24 February 1994

UNITED STATES - ANTI-DUMPING DUTIES ON IMPORTS OF STAINLESS STEEL PLATE FROM SWEDEN

Report of the Panel
(ADP/117, and Corr.1)*

Table of Contents

* English only

Table of Contents (Cont'd)

Table of Contents (Cont'd)

I. INTRODUCTION

1. On 6 May 1991 Sweden requested consultations with the United States under Article 15:2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "the Agreement"), regarding anti-dumping duties imposed by the United States in 1973 on imports of stainless steel plate from Sweden. On 9 July 1991 such consultations were held between the two parties. In a letter to the Committee on Anti-Dumping Practices (hereinafter referred to as "the Committee") dated 10 October 1991, Sweden stated that the consultations had failed to achieve a mutually satisfactory solution, and referred the matter to the Committee for conciliation under Article 15:3 of the Agreement (ADP/67). Conciliation on this matter was held at a regular meeting of the Committee on 21 October 1991 (ADP/M/35). As the conciliation process did not lead to a resolution of this dispute, Sweden, on 15 April 1992, requested the establishment of a panel under Article 15:5 of the Agreement to examine the matter (ADP/77).

2. At its regular meeting on 27 April 1992, the Committee decided to establish a panel in the matter referred to the Committee by Sweden in document ADP/77. The Committee authorized its Chairman to decide, in consultation with the 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 composition of the Panel (ADP/M/37).

3. On 17 September 1992 the Committee was informed by its Chairman in document ADP/84 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 Sweden in document ADP/67, and to make such findings as will assist the Committee in making recommendations or in giving rulings."

Composition:

Chairman: Mr. Friedrich Klein

Members: Mr. David Walker
Mr. Peter Palecka

4. The Panel met with the parties to the dispute on 8 December 1992 and 24-25 February 1993. The Panel submitted its findings and conclusions to the parties on 4 February 1994.

II. FACTUAL ASPECTS

5. The dispute before the Panel concerned anti-dumping duties imposed by the United States in 1973 on imports of stainless steel plate from Sweden.

6. On 25 April 1972 the United States Treasury Department received a complaint that stainless steel plate imported from Sweden was being dumped in the United States and was injuring a US industry. On 31 January 1973 the Department of Treasury issued a "Determination of Sales at Less Than Fair

Value".[1] The United States Tariff Commission investigated the matter and determined on 1 May 1973 that an industry in the United States was injured within the meaning of the Antidumping Act of 1921 by reason of imports of stainless steel plate from Sweden which the Secretary of Treasury had determined to be sold or likely to be sold at less than fair value.[2] On 5 June 1973 the Department of Treasury issued a finding of dumping[3] with respect to stainless steel plate from Sweden.[4] The finding covered all exporters of stainless steel plate from Sweden except Stora Kopparbergs Bergslags AB. As Swedish companies merged, the merged companies remained subject to the finding.

7. In June 1976, two letters were sent by counsel representing Uddeholm AB, a Swedish stainless steel plate producer, to the US Customs Service of the Department of Treasury raising the question

---

[1]38 Fed. Reg. 3204 (2 February 1973).

[2]Determination of Injury in Investigation No. AA1921-114, 1 May 1973, Tariff Commission Publication 573. 38 Fed. Reg. 11381 (7 May 1973).

[3]Up until the entry into force of the Trade Agreements Act of 1979, the United States used the term "finding of dumping" or "dumping finding" to mean the decision to impose anti-dumping duties. Subsequently, the term "anti-dumping duty order" was used to indicate the same thing. The terms are used interchangeably in this text.

[4]38 Fed. Reg. 15079 (8 June 1973). The product coverage of this finding was "stainless steel plate from Sweden" except for shipments by Stora Kopparbergs Bergslags AB. The 1990 Federal Register notice of the Department of Commerce's determination not to revoke the 1973 anti-dumping finding (55 Fed. Reg. 36680, 6 September 1990) states that imports covered by this finding are shipments of stainless steel plate from Sweden classifiable under item number 607.9005 of the Tariff Schedules of the United States Annotated through 1988, and that this merchandise is currently classifiable under items numbers 7219.12.00, 7219.21.00, 7219.22.00, 7219.31.00, and 7219.11.00 of the Harmonized Tariff Schedule (HTS) to which the United States converted on 1 January 1989. The notice indicates that the HTS item numbers are provided only for convenience and Customs purposes, and that the written description of the scope remains dispositive. The following products correspond to the above-cited HTS item numbers:

- Flat-rolled products of stainless steel, of a width 600 mm or more, not further worked than hot-rolled, in coils, of a thickness of 4.75 mm or more but not exceeding 10 mm. (7219.12.00)

- Flat-rolled products of stainless steel, of a width 600 mm or more, not further worked than hot-rolled, not in coils, of a thickness exceeding 10 mm. (7219.21.00)

- Flat-rolled products of stainless steel, of a width 600 mm or more, not further worked than hot-rolled, not in coils, of a thickness of 4.75 mm or more but not exceeding 10 mm. (7219.22.00)

- Flat-rolled products of stainless steel, of a width 600 mm or more, not further worked than cold-rolled (cold-reduced),
  - of a thickness of 4.75 mm or more. (7219.31.00)

- Flat-rolled products of stainless steel, of a width 600 mm or more, not further worked than hot-rolled, in coils, of a thickness exceeding 10 mm. (7219.11.00)

as to whether three specific products - Stavex, Ramex and Type 904L steel - were covered by the 1973 finding of dumping issued with respect to stainless steel plate from Sweden. On 11 November 1976 the US Customs Service responded by letter that the Office of Regulations and Rulings, Value Branch, had advised it that these three types of steel were not included within the purview of the 1973 dumping finding and that accordingly, Customs Service field officers would be instructed to appraise and liquidate all entries of this merchandise without regard to the Antidumping Act.

8. In May 1980, Avesta Jernverks requested a ruling as to whether or not several special grades of stainless steel, including 253 MA and 254 SMO, were within the scope of the anti-dumping order.[5] On 21 October 1980, the United States Department of Commerce (hereinafter referred to as the "DOC") ruled that the following six products were within the scope of the anti-dumping order: 254 SLX, 253 MA, 254 SFER, 254 SMO, 3 RE 60, and 393 HCR/393. On 4 March 1981 Avesta Jernverks made a request for reconsideration of the ruling, and on 3 December 1981 the DOC affirmed its previous ruling.

9. The relevant United States law on reviews of affirmative determinations of dumping or injury is in Title VII of the Tariff Act of 1930, as amended. The most recent amendments concerning such reviews resulted from the United States Trade and Tariff Act of 1984 (signed into law on 30 October 1984). Section 751[6] of this Act provides, in part, as follows: Whenever the administering authority receives information concerning, or a request for the review of, an affirmative determination of dumping or injury, which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register. During a review investigation of an injury determination, the party seeking revocation of an anti-dumping duty order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the anti-dumping duty order.

10. In 1973 there were four unrelated Swedish companies producing stainless steel plate in Sweden and exporting to the United States: Avesta Jernverks AB, Uddeholm AB, Gränges Nyby AB and Stora Kopparbergs Bergslags AB. In 1974 Avesta Jernverks halted production of carbon steel products at its mill at Avesta, Sweden. In 1976, Stora Kopparbergs Bergslags terminated its production of stainless steel products, and in 1977 sold its remaining production facilities for high speed and tool steel to Uddeholm. In 1977 Gränges Nyby's plate-producing facilities were closed. In 1979 Uddeholm's stainless steel operations were acquired by Gränges Nyby and its name was changed to Nyby Uddeholm. In 1980 Avesta Jernverks and Nyby Uddeholm each commissioned a new continuous casting unit for stainless steel products.

11. In 1976 the Ingersoll Division of Borg Warner Corporation, a US stainless steel plate producer located in New Castle, Indiana, was acquired by the Axel Johnson Group of which Avesta Jernverks was a member. The Ingersoll Division became "Avesta Inc."

12. In 1983 the two remaining producers of stainless steel plate (Avesta Jernverks and Nyby Uddeholm) and the two producers of other stainless steel products (Fagersta and Sandvik) began negotiations to merge or consolidate their separate companies. In 1984 Avesta Jernverks and Sandvik together acquired the stainless steel operations of Fagersta and Nyby Uddeholm, with Sandvik producing

[5]The products 253 MA and 254 SMO are patented grades of stainless steel plate. They are not related in any way to Stavex, Ramex or Type 904L.

[6]The entirety of Section 751 is carried in Annex I, *infra*.

stainless steel seamless tubing and wire, and the "Avesta Group"[7] producing stainless steel flat-rolled products and welded pipes and tubes, as well as certain stainless steel forgings, welding wire and electrodes, knocked-down pressure vessels and fittings. Avesta AB is the new name for the corporate entity created in May 1984 of certain stainless steel units of three companies: Avesta Jernverks AB, Nyby Uddeholm AB and Fagersta AB. Since May 1984, the entire Swedish stainless steel plate industry has consisted of the single corporate enterprise of the Avesta Group of which Avesta AB is a part.

13. The amount of the anti-dumping duties to be collected on stainless steel plate from Sweden has been subject to three administrative reviews by the DOC.[8] A fourth review was begun in May 1983. On 30 August 1985, the International Trade Administration of the Department of Commerce (hereinafter referred to as the "ITA") advised all interested parties that pursuant to certain provisions of the Trade and Tariff Act of 1984[9], all future administrative reviews would be conducted upon request rather than automatically on an annual basis. The ITA did not receive a request for review of Swedish stainless steel plate and thus terminated the review begun in 1983. On 16 September 1985, the DOC instructed the US Customs Service to require the deposit of estimated anti-dumping duties at the rates previously applied, namely, 4.46 per cent for Nyby Uddeholm and zero per cent for Avesta Jernverks.

14. In January 1986, a request was made to the DOC by Avesta AB to determine which duty rate - the zero rate applicable to the former Avesta Jernverks or the 4.46 per cent applicable to the former Nyby Uddeholm - would apply to the new company. US domestic producers filed several briefs in opposition to the request for a zero-duty rate, and Avesta AB made replies to that opposition. Avesta AB continued to seek a response until 1989, when it was told that the request was dormant. In August 1991, US domestic producers sent a letter to the DOC advising it that they remained opposed to the requested zero-duty rate. In October 1991 the DOC informed Avesta AB that it had not yet been able to assess whether it could, procedurally, issue a ruling in response to Avesta AB's request. Since then, Avesta AB has received no further communication from the DOC. The duty rate assigned to Avesta AB has remained at 4.46 per cent.

15. On two occasions, in 1990 and 1991, the DOC published notices in the Federal Register stating that unless the finding on stainless steel plate from Sweden was still of interest to interested parties, it would revoke the finding. On both occasions domestic stainless steel plate producers notified the DOC that they were still interested in having the finding maintained. In light of the expressed interest, the DOC determined not to revoke the finding.[10]

16. On 8 July 1985 Avesta AB and Avesta Stainless Inc. filed a request pursuant to section 751(b) of the Tariff Act of 1930 with the United States International Trade Commission (hereinafter referred

---

[7]The "Avesta Group" consists of nine wholly-owned manufacturing companies (including Avesta AB - the new name for Avesta Jernverks - and Avesta Inc. of New Castle, Indiana), eight affiliated manufacturing companies, 19 wholly-owned sales companies - of which Avesta Stainless Inc. is the US sales company - and several non-manufacturing associated companies.

[8]Following the enactment of the Trade Agreements Act of 1979, the responsibility for dumping investigations, determinations and reviews was shifted from the Department of Treasury to the Department of Commerce. The results of the three reviews were published in 47 Fed. Reg. 29867 (9 July 1982), 47 Fed. Reg. 41151 (17 September 1982) and 49 Fed. Reg. 39885 (11 October 1984), respectively.

[9]Pub. Law No. 98-573, para. 611(a), 98 Stat. 2948, 3031 (1984), (amending the Tariff Act of 1930, 751(a); 19 U.S.C. 1675(a)).

[10]55 Fed. Reg. 36680 (6 September 1990), 56 Fed. Reg. 40866 (16 August 1991).

to as the "USITC") for review of the 1973 affirmative determination of injury based on changed circumstances. The request included a summary of the alleged changed circumstances as follows[11]:

> "The circumstances surrounding the effects which imports of Swedish stainless steel plate have on United States producers in mid-1985 have changed enormously from the circumstances which prevailed in 1972. There have occurred four major changes:
>
> First, imports of Swedish plate into the United States are commercially insignificant and statistically *de minimis*; since 1976 imports of Swedish plate have represented less than one per cent of apparent U.S. consumption in every year but one.
>
> Second, in 1972 there were four Swedish companies producing stainless steel plate at four locations in Sweden; today, the sole Swedish plate producer manufactures plate at two Swedish mills and one mill in the United States.
>
> Third, in 1976, the Ingersoll Division of the Borg-Warner Company produced stainless steel plate at its mill at New Castle, Indiana, and accounted for [ ] per cent of apparent U.S. consumption. That mill was acquired in 1976 by a predecessor of Sweden's sole producer and, in 1984, accounted for [ ] per cent of apparent U.S. consumption.
>
> Fourth, in 1972 Sweden and the European Community entered into a bilateral trade agreement which allow Swedish plate duty-free entry into the EC; today, in sharp contrast to the 1970-1972 period, Swedish exports to the EC are almost 20 times the quantity of plate exported to the United States."

Also contained in the request was the argument that in the event of revocation of the 1973 finding, future imports of stainless steel plate from Sweden would not cause material injury to the US industry because, in part, of the improved state of the US domestic industry. On 31 July 1985 the USITC published a notice in the Federal Register[12] requesting public comment concerning whether the changed circumstances alleged by the requesting Party were sufficient to warrant a review investigation. A number of domestic producers represented by the same counsel provided comments in opposition to the request for a review investigation.

17. On 23 October 1985 the USITC determined that the request did not show changed circumstances sufficient to warrant institution of a review investigation and dismissed the request by a three-to-two vote.[13] The rationale for this decision as stated by the USITC is found in Annex II.

18. On 28 October 1985 Avesta AB and Avesta Stainless Inc. brought an action in the United States Court of International Trade (hereinafter referred to as "the CIT") seeking an order invalidating and

---

[11]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 8 July 1985, pp. 33-34. A summary of the changed circumstances alleged in the request is also found in 50 Fed. Reg. 31056 (13 July 1985).

[12]50 Fed. Reg. 31056 (31 July 1985).

[13]50 Fed. Reg. 43613 (28 October 1985).

vacating the determination by the USITC not to institute a review investigation. On 7 June 1988, in a review of each of Avesta's claims of error, the motion was denied by the CIT.[14]

19. On 24 February 1987, while the lawsuit challenging the dismissal of the first request for review by the USITC was still pending, Avesta AB and Avesta Stainless Inc. filed a second request with the USITC for a review of the 1973 injury determination. The changed circumstances alleged in the request for review were summarized in the request as follows[15]:

> "First, Sweden's stainless steel plate-producing industry has shrunk from four producers in 1972 to a single producer in 1987 with a consistently decreasing capacity to produce stainless steel products.
>
> Second, imports of hot-rolled stainless steel plate from Sweden have been and are at *de minimis* levels and, in 1986, imports of Swedish hot-rolled stainless steel plate represented [ ] per cent of apparent U.S. consumption.
>
> Third, the *de minimis* levels of imports from Sweden result directly from the 1976 acquisition of a hot-rolling plate producing mill in the United States by a predecessor of Avesta. Today, Avesta's U.S. mill is one of the United States' largest producers of hot-rolled stainless steel plate and Avesta has virtually abandoned exports to the United States except for extremely small quantities of patented or "special" grades of hot-rolled plate.
>
> Fourth, In sharp contrast to the early 1970's, the European Communities represent an increasingly strong and natural market for Swedish plate (which enters the EC duty-free and without any quantitative limits). The Tariff Commission's 1973 determination was principally based on the facts that there was a "decline in demand for stainless steel plate … in Sweden's largest market, Western Europe …" and that "Sweden maintained its total export level in 1971 by increasing its exports to the United States market …". These circumstances have totally changed. In fact, Swedish exports to the EC have increased 266 per cent from 1971 to 1985.
>
> Fifth, today's U.S. producers are highly protected. On March 1, 1986, the United States implemented bilateral quota agreements with virtually every major stainless steel plate exporting country, including Japan and the European Communities. These voluntary restraint agreements ("VRAs") absolutely limit the quantity of stainless steel plate which may be imported into the United States from the major exporting nations. But even before this quota system became effective in 1986, the competitive United States industry was obviously prospering:

[14] Avesta AB and Avesta Stainless Inc v. United States, 689 F. Supp. 1173 (CIT 1988).

[15] Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987. A summary of the changed circumstances alleged in the request is also found in 52 Fed. Reg. 9551 (25 March 1987).

Year	Stainless Steel Plate: Shipments by U.S. Producers (Net Tons)
1982	98,000
1983	99,000
1984	116,000
1985	145,000
1986	119,000

Sixth, the United States system of quotas seriously inhibits Swedish plate from competing in the United States market. In exchange for the quota commitments from major exporting countries, the United States agreed (i) to eliminate the additional "Section 201" duties on stainless steel plate imported from the so-called "VRA countries"; (ii) to revoke all countervailing duty and antidumping orders in effect against imports of stainless steel plate from any "VRA country"; and (iii) to obtain assurances from the United States producers that they will not commence new antidumping or countervailing duty proceedings against imports of stainless steel plate from any "VRA country". Sweden is not a VRA-signatory country and, as a result, even if the 14-year Finding of Dumping is revoked or modified, imports of stainless steel plate from Sweden will remain subject to all regular customs duties and to the antidumping and countervailing duty laws while imports from the "VRA countries" have a "license to dump".

Seventh, no United States producer manufactures cold-rolled plate in large widths in a continuous process. This product has never been widely offered for sale in the United States and, in 1986, imports of this product from Sweden represented only one-half of one per cent of total U.S. consumption of stainless steel plate.

Eighth, certain types of hot-rolled stainless steel plate which did not exist in the early 1970's are now being imported from Sweden in minimal quantities. These plates are composed of patented grades of stainless steel which are not manufactured by any U.S. producer." (emphasis added by Avesta AB)

On 30 March 1987 the USITC published a notice in the Federal Register[16] requesting public comment regarding the request for review. The parties which commented on the request for a review investigation were Allegheny Ludlum Corporation, Armco Inc., Jessop Steel Company, J&L Specialty Products Company, Washington Steel Corporation, and the United Steelworkers of America, represented by the same counsel. The petitioners Avesta AB and Avesta Stainless Inc. also filed a response to the notice, adding further information and argument to their petition. On 1 July 1987 the USITC, by a three-to-two majority, dismissed the request, concluding that the petitioner had not shown changed circumstances sufficient to warrant institution of a review investigation.[17] The rationale for this decision as stated by the USITC is found in Annex III.

20. On 8 July 1987 Avesta AB and Avesta Stainless Inc. filed a request with the USITC for reconsideration of the USITC's determination not to institute a review investigation. It was stated in the request that "somewhere in the administrative agency process, there was a serious misreading of the basic facts." The factual misreadings alleged were:

[16]52 Fed. Reg. 9551 (25 March 1987).

[17]52 Fed. Reg. 24541 (1 July 1987).

(1) the USITC conclusion that Avesta was exporting very significant quantities of standard types of hot-rolled plate to the United States, although the opposite was shown in the data;

(2) the USITC's assumption that the import data for standard types of stainless steel plate excluded Avesta's patented grades, when the latter were included in the data; non-standard types of stainless steel plate (KBR, Stavex and Ramex) did not compete with standard types of hot-rolled plate;

(3) the USITC conclusion that import levels had not decreased since Avesta's purchase of a US mill in 1976, although Avesta had submitted information showing the opposite;

(4) the USITC conclusion that exports to the EC had not increased significantly, although Avesta had submitted data showing this.

In a letter of 23 July 1987 to the USITC, counsel for the US domestic industry rebutted each point raised by Avesta AB in its request for reconsideration and urged the USITC to reject the request. On 18 August 1987 the USITC notified Avesta AB of its decision that reconsideration of the determination was not warranted.

21. The 1987 decision by the USITC not to initiate a review investigation was appealed by Avesta AB and Avesta Stainless Inc. to the CIT on 31 July 1987. On 27 October 1989 the CIT denied the motion to invalidate the USITC's determination not to institute a review investigation.[18] On 14 September 1990 the United States Court of Appeals for the Federal Circuit affirmed the decision of the CIT.[19] On 13 December 1990 Avesta AB and Avesta Stainless Inc. petitioned the Supreme Court of the United States for review of the Court of Appeals' decision. On 18 March 1991 the Supreme Court denied the petition for a writ of *certiorari*.[20]

III. **FINDINGS REQUESTED**

22. Sweden requested the Panel to find that the ongoing imposition by the United States of anti-dumping duties on stainless steel plate from Sweden constituted a *prima facie* nullification or impairment of Sweden's benefits under the Agreement. Sweden set forth three arguments in support of this claim:

(i) The anti-dumping duties were based on a determination of injury from 1973; the latter could not be considered a valid basis for the continued imposition of such duties in 1992. Thus, the United States had acted and was still acting contrary to Article 9:1 of the Agreement.

(ii) The United States authorities had not, on their own initiative, reviewed the determination of injury, although such a review had been and was

[18] Avesta AB and Avesta Stainless Inc. v. United States, 724 F. Supp. 974 (CIT 1989).

[19] Avesta AB and Avesta Stainless Inc. v. United States, 914 F.2nd 233 (Fed. Cir. 1990).

[20] Avesta AB, et al., Petitioners, v. United States, et al., 111 S. Ct. (1991).

still warranted. Thus, the United States had acted and was still acting contrary to Article 9:2 of the Agreement.

(iii) The United States authorities had not accepted Avesta's[21] request for a review of the determination of injury, although Avesta had twice submitted positive information substantiating the need for a review. Thus, the United States had acted contrary to Article 9:2 of the Agreement.

23. Sweden requested the Panel to recommend that the United States bring its measure into conformity with the Agreement. The proper way to achieve such conformity, given the facts of the case, would be revocation of the anti-dumping duty order and reimbursement of duties already paid, to an extent that the Panel considered reasonable. In Sweden's view, the United States had imposed and collected duties in a manner inconsistent with the Agreement since at least 1985, the year the USITC had received the first request from Avesta for a review investigation. The imposition of the duties should have been terminated, at the latest, that year. Consequently, the United States should immediately revoke the finding and reimburse duties paid since at least 1985.

24. The United States requested the Panel to find that the United States had acted in conformity with the Agreement with respect to all of the allegations raised by Sweden in this dispute, and that it therefore need take no steps to bring its laws or practice into conformity with the Agreement. The United States' main arguments were that:

(i) Article 9 required review of the imposition of anti-dumping duties only in certain circumstances, and there was no requirement for automatic periodic review.

(ii) The USITC's decision that Avesta had failed to submit positive information substantiating the need for review of the 1973 injury determination was properly explained and reflected an objective examination of the record before it.

(iii) In view of the USITC's two separate determinations denying Avesta's petitions for review, a review of the 1973 injury determination upon the United States investigating authorities' initiative was not warranted.

25. Regarding Sweden's statement that the proper way to bring the United States' anti-dumping measure into conformity with the Agreement would be for the United States to revoke the finding and reimburse duties paid to the extent reasonable, the United States was of the view that even if the Panel were to find that the United States had acted inconsistently with the Agreement, such a recommendation would be inappropriate. A panel should go no further than the general recommendation that a Party bring its practices into conformity with the Agreement. A determination as to how to achieve such conformity should be left to the Party, which was in the best position to make such a determination. Furthermore, a request for revocation and refunding of duties assumed that a review would find that

[21]The term "Avesta" is used by Sweden and the United States in their respective arguments, and in the official documents to which they refer, to indicate the Swedish stainless steel plate-producing industry generally (which, since 1984, has been comprised of the Swedish company, Avesta AB, the Swedish-owned US mill, Avesta Inc., and the US sales company, Avesta Stainless Inc.). The 1985 and 1987 requests to the USITC for a review investigation were made by Avesta AB and Avesta Stainless Inc. together.

injury would not recur upon revocation. This was inconsistent with Sweden's argument elsewhere that the decision to conduct a review was a threshold determination that did not prejudge the outcome of the review. Thus, by requesting revocation and refunding of the duties, Sweden had apparently prejudged the outcome of the review which it alleged should have been undertaken by the investigating authorities.

26. The United States noted that Sweden had included in its submissions to the Panel certain factual information pertaining to the period after 1987. In the view of the United States, this information was not admissible in the Panel's proceedings, because it had not been presented to the USITC for its consideration as part of Avesta's 1985 or 1987 requests for review, or at any time thereafter. Thus, the investigating authorities had had no previous opportunity to consider whether such information justified a review. Article 15:5 of the Agreement stated explicitly that panels shall examine a matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country." This meant that panel review of administrative decisions was based on, and limited to, the record compiled by the investigating authorities. Information that was not part of that record was thus not germane to the Panel's task, since it had never been presented to the investigating authorities. By submitting information that was not part of that record to the Panel, Sweden sought to bypass the review procedures of Article 9 of the Agreement, which entrusted to a Party's investigating authorities the responsibility of deciding whether information submitted by an interested party justified a review. Moreover, disparities between Sweden's post-1987 data and other available data illustrated clearly why it was inappropriate for a party to present this kind of new data to a panel in the first instance, rather than presenting it to the administering authorities as part of a request for a review.

27. Sweden asserted that it had not bypassed the investigating authorities in presenting information pertaining to the period after 1987. The role of a Panel could not be circumscribed in the manner suggested by the United States. Information pertaining to the period after 1987 was relevant in connection with the argument that a Party to the Agreement was obliged to conduct a review on its own initiative "where warranted". This obligation applied throughout the life of an anti-dumping order. Article 15:5 of the Agreement did not in any respect narrow the scope of what the Panel could examine; it explicitly stated that the Panel should examine the matter, based upon (1) the written statement of the Party making the request and (2) the facts made available under the domestic procedures to the authorities of the importing country. As factors relevant to the anti-dumping order were under constant development, information pertaining to the period after 1987 could not be disregarded. The argument put forward by the United States that the USITC had had no previous opportunity to consider whether such information justified a review had no merit. Furthermore, the obligation of the United States to conduct a review on its own initiative was in no way limited by the fact that the latest request for a review had been made in 1987.

IV. **ARGUMENTS OF THE PARTIES**

A. **Article 9:1 - Continued Imposition of the Anti-Dumping Duty Order**

28. Sweden argued that the United States had acted, and was still acting, inconsistently with Article 9:1 in maintaining anti-dumping duties on imports of stainless steel plate from Sweden since 1973.

29. Sweden noted that Article 9:1 provided that "an anti-dumping duty shall remain in force only as long as … necessary to counteract dumping that is causing injury". Thus, Article 9:1 contained a general legal obligation concerning the duration of anti-dumping duties. Since dumping that caused injury could not, *a priori* be expected to last indefinitely, the provision set a limit on the duration of

a duty. This, in turn, implied that an anti-dumping duty was temporary in nature. This conclusion was reinforced by the Preamble of the Agreement:

> "… anti-dumping practices should not constitute an unjustifiable impediment to international trade and … may be applied against dumping only if such dumping causes or threatens material injury to an established industry or materially retards the establishment of an industry."

It was also supported by the provision in Article 7:6 concerning price undertakings, which stated that "[u]ndertakings shall not remain in force any longer than anti-dumping duties could remain in force under this Code." The words "only as long as" in Article 9:1 put a limit on the duration of an anti-dumping duty, not in absolute and explicit terms - such as a fixed cut-off date - but implicitly, since these words indicated that a duty had to be revoked if dumping, injury or a causal link between the two no longer existed. The assurance provided for in Article 9:1 was essential in relation to the recognition in the Preamble of the Agreement that anti-dumping measures should not constitute unjustifiable impediments to international trade. Anti-dumping measures were intended to be temporary and remedial measures imposed solely for the purpose of counteracting injurious dumping. If the Party imposing a duty did not recognize this constraint on the duration of the measure, a situation could easily occur in which the duty became more or less permanent. Sweden maintained that this was what had happened in the present case.

30. Sweden maintained that the use of the word "shall" in Article 9:1 made the provision legally binding on Parties. The obligation in Article 9:1 could only be fulfilled if the authorities kept the anti-dumping duties under appropriate surveillance. Thus, investigating authorities were obliged to monitor, once anti-dumping duties were imposed, that the conditions of dumping and injury were fulfilled, and that a causal link existed between the two. This requirement should be fulfilled during the lifetime of an anti-dumping duty, provided that a reasonable period of time had elapsed since the final determination of injury. If the investigating authorities could not find that the relevant conditions were met, the anti-dumping duties in question should be revoked. This monitoring need not be within certain predetermined intervals, but had to be sufficiently effective to fulfil its purpose, which was to determine whether the injury caused by the dumped imports had been remedied. When the monitoring resulted in a finding that the injury had been remedied, the investigating authorities either had to revoke or review the duty.

31. Sweden said that since the United States applied the pre-selection system[22] for injury determinations, the appropriate and reasonable way of monitoring whether the duties were fulfilling their aims would have been to monitor the original determination of injury, in order to determine whether it was still a valid legal basis for the continued imposition of the anti-dumping duties. The use of the pre-selection system for injury determinations had to be kept in mind when addressing the proper standard for determining injury with an anti-dumping duty in force. As stated in the report of the Panel on "United States - Countervailing Duties on Non-Rubber Footwear from Brazil" (hereinafter referred to as the "Brazilian Footwear" report)[23]

---

[22]Under the pre-selection system, after a specific complaint has been investigated and a finding of dumping and material injury has been made, anti-dumping duties are applied on all importations of the product concerned, without making a new determination of dumping and material injury for each importation.

[23]Report of the Panel (unadopted), 4 October 1989, SCM/94, para. 4.4.

> "… the fact that Article VI:6(a) required an injury determination to levy duties, combined with the fact that it had been implemented by the pre-selection system, made it necessary to introduce a review mechanism under which countervailing duties, once imposed, had to be reviewed if the circumstances justifying their imposition had changed."

In Sweden's view, the pre-selection system necessitated a system of monitoring whether the duties were fulfilling their aim of remedying injury.

32. Sweden noted that the passage of time presumed change. Consequently, the longer the time that passed, the greater the likelihood for changes and development, and the greater the need for review. Thus, time itself was a relevant factor for a decision on whether to initiate a review. The relevance of the time factor might differ between different products, industries and countries. Furthermore, the relevance of the time factor might depend on developments in economic factors of both a structural and cyclical nature, as well as technological developments. In the Committee on Anti-Dumping Practices established under the 1967 Anti-Dumping Code, one participant had stated that

> "In view of the current high rate of technological development and the speed with which international commercial conditions change, there is an obvious need for anti-dumping actions to be regularly reviewed by the authorities concerned. … The proper application of the Code would result in anti-dumping duties being maintained for considerably varying time periods, depending on the product concerned."[24]

Sweden asserted that since 1973, the United States authorities had not provided any evidence on the potential continuation of injury, or demonstrated that imposition of the anti-dumping duty was still necessary to prevent injurious dumping. An injury determination that was almost 20 years old could not be considered a valid basis for continued imposition of an anti-dumping duty. Even in theory, it was extremely unlikely that nothing changed in a given industry as time passed, especially over a period as long as 20 years.

33. Sweden maintained that discussions in the GATT regarding the elaboration of anti-dumping rules reinforced the above arguments. In a report of a Group of Experts, adopted by the CONTRACTING PARTIES in May 1959, it was agreed that "[t]hese [anti-dumping and countervailing] duties were to be regarded as exceptional and temporary measures to deal with specific cases of injurious dumping or subsidization."[25] It was further stated "that anti-dumping duties should remain in force only so long as they were genuinely necessary to counteract dumping which was causing … injury …."[26] During the Kennedy Round negotiations, a "Draft International Code on Anti-Dumping Procedure and Practices" was circulated by the United Kingdom. In that Draft Code it was suggested that

> "Anti-dumping duties … shall be revoked as soon as … the authorities concerned are satisfied in the light of information at their disposal, … that the imports, … would no longer cause or threaten material injury …."[27]

---

[24]"Problems and Issues in the Field of Anti-Dumping", submission by Canada, COM.AD/W/52, 25 March 1976, page 2.

[25]BISD 8S/145, para. 4.

[26] *Ibid*, para. 23.

[27]Spec(65)86, 7 October 1965, page 21.

The stated rationale for the suggested provisions on duration of anti-dumping duties was that:

> "If full relief has been granted over a period of time on all consignments of goods supplied by any one country this would demonstrate that the continued imposition of the duties was unnecessary and,… the authorities concerned should … revoke the duties."[28]

In the Committee on Anti-Dumping Practices established under the 1967 Code, anti-dumping measures were recognized as temporary measures: in a 1977 Note by the secretariat, it was stated that with regard to the duration of anti-dumping duties, the remaining problem, at the time of writing, was "the fixing of reasonable time-limits for review and for revocation.[29] In addition, the requirement to monitor duties was recognized by the drafters of the present Agreement. In an earlier exercise in the Committee on Anti-Dumping Practices, Canada had stated as follows:

> "There is probably some reasonable minimum period of time during which anti-dumping duties may justifiably be imposed but, thereafter, the authorities concerned should be required to monitor anti-dumping actions to ensure that actions are not maintained except in cases of continued existence or threat of injury."[30]

34. Sweden explained that it was not arguing that Article 9 contained a clear-cut sunset clause. However, the manner in which Article 9 had been implemented - and presumably interpreted - in the domestic legislation of Canada, the EEC and Australia was instructive. All three had set explicit time-limits for duration of anti-dumping duties. In this context, Sweden referred to the "sunset" clause provisions in the anti-dumping legislation of these Parties. Nevertheless, in Sweden's view, the introduction of periodic reviews or, for that matter, "sunset" clauses, did not necessarily implement the obligation to monitor the duties in a manner which was consistent with the Agreement, as it was possible, due to the different circumstances in individual cases, that injury had been remedied prior to the expiry of any predetermined period.

35. The United States argued that it had not acted, nor was it still acting, inconsistently with Article 9:1 in maintaining anti-dumping duties on imports of stainless steel plate from Sweden since 1973.

36. The United States maintained that Article 9:1 imposed a general legal obligation on Parties to maintain anti-dumping measures only as long as and to the extent necessary to counteract injurious dumping. Article 9:1 did not set forth any procedural mechanism for carrying out this obligation; it contained no temporal limit for anti-dumping duties and no requirement that national investigating authorities "monitor" anti-dumping measures - that is, routinely reconsider whether the domestic industry was continuing to suffer injury or threat of injury by reason of the dumped imports.

37. In the United States' view, a logical and appropriate way for a Party to ensure that anti-dumping duties were imposed only as long as necessary was to review, where warranted, the need for such measures. This was precisely what Article 9:2 provided. Article 9:2 created the mechanism that implemented the general legal obligation of Article 9:1. This mechanism was the obligation to review,

---

[28] *Ibid*, page 22.

[29] "Analytical Inventory of Problems and Issues Arising under the Anti-Dumping Code," COM.AD/W/68, 8 March 1977, page 43.

[30] COM.AD/W/52, page 2.

in certain circumstances, the need for the anti-dumping duties. These circumstances were specific - i.e., "where warranted" - and only in these circumstances were the investigating authorities required to conduct a review, either on their own initiative or at the request of an interested party.

38. The United States explained that the drafters of Article 9 had a number of options available to them, ranging from leaving the duration of anti-dumping duties completely in the hands of investigating authorities, to requiring constant investigation and ongoing determinations that the requirements of Articles 2 and 3 of the Agreement were satisfied at all times. Rather than adopt either of these extreme positions, or a sunset clause, the drafters instead struck a balance that provided that the need for continuation of duties had to be reviewed when there was credible new information indicating that the duties might not be needed. This common-sense rule was reflected in the "positive information" and "where warranted" standards of Article 9.

39. The United States further argued that since any elimination of anti-dumping measures was preceded by a review, it followed that if it was appropriate not to conduct a review, it was also appropriate to maintain the anti-dumping measures. Thus, should the Panel determine that the United States had acted in conformity with Article 9:2 in not conducting a full review, the Panel should also determine that no violation of Article 9:1 existed in this case.

40. The United States observed that there was no specific time period for review set by Article 9, and its plain language did not suggest even a general temporal requirement. A correct interpretation of the Agreement was that it was the change in circumstances rather than the mere passage of time that was relevant, as time passage alone did not automatically indicate that anti-dumping duties might not be necessary. While it might be expected that as time passed, developments could occur suggesting the need for review, it was not the time elapsed which necessitated the review, but the specific developments that had transpired in that period. It was therefore appropriate to require, as the Agreement did, that the party requesting review specifically identify such developments and show why they substantiated the need for review. Had the drafters intended Article 9 to have a review requirement based on passage of time, they could easily have included it.

41. The United States argued that by the very terms used in Article 9:2, it was clear that there was no legal obligation to review simply on the basis of the passage of time. The purpose of a review under Article 9 was to determine whether, despite a previous finding of injury, the current situation was such that injury would not recur upon revocation of the anti-dumping duty. There was nothing in the Agreement suggesting that the standard for "positive information" substantiating the need for review became lower over time. The presumption that with the passage of time, circumstances were increasingly apt to change in such a way as to warrant a review and revocation of the duty, was no more sound than the opposite presumption, namely, that as long as dumping continued, import-related injury would occur absent anti-dumping duties. Although investigating authorities might take time alone into account, there was nothing in the Agreement mandating that the authorities had to do so.

42. Regarding Sweden's reference to "sunset" provisions[31], the United States maintained that the Agreement did not require periodic review or "sunset" provisions. The fact that a proposal requiring periodic review of anti-dumping measures was included in the Draft Final Act embodying the results of the Uruguay Round of Multilateral Trade Negotiations showed that there was no such requirement in the existing Agreement. Article 11.3 of the draft Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade added a "sunset" provision for anti-dumping duties as follows:

[31]See para. 34, *supra*.

> "Notwithstanding the provisions of paragraphs 1 and 2, any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition … unless the authorities determine … that the continued imposition of the duty is necessary to prevent the continuation or recurrence of injury by dumped imports."[32]

That this proposal was currently under negotiation for possible insertion in a future anti-dumping agreement showed that there was no such requirement in the present Agreement. Moreover, the above-quoted provision began with the phrase, "notwithstanding the provisions of paragraphs 1 and 2". The "paragraphs 1 and 2" referred to in this Article were similar to Articles 9:1 and 9:2 of the present Agreement. The use of the word "notwithstanding" would be necessary only if paragraphs 1 and 2 did not otherwise contain a requirement for periodic review which might lead to revocation.

43. The United States further argued in this context that the fact that certain Parties had chosen to have "sunset" provisions did not alter what the Agreement required. Furthermore, such provisions had been implemented by these Parties four years after the Agreement had entered into force, which showed - in the absence of any indication to the contrary - that they had not been considered by these Parties to be mandated by the Agreement.

44. The United States noted that Sweden had cited several documents that it claimed justified its interpretation that periodic review was required under the Agreement.[33] These documents either did not support Sweden's position or, in fact, lent credence to the interpretation based on the plain meaning of Article 9 suggested by the United States. Sweden had cited the 1977 secretariat Note containing the inventory of problems and issues arising under the Anti-Dumping Code[34] in which the secretariat had stated: "Problem: fixing of reasonable time-limits for review and for revocation". The existence of this report made clear that contracting parties had considered the inclusion of a temporal requirement for review and revocation of anti-dumping duties, but had chosen not to include one. Like the 1967 Anti-Dumping Code, the 1979 Agreement contained no such requirement for automatic periodic review. Far from demonstrating Sweden's textually unfounded position, this report helped to demonstrate the correctness of an interpretation of Article 9 based on its plain meaning. Sweden had also cited the 1959 Report of the Group of Experts[35] which stated that anti-dumping duties were to be "exceptional and temporary measures". Such language did not impose any specific obligation on contracting parties with regard to review of dumping orders. In addition, Sweden had cited the statement by the same Group of Experts that

> "… anti-dumping duties should remain in force only so long as they are genuinely necessary to counteract dumping which was causing or threatening material injury to a domestic industry."[36]

This statement did not go beyond Article 9:1, which contained a similar standard. Furthermore, the statement begged the question of how investigating authorities were to determine that duties were "genuinely necessary." In the United States' view, Article 9:2 contained the specific mechanism for doing so.

---

[32]MTN.TNC/W/FA, 20 December 1991, page F.21.

[33]See paras. 32-33, *supra*.

[34]COM.AD/W/68, 8 March 1977.

[35]BISD 8S/145, para.4.

[36] *Ibid*, para. 23.

45. The United States noted that Sweden had also referred to the United Kingdom's 1965 "Draft International Code on Anti-Dumping Procedure and Practices"[37], citing a passage under the heading "Rationale" that stated that

> "If full relief has been granted over a period of time on all consignments of goods supplied by any one country this would demonstrate that the continued imposition of the duties was unnecessary and, in the unlikely event that no request for revocation had been received, the authorities concerned should, nevertheless, revoke the duties."[38]

Contrary to what Sweden had alleged, the above-quoted statement was the rationale behind a proposed provision that addressed dumping, not injury. The relevant part of the provision read as follows:

> "Anti-dumping duties … shall be revoked as soon as (i) full relief from duty has been granted in accordance with Provision 16 over a sufficiently long period to demonstrate that the goods in question will continue to be sold at undumped prices …."[39] (emphasis added by the United States)

46. The United States referred to the statement by Canada that Sweden had quoted from COM.AD/W/52:

> "The proper application of the Code would result in anti-dumping duties being maintained for considerably varying time periods, depending on the product concerned."[40]

and said that this was entirely consistent with the practice of the United States and with Article 9 - that duties be reviewed for possible revocation, if and when the circumstances of the particular product warranted it.

47. Regarding Sweden's reference to the Brazilian Footwear Panel report[41], the United States asserted that paragraph 4.4 of this report, seen in proper context, supported the position of the United States on what Article 9 required:

> "[T]he fact that Article VI:6(a) required an injury determination to levy duties, combined with the fact that it had been implemented by the pre-selection system, made it necessary to introduce a review mechanism under which countervailing duties, once imposed, had to be reviewed if the circumstances justifying their imposition had changed. In other words, the continuing obligation regarding determination of injury was implemented through periodic reviews."

The first sentence of the above quotation stated that review was necessary if circumstances had changed. The next sentence began with the phrase, "in other words," which indicated that what followed in the sentence - periodic reviews - was in substance the same as what preceded it in the previous sentence -

---

[37]See para. 33, *supra*.

[38]Spec(65)86, 7 October 1965, page 22.

[39] *Ibid*, page 21.

[40]COM.AD/W/52, page 2.

[41]See para. 31, *supra*.

changed circumstances. Read as a whole, therefore, this statement meant that reviews were to be conducted from time to time, if and when circumstances had changed. This was the standard applied by the United States. Nothing in the above-quoted paragraph indicated that reviews had to be provided simply after passage of a particular amount of time.

48. The United States further asserted that what had been at issue in the Brazilian Footwear case were the circumstances under which a signatory was required to conduct an injury investigation on goods from a country that had newly become a signatory of the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement (hereinafter referred to as the "Subsidies Agreement"). A conclusion that Article 9 of the Agreement required reviews after periodic intervals would not have been germane to that issue.

49. The United States argued further that, contrary to Sweden's claims, Article 9 contained no "monitoring" requirement. The text of Article 9 contained nothing suggesting such a requirement. Since there was nothing explicit in Article 9:1 about monitoring, Sweden's claim had to be that such an obligation was implicit in Article 9:1. Sweden had pointed to nothing, however, to indicate that the drafters of the Agreement had intended this unstated obligation. Given how specific the drafters had been about reviews in Article 9:2, it was not reasonable to conclude that they had also intended certain similar procedural obligations - that they chose not to enumerate - in Article 9:1. Moreover, while Sweden had argued that monitoring was required under Article 9, Sweden had failed to explain what monitoring would consist of and how it would differ from a review itself, and had acknowledged that the Agreement did not specify any methodology for monitoring.

50. The United States asserted that no other Party to the Agreement engaged in the kind of ongoing "surveillance" suggested by Sweden, for the reason that to do so would place the investigating authorities in a near-constant state of investigating the conditions surrounding all outstanding anti-dumping duty orders. To be meaningful, monitoring would necessarily entail the very types of examination undertaken in an actual review. Furthermore, Article 7 of the Agreement, pertaining to price undertakings, demonstrated that when the drafters of the Agreement had intended some type of surveillance, they had stated it plainly in the text of the Agreement. Article 7:5 provided that

> "Authorities of an importing country may require any exporter from whom undertakings have been accepted to provide periodically information relevant to the fulfilment of such undertakings, and to permit verification of pertinent data."

Article 7:6 contained a provision for reviews of undertakings that was identical to Article 9. Apparently the drafters of the Agreement had believed that the language on reviews in Article 7, by itself, did not imply monitoring the undertaking; thus, they had explicitly included a monitoring provision. This was in contrast to Article 9, which contained no explicit mention of monitoring.

51. Sweden rejected the United States' interpretation of Article 9:1, in particular as it would add a punitive element to the imposition of anti-dumping duties that had not been foreseen under the Agreement. Sweden also questioned the strict reliance of the United States on the "plain language" of the Agreement. According to generally accepted principles of public international law regarding treaty interpretation, as codified by the Vienna Convention, a comprehensive interpretation had to be made, taking account of the treaty's context and in the light of its objectives and purposes. This had been overlooked by the United States. Under United States procedures, an injury determination could be regarded as a valid legal basis for continued imposition of anti-dumping duties indefinitely. Sweden asserted that the United States' argument that no other Party engaged in monitoring or surveillance of anti-dumping duties was not correct. According to Sweden's information, every other Party to the Agreement had implemented Article 9:1 either by a clear-cut sunset clause, under which the duties were revoked after a pre-determined period of time, or by periodic reviews, i.e by a kind of monitoring

mechanism. While these two ways of implementing Article 9:1 might not in all cases be perfect, they were nevertheless examples of what Sweden regarded as a reasonable interpretation of Article 9:1.

52. Sweden said that it had never argued that investigating authorities should be in a "near-constant state of investigating the conditions surrounding all outstanding orders". What it had argued was that the responsibility of the investigating authorities did not end with the decision to impose anti-dumping measures. In order to implement Article 9:1, it was necessary for the investigating authorities to follow, *inter alia*, developments on the market for the product covered by the measure. If not, the investigating authorities could not know when, according to Article 9:2, they were obliged to review a measure on their own initiative.

53. As to the United States' arguments regarding Articles 7:5 and 7:6 of the Agreement[42], Sweden said that these arguments concerned a different issue, namely, how to control that a price undertaking was respected and fulfilled by the exporter. Contrary to an ordinary anti-dumping duty, a price undertaking was not under the control of the investigating authorities. It was the exporter who was obliged to price the product at a certain level. The only way for the investigating authorities to control the prices of the exporter was by requesting him to provide certain information. In order to facilitate such control, Article 7:5 provided certain rights for the authorities vis-à-vis the exporter. This kind of control had no similarities to the concept of monitoring whether an anti-dumping duty was still necessary to counteract injurious dumping. The fact that Article 7:6 contained language similar to Article 9:2 merely underlined that the obligations put on the investigating authorities concerning the duration of price undertakings corresponded to the obligations concerning the duration of anti-dumping duties.

B. **Article 9:2 - Failure of the United States to Self-Initiate a Review**

54. Sweden asserted that the United States, by keeping the duty on imports of stainless steel plate from Sweden in force without taking any initiative to conduct a review, had acted and was still acting contrary to Article 9:2 of the Agreement. In Sweden's view, it was beyond doubt that a review was warranted in the present case. The long period of time and the facts of the case showed that the determination of injury from 1973 had lost its validity as a basis for the continued imposition of anti-dumping duties and that the duties should have been revoked.

55. Sweden argued that while Article 9:1 contained a general legal obligation concerning the duration of anti-dumping duties, Article 9:2 contained a more specific legal obligation concerning the initiation of a review of the need for continued imposition of anti-dumping duties. Article 9:2 complemented the general legal obligation in Article 9:1, but legally, both contained separate obligations. The provisions in paragraphs 1 and 2 of Article 9 were related as they both concerned the duration of anti-dumping duties. Both were operative, and consequently, both had to be implemented in domestic legislation. Article 9:2 specified when a review, in the meaning of the Agreement, was required. It contained two complementary - not alternative - provisions, on the one hand for self-initiated reviews, and on the other hand for reviews when an interested party so requested and submitted positive information substantiating the need for review. The word "shall" indicated that there was a legal obligation of the investigating authorities under Article 9:2. It was the investigating authorities, as a governmental body, that had to show that the continued imposition of an anti-dumping duty was necessary to counteract dumping which was causing injury.

[42]See para. 50, *supra*.

56. Sweden noted that the first part of Article 9:2 stated that, "The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative …." The words "on their own initiative" placed an obligation on the investigating authorities to take the initiative to review the need for the anti-dumping duty. Since it was the investigating authorities that had taken the decision to levy the duty, it was these same authorities that had the responsibility to initiate a review. This obligation could be interpreted as a safeguard against passivity of any of the interested parties. The purpose of such a safeguard would be to assure that a duty did not remain in force when the original determination had lost its validity as a basis for the continued imposition of duties. Without an assurance of this kind, an anti-dumping duty could remain in force for an indefinite number of years, and the duty would become more or less permanent. This would be contrary to the Agreement, as anti-dumping duties were regarded as temporary and remedial measures intended to relieve injury caused by dumped imports.

57. Sweden asserted that the investigating authorities' obligation to review a measure on its own initiative had been recognized in the Brazilian Footwear Panel report:

> "[T]he fact the Article VI:6(a) required an injury determination to levy duties, combined with the fact that it had been implemented by the pre-selection system, made it necessary to introduce a review mechanism under which countervailing duties, once imposed, had to be reviewed if the circumstances justifying their imposition had changed. In other words, the continuing obligation regarding determination of injury was implemented through periodic reviews." (page 20, para. 4.4)

> "The Panel recalled that Article VI:6(a) of the General Agreement required a contracting party not to levy a countervailing duty on the importation of goods unless there had been an injury determination and that this requirement imposed an ongoing obligation throughout the life of the decision to impose such a duty." (page 20, para. 4.5)

The Panel concluded in this case that there was an ongoing obligation on the investigating authorities imposing the duty to undertake a review periodically. In setting the threshold for the notion "where warranted", it had to be assumed that this threshold should not be higher than the threshold for the initiation of a review after positive information had been submitted by an interested party.

58. Sweden argued that the situation in the Avesta case was an example of when a review was warranted, and that an assessment of this question had to begin with the facts that had formed the basis for the original determination of injury in 1973. The facts supported the contention that the situation in 1992 was substantially different from the situation in the early seventies. This should have led the investigating authorities to conduct a review on their own initiative, and subsequently to revoke the anti-dumping duties in question. In this context, Sweden noted that the determination from 1973 stated that imports of stainless steel plate from Sweden as a percentage of apparent US consumption had increased from two per cent in 1970 to nearly 12 per cent in 1972, and that as a percentage of total imports, had increased from 19 per cent in 1970 to 58 per cent in 1972. These findings had to be read in connection with Article 3:2 of the Agreement, which stated that

> "With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country."

Facts that had emerged since 1973 showed that the conditions stipulated in Article 3:2 were no longer fulfilled. Imports of stainless steel plate from Sweden had decreased substantially since the determination of injury had been made and had, since 1974, remained at negligible levels. Between 1974 and 1991, imports from Sweden, in relation to apparent US consumption, had in most years been below one

per cent, with an average during those years of less than 0.9 per cent per year. Sweden noted that these figures included three products - Stavex, Ramex and Type 904L - that had been excluded from the scope of the anti-dumping order in 1976 and had not been subject to anti-dumping duties since then. The figures also included other products - KBR, 253 MA, 254 SMO - that should be excluded from the scope of the order since these products did not compete with any type of stainless steel plate made in the United States. In addition, Sweden's share of total imports of stainless steel plate had decreased substantially since the original determination of injury. During the period 1974 to 1991, US imports from all sources represented less than nine per cent of US consumption. Thus, imports from Sweden were now at negligible levels, and the conclusions in the 1973 determination of injury were no longer valid as a basis for continued imposition of the anti-dumping duties.

59. Sweden also noted that in the determination of injury from 1973, it was stated that:

> "One of the principal reasons for increased Swedish concentration on the U.S. market was the decline in demand for stainless-steel plate and sheet in Sweden's largest market, Western Europe. … However, exports to Western Europe fell off … in 1971, while exports to the United States increased sharply. With the loss of its Western European market, Sweden maintained its total export level in 1971 by increasing its exports to the United States and to other markets outside of Western Europe."[43]

Sweden asserted that this conclusion had also lost its validity. Swedish exports of hot-rolled sheet and plate to the ten-member European Community (EC-10) had increased by over 30 per cent from 1972 to 1985. During the same period, Sweden's total exports of hot-rolled sheet and plate to all countries had declined by over 16 per cent.[44] Exports of both cold-rolled and hot-rolled products in thicknesses exceeding 4,75mm to the 12-member European Community (EC-12) had amounted in 1972 to 18,876 tons, in 1980 to 27,203 tons, in 1985 to 39,131 tons and in 1990 to 46,432 tons.[45] Another relevant and substantial difference in the conditions in 1971 and 1972, as compared to the current situation, which contributed to the explanation of the increase of Swedish exports to the EC, was the Free Trade Agreement between the European Coal and Steel Community and Sweden, which entered into force on 1 January 1974. Prior to 1974, the EC applied a seven per cent *ad valorem* duty on imports of stainless steel plate from Sweden. The Free Trade Agreement provided for staged reduction of customs duties, which were eliminated on 1 January 1980. As a result, stainless steel plate between Sweden and the EC was traded duty-free and with no quantitative restrictions. Thus, the increase of Swedish exports to the EC, largely explained by the Free Trade Agreement, invalidated the conclusion contained in the determination of injury from 1973 concerning "one of the principal reasons for increased Swedish concentration on the U.S. market".

60. Sweden further noted that in the determination of injury from 1973 it was stated that:

> "There is considerable room for expansion of exports to the United States not only by altering market priorities but also by increasing production".

---

[43]Determination of Injury by the United States Tariff Commission in Stainless Steel Plate from Sweden, Investigation No. AA1921-114, T.C. Pub. 573, May 1973, pp. 5-6.

[44]Brief for Plaintiffs-Appellants, Avesta AB and Avesta Stainless Inc. v. the United States, Appeal from the United States Court of International Trade, United States Court of Appeals for the Federal Circuit, Appeal No. 90-1120, 12 February 1990, page 8, footnote 13.

[45]See Annex V, *infra*.

The acquisition by Avesta[46] in 1976 of a hot-rolling plate-producing mill in the United States had resulted in a change in its export behaviour which had rendered the above-cited conclusion invalid. This mill was presently one of the United States' largest producers of hot-rolled stainless steel plate. The acquisition had resulted in a decline of almost 40 per cent of Avesta AB's exports of hot-rolled stainless steel plate to the United States. The restructuring of the stainless steel industry in Sweden had resulted in decreased capacity to produce hot-rolled stainless steel plate both in absolute and relative terms compared to all other stainless steel products. In addition, the individual Swedish mills had also restructured. From 1984 to 1986, the mill in Avesta had decreased its capacity to produce hot-rolled plate by over 10 per cent. Accordingly, the conclusion in the determination of injury from 1973 concerning Sweden's "room for expansion" was no longer valid.

61. Sweden argued that the USITC had failed to consider the relevance of the relief programmes in the steel sector to the issue of whether the US industry was suffering injury. Sweden noted that Article 3:3 of the Agreement stipulated how the impact of dumped imports on the domestic industry should be assessed:

> "The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry …."

In the 1973 determination of injury, it was stated, regarding the state of the US industry, that:

> "By reasons of the LTFV sales on the part of the Swedish exporters, U.S. producers' prices have failed to increase in proportion to increased costs of domestic production."
>
> "Other costs of production have also increased, thus resulting in a severe profit squeeze for the U.S. producers, caused - at least in part - by their inability to raise prices sufficiently to meet competition from LTFV imports of stainless-steel plate from Sweden."
>
> "A review of the accounting procedures and financial statements of the principal producers of stainless-steel plate finds an overall decline in profits and returns on investment."
>
> "For their stainless-steel plate operations alone, net operating profit as a percentage of net sales of stainless-steel plate declined … from 4.4 per cent in 1968 to 1.5 per cent in 1972."

These facts had also changed to an extent that the above-cited conclusions were outdated. Several proceedings under Section 201 of the Trade Act of 1974 and voluntary export restraints concluded in 1986 with major exporters of steel to the United States had had an important impact on the condition of the domestic industry. Repeated protection of this kind had significantly altered, and financially improved, the state of the US industry, and this was confirmed by a number of reports and studies

[46]The acquisition in 1976 was made by the Axel Johnson Group, of which Avesta Jernverks was a member. As explained in para. 12 *supra,* Avesta Jernverks was subsequently renamed "Avesta AB".

by the US Government.[47] As a result of this adjustment, the facts upon which the determination of injury from 1973 had been based were no longer valid.

62. Sweden also noted that in the context of arguments relating to the USITC's decision not to initiate a review upon request, the United States had argued that Avesta had failed to demonstrate the relevance of the VRAs to the volume and price effects of imports from Sweden.[48] However, the USITC had not contested the evidence showing that the US steel VRA programme had resulted in a significant improvement in the economic condition of the US stainless steel plate industry. The USITC and the United States in its arguments had overlooked that the relief programmes were of direct relevance to the issue of whether the US industry was suffering injury. The impact of the programmes on Swedish volumes or prices was, in this context, not relevant, as it was not necessary to consider the volume and price effects of imports if there was no injury. The improvement in the condition of the US industry resulting from the relief programmes had minimized the likelihood that the US industry was experiencing material injury. Consequently, the results of the relief programmes had substantiated the need for a review.

63. Sweden also noted that total imports of stainless steel plate, in relation to apparent US consumption, had decreased by approximately 40 per cent between the years 1972 and 1991 while, at the same time, total exports from the United States had increased by 670 per cent.[49] Thus, the conclusion in the determination of injury from 1973 concerning the state of the US industry was no longer valid.

64. Sweden said that it was difficult to judge whether the United States, in Section 751 of the Tariff Act of 1930, as amended, respected the Agreement's obligation to self-initiate a review. However, it seemed that, based on the experience of the Swedish exporter in the present case as well as on the USITC's past practice, the USITC had not provided any real scope or practical possibility to conduct self-initiated reviews in its implementation of Article 9. For example, the USITC had not examined the information specifically attributable to this case regarding the state of the US domestic industry, even though these facts had been prepared by that very agency.

65. The United States denied that by keeping the duty on imports of stainless steel plate from Sweden in force without self-initiating a review, it had acted and was still acting contrary to Article 9:2 of the Agreement.

66. The United States pointed out that Article 9:2 was phrased in the disjunctive: investigating authorities shall review upon their own initiative or if an interested party submits positive information substantiating the need for review. The use of the word "or" indicated that a Party had to provide the opportunity for either self-initiated reviews or reviews upon request.

---

[47]The "1988 Report of the President under the Steel Import Stabilization Act" (53 Fed. Reg. 38703, 3 October 1988) showed that a substantial process of adjustment had taken place in the United States. The USITC's 1988 annual survey concerning competitive conditions in the steel industry and industry efforts to adjust and modernize showed radical changes in many areas. A special study by the Congressional Budget Office in 1987 concerning the impact of federal policies in the steel industry recommended that trade restraints should be continued as a means of increasing domestic production and profitability.

[48]See para. 192, *infra*.

[49]See Annex IV, *infra*.

67. The United States said that the Brazilian Footwear Panel report to which Sweden had referred[50] also supported the United States' position that it was sufficient under Article 9:2 to provide reviews upon request of an interested party. This Panel report stated that

> "… the requirements of Article 4:9 applied, *mutatis mutandis*, to a case under the Code where a countervailing duty imposed without an injury determination, subsequently became subject to the Code's provisions and therefore eligible for an injury determination."[51]

Article 4:9 of the Subsidies Agreement was identical to Articles 9:1 and 9:2 of the Anti-Dumping Agreement. The United States' procedure for providing an injury determination in transition cases such as those described in the above quotation provided only for reviews upon request, and did not contain any provision for self-initiated reviews. The Panel had examined this procedure and concluded that

> "In the Panel's view, the US legislation implementing the Code (in particular section 104(b) of the [Trade Agreements Act of 1979]) effectively provided Brazil with a procedure for the examination of injury and the possible subsequent revocation of the pre-existing countervailing duty order as of the date of the request. The Panel concluded that the approach taken in this case was consistent with US obligations under the Code as derived from Article VI:6(a) of the General Agreement."[52]

In light of Brazil's opportunity to request a review, the Panel in that case had not found it necessary to consider whether the United States should have initiated the review on its own initiative under Article 4:9 of the Subsidies Agreement, even though that Article was worded identically to Articles 9:1 and 9:2 of the Agreement.

68. The United States said that even though Article 9 could be read to require only one type of review or the other, the practice of the United States was to provide more than the minimum required. Section 751(b) of the Tariff Act of 1930 and the USITC's procedural regulations provided for reviews upon request or upon receipt of information by the USITC showing changed circumstances sufficient to warrant review. Moreover, the USITC had conducted at least one such review on its own initiative.

69. The United States also noted that Article 9:2 provided that investigating authorities shall review the need for anti-dumping duties "where warranted". The inclusion of "where warranted" in the provision indicated that self-initiated reviews were not automatic, but were only required when there was a reason to conduct them.

70. Regarding Sweden's argument that the words "on their own initiative" placed an obligation on the investigating authorities that could be interpreted as a safeguard against passivity of any of the interested parties[53], the United States noted that "interested parties" were generally those that had a financial stake in either the maintenance or elimination of the anti-dumping measures. Such parties were unlikely to remain passive in the face of negative economic effects caused by continuation of

---

[50]See para. 57, *supra*.

[51] United States - Countervailing Duties on Non-Rubber Footwear from Brazil, 4 October 1989, SCM/94 (unadopted), para. 4.10.

[52] *Ibid*, para. 4.11.

[53]See para. 56, *supra*.

anti-dumping measures, and could be expected to bring relevant information to the attention of the investigating authorities.

71. The United States said that in the present case, the issue of whether the USITC should have self-initiated a review without having received a request had not arisen, because requests had been filed. Avesta had petitioned the USITC for review not once, but twice. At both times it had raised numerous allegations that it claimed justified a review, and at both times the USITC had conducted a preliminary review of those allegations. The USITC had weighed the allegations, considered other information, and rendered an opinion analyzing why a full review was not justified. The USITC had properly determined not to conduct a full review upon Avesta's two requests, on the basis of its finding that Avesta had failed to submit positive information substantiating the need for review.[54]

72. The United States said that if, on the basis of specific requests by an interested party, there was insufficient reason for a review, a self-initiated review was in no way warranted. This was because the evidentiary standard applicable to both types of reviews was the same. The only difference between the two types was the source of the information leading to the review: in one case it was submitted by an interested party, and in the other case it was not. However, the threshold was the same. Logically, the standard for reviews on request could not be higher than the standard for self-initiated reviews. Sweden had claimed that the investigating authorities were obliged to take the initiative to review the need for an anti-dumping duty. However, the changed circumstances that Sweden alleged should have caused the USITC to self-initiate a review investigation, were the very same circumstances upon which Avesta had unsuccessfully based its two requests for review. The USITC was not required to self-initiate a review based on these same circumstances.

73. Furthermore, the United States noted that Sweden had included in its argument before the Panel certain information pertaining to the period after 1987, the year of the USITC's decision on Avesta's second request. This information had not been presented to the USITC. Thus, the USITC had had no previous opportunity to consider whether such information justified a review. If Sweden believed that the new information justified a review, its exporter Avesta could file a new request for review.

74. The United States asserted that Sweden's emphasis on self-initiation of reviews of injury determinations glossed over the fact that Avesta continued to have a margin of dumping assigned to it and, since June 1982, had not availed itself of the opportunity to have a review by the DOC to reduce or eliminate that margin.

75. Regarding the United States' charge that since 1982 Avesta had not requested the DOC to review the margin of dumping in order to reduce or eliminate it, Sweden stated that on two occasions Swedish exporters had been subject to administrative reviews. On the first occasion, Nyby-Uddeholm had been granted zero-margins, and on the second, Nyby-Uddeholm had been granted a margin of 4.46 per cent, while Avesta Jernverks had obtained a zero-margin. It was for this reason that no such attempt had been made since 1982. However, the issue of dumping was irrelevant, since the issue before the Panel was whether the United States had acted inconsistently with Article 9 of the Agreement. Furthermore, there had been no evidence of dumping from Avesta AB since 1980. Sweden contested the US view that Avesta could have obtained a review long ago had it stopped dumping. It would have been nearly impossible for Avesta not to have had at least technical margins of dumping attributed to it over a period of three consecutive years, which was the United States' requirement. Sweden explained that the risk of technical margins of dumping would always be present due to (1) the United States' methodology for calculating the dumping margin, such as comparing single export transactions with a weighted average

[54]The arguments of the United States on this point can be found in the section entitled "Factual Arguments".

of home market sales, and (2) the currency fluctuations between the Swedish krona and the US dollar. Sweden also understood that even if these requirements were fulfilled, it was within the discretion of the DOC to decide whether or not to revoke an anti-dumping duty order.

76. Sweden argued that providing for reviews upon request did not relieve the responsible authority of its obligation to self-initiate reviews, where warranted. The United States had had several possibilities to initiate a review. The duty had been in force since 1973 and the first request for review had been presented in 1985. As shown in Avesta's request, most of the "changed circumstances" related to developments during the seventies.

77. Regarding the United States' allegations with respect to data presented to the Panel pertaining to the period after 1987, Sweden referred to its arguments in paragraph 27, *supra*.

78. Sweden noted that, in the context of the United States' arguments in defense of the USITC's failure to initiate a review investigation on Avesta's request, the United States had claimed that Avesta had not presented information to substantiate its claim regarding a change in market strategy.[55] However, it would be impossible for Avesta or any other individual company to provide evidence of the kind required by the USITC. Such an investigation could only be made by an entity having access to information on the full market situation, i.e. the USITC. This supported Sweden's position that the USITC had a responsibility to undertake a review on its own initiative.

C. **Article 9:2 - United States' Dismissal of Requests for the Initiation of a Review**

79. Sweden argued that the United States had acted in a manner contrary to Article 9:2 by not accepting the Swedish exporter's requests for a review of the 1973 injury determination. In the present case, Avesta had twice submitted positive information substantiating the need for a review. However, the United States had rejected those requests.

80. The United States argued that it had not acted in a manner contrary to Article 9:2 by not accepting the Swedish exporter's requests for a review of the 1973 injury determination. In both of Avesta's requests for a review, the USITC had objectively examined the evidence before it and had explained the reasons for its decision.

81. The Parties made legal arguments (paras. 82-108, *infra*) relating to the interpretation of the obligations in Article 9:2, and factual arguments (paras. 109-193, *infra*) relating to the USITC's findings and analysis on the basis of the information before it in Avesta's 1985 and 1987 requests for a review.

1. Legal Arguments

82. Sweden argued that according to Article 9:2, the review procedure was divided into two steps and involved two separate decisions. First, the investigating authorities had to determine whether a review was needed, and second, they had to determine whether prolongation of the duties was necessary. The first determination should be based on an examination of whether the injury had been remedied. This would imply a decision as to whether the original determination of injury was still valid as a legal basis for the continued imposition of the anti-dumping duties. This determination should be based on the original injury determination and on whether the circumstances described therein, or other circumstances relevant to the case, were, in any respect, sufficiently different from the former situation so as to invalidate the determination. If that were the case, a review had to be conducted.

[55]See para. 139, *infra*.

The factors being considered had to be examined in connection with the provision in Article 3 of the Agreement. In the present case, the determination had been made in 1973, based on facts from earlier years. Those facts had to be examined in relation to the current situation. The purpose of the second stage, the actual review, would then be to determine whether continued imposition of the duties was still necessary. The proper standard for such a determination would be to examine whether injury would recur if the duties were removed. In other words, the investigating authorities had to determine that a prolongation was necessary in order to counteract recurrence of injury.

83. In Sweden's view, the threshold set by the reference in Article 9:2 to "positive information" and "where warranted" should not be interpreted as a more burdensome requirement than the standard for initiation of an anti-dumping investigation. Article 5:1 required that in order to initiate an investigation, the authority had to receive a request including "sufficient evidence" of injurious dumping. It could be argued that the concept of "evidence" in Article 5:1 in itself implied a higher degree of proof than the more neutral notions of "positive information", and "where warranted", and that consequently, the standard for initiating a review should be lower than that for initiating an investigation. It was clear that the determination whether to initiate an investigation required a lower level of evidence than the findings in the final determination. This followed from the fact that the term "sufficient evidence" in Article 5:1 implied that less evidence had to be at hand than what the notion of "positive evidence" in Article 3:1 required. Also, the investigating authorities were less informed about the facts of a case in the first stage of the procedure than in the final stage. Logically, the threshold for initiating a review had to be set at a lower level than the standard for the ultimate determination in a review procedure. In this context, Sweden noted that the decision whether or not to initiate a review merely determined whether such a review was warranted; it did not prejudge the outcome of the review. Nevertheless, in Sweden's view the facts that Avesta had presented to the USITC would, in a review, have shown that the continued imposition of anti-dumping duties was not necessary to counteract injurious dumping.

84. Sweden argued, referring to several dictionaries, that a pure linguistic comparison of the terms used in Articles 3:1, 5:1 and 9 - "positive evidence", "sufficient evidence", "information", and "positive" - showed a fundamental difference between them.

85. Sweden noted that in the "Draft International Code on Anti-Dumping Procedure and Practices" circulated by the United Kingdom, it was suggested that:

> "Anti-dumping duties … shall be revoked as soon as … the authorities concerned are satisfied in the light of information at their disposal, … that the imports, … would no longer cause or threaten material injury …."[56]

The rationale for the above proposal, as earlier stated, was that

> "If full relief has been granted … and, in the unlikely event that no request for revocation had been received, the authorities concerned should, nevertheless, revoke the duties."[57]

Sweden maintained that in light of the above arguments, all that was required for the decision whether or not to initiate a review was information which indicated that the original determination of injury had lost its validity as a basis for the continued imposition of anti-dumping duties. When an interested

[56]Spec(65)86, 7 October 1965, page 21.

[57] *Ibid*, page 22.

party had been able to provide such information, it was the investigating authorities which had the responsibility to demonstrate that prolongation of the anti-dumping duties was necessary to prevent injury.

86. Sweden said that the United States' statute regarding injury reviews provided for the initiation of reviews only if there were "changed circumstances sufficient to warrant a review". The statute thus imposed two requirements: (1) a "change" had to have occurred in the circumstances existing at the time of the original determination; and (2) these "changed circumstances" had to be "sufficient to warrant a review" - that is, they had to prove that injury would not recur upon revocation of the order. These requirements did not correspond to the language of the Agreement; they added an extra burden on the party requesting the review for which there was no explicit support in the Agreement.

87. The United States asserted that it had not acted in a manner contrary to Article 9:2 by not granting the Swedish exporter's requests for a review of the 1973 injury determination.

88. The United States maintained that Article 9:2 provided that the purpose of review was to determine the need for the continued imposition of the duty. Taken together with Article 9:1, this meant that an Article 9 review determined whether the duty was still needed to counteract injurious dumping. As earlier stated, Article 9 set forth the circumstances under which a review was required, but did not provide specific procedures for how the review was to be conducted, nor did it set forth any standard governing decisions on whether to modify or revoke anti-dumping measures following a full review. Thus, investigating authorities had broad discretion in implementing the review provisions of Article 9. In the United States' view, an appropriate test for review under Article 9 was whether injury was likely to recur upon revocation. If injury would recur, then duties would remain in place; if not, then duties would be removed. This was the standard the United States applied under Section 751(b); the standard was fully consistent with Article 9:2.

89. The United States asserted that it would not make sense, contrary to the suggestion of Sweden, for the investigating authorities to determine whether dumping was continuing to cause injury even with anti-dumping duties in place, since the very purpose of such duties was to offset injurious dumping, and the injury from the dumping stopped once the dumping had been offset by the duties. The Norwegian Salmon Panel[58] had addressed this issue directly, stating, at paragraph 588:

> "If the mere fact that, following the imposition of anti-dumping duties, the imports in question were no longer causing injury were sufficient to require a Party to terminate the imposition of these duties, the logical result would be that any anti-dumping duty which was effective in removing injury to a domestic industry had to be withdrawn immediately. The Panel considered that this interpretation of Article 9 would make ineffective the other provisions of the Agreement. [I]n considering whether a Party was acting inconsistently with Article 9:1, account [must] be taken of the effect of the imposition of the anti-dumping duties."

Thus, it was proper in review investigations for investigating authorities to determine whether injury would recur upon revocation of the duties, and not whether injury was still occurring with the duties in place. According to Sweden, however, the absence of continuing injury was evidence that the injury had been "remedied", or that the original determination had "lost its validity", thereby providing grounds for instituting a review. Since duties offset dumping, the investigating authorities would always be required to grant a request for review. Sweden's interpretation of Article 9 would not only require

[58] United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, Report of the Panel (unadopted), 30 November 1992, ADP/87.

that all requests be granted, but that all anti-dumping orders once reviewed be revoked, since the order, by definition, eliminated the effects of dumping by imposing offsetting duties. This was not what was intended by Article 9.

90. The United States emphasized that the "positive information" that would substantiate the need for a review, and the information that would make a review "warranted", had to tend to show that injury would not recur upon revocation. The relevant "positive information" that would justify review also had to differ from the information considered by the investigating authorities in their original finding of injury, i.e., the information had to represent, literally, "changed" circumstances. If there were no substantial changes from the original situation in which injury had been found, logically there could be no need for a review. The USITC's test - whether there were "changed circumstances" justifying a review - made perfect sense and was fully consistent with the requirement in Article 9:2 that a review be conducted "where warranted" and where a party submitted "positive information substantiating the need for review".

91. The United States disputed Sweden's assertion that the United States' Section 751(b) test had two requirements for obtaining a review - to show that there were changed circumstances justifying review, and that injury would not recur upon revocation - and that this "additional layer" was inconsistent with the Agreement.[59] In fact, these two elements were part of the same single standard. Changed circumstances were only relevant if they related to whether injury would recur upon revocation of the order. Thus, to obtain an injury review under Section 751(b), the Party seeking review had to meet a single test - it had to show changed circumstances indicating that injury would not recur upon revocation of the order.

92. The United States explained that in a Section 751(b) review, the USITC focused on whether there were changed circumstances such that material injury would not recur should the order be revoked. Trends that resulted from the imposition of duties, such as a decline in imports, an increase in import prices, or improved performance of the domestic industry - absent an explanation other than the anti-dumping order - would not be "positive information substantiating the need for a review" and would not otherwise warrant review upon the investigating authorities' own initiative. This was because a review investigation asked whether injury would recur if duties were removed. Once duties were removed, foreign producers could again enjoy the advantage of selling at dumped prices. In the absence of other changes in the market, the unrestrained imports could be expected to regain their previously injurious market position. According to Sweden, a decline in imports was proof that the original finding had "lost its validity". Since import declines might well result from imposition of anti-dumping duties, Sweden's standard would require investigating authorities to review and revoke anti-dumping measures as soon as they had taken effect.

93. The United States maintained that Article 9:2 placed an explicit burden upon the Party requesting review to provide positive information substantiating the need for a review. The "positive information" standard in Article 9:2 could be likened to the standard of "positive evidence" in Article 3:1 which pertained to determinations of the existence of injury. In the United States' view, "positive information" was not as high a standard as "positive evidence" in Article 3:1, but it was closer to "positive evidence" than to "sufficient evidence" in Article 5:1 (pertaining to the initiation of anti-dumping investigations) for two reasons: First, the words were more similar -- "positive information" and "positive evidence" shared the word "positive"; there were no common words shared by "positive information" and "sufficient evidence." Second, reviews, by their nature, merited a higher evidentiary threshold than a new investigation. The requirement of "positive evidence" in Article 3 for imposing a duty and the requirement of "positive information" in Article 9 for reopening an investigation were significantly

[59]See para. 86, *supra*.

different from the minimal threshold of "sufficient evidence" in Article 5 for the institution of an entirely new investigation.

94. The United States argued that unlike a new investigation, a review investigation was not written on a "blank slate." The respondents had previously been found to have dumped and to have caused injury. A substantial record existed of the facts leading to that determination. A full investigation to uncover facts already known would waste valuable administrative resources and unnecessarily burden all parties. It was therefore not surprising that the Agreement would place a burden on a respondent requesting review to submit facts that justified the review. A higher standard was required to justify an examination of whether the situation was now opposite to what it had been (review), than an examination of whether injury existed starting from a neutral position (new investigation).

95. The United States said that in deciding whether "positive information" existed under Article 9:2, the investigating authorities were entitled to consider contrary evidence and to make a judgement as to the significance of the information. It was not enough for a party simply to allege certain facts. The Agreement required submission of positive information "substantiating" the need for review. With respect to the initiation of a review, the party seeking review had, in effect, to persuade the USITC that changed circumstances warranted conducting the equivalent of another "final" investigation of injury. Although a request for institution of a review did not have to "prove" that changed circumstances existed such that injury would not recur upon revocation, it nevertheless had to contain credible evidence which, if uncontroverted by other evidence, would persuade the USITC that a full review was warranted. Full reviews would not be instituted based upon mere allegations in a request that were clearly contradicted by evidence submitted by others in response to the USITC's notice, or allegations that were contradicted or undermined by a requesting party's own data. To allow full reviews in such circumstances would sanction a waste of administrative resources and would subject the injured domestic industry to the added expense of defending the USITC's injury determination repeatedly, based on no showing by the requesting party that such a review was warranted.

96. Regarding the United States' reference to the Norwegian Salmon Panel[60], Sweden said that it did not see any similarities between the issue before that Panel and the case at hand. In the Norwegian Salmon Panel, it had been argued by the complainant that since the anti-dumping duties by definition removed the injury, revocation of the duties was called for as soon as they had been imposed. In the case of Avesta, almost 20 years had passed since the anti-dumping duties had been first imposed. There was a fundamental difference between revocation immediately and revocation after 20 years. Sweden considered that the imports which entered the market after the imposition of an anti-dumping duty could not, by definition, be injurious. The anti-dumping duty should be seen as a remedy for the injury suffered by the domestic industry. Therefore, an anti-dumping duty should not be withdrawn immediately. However, the remedial nature of the anti-dumping duty made it necessary, at some point in time, to revoke or review the anti-dumping order. Thus, the conclusions of the Norwegian Salmon Panel report had no relevance to the case at hand.

97. Sweden noted that the United States, without offering any legal authority for its argument, contended that the "positive information" standard as used in Article 9:2 was equal to the "positive evidence" standard as used in Article 3:1, and thus, that already in this initial stage, the exporter had to prove that injury would not recur. Furthermore, the United States also demanded that the "changed circumstances" had to be unrelated to the "expected results" of the anti-dumping duties. This imposed an additional obligation which found no support in the Agreement. Even if the levels of imports had decreased as a result of the duties, it was not correct to draw the reverse conclusion, i.e. that imports

[60]See para. 89, *supra*.

would increase if the duties were removed. It was also incorrect to presume that injury would automatically recur if imports increased.

98. Sweden objected to the United States' arguments concerning "continuing injury".[61] In Sweden's view, the United States' reasoning regarding its interpretation of Article 9:2 had the following implications: Firstly, it would impose a double standard for obtaining a review. Not only would the exporter have to provide evidence regarding "changed circumstances", he would also have to provide evidence that injury would not recur. Secondly, it would mean that an anti-dumping duty could remain in force with no valid determination of injury as a legal basis for the continued imposition of duties. The duty would thus become punitive instead of remedial. Thirdly, it would reverse the burden of proof. It was the Party imposing the duty who had the responsibility to ensure that all actions were consistent with the Agreement and, under Article 9, who had the burden to prove that the continued imposition of duties was still necessary. It could not be up to the exporter to show - and certainly not to prove beyond a reasonable doubt - that he was "innocent" of injurious dumping. Sweden asserted that the idea that the requirement for initiating a review should be interpreted to place a burden on the respondent was inconsistent with the concepts of "equitable and open procedures" and "full examination" contained in the Preamble of the Agreement.

99. In Sweden's view, "positive evidence" referred to a complete factual record compiled after a lengthy investigation conducted by governmental agencies. These agencies had the authority to compel companies, among other things, to submit confidential business information. The exporter had no legal authority to obtain such information from its competitors, and in this respect did not have the same resources as the governmental agency. Furthermore, the standard proposed by the United States would make the actual review superfluous. If an interested party was able to provide "positive evidence", as the United States argued should be provided, that party had already directly proven that injury would not recur, and there would be no need to conduct a review in order to determine the same conclusion again. Thus, whenever the exporter had been able to indicate - or when the investigating authority had the information - that the original injury determination was no longer valid, a review had to be conducted.

100. Regarding the United States' argument that a review investigation "was not written on a blank slate"[62], Sweden said that a review was prospective in nature and that the earlier established facts - the original determination of injury - were thereby less important. In the present case, the "substantial record" referred to by the United States was a 20-year old determination of injury. The 1973 determination did not in any way support the argument that injury would recur if the duties were removed. Moreover, the United States' argument concerning wasting valuable administrative resources revealed a negligence of fulfilling the obligations under the Agreement. A Party which imposed duties under the Agreement had to be prepared to bear the full costs of doing so.

101. The United States noted that Sweden had acknowledged that "imports which entered the market after the imposition of an anti-dumping duty could not, by definition, be injurious." It was thus contradictory for Sweden also to state that the test for deciding whether to review was whether injury had been "remedied".

102. The United States argued that in determining whether a full review was warranted, the USITC was permitted to weigh the evidence presented to it. However, the USITC did not look to resolve significant factual disputes that required the collection of additional factual information, unless the

---

[61]See para. 89, *supra*.

[62]See para. 94, *supra*.

information submitted warranted this. In this regard, the United States cited the example of a case that had come before the USITC for review in 1987. In "Liquid Crystal Display Television Receivers from Japan"[63], there was a conflict between the data submitted by the requesting Party and that submitted in opposition to the request. Given the conflict in the data, the USITC determined that a full review was appropriate in order to gather all relevant information prior to making a determination. By contrast, in Avesta's case, the data submitted by the requesting Party itself contained internal inconsistencies.

103. Regarding Sweden's contention that the United States had wrongly, and without legal authority, equated the "positive information" in Article 9:2 with the "positive evidence" in Article 3:1, the United States said that it was only arguing that, as between "positive evidence" and "sufficient evidence", "positive information" was closer to "positive evidence", but that, in any event, it need not be decided precisely where the term "positive information" fell. It was sufficient in the case at hand for the Panel to conclude that, in deciding whether positive information had been submitted, the investigating authorities were permitted to examine the information critically, and to weigh it against other information received. This was what the USITC had done in the present case, and that was how it had arrived at its conclusion that a full review was not warranted. The United States noted that Sweden had not contested that the investigating authorities could do this under Article 9:2.

104. Contrary to what Sweden had alleged, the United States asserted that the USITC did not require the requesting party to prove in its request for review that injury would not recur upon revocation of the duties. Nor, at the request stage, did the USITC seek to resolve legitimate and substantial factual issues that required further investigation. The USITC did require that the requesting Party justify the review by presenting information that provided a reasonable basis on which to suspect that injury would not recur upon revocation of duties. This information had to be credible and had to be more than mere allegations.

105. The United States said that in Avesta's case, the USITC determined that there was not credible information of changed circumstances warranting a review. In reaching this determination it had not been necessary for the USITC to resolve legitimate factual disputes or to choose between conflicting credible evidence submitted by interested parties. In fact, in most instances the USITC had relied upon data provided by Avesta in making its determination.

106. The United States argued that the changed circumstances alleged in the request for a review would be the changed circumstances examined in the course of the review itself, although a review might not include all allegations in a request, but only those warranting review. In this sense, the standard for evaluating changed circumstances at the institution stage and after review was the same - they had to relate to what would happen upon revocation of the duties. However, the level of evidentiary support that would justify revocation of duties was higher than that for institution of a review, in view of the more complete record in a full review.

107. The United States also remarked that, under US law, the Party requesting the review retained the burden, during a review, of showing changed circumstances justifying revocation. This was consistent with the Agreement. Sweden itself had indicated that the burden of proof during a review was higher than the requesting Party's burden in obtaining a review. Sweden had also stated, however, that the requesting Party's burden during a review was not only not higher than its burden in requesting a review, but disappeared completely once a review began, and instead shifted to the investigating authorities to demonstrate that continued anti-dumping measures were necessary. There was nothing in the Agreement that justified burden shifting once a review ensued.

[63]Inv. No. 751-TA-14 (1987).

108. Regarding the United States' argument that in determining whether a full review was warranted, the USITC was permitted to weigh the evidence presented to it[64], Sweden said that Article 9:2 of the Agreement did not prevent an investigating authority from taking into account other information when assessing whether a request fulfilled the requirement of "positive information". Sweden was of the view, however, that the US review procedure in itself and as applied in this particular case was unfair and inequitable, and not in accordance with the Agreement. The Agreement was mandatory in its requirement that a review should be initiated when positive information had been submitted by the party requesting the review. If, however, a signatory gave the domestic industry the opportunity to submit counter-arguments already at the initial stage, the requesting party had to have the opportunity to respond to such counter-arguments. This had not been allowed for in the present case.

2. Factual Arguments

109. In its 1987 request under Section 751 for a review by the USITC of the injury determination regarding imports of stainless steel plate from Sweden, Avesta alleged a number of factors as changed circumstances substantiating the need for review.[65] The Parties' views - as presented to the Panel - on the information presented in, and the action taken on, the 1987 request are as follows in sub-sections (1) through (6) below. As the changed circumstances alleged in Avesta's 1985 request for review by the USITC were covered in the 1987 request, these sub-sections focus on the 1987 request. The USITC's statement of reasons in its decisions on the 1985 and 1987 requests are carried in Annexes II and III, respectively.

110. Sweden maintained that had the United States investigating authorities made a correct evaluation of all the information submitted by Avesta, the request for review should have been accepted. In such a review, Sweden was of the firm opinion that an investigating authority could not have drawn any other conclusion than to order revocation of the duties.

111. The United States asserted that the USITC had properly examined and fully explained the reasons why none of the arguments proffered by Avesta had warranted a full review of the original injury determination, and that the USITC was entirely justified in refusing to initiate a review as requested. The United States said that in the present case, two key factors had to be kept in mind. First, the USITC had based most of its conclusions on data submitted by Avesta itself; the USITC's determination had not turned on choosing between different sets of credible but conflicting data. Second, the USITC had concluded that certain information submitted by Avesta was flawed and/or manipulated, casting doubt on Avesta's credibility before the USITC.

112. Sweden objected to the United States' contention that Avesta had submitted manipulated data. The USITC, had it deemed it necessary, could easily have obtained clarifications on the data submitted by Avesta, both prior to the determination and, preferably, during the actual review. Sweden noted that Avesta had argued in the appeal process that it was improper for the USITC to dismiss the review request without an investigation, since there was disputed evidence concerning exports to the EC.

113. The United States argued that the role of dispute settlement panels was to review findings so as to ascertain whether the administering authorities had objectively examined the evidence, had explained the reasons for their decision, and whether the evidence reasonably supported that decision. However, a panel should refrain from re-evaluating the weight to give the evidence. This de novo standard of review would exceed the proper role of a panel. The issue was not whether the investigating authorities

[64]See para. 102, *supra*.

[65]See para. 19, *supra*.

had made the decision the Panel would have made had it been the investigating authorities. It was axiomatic that reasonable persons looking at the same set of facts could draw different conclusions. In the present case, the USITC had concluded that Avesta had not submitted positive information substantiating the need for review. The Panel's task was to determine whether that conclusion was inconsistent with the Agreement by examining whether the facts reasonably supported the conclusions articulated by the USITC. This was not a standard that required the Panel to accept the USITC's conclusions without examining them, including, where necessary, examining factual aspects of the case; nor did it limit the Panel to looking only at whether proper procedures had been followed. It did, however, avoid placing the Panel in a role like that of an investigating authority considering the case in the first instance.

114. Sweden argued that it had to be up to the Panel to determine, in each specific case, what information it needed in order to make its findings. A determination by the Panel as to whether Avesta had fulfilled the requirements of the Agreement involved a determination as to how the United States had applied the mandatory requirement to conduct a review if an interested party submitted "positive information". Sweden argued that even where the authorities might have examined the evidence objectively, it was a violation of the Agreement to refuse to conduct a review where "positive information" had been presented. By arguing that the Panel should not reweigh the evidence, the United States implied that the Panel could not address the legal issue of whether the information before the USITC substantiated the need for review. The Panel had to have the power to conduct its own independent review of the factual evidence relating to the issue of whether the United States authorities had fulfilled their obligations under the Agreement.

2.1 Evolution of the Volume of Imports

115. Sweden contested the USITC's evaluation of the data regarding the volume of Swedish imports and its conclusion that the information presented did not show changed circumstances warranting a review. The USITC had wrongly attributed the decline in imports from Sweden to the imposition of the anti-dumping duty, and had not taken into account that changes had occurred that indicated that imports would not increase in the future. In addition, the inclusion in the data relied upon by the USITC of certain products that should have been excluded had skewed the results of the USITC's examination.

116. Sweden recalled that Article 3:2 of the Agreement stated that:

> "With regard to volume of the dumped imports the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing country."

The USITC had excluded the factors provided for in Article 3 from its consideration of whether a review was needed, by considering the decline in stainless steel plate imports from Sweden as a natural result of the duties, by neglecting the possible price effect, and by neglecting other factors which might have a bearing on the industry. This had made it more or less impossible for an interested party to obtain a review. The USITC had argued that the natural result of imposition of duties was a decline in imports and, in addition, that the interested party had also to prove that the decline in imports was unrelated to the duties. As previously stated[66], in Sweden's view such an interpretation added an extra burden upon the exporter and introduced an additional requirement for which there was no support in the Agreement.

[66]See para. 86, *supra*.

117. Sweden noted that Avesta's 1987 request for a review showed that US imports of stainless steel plate from Sweden had decreased substantially and, since 1974, had been at negligible levels. Between 1974 and 1986 these imports, in relation to apparent US consumption, had in most years been below one per cent: for example, 0.86 per cent in 1974, 0.57 per cent in 1980, and 0.63 per cent in 1985.[67] On average, imports from Sweden as a percentage of US consumption were 0.9 per cent between 1974 and 1986.

118. Sweden noted that the above-mentioned figures included three products - Stavex, Ramex and Type 904L - that had been officially excluded from the anti-dumping order in 1976 and had not been subject to anti-dumping duties since then. The figures also included other imported products - KBR, 253 MA and 254 SMO - that in Sweden's view should be excluded from the scope of the order because they did not compete with any type of stainless steel plate made in the United States.

119. Sweden further noted that its share of total US imports of stainless steel plate had decreased since the original determination of injury in 1973: imports from Sweden represented 41 per cent in 1974, 22 per cent in 1980 and only eight per cent in 1985. In its 1987 determination, the USITC stated that

> "As we noted there [in the 1985 decision], U.S. imports of Swedish stainless steel plate declined sharply in 1974, the year following the imposition of the anti-dumping order, and, although fluctuating from year to year, they remained relatively constant thereafter. A decline in exports is an expected result from the imposition of an order." (pages 3-4)

Thus, the USITC had recognized that the anti-dumping duties, by leading to a reduction in import volumes, had accomplished their intended effect of remedying injury. When this intended result had been accomplished, the USITC should have investigated whether the continued imposition of the duties was necessary to prevent injury. Instead, the accomplishment of the intended result had been treated as an excuse for not conducting the injury review. The USITC's refusal to initiate a review was incorrect, since Avesta had also provided detailed explanations of the decline in these imports and of why they had remained at negligible levels.

120. The United States argued that the USITC had properly found that the information presented by Avesta regarding the volume of imports did not constitute changed circumstances warranting review. A major effect of anti-dumping duties was to offset the competitive advantage gained in the importing market by pricing imports at less than fair value. Thus, a decline in imports was a natural result of the imposition of anti-dumping duties. When imports were forced to price fairly, they lost this market advantage, without which such imports might well decline. This was what had happened with stainless steel plate from Sweden following imposition of anti-dumping duties. Without the advantage of dumped sales, Avesta's US imports had declined precipitously. Imports of stainless steel plate from Sweden, as a percentage of apparent domestic consumption, had declined from 11.52 per cent in 1972 to 5.16 per cent in 1973, the year of the original investigation.[68] Immediately following imposition of the anti-dumping duty order in 1974, imports of Swedish plate had fallen to 0.86 per cent. For the next decade, import levels had remained low. From 1974-1985, imports from Sweden had fluctuated, but had always remained below 1 per cent of apparent domestic consumption. In sum since the imposition of duties, the volume of Swedish imports had been low.

---

[67]See Annex IV, *infra*.

[68]See Annex VI, *infra*.

121. The United States reiterated that the purpose of a review investigation was to determine whether injury would recur if the duties were removed. Once such duties were removed, the unfair price advantage gained by dumped sales was no longer offset. In the absence of other changes in the market, the unrestrained imports could thus be expected to regain their previously injurious market position. Therefore, the party seeking to substantiate the need for a review had to provide, at a minimum, positive information substantiating its allegation that the decline in imports subsequent to the order was unrelated to the imposition of duties. Avesta had not provided such information.

122. Regarding Sweden's contention that the import levels had been inflated because they included three products that had been excluded by the DOC in 1976 and were not covered by the anti-dumping duty[69], the United States said that, as a factual matter, Sweden was at least partly incorrect. While Type 904L plate had been excluded from the order in 1976, the volume of this plate was very small and had not affected the general trend of the import statistics. The CIT had observed that the failure to exclude Type 904L was harmless error[70], and had affirmed the USITC's determination that Stavex and Ramex were both included in the order and that counting them in import levels was appropriate. While the matter was before the USITC, Avesta had failed to demonstrate that Stavex and Ramex were not included in the tariff items covered by the anti-dumping duty order.

123. Sweden noted that Avesta, in its 1987 review request, had requested the USITC to exclude three imported products - Type 904L plate, Stavex, and Ramex - from the official imports statistics when it evaluated the level of imports from Sweden. Avesta had explained, by referring to the 1973 finding of dumping by the Treasury Department, that Type 904L had been excluded from this finding because its composition was outside the normal composition of most other stainless steel grades. Avesta had also explained that neither Stavex nor Ramex competed in the same market as the standard grades of stainless steel plate, and that they were produced by an unrelated company, Uddeholm Tooling. Contrary to the United States' contention that the USITC had specifically addressed each issue raised by Avesta, the USITC had not mentioned Avesta's claim that the three products should be excluded from the import statistics. The USITC decision did not state expressly whether or not it had excluded imports of these three products from its analysis, or whether or not it had considered the products to be subject to the anti-dumping duty order.

124. Sweden noted that in 1976, the Customs Service of the Treasury Department had issued a binding ruling which held that Stavex, Ramex and Type 904L were not subject to the anti-dumping duty. In Sweden's view, the USITC had not sought the necessary information from the responsible agency, and instead had erroneously assumed that Stavex and Ramex were within the scope of the anti-dumping order. The USITC could easily have obtained a copy of the ruling if it had made such a request, since the 1976 ruling was an official record of the US Government in the anti-dumping proceeding and was on file at the DOC. Avesta had shown in its 1987 request that a significant volume of the reported imports consisted of Stavex and Ramex - and to a lesser extent, Type 904L. In each year from 1977 to 1986, Stavex and Ramex had represented at least 25 per cent of US imports from Sweden, reaching 68 per cent in 1983. The erroneous inclusion of the products in the import statistics had distorted the USITC's conclusions concerning the volume of imports.

125. The United States said that in 1985, no argument had been raised regarding Stavex and Ramex. In its analysis of Avesta's 1987 request for review, the USITC noted that the import volume was rising and unchanged from 1985, thus indicating that the USITC had clearly not excluded Stavex and Ramex from its 1987 analysis. Avesta had made no mention of the 1976 ruling by the Treasury Department,

---

[69]See para. 118, *supra*.

[70] Avesta AB and Avesta Stainless Inc. v. United States, 724 F. Supp. 974 (CIT 1989) at 980.

and the USITC had not been aware of that ruling. The ruling had never been issued publicly or published in the Federal Register.

126. The United States further observed that, not only had Avesta not indicated that products might already be excluded from the scope of the anti-dumping order, but by arguing that the USITC should find a way to exclude Stavex and Ramex from the order, Avesta had necessarily represented that such products were within the scope of the order at that time. By requesting that the USITC undertake to perform a specific act, Avesta had led the USITC to believe that the act had not yet been performed. In fact, at all times that this matter had been before the USITC and the courts of appeal, Avesta had consistently argued that the USITC should exclude these items from the order. At no time had Avesta suggested that imports of Stavex or Ramex had already been excluded by the Treasury Department in 1976, nor had it brought any previous documents of the US Customs Service to the USITC's attention. The only item that it had argued had been excluded was 904L. The simple reason why the import data the USITC had examined did not explicitly exclude Stavex and Ramex, was that the USITC had used Avesta's data. In its request for review, Avesta had submitted a table[71] that it had claimed showed total imports of stainless steel plate from Sweden. This table included Stavex and Ramex. Sweden could not now complain that the USITC had based its decision on these data.

127. Sweden explained that Avesta did not know about the 1976 ruling until the end of 1990, i.e. after the decision of the United States Court of Appeals, when the US Customs Service, in connection with one of Avesta's importations, had requested evidence that 904L was not subject to the order. Since Avesta had not been aware of the ruling until 1990, it could not have raised the issue in the appeal process. Even if Avesta had been aware of the ruling earlier, the appeal was, by US law, limited to the USITC's official record which did not include this ruling. One of the reasons for Avesta's request for reconsideration of the USITC's decision on the 1987 request for review was to receive an explanation of the product coverage of the anti-dumping duty order.

128. Sweden said that the United States had conceded that Stavex, Ramex and 904L had been excluded from the scope of the dumping order in 1976, and yet the USITC had based it evaluation on statistics which included these three products. Thus, the USITC had based its decision on incorrect factual premises, although the correct information was in the public record and on file in the Department of Commerce. In Sweden's view, Avesta had been in no position to know that Stavex and Ramex had already been excluded from the scope of the dumping finding, since those products were produced by an unrelated company, Uddeholm Tooling. Avesta had direct business reasons to know the dutiable status of Type 904L, but not of Stavex or Ramex. Sweden reiterated that Avesta had explicitly claimed that these products should be excluded, but that the USITC had considered - although never stating it, and contrary to the 1976 ruling by the Treasury Department - that the products were competitive.

129. Sweden noted that Avesta's request for the exclusion of these three products from the statistics had not even been controverted by the US domestic producers in their memorandum in opposition to the request for review. In addition, Avesta had repeatedly tried to discuss the product coverage of the anti-dumping duty order with the USITC in order to exclude certain products. Sweden noted that the special grades of plate had been excluded from the "Section 201" duties, which implied that the USITC had not considered them to be injurious; the product distinction "hot-rolled" and "cold-rolled" was relevant only in that context. As to overall statistics, Sweden argued that the relevant product definition should be such stainless steel plate, hot-rolled or cold-rolled, that was covered by the dumping order, but not Stavex, Ramex and 904L which had been excluded. Had the USITC tried to satisfy itself that Avesta's request concerning 904L was correct, it might also have found that Stavex and Ramex had been excluded from the scope of the dumping finding. Sweden asserted that it was not Avesta's

[71]See Annex VII, *infra*.

responsibility to be updated on US determinations. The fact that the United States had divided the responsibilities regarding dumping and injury determinations between two government agencies was no excuse for the USITC's ignorance in this matter.

130. The United States explained that the USITC had often rejected Avesta's manipulation of its data or Avesta's dubious explanations of the significance of certain data, but that the facts themselves had been provided by Avesta. The arguments of Avesta had been consistently undermined by Avesta's faulty presentation of fact and mislabelling of statistical information. This lack of credibility had seriously undermined Avesta's attempts to meet its burden of persuasion.

131. Sweden rejected the United States' allegation that the information submitted by Avesta had been manipulated. The USITC had never indicated to Avesta that Table 3A[72] of Avesta's 1987 request for review was not going to be accepted. This failure had caused the USITC to draw an improper conclusion, namely that imports from Avesta (1) had not decreased and (2) were mainly standard grade. For example, in 1986 the imported quantities, as set out in Avesta's request, were as follows: standard grade hot-rolled - 0; KBR plate - 684 tons; patented hot-rolled - 50 tons; others - 215 tons. The imports of "others" had, according to Sweden's information, often been misclassified; on many occasions sheet bar had been classified as plate. For customs clearance purposes, this had been corrected, but in the statistics, these quantities were still reported as plate from Sweden. Another problem was that on many occasions Sweden had been classified as the country of origin, although the imports had been made through third countries. Unfortunately, these mistakes had not been corrected in the statistics.

132. Sweden further argued that the difference between Tables 3A and 3B of Avesta's 1987 request for review was that Table 3A did not include Stavex, Ramex and 904L. This was correct, since those products were not within the scope of the order. In addition, Avesta had excluded KBR from the statistics, while at the same time claiming that Stavex, Ramex and Type 904L should be excluded from the scope. This had not been accepted by the USITC and, apparently, the USITC had drawn the conclusion that Table 3A was improper in whole. If the USITC had had the intention of basing its conclusions on the proper data, it could easily have done so, since the import figure for KBR, which had been imported only in 1986 (684 tons), had been provided in Avesta's request. At any rate, Sweden considered that if there were controverted data, the USITC should, in accordance with its own practice, have initiated a review.

133. With regard to Sweden's arguments relating to the 1976 US Customs Service letter, the United States argued that Article 15:5 of the Agreement limited Panel review to the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country, and that the newly introduced letter did not meet this requirement.

134. With regard to Sweden's reference to Avesta's request for reconsideration of the USITC's 1987 decision[73], the United States said that although the USITC's rules did not specifically authorize requests for reconsideration, the USITC had nevertheless replied to Avesta with a letter noting that the USITC had "carefully reviewed" Avesta's request but had decided to deny the request. The United States asserted that this decision was entirely reasonable, as the arguments in Avesta's request had either repeated arguments it had made in its request for review, or were obviously without merit. In short, Avesta's request for reconsideration had not only been outside of the USITC's rules, but had offered little or nothing new that would have justified a change in result.

---

[72]See Annex VI, *infra*.

[73]See para. 127, *supra*.

2.2 1976 Acquisition of a Mill in the United States

135. Sweden contested the USITC's conclusion that the acquisition by Avesta of a mill in the United States did not constitute a changed circumstance warranting a review. Avesta had argued in its 1987 request for review that the negligible levels of the volume of imports from Sweden had resulted largely from the 1976 acquisition of a hot-rolling plate-producing mill in the United States by the predecessor of Avesta AB. At present, Avesta's US mill, Avesta Inc., was one of the United States' largest producers of hot-rolled stainless steel plate. The acquisition of this mill had resulted in a decline of Avesta's exports of hot-rolled stainless steel plate to the United States. Sweden provided the Panel with information on the evolution of the volume of exports[74] to support its argument regarding the impact of the acquisition of this mill. In 1976, Avesta's US mill shipped almost [ ] tons of hot-rolled stainless steel plate into the US market; this volume represented only [ ] per cent of all shipments by US domestic producers. In 1984, shipments of hot-rolled plate into the US market by Avesta Inc. had grown to over [ ] per cent of all shipments of stainless steel plate by all US producers.[75]

136. Sweden asserted that the USITC, in its decision on Avesta's 1987 request for review, had not considered that this acquisition had resulted in a decline in imports:

> "As we found in 1985, the level of imports from Sweden has not decreased since that purchase. … We conclude that the Swedish producers have offered no additional argument to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States." (pages 4-5)

The USITC had not considered whether the acquisition was relevant to the original determination of injury from 1973, or whether the submission contained "positive information substantiating the need for review", or whether the continued imposition of duties was necessary to prevent injury. The USITC had concluded only that the acquisition did not constitute "changed circumstances".

137. The United States said that the USITC had correctly found that Avesta's acquisition of a mill in the United States was not a changed circumstance warranting review, because Avesta's claim regarding the impact of the US mill purchase was unsupported by the facts. While Avesta's US plate production had obviously grown since the 1976 acquisition, its import levels and market share had fluctuated within a narrow range. In 1977, import volume and market share had declined slightly from 1976 levels. In 1978 and 1979, however, these levels had again risen. Import volume of plate from Sweden had exceeded 1976 levels in 1979, 1984 and 1986, and market penetration by Swedish plate had exceeded 1976 levels in 1984 and 1986. In fact, by 1986 - the last year under investigation - both annual volume and market share for Swedish plate had exceeded 1976 levels. If Avesta's US-made plate was supplanting sales, it was not sales of Avesta's Swedish imports into the United States, which had continued at rates equal to or higher than when its US plant had begun production in 1976.

138. Regarding Sweden's contention that the USITC had not considered whether Avesta's US plant purchase was relevant to the original determination or whether the purchase amounted to positive information substantiating the need for review[76], the United States said that the USITC had specifically determined whether Avesta's claim was a changed circumstance sufficient to warrant a full review. The USITC had examined whether the changed circumstance would affect the USITC's original

---

[74]See Annex IV, *infra*.

[75]See Annex VIII, *infra*.

[76]See para. 136, *supra*.

determination regarding the condition of the industry or the impact of dumped imports. Since the USITC had found that the purchase of the US mill would affect neither the US industry's condition nor the likelihood of additional imports from Sweden, it had determined that the purchase was not a changed circumstance substantiating the need for a review. In making this finding, the USITC had objectively examined the evidence of record and had fairly applied the standard of Article 9, thereby fulfilling its obligations under the Agreement.

139. In response to a question from the Panel as to the basis for the USITC's conclusion that "…the Swedish producers have offered no additional argument to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States", the United States noted that it was Table 3B of Avesta's 1987 request for review - which provided data for all imports from Sweden - upon which the USITC had relied in making its determination that the long-term practices of exporters had not significantly changed. Table 3B indicated that Swedish imports in 1984 and 1986 were higher both in absolute terms and as a percentage of apparent US consumption than they had been in 1976, the year of the acquisition of the US plant. The USITC had chosen not to rely on the incomplete data in Confidential Table E[77] of Avesta's 1987 request for a review, and instead had relied on the complete data provided by Avesta in Table 3B. Confidential Table E presented a distorted and incomplete picture of Swedish imports and was one of the many examples of transparent manipulation of data that had undermined the credibility of Avesta before the USITC.

140. The United States noted that Avesta had asserted that acquisition of the mill had caused a substantial shift in its market strategy and that the New Castle mill was used to supply the majority of Avesta's hot-rolled plate for the US market. Avesta had stated that it intended to use the US facility for hot-rolled plate except for specialty types. However, Avesta's data showed that exports of Swedish plate to the United States were predominantly hot-rolled, including a very substantial percentage of standard types. Once again, Avesta's arguments had been belied by its own data. Avesta's total imports of stainless steel plate from Sweden were actually higher in 1986 than they were in 1976 when the New Castle plant had been acquired. In response to a question from the Panel as to the data on which the USITC had based its conclusion that "… exports of Swedish plate to the United States are predominantly hot-rolled ….", the United States explained that "KBR" was the term used by Avesta to designate all of its cold-rolled products - sheet, plate and coils. Avesta's total imports reported in Table 3B included only one shipment (of 684 tons) of KBR plate in 1986. All other imports had consisted of hot-rolled plate. Again, the USITC's conclusion that "exports of Swedish plate to the U.S. are predominantly hot-rolled" had been based on Avesta's own data. The USITC had examined the patterns of imports from Sweden and had found that Avesta had not presented information to substantiate its claim regarding a change in market strategy.

141. In response to a question from the Panel as to the data on which the USITC had based its finding that "… the two patented types of plate are being imported in only small quantities and, … Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States", the United States noted that the statement of the USITC that "Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States" was based on Table 3A of Avesta's 1987 request for review, which excluded the specialty types of stainless steel plate such as 904L, Stavex, Ramex and KBR.

142. Sweden noted that the USITC had stated that "current data show notable increases in the most recent period" and that "exports of Swedish plate to the U.S. are predominantly hot-rolled". On the one hand, the USITC argued that Sweden's exports had increased - which could only refer to imports

[77]See Annex VIII, *infra*.

of KBR plate - and on the other hand, the USITC argued that those exports consisted predominantly of hot-rolled grades. Sweden said that up to 1986, exports of plate from Avesta AB to the US had contained only hot-rolled plate products. In 1986 - the year which the United States had cited as an indication that imports had increased - cold-rolled products (KBR) had also been imported. In 1986, imports from Sweden had consisted of the following:

Standard hot-rolled grades	-	0 net tons
Special hot-rolled grades	-	50 net tons
Cold-rolled grades (KBR)	-	684 net tons
Misclassified	-	215 net tons.

Thus, for 1986, the USITC conclusion that exports of Swedish plate to the United States were predominantly hot-rolled was factually wrong. Regarding the USITC's statement that Swedish exports included "a very substantial percentage of standard types", this could perhaps have been true for the situation immediately after the imposition of the duties, but certainly not for the 15 years following the imposition of the duties. Imports from Sweden did not contain any hot-rolled standard grades in 1986, since those grades had been, and continued to be, produced by Avesta's US mill. Thus, the USITC's argument that a substantial percentage of Swedish exports was standard grades was also factually wrong.

143. In response to a question by the Panel as to the USITC's consideration of the data in Table 4[78] of Avesta's 1987 request for a review, the United States explained that Table 4 - which contained data on average monthly imports of stainless steel plate from Sweden and upon which Avesta had relied in making its argument regarding the impact of the US mill purchase - had been considered by the USITC in making its decision. However, the USITC had decided to base its decision on the annual data in Avesta's request, which was contained in Table 3B. Avesta's annual data demonstrated that the major decrease in imports from Sweden had occurred following the 1973 imposition of anti-dumping duties, and that there had been no clear decreasing trend since 1976. Although it might also have been reasonable to rely instead on the data as broken out in Table 4, this did not make it any less reasonable to have used Avesta's annual data. Avesta itself had based many of its arguments on the annual data. The USITC's general practice was to examine yearly figures, in order to better discern long-term trends in data. Also, Table 4 was based on the data in Table 3A, which did not include all stainless steel plate imports from Sweden, but was limited to what Avesta had termed "competitive" grades. Furthermore, the groupings in Table 4 would tend to distort the monthly trends. The increases in shipments in 1984 and 1986 were diluted by weighing them together in a ten-year monthly average. In addition, the bulk of the imports in the period 1973-1975 had occurred in 1973, the year of the investigation, thus upwardly biasing the monthly average for the period as a whole. In short, the groupings suggested by Avesta had not helped to make the picture of Swedish imports clearer, but rather had made it more unclear. The USITC had chosen to rely on annual data instead.

144. Sweden contended that it would have been unreasonable to ask Avesta to provide evidence that its production in the United States had supplanted direct imports of plate from Sweden. It would be beyond the possibilities of an individual company to prove the causality of a specific market situation. Such an investigation could only be made by an entity having access to information on the full market situation, i.e. the USITC. This supported the statement that the USITC had a responsibility to undertake a review on its own initiative and that it would be impossible for Avesta or any other individual company to provide evidence of the kind required by the USITC. Sweden alleged that the three majority Commissioners' statement in 1987 that "U.S. imports of Swedish plate … remained relatively constant [after 1974]" and that "the level of imports from Sweden has not decreased since [the 1976] purchase

[78]See Annex X, *infra*.

[of the New Castle Mill]" was erroneous. The record had established that the average quantity of stainless steel plate imported from Sweden in 1974 and 1975 was 1632 short tons, and its average annual import penetration was 1.25 per cent. In the eleven years from 1976 through 1986, the average quantity of plate imported from Sweden had been only 1019 net tons. The average annual import penetration had been 0.85 per cent of apparent US consumption. Thus, since the acquisition of the US mill, the average annual quantity of imports had been more than 60 per cent below the average annual level in the period 1974 to 1975. The average annual import penetration since 1976 had been more than 47 per cent below the 1974-1975 average.

145. Sweden explained that Avesta's corporate strategy was to supply the US market with stainless steel plate from its operating mill in the United States. In 1984, Avesta's management had publicly announced that this production facility was to be used as a base for marketing in the United States. Swedish exports were to be concentrated mainly on the European market while the US market was to be supplied through the mill in New Castle, Indiana. Sweden said that the 1976 acquisition of the US mill by Axel Johnson & Co. Inc., a corporate affiliate of Avesta Jernverks, constituted a change, already in 1976, in Avesta Jernverks' strategy towards the US market, when it began to rely on the US mill for selling standard grades in the United States; however, it had only been after the consolidation of Avesta Jernverks, Nyby Uddeholm and the New Castle mill that a comprehensive marketing plan of the entire plate industry of Avesta could be conceived. Since that date, the New Castle mill had been used as a base for production for the US market of Avesta AB's plate products. The marketing of Avesta AB's and Avesta Inc.'s products was handled by a third company, Avesta Stainless Inc. Sweden asserted that the fact that there was a change of strategy was supported by the statistics regarding the development of shipments from the New Castle mill as reported in Confidential Table E in Avesta's 1987 request for review read in connection with the statistics on US imports from Sweden.

146. Sweden noted that the New Castle mill could produce virtually all grades and sizes needed for the US market. Only in very special cases was any plate shipped from Swedish production. In this respect, Sweden noted the increased level of shipments from the US mill since the acquisition: [ ] net tons of stainless steel plate were produced in the US mill in 1976, and [ ] net tons in 1984, an increase of almost 500 per cent.[79] Sweden argued that the volume produced in the US mill and shipped to the US market could not have been produced in Sweden due to lack of capacity. In 1992, the plate production in Sweden was totally concentrated at the Degerfors plant. This plant's capacity was fully utilized in supplying the European market, sales to Avesta's own internal fabrication units, Eastern Europe and the Far East. There were no corporate plans to increase this capacity in Sweden, let alone to increase exports to the United States.

147. Sweden said that the United States' arguments regarding the evolution of the volume of imports of plate from Sweden and market penetration by Swedish plate since 1976 rested entirely on the analysis of import statistics which included imports of Stavex, Ramex, and Type 904L. It was not surprising that imports of these products had not decreased since 1976, as that was the year in which they had been excluded from the effects of anti-dumping duties. It was also not surprising that Avesta's acquisition of the US mill had had no effect on imports of Stavex and Ramex, since these two steel products were not produced by Avesta AB and were not commercially competitive with the stainless steel plate produced at Avesta's US mill. Sweden asserted that when the erroneous inclusion of these products was corrected, the evidence upon which the United States' argument relied supported the opposite conclusion. As Avesta had shown in its 1987 review request, when these products were excluded, both the volume of imports of plate from Sweden and the market penetration by Swedish plate had remained below the 1976 level in every subsequent year considered by the USITC. This evidence supported Avesta's

[79]See Annex VIII, *infra*.

claim that the volume of imports subject to the anti-dumping duties had declined after the acquisition of the US mill.

148. The United States said that if one assumed that Avesta's allegations regarding the volume of US imports of Stavex and Ramex were accurate, then Sweden was correct in stating that the import volume and market share of Swedish stainless steel plate - excluding 904L, Stavex and Ramex from the analysis - were below the 1976 level in each subsequent year. Nonetheless, the volume - even once one adjusted it by excluding these three products - had been increasing in recent periods and had approached the 1976 level. This was consistent with the USITC's finding in its 1987 determination that "current data show notable increases in the most recent periods". Thus, the USITC's conclusions were unaffected by the exclusion of Stavex, Ramex and 904L from the import data. Also, regardless of any exclusion of Stavex and Ramex, the data showed that a huge decline had occurred following the 1973 imposition of duties, and that any subsequent decline had been slight in comparison to the decrease caused by the imposition of duties.

149. The United States emphasized that Avesta's claims regarding the volume of US imports of Stavex and Ramex were based on certain untested assumptions. Avesta had provided no direct information on imports of Stavex and Ramex, but had simply stated that certain US tariff item numbers "reflected" such imports. Those tariff item numbers were assumed to include only Stavex and Ramex, with no explanation of the basis for that assumption. In fact, as shown by a letter submitted by the United States, US Customs officials were unaware of any imports of Stavex and Ramex in recent years.

150. Sweden argued that regardless of past import volumes, the USITC should have investigated whether, in light of the acquisition of the US mill, there was any evidence that imports would increase if the anti-dumping duties were revoked. A determination of the likelihood of recurrence of injury, by definition, had to be prospective in nature. It was evident that a company would be reluctant to compete with its own production. Clearly, Avesta had no incentive to export standard grades of plate which had to absorb high *ad valorem* import duties of 10 per cent and freight, insurance and other import costs, when equivalent local production at lower total costs was available. The statistics provided clear supporting evidence that the acquisition of the US mill had resulted in an unmistakable pattern of decreased imports from Sweden. Sweden noted that two of the USITC Commissioners had considered that Avesta's 1987 request did allege changed circumstances sufficient to warrant a review investigation, in particular, the factor of the purchase of the US mill.

151. The United States said that Sweden's argument that Avesta would have no incentive to export to the United States and thereby compete with its production at the steel mill in New Castle incorrectly assumed that investing in a foreign market and exporting to that market were mutually exclusive strategies. Sweden had offered nothing to support this broad assumption, and in fact, the two strategies were frequently complementary. According to Avesta's figures in its 1987 request for review, production from Avesta's US mill represented on average less than [ ] per cent of the US market for stainless steel plate. Thus, Avesta could easily export from Sweden without causing a significant loss, or even any loss, to the market share of its US mill. Moreover, Avesta's figures on its productive capacity in Sweden showed substantial available capacity to increase production for sale to the US market. For example, in 1985 Avesta's capacity utilization had actually exceeded 88 per cent, thus demonstrating the ease with which production could be readily increased.

2.3 Swedish Stainless Steel Plate Exports to the EC

152. Sweden contested the USITC's conclusion that the increase in Swedish stainless steel plate exports to the EC, and the reasons for that increase, did not constitute a changed circumstance warranting review. Sweden asserted that the USITC had used incorrect data, had understated the growth of Swedish exports of stainless steel plate to the EC market, and had never investigated whether the Free Trade

Agreement between Sweden and the EC - and the subsequent declining import volumes of Swedish stainless steel plate in the United States - had any relevance to the 1973 injury determination or whether this information substantiated the need for review. Sweden claimed that since the United States had included KBR plate in the anti-dumping order, these products had to be included in a comparison of the development of exports to the EC in order to arrive at a comparable data basis.

153. Sweden noted that Avesta had argued that in sharp contrast to the early 1970s, Western Europe represented in 1987 an increasingly strong market for Swedish plate, which entered both the EC and the EFTA countries duty-free and without any quantitative limitations. In the determination of injury from 1973 it was stated that:

> "One of the principal reasons for increased Swedish concentration on the U.S. market was the decline in demand for stainless-steel plate and sheet in Sweden's largest market, Western Europe. … However, exports to Western Europe fell off … in 1971, while exports to the United States increased sharply. With the loss of its Western Europe market, Sweden maintained its total export level in 1971 by increasing its exports to the United States and other markets outside of Western Europe." (pages 5-6)

Avesta had argued that a "changed circumstance" since 1973 was the creation of the Free Trade Agreement between the European Coal and Steel Community and Sweden, which had entered into force on 1 January 1974. This agreement had resulted in a major change in the circumstances on which the 1973 determination had been based. For example, prior to 1974, the EC had applied a seven per cent *ad valorem* duty on imports of stainless steel plate. The Free Trade Agreement provided for staged reduction of customs duties beginning on 1 January 1974, and customs duties on stainless steel were eliminated on 1 January 1977. In 1987 as at present, stainless steel plate between Sweden and the EC was traded duty-free and not subject to any quantitative restrictions. As a result, Swedish exports of hot-rolled sheet and plate to the EC-10 had increased from 22,494 metric tons in 1972 to 29,407 metric tons in 1985 - an increase of over 30 per cent. During the same period, Sweden's total exports of hot-rolled sheet and plate to all countries had declined from 66,126 metric tons in 1972 to 55,264 metric tons in 1985 - a decrease of over 16 per cent.[80]

154. Sweden argued that equally important, in 1987 the EC had imported substantial quantities of cold-rolled stainless steel plate and sheet thicker than 3 millimetres. By contrast, in the early 1970s only minimal quantities of Sweden's cold-rolled plate had been imported into the EC.[81] In its 1987 determination, the USITC had stated that:

> "Although petitioners here rely on a different data series for this proposition from that on which they relied in 1985, their current data failed to take into account the change in E.C. membership since 1972. When that change is accounted for, Swedish shipments to the E.C. fell irregularly from 1973 to 1981 and then increased irregularly through 1985. In 1985, Swedish exports to the EC were just five per cent higher than in 1972[*]. Thus, the Commission again finds that there is no sufficient changed circumstance with

[80]Brief for Plaintiffs-Appellants, Avesta AB and Avesta Stainless Inc. v. United States, Appeal from the United States Court of International Trade, United States Court of Appeals for the Federal Circuit, Appeal No. 90-1120, 12 Feb. 1990, page 8, Footnote 13.

[81]See Annex XI, *infra*.

[*]The United States subsequently clarified during the Panel proceedings that "1972" was a typographical error and that the text should have read, "since 1973".

regard to this allegation." (page 6)

However, in Sweden's view it was clear from the statistics found on page 8, footnote 13 in Avesta's brief before the United States Court of Appeals[82] and from the data on Swedish exports to the EC of stainless steel plate provided to the Panel by Sweden[83], that the statement of the USITC majority was not correct. The quantities imported from Sweden by the EC were, in volume terms, more than 100 times greater than the quantities imported by the United States from Sweden. Thus, a small percentage increase in exports to the EC had a huge impact on the possibility of exporting to other markets. Sweden claimed that the most proper data to use were those provided to the Panel. From those data a clear trend could be identified: exports to the EC had constantly increased and, between 1972 and 1991, by almost 130 per cent.

155. Sweden noted that the Free Trade Agreement between the EC and Sweden had not entered into force until after the 1973 determination. This fact had been ignored by the USITC in 1987, although the EC's elimination of import duties on Swedish stainless steel plate and the absence of quantitative import restrictions were relevant to the impact of Swedish stainless steel exports on the US industry, in particular since Sweden's trade with the EC had played a prominent role in the 1973 determination of injury. The USITC had never investigated whether the Free Trade Agreement and the subsequent declining volumes imported into the United States had any relevance to the determination of injury from 1973, or whether the information substantiated the need for review. The USITC had concluded only that the developments did not constitute "changed circumstances". Consequently, the USITC must have considered that the conclusion in the 1973 determination regarding Sweden's export behaviour vis-à-vis Western Europe was still valid, contrary to the facts presented by Avesta.

156. The United States said that the USITC reasonably determined that the alleged increase in Avesta's exports to the EC had not substantiated the need for review.

157. The United States noted that while the matter was before the USITC, Avesta had misstated the growth of its exports to the EC market. Despite Avesta's claim that Swedish shipments to the EC had increased 30 per cent from 1972-1985, the USITC had found that in 1985, such shipments had in fact been only five per cent higher than in 1973. This five per cent change from 1973 to 1985 had been calculated using the data supplied by the domestic industry in Table 7[84] of its 1987 submission.[85] EC shipments had been 28,005 tons in 1973 and 29,407 tons in 1985. The USITC had found that such a modest increase over a period of more than ten years did not constitute a changed circumstance, let alone a circumstance justifying a full review. Furthermore, Avesta had submitted flawed shipments data to the USITC, which the USITC had noted "failed to take into account the change in EC membership since 1972". Thus, Avesta had failed to satisfy its burden to submit positive information substantiating the need for review. The United States observed that, with regard to the EC shipments data provided by Sweden to the Panel[86], those data had never been presented to the USITC. Moreover, the new

---

[82]Brief for Plaintiffs-Appellants, Avesta AB and Avesta Stainless Inc. v. the United States, Appeal from the United States Court of International Trade, United States Court of Appeals for the Federal Circuit, Appeal No. 90-1120, 12 February 1990.

[83]See Annex V, *infra*.

[84]See Annex XII, *infra*.

[85]Memorandum in Opposition to the Request of Avesta AB and Avesta Stainless, Inc. for the Institution of a Changed Circumstances Review, 24 April 1987.

[86]See Annex V, *infra*.

data extended beyond 1987, the year of the USITC's determination regarding Avesta's second request for review. Thus, these data were irrelevant to the question of whether the USITC should have initiated a review. Moreover, Sweden's data did not agree with the data Avesta had submitted to the USITC. By submitting such data to the Panel, Sweden apparently believed that the data Avesta submitted to the USITC were incorrect. This was further proof that Avesta had not met its burden to submit positive information substantiating the need for review.

158. The United States said that Sweden had failed to explain how an increase in exports to other markets would have justified review in any event. Significantly, Sweden had retained substantial excess capacity in which to increase exports to the United States upon revocation of the anti-dumping duty order, regardless of its exports elsewhere. In its 1987 determination, the USITC had found (at page 7) that "there remains sufficient unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets." Even modest increases in Sweden's capacity utilization could substantially increase exports of dumped Swedish plate to the United States, further endangering US producers. Moreover, when exports to the United States decreased upon imposition of the order, exports to other markets could be expected to increase, as Swedish producers were forced to find markets elsewhere. Thus, an increase in exports to other markets could simply have been another result of the imposition of anti-dumping duties. Furthermore, although Avesta had offered reasons why it could not expand its practical capacity to produce stainless steel plate in the short-term, it had provided no information to show that it was unable or unlikely to expand operations using its existing capacity.

159. The United States said that Sweden's argument that the USITC had never ruled whether the increase in exports to the EC substantiated the need for a review[87] was mistaken. The USITC had correctly held that the alleged increase in exports to the EC was, at best, minimal, and had explained why the alleged increase did not constitute changed circumstances warranting review. Moreover, even if EC shipments had grown significantly, US imports of Swedish plate had stayed constant and could easily have risen to injurious levels were the order to have been revoked, given existing unused capacity in Sweden. Avesta had failed to provide data probative of the issue regarding shipments to the EC because of the changing membership of the EC and the inclusion of cold-rolled sheet. The petition was insufficient for this reason. In its discussion of the trends in EC shipments, the USITC had relied on the best information available, that submitted by the domestic industry. The United States noted, however, that the analysis of EC data submitted by the domestic industry had not been necessary to the USITC's determination that Avesta had failed to meet its burden. The USITC's determination that any alleged increase in exports to the EC did not substantiate the need for review had been reached after an objective examination of the evidence and a full explanation of its reasoning. Therefore, the United States had complied with its obligations under Article 9.

160. In response to the United States' argument that Avesta had misstated the growth of its exports to the EC market[88], Sweden noted that in addition to the data in Avesta's 1987 review request, the domestic industry had submitted data to the USITC which - although the data contained a rather broad product coverage - reflected that 53 per cent of Swedish exports of hot-rolled plate and sheet had gone to the EC-10 in 1985, while only 34 per cent had gone to the same ten countries in 1972. The United States' claim that Swedish exports to the EC had increased by only five per cent in the period 1973-1985 was based on data from the US domestic industry. These data were subject to two demonstrable distortions: first, they included hot-rolled sheet, wholly outside the scope of the "like product" in the original investigation, and second, the data erroneously excluded cold-rolled plate,

[87]See para. 152, *supra*.

[88]See para. 157, *supra*.

which was within the scope of the "like product" and which Avesta exported in substantial quantities to the EC. Nevertheless, the USITC had considered that these data - which had not been derived from official government sources - were adequate, and had neither verified these data nor afforded Avesta the opportunity to comment on them. The United States' statement that Swedish exports to the EC had increased by only five per cent was based on the assumption of 1973 as the base year; in Sweden's view, it would have been more appropriate to use 1972, since this was the year when the original investigation had been conducted. Between the years 1972 - 1985 Swedish exports to the EC had increased by 24 per cent according to the US domestic industry's data.

161. The United States said that Table 5[89] in Avesta's 1987 request for review, which purported to show EC imports of stainless steel plate from Sweden for the period 1971-1986, included both hot-rolled and cold-rolled products. A review of the footnote to this Table in Avesta's petition showed that the cold-rolled category, which had registered the most growth over the period, included both stainless steel plate and stainless steel sheet. Avesta itself had admitted that the vast majority of its cold-rolled production was sheet[90]; furthermore, there had been only one shipment of cold-rolled stainless steel plate to the United States during the entire period 1970-1985. By contrast, the data relied upon by the USITC - Table 7[91] of the domestic industry's submission - excluded cold-rolled products. In addition, the footnote to the Table also revealed that the data for EC imports did not take into account changes in the membership of the EC in 1974 and 1981; thus, the data did not have a constant base. The domestic industry's data did have a constant base, as all current members of the EC had been included for the years 1970 to 1985.

162. Regarding the United States' argument that the statistics presented by Avesta were not representative since the enlargement of the EC had not been taken into account[92], Sweden said that Avesta, in presenting its request for review, had had discussions with the USITC staff, but that the USITC had never raised this matter. The United States had indicated that the USITC staff would often meet with the petitioner's representative to discuss the merits of the petition and to gather additional information regarding the alleged changed circumstances. Apparently, the USITC had not followed those procedures in this particular case. Avesta had had no opportunity to rebut the data submitted in opposition to the review request. Furthermore, Avesta had never "manipulated" the data; it had been clearly spelled out in Avesta's 1987 request in the footnotes to the Tables, which products and countries had been included. Avesta had also argued that the enlargement of the EC, as such, had had effects on the future level of Swedish exports to the EC.

163. Sweden explained that Table 5 of Avesta's 1987 request stemmed from EC data (Eurostat), as Avesta had deliberately chosen to rely on official EC import statistics. Table 5 did not include hot-rolled sheet. It had not been possible for Avesta to obtain break-outs for cold-rolled plate, since the division between sheet and plate was a US practice.[93] Also, sheet below 3.0 millimetres had not been included. The reason for the inclusion of sheet between 3.0 and 4.75 millimetres in the statistics was that in 1983, these products had been added to the product coverage of the European Coal and Steel

---

[89]See Annex XI, *infra*.

[90]Confidential Table I (Annex XIII, *infra*) of Avesta's 1987 request for review showed that plate had never exceeded 33.3 per cent of cold-rolled production.

[91]See Annex XII, *infra*.

[92]See paras. 157 and 161, *supra*.

[93]In the United States, the distinction between sheet and plate was made on the basis of the thickness, where plate was thicker than 4.75 millimetres.

Community. Regarding the enlargement of the EC, it had been clearly spelled out by Avesta, in Footnote 48 to Table 5 of the 1987 request for review, which countries had been included for the various years. Avesta had relied on official EC statistics without any alterations; those data pertained to the actual number of member States for each particular year.

164. Sweden explained that Avesta's underlying contention had been that, in contrast to the early 1970s, the EC had become a much more important trading partner for Sweden. This increased importance was attributable not only to the EC's general economic growth, but also to its admission of additional members. The USITC had never sought any additional information from Avesta, and the US procedures had not provided any opportunity for Avesta to rebut the data submitted in opposition to the review request. Sweden noted that the US industry's opposition had been filed on the last day of the stipulated 30-day period for submitting information, and that Avesta had not had an opportunity to rebut the US industry's statistics or any other aspect of its submission. Sweden argued that this was not in conformity with the Agreement's requirements for "fair and equitable procedures".

165. The United States argued that the record did not indicate that USITC staff had met either with petitioners' representatives or with representatives of the domestic industry. In this respect, USITC staff treated both sides equally. Moreover, Avesta also submitted comments on its own petition to the USITC, which the USITC accepted. These comments included additional information and argument.

166. The United States also pointed out that there was no requirement in the Agreement that investigating authorities comb draft petitions for all possible defects prior to filing. Article 9 required an interested party to submit positive information "substantiating" the need for review; incorrect data was relevant to whether this burden had been satisfied. Moreover, if Avesta believed it could correct the information it had submitted, Avesta was free to file another request for review to the USITC. The USITC's rules did not limit the form or frequency of such requests. Indeed, the fact that Avesta had filed two such requests showed that it was fully aware of this opportunity. Given this available avenue, Avesta had not been prejudiced by any alleged failure by the USITC to bring defects in the petition to Avesta's attention prior to issuing a determination.

167. The United States noted that both the data provided by Avesta and that provided by the domestic industry had included hot-rolled sheet and plate. Apparently, the Parties had agreed that there were not significant sales of hot-rolled "sheet". Thus, Avesta had no basis on which to complain that the data provided by the domestic industry included minimal portions of hot-rolled sheet, when Avesta's data also contained hot-rolled sheet. Moreover, very little sheet was hot-rolled. Hence, any skewing introduced by inclusion of hot-rolled sheet would be very minor in comparison to the skewing caused by inclusion of cold-rolled sheet.

168. The United States noted that Avesta's data and the domestic industry's data for EC imports of hot-rolled products from Sweden, while not exactly the same, were not fundamentally different, once one acknowledged the growth of the EC over time. The two data sets for the years 1980 to 1985 were as follows:

Year	Avesta Table 5	Domestic Industry Table 7
1981	15,625	16,297
1982	23,589	24,334
1983	23,544	23,066
1984	27,369	27,252
1985	28,736	29,407

Given the correspondence of the data of Avesta and the domestic industry for the years in which both parties had included all EC members, it was clear that Avesta had not been prejudiced by the use of the domestic industry's figures. The correspondence also showed that the divergence between the two sets of data prior to 1981 had been the result of the failure of Avesta's data to correct for the change in EC membership.

2.4 Reduced Production Capacity Resulting from the Restructuring of the Swedish Stainless Steel Plate Industry

169. Sweden contested the USITC's evaluation of the impact of the restructuring of the Swedish stainless steel plate industry on the productive capacity of the Swedish producers, and the USITC's conclusion that this restructuring did not constitute a changed circumstance warranting review. Avesta had argued that the restructuring of the Swedish industry had resulted in reduced capacity to produce stainless steel plate in Sweden, both in absolute terms and relative to all other stainless steel products. Avesta had given a detailed explanation of the sequence of mergers and consolidations in the Swedish stainless steel industry which had resulted, in 1987, in Sweden's stainless steel plate producing industry consisting of one producer with two facilities in Sweden: the Avesta facility, which produced both hot- and cold-rolled stainless steel plate, and the Degerfors facility, which produced hot-rolled stainless steel plate. Avesta had further argued that the individual mills had also reduced their capacity. From 1984 to 1986 the mill in Avesta had decreased its capacity to produce hot-rolled plate by over 10 per cent.

170. Sweden noted that in the 1973 determination of injury it was stated that:

> "There is considerable room for expansion of exports to the United States not only by altering market priorities but also by increasing production."

In the USITC determination of 1987, the reduced capacity to produce stainless steel plate in Sweden was recognized, but it was stated that:

> "However, notwithstanding the decreases in absolute capacity, there remains sufficient unused productive capacity to significantly increase exports to the United States.…" (page 7)

Thus, the USITC recognized the reduced capacity to produce stainless steel plate in Sweden, but never considered whether the restructuring had any relevance to the original determination of injury from 1973. The USITC had concluded only that the restructuring of the Swedish steel industry did not constitute "changed circumstances", and had not considered whether the information substantiated the need for review.

171. The United States maintained that the USITC had examined the evidence before it and had correctly found that the consolidation of the Swedish stainless steel plate industry did not constitute a changed circumstance warranting review. In its 1987 determination, the USITC had addressed Avesta's claim regarding the restructuring of the Swedish stainless steel plate industry and had found that

> "… notwithstanding the decreases in absolute capacity, there remains significant unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets". (page 7)

The USITC based its decision on capacity data submitted by Avesta itself. Although Avesta had offered reasons why it could not expand its practical capacity to produce stainless steel plate in the short term, it had provided no information to show that it was unable or unlikely to expand operations using its existing capacity.

172. The United States asserted that even small increases in capacity utilization could lead to substantial increases in the volume of exports from Sweden. For example, if Avesta had increased its capacity utilization by two per cent in 1986 for export to the United States, its export volume would have multiplied several times from 1986 levels. Thus, with significant excess capacity remaining, a modest reduction in capacity did not give rise to the need for a full review. Moreover, the fact that the Swedish industry had merged from four producers to one producer suggested, if anything, increased danger of future injurious dumping in the absence of anti-dumping duties. Without home-market competition, an industry consisting of just one firm could use its monopoly status to restrict home market sales to raise prices and maximize revenues, at the same time freeing additional tonnage for sale abroad at lower prices. Home market windfalls could subsidize foreign sales, allowing monopolists to charge unfairly low prices in overseas markets.

173. Regarding Sweden's claim that the USITC had not considered whether Swedish restructuring substantiated the need for a review[94], the United States said that this was plainly incorrect. The USITC had clearly demonstrated how the existence of sufficient excess capacity overshadowed any modest decrease in total productive capacity. The USITC had objectively examined the evidence in the record before it and had correctly found that the consolidation of the Swedish stainless steel plate industry did not constitute a changed circumstance warranting the institution of a full review.

174. In response to a question put by the Panel as to the data on which the USITC had based its conclusion regarding Avesta's unused productive capacity, the United States noted that Avesta had provided data regarding capacity and capacity utilization rates of its Swedish operations in a Table H[95] in its 1987 request for review. While capacity had declined from 1982 to 1986, excess capacity had far exceeded the amount of any level of Swedish shipments to the United States. Specifically, in 1986 practical capacity in Sweden had been 68,000 metric tons, while actual production had been 55,700 metric tons. Thus unused capacity equalled 12,300 metric tons. As Table 3B indicated, Swedish imports to the United States in 1973, the year of the USITC's injury determination, were 4,605 net tons. Indeed, the largest volume of Swedish shipments to the United States - 9,985 net tons in 1972 - was significantly less than the existing excess capacity in Sweden in 1986. In 1986 Swedish imports had totalled 1,784 net tons. Thus, utilization of Avesta's existing capacity would have had to increase only by approximately 2,900 tons in order to reach the injurious level of 1973. The result would have been a capacity utilization rate of 86 per cent - 58,600 tons out of 68,000. Further, in 1985 Avesta's capacity utilization had actually exceeded 88 per cent, thus demonstrating the ease with which production could

[94]See para. 170, *supra*.

[95]See Annex XIV, *infra*.

be readily increased. The United States said that, as with a number of other arguments made by Avesta to the USITC, the arguments that had been made in this area had not been supported by Avesta's own data.

175. Sweden noted that the United States had claimed that Avesta had no home-market competition and could therefore use its monopoly status to restrict home-market sales to raise prices and maximize revenues, and that Avesta could thus free additional tonnage for sale abroad at lower prices.[96] This claim was completely erroneous. First, the USITC had never found that Avesta exercised monopoly power in the Swedish market and had never used the words "monopoly" or "monopolization" in its decisions. Second, steel products from the EC and the EFTA States entered Sweden without any restrictions whatsoever, which meant that Avesta was subject to a high degree of competitive imports; in effect, Europe could be regarded as Avesta's home market. The import penetration in Sweden had varied around 40 per cent between 1975 and 1987. This was underlined by the fact that for other countries, the Swedish *ad valorem* custom duties on the products in question were low by international standards and varied between 3.2 per cent and 5.0 per cent. By comparison, the US *ad valorem* duties on the same products ranged from 9.6 per cent to 10.6 per cent. Third, the significant restructuring and specialization that had taken place in the Swedish steel industry was very much due to an open and liberal trade policy. If Avesta raised prices in Sweden, it would lose market share due to lower pricing by foreign competitors exporting to Sweden. Avesta had no such dominant position, either in the Swedish or the European market, as the United States had implied it did. By size, Avesta was ranked fifth or sixth in Europe.

176. In response to the Panel's request that Sweden comment on the USITC's conclusion in its 1987 determination that

> "notwithstanding the decreases in absolute capacity, there remains significant unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets",

Sweden said that the USITC's conclusion that Avesta would increase its exports if the anti-dumping duty of 4.46 per cent was revoked was not based on facts. On the contrary, it was based solely on speculation since no review had ever been conducted. Sweden noted that Article 3:6 of the Agreement stated that:

> "A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent."

This provision gave guidance on how to interpret recurrence of injury, a notion that in Sweden's view, had obvious similarities with "threat of injury". Contrary to the USITC's position, the alleged existence of unused productive capacity and the possibility that exports to the United States might increase at some unspecified time in the future was not sufficient to conclude that there would, in fact, be a clearly foreseeable and imminent increase in Avesta's exports to the United States if the anti-dumping duties were revoked. Since 1984, Sweden's stainless steel industry had consisted of only one producer, Avesta AB, compared to the structure of the Swedish industry in 1973 when there had been four unrelated producers of stainless steel plate. A consequence of these producers merging into one was that total Swedish production capacity had decreased. In 1987, the Swedish steel industry had already been restructured to the extent that the plants of Avesta AB in Degerfors and in Avesta were the only

[96]See para. 172, *supra*.

remaining producers of stainless steel plate. The plant in Avesta produced both hot- and cold-rolled plate, while the plant in Degerfors produced only hot-rolled plate. Hence, already in 1987, the production of hot-rolled plate was largely concentrated to the plant in Degerfors. In 1992, plate production in Sweden had been totally concentrated to the Degerfors plant. This plant's capacity was fully utilized in supplying the European market, Avesta's own internal fabrication units, Eastern Europe and the Far East. There were no corporate plans to increase this capacity in Sweden, let alone to increase exports to the United States.

177. Sweden said that the USITC's conclusions regarding the possible increase in Avesta's exports to the United States were not supported by the facts. Total Swedish production of stainless steel for Avesta for the period after 1984 was roughly 300,000 tons per year, of which stainless steel plate had comprised 50,000-60,000 tons. Avesta's total exports of stainless steel to the United States had been less than 10,000 tons per year, of which stainless plate had been nearly 1,000 tons. In 1991, Sweden had exported more than 100 times as much stainless cold-rolled and hot-rolled products to the EC-12 (42,000 metric tons) as to the United States (378 metric tons). In Sweden's view, it was obvious that Avesta's strategy was to concentrate on exporting to the EC-12 and supplying the US market through its US mill.

178. Sweden said that from USITC's statement that "there remains sufficient unused productive capacity to significantly increase exports to the United States", one could draw the conclusion that the mere existence of unused capacity was enough, in itself, to justify the decision to deny the request for review. This issue had never been examined in its proper context. In response to a question by the Panel as to whether Sweden was arguing that the mere existence of excess production capacity was irrelevant, Sweden said that the question of excess production capacity was not irrelevant *per se*. As stated in the "Recommendation concerning Determination of Threat of Material Injury" adopted by the Committee on Anti-Dumping Practices in 1985[97], the administering authority should consider, *inter alia*, such factors as

> "sufficient freely disposable capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing country's market taking into account the availability of other export markets to absorb any additional exports".

Apparently, the United States had never examined the unused capacity in this context, but had merely stated that the excess capacity in itself was sufficient to draw the conclusion that imports from Sweden would increase. This conclusion was unverified, unsubstantiated and erroneous.

179. Sweden said that it was a well known fact that unused production capacity was nothing unusual within a cyclical industry such as the steel industry. Furthermore, production capacity was not a scientific notion; it was widely recognized to be virtually impossible to measure production capacity in exact figures. The figures presented by Avesta pertained to a period (1982-1986) when the industry had been in an economic downturn. Nevertheless, Avesta's capacity utilization was high compared to its competitors. Since 1986, capacity utilization had increased, mainly because of the restructuring of the Swedish plate industry. In addition, it was not practically possible to operate at 100 per cent of theoretical capacity. The marginal cost of increasing capacity increased when above a certain level. For example, it took several months to add shift work, which also increased hourly costs significantly due to Swedish labour contracts. There could also be other bottlenecks in the production line, such as supply of raw material, transportation, etc. The USITC had presumed that all additional capacity would be used for exports to the US, when only minimal quantities of Avesta's plate production was shipped to the US and export to the EC was 100 times greater in volume than exports to the US. The

[97]BISD 32S/182.

USITC had also presumed that any additional imports would automatically injure the US industry, but had never investigated whether that would be the case. For all of these reasons, the USITC assumption was without merit; it had never investigated whether Avesta had unused capacity, and its reasoning implied that the only way Avesta could have shown decreased capacity was to have closed down its mills.

180. Regarding Sweden's argument that the USITC's examination of production capacity in the Swedish industry was not a sufficient basis on which to conclude that there would be a "clearly foreseeable and imminent increase" in Avesta's exports to the United States if anti-dumping duties were revoked[98], the United States said that this argument proceeded from a false premise, namely, that a decision not to initiate a review under Article 9:2 was the equivalent of an affirmative finding of threat of injury under Article 3:6. There was no support in the Agreement for this presumption. For reviews upon request, Article 9:2 placed a clear evidentiary burden on the requesting party to "[submit] positive information substantiating the need for review." Article 9:2 set forth the standard for determining whether a review should be initiated. Article 3:6, by contrast, contained the standard for affirmative determinations of threat of material injury. Nothing in the Agreement required application of Article 3:6 to reviews conducted under Article 9:2. Furthermore, unlike initial investigations governed by Article 3, reviews under Article 9 did not start from a blank slate, but were based on an existing finding of material injury.

181. With regard to Sweden's argument that Avesta did not have a monopoly in the Swedish market, the United States observed that it was true that foreign competition was not shut out of the Swedish market. Nonetheless, consolidation of the four Swedish producers into a single firm meant that there was no longer any competition between different Swedish firms in the Swedish market or elsewhere. Consolidation meant that the new firm could adjust its production and sales strategies for both home and export sales as a single unit, thereby becoming, if anything, a more effective competitor that might also be better able to respond quickly to changing market conditions, including those in export markets such as the United States.

2.5 Avesta's Request for the Exclusion of Three Products

182. Sweden asserted that the USITC should have excluded three kinds of specifications for stainless steel plate (KBR, 253 MA and 254 SMO) from the scope of the anti-dumping duty order, as specifically requested by Avesta. Avesta had argued that the fact that it had developed new products and thereby changed the mix of products and volumes exported to the United States, should constitute a "changed circumstance". Article 3:5 of the Agreement stated that "[t]he effect of the dumped imports shall be assessed in relation to the domestic production of the like product …." In Article 2:2, the term "like product" was defined as "… a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration." Regarding the KBR plate, Avesta had argued that this product should be excluded from the anti-dumping duty order since no US producer manufactured cold-rolled plate in large widths in a continuous process. The KBR plate had never been widely offered for sale in the United States and, in 1986, imports of this product from Sweden had represented only one-half of one per cent of total US consumption of stainless steel plate. The KBR plate had different dimensional properties and a different appearance from hot-rolled plate; it weighed less, was stronger and was easier to form and weld. The finish of KBR plate was smoother than hot-rolled plate, which meant that KBR needed less final treatment and was more corrosion resistant.

[98]See para. 176, *supra*.

183. Regarding the grades 253 MA and 254 SMO, Sweden noted that Avesta had also shown that these grades of hot-rolled stainless steel plate, which did not exist in the early 1970's, were being imported from Sweden . These plates were composed of patented grades of stainless steel which were not manufactured by any US producer. The 254 SMO grade was used for very special purposes such as sea water handling equipment and paper mill bleaching systems. The mechanical and corrosion resistant properties of these grades were unique, and tests had demonstrated that alternate materials were inferior to the 254 SMO alloy. The 253 MA grade was an alloy developed to provide exceptional oxidation resistance and high strength for elevated temperature service. The alloy was composed of a magnitude of elements, some of which were rare earth metals. Despite the provisions in Articles 2:2 and 3:5 of the Agreement, the USITC in its 1987 determination had stated that:

> "Moreover, plate may be produced in an almost infinite variety of compositions and sizes, depending on the components chosen, the ratios in which they are used, and the individual production machinery and steps employed. Simply because a new composition or size is produced - and even patented - does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product. The Commission has regularly rejected arguments that specialty types of stainless steel should be treated differently from standard types in making like product determinations." (page 5)

184. Sweden said that it was not seeking a finding by the Panel that the United States had acted inconsistently with the "like product" definition in Article 2 of the Agreement by not excluding these three products, but that it was arguing that the United States had acted inconsistently with Article 9 by not initiating a review in order to modify the 1973 dumping finding. The fact that these products neither competed with nor were produced by the US industry had already been established by the USITC determination to exclude these products from the Section 201 import relief programme in 1983.[99]

185. Sweden noted that in addition to the request for modification of the order, Avesta had also argued that if these products were excluded, Sweden's share of total US consumption would be even lower than indicated earlier in the official statistics. In this respect, the USITC stated:

> "However, the data show that the two patented types of plate are being imported in only small quantities and, as noted above, Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States. KBR sales have occurred in a very limited market, with only minimal possibilities for further sales." (page 5)

Avesta had argued that according to the statistics, the above statement was not correct. The quantities imported from Sweden could hardly be described as "very significant". If these three types of grades were excluded, imports from Sweden, in relation to US consumption, would be the following[100]:

---

[99]Presidential Proclamation 5074, 48 Fed. Reg. 33233 (1983); Stainless Steel and Alloy Tool Steel, Inv. No. TA-201-48, USITC Pub. 1377 (1983). As a result of the Section 201 proceeding in 1983, special duties were to continue in effect until 19 July 1987. On 14 January 1987 counsel for the US industry filed a petition with the USITC to extend the Section 201 duties for an additional three years. At the time of Avesta's 1987 request for a review, the USITC was conducting an investigation into the economic effects of terminating the duties applied under the Section 201 import relief programme established in 1983 (Stainless Steel and Alloy Tool Steel, Inv. No. TA-203-16).

[100]See Annexes VI and VII, *infra*.

	Grades excluded	All grades
1980	0.25%	0.57%
1983	0.09%	0.33%
1985	0.26%	0.63%

Nevertheless, the USITC had not considered that the information submitted by Avesta substantiated the need for review. The USITC had neither assessed the relationship between the allegedly dumped new imports and the domestic industry, nor determined which products were causing the alleged injury. The USITC's conclusion that KBR plate and the two patented products were imported in small quantities or for limited markets did not support the USITC's refusal to initiate an injury review. On the contrary, the USITC's conclusions supported Avesta's contention that excluding the three products from the dumping order would not have an adverse effect on the US industry.

186. The United States said that the USITC had determined that modifying the order would not be appropriate. Notwithstanding the USITC's determination that all stainless steel plate constituted a single "like product", Sweden had argued that patented and KBR plate should be excluded from the anti-dumping duty order. The United States pointed out that as an initial matter, only the DOC could "exclude" products from the scope of an anti-dumping order. Under the authority of Section 751 of the Tariff Act of 1930, as amended, the USITC - rather than the DOC - could modify an order to effectively exclude certain imports only after finding that those imports corresponded to a separate like product in the United States. Based on the evidence of record in the original investigation of injury and in the requests for reviews, the USITC had determined that all types of stainless steel plate competed with each other across a broad spectrum, and that stainless steel plate constituted a single like product. Consistent with the Agreement, the USITC rendered a single injury determination for each like product. Because the USITC had correctly held that all stainless steel plate constituted a single like product, it had refrained from finding separate like products and rendering a number of separate judgements.

187. The United States said that the minimally differentiated new grades of imported plate were sufficiently similar to domestic analogues that a finding of separate like products was unfounded. The USITC had based its determination in part on a finding in a concurrent investigation[101] that these grades of plate did in fact compete with US production. Moreover, in response to Avesta's 1987 request for review, the domestic industry had provided information indicating that US plate did in fact compete with Avesta's grades 253 MA and 254 SMO. In May 1980, the DOC had received a request from Avesta for a ruling regarding several special grades of stainless steel, including 253 MA and 254 SMO. In October 1980, the DOC had replied that these products were included within the scope of the anti-dumping order. The DOC's discussion, in its letter of reply, of the similarities between these grades and all other stainless steel plate buttressed the USITC's conclusion that patented grades 253 MA and 254 SMO were not sufficiently different from other stainless steel plate as to be separate "like products". In addition, in its Section 751 determination, the USITC had noted that grades 253 MA and 254 SMO were imported in only small quantities. As a result, exclusion of these products would likely have had no impact on the USITC's injury analysis.

188. With regard to KBR plate, the United States said that although Sweden claimed that KBR plate differed from hot-rolled plate, Sweden had failed to show how KBR plate differed significantly from other domestic cold-rolled plate which were also within the like product. In its 1987 decision, the USITC wrote:

[101] Stainless Steel and Alloy Tool Steel, TA-203-16, USITC Pub. 1975 (May 1987).

> "[A]lthough there is no domestic production of continuously-made cold-rolled plate in 80-inch width, there is piece-by-piece production of plate up to 72-inch width. Moreover, plate may be produced in an almost infinite variety of compositions and sizes .... Simply because a new composition or size is produced - and even patented - does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product." (page 5)

Moreover, the USITC had found that KBR plate was imported in such small quantities that exclusion would not change its injury finding. Finally, the USITC found that there were "only minimal possibilities for further sales" of KBR plate.

189. In response to a question from the Panel as to whether the USITC had interpreted the issue raised by Avesta regarding KBR, 253 MA and 254 SMO as a request for exclusion of these products from the scope of the 1973 dumping finding, or as an allegation of a change in circumstances, the United States said that the USITC had treated the allegations both as a request for exclusion and as an allegation of changed circumstances warranting review. These products did not exist at the time of the 1973 order, thus their existence was a change. However, it was not a change warranting review, since there had been no showing that the products were sufficiently different from other types of stainless steel plate. Mere unsupported allegations regarding "niche" products were not enough to demonstrate the need for a full review. Avesta had failed to provide any documentation whatsoever regarding the patents for two of these products, the import volumes of those products, or the competition issue. In contrast, the domestic industry had provided specific instances of competition between these products and products made by the domestic industry.

2.6 Steel Voluntary Restraint Agreements

190. Sweden asserted that against the background of Article 3, the USITC should have determined that the information presented by Avesta regarding the state of the US stainless steel plate industry - in addition to information related to the volume of Swedish exports - was sufficient to warrant a review. Article 3:3 stated that:

> "The examination of the impact on the industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry such as actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments."

The information submitted by Avesta was as follows. During the period from 1973 to 1986, the US industry had become more and more protected from import competition. In 1983, additional Section 201 customs duties had been imposed on most stainless steel plate imports. As stated in Avesta's request, voluntary restraint agreements (VRAs) had been concluded in 1986 between the United States and virtually all major exporting countries replacing other import relief instruments. Sweden had not concluded a restraint agreement with the United States, which meant that Section 201 duties, in addition to anti-dumping duties, continued to be imposed. The quotas had resulted in a limitation of the quantity of stainless steel plate which might be imported into the United States.

191. Sweden noted that, as the data submitted by Avesta had shown, the US industry's share of the domestic market had increased during the period being examined: between 1972 and 1985, its share of the US market had increased from 80.9 per cent to 92.5 per cent. In certain years, imports

had been almost insignificant, such as in 1980 when imports had represented only 2.4 per cent. In the 1973 determination of injury, it was stated that:

> "For their stainless-steel plate operations alone, net operating profit as a percentage of net sales of stainless-steel plate declined even more precipitously, from 4.4 per cent in 1968 to 1.5 per cent in 1972. Although some of the decline in profitability of these producers may have been due to recessionary factors in 1970 and in 1971, the continued low level of profits in 1972 is directly attributable to increased production costs coupled with LTFV sales of Swedish stainless-steel plate that have held domestic prices at abnormally low levels."

Regarding the state of the US industry, the USITC stated in 1987 that:

> "… the existence of the VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to the impact of dumped imports." (page 7)

Thus, despite the fact that the level of profits and other economic and financial indicators regarding the US industry had changed since 1972, the USITC had not considered the arguments as relevant. The USITC had concluded only that the VRAs did not constitute a "changed circumstance", and not whether the information substantiated the need for review or whether the original finding of injury from 1973 was still valid with respect to the state of the US industry.

192. The United States asserted that the USITC had assessed the record before it in Avesta's 1987 request for a review and had correctly concluded that VRAs had not made US producers less vulnerable to dumped imports from Sweden. Sweden had argued that US plate producers had been nursed to health by these VRAs, which had placed limits on US imports from certain countries, and that anti-dumping relief was no longer necessary. The USITC had specifically found that:

> "There are two flaws in [Avesta's VRA] argument. First, because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses. Second, the existence of the VRAs does not mean that the US stainless steel industry is any less vulnerable to the impact of dumped imports." (pages 6-7)

Avesta had failed to demonstrate the relevance of the VRAs with other countries on the volume and price effects of imports from Sweden. In addition, Avesta had substantial excess capacity with which to increase its exports, free of any VRA restrictions. Thus, contrary to Avesta's claims, the VRAs had had no restraining effect on the volume and prices of Swedish exports, since Sweden had refused to enter into a VRA with the United States. The USITC had objectively examined all information available regarding the significance of the VRA restrictions and had fully explained its rationale in determining that the VRAs did not substantiate the need for review. Accordingly, the United States had fulfilled its obligations under the Agreement.

193. Regarding the United States' argument that Avesta had failed to demonstrate the relevance of the VRAs with other countries on the volume and price effects of imports from Sweden[102], Sweden said that what the United States and the USITC had overlooked was the fact that relief programmes were of direct relevance to the issue of whether the US industry was suffering injury. The impact of the programmes on Swedish volumes or prices was in this context not relevant. If a domestic industry was not experiencing material injury, it was not necessary to consider the volume and price effects

[102]See para. 192, *supra*.

of imports from the country under investigation. For this reason, the improvement in the condition of the US industry resulting from the relief programmes minimized the likelihood that the US industry was experiencing material injury. Consequently, the results of the relief programmes substantiated the need for a review.

194. The United States noted that Sweden had argued before the present Panel that the VRAs had improved the domestic industry's position[103], based in part on reports that were not in existence at the time of the USITC's determination, or that Avesta did not choose to submit to the USITC. This was not what Avesta had argued in 1987 before the USITC. Although information suggesting that the domestic industry's condition had improved due to factors other than the imposition of duties might be relevant to the question of whether or not to conduct a review, Avesta, in its 1987 request, had provided little or no information, or even allegations, that this had been the case. Avesta's only argument concerning import relief had pertained to the VRAs. On this issue, Avesta's principal argument had been that the VRAs had placed Swedish exports at a competitive disadvantage because countries under VRAs could price their imports free of any restraints. In other words, Avesta had asked the USITC to focus on the effects the VRAs had on exports from Sweden, rather than on any possible effects on the condition of the US industry. Moreover, unlike Avesta, the domestic industry's response contained a substantial amount of information indicating continued industry vulnerability to dumped imports. Despite Avesta's failure to focus on the issue of industry condition, the USITC addressed that issue in its determination and found that it did not justify a review in this case.

195. Sweden stated that Avesta had, in its request for review in 1987, argued that the VRAs had an effect on the US industry, but that the reason Avesta had not provided, in 1987, a more detailed discussion of this issue had its grounds in Avesta's 1985 request for review. In that request, Avesta had provided a magnitude of arguments concerning the condition of the US industry and an analysis of why the US industry would not be injured after revocation of the anti-dumping duty order. However, the USITC had apparently not considered issues involving the condition of the US industry to be relevant at the stage of initiation of a review. In the USITC's decision on Avesta's 1985 request, the arguments concerning the state of the US industry had not even been discussed. Avesta had thus drawn the conclusion that the condition of the US industry was not a matter which the USITC examined prior to initiation, but rather in the course of the actual review investigation. Sweden also noted that at the time the 1987 request had been filed, the USITC was conducting an investigation into the economic effects of terminating the "Section 201" duties on specialty steel, including stainless steel plate, which the United States had imposed in 1983. Hence, the USITC already had extensive information on the state of the US industry, and duplication would have been unnecessary.

V. REQUEST FOR SUSPENSION OF THE PANEL'S PROCEEDINGS

196. On 18 June 1993 the United States informed the Panel that the United States Government was prepared to undertake further consideration of the 1976 ruling by the US Customs Service[104] regarding the scope of the 1973 anti-dumping order, and requested that the Panel suspend its deliberations pending the outcome of this examination. On 24 June 1993, the United States informed the Panel that on 23 June 1993 the USITC had decided to self-initiate a review investigation under Section 751(b) of the Tariff Act of 1930, as amended, of the 1973 affirmative determination of injury regarding imports of stainless steel plate from Sweden, and reiterated its request for a suspension of the Panel's proceedings.

[103]See paras. 61-62, *supra*.

[104]See para. 124, *supra*.

On 13 July 1993 Sweden informed the Panel that in its view, a suspension of the Panel's proceedings at that time was not warranted.

VI. FINDINGS

A. Introduction

197. The dispute before the Panel arose from a complaint by Sweden that the continued application by the United States of anti-dumping duties on imports of stainless steel plate from Sweden was inconsistent with the obligations of the United States under Article 9 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade ("the Agreement"). The essential facts which gave rise to this complaint can be briefly recapitulated as follows.

198. On 5 June 1973, the United States imposed anti-dumping duties on imports of certain stainless steel plate from Sweden. These duties were imposed under a "finding of dumping" which was issued following a determination of dumping made in January 1973 by the United States Department of Treasury and a determination of injury made in May 1973 with respect to these imports by the United States Tariff Commission.

199. Since the imposition of anti-dumping duties in June 1973 on imports of stainless steel plate from Sweden, the United States conducted several administrative reviews in order to determine the margin of dumping and the amount of anti-dumping duties to be collected on these imports. Until June 1993, the United States had not initiated a review of the affirmative determination of injury made in May 1973 by the United States Tariff Commission in respect of imports of stainless steel plate from Sweden.

200. In July 1985, the sole Swedish exporter to the United States of the products in question and its affiliated company in the United States submitted a request to the United States International Trade Commission (USITC) for the initiation of a review of the injury determination made in May 1973 in order to revoke the finding of dumping issued in June 1973. This request, made pursuant to the provisions of Section 751(b) of the United States Tariff Act of 1930, as amended, submitted that there were changed circumstances (as compared to the situation prevailing at the time the Tariff Commission made its determination) warranting review and revocation of the finding of dumping.

201. In October 1985, the USITC dismissed this request for the initiation of a review proceeding under Section 751(b) of the Tariff Act of 1930. The USITC determined that the request did not show changed circumstances sufficient to warrant institution of an investigation to review the affirmative determination of injury made in May 1973 by the United States Tariff Commission.[105]

202. In February 1987, the Swedish exporter and its affiliated company in the United States filed another request with the USITC under Section 751(b) of the United States Tariff Act of 1930 for the initiation of a review of the finding of dumping on imports of stainless steel plate from Sweden. The request alleged the existence of changed circumstances warranting the initiation of a review investigation to revoke or modify this finding.

[105]See Annex II.

203. In July 1987, the USITC dismissed this second request for initiation of a review on the ground that the request did not show changed circumstances sufficient to warrant institution of a review investigation.[106]

204. The decision of the USITC dismissing the request made in July 1985 for initiation of a review under Section 751(b) of the Tariff Act of 1930 was affirmed by the United States Court of International Trade. The decision of the USITC dismissing the request made in April 1987 for initiation of a review under Section 751 (b) of the Tariff Act of 1930 was affirmed by the United States Court of International Trade, the United States Court of Appeals for the Federal Circuit, and the United States Supreme Court.

205. Sweden submitted in the dispute before the Panel that the United States was in violation of its obligations under Article 9 of the Agreement by reason of the ongoing application of the anti-dumping duties on imports of stainless steel plate from Sweden.

206. Specifically, Sweden requested that the Panel make the following findings:

(i) The affirmative finding of injury made in 1973 regarding imports of stainless steel plate from Sweden was not a valid basis for the current application of anti-dumping duties. Consequently, by maintaining these duties the United States had acted, and was still acting, inconsistently with Article 9:1 of the Agreement.

(ii) The United States had not on its own initiative conducted a review of the injury finding made in 1973. In this respect, the United States had acted, and was still acting, inconsistently with Article 9:2 of the Agreement.

(iii) In dismissing the requests made in 1985 and 1987 by the Swedish exporter for a review of the injury finding made in 1973 the United States had acted inconsistently with Article 9:2 of the Agreement.

207. Sweden requested that the Panel recommend that the United States bring its measure into conformity with the Agreement. In Sweden's view, this would require revocation of the dumping finding, and reimbursement of duties already paid to an extent the Panel considered reasonable. Since at least 1985 (the year in which the Swedish exporters made their first request to the USITC for a review) the United States had been collecting anti-dumping duties on Swedish stainless steel plate in a manner inconsistent with its obligations under the Agreement. The United States should therefore immediately revoke the dumping finding and reimburse duties paid since at least 1985.

208. The United States requested the Panel to find that with respect to all claims presented by Sweden the United States had acted in conformity with the requirements of the Agreement and that the United States therefore did not need to take any steps to bring its laws or practice into conformity with the Agreement.

209. The United States submitted the following with respect to the claims presented by Sweden:

(i) Article 9 did not require automatic, periodic review of the need for the continued imposition of anti-dumping duties but required such a review only in certain circumstances.

---

[106]See Annex III.

(ii) The decisions taken by the USITC in 1985 and 1987 that the Swedish exporter had failed to submit positive information substantiating the need for a review of the injury finding were properly explained and reflected an objective examination of the information in the record before the USITC.

(iii) In view of the two determinations of the USITC dismissing the requests for review made by the Swedish exporter, a review of the injury finding upon the initiative of the investigating authorities in the United States was not warranted.

210. The United States further submitted that, even if the Panel were to find that the United States had acted inconsistently with its obligations under the Agreement, it would be inappropriate for the Panel to recommend that the United States be requested to revoke and reimburse the anti-dumping duties. The United States considered that a panel should limit itself to a general recommendation that a Party bring its practices into conformity with the Agreement, and that it should be left to that Party to determine how best to achieve such conformity.

211. The United States also argued in this connection that the recommendation requested by Sweden regarding revocation and reimbursement of anti-dumping duties assumed that a review by the USITC of the injury finding made in 1973 would lead to the conclusion that injury would not recur upon revocation of the dumping finding. As such, this request was in the view of the United States inconsistent with the argument of Sweden that a decision to initiate a review was a mere threshold decision which did not prejudge the outcome of the review.

212. In June 1993, the Panel received a request from the United States that it suspend its proceedings, in the light of the initiation by the USITC of a review of the 1973 affirmative injury determination on imports of stainless steel plate from Sweden (*supra*, paragraph 196). Sweden objected to such a suspension of the Panel's proceedings.

213. The Panel considered that absent agreement of the parties on the request by the United States there was no basis for it to suspend its proceedings. The Panel therefore decided to continue its work.

B. Alleged infringement by the United States of its obligations under Article 9:1 of the Agreement

214. The Panel proceeded to examine the claim of Sweden that the United States had acted, and was still acting, inconsistently with its obligations under Article 9:1 of the Agreement by reason of the continued application of anti-dumping duties on stainless steel plate from Sweden.

215. Article 9:1 provides:

> "An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury."

Sweden argued that the United States was acting in violation of this provision because the injury finding made in May 1973 by the United States Tariff Commission did not constitute a valid basis for the continued application of the anti-dumping duties on imports of stainless steel plate from Sweden at present, i.e. in 1992. Although almost twenty years had passed since the imposition of the anti-dumping duties, the United States had not provided any evidence on the potential continuation of injury, or demonstrated that the imposition of the anti-dumping duties was still necessary.

216. According to Sweden, Article 9:1 did not set forth a specific time limit to the duration of anti-dumping duties but nevertheless contained an obligation of Parties to take steps to ensure the temporary

and remedial nature of anti-dumping duties. The text of this provision indicated that anti-dumping duties were of a temporary and remedial nature and were to be revoked if there was no longer dumping, injury or a causal relationship between dumping and injury. The temporary and remedial character of anti-dumping duties was also evident from the preamble of the Agreement. The obligation in Article 9:1 to ensure this temporary and remedial character of anti-dumping duties could only be fulfilled through surveillance or monitoring to determine whether the injury caused by the dumped imports had been remedied. When such surveillance or monitoring led to the conclusion that the injury had been remedied, Parties were required to either revoke the duties or initiate a review under Article 9:2. Sweden argued that especially where a Party used the "pre-selection system" that Party was required to monitor the original injury determination in order to determine whether that determination remained a valid legal basis for the continued application of the anti-dumping duties. Sweden further argued that the passage of time created a presumption of change and was thus a relevant factor in determining the need for a review of anti-dumping duties.

217. In support of this interpretation of Article 9:1, Sweden invoked, in addition to the text of Article 9:1 and the preamble of the Agreement, certain historical materials. Thus, Sweden referred to discussions on the question of the duration of anti-dumping measures in a 1959 Report of a Group of Experts on anti-dumping and countervailing duties, negotiations on anti-dumping during the Kennedy Round, and discussions in the Committee on Anti-Dumping Practices established under the Kennedy Round Anti-Dumping Code. Sweden also mentioned as support for its arguments a panel report in a dispute under the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement regarding countervailing duties applied by the United States on imports of non-rubber footwear from Brazil. Finally, Sweden referred to the practice of several Parties to the Agreement which had provided in their domestic legislation for "sunset" clauses.

218. In rejecting Sweden's claim under Article 9:1, the United States argued that Article 9:1 imposed a general legal obligation on Parties to maintain anti-dumping duties only as long as, and to the extent necessary, to counteract dumping which was causing injury, but did not by itself contain a procedural mechanism for carrying out this obligation. Article 9:1 did not set forth a temporal limitation to the duration of anti-dumping duties, nor did it contain a requirement for monitoring or surveillance of anti-dumping duties. Rather, the mechanism for implementing the obligation in Article 9:1 was provided by the review procedure in Article 9:2, the purpose of which was to determine whether, despite a previous finding of injury, the current situation was such that injury would not recur upon revocation of the anti-dumping duties. Under Article 9:2, an obligation to review existed where such a review was warranted by specific circumstances. The United States thus disagreed with Sweden's view on the relevance of the passage of time as a factor in determining the need for a review of anti-dumping duties. The United States further argued that a decision on whether or not to maintain anti-dumping duties was preceded by a review under Article 9:2. Therefore, when it was appropriate not to conduct a review, it followed that it was consistent with Article 9:1 to maintain the anti-dumping duties.

219. The United States argued that the historical materials mentioned by Sweden and the panel report in the dispute on countervailing duties applied by the United States on imports of non-rubber footwear from Brazil did not support the interpretation of Article 9:1 advanced by Sweden. The United States also contested that the fact that certain Parties to the Agreement had introduced "sunset" clauses in their legislation supported Sweden's interpretation of Article 9:1.

220. In its examination of Sweden's claim under Article 9:1, the Panel noted that, in addition to this claim, Sweden also presented a claim that the United States had violated Article 9:2 by failing to initiate a review of the injury determination made in 1973 by the United States Tariff Commission. These separate claims reflected an interpretation of Article 9 under which Article 9:1 required Parties to monitor, or keep under surveillance, the conditions which had led to the original injury determination in order to determine whether this injury determination was still valid as a basis for the continued

application of the anti-dumping duties, while Article 9:2 contained a distinct obligation to conduct a review of the need for continued imposition of the anti-dumping duties.

221. The Panel therefore considered that the basic legal question raised by Sweden's claim under Article 9:1 was whether this provision by itself contained an obligation on Parties to the Agreement to examine whether the injury determination made in the original investigation remained a valid basis for the continued application of anti-dumping duties, which obligation would be distinct from the obligation of Parties to conduct reviews under Article 9:2.

222. In its examination of this question, the Panel noted that the obligations of Parties with respect to the duration of anti-dumping duties were governed by Article 9 as a whole, i.e. by Articles 9:1 and 9:2 taken together. The question of whether Article 9:1 required Parties to take the steps referred to by Sweden therefore necessitated an analysis of the specific rôle of Articles 9:1 and 9:2 in defining the obligations of Parties to the Agreement regarding the duration of anti-dumping duties.

223. The Panel noted that under Article 9:1 "An anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." Accordingly, Article 9:1 obliged Parties to the Agreement not to maintain anti-dumping duties when such duties were no longer necessary to counteract dumping which was causing injury. However, the text of Article 9:1 did not provide an express obligation regarding the steps to be taken by Parties to the Agreement in order to make a determination on whether the continued imposition of an anti-dumping duty was necessary to counteract dumping which was causing injury.

224. In contrast, Article 9:2 provided for a specific obligation to "review" the need for the continued imposition of the duty, on the initiative of investigating authorities, or upon a duly substantiated request by any interested party. In the Panel's view, the purpose of the review procedure under Article 9:2 could only be understood if Article 9:2 was read in the light of Article 9:1. The references in Article 9:2 to "the need for the continued imposition of the duty" and "the need for review" could only be interpreted in a meaningful manner when read in conjunction with the obligation in Article 9:1. Thus, a review under Article 9:2 of "the need for the continued imposition of the duty" was a review of whether that duty continued to be "necessary to counteract dumping which is causing injury". Similarly, "positive information substantiating the need for review" in Article 9:2 necessarily meant information relevant to the issue of whether the anti-dumping duty remained "necessary to counteract dumping which is causing injury."

225. The Panel thus read Article 9:1 as requiring Parties not to maintain anti-dumping duties longer than necessary to counteract dumping which was causing injury, and Article 9:2 as setting forth an obligation of Parties regarding the undertaking of a factual examination of whether the continued imposition of anti-dumping duties was necessary within the meaning of Article 9:1.

226. The Panel considered that it would not be consistent with this interpretation of the relationship between Articles 9:1 and 9:2 to interpret Article 9:1 as containing an obligation of Parties to conduct a factual examination of the necessity of the continued application of anti-dumping duties (in the form of "monitoring" or "surveillance"), distinct from their obligation to carry out reviews under Article 9:2 of the Agreement. The silence of Article 9:1 regarding the means by which a Party was to determine when an anti-dumping duty was no longer necessary within the meaning of that provision, together with the mandatory review procedure specifically provided for in Article 9:2, the purpose of which could only be understood in light of the requirement embodied in Article 9:1, contradicted the view that Article 9:1 by itself obliged Parties to take specific procedural steps to satisfy themselves as to the continued need for the imposition of an anti-dumping duty distinct from those required under Article 9:2.

227. The Panel noted in this regard that, if Article 9:1 were interpreted to contain an obligation of Parties to conduct a form of factual examination through monitoring or surveillance, the result would be that a Party could be alleged to be in breach of that obligation under Article 9:1 in a situation in which that Party had not conducted such monitoring or surveillance even if the Party had on several occasions during the life of an anti-dumping duty conducted a review within the meaning of Article 9:2 of the need for the continued imposition of an anti-dumping duty. In the Panel's view such an interpretation would be inconsistent with the logic of the régime of Article 9 as a whole and with the function of Article 9:2 within that régime.

228. The Panel did not exclude that it could be argued that a Party's failure to comply with its obligations under Article 9:2 regarding the initiation of reviews could entail a violation of Article 9:1. However, the Panel did not consider that Article 9:1 by itself could constitute an independent legal ground for a claim that by failing to carry out surveillance or monitoring a Party was *ipso facto* in breach of its obligation under Article 9:1 to maintain anti-dumping duties only as long as, and to the extent necessary, to counteract dumping which is causing injury.

229. The Panel therefore considered that, where a Party had not examined the issue of the continued necessity of the application of an anti-dumping duty, the question of whether that Party thereby was in breach of its obligations under the Agreement had to be analyzed in the first place on the basis of the specific provision in Article 9:2, which explicitly obliged Parties to carry out reviews of the need for the continued imposition of an anti-dumping duty under certain circumstances.

230. The Panel noted Sweden's arguments that a requirement for "monitoring" or "surveillance" followed implicitly from the wording of Article 9:1 and from the first recital in the preamble of the Agreement.

231. The Panel agreed that, as argued by Sweden, Article 9:1 and the preamble of the Agreement made it clear that anti-dumping duties were temporary and remedial in nature. However, the Panel did not consider that the temporary and remedial nature of anti-dumping duties provided a basis to construe Article 9:1 as containing an obligation for "monitoring" or "surveillance".

232. First, as explained above, the Panel considered that Article 9:2 provided a specific mandatory procedural mechanism by which Parties were to ensure the temporary and remedial character of anti-dumping duties as expressed in Article 9:1, and that the text of Article 9 as a whole did not provide any indication that, in addition to the review procedure in Article 9:2, there existed another procedural obligation upon Parties with respect to the examination of whether the continued imposition of an anti-dumping duty remained necessary within the meaning of Article 9:1.

233. Second, the Panel noted that underlying Sweden's interpretation of Article 9:1 was the view that the temporary and remedial nature of anti-dumping duties necessarily meant that when the injury which had been found to exist in the original injury determination was remedied, that determination lost its "validity" as a legal basis for the continued imposition of anti-dumping duties. The Panel was not persuaded that this was a sound interpretation of the requirement that anti-dumping duties "shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury". In the Panel's view, the words "necessary to counteract dumping which is causing injury" could also be interpreted to mean that the necessity of continued application of anti-dumping duties depended upon whether dumping would again cause injury in the absence of the duties. Given the effect of the application of anti-dumping duties on the condition of the domestic industry, a prospective interpretation of these words seemed more logical than an interpretation focusing on whether the injury found in the original investigation had been remedied. The Panel noted in this regard that such a

prospective interpretation of these words found support in the non-rubber footwear panel report cited by Sweden.[107]

234. The Panel also noted the references made by Sweden to certain historical materials in support of its view that Article 9:1 required a process of monitoring or surveillance of anti-dumping duties.

235. The Panel noted that under customary rules of public international law on treaty interpretation, as codified in the Vienna Convention on the Law of Treaties (1969), it was permissible to use preparatory work as a supplementary means of treaty interpretation in order to confirm the meaning of a treaty provision resulting from the application of the general rule in Article 31 of that Convention, or in order to determine the meaning of the provision when an interpretation in accordance with the general rule leaves the meaning of the provision ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable.[108]

236. As discussed in paragraphs 222-227, the text of Article 9:1 and its context, i.e. the review procedure in Article 9:2, were in the Panel's view sufficient to conclude that Article 9:1 by itself did not contain an obligation that Parties exercise monitoring or surveillance of an anti-dumping duty. Thus the Panel was not persuaded that in the present case it was necessary or even appropriate to have regard to the preparatory work of this provision.

237. In any event, the Panel considered that the references made by Sweden to the preparatory work of Article 9 and to discussions in the former Committee on Anti-Dumping Practices confirmed that anti-dumping duties were intended to be temporary measures, but did not support the view that, in order to ensure the temporary character of such measures, there was an obligation upon Parties to engage in a process of "monitoring" or "surveillance", in addition to conducting reviews under Article 9:2 of the Agreement. Moreover, these references did not support the view that the temporary and remedial nature of anti-dumping duties meant that anti-dumping duties were no longer necessary when the injury found in the original investigation had been remedied. Thus, the Panel noted the following passage cited by Sweden from the "draft International Code on Anti-Dumping Procedure and Practice" submitted by the United Kingdom in October 1965, according to which anti-dumping duties were to be revoked as soon as:

> "(ii) the authorities are satisfied in the light of information at their disposal, or which is submitted to them, that imports of the goods in question on which the duty has been imposed can be sold at undumped prices or that the imports, though technically dumped, would no longer cause or threaten material injury to a domestic industry or materially retard the establishment of a domestic industry." (emphasis added)

238. The Panel also noted Sweden's reference to a passage in a panel report in the matter of "United States - Countervailing Duties on Non-Rubber Footwear from Brazil". The paragraph from which this passage was taken read in relevant part:

> "However, the fact that Article VI:6(a) required an injury determination to levy duties, combined with the fact that it had been implemented by the pre-selection system, made it necessary to introduce a review mechanism under which countervailing duties, once imposed, had to be reviewed if the circumstances justifying their imposition had

[107] *Infra*, paragraph 238.

[108] Article 32 of the Vienna Convention.

> changed. In other words, the continuing obligation regarding determination (sic) of injury was implemented through periodic reviews. Such a review was conducted either on the initiative of the investigating authority or upon request by an interested party (footnote omitted). The Panel also noted that because of the fact that countervailing duties were already in place, any such review could only be prospective in nature, in that it determined whether subsequent importations would be causing injury if the duties were removed. This approach had been codified in injury review provisions of the Anti-Dumping Codes (1967 and 1979) and in Article 4:9 of the Code."[109]

239. The Panel observed that this passage of the non-rubber footwear panel report discussed the need for "… a review mechanism under which countervailing duties, once imposed, had to be reviewed if the circumstances justifying their imposition had changed" (emphasis added). The panel explicitly stated that this review mechanism was the manner in which the continuing obligation of signatories regarding the determination of injury was implemented once countervailing duties had been imposed. Furthermore, the panel indicated that such reviews were necessarily prospective in nature. At the end of the passage, the panel specifically referred to the "injury review provisions of the Anti-Dumping Codes (1967 and 1979) and in Article 4:9 of the Code" (emphasis added). The Panel considered that, because this passage of the (as yet unadopted) report consistently used the term "review" and indicated that such a review was prospective in nature, it could not be said to support the view that Article 9:1 of the Agreement contained an obligation to undertake monitoring or surveillance of the validity of the original injury determination in addition to the obligation to conduct reviews under Article 9:2.

240. Finally, the Panel was of the view that the fact that several Parties to the Agreement had adopted "sunset" clauses, which limited the duration of anti-dumping duties, subject to the possibility of an extension after a review, could not be said to amount to a "subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" within the meaning of Article 31:3(b) of the Vienna Convention (1969) on the Law of Treaties.

241. Based on its analysis in the preceding paragraphs of the text and context of Article 9:1 and of the arguments presented by Sweden on the interpretation of this provision, the Panel was of the view that where, as in the present case, a complaint was raised regarding the alleged failure of a Party to undertake a factual analysis of whether the continued imposition of an anti-dumping duty remained necessary within the meaning of Article 9:1, such a complaint needed to be examined in the first place under the provisions of Article 9:2 of the Agreement.

242. The Panel **concluded** that whether the United States acted inconsistently with Article 9 by continuing to apply anti-dumping duties on imports of stainless steel plate from Sweden without having conducted an analysis of the need for the continued imposition of those duties was an issue to be examined in the first instance in light of the requirements in Article 9:2 of the Agreement regarding the review of anti-dumping duties.

C. **Alleged Infringement by the United States of its obligations under Article 9:2 of the Agreement**

1. Whether the United States acted inconsistently with Article 9:2 by not self-initiating a review of the injury finding made in respect of imports of Swedish stainless steel plate

243. The Panel next proceeded to examine Sweden's claim that the United States had acted, and was still acting, inconsistently with its obligations under Article 9:2 by continuing to apply anti-dumping

[109]Report of the Panel (unadopted), 4 October 1989, SCM/94, para. 4.4.

duties on imports of stainless steel plate from Sweden without undertaking, on its own initiative, a review of the injury finding made in 1973 with respect to these imports.

244. Article 9:2 provides:

> "The investigating authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if any interested party so requests and submits positive information substantiating the need for review."

245. Sweden argued that Article 9:2 contained an obligation for Parties to undertake upon their own initiative a review of the need for continued imposition of an anti-dumping duty, which obligation was independent from, and additional to, the obligation of Parties to undertake such a review upon request by an interested party which submitted positive information substantiating the need for review. The words "on their own initiative" placed an obligation on investigating authorities to take the initiative to initiate a review. The authorities which had imposed an anti-dumping duty were also responsible for showing that the continued imposition of an anti-dumping duty was necessary to counteract dumping which was causing injury. This distinct obligation to undertake self-initiated reviews under Article 9:2 served the purpose of ensuring that, when interested parties did not request a review, an anti-dumping duty would nevertheless not remain in force when the original determination which had led to the imposition of the duty had lost its validity. The existence of this obligation was consistent with the temporary and remedial character of anti-dumping duties. That there was an ongoing obligation on investigating authorities to undertake a review periodically had been confirmed by the report of the panel in the dispute between Brazil and the United States on countervailing duties applied by the United States on non-rubber footwear from Brazil.

246. Sweden considered that, in the case at hand, a self-initiated review and subsequent revocation of the anti-dumping duties were warranted because of the substantial difference between the factual situation in 1992 and the factual situation which had led to the affirmative determination of injury made in 1973 with respect to Swedish stainless steel plate. In this regard Sweden pointed to the following factors:

(i) the decline in the volume of imports into the United States of Swedish stainless steel plate since 1973, and the negligible level of these imports during the period 1974-1991, both in absolute and in relative terms;

(ii) the increase of Swedish stainless steel plate exports to the EC;

(iii) the free-trade agreements between the EC and Sweden, as a result of which Swedish exports of stainless steel plate entered the EC duty-free and without quantitative restrictions;

(iii) the changed strategy of the Swedish exporter, which had supplanted direct exports to the United States with sales made from a facility in the United States acquired in 1976;

(iv) the reduced production capacity in the Swedish stainless steel plate industry; and

(v) the improvement in the condition of the US domestic industry, resulting from several safeguard measures applied during the 1970s and 1980s and from the voluntary export restraint agreements concluded between the United States and several steel exporting countries.

247. The United States argued that Article 9:2 was phrased in the disjunctive and that it was therefore sufficient for a Party to provide the opportunity for either self-initiated reviews or reviews upon request by an interested party. This interpretation was supported by the report of the panel in the dispute between Brazil and the United States on countervailing duties applied by the United States on non-rubber footwear from Brazil. Even though Article 9:2 could thus be read to require only one of these two types of review, the practice of the United States was to provide more than the minimum required and also to provide the possibility of self-initiated reviews. The United States further argued that the words "where warranted" in Article 9:2 indicated that self-initiated reviews were not automatic but had to be conducted only if there were reasons for doing so.

248. According to the United States, the question of whether in the case before the Panel the USITC should have initiated a review without having received a request by an interested party did not arise because such a request had been received by the USITC. The circumstances referred to by the Swedish exporter in the two requests for initiation of a review were identical to the circumstances referred to by Sweden before this Panel as an indication that a self-initiated review was warranted under Article 9:2. In the view of the United States, the USITC had properly determined that these circumstances did not warrant the initiation of a review upon request. If these circumstances were not sufficient to warrant initiation of a review upon request, they were also insufficient to make a self-initiated review under Article 9:2 warranted.

249. The United States objected to the presentation by Sweden of certain information pertaining to the period after 1987, on the ground that the USITC had not had an opportunity to consider this information.

250. In its examination of Sweden's claim with respect to the alleged failure of the United States to self-initiate a review, the Panel noted the disagreement between the parties on whether Article 9:2 contained both an obligation to self-initiate a review of the need for the continued imposition of an anti-dumping duty, where warranted, and an obligation to initiate such a review when requested, or whether a Party could provide for only one of these two types of review. Sweden was of the view that Article 9:2 contained an obligation to self-initiate a review and an obligation to undertake a review upon request, and that both these obligations must be given effect in the practice of a Party. The United States took the view that under Article 9:2 a Party was required to provide for the opportunity of either a self-initiated review, or a review upon request by an interested party.

251. In the Panel's view, the fact that Article 9:2 was phrased in the disjunctive simply served to distinguish between different modalities of initiation of a review, but did not imply that a Party had the discretion to provide in its legislation or practice for only one of those modalities, to the exclusion of the other. The Panel noted in this regard that the logical implication of the interpretation advanced by the United States was that a Party would be free to provide in its legislation or practice only for the possibility of self-initiated reviews, to the exclusion of reviews upon request. If this interpretation were accepted, a Party would be free to refuse to initiate a review upon request, even where an interested party submitted positive information substantiating the need for review. Furthermore, the Panel considered that there could be situations in which information indicating that initiation of a review was warranted was more readily available to investigating authorities than to interested parties. Under the interpretation advanced by the United States, in such a situation a Party which had decided to provide only for reviews upon request would be permitted not to act upon such information at its disposal by self-initiating a review.

252. Based on the above considerations, the Panel rejected the interpretation of Article 9:2 advanced by the United States, according to which a Party had the discretion to provide the opportunity for either self-initiated reviews or reviews upon request, and considered that the fact that in this case the United States had provided for opportunities for reviews upon request by interested parties did not by itself

dispose of Sweden's claim that the United States had violated Article 9:2 by not undertaking a review on its own initiative.

253. The Panel noted that Article 9:2 required investigating authorities to undertake a review on their own initiative "where warranted". Accordingly, the Panel examined the factors which according to Sweden warranted a self-initiated review in this case. The Panel recalled that it was requested by Sweden to find that the United States had acted inconsistently with Article 9:2 by not self-initiating a review, and to find that the United States had acted inconsistently with Article 9:2 by denying the Swedish exporter's requests for initiation of a review.

254. In this connection, the Panel noted that as support for its argument that a self-initiated review was warranted in this case, Sweden identified several circumstances which in Sweden's view indicated that the current situation, i.e. the situation in 1992, differed substantially from the situation prevailing at the time of the investigation which had led to the injury determination in 1973. The factors mentioned by Sweden in this context were identical to the factors described in the two requests for initiation of a review presented in 1985 and 1987 to the USITC by the Swedish exporter. However, in presenting these factors before the Panel as evidence that a self-initiated review was warranted, Sweden submitted information relating to the period 1973-1991, while the factors presented by the Swedish exporter in the requests for the initiation of a review of course did not cover this period.

255. The Panel first noted that it could not make a finding on whether the United States had acted inconsistently with Article 9:2 by not self-initiating a review during a period in which the Agreement was not in force (1973-1980).

256. The Panel further noted that, while some of the developments mentioned by Sweden to support its argument that a self-initiated review was warranted had occurred during the 1970s, other developments referred to by Sweden, such as the reduction of the production capacity of the Swedish stainless steel plate industry and voluntary export restraint agreements between the United States and a number of exporting countries, had occurred in the early and mid-eighties. Thus, taken together these developments did not cover a period of time prior to the period covered by the Swedish exporter's requests for the initiation of a review. On the contrary, in light of Sweden's statement that a self-initiated review was warranted in this case because the factual situation in 1992 differed substantially from that in the early seventies, it appeared to the Panel that the period referred to by Sweden in its claim that the United States had failed to self-initiate a review went beyond the period covered by the developments described in the two requests made in 1985 and 1987 by the Swedish exporter for the initiation of a review.

257. Given that the factors alleged by Sweden to have warranted a self-initiated review overlapped with, and covered a longer period of time than, the factors described in the Swedish exporter's requests for a review, the Panel had to decide whether it was legally possible for it to make a finding on Sweden's claim regarding the alleged failure of the United States to self-initiate a review, in addition to a finding on Sweden's claim that the United States had acted inconsistently with Article 9:2 by denying the exporter's requests for review.

258. In this respect, the Panel considered that, if in the present case it were to find that the United States had properly determined that the information submitted by the Swedish exporter in the two requests did not constitute positive information substantiating the need for review, it would not be legally possible for the Panel to find that the United States should nevertheless at the same time and on the basis of the same information have self-initiated a review. If, on the other hand, the Panel were to find that the United States had erred in determining that the information submitted by the Swedish exporter in the two requests did not constitute positive information substantiating the need for review, that finding would be sufficient to conclude that the United States had acted inconsistently with Article 9:2. An additional determination that, based on the same information the United States should at the same time

also have self-initiated a review would not be possible in that situation because logically a Party could not at the same time and with respect to the same factual circumstances violate Article 9:2 by dismissing a request for a review and separately violate Article 9:2 by not undertaking a review on its own initiative.

259. Thus, the Panel was of the view that, where an interested party presented certain factual information to the investigating authorities of a Party in support of a request for initiation of a review under Article 9:2, the only relevant question in terms of that Party's compliance with Article 9:2 was whether that Party had properly determined that the information submitted in the request did not constitute positive information substantiating the need for review. The question of whether that Party should at the same time and on the basis of the same information have self-initiated a review could not arise in such a situation. In other words, given the presence of a request for the initiation of a review, the question of whether the Party was required to self-initiate a review based on the information presented in that request became moot.

260. The Panel therefore was of the view that it could not make findings on Sweden's claim regarding the United States' alleged failure to self-initiate a review, in so far as the factors presented by Sweden in support of this claim were identical to, and covered the same period of time as, the factors presented by Sweden in support of its claim that the United States had violated Article 9:2 by denying the Swedish exporter's requests for initiation of a review.

261. With respect to information presented by Sweden in support of its claim that a self-initiated review was warranted on developments subsequent to the USITC's dismissal of the second request for a review (in 1987), the Panel did not accept the argument of the United States that this information was inadmissible before the Panel on the ground that it had not previously been presented to the investigating authorities in the United States. In the Panel's view, this argument could be relevant in the context of a complaint regarding a refusal by a Party to initiate a review upon request, but not in the context of a complaint regarding the alleged failure of a Party to undertake a review on its own initiative. However, the Panel considered that the need to address the question of whether the information on developments subsequent to the second request for a review warranted a self-initiated review would arise only if the Panel were to find that the United States had not acted inconsistently with Article 9:2 by dismissing the requests made in 1985 and 1987 for initiation of a review.

262. Although the Panel thus decided, for procedural reasons, that in the present case the question of whether the United States should have self-initiated a review was possibly relevant only with respect to factual developments subsequent to the USITC's dismissal of the second request by the Swedish exporter for the initiation of a review, the Panel also noted that in the case at hand anti-dumping duties had been in place since 1973 without there having been an injury review. In the Panel's view, Article 9:2 required investigating authorities to undertake a review upon their own initiative "where warranted", but did not prescribe any time-limits within which such a review was to be initiated, or provide for automatic periodic reviews. At the same time, as explained above, the Panel was of the view that Article 9 needed to be interpreted as a whole and that, accordingly, the review requirements in Article 9:2 were to be interpreted in conjunction with the requirement in Article 9 that an anti-dumping duty remain in force only as long as and to the extent necessary to counteract dumping which was causing injury. In view of this relationship between Articles 9:2 and 9:1, the Panel considered that where during a considerable length of time a Party did not undertake a review on its own initiative, this could raise serious questions as to whether that Party did not exceed the limits of the discretion afforded by Article 9:2, notwithstanding the lack of time-limits for the initiation of reviews under that provision.

263. The Panel further considered that, while Article 9:2 was silent on the means by which a Party was to determine whether a self-initiated review was warranted, at a minimum a good faith implementation of this provision required that investigating authorities ensured that they disposed of relevant information indicating that such a review might be warranted. The Panel was not persuaded

that in the case at hand the USITC's procedures were entirely satisfactory in this regard. Thus, as discussed in more detail in Section 2.1.1 below, the USITC was not aware of the precise product coverage of the 1973 dumping finding. The Panel was concerned that this lack of awareness of such an important issue appeared to reflect a somewhat passive attitude which was not conducive to an effective implementation of Article 9:2 consistent with the spirit of that provision.

2. Whether the United States acted inconsistently with its obligations under Article 9:2 by dismissing the requests for initiation of a review of the injury determination on imports of stainless steel plate from Sweden

264. The Panel proceeded to examine the complaint of Sweden that, by dismissing the requests made in 1985 and 1987 by the Swedish exporter for the initiation of a review of the 1973 injury finding, the United States had acted inconsistently with its obligations under Article 9:2 of the Agreement.

2.1 The USITC's dismissal of the 1987 request for initiation of a review to revoke or modify the 1973 dumping finding

265. Most of the arguments presented by the parties to the Panel focused on the USITC's decision taken in July 1987 with respect to the second request by the Swedish exporter for the initiation of a review under Section 751(b) of the Tariff Act of 1930, as amended.

266. The Panel noted that in this request, submitted in February 1987, the Swedish exporter had developed two main arguments.

267. First, according to the exporter, the facts established "changed circumstances sufficient to warrant the institution of a review investigation" to revoke the 1973 dumping finding. Second, according to the exporter, the facts established "changed circumstances sufficient to warrant the institution of a review investigation" to modify the 1973 dumping finding. It was apparent from the text of the request that these two arguments were presented by the exporter in the alternative. Thus, the introductory section of the request began as follows:

> "This is a request that the Commission institute a review investigation to determine whether an industry in the United States would be materially injured or threatened with material injury by imports of hot and cold-rolled stainless steel plate from Sweden in the event a 1973 'Finding of Dumping' covering such merchandise were (i) revoked or, in the alternative, (ii) modified to exclude cold-rolled steel plate."[110]

268. In support of its contention that the facts established the existence of "changed circumstances sufficient to warrant the initiation of a review" to revoke the 1973 dumping finding, the Swedish exporter pointed to the following factual developments[111]:

(i) Imports from Sweden had been at *de minimis* levels since 1976.

[110]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, p.1.

[111]*Ibid*, pp.27-68.

(ii) This *de minimis* level of the volume of imports resulted not from the dumping finding issued in 1973 but from the acquisition in 1976 of a steel mill in New Castle, Indiana by a predecessor of the Swedish exporter.

(iii) The structure of Sweden's stainless steel plate producing industry had changed dramatically since 1973.

(iv) The level of demand in Western Europe for stainless steel plate from Sweden had changed materially since the injury finding was made in 1973.

(v) Trade agreements between the European Communities and Sweden had eliminated all import duties on Swedish steel and did not impose quantitative restrictions on exports of Swedish plate to the EC.

(vi) Quota arrangements between the United States and the European Communities, Japan, and other major stainless steel plate exporting countries had seriously impeded the ability of Swedish imports to compete in the United States market for stainless steel plate

269. In support of its alternative contention that the facts established the existence of changed circumstances sufficient to warrant the institution of a review investigation to modify the 1973 dumping finding, the Swedish exporter argued that three types of Swedish stainless steel plate which did not exist in 1973 were now being imported in minimal quantities. These products were not produced in the United States. The Swedish exporter thus submitted that the 1973 dumping finding should be reviewed with a view to excluding these three products from the scope of application of the finding.[112]

270. Sweden claimed before the Panel that the information provided in the request on the above-mentioned factors constituted "positive information substantiating the need for review" within the meaning of Article 9:2 and that the USITC had acted inconsistently with the requirements of Article 9:2 for the initiation of reviews upon request by rejecting this petition. In support of this claim, Sweden contested the USITC's analysis of each of these factors.

271. The United States argued that the USITC's decision that the information provided by the Swedish exporter did not substantiate the need for a review had been properly explained and was the result of an objective examination of the evidence before the USITC.

272. The Panel noted that the parties to the dispute had presented arguments pertaining both to the interpretation of the phrase "positive information substantiating the need for review" in Article 9:2 and to the factual sufficiency of the findings made by the USITC.

273. The parties disagreed on the interpretation of the standard of evidence implied by the words "positive information substantiating the need for review" in Article 9:2.

274. Sweden considered that it could be argued that this expression implied a lower level of evidence than the "sufficient evidence" standard in Article 5:1 of the Agreement. In any event, the "positive information" standard in Article 9:2 was a lower standard of evidence than the "positive evidence" standard in Article 3.

[112] *Ibid*, pp.69-75.

275. The United States argued that the "positive information" standard in Article 9:2 was closer to the "positive evidence" standard in Article 3 than to the "sufficient evidence" standard in Article 5:1

276. The Panel considered that the standard of evidence implied by the "positive information" requirement in Article 9:2 needed to be interpreted in its proper context, and was thus not persuaded that the references made by the parties to evidentiary standards elsewhere in the Agreement were particularly useful. A decision under Article 9:2 to initiate a review was a decision to begin a fact-finding process in order to determine whether or not the continued imposition of an anti-dumping duty was necessary. It could therefore be said that "positive information substantiating the need for review" was such information as would persuade an objective, unprejudiced mind, that a fact-finding process was necessary in order to determine whether continued application of the duty was necessary. While the words "positive information substantiating the need for review" clearly implied that there was a certain burden on an interested party requesting a review to come forward with information indicating that such a fact-finding process was warranted, this burden had to be seen in conjunction with the threshold nature of the decision on whether or not to initiate a review. Furthermore, a decision to initiate a review naturally did not prejudge the outcome of such a review.

277. Regarding issues of interpretation of Article 9:2, the parties also offered conflicting views on whether the standard applied by the USITC - requiring the presence of "changed circumstances sufficient to warrant review" - was in accordance with Article 9:2.

278. Thus, Sweden argued that the threshold decision on whether or not to initiate a review had to be based on an examination, in the light of the current situation, of the factors which constituted the basis of the original injury determination. According to Sweden, a review under Article 9:2 should be initiated if information was provided by an interested party indicating that changes had occurred in the factors underlying the original injury determination such that this determination no longer constituted a valid basis for the continued application of anti-dumping duties. Once it had been found that changed circumstances invalidated the original injury determination, the burden was on the Party applying the anti-dumping duty to demonstrate, during a review, that continued imposition of the anti-dumping duty was necessary. It was only at this stage that the question of whether revocation of the duty would again cause or threaten material injury to the domestic industry was relevant. In Sweden's view, it was inconsistent with Article 9:2 to condition a decision on the initiation of a review on whether the interested party requesting the review had provided evidence that injury would not recur upon revocation of the anti-dumping duty.

279. The United States took the view that the "changed circumstances sufficient to warrant review" standard applied by the USITC was consistent with Article 9:2. In the view of the United States, the purpose of a review under Article 9:2 was to determine the need for the continued imposition of an anti-dumping duty to counteract dumping which was causing injury. A logical way to make this determination was to ask whether injury would recur upon revocation of the anti-dumping duty. Whether injury continued to exist with the anti-dumping duty in place was irrelevant in this respect. The standard of "positive information substantiating the need for review" had to be interpreted in the light of this purpose of the review. Accordingly, such information had to tend to show that injury would not recur upon revocation of the anti-dumping duty. Thus, in the view of the United States, there could be no distinction between the type of information relevant to a decision on the initiation of a review, and the type of information relevant during such a review. While the evidentiary standards were different at these stages of the proceeding, in both cases the information had to relate to what would happen in the absence of the anti-dumping duty.

280. Closely related to the disagreement on this issue, the parties also differed on the question of whether changed circumstances that were merely the expected consequences of the imposition of an anti-dumping duty could be a ground for initiation of a review.

281. In this respect, the United States argued that because the information warranting initiation of a review had to tend to indicate that revocation of the anti-dumping duty would not again lead to injury, changes that were merely the expected consequences of the imposition of the anti-dumping duty were irrelevant as a grounds for initiating a review. Thus, a decline in the volume of imports, absent an explanation other than the imposition of the anti-dumping duty, by itself was not a ground for initiation of a review.

282. Sweden rejected the view of the United States regarding the irrelevance of changes that were the expected consequence of the imposition of an anti-dumping duty as an indication of the need for a review. In Sweden's view, when the anti-dumping duty had led to a decline in the volume of imports, this was an indication that the duty had fulfilled its purpose. The nature of the anti-dumping duty as a temporary and remedial measure required that at that point a review of the need for the continued application of the duty be initiated. In addition, Sweden argued that, while an anti-dumping duty could affect the volume of imports, it could also affect the price level of those imports. Furthermore, even if imports had declined as a result of the imposition of an anti-dumping duty, it did not necessarily follow that imports would increase upon revocation of the duty, or that if imports increased, they would again cause or threaten material injury to a domestic industry.

283. The Panel was thus presented with significant questions of interpretation of the concept of "positive information substantiating the need for review" in Article 9:2. The Panel decided to refrain from addressing these questions *in abstracto* and considered that it should first proceed to examine the factual issues raised by the parties in order to determine whether it was necessary for the Panel to pronounce itself on these matters of interpretation. The Panel noted in this regard that, with the exception of the issue of the decline in the volume of Swedish imports of stainless steel plate into the United States, the USITC had not mentioned in its decision that the factors mentioned by the Swedish exporter were insufficient because they related to developments which were merely the expected consequence of the imposition of anti-dumping duties. With respect to the issue of declining Swedish imports into the United States, the Panel considered that it should first examine the factual basis of the finding of the USITC that the decline in imports was merely the expected consequence of the imposition of anti-dumping duties, before pronouncing itself on whether the USITC's dismissal of this factor on this ground rested on an interpretation which, as a matter of law, was inconsistent with Article 9:2.[113]

284. Regarding the factual issues raised by the parties, the Panel considered that in its examination of whether the United States had properly determined that the information submitted by the Swedish exporter did not constitute positive information substantiating the need for review, it should examine whether the USITC determination resulted from an objective examination of the information before the USITC, and in this context whether the USITC had adequately explained its determination, and whether the information before the USITC supported the determination. To this end, it was necessary for the Panel to carefully review the factual basis of the determination (as discernible from the USITC's decision) without however conducting a *de novo* investigation of the factual information before the USITC.

285. The Panel noted that the decision taken by the USITC which contained the USITC's determination that the request of the Swedish exporter did not show "changed circumstances sufficient to warrant institution of a review investigation" provided "the reasons for that determination". Accordingly, the Panel examined the issue of whether the decision of the USITC was inconsistent with Article 9:2 of the Agreement in light of the reasons expressed in that decision.

---

[113]See para. 314, *infra*.

286. The Panel proceeded to consider the USITC's decision on the first point raised in the request for review by the Swedish exporter, i.e. the contention that the facts established "changed circumstances sufficient to warrant a review investigation" in order to revoke the 1973 dumping finding.

2.1.1 Evolution of the volume of imports of Swedish stainless steel plate and acquisition in 1976 of a US steel mill

287. The Panel noted the arguments of the Swedish exporter in the request for initiation of a review according to which (1) since 1976 imports of hot-rolled stainless steel plate from Sweden had been at a *de minimis* level, and (2) this *de minimis* level resulted not from the anti-dumping duties in force on these imports but from the acquisition in 1976 of a steel mill in New Castle, Indiana by one of the Swedish exporter's predecessors.

288. As factual support for its contention regarding the *de minimis* level of imports since 1976, the Swedish exporter provided two tables.[114] The first of these tables provided data on imports of stainless steel plate from Sweden, excluding four products which in the view of the Swedish exporter should not be included in the import statistics. The exporter noted several problems with these statistics. The second table did include these four products in the import statistics. According to the exporter, whether the import volume was analyzed with or without the four products, the result was the same: the level of imports of stainless steel plate from Sweden had been *de minimis*.

289. In support of its contention that the minimal level of the volume of imports of Swedish stainless steel plate since 1976 was the result of the acquisition of the steel mill in New Castle[115], the Swedish exporter provided data on the evolution of the volume of shipments of this steel mill since 1976 and argued that its management had decided to participate in the US market for hot-rolled plate through the sale of plate produced at this mill and to cease exports of virtually all hot-rolled plate from Sweden. The exporter also provided a table which compared the volume of direct exports of stainless steel plate from Sweden and the volume of sales of stainless steel plate made by the Swedish-owned mill in the United States. The exporter claimed that the impact of the acquisition of the US steel mill was reflected in this table in the increasing importance of sales made by the Swedish-owned steel mill in the United States relative to the direct exports from Sweden.

290. The Panel noted the following statement of the USITC explaining why it found the claim of the exporter regarding the *de minimis* level of imports to be unfounded:

> "The Commission found this same allegation unpersuasive when raised in 1985. As we noted there, U.S. imports of Swedish plate declined sharply in 1974, the year following the imposition of the anti-dumping order and, although fluctuating from year to year, they remained relatively constant thereafter. A decline in exports is an expected result from the imposition of an order. Moreover, plate imports, including those from Sweden, have been subject to quotas and additional duties during portions of the years since 1973 including, for example, special duties imposed pursuant to Section 202 of the Trade Act of 1974. (footnote omitted) The current allegation is not in any significant respect different from the allegation rejected by the Commission in 1985. The

[114]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, pp.35-36.

[115]*Ibid*, pp.37-45.

> Commission again finds that petitioners have offered no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief."[116]

Regarding the contention of the exporter on the effect of the acquisition in 1976 of a US steel mill on the evolution of the volume of imports of stainless steel plate from Sweden, the USITC observed:

> "… the volume of imports of Swedish plate declined sharply in 1974. As we found in 1985, the level of imports from Sweden has not decreased since that purchase. In fact, current data show notable increases in the most recent periods. Unlike their 1985 petition, petitioners now assert that acquisition of the mill caused a substantial shift in their market strategy and that the New Castle mill is used to supply the majority of petitioner's hot-rolled plate for the U.S. market. They state that they intend to use the U.S. facility for hot-rolled plate except for specialty types. Their data, however, show that exports of Swedish plate to the U.S. are predominantly hot-rolled, including a very substantial percentage of standard types. We conclude that (sic) the Swedish producers have offered no additional argument to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States."[117]

291. The parties to the dispute disagreed on factual and legal grounds as to whether the USITC's dismissal of the change in import volume and of the acquisition of the US steel mill in 1976 as "changed circumstances warranting the initiation of a review" was in accordance with Article 9:2 of the Agreement.

292. The factual aspects on which the parties disagreed pertained to the conclusion of the USITC that the acquisition of a US steel mill in 1976 by a predecessor of the Swedish exporter had affected neither the volume of direct imports of stainless steel plate from Sweden nor the product composition of those imports.

293. The main legal issue on which the parties disagreed concerned the issue of whether a decline in the volume of imports *per se* was relevant as an indication that initiation of a review was warranted under Article 9:2 of the Agreement.

294. The Panel first examined the disputed issues of a factual nature.

295. One of the factual arguments advanced by Sweden was that the USITC, in its analysis of the contentions of the Swedish exporter regarding the *de minimis* level of imports and the impact on the volume of imports of the acquisition of the steel mill in New Castle, had relied on import statistics which erroneously included three products which in 1976 had been exempted from the scope of application of the dumping finding by a ruling of the United States Customs Service. According to Sweden, if these products were excluded from the statistics, the volume of imports had declined since the date of purchase of the US facility.

296. While the text of the USITC's decision dismissing the request for the initiation of a review did not identify the data on which the USITC relied in its analysis of the evolution of the volume of imports of stainless steel plate from Sweden, the United States indicated to the Panel that the USITC

---

[116]See Annex III *infra*.

[117]See Annex III *infra*.

had relied on data in Table 3B in the request of the Swedish exporter.[118] This Table included in the import statistics the three products claimed by Sweden to have been exempted from the scope of the dumping finding in 1976.

297. The Panel had before it documentation provided by the parties showing that in November 1976 the United States Customs Service had ruled that the three products in question should be exempted from the dumping finding issued in June 1973 on imports of stainless steel plate from Sweden.

298. The Panel thus found that in its analysis of the evolution of the volume of imports of Swedish stainless steel plate the USITC had relied on data which included in the import statistics three products which since November 1976 had not been subject to the anti-dumping duties.

299. The Panel noted the argument of the United States that the issue of the product coverage of the import statistics used by the USITC was not properly before the Panel. In this regard, the United States pointed out that the ruling of the United States Customs Service excluding the three products was not known to the USITC. The ruling was never issued publicly and had not been submitted to the USITC by the Swedish exporter. Consequently, the ruling was not part of the record of the proceedings before the USITC and, pursuant to Article 15:5(b) of the Agreement, could not be taken into account by the Panel.

300. The United States also argued that only with respect to one of the three products had the Swedish exporter informed the USITC that the product had been exempted from the application of the dumping finding. With respect to the other two products, the exporter had argued that the USITC should find a way to exclude these products from the finding. By making this request, the exporter necessarily represented that these products were within the scope of the finding at the time of the exporter's request for the initiation of a review.

301. The Panel noted that the factual information of which the USITC was claimed not to have been aware related to an action taken by the authorities of the United States in 1976 to exclude three products from the scope of the dumping finding on stainless steel plate from Sweden. This information was thus in the hands of the Government of the United States. That the Customs Service ruling was not issued publicly, and that this ruling was on file with the Department of Commerce rather than with the USITC, did not mean that the Government of the United States could be said to be unaware of the existence of this ruling.

302. Furthermore, with respect to at least one of the three products, the Swedish exporter had mentioned the fact that this product had been excluded from the scope of the finding. The Panel failed to understand why the USITC, having been presented by the exporter with an issue regarding the product coverage of the dumping finding, did not take any steps to ensure that it was in the possession of accurate information on the product coverage of the finding. As noted above, the three products had been excluded from the application of anti-dumping duties by the same Customs Service ruling. Had the USITC seriously considered this point, it would have found that the same Customs Service ruling which excluded the one product mentioned by the Swedish exporter also excluded two other products from the application of anti-dumping duties on imports of Swedish stainless steel plate.

303. The Panel noted that Article 15:5(b) of the Agreement required that the examination by a panel of disputed issues be based upon:

[118]See Annex VII *infra*.

> "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country."

In the Panel's view, the 1976 Customs Service ruling could not be said to be a fact not "made available in conformity with appropriate domestic procedures to the authorities of the importing country." As noted above, this "fact" pertained to an action taken by the authorities of the United States regarding the product coverage of the 1973 dumping finding and was thus "available … to the authorities of the importing country". That the USITC had not become aware of this ruling was the result of a lack of adequate consideration given by the USITC to an issue raised by the Swedish exporter. Moreover, even if the issue of product coverage had not been raised by the exporter, the Panel did not consider that Article 15:5(b) could be interpreted to allow a Party to ignore information in its possession on as straightforward an issue as the product coverage of an anti-dumping duty.

304. The Panel therefore rejected the argument of the United States that the issue raised by Sweden on the inclusion in the import statistics of three products not subject to the anti-dumping duties was inadmissible in the proceedings before the Panel.

305. The Panel then turned to the argument of the United States that the inclusion of these three products did not materially affect the validity of the conclusions reached by the USITC on the decline in the volume of imports of Swedish stainless steel plate as an alleged "changed circumstance warranting review."

306. The United States argued in particular that even if one excluded these three products, this did not detract from the validity of the USITC's conclusion that "current data show notable increases in the most recent periods". In addition, the United States argued that the import data, excluding the three products, showed a huge decline in the volume of imports following the imposition of anti-dumping duties in 1973. Any subsequent decline in the import volume was slight in comparison to the decline immediately following the imposition of these duties.

307. The Panel observed that the USITC had stated in its decision that "… the level of imports from Sweden has not decreased since that purchase. In fact, current data show notable increases in the most recent periods." (emphasis added)

308. The adjusted figures referred to by the United States[119] might be consistent with the statement that there were increases in the most recent periods (although the Panel noted that this increase in the most recent periods was largely a reflection of one shipment of cold-rolled plate in 1986), but were certainly not consistent with the statement that the level of imports had not declined since the purchase in 1976 of the steel mill in New Castle. These figures showed that imports did decline following that purchase and that in each subsequent year the volume of imports was smaller than in 1976. Therefore, without the erroneous inclusion of the three products in the import statistics, the USITC's statement regarding the absence of a decline in the volume of imports since 1976 was not supported by fact.

309. The Panel could therefore not accept the contention of the United States that the inclusion of these products did not materially affect the validity of the USITC's conclusions. In the view of the Panel, a key element in the USITC's analysis was its denial of a link between the acquisition of the steel mill in 1976 and the level of imports of stainless steel plate from Sweden in subsequent years. When the import data used by the USITC were corrected to exclude the three products, the USITC's conclusion on this point proved to be without any factual basis.

---

[119] *Supra*, paragraph 148.

310. The Panel observed that it was factually correct, as argued by the United States, that even with the adjusted figures on the level of import volume of Swedish stainless steel plate, the decrease in imports since 1976 was of a lesser magnitude than the decrease in imports immediately following the imposition of the anti-dumping duties in 1973. The Panel noted however that the USITC in its decision had not made any comparison between the decline in imports in 1974 and the decline in imports since 1976. Rather, the USITC simply denied that imports had declined since 1976. The Panel therefore considered that this argument of the United States was an inadmissible attempt to rationalize *ex post facto* the decision of the USITC. The text of the USITC's decision indicated that it was a full statement of reasons for the USITC's determination to dismiss the request for the initiation of a review. The Panel, accordingly, refused to review the USITC's decision in light of reasons not stated in that decision.

311. It followed from the preceding considerations that the USITC's conclusion that the decline in imports was not related to the acquisition of the steel mill in 1976 was based on a factual error made by the USITC. The Panel thus found that the USITC's conclusion that there was no connection between the decline in the volume of imports since 1976 and the acquisition of a steel mill in New Castle by a predecessor of the Swedish exporter was not supported by fact. In light of this finding, the Panel also considered that the USITC erred when it stated that petitioners had provided "no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief".

312. The Panel then noted that the parties to the dispute not only disagreed on the factual correctness of the USITC's analysis of the evolution of import volume, but also more generally offered conflicting views on the relevance of a decline in imports as a circumstance indicating that a review was warranted under Article 9:2.

313. Sweden argued that a decline in the volume of imports following the imposition of anti-dumping duties was relevant as an indication that a review within the meaning of Article 9:2 was warranted. The United States argued that a decline in the volume of imports was merely the expected result of the imposition of anti-dumping duties and was therefore by itself, without the presence of circumstances other than the existence of the anti-dumping duties to explain this decline, not a ground for initiating a review within the meaning of Article 9:2 of the Agreement.

314. The Panel considered that it would have been necessary to pronounce itself on this matter had it found that in the case before it the USITC had properly concluded that there were no factors other than the existence of the anti-dumping duties which could explain the decline in the volume of imports of stainless steel plate from Sweden. However, as noted above, the Panel found that the USITC's statements that imports had not declined since 1976 and that the acquisition of the US steel mill by a predecessor of the Swedish exporter had not affected the evolution of imports from Sweden, were unsupported by fact. In these circumstances, the Panel considered as irrelevant the argument of the United States that a decline in imports, absent factors other than the presence of anti-dumping duties to explain that decline, was not a basis for initiating a review.

315. As described in paragraph 290, in dismissing the acquisition of the New Castle steel mill as a "changed circumstance warranting the institution of a review", the USITC also noted that, according to data provided by the Swedish exporter, "… exports of Swedish plate to the US are predominantly hot-rolled, including a very substantial percentage of standard types".

316. Sweden provided the Panel with data on the composition of imports of Swedish stainless steel plate in 1986 and argued on the basis of this data that at least for this year the USITC was factually incorrect in stating that Swedish imports of stainless steel plate were predominantly hot-rolled.[120]

[120]*Supra*, paragraph 142.

317. The United States argued that the USITC's statement on the product composition of stainless steel plate imports from Sweden was supported by data provided by the Swedish exporter in its request for initiation of a review investigation.[121]

318. The United States indicated that the USITC based its statement that exports of Swedish stainless steel plate "were predominantly hot-rolled, including a very substantial percentage of standard types" on import statistics in Table 3B in the request of the Swedish exporter for the initiation of a review.[122] According to the United States, these import data included only one shipment of cold-rolled plate (in 1986); all other imports reported in this Table were imports of hot-rolled plate.

319. The Panel noted that the Table which, according to the United States, formed the factual basis for the USITC's statement on the product composition of Swedish stainless steel plate imports included imports of the three specialty steel products which in 1976 had been exempted from the scope of the dumping finding. The removal from the data in this Table of the one shipment of cold-rolled plate resulted in figures representing imports of hot-rolled plate. However, these figures did not represent imports of hot-rolled plate actually subject to the dumping finding since they included the three specialty products excluded from the finding in 1976. The Panel therefore found it difficult to understand how the simple removal from the data of the one shipment of cold-rolled plate in 1986 resulted in a set of data from which conclusions could be drawn regarding the importance of imports of standard types of hot-rolled plate subject to the dumping finding relative to imports of non-standard types of hot-rolled plate subject to that finding.

320. The Panel's difficulties in understanding how the data in Table 3B enabled the USITC to draw its conclusion regarding the substantial percentage of standard types of hot-rolled plate were compounded by the fact that later in its decision the USITC stated that "… as noted above, Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States". Because the USITC referred back to its earlier statement regarding the substantial percentage of standard types of hot-rolled plate, it appeared to the Panel that the two statements logically should have the same factual basis. However, the United States explained before the Panel that the USITC's statement regarding the "very significant quantities of standard types of hot-rolled plate" which Avesta allegedly continued to export to the United States was based on data in Table 3A of the Swedish exporter's request for a review.[123] The Panel found it hard to understand how these two statements could be based on different sets of data.

321. The Panel also had serious difficulties in discerning how the data in Table 3A provided the basis for the USITC's statement that "… Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States" (emphasis added). The data in this Table covered imports of stainless steel plate other than the three specialty products which had been exempted from the finding in 1976 and one shipment of cold-rolled plate in 1986. The Table showed that from 1984 to 1985 these imports declined to a level which in the view of the Panel could not, without further explanation, support the qualification of "very significant".

322. Furthermore, it could be concluded from information provided by the Swedish exporter in its request for a review that in 1986 the Swedish exporter made one shipment of 50 tons of a patented grade of hot-rolled steel plate. All other imports covered by the import figure for 1986 were imports

---

[121]*Supra*, paragraph 140.

[122]See Annex VII *infra*.

[123]See Annex VI *infra*.

made not by the Swedish exporter but by unrelated parties through third countries. If the data in this Table were indeed the basis for this statement of the USITC, one would have expected at least an explanation by the USITC of how it concluded that the exporter continued to export very significant quantities of standard types of hot-rolled plate, given the decrease in imports in the most recent periods.

323. In sum, the Panel found itself unable to determine, on the basis of the text of the USITC's determination and the explanation provided by the United States before the Panel, how the Tables in the request of the Swedish exporter for a review had enabled the USITC to draw its conclusions regarding the product composition of the imports of stainless steel plate from Sweden. The Panel therefore was of the view that the USITC had not adequately explained its conclusion that the product composition of imports of stainless steel plate from Sweden had not been affected by the purchase in 1976 of a US steel mill by a predecessor of the Swedish exporter.

324. The Panel recalled that the USITC had dismissed the contention of the Swedish exporter regarding the acquisition of the steel mill in New Castle as a "changed circumstance warranting initiation of a review", on the ground that the volume and the product composition of the imports of stainless steel plate had not been affected by this acquisition. In light of its findings in paragraphs 311 and 323 on these two aspects of the USITC's decision, the Panel **concluded** that the USITC had erred in determining that the information on the acquisition of this steel mill did not substantiate the need for the initiation of a review because (1) the USITC had concluded on the basis of factually incorrect data that the volume of imports of stainless steel plate from Sweden had not declined since that purchase, and (2) the USITC had not adequately explained its conclusion that the product composition of imports of stainless steel plate from Sweden had not been affected by that purchase.

2.1.2 Changed structure of the Swedish stainless steel plate industry

325. The Panel proceeded to examine the issues disputed between the parties regarding the USITC's dismissal of the changed structure of the Swedish stainless steel plate industry as a "changed circumstance warranting the initiation of a review investigation."

326. The Panel noted that in the request for a review submitted in February 1987 the Swedish exporter had contended that there were at least two reasons why the restructuring which had occurred in the Swedish stainless steel plate industry since the 1973 injury finding had fundamentally changed the impact of exports of Swedish stainless steel plate on the domestic industry in the United States:

> "First, there is now a single Swedish company - Avesta AB - producing stainless steel plate, and Avesta is committed to participating in the U.S. market primarily through its hot-rolled plate producing facility in the United States (rather than by exporting hot-rolled stainless steel plate from Sweden to the United States). Second, the consolidation of the industry has reduced Sweden's capacity to produce hot-rolled stainless steel plate."[124]

327. In support of its contention regarding the changed structure of the Swedish stainless steel plate industry as a "changed circumstance warranting the initiation of a review", the exporter described the developments leading to the consolidation in 1984 of the Swedish domestic industry into one single corporate enterprise (the "Avesta Group") and provided data on production capacity and capacity

[124]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, pp.45-46.

utilization of the Avesta Group with respect to hot-rolled and cold-rolled plate. Regarding hot-rolled plate, the exporter noted that production capacity had declined by 10 per cent from 1984 to 1986.[125]

328. In its decision issued in July 1987 dismissing the exporter's request for a review, the USITC made the following statement on the changed structure of the Swedish domestic industry as an alleged "changed circumstance warranting the initiation of a review:"

> "Finally, petitioners allege, as they did in 1985, that there has been a restructuring of the Swedish stainless steel industry after 1972, in which the number of Swedish producers had declined from four to one. They also allege, as they did in 1985, that there was a decrease in the number of steel mills during the same period. In 1985, the Commission found these allegations insufficient. It is currently alleged, *inter alia*, that since 1984, capacity to produce hot-rolled plate has declined. However, notwithstanding the decreases in absolute capacity, there remains sufficient unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets."[126]

329. In the proceedings before the Panel, Sweden argued that, while in its injury finding made in 1973 the Tariff Commission had specifically noted the room for expansion of Swedish exports of stainless steel plate by increasing production, the restructuring of the Swedish stainless steel plate industry in the period subsequent to the imposition of the anti-dumping duties had been accompanied by a decline in the production capacity in that industry. In Sweden's view, in dismissing the petition for initiation of a review, the USITC had given insufficient consideration to this decline in production capacity as a relevant change in circumstances compared to the situation prevailing at the time of the finding by the Tariff Commission.

330. Regarding the USITC's finding that "there remains sufficient unused productive capacity to significantly increase exports to the United States …", Sweden argued that it was improper for the USITC to have relied on the mere existence of unused production capacity without considering the likelihood that such excess capacity would actually be used to increase exports to the United States in case of a revocation of the dumping finding on imports of Swedish stainless steel plate. Sweden considered that the question of the existence of unused production capacity as an indication of the need for the initiation of a review should have been analyzed in the light of the concept underlying the provisions of Article 3:6 of the Agreement regarding the determination of the existence of a threat of material injury. Thus it was not the existence of excess production capacity as such, but the likelihood that this excess capacity would be used to increase exports to the United States that should have been the focus of the USITC's analysis. In Sweden's view, it was obvious that the strategy of the Avesta Group was to concentrate on exports to EEC countries and to sell in the United States from its plant in New Castle.

331. Sweden rejected the argument of the United States that, because of its monopoly position in the Swedish market, it was possible for the Avesta Group to restrict home market sales and to free additional production to increase exports. In Sweden's view, the high degree of import penetration in the Swedish market and the liberal trade policy in this sector indicated that Avesta did not have a monopoly position in the Swedish stainless steel plate market. Sweden also pointed out that there was nothing in the decision of the USITC indicating that the USITC had found Avesta to be in a monopoly position.

---

[125]*Ibid*, pp.46-53.

[126]See Annex III *infra*.

332. The United States argued that the USITC had correctly found, based on an examination of the evidence before it, that the consolidation of the Swedish stainless steel plate industry was not a "changed circumstance warranting initiation of a review investigation". The United States therefore denied that, as argued by Sweden, the USITC had failed to analyze whether this factor was relevant as an indication of a change which would warrant a review.

333. The United States explained before the Panel that the USITC's finding on the existence of sufficient unused production capacity was based on information provided by the Swedish exporter. This information showed that the extent of existing excess capacity far exceeded the expansion in production necessary to significantly increase exports to the United States. Furthermore, although the Swedish exporter had provided reasons why it could not expand its practical production capacity in the short term, it had provided no information showing that it was unable or unlikely to expand operations using its existing capacity.

334. The United States also submitted that the consolidation of the Swedish stainless steel industry into one corporate entity suggested, if anything, an increased danger of future injurious dumping if the anti-dumping duties were revoked. Due to its monopoly status in its home market, the exporter could restrict home market sales and make additional production available to increase exports.

335. The United States rejected as irrelevant Sweden's argument that the mere existence of excess capacity was not a sufficient basis to conclude that there would be "a clearly foreseeable and imminent increase" in exports from Sweden to the United States in case of revocation of the dumping finding. In the view of the United States, this argument rested on a false premise that the threat of material injury concept in Article 3:6 was relevant to a determination under Article 9:2 of whether or not to initiate a review.

336. The Panel noted that the USITC's decision nowhere indicated that the USITC had found that the Swedish exporter occupied a monopoly position in the Swedish market and that this was one of the reasons why the USITC did not consider the restructuring of the industry a basis for initiating a review. Accordingly, the Panel considered that it could not take into account in its analysis the argument of the United States that the monopoly position of the Swedish exporter created an increased danger of future injurious dumping in case of a revocation of the 1973 dumping finding.

337. The Panel then turned to the issue of whether the USITC's statement on the existence of sufficient unused production capacity in Sweden was supported by the information before the USITC.

338. The Panel reviewed the information on production capacity and capacity utilization provided by the Swedish exporter in the request for the initiation of a review. This information showed that in 1986, excess production capacity amounted to 12,300 metric tons. This surplus capacity far exceeded the current volume of exports of Swedish stainless steel plate to the United States and was also significantly larger than the volume of exports of Swedish stainless steel plate to the United States in 1972. As such, the information provided by the Swedish exporter supported the USITC's statement that "there remains sufficient unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets".

339. Having found that the USITC's conclusion on the existence of sufficient excess capacity was supported by the information before the USITC, the Panel proceeded to analyze what appeared to be the key issue disputed between the parties: whether the USITC should have considered the likelihood that this excess capacity would actually be used to increase exports to the United States in case of revocation of the dumping finding.

340. The Panel recalled that the text of the relevant section in the exporter's request for a review indicated that the restructuring of the Swedish stainless steel industry was a factor warranting a review because of the reduction of production capacity entailed in this restructuring in conjunction with the decision of the exporter to participate in the US market for hot-rolled stainless steel plate primarily through its hot-rolled plate producing facility in the United States. In other words, the claim of the exporter presented the USITC not only with the question of whether the exporter could expand production in order to increase exports of stainless steel plate to the United States, but also with the question of whether the exporter had the incentive to do so.

341. The Panel considered that, had the exporter's argument regarding the restructuring of the Swedish industry as a "changed circumstance warranting initiation of a review" been limited to the reduction of production capacity in that industry, the USITC's statement that there existed sufficient excess capacity to significantly increase exports to the United States might have been a sufficient explanation of why the USITC did not treat the restructuring of the Swedish stainless steel plate industry as a factual development which warranted a review. However, given the context in which the exporter had presented the argument regarding the reduction of excess capacity, the Panel was of the view that it was incumbent upon the USITC to explain why the reduction in production capacity in conjunction with the exporter's alleged change in marketing strategy was not a sufficient ground for initiating a review.

342. The Panel wished to make it clear that in its view the need for such an explanation arose from the specific allegations made by the exporter in this case. The Panel therefore did not address the more general arguments of the parties on the issue of whether the criteria of Article 3:6 of the Agreement were applicable to decisions under Article 9:2 on the initiation of reviews.

343. The Panel realized that the USITC had earlier in its decision dismissed the contentions of the Swedish exporter with respect to the change in marketing strategy of the exporter, and that this might explain why the USITC did not consider it necessary to discuss this issue again in connection with the exporter's allegation on the reduction of production capacity. However, the Panel recalled its conclusion in paragraph 324 that the USITC had improperly dismissed the arguments of the Swedish exporter on this point.

344. In light of the foregoing considerations, the Panel **concluded** that the USITC's determination that the information on the changed structure of the Swedish stainless steel plate industry did not substantiate the need for the initiation of a review was supported by fact in respect of the USITC's statement on the existence of sufficient unused production capacity in the Swedish industry. However, the USITC had failed to adequately explain why this unused production capacity in conjunction with the alleged change in marketing strategy of the exporter did not substantiate the need for the initiation of a review.

2.1.3 Increased demand in Western Europe for Swedish stainless steel plate and free-trade agreements between the European Communities and Sweden

345. The Panel turned to the issues disputed between the parties regarding the USITC's finding that the allegedly increased demand for Swedish stainless steel plate in Western Europe and the free-trade agreements between the European Communities (EC) and Sweden, did not constitute "changed circumstances warranting the initiation of a review."

346. In the request for a review, the Swedish exporter argued that (1) the level of demand in Western Europe for stainless steel plate from Sweden had changed materially since 1973, and (2) free-trade agreements between the EC and Sweden had eliminated all customs duties on steel imports from Sweden

into the EC and did not impose quantitative restrictions on imports of stainless steel plate from Sweden into the EC.[127]

347. Regarding the increased level of demand in Western Europe for Swedish stainless steel plate as a factor indicating that a review of the 1973 injury finding was warranted, the Swedish exporter observed that in its finding made in 1973 the Tariff Commission had found that the decline in demand in Western Europe, Sweden's largest market, was one of the main causes of increased concentration of Swedish stainless steel plate exports on the US market. According to the exporter, in contrast to the short-term cyclical decline in demand in Western Europe during the period 1968-1971, "Western Europe has represented a strong and consistently growing market for Swedish stainless steel plate during the past five years".[128] In addition, the exporter alleged that current total demand for Swedish stainless steel plate in the EC was "substantially greater than it was at the time of the 1973 Determination".[129]

348. The Swedish exporter provided in Table 5 of the request for initiation of a review data which showed that "Sweden's exports of hot-rolled stainless steel plate to the European Community have increased by 168 per cent between 1971 and 1985" and that "Sweden's total exports of hot and cold-rolled plate (and thick cold-rolled sheet) to the EC have increased by 272 per cent between 1971 and 1985 from 13,846 net tons in 1971 to 51,467 net tons in 1985".[130]

349. The Swedish exporter also alleged that "a major change in the circumstances on which the 1973 Determination was based" had resulted from free-trade agreements between the EC and Sweden which had entered into force on 1 January 1974. The exporter mentioned in this regard the complete elimination of all customs duties on 1 July 1977 and the absence of quantitative restrictions on imports of Swedish stainless steel plate into the EC. The exporter contended that the EC's elimination of import duties on Swedish stainless steel plate and the absence of quantitative import restrictions were relevant to the impact of the Swedish exports on the domestic industry in the United States. In this regard, the exporter noted *inter alia* the trade diversion caused by the free-trade agreements, as evidenced by statistical data which showed that Sweden's exports of stainless steel plate to the United States declined sharply and then remained at *de minimis* levels after the free-trade agreements with the EC had come into effect.[131]

350. The Panel noted that in its dismissal of the Swedish exporter's request for the initiation of a review, the USITC had made the following comments on the issue of increased exports of Swedish stainless steel plate to the EC:

> "Petitioners further allege, as they did in 1985, that the European market is a growing market for its plate exports. Although petitioners here rely on a different data series for this proposition from that on which they relied in 1985, their current data fail to take into account the change in E.C. membership since 1972. When that change is accounted for, Swedish shipments to the E.C. fell irregularly from 1973 to 1981 and

---

[127]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, pp.57-65.

[128]*Ibid*, p.58.

[129]*Ibid*, pp.58-59.

[130]*Ibid*, p.59.

[131]*Ibid*, pp.61-65.

> then increased irregularly through 1985. In 1985, Swedish exports to the E.C. were just five percent higher than in 1972. Thus, the Commission again finds that there is no sufficient changed circumstance with regard to this allegation."[132]

In the proceedings before the Panel, the United States indicated that the penultimate sentence in this statement contained a typographical error and should have referred to 1973 instead of 1972. The United States also indicated that the USITC's finding of an increase of five per cent in Swedish exports of stainless steel plate to the EC was based on data provided by the domestic industry in its memorandum opposing the Swedish exporter's request for a review.

351. Sweden argued before the Panel that the USITC's finding regarding the increase of Swedish stainless steel plate exports to the EC by five per cent was based on incorrect data, and that the USITC had failed to examine whether the free-trade agreements between the EC and Sweden and the subsequent decline in the volume of imports of Swedish stainless steel plate into the United States were relevant as an indication that a review of the 1973 injury finding was warranted.

352. The United States argued before the Panel that the USITC reasonably determined that the alleged increase in stainless steel exports to the EC had not substantiated the need for the initiation of a review. The Swedish exporter had provided flawed data, which misstated the growth of its exports to the EC. Although this by itself was sufficient to dismiss this factor as an alleged changed circumstance, the USITC also found on the basis of data provided by the domestic industry that stainless steel exports from Sweden to the EC had increased only slightly. In addition, the United States argued that Sweden had failed to explain why an increase in exports to the EC was in any event a factor warranting the initiation of a review. Given the level of excess capacity in the Swedish stainless steel plate industry, the Swedish exporter could have significantly increased exports to the United States if the dumping finding were revoked, even if exports to the EC had increased significantly. Furthermore, any increase in exports of stainless steel plate to the EC could simply have been another result of the imposition of anti-dumping duties on imports of these products into the United States.

Increased demand for Swedish stainless steel plate in Western Europe

353. The Panel proceeded to examine the USITC's analysis of the argument presented by the Swedish exporter that the change in the level of demand for Swedish stainless steel plate in Western Europe constituted a "changed circumstance warranting initiation of a review investigation".

354. As indicated above, the USITC found that the import statistics data provided by the Swedish exporter failed to take account of the change in EC membership since 1972 and that, when that change was taken into account, exports of stainless steel plate from Sweden to the EC had increased by only five per cent from 1973 to 1985.

355. Sweden argued that the statistics in Table 5 of the Swedish exporter's request for initiation of a review were based on official EC import statistics. The footnotes to the Table clearly specified the countries covered by the statistics. Although the exporter had discussions with the USITC staff when presenting its request for a review, the USITC staff had never indicated that the lack of a constant base in terms of importing countries covered made the data in Table 5 problematic. According to Sweden, the exporter had argued in its request that the EC enlargement as such was a factor affecting exports of Swedish stainless steel plate to the EC. The increased importance of the EC as a market for Swedish stainless steel plate resulted not only from economic growth in the EC but also from its admission of new members.

---

[132]See Annex III *infra*.

356. Referring to import statistics presented in proceedings before the United States Court of Appeals for the Federal Circuit, Sweden alleged that Swedish exports of hot-rolled sheet and plate to the EC-10 increased by more than 30 per cent from 1972 to 1985 (from 22,494 metric tons in 1972 to 29,407 metric tons in 1985). At the same time, Sweden's total exports of hot-rolled sheet and plate to all countries declined from 66,126 metric tons in 1972 to 55,264 metric tons in 1985. Sweden also provided to the Panel data prepared by the Swedish customs service[133] which showed that exports of stainless steel plate from Sweden to the EC-12 increased by almost 130 per cent from 1972 to 1991.

357. Sweden further argued that the data of the domestic industry on which the USITC had relied were not based on official sources and had not been verified by the USITC. The Swedish exporter had not been provided with an opportunity to rebut the statistics submitted by the US domestic industry. The import statistics submitted by the domestic industry were distorted because they included hot-rolled sheet and excluded cold-rolled plate. In any event, if 1972 rather than 1973 was chosen as the base year, even the domestic industry's data showed that exports of stainless steel plate from Sweden to the EC increased by 24 per cent from 1972 to 1985. In Sweden's view, 1972 was more appropriate than 1973 as a base year for comparison with the import statistics for 1985 because the investigation leading to the original injury determination was conducted in 1972.

358. According to the United States, there was no information on the record suggesting that the USITC staff had held discussions with representatives of the Swedish exporter or with representatives of the domestic industry in connection with the USITC's consideration of the Swedish exporter's request for initiation of a review. Moreover, Article 9:2 of the Agreement did not require that investigating authorities review a draft of a request for the initiation of a review in order to identify possible defects in the request.

359. The United States argued that the statistics on EC imports of stainless steel plate from Sweden during the period 1971-1986 in Table 5 of the Swedish exporter's request for initiation of a review were distorted because they lacked a constant base in terms of countries covered and included imports of cold-rolled sheet. By contrast, the statistics provided by the US domestic industry in its memorandum opposing the request for a review had a constant base regarding the importing countries covered and excluded cold-rolled products. A comparison of the data provided by the Swedish exporter and by the US domestic industry showed that the statistics were not fundamentally different, once account was taken of the change in EC membership. Regarding Sweden's argument that the statistics of the US domestic industry were flawed because they included imports of hot-rolled sheet, the United States argued that there were no significant sales of hot-rolled sheet and that, in any event, hot-rolled sheet was also included in the import statistics provided by the Swedish exporter.

360. The United States considered that the statistics provided by Sweden to the Panel on Swedish exports of stainless steel products to the EC-12 over the period 1970-1991 were irrelevant to the Panel's review of the USITC's decision. These statistics had never been presented to the USITC and were inconsistent with the data provided by the Swedish exporter in its request for a review. Moreover, the statistics covered a period beyond 1987.

361. The Panel noted the argument of the United States that the statistics in Table 5 of the Swedish exporter's request for a review were distorted *inter alia* because these statistics included imports of cold-rolled sheet. The Panel did not find any reference to this issue in the USITC's decision. The only reason given by the USITC for rejecting the statistics provided by the Swedish exporter was that the statistics did not take account of the EC enlargement since 1972. The Panel therefore considered that, in examining the USITC's finding that the contentions of the Swedish exporter regarding increased

[133]See Annex V *infra*.

exports were not a sufficient basis to initiate a review, it could have regard only to the alleged distortion of the import statistics resulting from the fact that they did not take into account the change in EC membership since 1972.

362. The Panel examined the statistics on imports into the EC in Table 5 of the Swedish exporter's requests for a review and found that these import statistics did not have a constant base in terms of importing countries covered. A footnote to the Table explained that for the years 1971-1973 the statistics covered imports into the original six EEC member States. For the period 1974-1980 the statistics covered in addition to the six original member States, imports into the United Kingdom, Ireland and Denmark. Finally, for 1981 through the first months of 1986, the statistics also included imports into Greece.

363. The Panel recalled that the changed circumstance alleged by the Swedish exporter to warrant initiation of a review was that "the level of demand in Western Europe for stainless steel plate from Sweden has changed materially since the 1973 determination" (emphasis added). However, the statistics in Table 5 were presented as support for the contention that "… the total demand for Swedish stainless steel plate in the European Community is substantially greater than it was at the time of the 1973 determination." (emphasis added) According to the exporter, the statistics in Table 5 showed that "Sweden's exports of hot-rolled stainless steel plate to the European Community have increased by 168 per cent between 1971 and 1985". It was therefore apparent from the text of the exporter's request for a review that the import statistics in Table 5 were submitted as support for the exporter's contention regarding the current level of demand in the EC for stainless steel plate from Sweden, as compared to the demand for Swedish stainless steel plate at the time of the 1973 injury determination. Contrary to what had been argued by Sweden before the Panel, there was no mention in this section of the request of the argument that the enlargement of the EC as such was a factor affecting Swedish exports of stainless steel plate to the EC. While the exporter also argued that "In contrast to the short-term cyclical trend described in the 1973 Determination, Western Europe has represented a strong and consistently growing market for Swedish stainless steel plate during the past five years", no statistical information was presented on the growth in demand in "Western Europe", as distinguished from growth in demand in the EC.

364. Given that the import statistics in Table 5 were presented by the Swedish exporter to demonstrate the changed level of demand for stainless steel plate in the EC, as evidence of an increased demand for stainless steel plate in Western Europe, the Panel considered that the USITC did not err in holding that these statistics were deficient because they did not relate to a constant number of importing countries. Because of this lack of constant base regarding the importing countries covered, the statistics in this Table did not permit any conclusions to be drawn on how the increased imports reported in the Table were a reflection of a growth in demand for Swedish stainless steel plate since "the time of the 1973 Determination". For example, the increase in imports from 1973 to 1974 could have simply been the result of the inclusion in the data for the years after 1973 of import data of three countries not covered by the statistics for 1971-1973.

365. The Panel noted Sweden's argument that the USITC's staff had not drawn the attention of representatives of the Swedish exporter to the deficiencies in the statistics in Table 5.

366. The Panel considered that under Article 9:2 the United States' authorities were not obliged to examine the Swedish exporter's request for a review with a view to identifying possible shortcomings in the data contained in the request, and informing the Swedish exporter of such shortcomings, before making a decision on whether or not to grant the request for initiation of a review. If, prior to the USITC's decision on whether or not to grant the request of the Swedish exporter for the initiation of a review, there had been communications on factual issues raised in the exporter's request between the USITC's staff and the domestic industry, but not between the USITC's staff and the Swedish

exporter, this might have raised a serious question with respect to due process. However, there was no factual information before the Panel indicating that such different treatment had taken place.

367. Based on the foregoing considerations, the Panel found that the USITC's decision not to rely on the import statistics in Table 5 of the Swedish exporter's request for a review, on the ground that these statistics did not account for the enlargement of the EC, was adequately explained and was supported by the information before the USITC.

368. The Panel then turned to the issues raised by the parties regarding the factual basis for the USITC's finding that Swedish exports of stainless steel plate to the EC had increased by just five per cent between 1973 and 1985.

369. The United States had indicated in the proceedings before the Panel that this finding was based on import statistics in Table 7 of the memorandum submitted by the US domestic industry in opposition to the Swedish exporter's request for a review. The Panel reviewed these statistics and found that they supported the USITC's statement as far as exports of hot-rolled sheet and plate were concerned.

370. The Panel was not persuaded by Sweden's argument that these statistics were distorted because they included data on exports of hot-rolled sheet. A review of the footnote to Table 5 in the Swedish exporter's request for review indicated that hot-rolled sheet was also included in the statistics provided by the Swedish exporter.

371. However, the Panel also noted Sweden's argument that these statistics were distorted because they excluded data on exports of cold-rolled plate to the EC. The Panel recalled that the Swedish exporter's contentions regarding the importance of increased stainless steel plate exports to the EC related to both hot-rolled and cold-rolled products. In support of these contentions the exporter had in Table 5 submitted statistics on both categories of products. The statistics of the domestic industry in Table 7 of its memorandum might have been an adequate basis for the USITC to draw conclusions on the growth of Swedish exports of hot-rolled stainless steel plate, but the Panel failed to see how these statistics enabled the USITC to draw conclusions on total Swedish exports of stainless steel plate to the EC.

372. The Panel did not exclude that there might have been sound reasons for the USITC to rely on statistics on Swedish exports of stainless steel plate to the EC which did not include exports of cold-rolled plate. The Panel noted in this regard the argument presented by the United States before the Panel that the Swedish exporter had indicated that the vast majority of its cold-rolled production of stainless steel consisted of sheet, and that in the entire period 1970-1985 only one shipment of cold-rolled plate had been made to the United States. The Panel, however, could not find any reasoning on this point in the USITC's decision. Indeed, the USITC's decision did not even mention the fact that the five per cent increase in exports found by the USITC related not to total exports of Swedish stainless steel to the EC but only to exports of hot-rolled stainless steel plate and sheet.

373. Regarding the argument of Sweden that even the data in Table 7 of the memorandum submitted by the domestic industry showed that exports of hot-rolled products to the EC had increased from 1972 to 1985, the Panel found that while factually correct, this argument rested on the view that the USITC should have taken 1972, rather than 1973, as the base year for its comparison. In view of the fact that the Swedish exporter alleged that current demand for Swedish stainless steel plate in the EC was "substantially greater than it was at the time of the 1973 Determination", the Panel found no persuasive reason why the USITC should have taken 1972 as the base year for its comparison.

374. Finally, the Panel considered that the statistics provided by Sweden to the Panel on exports of stainless steel plate from Sweden to the EC-12 over the period 1970-1991 were not relevant to the

Panel's examination of the USITC's finding on increased exports of Swedish stainless steel plate to the EC. These data clearly were not part of the information submitted by the Swedish exporter in support of the request for a review.

375. The Panel thus found that the USITC had properly explained the reasons for rejecting the statistics submitted by the Swedish exporter. At the same time, the Panel found that the USITC had failed to explain the use of statistics on exports of Swedish stainless steel plate to the EC which did not include cold-rolled plate.

376. The Panel noted that under Article 9:2 the relevant legal question was whether the USITC had improperly determined that the information provided by the Swedish exporter did not amount to "positive information substantiating the need for review". The Panel considered that the lack of a constant base in terms of importing countries in Table 5 of the Swedish exporter's request for a review was by itself sufficient to conclude that the USITC had not erred when it found that the information provided by the Swedish exporter was not such as to warrant initiation of a review investigation, notwithstanding the Panel's misgivings regarding the lack of adequate explanation offered by the USITC for its use of statistics submitted by the domestic industry which did not include exports of cold-rolled plate to the EC, and notwithstanding the fact that even the data provided by the domestic industry allowed for differing interpretations.

377. In light of the preceding considerations, the Panel **concluded** that the USITC had adequately explained its determination that the information before it on the alleged change in the level of demand for Swedish stainless steel plate in Western Europe did not substantiate the need for the initiation of a review of the 1973 injury finding, and that this determination was supported by the information before the USITC.

Free-trade agreements between the EC and Sweden

378. Having concluded that the USITC had not improperly dismissed the exporter's allegations regarding the relevance of changes in the level of demand in Western Europe, the Panel proceeded to examine the issues disputed by the parties with respect to the USITC's analysis of the effect of the free-trade agreements between the EC and Sweden.

379. The Panel noted that in the request for a review the Swedish exporter alleged that the free-trade agreements between the EC and Sweden affected Swedish exports to the EC after the 1973 injury determination. The agreements had entered into force on 1 January 1974 and did not eliminate customs duties until July 1977, i.e. not until over four years after the 1973 injury determination. In addition to the elimination of customs duties, the exporter referred to the absence of quantitative restrictions on imports of Swedish stainless steel plate into the EC.

380. In the view of the Swedish exporter, the EC's elimination of import duties on Swedish stainless steel plate and the absence of quantitative import restrictions were relevant to the impact of Swedish stainless steel plate exports on the domestic industry in the United States for the following reasons. First, the 1973 injury determination was based, in major part, on the conclusion that the level of demand in Western Europe directly affected Sweden's exports to the United States. Second, the bilateral free-trade agreements between the EC and Sweden had led to trade diversion, in the form of a shift of Sweden's exports away from the United States, and trade creation, in the form of an increase in Sweden's trade with the EC. The exporter argued that these propositions were supported by statistical data presented elsewhere in the request, which illustrated that Sweden's exports of stainless steel plate to

the United States had declined sharply and then remained at *de minimis* levels after the free-trade agreements with the EC became effective.[134]

381. The Panel reviewed the USITC's decision dismissing the exporter's request for a review and found that, while the USITC had expressly addressed the exporter's contention regarding the growth in demand for Swedish stainless steel plate in Western Europe[135], it had not specifically addressed the exporter's contentions regarding the effect of the free-trade agreements between the EC and Sweden.

382. In the proceedings before the Panel, Sweden raised the issue of the effect of the free-trade agreements in conjunction with the issue of the alleged growth in demand in Western Europe for Swedish stainless steel plate.[136] Sweden argued that the USITC had failed to examine the impact of the free-trade agreements, both on Swedish exports to the EC and on Swedish exports to the United States. The United States' arguments focused on the inadequacy of the statistical data provided by the Swedish exporter, and on the limited extent of the increase in Swedish exports to the EC.

383. Consistent with its approach to other issues disputed between the parties, the Panel reviewed the USITC's decision that the alleged effect of the free-trade agreements between the EC and Sweden was not a relevant changed circumstance in the light of the reasons articulated in the USITC's decision.

384. As noted above, the Panel found that there was no specific analysis in the USITC's decision of the effects of the free-trade agreements between the EC and Sweden, as distinguished from the issue of the alleged changes in the level of demand for stainless steel plate in Western Europe.

385. In the Panel's view, it could not be contested, as a factual matter, that the issue of the effect of the free-trade agreements between the EC and Sweden had indeed been raised by the Swedish exporter as an issue distinct from the changed circumstance resulting from the growth in demand for Swedish stainless steel plate in Western Europe. The two issues were dealt with in separate sections of the exporter's request for a review and raised different factual issues. Thus, in connection with the alleged effect of the free-trade agreements between the EC and Sweden, the Swedish exporter focused not only on the increase in exports of Swedish stainless steel plate to the EC, but also on the decline in the volume of exports of Swedish stainless steel plate to the United States.

386. Significantly, the introductory section of the USITC's decision, which summarized the eight alleged changed circumstances described in the Swedish exporter's request for a review, noted:

> "In contrast to the early 1970s, the European Community (EC) is a growing market for Swedish plate and Swedish plate enters the EC without quantitative restrictions and duty-free." (emphasis added)

Thus, the USITC itself had indicated that the argument regarding the duty-free importation of Swedish stainless steel plate into the EC and the absence of quantitative import restrictions appeared in the Swedish exporter's request for a review in addition to the allegation regarding the growth in demand for stainless steel plate in Western Europe.

---

[134]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, p.64.

[135]*Supra*, paragraph 350.

[136]*Supra*, Section C.2.3.

387. The Panel realized that it was possible that the USITC might have considered that, because of its findings on the limited extent of the increase in Swedish stainless steel plate exports to the EC and the absence of a decline in imports into the United States since 1976, there was no merit to the argument of the Swedish exporter regarding the effect of the free-trade agreements between the EC and Sweden. However, the Panel considered that, where the USITC had failed to provide a reasoned finding on one of the factors raised by the exporter, it was inappropriate for the Panel to substitute for that lack of reasoning its own speculation as to how the USITC might have evaluated the exporter's contentions and the evidence provided in support thereof. Nor was it for the Panel to provide its own assessment of whether there was merit to the exporter's allegations on this issue. To do so would be inconsistent with the Panel's view that its task was not to undertake a *de novo* review of the information before the USITC, but to review the USITC's decision in light of the reasons provided by the USITC.

388. On the basis of the foregoing considerations, the Panel **concluded** that the USITC's determination did not provide any explanation of why the information before the USITC on the free-trade agreements between the EC and Sweden did not substantiate the need for the initiation of a review.

389. The Panel wished to emphasize that it had conducted an examination of the USITC's determination in light of the reasons given in that decision. The Panel noted that the United States had argued before the Panel that an increase in exports to the EC could simply have been another result of the imposition of anti-dumping duties on Swedish stainless steel plate in the United States. This argument was not among the reasons offered by the USITC in support of its decision and was therefore irrelevant to the Panel's examination of whether the USITC had acted inconsistently with Article 9:2.

2.1.4 Steel voluntary export restraint arrangements

390. The Panel proceeded to examine the issues disputed between the parties with respect to the determination by the USITC that the existence of voluntary restraint arrangements, under which exports of certain steel products to the United States from various exporting countries were subject to quantitative restrictions, did not constitute a "changed circumstance sufficient to warrant the institution of a review".

391. The Panel noted that in the introductory section of the request for initiation of a review, the Swedish exporter had presented two reasons why the existence of the steel voluntary export restraint arrangements constituted a ground for initiating a review.[137]

392. First, the exporter stated that the domestic industry in the United States was highly protected as a result of the implementation on 1 March 1986 of arrangements limiting the quantities of exports of stainless steel plate from various countries to the United States. According to the exporter, even before the entry into effect of these arrangements, the US domestic industry was prospering, as evidenced by the increase in domestic shipments by US producers over the period 1982-1986. Second, the exporter argued that imports from countries subject to bilaterally agreed restrictions on imports of stainless steel plate were exempted from the application of safeguard measures in the form of increased customs duties introduced in July 1983 under Section 203 of the United States Trade Act of 1974. Moreover, in exchange for the undertakings provided by foreign countries to limit their exports of stainless steel plate, the United States had revoked anti-dumping and countervailing duty orders on stainless steel plate from these countries, and domestic producers in the United States had offered assurances that they would not file new petitions under the anti-dumping and countervailing duty laws. In contrast, stainless steel plate imports from Sweden, which had not concluded a voluntary export restraint

[137]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, pp.5-6.

arrangement with the United States, remained subject to the safeguard measures introduced in July 1983 and to the anti-dumping and countervailing duty laws.

393. Only the second of these two arguments was elaborated in detail by the exporter in Section F of the request for initiation of a review, in which the exporter claimed that "The quota arrangements between the United States and the European Communities, Japan and other major stainless steel plate exporting countries have seriously impeded the ability of Swedish imports to compete in the US market for stainless steel plate."[138]

394. In its decision dismissing the Swedish exporter's request for initiation of a review, the USITC made the following comments on the issues raised by the exporter on the existence of steel voluntary export restraint arrangements as a factor giving rise to the need for a review:

> "Petitioners allege that the U.S. producers of stainless plate are highly protected due to the negotiation and implementation of voluntary restraint agreements (VRAs) with a variety of countries, though not with Sweden. As petitioners correctly note, those VRAs, *inter alia*, limit exports of stainless steel plate to the U.S. and eliminate exposure to U.S. antidumping and countervailing duties for those exports. There are two flaws in the argument. First, because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses. Second, the existence of the VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to the impact of dumped imports (footnote omitted)."[139]

395. Sweden, referring to Article 3:3 of the Agreement, argued that on the basis of the information presented by the Swedish exporter regarding the improved condition of the United States stainless steel plate industry the USITC should have determined that the initiation of a review was warranted. This information indicated the impact on the performance of the stainless steel plate industry in the United States of increasing levels of protection enjoyed by that industry between 1973 and 1986. Between 1972 and 1985 the domestic industry had increased its share of the domestic market, while import penetration had been minimal. There also had been improvements in the industry's profitability and in other economic and financial indicators. The improved performance of the industry stood in contrast with the condition of the stainless steel plate industry when the original finding of injury was made in 1973.

396. Although Sweden also mentioned the effect of the steel voluntary export restraint arrangements in creating a competitive disadvantage for Swedish steel imports, compared to imports from countries subject to these arrangements, Sweden emphasized the impact of the voluntary export restraint arrangements and earlier import relief programmes on the condition of the domestic industry. In Sweden's view, the USITC had overlooked the fact that the import relief programmes were directly relevant to the question of whether the industry in the United States was suffering material injury. The effect of these programmes on volumes and prices of Swedish imports was in this regard not relevant.

397. The United States submitted that the USITC had correctly concluded that the existence of steel voluntary export restraint arrangements had not made the domestic industry in the United States less vulnerable to the effects of dumped imports from Sweden, and that the USITC had fully explained the rationale for this conclusion. The Swedish exporter had not demonstrated the relevance of these

---

[138]*Ibid*, pp.65-68.

[139]See Annex III *infra*.

voluntary export restraint arrangements to the question of the volume and price effects of imports of stainless steel plate from Sweden, which were not subject to any quantitative import restrictions.

398. The United States argued further that the Swedish exporter in its request for the initiation of a review had provided little or no information, or even allegations, regarding the improved condition of the domestic industry in the United States as a factor indicating that the initiation of a review was warranted. The principal argument of the exporter related to the effect of the steel voluntary export restraint arrangements on the competitive position of Swedish stainless steel plate imports relative to imports from countries with which the United States had concluded such arrangements. Contrary to the argument presented to the Panel by Sweden, the exporter had not focused on the impact of the voluntary export restraint arrangements on the condition of the domestic industry. The United States considered in this respect that Sweden was presenting information to the Panel on the condition of the domestic industry which had not been submitted to the USITC by the Swedish exporter. Even though the Swedish exporter had not addressed the issue of the condition of the domestic industry, the USITC had dealt with the issue in its determination and concluded that it did not constitute a ground for initiating a review.

399. In the Panel's opinion, it was clear from the request for initiation of a review by the Swedish exporter that the main focus of the exporter's argument on the relevance of the steel voluntary export restraint arrangements as a "changed circumstance warranting the initiation of a review" was on the competitive disadvantage caused by these arrangements for imports of stainless steel plate from Sweden, relative to imports of stainless steel plate from countries subject to those arrangements. Although the introductory section of the request also mentioned the impact of the steel export restraint arrangements on the condition of the US domestic industry, the more detailed elaboration in Section F of the Swedish exporter's request dealt solely with the issue of how the export restraint arrangements put imports of Swedish stainless steel plate at a competitive disadvantage. The Panel further noted that, apart from the reference to increased shipments by domestic producers in the introductory section of the request for a review, there was no information or argument in the request on any of the factors regarding the condition of the domestic industry (e.g. market share and profitability) mentioned before the Panel by Sweden. Nor could the Panel find in the request any argument that previous import relief programmes implemented during the period 1973-1986 had led to an improvement in the condition of the domestic industry.

400. The Panel therefore considered that in its examination of the USITC's determination that the existence of steel voluntary export restraint arrangements did not constitute a "changed circumstance warranting the initiation of a review", it should proceed on the basis that the principal argument presented to the USITC by the Swedish exporter was that these export restraint arrangements put imports of Swedish stainless steel plate at a competitive disadvantage compared to imports of stainless steel plate from countries subject to these arrangements. If there was an allegation in this request regarding the impact of these arrangements on the condition of the domestic industry in the United States, that argument was clearly secondary.

401. As presented on pp.65-68 of the Swedish exporter's request for initiation of a review, the exporter's argument on the relative impact of the steel voluntary export restraint arrangements was based on certain advantages allegedly enjoyed by imports from countries subject to those arrangements. The exporter mentioned in this regard the revocation of anti-dumping and countervailing duty orders on stainless steel plate from such countries, the undertakings given by domestic producers in the United States not to file new anti-dumping and countervailing duty petitions, and the exemption from the application of increased customs duties imposed in July 1983 on stainless steel plate imports from these countries. As a result, the exporter argued, exports of Swedish stainless steel plate to the United States:

> "… face a 'three-tier' barrier to entry into the United States: the regular duties, the additional '201' duties, and the application of the antidumping and countervailing duty laws. On the other hand, exports from the major exporting countries face a single barrier - the regular customs duties - and will be able to be sold in the U.S. without regard to the U.S. antidumping or countervailing duty laws."[140]

402. The Panel observed that the limitation of exposure to US anti-dumping and countervailing duty actions, and the elimination of the additional customs duties imposed in July 1983, were the counterpart of the quantitative restrictions on exports of steel provided for in the bilateral steel voluntary export restraint arrangements. Such agreed restrictions on exports did not exist with respect to stainless steel plate from Sweden. The Panel therefore considered that the USITC did not err in finding that the exporter's argument was flawed, on the ground that "because of the absence of a VRA with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it wishes".

403. The Panel therefore was of the opinion that regarding the principal argument of the exporter concerning the existence of voluntary export restraint arrangements as a "changed circumstance warranting the initiation of a review", the USITC had adequately explained its determination that this factor did not constitute a ground for initiating a review, and that this determination was supported by the information before the USITC.

404. The Panel then considered the USITC's statement that "the existence of the VRAs does not mean that the US stainless steel industry is any less vulnerable to the impact of dumped imports". By way of explanation of this statement, the USITC referred in a footnote to a determination it had made in May 1987 in an investigation under Section 203 of the United States Trade Act of 1974 on the probable economic effects of the termination of the safeguard measures introduced in July 1983 on imports of stainless steel and alloy tool steel. The footnote did not specifically identify the relevant passages in the determination which formed the basis for the USITC's statement.

405. The Panel noted that in the May 1987 determination under Section 203 of the Trade Act, the USITC majority recommended that a termination of the import relief measures for stainless steel plate would not have an adverse effect on the domestic industry in the United States, based on the assumption of "continued administration of voluntary restraint agreements at present levels".[141] The Panel did not find in this determination any other discussion of the issue of the possible impact of the existence of the voluntary export restraint arrangements on the condition of the domestic industry. The Panel further noted that the USITC majority found in the May 1987 determination that the condition of the domestic industry had improved over the period during which the import relief measures had been in force.

406. Without wishing to suggest that the May 1987 determination did not provide a basis for the USITC's statement that "the existence of the VRAs does not mean that the US stainless steel industry is any less vulnerable to the impact of dumped imports", the Panel was of the opinion that a more explicit explanation by the USITC of how that determination constituted the rationale for this statement, instead of a simple reference to this determination in a footnote, would have been appropriate. At the same time, the Panel recalled that the Swedish exporter's argument on the impact of the steel

---

[140]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, p.68.

[141]Stainless Steel and Alloy Tool Steel, Report to the President on Investigation No. TA-203-16 Under Section 203 of the Trade Act of 1974, USITC Publication 1975, May 1987, pp. 1-2.

voluntary export restraint arrangements on the condition of the domestic industry was clearly of a secondary nature, and that the exporter had provided very little information in support of this argument. The Panel therefore did not consider that the questions which could be raised regarding the adequacy of the reasoning of the USITC on this point constituted a basis for the Panel to find that the USITC had erred in determining that the improved condition of the domestic industry alleged to be the result of the voluntary export restraint arrangements did not substantiate the need for the initiation of a review.

407. Based on the foregoing considerations, the Panel **concluded** that the USITC had adequately explained its determination that the information before it on steel voluntary export restraint arrangements did not substantiate the need for the initiation of a review, and that this determination was supported by the information before the USITC.

2.1.5 Summary

408. The Panel recalled its conclusions in paragraphs 324, 344, 377, 388 and 407 above:

(i) The USITC had erred in determining that the information on the purchase in 1976 of a US steel mill by a predecessor of the Swedish exporter did not substantiate the need for the initiation of a review because (1) the USITC had concluded on the basis of factually incorrect data that the volume of imports of stainless steel plate from Sweden had not declined since that purchase, and (2) the USITC had not adequately explained its conclusion that the product composition of imports of stainless steel plate from Sweden had not been affected by that purchase.

(ii) The USITC's determination that the information on the changed structure of the Swedish stainless steel plate industry did not substantiate the need for the initiation of a review was supported by fact in respect of the USITC's statement on the existence of sufficient unused production capacity. However, the USITC had failed to adequately explain why this unused production capacity in conjunction with the alleged change in marketing strategy of the exporter did not substantiate the need for the initiation of a review.

(iii) The USITC had adequately explained its determination that the information before it on the alleged change in the level of demand for Swedish stainless steel plate in Western Europe did not substantiate the need for the initiation of a review, and this determination was supported by the information before the USITC.

(iv) The USITC's determination did not provide any explanation of why the information before the USITC on the free-trade agreements between the EC and Sweden did not substantiate the need for the initiation of a review.

(v) The USITC had adequately explained its determination that the information before it on steel voluntary export restraint arrangements did not substantiate the need for the initiation of a review, and this determination was supported by the information before the USITC.

409. The Panel **concluded** that the United States had acted inconsistently with its obligations under Article 9:2 by dismissing the request made in 1987 by the Swedish exporter for the initiation of a review to revoke the dumping finding on stainless steel plate from Sweden, as a result of (1) the factual insufficiency and inadequate explanation of the USITC's determination that the information on the purchase in 1976 of a US steel mill by a predecessor of the Swedish exporter did not substantiate the need for the initiation of a review, and (2) the inadequate explanation of the USITC's determination that the information on the changed structure of the Swedish stainless steel plate industry and on the

free-trade agreements between Sweden and the EC did not substantiate the need for the initiation of a review.

2.1.6 The USITC's dismissal of the request for initiation of a review to modify the 1973 dumping finding

410. The Panel recalled that the Swedish exporter had in its petition submitted in February 1987 presented two bases for the initiation of a review. First, the existence of "changed circumstances warranting initiation of a review" to revoke the 1973 dumping finding, and, second, the existence of "changed circumstances warranting initiation of a review" to modify the 1973 dumping finding by changing its product coverage. This second, more limited, ground for initiation of a review was presented as an alternative to the first ground for initiation of a review.

411. Having concluded its examination of the issues disputed between the parties concerning the USITC's decision on the exporter's request for initiation of a review in order to revoke the 1973 dumping finding, the Panel proceeded to examine the USITC's decision on the exporter's request for a review in order to modify the 1973 dumping finding. The Panel was aware that it could be argued that, in light of its conclusion in paragraph 409, it was not necessary for the Panel to make a finding on the USITC's treatment of this alternative and more limited ground for initiation of a review advanced by the Swedish exporter in its petition to the USITC. However, the Panel was not persuaded that that conclusion entirely obviated the need for it to address this issue.

412. The Panel noted that, in support of the request for a review to modify the product coverage of the 1973 dumping finding, the Swedish exporter argued that three types of stainless steel plate which did not exist in 1973 were now being imported into the United States in minimal quantities. Regarding one of these products, continuously cold-rolled "KBR" plate, the exporter contended that the domestic industry in the United States did not produce a plate which was competitive with this product. Regarding the two other products, patented stainless steel grades 253 MA and 254 SMO, the Swedish exporter contended that the US domestic industry could not produce these grades.[142]

413. In its decision dismissing the Swedish exporter's request for the initiation of a review, the USITC made the following comments on the issues raised by the exporter regarding these three products:

> "Petitioners have also argued that they now predominantly export specialty types of stainless steel plate that are not produced in the United States. These are two patented types of plate (identified as '253 MA' and '254 SMO') and KBR plate, a continuously-made cold rolled plate in 80-inch width. However, the data show that the two patented types of plate are being imported in only small quantities and, as noted above, Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States. KBR sales have occurred in a very limited market, with only minimal possibilities for further sales. In fact, although there is no domestic production of continuously-made cold-rolled plate in 80-inch width, and (sic) there is piece-by-piece production of plate up to 72-inch width. Moreover, plate may be produced in an almost infinite variety of compositions and sizes, depending on the components chosen, the ratios in which they are used, and the individual production machinery and steps employed. Simply because a new composition or size is produced - and even patented - does not make it sufficiently different in its characteristics and uses from other types

[142]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 23 February 1987, pp.69-75.

> of stainless steel plate to warrant a finding that there is no domestic like product (footnote omitted). The Commission has regularly rejected arguments that specialty types of stainless steel should be treated differently from standard types in making like product determinations (footnote omitted). In fact, in recently concluded investigation, the Commission did not accept Avesta's argument that these two patented types of stainless steel are not competitive with domestically produced types of stainless steel (footnote omitted)."[143]

414. Sweden argued that the USITC acted inconsistently with Article 9:2 by not undertaking a review to determine whether KBR plate and the two patented grades of stainless steel plate should be exempted from the coverage of the 1973 dumping finding.

415. Referring to Articles 2:2 and 3:5 of the Agreement, Sweden contended that KBR plate and the two patented grades of stainless steel plate were not competitive with a like product produced by the US domestic industry. Sweden noted in this regard that because of the absence of competition between these products and products of the US domestic industry, these three products had been exempted from the application of safeguard measures introduced by the United States in July 1983 on imports of stainless steel and alloy tool steel. Sweden considered that the USITC's statement that the Swedish exporter "continues to export very significant quantities of standard types of hot-rolled plate to the United States" was factually incorrect. Sweden further argued that the USITC's statement that the three products were imported only in minimal quantities did not support the USITC's decision not to initiate a review to investigate whether the three products should be excluded from the 1973 dumping finding. On the contrary, that these products were imported in minimal quantities supported the argument of the Swedish exporter that the US domestic industry would not be materially injured if these products were excluded from the dumping finding.

416. The United States argued that the USITC had correctly found that, since all types of stainless steel plate constituted a single like product, a modification of the 1973 dumping finding to exclude KBR plate and the two patented grades of stainless steel plate would not be appropriate.

417. With respect to the two new patented grades of stainless steel plate, the United States noted that the USITC's finding that these grades did not constitute a separate like product was based, in part, on a finding made in a concurrent investigation under Section 203 of the Trade Act of 1974 that these grades did in fact compete with domestic production in the United States. Furthermore, US producers opposing the request for initiation of a review had provided information to the USITC indicating that there was competition between domestic products and the two patented grades. The United States also referred to a ruling made in October 1980 by the Department of Commerce that, based on the similarities between these two imported grades and all other stainless steel plate, the two grades were properly within the scope of the 1973 dumping finding. According to the United States the Swedish exporter had failed to provide documentation regarding the patents for these products, the import volumes of the products, and the issue of competition between these grades and domestic stainless steel plate.

418. Regarding the exporter's request for exclusion of cold-rolled KBR plate from the application of the 1973 dumping finding, the United States argued that Sweden had failed to show how this plate differed significantly from other domestic cold-rolled plate, which were also within the like product. The USITC had also found that there were only minimal possibilities for further sales of KBR plate in the US market.

---

[143]See Annex III *infra*.

419. Regarding both KBR plate and the two new patented grades of stainless steel plate imported from Sweden, the United States argued that, because of the minimal quantities in which these products were imported, their exclusion would not have an impact on the USITC's injury analysis.

420. The Panel observed that it was not clearly discernable from the text of the USITC's decisions whether the USITC had treated the Swedish exporter's request for a review to modify the 1973 dumping finding as an alternative to the exporter's request for initiation of a review to revoke the dumping finding. The decision did not distinguish between the two requests and did not discuss the factors mentioned by the exporter as support for modification of the dumping finding separately from the factors mentioned by the exporter as a ground for the initiation of a review to revoke the finding.

421. The Panel noted in this regard that the USITC had dismissed the exporter's allegations on the two new patented products, in part, on the following ground:

> "… the data show that the two patented types of plate are being imported in only small quantities and, as noted above, Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States."

This statement was in response to what the USITC considered to be the argument of the Swedish exporter:

> "Petitioners have also argued that they now predominantly export specialty types of stainless steel plate that are not produced in the United States."

The Panel's review of the section of the exporter's petition which discussed the reasons why in the exporter's view a modification of the product coverage was warranted revealed that the exporter had referred to the fact that the two patented grades of Swedish stainless steel plate and KBR plate were imported in minimal quantities and did not compete with a domestic like product. The exporter's argument in favour of a modification of the product coverage was not based on the relative importance of the quantities of the three specialty stainless steel plates compared to the quantities of imports of standard types of stainless steel plate. There was no argument in this section that the exporter was now predominantly exporting the three specialty stainless steel plates into the United States.

422. The Panel therefore found it difficult to understand why in this context the USITC attached significance to the fact that the two specialty types of stainless steel plate were imported in minimal quantities, whereas the exporter continued to export very significant quantities of standard types of stainless steel plate.

423. The Panel further recalled its observations in paragraphs 321-323 regarding the unclear factual basis for the USITC's statement that "Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States."

424. Based on the above considerations, the Panel was not persuaded that the USITC adequately addressed the issues raised by the Swedish exporter in his request for a modification of the product coverage of the 1973 dumping finding when it contrasted the small quantities of imports of the two patented types of specialty steel with the allegedly significant quantities of imports of standard types of hot-rolled plate.

425. However, the Panel noted that the USITC had mentioned additional reasons for its determination that the existence of the new products was not a sufficient basis to initiate a review. In particular, the USITC discussed why in its view the new products were not outside the scope of the domestic "like product" definition. Thus, it stated:

> "Simply because a new composition or size is produced - and even patented - does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product."

The Panel noted in this respect that Sweden had not sought a finding from the Panel that the USITC had acted inconsistently with the definition of "like product" in Article 2:2 of the Agreement. The Panel did not wish to preclude that there could be circumstances in which it could be argued that an imported product which was like a domestic product should be excluded from the application of an anti-dumping duty. However, in the Panel's view, in the case at hand Sweden had not sufficiently clarified the legal basis for its view that the products determined by the USITC to be like the relevant domestic product - a determination which was not challenged by Sweden - should nevertheless be excluded from the scope of application of an anti-dumping duty. The Panel therefore considered that, in discussing why the new products were not outside the scope of the "like product" definition, the USITC had provided an adequate explanation of its determination that the existence of these products did not substantiate the need for the initiation of a review.

426. Nevertheless, the Panel wished to note that it was not persuaded that the USITC was factually correct when it stated with regard to the two patented types of specialty steel plate:

> "In fact, in [a] recently concluded investigation, the Commission did not accept Avesta's argument that these two patented types of stainless steel are not competitive with domestically produced types of stainless steel."

The "recently concluded investigation" referred to by the USITC was an investigation under Section 203 of the Trade Act of 1974 on the probable economic effects of a termination of safeguard measures on imports of stainless steel and alloy tool steel. The Panel carefully reviewed the report issued upon conclusion of this investigation[144] but did not find in this Report any statement on whether or not the two patented types of stainless steel plate were competitive with domestically produced types of stainless steel.

427. In sum, the Panel had misgivings on some of the reasons mentioned by the USITC in explaining its dismissal of the existence of the three new products as a ground for initiation of a review, but in view of the USITC's explanation that these products were not outside the scope of the domestic "like product" definition, the Panel considered that the USITC had adequately explained why the information on the existence of the three new products did not substantiate the need for the initiation of a review, and that the USITC's determination on this issue was supported by the information before the USITC. The Panel therefore **concluded** that the United States had not acted inconsistently with its obligations under Article 9:2 by dismissing the request made in 1987 by the Swedish exporter for the initiation of a review to modify the 1973 dumping finding on imports of stainless steel plate from Sweden.

428. The Panel wished to emphasize that its observations and conclusions in the preceding paragraphs were without prejudice to the issue of whether new products could be included within the scope of an anti-dumping duty solely on the basis that they were like an existing product subject to that duty or like the domestic product in question.

[144]USITC Publication 1975, May 1987.

2.2 The USITC's dismissal of the 1985 request for initiation of a review to revoke the 1973 dumping finding

429. The Panel recalled that Sweden's claim that the United States had acted inconsistently with its obligations under Article 9:2 by not initiating a review upon request of the 1973 finding of dumping related to both the petition filed in 1985 by the Swedish exporter and the petition filed in 1987. While almost all arguments of Sweden in support of this claim pertained to the second petition, the Panel had to take into account that this claim also covered the USITC's denial of the first petition.

430. The Panel noted that in the petition filed in 1985[145] the Swedish exporter submitted that: (1) the circumstances affecting the Swedish stainless steel industry and the factors affecting its competitive position in the United States market had changed dramatically since 1973; (2) revocation of the 1973 finding of dumping would not cause the sole Swedish producer to alter its current supply and price behaviour towards the United States' market, and (3) in the event of revocation of the 1973 finding, future imports of stainless steel plate from Sweden would not cause material injury to the US domestic industry.

431. According to the petitioner, the changed circumstances since 1973 resulted from the following factors[146]:

(i) Imports of Swedish plate into the United States were commercially insignificant and statistically *de minimis*; since 1976 imports of Swedish plate had represented less than one percent of apparent US consumption in every year but one.

(ii) While in 1972 there were four Swedish companies producing stainless steel plate at four locations in Sweden, at present the sole remaining swedish producer of plate manufactured plate at two Swedish mills and at one mill in the United States.

(iii) In 1976, a predecessor of the sole remaining Swedish producer acquired a stainless steel plate mill in New Castle, and by 1984 this mill's share of apparent US consumption had increased significantly.

(iv) In 1972, Sweden and the EC entered into bilateral agreements which allowed Swedish stainless steel plate duty-free entry into the EC. In sharp contrast to the 1970-1972 period, Swedish exports to the EC were now almost 20 times the quantity of stainless steel plate exported from Sweden to the United States.

432. In its determination dismissing this request for initiation of a review, the USITC dismissed each of these four factors. The USITC did not pronounce itself on the arguments of the exporter that the revocation of the dumping finding would not alter the supply and price behaviour of the Swedish exporter towards the United States' market, and that future imports of stainless steel plate would not injure the domestic industry in the United States in the event of revocation of the dumping finding.

433. In its review of this determination, the Panel was faced with the difficulty that very little argumentation had been presented to it by the parties on the USITC's dismissal of the 1985 petition.

---

[145]Request for Review and Revocation of "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on June 7, 1973, Submitted Pursuant to Section 751 of the Tariff Act of 1930 on Behalf of Avesta AB and Avesta Stainless Inc., 8 July 1985.

[146]*Ibid*, pp.33-52.

While the factors mentioned in the 1985 petition were largely identical to a number of factors in the 1987 petition, there were differences in the specific arguments and information presented in the two petitions with respect to these factors. Furthermore, the USITC's explanation of its dismissal of these factors was not in all respects identical in its 1985 determination[147] and in its 1987 determination.

434. However, the Panel found that at least in one respect the conclusions drawn in its review of the 1987 determination were also relevant to the 1985 determination. This was the explanation provided by the USITC in its 1985 determination of why the purchase in 1976 of the steel mill in New Castle did not constitute a changed circumstance warranting the initiation of a review. The Panel noted the following statement made by the USITC on this issue:

> "Petitioners allege that the 1976 purchase of the Ingersoll Division of the Borg Warner Corp., a manufacturer of plate located in New Castle, Indiana, constitutes another changed circumstance. Nevertheless, the level of stainless steel plate imports from Sweden has not decreased since that purchase, and there was a notable increase from 1983 to 1984. Petitioners have not shown how the purchase of the domestic mill has affected the quantity of imports of Swedish stainless steel plate and, in fact, the only impact that the petition alleges is that there will be a change in the types of stainless steel plate that will be imported in the future."

The Panel was of the view that, as explained in paragraphs 305-311, the USITC based itself on factually incorrect information when it stated that "the level of stainless steel plate from Sweden has not decreased since that purchase," because the statistics on which this statement was based included imports of three types of stainless steel plate which in 1976 had been exempted from the application of the anti-dumping duties. The Panel noted that, unlike the petition filed in 1987, the petition filed in 1985 did not make any reference to the exclusion of any of these three products from the scope of the dumping finding. Nevertheless, the Panel considered that information on the exclusion of these three products was in the hands of the United States' authorities and was obviously relevant to an analysis of the volume of the imports of the products subject to the anti-dumping duties. The Panel considered that such relevant information could not be ignored by investigating authorities, and recalled in this respect its observations in paragraph 303. The fact that this information was on file with another branch of the United States Government could not be considered to be a justification for the USITC not to take this information into account in its examination of the petition filed by the Swedish exporter.

435. The Panel therefore **concluded** that the USITC erred when it stated that the level of stainless steel plate imports from Sweden had not declined since the purchase of the New Castle mill and that the information on this purchase therefore was not a basis for the initiation of a review. The Panel also **concluded** that the USITC erred when it stated later in its determination dismissing the 1985 petition that:

> "The petitioners have offered no persuasive reason why the current level of Swedish plate imports is the result of anything other than import relief."

436. The Panel also noted that, while the petition filed in 1985 contained rather detailed information in support of the argument of the Swedish exporter that the improved condition of the US domestic industry was a factor which warranted initiation of a review, the USITC decision did not address this issue. However, given that the parties to the dispute had not argued this issue before the Panel, the Panel decided to refrain from making a finding on this issue.

---

[147]See Annex II *infra*.

437. The Panel **concluded** that the United States had acted inconsistently with its obligations under Article 9:2 of the Agreement by dismissing the request made in 1985 by the Swedish exporter for the initiation of a review of the 1973 dumping finding on stainless steel plate from Sweden, because the USITC had concluded based on factually incorrect data that the information on the purchase in 1976 of a steel mill in New Castle by a predecessor of the Swedish exporter did not substantiate the need for the initiation of a review.

438. Having concluded its examination of Sweden's claims under Article 9:2 of the Agreement, the Panel recalled its observation in paragraph 228 that it could be argued that a violation of Article 9:2 could also entail a violation of Article 9:1 of the Agreement. While the Panel did not exclude the possibility that, had the United States initiated a review in 1985 and/or in 1987 of the dumping finding on imports of stainless steel plate from Sweden, such a review would have led to the revocation of this finding, the Panel did not consider that on the basis of the information presented to the USITC by the Swedish exporter in its two requests the outcome of such a review could be prejudged. Nor did the Panel consider that it was presented with sufficient information on the period subsequent to the USITC's dismissal of the second request of the Swedish exporter to enable the Panel to draw a conclusion on whether or not in this case the continued imposition of the anti-dumping duties was necessary. Accordingly, while the Panel had found that by dismissing the requests for the initiation of a review the United States had acted inconsistently with its obligations under Article 9:2, the Panel did not consider that this finding enabled it to conclude that the United States had also acted inconsistently with Article 9:1 by maintaining the anti-dumping duties.

VII. CONCLUSIONS

439. The Panel **concluded** that:

(i) The United States had acted inconsistently with its obligations under Article 9:2 by dismissing the request made in 1987 by the Swedish exporter for the initiation of a review to revoke the dumping finding on stainless steel plate from Sweden, as a result of (1) the factual insufficiency and inadequate explanation of the USITC's determination that the information on the purchase in 1976 of a US steel mill by a predecessor of the Swedish exporter did not substantiate the need for the initiation of a review, and (2) the inadequate explanation of the USITC's determination that the information on the changed structure of the Swedish stainless steel plate industry and on the free-trade agreements between Sweden and the EC did not substantiate the need for the initiation of a review;

(ii) the United States had not acted inconsistently with its obligations under Article 9:2 by dismissing the request made in 1987 by the Swedish exporter for the initiation of a review to modify the 1973 dumping finding on imports of stainless steel plate from Sweden; and

(iii) the United States had acted inconsistently with its obligations under Article 9:2 of the Agreement by dismissing the request made in 1985 by the Swedish exporter for the initiation of a review to revoke the 1973 dumping finding on stainless steel plate from Sweden, because the USITC had concluded based on factually incorrect data that the information on the purchase in 1976 of a steel mill in New Castle, Indiana by a predecessor of the Swedish exporter did not substantiate the need for the initiation of a review.

440. The Panel noted Sweden's request for revocation of the dumping finding on imports of stainless steel plate from Sweden and for a reimbursement of duties paid pursuant to this finding to an extent considered reasonable by the Panel.[148] The Panel also noted the arguments of the United States against this request.[149]

441. The Panel was of the view that the errors committed by the USITC affected the validity of key elements in the USITC's dismissal of the requests for initiation of a review, and that had the USITC properly evaluated the two requests made by the Swedish exporter for the initiation of a review, it would have determined that these requests substantiated the need for the initiation of a review. The Panel therefore considered that the proper way for the United States to bring its measure into conformity with its obligations under the Agreement was to promptly initiate such a review of the dumping finding on stainless steel plate from Sweden and to take such measures with respect to this finding as may be necessary in light of the outcome of that review.

442. The Panel **recommends** that the Committee request that the United States bring its measure into conformity with its obligations under the Agreement, and that to this end the United States promptly initiate a review of the 1973 dumping finding on imports into the United States of stainless steel plate from Sweden, consistent with the Panel's conclusions in paragraph 439, and take such measures with respect to this dumping finding as may be necessary in light of the outcome of that review.

[148]*Supra,* paragraph 207.

[149]*Supra,* paragraphs 210-211.

ANNEX I

Section 751 of the United States
Tariff Act of 1930, as Amended[150]

"SEC. 751. Administrative Review of Determinations

(a) Periodic Review of Amount of Duty.--

(1) In general.-- At least once during each 12-month period beginning on the anniversary of the date of publication of a countervailing duty order under this title or under section 303 of this Act, an antidumping duty order under this title or a finding under the Antidumping Act, 1921, or a notice of the suspension of an investigation, the administering authority, if a request for such a review has been received and after publication of such review in the Federal Register, shall --

(A) review and determine the amount of any net subsidy,

(B) review, and determine (in accordance with paragraph (2)), the amount of any antidumping duty, and

(C) review the current status of, and compliance with, any agreement by reason of which an investigation was suspended, and review the amount of any net subsidy or margin of sales at less than fair value involved in the agreement,

and shall publish the results of such review, together with notice of any duty to be assessed, estimated duty to be deposited, or investigation to be resumed in the Federal Register.

(2) Determination of antidumping duties.-- For the purpose of paragraph (1)(B), the administering authority shall determine --

(A) the foreign market value and United States price of each entry or merchandise subject to the antidumping duty order and included within that determination, and

(B) the amount, if any, by which the foreign market value of each such entry exceeds the United States price of the entry.

The administering authority, without revealing confidential information, shall publish notice of the results of the determination of antidumping duties in the Federal Register, and that determination shall be the basis for the assessment of antidumping duties on entries of the merchandise included within the determination and for deposits of estimated duties.

(b) Reviews Upon Information or Request.--

(1) In general.-- Whenever the administering authority or the Commission receives information concerning, or a request for the review of, an agreement accepted under section 704 (other than a quantitative restriction agreement described in subsection (a)(2) or (c)(3)) or 734 (other than a quantitative restriction agreement described in subsection (a)(2)) or an affirmative determination made under section 704(h)(2), 705(a), 705(b), 734(h)(2), 735(a), 735(b), 762(a)(1), or 762(a)(2), which shows changed circumstances sufficient to warrant a review of such determination, it shall conduct such a review after publishing notice of the review in the Federal Register. In reviewing

[150]Trade and Tariff Act of 1984, Pub. L. No. 98-573, 611(a)(2), 98 Stat. 2948, 3031 (codified at 19 U.S.C. 1675(b)(1)).

its determination under section 704(h)(2) or 734(h)(2), the Commission shall consider whether, in the light of changed circumstances, an agreement accepted under section 704(c) or 734(c) continues to eliminate completely the injurious effects of imports of the merchandise. During an investigation by the Commission, the party seeking revocation of an antidumping or countervailing duty order shall have the burden of persuasion with respect to whether there are changed circumstances sufficient to warrant revocation of the antidumping or countervailing duty order.

(2) Limitation on period for review.-- In the absence of good cause shown --

(A) the Commission may not review a determination under section 705(b) or 735(b), and

(B) the administering authority may not review a determination under section 705(a) or 735(a), or a suspension of an investigation suspended under section 704 or 734,

less than 24 months after the date of publication of notice of that determination or suspension."

(c) Revocation of Countervailing Duty Order or Antidumping Duty Order.-- The administering authority may revoke, in whole or in part, a countervailing duty order or an antidumping duty order, or terminate a suspended investigation, after review under this section. The administering authority shall not revoke, in whole or in part, a countervailing duty order or terminate a suspended investigation on the basis of any export taxes, duties or other charges levied on the export of the merchandise to the United States specifically intended to offset the subsidy received. Any such revocation or termination shall apply with respect to unliquidated entries of merchandise entered, or withdrawn from warehouse, for consumption on and after a date determined by the administering authority.

(d) Hearings.-- Whenever the administering authority or the Commission conducts a review under this section it shall, upon the request of an interested party, hold a hearing in accordance with section 774(b) in connection with that review.

(e) Determination That Basis for Suspension No Longer Exists.-- If the determination of the Commission under the last sentence of subsection (b)(1) is negative, the agreement shall be treated as not accepted, beginning on the date of publication of the Commission's determination, and the administering authority and the Commission shall proceed, under section 704(i) or 734(i), as if the agreement had been violated on that date, except that no duty under any order subsequently issued shall be assessed on merchandise entered, or withdrawn from warehouse, for consumption before that date.

(f) Correction of Ministerial Errors.-- The administering authority shall establish procedures for the correction of ministerial errors in final determinations within a reasonable time after the determinations are issued under this section. Such procedures shall ensure opportunity for interested parties to present their views regarding any such errors. As used in this subsection, the term "ministerial error" includes errors in addition, subtraction or other arithmetic function, clerical errors resulting from inaccurate copying, duplication, or the like, and any other type of unintentional error which the administering authority considers ministerial."

ANNEX II*

Stainless Steel Plate from Sweden

AGENCY: International Trade Commission.

ACTION: Dismissal of a request to institute a section 751(b) review investigation concerning affirmative determination in Investigation No. AA1921-114, Stainless Steel Plate from Sweden.

SUMMARY: The Commission determines, pursuant to section 751(b) of the Tariff Act of 1930 (19 U.S.C. 1675(b)) and rule 207.45 of the Commission's rules (19 CFR § 207.45), that the petition does not show changed circumstances sufficient to warrant institution of an investigation to review the Commission's affirmative determination in investigation No. AA1921-114 regarding stainless steel plate from Sweden provided for in items 607.76 and 607.90 of the Tariff Schedules of the United States.

SUPPLEMENTARY INFORMATION: On May 1, 1973, the Commission determined that an industry in the United States was injured within the meaning of the Antidumping Act, 1921, by reason of imports of stainless steel plate from Sweden determined by the Secretary of Treasury to be sold or likely to be sold at less than fair value (LTFV).

On June 8, 1973, the Department of the Treasury issued a finding of dumping (T.D. 73-157) and published notice of the dumping finding in the Federal Register (38 FR 15079).

On July 8, 1985, the Commission received a request to review its affirmative determination in investigation No. AA1921-114. The request was filed pursuant to section 751(b) by the law firm of Freeman, Wasserman and Schneider on behalf of Avesta AB, the sole Swedish producer and exporter of stainless steel plate, and its affiliated company, Avesta Stainless Inc., a U.S. producer of stainless steel plate.

On July 31, 1985, the Commission published a notice in the Federal Register (50 FR 31056) requesting public comment concerning whether the following alleged changed circumstances were sufficient to warrant institution of a review investigation: (1) Imports of Swedish plate into the United States are commercially insignificant and statistically de minimis, representing less than one per cent of apparent U.S. consumption of plate in every year but one since 1976; (2) The number of companies producing stainless steel plate in Sweden has fallen from four producers with four mills in 1972 to one producer with one mill in 1985; (3) In 1976, a predecessor of Sweden's sole remaining producer of stainless steel plate acquired Borg Warner Corporation's Ingersoll Division mill at New Castle, IN., and by 1984 this mill's share of apparent U.S. consumption of stainless steel plate had greatly increased; and (4) In 1972, Sweden and the European Community (EC) entered into a bilateral trade agreement which allowed Swedish plate duty-free entry into the EC; today, Swedish exports to the EC are almost 20 times the quantity exported to the United States.

The Commission received comments from the law firm of Collier, Shannon, Rill and Scott on behalf of Allegheny Ludlum Steel Corp., Armco Inc., LTV Steel Co., Washington Steel Corp., and the United Steelworkers of America. Their statement argued that the Commission not institute a review investigation.

---

* Source: 50 Fed. Reg. 43613 (28 October 1985).

After review of the petition for review and the responses to the petition, the Commission has determined, pursuant to 19 U.S.C. § 1675(b) and 19 C.F.R. § 207.45, that the petition does not show changed circumstances sufficient to warrant institution of a review investigation regarding stainless steel plate from Sweden.[1],[2]

Petitioners allege that Western Europe is a strong, growing market for Swedish stainless steel plate exports and that there have been recent increases in exports of plate to certain Western European countries. They allege that this results from a 1972 agreement between Sweden and the European Community (EC) which grants Swedish products duty-free entry into the EC, in contrast to the pre-1972 period of restricted imports. Petition at 34. However, as the agreement was entered into before the Commission's 1973 determination, it cannot constitute a changed circumstance.

Moreover, the level of Swedish stainless steel plate exports to the EC, although it has fluctuated, has shown a decreasing trend since 1973 and petitioners' reliance on apparent recent increases in exports to certain EC countries is misplaced for several reasons. First, exports to the EC, even after the recent increases, remain below the levels of the early 1970s. Second, the recent increase in exports depends on 1981 as the base year, and 1981 was a bad year for stainless steel production and exports worldwide. Further, access to the EC market is not unrestricted, but the levels, timing, product mix, and geographic distribution of Swedish steel imports are limited. Finally, EC willingness to accept imports of Swedish steel may be damped because there are now additional duties on EC exports to the United States. We note that the petition does not show any enlargement of any other market, including the Swedish domestic market, for Swedish stainless steel plate.

Petitioners allege that during the past five years there has been a restructuring of the stainless steel industry in Sweden. That restructuring consists of the consolidation of four Swedish steel producers into a single company and a decrease in the number of steel mills. Because the specific facts about the current state of the Swedish stainless steel plate industry as they relate to the United States market are confidential, we can only state that they do not show changed circumstances sufficient to warrant institution of a review investigation.

Petitioners allege that the 1976 purchase of the Ingersoll Division of the Borg Warner Corp., a manufacturer of plate located in New Castle, Indiana, constitutes another changed circumstance. Nevertheless, the level of stainless steel plate imports from Sweden has not decreased since that purchase, and there was a notable increase from 1983 to 1984. Petitioners have not shown how the purchase of the domestic mill has affected the quantity of imports of Swedish stainless steel plate and, in fact, the only impact that the petition alleges is that there will be a change in the types of stainless steel plate that will be imported in the future.

Finally, petitioners allege that imports of Swedish plate have decreased significantly, in both absolute and relative terms. It is true that imports of Swedish plate declined sharply in 1974, the year after imposition of the anti-dumping order. Although fluctuating from year to year, imports of Swedish

---

[1]Chairwoman Stern determined that the petition showed changed circumstances, particularly the purchase by a Swedish producer of a US stainless steel plate production facility, sufficient to warrant institution of a review investigation. Therefore, she does not concur with the statement of reasons contained in this notice.

[2]Vice Chairman Liebeler determined that the petition showed changed circumstances sufficient to warrant institution of a review investigation. Therefore, she does not concur with the statement of reasons contained in this notice.

plate have remained relatively constant since then, although increases are apparent in 1984. We note that in addition to the antidumping duty, imports of stainless steel plate from Sweden have been subject to quotas and additional duties during portions of the intervening years. The level of imports, while clearly a change from the situation at the time of our 1973 determination, is not sufficient here. The petitioners have offered no persuasive reason why the current level of Swedish plate imports is the result of anything other than import relief.

For all the foregoing reasons, the Commission has determined that the petition does not show changed circumstances sufficient to warrant institution of a review investigation and has, therefore, dismissed the petition.

By order of the Commission.

Issued: October 25, 1985.

ANNEX III*

Stainless Steel Plate from Sweden

AGENCY: International Trade Commission.

ACTION: Dismissal of a request to institute a section 751(b) review investigation concerning the Commission's affirmative determination in investigation No. AA1921-114, stainless steel plate from Sweden.

SUMMARY: The Commission determines, pursuant to section 751(b) of the Tariff Act of 1930 (19 U.S.C. § 1675(b)) and rule 207.45 of the Commission's rules (19 C.F.R. § 207.45), that the petition does not show changed circumstances sufficient to warrant institution of an investigation to review the Commission's affirmative determination in investigation No. AA1921-114 regarding stainless steel plate from Sweden provided for in items 607.76 and 607.90 of the Tariff Schedules of the United States.

FOR FURTHER INFORMATION CONTACT: Lawrence Rausch (202-523-0300), Office of Investigations, U.S. International Trade Commission, 701 E Street NW, Washington, DC 20436. Hearing-impaired individuals are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-724-0002.

SUPPLEMENTARY INFORMATION:

Background. -- On May 1, 1973, the Commission determined that an industry in the United States was injured within the meaning of the Antidumping Act of 1921 by reason of imports of stainless steel plate from Sweden which the Secretary of Treasury had determined to be sold or likely to be sold at less than fair value (LTFV). On June 5, 1973, the Department of Treasury issued a finding of dumping (T.D. 73-157) and published a notice of such a finding in the Federal Register (38 FR 15079).

On July 8, 1985, the Commission received a request to review its affirmative determination in investigation No. AA1921-114. The request was filed pursuant to section 751(b) of the Tariff Act of 1930 by counsel on behalf of Avesta AB, the sole Swedish producer and exporter of stainless steel plate, and its affiliated company, Avesta Stainless Inc., a U.S. producer of stainless steel plate. The Commission published a notice in the Federal Register requesting comments as to whether the alleged changed circumstances were sufficient to warrant institution of a review investigation. Comments were supplied by counsel on behalf of Allegheny Ludlum Steel Corp., Armco Inc., LTV Steel Co., Washington Steel Corp., and the United Steelworkers of America opposing the institution of a review investigation. After review of the petition and the responses to the notice inviting comments, the Commission determined that the petition did not show changed circumstances sufficient to warrant institution of a review investigation (50 FR 43613).

On February 24, 1987, the Commission received a second request, pursuant to section 751(b) of the Act, to review its affirmative determination in investigation No. AA1921-114. This request was again filed by counsel on behalf of Avesta AB, the sole Swedish producer and exporter of stainless

---

* Source: 52 Fed. Reg. 24541 (1 July 1987) and Memorandum Opinion setting forth the reasons for dismissing the request, Office of the Secretary, USITC.

steel plate, and its affiliated company, Avesta Stainless Inc., a U.S. producer of stainless steel plate. On March 25, 1987, the Commission requested written comments in the Federal Register (52 FR 9551) as to whether the changed circumstances alleged by the petitioner were sufficient to warrant a review investigation. Comments were supplied by counsel on behalf of Allegheny Ludlum Steel Corp., Armco Inc., LTV Steel Co., Washington Steel Corp., and the United Steelworkers of America opposing the institution of a review investigation and by counsel on behalf of the petitioner supporting the institution of a review investigation.

After review of the petition for review and the responses to the notice inviting comments, the Commission has determined (Chairman Liebeler and Vice Chairman Brunsdale dissenting), pursuant to 19 U.S.C. § 1675(b) and rule 19 C.F.R. § 207.45, that the petition does not show changed circumstances sufficient to warrant institution of a review investigation regarding stainless steel plate from Sweden. A Memorandum Opinion, setting forth the reasons for dismissing this request, will be made available in the Secretary's office.

Issued: June 26, 1987.

By order of the Commission.

(Memorandum Opinion)
VIEWS OF COMMISSIONERS ALFRED ECKES,
SEELEY LODWICK, AND DAVID ROHR

Background

On May 1, 1973 the US Tariff Commission (predecessor to this Commission) determined that an industry in the United States was injured within the meaning of the Anti-Dumping Act, 1921, by reason of imports of stainless steel plate from Sweden which the Secretary of the Treasury had determined to be sold or likely to be sold at less than fair value. On June 5, 1973, the Department of Treasury issued a finding of dumping and published notice thereof in the Federal Register.[1]

On February 24, 1987, the Commission received a request to conduct an investigation under section 751(b) of the Tariff Act of 1930, 19 U.S.C. § 1675(b), on behalf of Avesta AB, the sole Swedish producer and exporter of stainless steel plate, and Avesta Stainless, Inc., an affiliated U.S. producer of stainless steel plate.[2] The petition alleged that there are eight changed circumstances:

1. The number of producers in Sweden has declined from four in 1972 to a single producer in 1987 and Sweden's capacity to produce stainless steel plate has declined;

[1]38 Fed. Reg. 15079.

[2]This is not the first time that the Commission has received a petition regarding stainless steel plate from Sweden. On July 8, 1985, the Commission received a request for a review investigation from the same parties. The Commission determined (Chairwoman Stern and Vice Chairman Liebeler dissenting) that the petition did not show changed circumstances sufficient to warrant institution of a review investigation. 50 Fed. Reg. 43613 (Oct. 28, 1985). That determination has been appealed by the petitioners. Avesta AB v. United States, U.S. Court of International Trade No. 85-10-1497.

2. Imports of hot-rolled stainless steel plate from Sweden have been and remain at de minimis levels;

3. The de minimis levels of imports from Sweden result from the 1976 acquisition by Avesta of a hot-rolling plate producing mill in the United States;

4. In contrast to the early 1970's, the European Community (EC) is a growing market for Swedish plate and Swedish plate enters the EC without quantitative restrictions and duty-free;

5. U.S. producers are highly protected due to the negotiation and implementation of "voluntary restraint agreements" (VRAs) with those countries whose producers are the major foreign supplier to the United States market;

6. Sweden has not entered into a VRA with the U.S. and its exports to the U.S. remain subject to antidumping and countervailing duties, while those from the VRA countries are not;

7. Sweden supplies U.S. demand for cold-rolled plate of widths which U.S. firms are unable to supply; and

8. Several patented types of stainless steel plate that did not exist in the 1970's and that are not produced in the U.S. are being exported from Sweden to the U.S.

The Commission published notice of the petition and requested public comments thereon.[3]

After considering the petition, the Commission determined[4] that the petition did not show changed circumstances sufficient to warrant institution of a review investigation.[5] This memorandum states the reasons for that determination.

Discussion

Having considered the petition for institution of an investigation and the comments received, the Commission has determined that the petition does not shown changed circumstances sufficient to warrant an investigation. Although we discuss the allegations individually, our determination is based on an examination of the petition as a whole.

Petitioners allege that imports of stainless steel plate (plate) from Sweden have been and remain at de minimis levels, asserting that this constitutes a changed circumstance supporting their request for a review investigation. The Commission found this same allegation unpersuasive when raised in 1985. As we noted there, U.S. imports of Swedish plate declined sharply in 1974, the year following the imposition of the antidumping order, and, although fluctuating from year to year, they remained relatively constant thereafter. A decline in exports is an expected result from the imposition of an order. Moreover, plate imports, including those from Sweden, have been subject to quotas and additional duties during portions of the years since 1973 including, for example, special duties imposed pursuant

[3]52 Fed. Reg. 9552 (March 25, 1987).

[4]Chairman Liebeler and Vice Chairman Brunsdale dissent from this determination.

[5]19 U.S.C. § 1675(b); 19 CFR § 207.45(a)(1)(i).

to section 202 of the Trade Act of 1974.[6] The current allegation is not in any significant respect different from the allegation rejected by the Commission in 1985. The Commission again finds that petitioners have offered no legally sufficient reason why the current levels of plate imports are the result of anything other than import relief.

Petitioners allege, as they did in 1985, that the decline in the volume of imports is the result of the 1976 acquisition of a stainless steel facility in New Castle, Indiana, formerly owned by the Ingersoll Division, Borg-Warner Corp. However, the volume of imports of Swedish plate declined sharply in 1974. As we found in 1985, the level of imports from Sweden has not decreased since that purchase. In fact, current data show notable increases in the most recent periods. Unlike their 1985 petition, petitioners now assert that acquisition of the mill caused a substantial shift in their market strategy and that the New Castle mill is used to supply the majority of petitioners' hot-rolled plate for the U.S. market. They state that they intend to use the U.S. facility for hot-rolled plate except for specialty types. Their data, however, show that exports of Swedish plate to the U.S. are predominantly hot-rolled, including a very substantial percentage of standard types. We conclude that the Swedish producers have offered no additional argument to support their assertion that exporters have significantly altered their long-term practices with regard to exports of plate to the United States.

Petitioners have also argued that they now predominantly export specialty types of stainless steel plate that are not produced in the United States. These are two patented types of plate (identified as "253 MA" and "254 SMO") and KBR plate, a continuously-made cold-rolled plate in 80-inch width. However, the data show that the two patented types of plate are being imported in only small quantities and, as noted above, Avesta continues to export very significant quantities of standard types of hot-rolled plate to the United States. KBR sales have occurred in a very limited market, with only minimal possibilities for further sales. In fact, although there is no domestic production of continuously-made cold-rolled plate in 80-inch width, and there is piece-by-piece production of plate up to 72-inch width. Moreover, plate may be produced in an almost infinite variety of compositions and sizes, depending on the components chosen, the ratios in which they are used, and the individual production machinery and steps employed. Simply because a new composition or size is produced - and even patented - does not make it sufficiently different in its characteristics and uses from other types of stainless steel plate to warrant a finding that there is no domestic like product.[7] The Commission has regularly rejected arguments that specialty types of stainless steel should be treated differently from standard types in making like product determinations.[8] In fact, in recently concluded investigation, the Commission did not accept Avesta's argument that these two patented types of stainless steel are not competitive with domestically produced types of stainless steel.[9]

Petitioners further allege, as they did in 1985, that the European market is a growing market for its plate exports. Although petitioners here rely on a different data series for this proposition from that on which they relied in 1985, their current data fail to take into account the change in E.C. membership since 1972. When that change is accounted for, Swedish shipments to the E.C. fell irregularly from 1973 to 1981 and then increased irregularly through 1985. In 1985, Swedish exports

---

[6] 19 U.S.C. § 2252.

[7] 19 U.S.C. § 1677(10) (1982).

[8] Compare 49 Fed. Reg. 4045 (Feb. 1, 1984) (Acrylic Sheet from Japan).

[9] Stainless Steel and Alloy Tool Steel, Inv. No. TA-203-16, USITC Pub. 1975 (May 1987).

to the EC were just five per cent higher than in 1972.* Thus, the Commission again finds that there is no sufficient changed circumstance with regard to this allegation.

Petitioners allege that the U.S. producers of stainless steel plate are highly protected due to the negotiation and implementation of voluntary restraint agreements (VRAs) with a variety of countries, though not with Sweden. As petitioners correctly note, those VRAs, *inter alia*, limit exports of stainless steel plate to the U.S. and eliminate exposure to U.S. antidumping and countervailing duties for those exports. There are two flaws in the argument. First, because there is no VRA in effect with Sweden, the Swedish producer may continue to export to the United States in whatever quantities it chooses. Second, the existence of the VRAs does not mean that the U.S. stainless steel industry is any less vulnerable to the impact of dumped imports.[10]

Finally, petitioners allege, as they did in 1985, that there has been a restructuring of the Swedish stainless steel industry after 1972, in which the number of Swedish producers had declined from four to one. They also allege, as they did in 1985, that there was a decrease in the number of steel mills during the same period. In 1985, the Commission found these allegations insufficient. It is currently alleged, *inter alia*, that since 1984, capacity to produce hot-rolled plate has declined. However, notwithstanding the decreases in absolute capacity, there remains sufficient unused productive capacity to significantly increase exports to the United States without decreasing production for the Swedish market or for other export markets.

Accordingly, considered as a whole, the petition does not show changed circumstances sufficient to warrant institution of a review investigation.

VIEWS OF CHAIRMAN SUSAN LIEBELER AND VICE CHAIRMAN ANNE BRUNSDALE

We believe that the subject request alleges changed circumstances, particularly the purchase by a Swedish producer of a U.S. stainless steel plate production facility, sufficient to warrant institution of a review investigation. Therefore, we dissent from the decision by the Commission to deny institution.

---

*The United States subsequently clarified during the Panel proceedings that "1972" was a typographical error and that the text should have read, "since 1973".

[10] See Stainless Steel and Alloy Tool Steel, *supra*.

ANNEX IV*

Apparent U.S. Consumption of Stainless Steel Plate, 1970-1991
(net tons)

Year	US producers' shipments	Total imports	Total exports	Apparent US consumption	Total imports as % AC	Imports from Sweden	Imports from Sweden as % AC	Imports from Sweden as % TI
1970	73,972	8,300	3,089	79,183	10.5%	1,580	2.00%	19.0%
1971	61,427	10,360	2,969	68,818	15.1%	3,960	5.75%	38.2%
1972	71,623	17,115	2,054	86,684	19.7%	9,985	11.52%	58.3%
1973	82,000	11,300	4,100	89,200	12.7%	4,605	5.16%	40.3%
1974	140,200	12,400	6,900	145,700	8.5%	1,256	0.86%	10.1%
1975	109,700	17,500	4,400	122,800	14.2%	2,008	1.64%	11.5%
1976	93,700	18,600	3,200	109,100	17.0%	1,271	1.16%	6.8%
1977	98,600	7,500	2,900	103,200	7.3%	909	0.88%	12.1%
1978	114,115	11,000	5,600	119,515	9.2%	1,115	0.93%	10.1%
1979	145,807	7,000	12,000	140,807	5.0%	1,270	0.90%	18.1%
1980	123,944	2,981	16,000	110,925	2.7%	635	0.57%	21.2%
1981	122,323	7,750	10,000	120,073	6.5%	631	0.53%	8.1%
1982	97,347	13,268	5,000	105,615	12.6%	785	0.74%	5.9%
1983	101,074	5,251	8,094	98,231	5.3%	316	0.32%	6.0%
1984	116,380	7,502	3,371	120,551	6.2%	1,553	1.29%	20.7%
1985	146,738	11,766	8,031	150,473	7.8%	949	0.68%	8.1%
1986	118,271	16,528	3,523	131,276	12.6%	1,784	1.36%	10.8%
1987	159,081	11,313	4,039	166,355	6.8%	1,875	1.13%	16.6%
1988	182,969	15,864	11,847	186,986	8.5%	1,621	0.86%	10.2%
1989	169,424	15,861	5,758	179,527	8.8%	1,390	0.77%	8.8%

Year	US producers[1] shipments	Total imports	Total exports	Apparent US consumption	Total imports as % AC	Imports from Sweden	Imports from Sweden as % AC	Imports from Sweden as % TI
1990	206,065	19,188	35,567	189,686	10.1%	1,217	0.64%	6.3%
1991	179,520	21,133	15,908	184,745	11.4%	659	0.36%	3.1%

Sources: US producers' shipments:
1970-1972, Stainless Steel Plate from Sweden, Staff Report, Inv. No. 1921-114, TC Pub. 573, at 58 Table 2 (1973) [1973 Anti-Dumping Injury Determination];
1973-1977, Stainless Steel and Alloy Tool Steel, Inv. No.TA-203-5, USITC Pub. 968, at A-94 Table 18 (1979);
1978-1982, American Iron and Steel Institute, reprinted in American Metal Market, Metal Statistics 1985 at 174 (1985) (same data, rounded, are also used in Stainless Steel and Alloy Tool Steel, Inv. No. TA-201-48, USITC Pub. 1377, at A-91 Table 8 (1983));
1983-1986, Stainless Steel and Alloy Tool Steel, Inv. No. TA-203-16, USITC Pub. 1975, at A-23 Table 5 (1987);
1987-1990, American Iron and Steel Institute, reprinted in American Metal Market, Metal Statistics 1992 at 165 (1992);
1991, estimate, based on market research conducted for Avesta.

Imports:

U.S. Department of Commerce, Bureau of the Census. 1970-1988, Tariff Schedule items 607.7603, 607.7606, & 607.9005, and predecessor item numbers, all covering stainless steel plate; 1989-1991, Harmonized Tariff Schedule subheadings 7219.11.00, 7219.12.00, 7219.21.00, 7219.22.00, and 7219.31.00.

Exports:

U.S. Department of Commerce, Bureau of the Census. 1970-1988, Schedule B number 608.8117. 1989-1991, Schedule B numbers 7219.11.0000, 7219.12.0000, 7219.21.0000, 7219.22.0000 and 7219.31.0000.

Note on 1988 total imports and imports from Sweden:

The officially reported US import statistics for 1988 for total imports and imports from Sweden include 1,382 net tons of stainless steel sheet bar imported by Avesta at the Port of Baltimore that was misclassified by the local customs officials as stainless steel plate in item 607.7606, TSUS. Avesta has obtained a ruling from Customs Service Headquarters determining that this classification was incorrect, and Avesta is in the process of seeking a correction in the official import statistics. The 1,382 tons have been excluded from the figures for total imports and imports from Sweden in the preceding Table.

*This table was presented to the Panel by Sweden.

ANNEX V*

Swedish Export of Stainless Cold Rolled and Hot Rolled Products > 4.75 mm
1970-1991

	EC-12 C.R.	H.R.	TOT.	USA C.R.	H.R.	TOT.	OTHERS C.R.	H.R.	TOT.	TOTAL C.R.	H.R.	TOT.
1970	493	24,670	25,163	0	1,803	1,803	545	15,415	15,960	1,038	41,888	42,926
1971	1,565	17,518	19,083	130	4,356	4,486	585	19,185	19,770	2,280	41,059	43,339
1972	1,384	17,483	18,867	55	9,086	9,141	487	24,383	24,870	1,926	50,952	52,878
1973	1,161	23,225	24,386	7	3,970	3,977	638	25,557	26,195	1,806	52,752	54,558
1974	1,882	28,724	30,606	2	1,110	1,112	130	32,524	32,654	2,014	62,358	64,372
1975	936	27,279	28,215	0	1,799	1,799	106	28,785	28,891	1,042	57,863	58,905
1976	978	21,799	22,777	41	1,367	1,408	147	24,145	24,292	1,166	47,311	48,477
1977	2,639	20,756	23,395	0	1,117	1,117	566	22,177	22,743	3,205	44,050	47,255
1978	4,205	18,565	22,770	65	723	788	1,095	25,290	26,385	5,365	44,578	49,943
1979	5,725	21,070	26,795	57	761	818	1,852	27,483	29,335	7,634	49,314	56,948
1980	5,903	21,300	27,203	0	367	367	2,240	25,044	27,284	8,143	46,711	54,854
1981	3,698	17,566	21,264	0	368	368	2,450	17,483	19,933	6,148	35,417	41,565
1982	5,770	27,369	33,139	0	548	548	2,759	15,504	18,263	8,529	43,421	51,950
1983	5,452	24,533	29,985	0	222	222	2,221	17,949	20,170	7,673	42,704	50,377
1984	8,103	28,227	36,330	5	705	710	-16,959	24,927	7,968	11,273	53,859	65,132
1985	8,938	30,193	39,131	38	385	423	3,859	22,701	26,560	12,835	53,279	66,114
1986	7,974	29,618	37,592	37	381	418	3,006	18,398	21,404	11,017	48,397	59,414
1987	8,324	32,658	40,982	369	181	550	3,876	21,576	25,452	12,569	54,415	66,984
1988	11,628	31,995	43,623	154	603	757	4,245	21,218	25,463	16,027	53,816	69,843
1989	9,884	33,131	43,015	268	548	816	3,671	20,716	24,387	13,823	54,395	68,218

	EC-12 C.R.	H.R.	TOT.	USA C.R.	H.R.	TOT.	OTHERS C.R.	H.R.	TOT.	TOTAL C.R.	H.R.	TOT.
1990	9,236	37,196	46,432	416	164	580	3,498	21,136	24,634	13,150	58,496	71,646
1991	9,839	33,064	42,903	251	127	378	3,856	15,270	19,126	13,946	48,461	62,407

Source: Jernkontoret, (their source: Swedish customs statistics).

*This table was presented to the Panel by Sweden.

ANNEX VI*

Imports of Competitive Grades and Types of Stainless Steel Plate from Sweden:
Share of Apparent United States Consumption
(net tons)

Year	Total shipments by US producers	Total imports from all sources*	Total exports	Apparent US consumption	Total imports as % of apparent US consumption	Total imports from Sweden[0]	Imports from Sweden as % of apparent US consumption
1970	73,972	7,845	3,089	78,728	10.0%	1,125	1.43%
1971	61,427	10,083	2,969	68,541	14.7%	3,683	5.37%
1972	71,623	16,391	2,054	85,960	19.1%	9,264	10.78%
1973	82,000	11,108	4,100	89,008	12.5%	4,413	4.96%
1974	140,200	12,345	6,900	145,646	8.5%	1,201	0.82%
1975	109,700	17,252	4,400	122,552	14.1%	1,760	1.44%
1976	93,700	18,356	3,200	108,856	16.9%	1,027	0.94%
1977	98,600	6,995	2,900	102,695	6.8%	404	0.39%
1978	114,000	10,586	5,000	119,586	8.9%	699	0.58%
1979	146,000	6,283	12,000	140,283	4.5%	561	0.40%
1980	124,000	2,643	16,000	110,643	2.4%	278	0.25%
1981	122,000	7,597	10,000	119,597	6.4%	200	0.17%
1982	98,000	12,617	5,000	105,617	11.9%	402	0.38%
1983	99,090	5,019	8,094	96,015	5.2%	84	0.09%
1984	116,803	6,922	3,371	120,354	5.8%	973	0.81%
1985	145,644	11,209	8,031	148,822	7.5%	392	0.26%
1986	119,073	14,719	3,523	130,269	11.3%	[265]	[0.20%]

Sources: 1970-1972, 1973 Determination (Staff Report), at 58 Table 2;
1973-1977, Stainless Steel and Alloy Tool Steel, Inv. No. TA-203-5, USITC Pub. 968, at A-88 Table 13, A-94 Table 18 (1979);

1978-1982, Stainless Steel and Alloy Tool Steel, Inv. No. TA-201-48, USITC Pub. 1377, at A-91 Table 8, A-96 Table 13 (1983);
1983 to September 1986 Shipments by US producers, Quarterly Survey on Certain Stainless Steel and Alloy Tool Steel Covering the Third Quarter of 1986), Inv. No. 332-167, USITC Pub. 1908, at 6, Table 3 (November 1986); all other data, U.S. Department of Commerce.
October, November and December 1986 Shipments, American Iron and Steel Institute; all other data, U.S. Department of Commerce.

[0]Excludes Swedish stainless steel plate which is not pickled and not cold rolled, and Type 904L for years 1975 to 1986, and KBR for 1986. The quantity of Swedish imports and Swedish imports as a per cent of apparent consumption are deleted because these figures coupled with other data in the petition would permit the determination of the quantity of imported KBR plate.

[*]Table 3A of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

ANNEX VII*

Imports of All Grades and Types of Stainless Steel Plate from Sweden:
Share of Apparent United States Consumption
(net tons)

Year	Total shipments by US producers	Total imports from all sources	Total exports	Apparent US consumption	Total imports as % of apparent US consumption	Total imports from Sweden	Imports from Sweden as % of apparent US consumption
1970	73,972	8,300	3,089	79,183	10.5%	1,580	2.00%
1971	61,427	10,360	2,969	60,818	15.1%	3,960	5.75%
1972	71,623	17,115	2,054	86,685	19.7%	9,985	11.52%
1973	82,000	11,300	4,100	89,200	12.6%	4,605	5.16%
1974	140,200	12,400	6,900	145,600	8.9%	1,256	0.86%
1975	109,700	17,500	4,400	122,700	14.2%	2,008	1.64%
1976	93,700	18,600	3,200	109,100	17.1%	1,271	1.16%
1977	98,600	7,500	2,900	103,200	7.3%	909	0.87%
1978	114,000	11,000	5,000	120,000	9.2%	1,115	0.93%
1979	146,000	7,000	12,000	141,000	5.0%	1,270	0.90%
1980	124,000	3,000	16,000	111,000	2.7%	635	0.57%
1981	122,000	8,000	10,000	120,000	6.7%	631	0.53%
1982	98,000	13,000	5,000	106,000	12.3%	785	0.74%
1983	99,090	5,251	8,094	96,247	5.5%	316	0.33%
1984	116,803	7,502	3,371	120,934	6.2%	1,553	1.28%
1985	145,644	11,766	8,031	149,379	7.9%	949	0.63%
1986	119,073	16,528	3,523	132,078	12.5%	1,784	1.35%

Sources: 1970-1972, 1973 Determination (Staff Report), at 58 Table 2;

1973-1977, Stainless Steel and Alloy Tool Steel, Inv. No. TA-203-5, USITC Pub. 968, at A-88 Table 13, A-94 Table 18 (1979);
1978-1982, Stainless Steel and Alloy Tool Steel, Inv. No. TA-201-48, USITC Pub. 1377, at A-91 Table 8, A-96 Table 13 (1983);
1983 to September 1986 Shipments by US producers, Quarterly Survey on Certain Stainless Steel and Alloy Tool Steel (Covering the Third Quarter of 1986), Inv. No. 332-167, USITC Pub. 1908, at 6, Table 3 (November 1986); all other data, U.S. Department of Commerce.
October, November and December 1986 shipments, American Iron and Steel Institute; all other data, U.S. Department of Commerce.

*Table 3B of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

ANNEX VIII*

Shipments[1] of Stainless Steel Plate to
U.S. Markets from Swedish-Owned Mills
in the U.S. and Sweden 1974-1986
(net tons)

Year	Shipments from mills in Sweden	Shipments from Swedish-owned mill in U.S.	Total shipments from Swedish-owned mills in U.S. and Sweden	Shipments from Sweden as percentage of total shipments from Swedish-owned mills in U.S. and Sweden
1974	1,201			
1975	1,760			
1976	1,027			
1977	404			
1978	699			
1979	561			
1980	278			
1981	200			
1982	402			
1983	84			
1984	973			
1985	392			
1986	265			

[1]Source: Table 3A and Table D, *supra*.**

*Confidential Table E of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

**Table 3A is contained in Annex VI, *supra*; Table D is contained in Annex IX, *infra*.

ANNEX IX*

Shipments by Avesta Inc.'s Plant at New Castle, Indiana
and Shares of Apparent U.S. consumption, 1976-1986
(net tons)

Year	Total shipments by US producers	Total shipments by Avesta Inc. (formerly, "The Ingersoll Division")[1]	Apparent US consumption	Shipments by Avesta Inc. as % of apparent US consumption
1976	93,700		108,856	
1977	71,623		102,695	
1978	114,000		119,586	
1979	146,000		140,283	
1980	124,000		110,643	
1981	122,000		119,597	
1982	98,000		105,617	
1983	99,090		96,015	
1984	116,803		120,354	
1985	145,644		148,822	
1986	119,073		130,269	

[1]Sources: Avesta Inc.; other data, Table 3A.

*Confidential Table D of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

ANNEX X*

Imports of Stainless Steel Plate for Sweden

	1970-April 1973	May 1973-1975	1976-1986
Total imports from Sweden (short tons)[1]	15,543	5,903	5,284
Length of period	40 months	30 months	132 months
Average monthly quantity of imports (short tons)	389	197	40

[1]Source: Table 3A, *supra*. Monthly imports for 1973 were obtained by prorating the imports for the full year. (Monthly import data were not available until 1976).

*Table 4 of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

ANNEX XI*

European Community Imports[1] of
Stainless Steel Plate from Sweden, 1971-1986
(net tons)

Year	Hot-Rolled	Cold-Rolled	Total
1971	10,722	3,124	13,846
1972	12,058	2,942	15,000
1973	15,814	4,835	20,649
1974	24,435	10,380	34,815
1975	21,856	5,592	27,448
1976	20,350	6,019	26,369
1977	19,102	7,288	26,390
1978	17,973	14,665	32,638
1979	21,498	17,309	38,807
1980	21,905	18,136	40,041
1981	15,625	11,478	27,103
1982	23,589	17,426	41,015
1983	23,544	16,820	40,364
1984	27,369	23,349	50,718
1985	28,736	22,731	51,467
1986 (9 mo.)	18,530	14,528	33,858

[1]Source: European Community, Eurostat (1971-1986). The data shown are for NIMEXE Code 73.75-23 (hot-rolled stainless steel sheet and plate greater than 4.75 mm in thickness) and NIMEXE Code 73.75-53 (cold-rolled stainless steel sheet and plate at least 3 mm in thickness). For U.S. tariff purposes, only those products greater than 4.75 mm in thickness are considered plate. Prior to 1974, the data include imports by West Germany, France, Italy, the Netherlands, Belgium and Luxembourg. From 1974 through 1980, the data include in addition the United Kingdom, Ireland and Denmark. Beginning in 1981, the data include Greece as well as the other nine countries. The 1986 data do not include Spain and Portugal.

*Table 5 of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

ANNEX XII*

Swedish Exports of Hot-Rolled Stainless Steel
Sheet and Plate to Western Europe and
The European Community, 1970-1985[1]
(metric tons)

Year	Swedish Exports to All of Western Europe of Hot Rolled Sheet and Plate	Swedish Exports[2] to the EC of Hot Rolled Sheet and Plate
1970	52,766	35,829
1971	36,265	24,048
1972	32,749	22,494
1973	41,632	28,005
1974	45,099	26,654
1975	41,963	23,458
1976	35,839	21,446
1977	31,749	23,037
1978	26,061	18,193
1979	31,072	20,661
1980	34,551	21,190
1981	25,443	16,297
1982	33,453	24,334
1983	33,198	23,066
1984	40,593	27,252
1985	41,342	29,407

[1]Although nominally covering both sheet and plate, these data are believed to reflect predominantly plate, rather than sheet, as most stainless steel sheet is sold in cold rolled form on the open market.

[2]In order to provide a consistent data series, the data for all years shown reflect exports by Sweden to the 10 countries that were EC members as of 1985.

Source: INCO and World Bureau of Metal Statistics, World Stainless Steel Statistics, various editions.

*Table 7 of Memorandum in Opposition to the Request of Avesta AB and Avesta Stainless Inc. for Institution of a Changed Circumstances Review, 24 April 1987.

ANNEX XIII*

Capacity Utilization of KBR Mill at Avesta, Sweden
(000's of net tons)

	1982	1983	1984	1985	1986
Mill capacity to produce cold-rolled ("KBR") sheet and plate	40.8	40.8	45.2	44.1	49.0
Actual production of KBR sheet and plate	30.5	30.9	40.2	44.1	49.0
Actual production of KBR plate	9.6	10.3	12.3	14.6	13.1
KBR plate as % of all KBR products	31.5%	33.3%	30.7%	33.1%	26.7%
Capacity utilization (%) [All KBR products]	74.8%	75.7%	88.9%	100.0%	100.0%

*Confidential Table I of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.

ANNEX XIV*

Comparison of Actual Production in Sweden
of Hot-Rolled Stainless Steel Plate
to Practical Capacity
(000's of net tons)

	1982	1983	1984	1985	1986
Practical plate-producing capacity of mills					
Degerfors	38	38	38	38	38
Avesta	38	38	38	32	30
Total	76	76	76	70	68
Actual production					
Degerfors	26.0	26.5	28.0	30.7	27.6
Avesta	30.1	28.3	34.0	31.3	28.1
Total	56.1	54.8	62.0	62.0	55.7
Percentage of actual production to practical capacity	73.8%	72.1%	81.6%	88.6%	81.9%

*Confidential Table H of Avesta's Petition (23 February 1987) to the USITC for Review Investigation of the "Finding of Dumping" Against Stainless Steel Plate from Sweden Issued on 7 June 1973.