35 and 42

⁴USITC Determination, at 12 and footnote 37

⁵Ibid., at 11

⁶Ibid., at 11, footnote 32

⁷Ibid., at 13

⁸USITC Report, at A-32

which, as the USITC had noted, was the year in which Babcock had ceased its production. In view of these figures, the statement by the USITC that the industry's profitability had been "generally low" was reasonable and fully supported by the record of the investigation. Finally, the USITC had noted that profits had dropped precipitously, in interim 1987, falling more than 50 per cent.

3.95 Sweden considered that the problem of double-counting, which had led the USITC to present certain data for integrated producers and redrawers seriatim could not be considered a sufficient ground for the USITC not to include redrawer data in its analysis of the impact of the imports on the domestic industry as defined by the USITC. The mere existence of data on redrawers in the footnotes to the text of the determination did not prove that these data had been included in the analysis by the USITC. In this respect it was significant that each time the USITC had discussed the Swedish market share, it had done so on the basis of market share defined in terms of quantities. This illustrated the point that redrawer data had not been considered because the domestic production defined in terms of quantities did not include production by redrawers. The Swedish market share, expressed as percentage of domestic production by quantities had amounted to 15-20 per cent. However, a more correct measure of the Swedish market share would be a market share calculated on the basis of value and taking into account the value added by the production of redrawers. The Swedish market share calculated in this manner had amounted to 11-14 per cent. This figure could, however, be found only in the Report accompanying the determination¹ and had not been discussed in the determination itself. In response to the argument of the United States that, if the data on such economic indicators as employment and production had been presented in aggregate, the USITC would have had to factor out redrawer unit shipment data, Sweden argued that, had there been some indication in the determination of the USITC of the likely result of such a process of "factoring out", this would have indicated that the USITC had, at least to some extent, considered data for redrawers. However, the determination did not contain such an indication.

(5.2) Injury caused by other factors

3.96 Sweden argued that the analysis by the USITC of the impact of the subject imports on the domestic industry was biased because of the failure of the USITC to consider the fact that one of the domestic producers in the United States of seamless stainless steel pipes and tubes, Babcock and Wilcox, had ceased production in 1985 for reasons not related to competition from the imports from Sweden covered by the investigation. The company had been a major producer of seamless stainless steel pipes and tubes and its departure from the industry had had a significant impact upon domestic production and employment in the United States. The main causes of the departure of this company had been the decline in construction activity in the nuclear power and petroleum industries and the company's decision not to make the necessary investments to shift its production to other markets. The determination of the USITC was in this respect inconsistent with the requirement in Article 3:4 that "injuries caused by other factors must not be attributed to the dumped imports". Under this provision, the USITC should have analysed the causes of the departure of Babcock and Wilcox and include this examination in its causation analysis. Available information indicated that not even the domestic integrated producers could be considered to have suffered material injury if one excluded data relating to Babcock and Wilcox. Thus, the sharp declines found by the USITC in aggregate capacity, production, shipments, employments and net sales were mainly attributable to the departure of this company from the industry. Similarly, the findings of the USITC on lost revenues and on the generally low profitability appeared to be based entirely on the effects of the departure of Babcock and Wilcox. The profitability of the remaining four integrated producers had improved substantially between 1984 and 1986 although it had declined in the first six months of 1987. This decline, however, appeared to reflect the decline by 20 per cent of domestic consumption. In order to further illustrate the importance of Babcock and Wilcox, Sweden

¹USITC Report, at A-56

pointed to available data on the evolution of the production capacity of integrated producers. This capacity had decreased from 21,3000 ST in 1984 to 18,300 ST in 1985 and 15,300 ST in 1986. At least 3,000 ST of this decline was accounted for by the cessation of production by Babcock and Wilcox. In addition, the USITC itself had stated in its determination that:

"... the increase in profitability in 1986 is partially attributable to the departure from the industry of Babcock and Wilcox".¹

3.97 The United States considered that Sweden's argument that Babcock's data should have been excluded from the analysis by the USITC suffered from three principal weaknesses. Firstly, the Agreement authorized a national administering authority such as the USITC to exclude from its material injury analysis data from a member of the domestic industry in only one circumstance, namely where a domestic producer was a related party within the meaning of Article 4:1(i). Sweden had not argued, and the record would not support, exclusion of Babcock's data under the related parties provision of Article 4. Moreover, the Agreement directed a national investigating authority to examine injury to a domestic industry "as a whole", rather than, as Sweden would have it, by conducting a firm-by-firm analysis. As both the 1959 Report by a group of Experts² and the Panel Report in a dispute between Finland and New Zealand³ had found, an injury determination under the Agreement must be made on the basis of the industry "as a whole".⁴ By contrast, Sweden was proposing that the USITC focus only on the harm suffered by single producer (Babcock and Wilcox) excluding such questions as how the domestic producers as a whole had performed in the wake of Babcock's departure. Secondly, even after Babcock and Wilcox had exited the industry, the industry's condition had deteriorated. The USITC had found that most of the economic indicators of the domestic industry's performance had declined throughout the investigation period, both while Babcock and Wilcox had been a producer of seamless pipes and tubes and after it had exited the market. The industry's deterioration had been reflected in the poor financial condition of the industry which, as noted by the USITC, had improved temporarily in the immediate wake of Babcock and Wilcox' departure and had declined sharply again in the first six months of 1987, 18 months after Babcock had withdrawn from the industry. The record also indicated that the domestic industry as a whole had had substantial unused capacity which could have been used to increase production in the wake of the exit from the industry of a firm which had accounted for a substantial share of the production by domestic integrated producers. Despite the existence of substantial excess capacity, the domestic industry's capacity utilization had barely increased after Babcock and Wilcox' exit and had, in fact, dropped from interim 1986 to interim 1987, a period in which capacity had been falling.⁵ Thus, data for the domestic industry as a whole indicated that the losses suffered by Babcock and Wilcox and other firms in the first two years of the period had in large part not been recaptured by the domestic industry in 1986 and interim 1987, in the face of sharply higher import volumes from Sandvik (in 1986), consistent underselling, declining prices and lost revenues. The United States considered that a third problem with Sweden's position on this point was that its hypothesis concerning the reasons for the exit of Babcock and Wilcox from the industry was not supported by the evidence obtained by the USITC in the investigation. The evidence indicated that Babcock and Wilcox had been affected by the subject imports. The fact that the firm had exited the industry in the immediate wake of Sandvik's record import penetration indicated that these imports had caused the withdrawal of this firm.

¹USITC Determination, at 13

²Anti-Dumping and Countervailing Duties, Report adopted on 13 May 1959, BISD8S/145-153, at 150.

³New Zealand - Imports of Electrical Transformers from Finland, Report by the Panel, BISD 32S/55

⁴Ibid. paragraph 4.5

⁵USITC Report, at A-22-23

3.98 Moreover, the United States explained that the USITC had noted that Babcock and Wilcox had discontinued production of the seamless like product in August 1985 and that the data from that firm were large enough to have had a noticeable effect on domestic industry data.¹ However, the USITC had further found that despite a modest improvement in the industry's financial performance in the immediate wake of Babcock's exit from the industry, those gains had not been sustained. The industry had not recaptured most of the earlier declines in production, shipments, capacity and other factors and, in fact, most of those indicators had continued to decline following Babcock's exit particularly toward the end of the period.

3.99 Sweden explained that Babcock and Wilcox's decision to discontinue its seamless pipe and tube production could largely be attributed to the decline in its captive demand. Historically, Babcock and Wilcox provided seamless pipe and tube as part of its construction operations (project sales) for the power and petroleum industries. Because Babcock and Wilcox's pipe and tube facilities were largely dedicated to the provision of construction materials for its own project sales, it appeared as if Babcock and Wilcox never played a substantial rôle as a market participant. Sweden pointed out that the process resulting in the exit of Babcock and Wilcox from the domestic industry had already begun in early 1984, more than two and one half years before the anti-dumping duty petition against the imports from Sandvik had been filed. The fact that in the period 1984-1985 neither the management of this firm nor its labour union had requested trade adjustment assistance to the United States Department of Labour or filed for import relief strongly indicated that the management of the firm and its labour union did not consider that the firm's difficulties had been caused by imports. It was, therefore, inconsistent to ascribe the closure of plants by Babcock and Wilcox to imports from Sweden when the company itself had not done so and had not availed itself of the possibilities to seek import relief measures. While it was correct that under the Agreement it was the industry as a whole which constituted the relevant entity in the analysis of injury, this did not entitle investigating authorities to disregard important changes within the domestic industry. The interpretation by the United States was in this respect inconsistent with Article 3:1 of the Agreement, according to which an injury determination should involve an "objective examination" of relevant factors, and with Article 3:4 which clearly provided that "injuries caused by other factors ... must not be attributed to the dumped imports."

3.100 Sweden did not agree with the view that the Agreement authorised the exclusion of data for an individual firm from the analysis of the domestic industry only under the circumstances foreseen in Article 4:1(i). The Report of the Group of Experts adopted on 3 May 1959 contained the following statement:

"The Group then discussed the term "industry" in relation to the concept of injury and agreed that, even though individual cases would obviously give rise to particular problems, as a general guiding principle judgements of material injury should be related to total national output of the like commodity or a significant part thereof."²

Thus, the Report did not, as contended by the United States, mandate that an injury investigation always be conducted with respect to a domestic industry as a whole. The investigation of seamless stainless steel pipes and tubes could be considered an "individual case" which, as a result of the cessation of production by Babcock and Wilcox, had raised a "particular problem." This "particular problem" had been caused by a lack of demand for products supplied by Babcock and Wilcox. Investigating authorities in anti-dumping duty investigations were under an obligation to take into account this type of "particular problems" in order to carry out their obligation under Article 3:1 of the Agreement

¹USITC Determination, at 13 and USITC Report, at A-14

²Anti-Dumping and Countervailing Duties, Report adopted on 13 May 1959, BISD 8S/145-153, at 150

to base their determination on an "objective examination" and to be consistent with the requirement of Article 3:4 that "injures caused by other factors must not be attributed to the dumped imports."

3.101 Sweden considered that the decline of the financial condition of the domestic industry in the United States in the first six months of 1987 had been a reflection of the decline in domestic consumption by 25,5 per cent from interim 1986 to interim 1987. Imports from Sweden had not increased during this period and could, therefore, not be considered as a cause of this deterioration of the financial condition of the domestic industry. With respect to the argument that, in the wake of the cessation of production by Babcock and Wilcox, the domestic industry had not recaptured most of the early declines in production, shipments, capacity and other factors, Sweden argued that this argument failed to take into account developments in demand. If a decline in production was the result of declining consumption it was difficult to see how such a decline of production could be "recaptured". The decline of the capacity utilization rate of the domestic industry from interim 1986 to interim 1987 had been caused by a decline in domestic consumption and not by imports from Sweden. Moreover, in this context it was necessary to examine the evolution of the market share of United States integrated producers. Such an examination indicated that these producers had indeed recaptured a part of the market following the exit of Babcock and Wilcox. The market share of domestic integrated producers had increased towards the end of the investigation period, despite the exit of Babcock and Wilcox. This increase had been particularly accentuated in the period interim 1986 - interim 1987, a period in which, the United States had claimed, the industry's economic conditions had declined sharply. The increase in market share of integrated producers had increased over the period from 26.6 to 32.9 per cent. It was significant that the Swedish market share had declined during the same period. During the entire investigation period the market share of the domestic integrated producers had increased by more than four per cent. This increase was significant, particularly in light of the fact that, as noted by the United States, Babcock and Wilcox had been a principal domestic producer accounting for a substantial part of both domestic integrated producer and total industry production.

3.102 Sweden noted that the United States had taken the view that Sweden's hypothesis concerning the causes of the exit of Babcock and Wilcox from the domestic industry was not supported by the evidence obtained by the USITC in its investigation. It was not possible to fully examine the analysis by the USITC of this issue because the USITC had treated the information relating to the causes of this firm's exit as confidential. If this exit had been caused by imports from Sweden, it was difficult to understand why this information had been considered confidential. Given that the USITC had not examined the decline of demand as a cause of the problems experienced by this firm, it was incorrect to argue that available evidence indicated that Babcock and Wilcox had been affected by the imports subject to investigation. Had the USITC taken into account the importance of the decline of domestic demand as a factor explaining the difficulties of Babcock and Wilcox, it would have come to a different conclusion in its causation analysis.

3.103 The United States argued that the views of Sweden on the causes of the problems experienced by Babcock and Wilcox were not supported by fact. The relevant relationship from the point of view of causation and injury was the one between the surge in Sandvik's imports in 1984 and Babcock's withdrawal from the industry in 1985, and not the relationship between the exit of this firm and the filing of the petition, which had involved the remaining members of the industry. If Sweden was asking why Babcock and Wilcox did not itself file an anti-dumping duty petition in 1984 or 1985, it was difficult to see the relevance of that question to the issues raised in the dispute before this Panel. The firm could have decided for any number of reasons, including cost to a financially strapped company, not to file a petition. The fact that it had not filed a petition did not provide any evidence of whether or not it had been injured because of the imports.

(6) Causal Relationship between imports and material injury to the domestic industry (Article 3:4)

3.104 Sweden argued that as a result of the deficiencies in the analysis of the volume, price effects and impact on the domestic industry of the imports subject to investigation, the USITC had not been able to demonstrate the existence of a causal relationship between the allegedly dumped imports of seamless stainless steel pipes and tubes from Sweden and the material injury to the domestic industry. Consequently, the determination of the USITC was inconsistent with Article 3:4 of the Agreement.

3.105 The United States noted that Article 3 of the Agreement provided that, in examining whether a causal relationship existed between imports and material injury to a domestic industry, investigating authorities should investigate a number of factors and that "no one or in several of these factors can necessarily give decisive guidance." In conducting its analysis in the investigation of seamless stainless steel pipes and tubes from Sweden, the USITC had followed the framework established by Article 3. The USITC had examined not only the volume of imports and evidence pertaining to underselling, but also declining prices, lost revenues and the impact of the imports on the domestic industry in the United States. Evidence relating to all of these factors sharply supported the final determination of the USITC. On the basis of an examination of all of these factors, the USITC had properly concluded that the imports had caused material injury to the domestic industry. Thus, Sweden's assertion that the USITC had not demonstrated the relationship between the volume and price effects of the imports and their impact on domestic producers was incorrect.

3.106 Sweden considered that, while it was correct that Articles 3:2 and 3:3 provided that "no one or several of these factors can necessarily give decisive guidance", this could not be a justification for the application of an anti-dumping duty in the absence of a finding of a causal relationship between imports subject to investigation and material injury to a domestic industry. Absent a significant increase in imports and evidence of significant price undercutting or price depression, other factors relating to the imports must be demonstrated to have had a harmful effect on the domestic industry in order for investigating authorities to determine the existence of a causal relationship between imports and material injury. In the case of the investigation of seamless stainless steel pipes and tubes from Sweden the USITC had not demonstrated that there were such other factors.

IV. ARGUMENTS PRESENTED BY CANADA

4.1 Canada supported the view expressed by Sweden that the practice of the United States Department of Commerce not to inquire as to the standing of a petitioner was contrary to Article 5 of the Agreement. Article 5 provided that:

"... an investigation ... shall normally be initiated upon a written request by or on behalf of the industry affected."

The term "domestic industry" was defined in Article 4 as "domestic producers as a whole of the like product or (...) those of them whose collective output constitutes a major proportion of the total domestic production." The Agreement directed the investigating authorities to accept a written request for an investigation only when it had been filed by or on behalf of producers accounting for a major proportion of the domestic industry producing the like product. The central issue in the case before the Panel was whether or not at the time of initiation of the investigation by the Department of Commerce the petition was supported by a major proportion of the domestic industry in the United States. The USITC had inquired during its final investigation whether other domestic producers of seamless pipes and tubes were in support of the petition.¹ However, the fact that in the course of the investigation the

¹USITC Report, at A-12

United States authorities had verified whether other producers supported the petition was immaterial to the question before the Panel. Article 5 of the Agreement required that such verification take place prior to the initiation of an investigation. In this regard, it was undisputable that the petition had been filed by only two of the fourteen domestic producers in the United States of seamless steel pipes and tubes. The obligation to proceed with a verification of the standing of a petitioner at the initiation phase of an investigation was of fundamental importance to ensure that anti-dumping measures did not become an instrument of harassment. The initiation of an investigation and the subsequent imposition of provisional duties could have immediate and disruptive effects on trade. In this particular case, there was evidence that imports of seamless stainless steel pipes and tubes from Sweden into the United States had declined abruptly in the months coinciding with the imposition of provisional duties¹, i.e., before the USITC had proceeded with a verification of the petitioner's standing. Canada appreciated the fact that the Agreement did not contain a specific threshold to define what constituted a "major proportion" within the meaning of Article 4:1 and that, after the verification conducted during the final phase of the injury investigation, the standing of the petitioner could be upheld. It remained, nevertheless, the view of Canada that the United States practice, as clearly evidenced in this case, of not inquiring about the petitioner's standing prior to the opening of an investigation was contrary to the obligation of Parties under Article 5 of the Agreement. In this context, Canada requested the Panel to take note of the following statement in the final determination of sales at less than fair value in the investigation of stainless steel hollow products from Sweden:

"Neither the Act nor the Commerce Regulations requires a petitioner to establish affirmatively that it has the support of a majority of a particular industry. The Department relies on petitioners representations that it has, in fact, filed on behalf of the domestic industry until it is affirmatively shown that this is not the case. Where domestic industry members opposing an investigation provide a clear indication that there are grounds to doubt a petitioner's standing, the Department will review whether the opposing parties do, in fact, represent a major proportion of the domestic industry."²

This practice was contrary to the obligation under Article 5 of the Agreement. The onus to demonstrate that a request for an investigation was supported by a major proportion of the industry affected clearly fell in the hands of the petitioners, and a fortiori, in the hands of the investigating authority, not on those opposing the request as in the United States practice as evidenced by this case.

V. FINDINGS

Introduction

5.1 The Panel noted that the dispute referred to it concerned the imposition of definitive anti-dumping duties on 3 December 1987 by the United States on imports of certain seamless stainless steel hollow products from Sweden. The imposition of these duties had resulted from determinations made in an anti-dumping investigation, the initiation of which had been announced in the Federal Register of the United States on 17 November 1986. Sweden requested the Panel to find that the decision to open this investigation and the determinations of dumping and injury made during the course of this investigation were not in conformity with the provisions of the Agreement and that, consequently the imposition of anti-dumping duties on imports of seamless stainless steel hollow products from Sweden had resulted in nullification or impairment of benefits accruing to Sweden under the Agreement. The United States considered the above-mentioned determinations to be fully in accordance with the

¹USITC Determination, at 14

²Final Determination of Sales at Less than Fair Value; Stainless Steel Hollow Products from Sweden, 52FR37810 (9 October 1987) at 37812.

Agreement and requested the Panel to find that the imposition of anti-dumping duties on seamless stainless steel hollow products from Sweden was consistent with its obligations under the Agreement.

5.2 The Panel noted that the United States had raised preliminary objections regarding some of the issues raised by Sweden with respect to the injury determination by the USITC which it considered went beyond the scope of the terms of reference of the Panel (paragraph 3.9). The Panel considered these objections and at its meeting on 25-26 May 1989 informed the parties of its views on these objections. In view of the conclusion reached in paragraphs 5.23-24, the Panel did not find it necessary to include in its Report its ruling on the preliminary objections raised by the United States.

5.3 The Panel noted that both parties had submitted a number of general arguments as to the appropriate standard of review which the Panel should apply in its examination of the determinations made in this case by the authorities of the United States. The Panel's terms of reference directed the Panel to examine the complaint by Sweden "in the light of the relevant provisions of the Agreement on Implementation of Article VI of the General Agreement". It was not the task of the Panel to examine whether the investigating authorities had acted in conformity with domestic legislation of the United States. Both parties agreed that a Panel, reviewing anti-dumping determinations, must necessarily consider issues of fact as well as issues of law. However, there was in particular disagreement over the extent to which the Panel should review certain legal arguments and factual evidence, particularly that submitted to the Panel by Sweden, which had not been made or submitted by the Swedish exporter in the course of the anti-dumping investigation. The Panel decided that - rather than attempting to formulate general standards of review - it would be more appropriate for the Panel to examine and decide on these arguments and legal issues where they arose in relation to specific matters in dispute.

Initiation of the anti-dumping investigation

5.4 The Panel noted that, with respect to the initiation of the anti-dumping investigation, the issues before it arose essentially from the following facts and arguments: On 17 November 1986, a notice had been published in the Federal Register of the United States of the initiation of an anti-dumping investigation of imports of certain stainless steel hollow products from Sweden. The determination by the United States Department of Commerce to initiate this investigation followed the receipt of a written request for the initiation of an investigation filed on 17 October 1986 by the Specialty Tubing Group and by each of its member companies which produced certain stainless steel hollow products, on behalf of the domestic industry in the United States producing these products. This request was amended on 9 February 1987 to include the United Steel Workers of America as a co-petitioner. While the Department of Commerce in its investigation of dumping treated all the imported products as constituting a single "class or kind of merchandise", the USITC determined in its investigation of injury that the imported products corresponded to two separate domestic "like products" (welded stainless steel pipes and tubes and seamless stainless steel pipes and tubes) and that there were two separate domestic industries producing these products.

5.5 In the proceedings before the Panel Sweden contested the consistency with Article 5:1 of the Agreement of the decision by the Department of Commerce to initiate this investigation on the grounds that the Department had failed to verify whether the written request in question had been filed on behalf of the domestic industry in the United States producing the like product. The United States argued that the initiation of this investigation was fully consistent with Article 5:1 in that the request had on its face supported the initiation of an investigation on behalf of a domestic industry in the United States and no opposition had been expressed to the opening of an investigation by any domestic producer of the like product. Furthermore, facts obtained by the Department of Commerce and the USITC during the investigation had supported the Department's initial conclusion in favour of the initiation of an investigation.

5.6 The Panel observed that under the Agreement the initiation of an anti-dumping investigation is subject to the following requirements, laid down in Article 5:1:

"An investigation to determine the existence, degree and effect of any alleged dumping shall normally be initiated upon a written request by or on behalf of the industry⁹ affected. The request shall include sufficient evidence of (a) dumping; (b) injury within the meaning of Article VI of the General Agreement as interpreted by this Code; and (c) a causal link between the dumped imports and the alleged injury. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request they shall proceed only if they have sufficient evidence on all points under (a) to (c) above."

The last sentence of this paragraph was irrelevant to the case under consideration because there clearly had been "a written request" for the initiation of an investigation. This written request had been filed not "by" but "on behalf of" a domestic industry in the United States. This was, for instance, reflected in the text of the notice of the preliminary affirmative determination by the Department of Commerce. Furthermore, in the course of the proceedings before the Panel, the United States had never argued that the written request had been filed "by", rather than "on behalf of" a domestic industry in the United States.

5.7 The Panel further noted that footnote 9 to Article 5:1 of the Agreement referred to the definition of industry in Article 4. Paragraph 1 of this Article defines the term "domestic industry" as "... the domestic producers as a whole of the like products or (...) those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products ...". It follows from this definition that a written request within the meaning of Article 5:1 "on behalf of" the industry affected can be either a written request made on behalf of the domestic producers as a whole of the like products, or a written request made on behalf of those domestic producers whose collective output of the like products constitutes a major proportion of the total domestic production of those products.

5.8 In this context the Panel observed that under Article 5:1 there is no priority or order of preference allocated to the initiation of an investigation upon a written request on behalf of the domestic producers as a whole as compared to the initiation of an investigation on behalf of those domestic producers accounting for a major proportion of domestic production of the like products. The word "normally" in the first sentence of Article 5:1 covers both of these cases. The reference to "special circumstances" in the third sentence refers to the case where there is initiation of an investigation in the absence of such request. In this respect the Panel rejected the argument advanced by Sweden at one stage of the proceedings (supra, paragraph 3.24) that an investigation should normally be initiated upon a written request by or on behalf of the domestic industry as a whole and that the initiation of an investigation upon receipt of a written request by or on behalf of domestic producers accounting for a major proportion of total domestic production of the like products was to take place only in "special circumstances".

5.9 The Panel noted the views expressed by Sweden and the United States regarding the meaning of the term "on behalf of" in the first sentence of Article 5:1 of the Agreement (supra, paragraphs 3.23 and 3.29). The Panel considered that in its ordinary meaning this term was used to refer to a situation where a person or entity acted on the part of another involving the notion of agency or representation. Nothing in the text of Article 5:1 suggested that the drafters of the Agreement had wished to attach a different meaning to this term; on the contrary, the fact that the term "on behalf of" appears in Article 5:1 as an alternative to "by" underlines that this term must be interpreted in accordance with its ordinary meaning. In the view of the Panel, the alternative for the requirement that a petition be filed "by" the domestic industry affected cannot be a requirement so loose as to allow a request to be filed by some members of an industry simply claiming to be acting "on behalf of" the rest of the industry. The Panel concluded that "a written request ... on behalf of the industry affected" implies that such a request must have the authorization or approval of the industry affected before the initiation of an investigation.

5.10 The Panel then turned to the question of whether Article 5:1 must be interpreted to require investigating authorities to satisfy themselves before initiating an investigation, in a case where a written request for the initiation of an investigation has been made allegedly on behalf of a domestic industry, that the request in question has indeed been made on behalf of that industry. The Panel considered in this respect that the reference in the first sentence of Article 5:1 to the definition of industry in Article 4 meant that, in evaluating a written request allegedly made on behalf of a domestic industry, investigating authorities must take into account this definition. This requirement to observe the definition of industry in Article 4 in decisions to initiate an investigation could only be met if investigating authorities examined whether the person or entity who made a request for the opening of an investigation acted on behalf of the industry affected, as defined in Article 4. The Panel therefore concluded that Article 5:1 must be interpreted to require investigating authorities, before opening an investigation, to satisfy themselves that a written request is made on behalf of a domestic industry, defined in accordance with Article 4.

5.11 The Panel noted that the parties to the dispute did not disagree on the existence of this requirement. Thus, the United States had explained that under its procedures for the initiation of investigations there had to be a careful examination of inter alia a petitioner's representation that it filed on behalf of a domestic industry (supra, paragraph 3.30). Rather, the parties seemed to disagree regarding the nature of the specific procedural steps to be taken by investigating authorities to meet this requirement. The Panel noted that the Agreement did not provide precise guidance in this respect and considered that the question of how this requirement was to be met depended upon the circumstances of each particular case. Rather than attempting to define any general guidelines, the Panel limited itself to examine whether in the case before it the relevant authorities of the United States had taken such steps as could reasonably be considered sufficient to ensure that the initiation of this investigation was consistent with their obligation to satisfy themselves that the written request for the opening of an investigation had been made on behalf of the relevant domestic industry.

5.12 The Panel noted that the Department of Commerce had opened the subject investigation following a written request made on behalf of the domestic producers of both welded and seamless stainless steel hollow products. While Sweden had at one point in the proceedings argued that the Department should have distinguished between a domestic industry producing welded stainless steel products and a domestic industry producing seamless products, its basic claim appeared to be that the initiation of this investigation was inconsistent with Article 5:1 even if the domestic industry was defined as comprising both producers of welded and producers of seamless stainless steel hollow products (supra, paragraph 3.15). The United States for its part had argued that the initiation of the investigation was consistent with Article 5:1, irrespective of how the domestic industry was defined on this point. In the light of these arguments, the Panel considered that it was not necessary to examine whether in initiating this investigation the Department of Commerce should have made a distinction between a domestic industry composed of producers of welded products and a domestic industry composed of producers of seamless products.

5.13 The Panel then considered the arguments and information presented to it during the course of its proceedings by the United States in response to the claim by Sweden that the initiation of the subject investigation was not consistent with the Agreement. First, the United States argued that the written request filed by the Specialty Tubing Group "on its face" supported the initiation of an investigation on behalf of a domestic industry. In support of this view, the United States noted that this Group included both producers of welded and producers of seamless stainless steel products and that two seamless producers, members of the Specialty Tubing Group, occupied a significant position in the domestic market. Furthermore, there had been no indication of opposition to the investigation by any domestic producer. Second, the United States argued that events subsequent to the opening of the investigation had confirmed the validity of the decision of the Department of Commerce to open an investigation. In this respect, the United States made in particular mention of the fact that in February 1987 the United Steel Workers of America had joined the Specialty Tubing Group as a petitioner.

5.14 Regarding the argument of the United States that the request for the opening of an investigation "on its face" supported the initiation of an investigation on behalf of a domestic industry, the Panel first considered the points made by the United States that were relevant to the significance of the market shares of the members of the Specialty Tubing Group who produced products like the imported product identified in the complaint. The Panel noted that the Specialty Tubing Group included six domestic producers of stainless steel hollow products; four of these producers produced welded stainless steel hollow products while the remaining two producers produced seamless stainless steel hollow products. The Panel also noted that information gathered by the USITC on the number of domestic producers engaged in the production of these products showed that the Specialty Tubing Group did not include all domestic producers of welded and seamless stainless steel hollow products. However, the actual proportion of total domestic production of these products accounted for by the members of the Specialty Tubing Group was not clarified to the Panel. Moreover, during the course of the Panel's proceedings no data had been provided by the United States showing that in the period between the date of receipt of the written request and the date of the opening of the investigation the Department of Commerce had considered data which permitted it to conclude that the members of the Specialty Tubing Group accounted for a major proportion of the domestic production of the like product. There was, therefore, no statistical evidence provided to the Panel in support of the claim that the request "on its face" supported the initiation of an investigation on behalf of the domestic industry.

5.15 The Panel then turned to the argument of the United States that no opposition to the initiation of the investigation in question had been expressed by any domestic producer prior to the initiation of this investigation. The United States had in this context referred to certain practical arrangements under which domestic producers opposed to the opening of an investigation could express such opposition in reply to questionnaires sent out by the USITC (supra, paragraph 3.17). Where, as a result of such indication of opposition, there was sufficient reason to doubt the standing of a petitioner, the Department of Commerce would poll the opposing parties to ascertain whether they represented a major proportion of the domestic industry. The Panel noted, however, that in the case before it the USITC had not sent out questionnaires in its preliminary investigation. No evidence was available to the Panel on any other opportunities which might have existed in this particular case to domestic producers possibly opposed to the initiation of an investigation to express this opposition during the period between the receipt of the petition and the opening of the investigation.

5.16 The Panel noted the points made by the United States regarding the relevance to this case of a preceding countervailing duty case on the same products (supra, paragraph 3.18). The Panel considered that no conclusion could be drawn regarding the status of support or otherwise to the anti-dumping petition on the basis of the information provided by the United States regarding the countervailing duty case. The Panel was of the view that anti-dumping and countervailing duty petitions address trade practices of a different nature. Irrespective of whether the countervailing duty investigation to which the United States referred had itself been properly initiated, the Panel considered that it could not be assumed that the subsequent anti-dumping petition with respect to the same product was supported by the domestic industry affected.

5.17 In any case, the Panel more generally did not consider that absence of opposition by domestic producers was a factor which, by itself, demonstrated that a written request for the initiation of an investigation was filed on behalf of the domestic industry. Absence of opposition prior to the opening of an investigation could result from ignorance, indifference, disapproval but failure to express it, or tacit approval. Given this possibility, "absence of opposition" itself was capable of covering a variety of situations which fell short of that where a party was acting on the part of another with the sense of agency or representation, and would thus be inconsistent with the ordinary meaning of the term "on behalf of" in the first sentence of Article 5:1 of the Code.

5.18 The Panel noted the statistical information provided by the United States regarding the degree of support for the investigation expressed by the domestic producers of stainless steel hollow products (supra, paragraph 3.16). It noted that this data provided an indication of the proportion of seamless stainless steel pipes and tubes production accounted for by domestic producers (including producers not members of the Specialty Tubing Group) who had indicated to the USITC that they supported the investigation. However, the United States did not claim and nothing in the record indicated that this information was available and considered by the Department of Commerce during the period prior to the opening of the investigation.

5.19 In light of the foregoing considerations, the Panel concluded that the arguments and information provided to it in the course of its proceedings did not permit it to conclude that the Department of Commerce had, prior to the initiation of the investigation, taken steps which could reasonably be considered to be sufficient to ensure that the initiation of this investigation was consistent with the obligation of the Department to satisfy itself that the written request for the initiation of an investigation had been filed on behalf of the domestic industry affected.

5.20 The Panel then turned to the argument of the United States that events subsequent to the initiation of the investigation had confirmed the validity of the Department's initial conclusion that the request for the initiation of an investigation had been filed on behalf of the relevant domestic industry (supra, paragraphs 3.20 and 3.21). The Panel observed that under Article 5:1 (apart from 'special circumstances') an anti-dumping investigation shall normally be initiated upon a written request "by or on behalf of the industry affected". The plain language in which this provision is worded, and in particular the use of the word "shall", indicates that this is an essential procedural requirement for the initiation of an investigation to be consistent with the Agreement. This is underlined by Article 1 of the Agreement which provides in relevant part:

"The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated() and conducted in accordance with the provisions of this Code." (emphasis added)

The Panel considered, in light of the nature of Article 5:1 as an essential procedural requirement, that there was no basis to consider that an infringement of this provision could be cured retroactively.

5.21 The Panel then considered whether it should proceed to make findings on the determinations of dumping and injury contested by Sweden (supra, paragraph 3.37 et seq.). The Panel was of the view that it followed from Article 1 of the Agreement that any anti-dumping duty imposed as a result of an investigation initiated in a manner inconsistent with Article 5:1 was thereby also inconsistent with Article 1. Given that in the dispute before it the Panel had found that the investigation which had resulted in the imposition of definitive anti-dumping duties on imports of seamless stainless steel hollow products from Sweden had been initiated in a manner inconsistent with Article 5:1, the Panel concluded that the imposition of these anti-dumping duties was inconsistent with the obligations of the United States under Article 1 of the Agreement. The United States was therefore obliged under Article 15 of the Agreement to revoke the anti-dumping duties in question and, in accordance with past GATT practice (see BISD 32S/55,70), to reimburse the anti-dumping duties paid.

5.22 In this context the Panel also noted the long-standing practice of GATT panels to make only those findings on issues raised by parties to a dispute which are necessary to enable the CONTRACTING PARTIES to make the recommendations or to give the rulings provided for in Article XXIII of the General Agreement on the complaint in question. In the dispute before it, this meant that the Panel had to make a finding on whether the imposition of definitive anti-dumping duties by the United States on imports of seamless stainless steel hollow products from Sweden was consistent with the obligations of the United States under the Agreement. In light of the considerations set forth in paragraph 5.21,

the Panel was of the view that in the case before it there was no need to make findings on the determinations of dumping and injury by the relevant authorities of the United States in order for the Panel to be able to make a finding on the consistency with the Agreement of the imposition of the definitive anti-dumping duties. In this respect, the Panel also took into account that, should the United States initiate a new investigation on the same products imported from Sweden, the determinations of whether dumping and injury existed in respect of such imports would necessarily be based on facts relating to a period different from the period covered by the determinations of dumping and injury contested by Sweden in the proceedings before the Panel. Accordingly, while the Panel had examined in detail the issues raised by Sweden with respect to these determinations of dumping and injury made in the investigation under consideration, it decided not to make findings on these issues.

Conclusions

5.23 The Panel concluded that the initiation, announced on 17 November 1986, by the United States of an anti-dumping investigation of imports of stainless steel hollow products from Sweden was inconsistent with the obligations of the United States under the first sentence of Article 5:1 of the Agreement. As a consequence, the imposition of anti-dumping duties by the United States on imports of seamless stainless steel hollow products from Sweden was not in conformity with Article 1 of the Agreement and had resulted in prima facie nullification or impairment of benefits accruing to Sweden under the Agreement.

5.24 The Panel suggests that the Committee on Anti-Dumping Practices request that the United States revoke the anti-dumping duties imposed on seamless stainless steel hollow products from Sweden and reimburse the anti-dumping duties paid.