EVOLUTION OF THE ANTIDUMPING LAW IN GATT/ WTO

Dissertation Submitted in Partial Fulfillment of the Requirements for the Degree of

MASTER OF LAWS

Submitted By

Sheela Rai

Under the Supervision of

Prof. A. Jayagovind

National law School of India University
Bangalore-560072
India

2002

DECLARATION

I hereby declare that this dissertation entitled "Evolution of the Antidumping Law in GATT/WTO" is the outcome of research conducted by me under the guidance of Prof. A. Jayagovind.

I also declare that this work is original except for such help taken from such authorities as has been referred to and acknowledged at the appropriate places.

I further declare that this work has not been submitted in part or in whole for any degree at any other University.

Date: 3-8-02

Sheela Rai

MLIH 60

NLSIU, Bangalore

Acknowledgements

I am grateful to Prof. Jayagovind (WTO Chair Professor, NLSIU) and owe my foremost thanks to him not only for guiding me in this dissertation but for initiating, educating and guiding me in the WTO area generally. As for this dissertation, the idea of the topic itself owes its origin to the advice of Prof. Jayagovind, who continuously guided in its scheme, progress and final shape. It is due to his expert and very patient guidance that I have been able to complete the task .

No words of thanks can explain my gratitude to my Parents due to whom I have been able to reach this stage. My mother, who unfortunately did not survive to see the completion of this work, had been a continuous source of support and encouragement throughout my career, much more by her patience and supportive behaviour than by words. She was enthusiastically looking forward for the completion of my LL.M. course, but unfortunately, Nature did not spare her enough time for that.

It was a dream of my father, who is himself a law teacher, to see all his children well educated and for this he not only lent general support but actively guided me throughout my LL.B. and LL.M. degree. I thank him not only for parental support and guidance but also for the education and guidance that he gave as a teacher.

I owe my sincere thanks to Dr. Mohan Gopal, (Director, NLSIU) for sparing time out of his busy schedule and patiently guiding me at the moment when I felt totally exhausted and frustrated. There are few heads of the institutions who are able to reach out to the individual students and guide them out of their problems.

Finally I thank all my friends and well wishers who might not have been directly associated with this work but whose general support has been a major contributing factor in the completion of the task.

TABLE OF CASES

United States-Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea
(WT/DS179/R Report of the Panel adopted on 22 December 2000.)

United States-Imposition of Anti-dumping duties of Fresh Chilled Atlantic Salmon from Norway
(ADP/87 , Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994.)

US-Anti-Dumping Measures on Certain Hot rolled Steel Products from Japan
(WT/DS184/R Report of the Panel adopted on 28 February 2001)

LIST OF ABBREVIATIONS

AD	Antidumping
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Communities
GATT	General Agreement on Trade and Tariff
ITO	International Trade organisation
KTC	Korea Trade Commission
POI	Period of Investigation
SECOFI	Secretariat of Commerce and Industrial Development (of the Government of Mexico)
SG&A	Selling, General and Administrative Costs
US	United States
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
WTO	World Trade Organisation

CONTENTS

Annexes

(i) The Kennedy Round Code of 1967
(ii) The Tokyo Round Code of 1979
(iii) The Uruguay Round Agreement on Antidumping1994

Bibliography

PREFACE

When Canada and other developed countries came up with their legislation on antidumping measures (Canada was the first country to have antidumping law since 1903) their purpose was to have a legal mechanism for their protectionist actions. When United States took the initiative in introducing antidumping as part of the Havana Charter, its purpose was to give legitimacy to the antidumping measures in a world aiming towards free trade. Article VI of the GATT recognised the right of the Contracting Parties to levy antidumping duties if domestic industry was injured due to dumping. However the nature of the international regulation has gradually changed from a general recognition of the right of countries to protect their domestic industry to a closely regulated right. The process towards more and more regulation is still continuing and countries, keeping their interest in mind, are bargaining on the rules to ensure that protectionist measures are not taken under a protective provision. The basic idea behind this development has been to strike a balance between the need of the importing country to protect their domestic industry and the ideal of free trade. However, in the process, the whole emphasis of antidumping law has changed from a positive provision conferring right on the countries to take antidumping measures to a negative provision ensuring that countries do not hinder free trade by imposing non-tariff barriers. This evolution of the antidumping law from Article VI of the GATT to the Uruguay Round Agreement on Antidumping is the subject of the present study.

INTRODUCTION

Antidumping: A conceptual Analysis

In his celebrated work 'The Wealth of Nations' Adam Smith advised never to attempt to make at home what it will cost more to make than to buy. Successive generation of economists have supported and refined Smith's argument contending that "if foreign country can supply us with commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage."[1] This is known as the concept of comparative advantage on which the principle of free trade rests. Economists contend that a decentralised market system that allows producers and consumers the freedom to choose according to market prices will provide the most efficient allocation of the scarce resources, and this will result in gain in real national income. Under free trade, comparative advantage dictates that a country should exchange what it can produce most efficiently for what others can produce more efficiently. Even if a country could produce every commodity well (absolute advantage), it would still gain by specialising in its better products (comparative advantage). An economist does not admit of many exceptions to free trade. They arise only when the domestic markets fail to allocate resources efficiently or non-economic objectives receive priority. Equal application of market economic principle to all firms is considered to be the backbone of free trade. Free trade, however, is contrasted with unfair trade. Unfair trade like subsidised and dumped imports hurt the free competitive market considered essential to free trade.[2]

Dumping is defined in the Oxford dictionary as sale of goods in foreign market at low price.[3] In the globalised economy dumping is one of the most controversial issues. The supporters of anti-dumping measure argue for the protection of home industry against unfair competition. However, the exponents of free trade want to ignore it (dumping) either as one of the effects of the free cross-border trade in which plus points out-weigh the small negative effects, or support it on the ground that consumers are benefited by getting goods at the cheapest possible price. They further contend that the price of regulating dumping is much more than the price of training the employees in the new skill wherein the concerned country has an advantage.[4] This is the view of the Classical School of International

[1] Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Glasgow ed. 1976), Book IV, Ch. III.
[2] Gerald M. Meier, *The International Environment of Business: Competition and Governance in the Global Economy* 78, (1998).
[3] The Concise Oxford Dictionary, (10th ed.). Article VI and Anti-dumping Agreement however, have given a specific definition of dumping.
[4] See Marco C.E.J. Bronckers, *Rehabilitating Anti-dumping and other Trade Remedies through Cost-Benefit Analyses*, Journal of World Trade 30(2):5-37,1996.

Economics.

WHY DO FIRMS DUMP?: Economists have enumerated various causes of dumping. Supporters of anti-dumping policies argue that anti-dumping is a justifiable attempt by importing country governments to offset the market access restrictions existing in an exporting firm's home country market, that underlie the ability of such firms to dump. Such restrictions may consist of import barriers preventing arbitrage, but may also reflect the non-existence or non-enforcement of competition law by the exporting country. Thus, the United States had claimed that lax Japanese antitrust enforcement permits Japanese firms to collude, raise prices, and use part of the resulting rents to cross subsidise (dump) products sold on foreign markets.[5] Viner developed the first original theoretical rationale for anti-dumping law. He argued that anti-dumping duties may be needed to protect domestic consumers from predatory dumping. Most economists however contend that predatory dumping is an exception rather than a rule. Viner distinguished three forms of dumping: sporadic, short run, and long run. Only the second form justified a reaction in his view, as only this form of dumping can be construed as anti-competitive. In the first case injury to firms is transitory, while the gains to consumers outweigh the losses to domestic producers in the last case.[6] Garten also offered a representative and thoughtful defence of anti-dumping that emphasised entry barriers in the exporter's home market as the main cause of dumping. Garten advanced four major reasons for dumping:

1. Closed home market of exporters;
2. Anti-competitive practices in the exporting country market which permit export sales below cost;
3. Government subsidisation; and
4. Non-market conditions

Garten goes on to defend active application of anti-dumping laws to address these conditions. Arguing against those who suggest that, if lack of competition is the problem, competition law should be applied, he says: "The Administration supports increased global standards in the area of competition law and believes that, with success in this effort, the need to invoke the anti-dumping law will be reduced. Competition laws can and do work effectively alongside the anti-dumping law, but are not a substitute for it. The need for vigorous enforcement of the US anti-dumping law will continue for the foreseeable future."[7]

---

[5] Gunnar Niles and Adriaan ten Kate, *Trusting Antitrust to Dump Antidumping: Abolishing Antidumping in Free Trade Agreements Without Replacing it with Competition Law*, Journal of World Trade 31(2): 29-52, 1997.
[6] J.Viner, *Dumping: A Problem in International Trade*, 262 (1966),
[7] Garten, Jeffrey,1994: *New Challenges in the World Economy: The Antidumping Law and U.S. Trade Policy*, Speech presented at the U.S. Chamber of Commerce, Washington. D.C. 7 April., pp 11-13.

Opponents argue that although exporting at less than normal value is considered unfair by anti-dumping laws this point of view does not recognise the real conditions of international trade. A huge part of international trade would be unfair when judged by the above criteria. According to this view international trading without price discrimination is unimaginable in a world where there are fluctuating exchange rates, different market conditions across countries etc.[8] Dumping involves price discrimination between two markets by the exporter for an identical product. Two conditions must be satisfied for price discrimination to take place:

(i) The producer must be able to separate the two markets, otherwise importers in the country of origin could engage in arbitrage by imposing the product from overseas country at a lower price and selling it at a profit in the home country. Such geographical segmentation of markets may be possible due to high transport costs and/or tariff non-tariff barriers. This is why allegations of dumping are often associated with countries which allegedly restrict imports by tariff and non-tariff means.

(ii) For such a pricing strategy to be profit maximising, the firm must have market power to discriminate, at least in the market where it charges the higher price. Thus, the exporter must face different demand conditions in home and foreign market. Specifically if it faces an elastic demand curve abroad where competition is much greater and an inelastic demand curve at home, it will maximise profits by charging a higher price domestically than it charges abroad.

Some writers contend that economic theory shows that the effect of this type of price discrimination, which is based on the separation of markets on the basis of different conditions prevailing in different markets, on economic efficiency is ambiguous. On the one hand, a monopolist practising price discrimination generally serves more markets than a non-discriminating one since the separation of markets makes it possible to gain additional customers without lowering price for customers willing to buy at a higher price. This increase in the number of markets served represents an efficiency gain. On the other hand, in order to maximise profits the monopolist may reduce supply in the higher price markets, resulting in an efficiency loss.

Economists believe that such kind of dumping is not harmful to the importing country. Dumping benefits the consumers in the importing country who can buy the products at cheaper rates. The losers are the consumers in the exporting country. A more harmful situation would be one of reverse

---

[8] Clarisse Morgan, *Competition Policy and Anti-dumping: Is it Time for Reality Check*, Journal of World Trade 30(5): 61-88, 1996.

dumping in which consumers of the importing country pay a higher price than consumers in the exporting country. Economists contend that while it is true that where such dumping takes place the domestic industry of the importing country will be smaller than it would otherwise be; but there is no reason why such dumping should threaten the survival of the domestic industry. Either domestic producers should lower their costs and prices to match those of foreign suppliers or cease producing the good. The fact that the number of domestic firms producing the product is fewer because the price of imports is lower is no justification for protection. This is true for any industry facing competition from producers in other countries willing and able to supply the goods more cheaply. Thus it is contended that the economic logic behind the measure to combat dumping based on monopolistic price discrimination is not clear. The only ground on which it makes any sense is as a measure to get the exporting country to increase market access for suppliers in other countries to the extent that tariff/non tariff barriers underlie its ability to dump. Opponents, however, question whether anti-dumping measures are the most effective way of dealing with the problem. It is not clear that the threat of such measures against countries with restricted market access will have the desired effect though there are frequent claims to the contrary.

Sometimes the resources invested by firms to separate markets and to determine optimal prices in each are mentioned as a further negative efficiency effect of price discrimination, since these resources could have been allocated to more productive uses. However in practice geographic markets are usually separated by natural or institutional factors, such as transportation costs, or import tariffs, rather than by a deliberate effort of a dominant firm. Moreover in the field of marketing it is commonly accepted that a firm determines optimal prices for each market as a function of demand and supply characteristics. Thus, in one geographic market it may be a price setter while in another a price taker.

The main reason why international price discrimination is usually considered unfair is that a dominant firm, exporting its surplus over domestic profit-maximising sales at lower prices, can benefit from economies of scale in production which its competitors abroad are not able to achieve. Such a situation could be sustained as long as its home market remains protected. However, such conduct enhances competition in the export market as long as the firm sets export prices at or above cost. Selling abroad at a loss could only be rational for predatory purposes.

For the above reason the competition authorities do not regard price discrimination between different markets as anti-competitive, unless it involves some form of below cost pricing for predatory

purposes. Price above cost are never considered too low, no matter whether the same firm in question charges higher prices in other markets.

Predatory pricing is cited as one of the forms of dumping. Here a dominant supplier embarks on a strategy of deliberate pricing below cost in order to drive competitors out of the foreign market. Having successfully dominated the competition, the price is raised above cost and the losses incurred during the period of price undercutting are recuperated. Predatory pricing entails pricing below marginal cost. Pricing below average cost constitutes normal behaviour whenever demand is depressed and a portion of costs is fixed. Then so long as price is set above average variable costs the firm is doing the best possible. There can be little doubt that predatory pricing is harmful since, if successful, it would lead to disappearance of any element of competition in the foreign market. In the long run consumers will have to suffer in having to pay prices well above marginal costs. But economists doubt as to the extent to which predatory dumping takes place in the international trade. They contend that it seems improbable that in recent years, anything more than a small fraction of anti-dumping cases have been concerned with such behaviour. This is because the conditions for such a strategy to be worth pursuing are highly restrictive.

Another cited cause of dumping is the existence of excess capacity arising from a combination of demand uncertainty and short run adjustment costs. This situation can arise in competitive industries where demand fluctuates a great deal but where in the short run the firms face large adjustment costs in changing output to match demand. This is the case in many intermediate goods industries such as steel and chemicals where production occurs in continuously run plants involving considerable changeover costs and necessitating constant use of capacity.

Dumping may also be caused by what is known as transitional dumping. It occurs when an exporter needs to price below marginal cost in order to maximise sales and expand market share. In this case below cost pricing is a kind of investment in the marketing of the product, deemed to be worthwhile if profits can be earned in the long run. Because this may require fixing price below marginal cost, it may be treated as predatory pricing, yet clearly it is not. The main argument advanced for taking measure against it is that it ensures that national producers get better experience than the foreign firms. It is frequently argued that such industries bring special advantages to a country either because they enable domestic factors of production to earn higher returns than in other sectors of the economy or because they generate externalities or spillover benefits for the rest of the economy. Even if these arguments are accepted it must still be demonstrated that antidumping policy is the best instrument for

achieving these objectives. Economists contend that it is not. Theory shows that a superior instrument would be production subsidy granted to domestic producers sufficient to correct for the market distortion.

ARE THE ANTIDUMPING MEASURES OPPOSED TO COMPETITIVE MARKET ECONOMY: Relationship between Anti-Dumping Policy and Competition Policy: The various causes cited for dumping have given rise to the debate on relationship of dumping and competition laws and whether anti-dumping Agreement should be replaced by agreement on competition policy. Anti-dumping duties have been described as a "curious hybrid of tariff ideas and price discrimination theories of anti-trust law"[9]. Different views exist here also[10]. While some writers support the idea of replacing anti-dumping laws with competition policy, others hold it not possible, enumerating the differences between competition policy and trade policy, some say that both should co-exist while some others say that anti- dumping laws should be scrapped. Thus, four alternatives have been suggested:

1. Substituting competition policy for anti-dumping policy in the context of a free trade agreement.
2. Making anti-dumping rules more competition friendly within the WTO context.
3. Simply abolish anti-dumping within the context of a free trade agreement without replacing it with competition rules.
4. Co-existence of both anti-dumping policy and competition policy.

Both competition policy and trade liberalisation are based on the principle that undistorted markets lead to optimal economic efficiency and resource allocation. Free trade pulls resources to where their comparative advantages are, and competition induces a process of market clean up in which the more efficient innovating firms are the winners while the inefficient, less dynamic firms stand to lose. It is fully recognised that the process of competition is unthinkable without losers, but that the net outcome will be more efficient markets with better and cheaper products for the consumers. Protecting the losers during this process would negatively interfere with the market clean up.

Some authors hold that no solid case can be made for anti-dumping on the basis of economic arguments alone. Competition policy standards, which protect competition, are more adequate in

[9] Referred in Michael Trebilock, *Competition Policy and Trade Policy: Mediating the Interface*, Journal of World Trade,71.
[10] See generally Clarisse Morgan, *Competition Policy and Anti-Dumping: Is it Time for Reality Check*, Journal of World Trade 30(5):61-88, 1996, Gunnar Niels and Adrian ten Kate: Trusting Antitrust to Dump Antidumping: Abolishing Antidumping in Free Trade Agreements Without Replacing it with Competition Law, Journal of World Trade, 31(6):29-52,1997. Michael J.Treilcock, Competition Policy and Trade Policy:Mediating the Interface Journal of World Trade 71-106, Bernard M.Hoekman and Petros C. Mavroidis, Dumping, Antidumping and Antitrust, 30(1): 181-193, 1996.

dealing with unfair trade practices and promoting efficiency than anti-dumping rules, which protect specific competitors. Likewise competition policy is perfectly compatible with trade liberalisation, whereas antidumping is something of an anomaly within the current WTO framework.

The writers who support the third alternative have highlighted the difference between the competition law and the anti-dumping law which is a trade policy.[11] They point out that the underlying objective of competition policy in most jurisdictions tends to be efficient resource allocation and thereby the maximisation of national welfare. The objectives underlying trade policy contrast starkly with those of competition laws. Governments pursue trade policies for a variety of reasons, including as a means to raise revenue, to protect specific industries, to shift the terms of trade, to attain certain foreign policy or security goals, or simply to restrict the consumption of specific goods. Whatever the underlying objective, an active trade policy redistributes income between segments of the population by protecting specific industries and the factors of production employed there, and usually does so in an inefficient manner. Trade policy is consequently often inconsistent with the objectives underlying competition policy. The way this inconsistency is frequently put is that competition law aims at protecting competition (and thus economic efficiency), while trade policy aims at protecting competitors (or factors of production). This is also the case for anti-dumping, although many defenders regard it as the example of a trade policy that is consistent with the objectives of competition law. While this may have been the case when anti-dumping laws where first written, it is certainly not the case today. Proponents of antidumping are concerned implicitly if not explicitly, with the continued existence of national firms that produce a good. The fact that competition from other outside sources will, in most realistic circumstances, prevent the formation of a monopoly is considered irrelevant. What matters is the prevention of domestic industry.

On the ground of effect on the complaining industry it is contended that the market power standard in competition policy represents the single most important difference with anti-dumping standards. Critics who consider competition policy as an adequate substitute for anti-dumping often overlook this fact. The injury standard might be regarded as anti-dumping's counterpart to market power. "Still the two (market power and injury standards) could not be applied more differently in practice."[12] Market power means a substantial market share and the presence of important barriers to entry. Instead injury to domestic industry can be found rather easily. The essence of competition is precisely to try to out perform and thus injure competitors, and if a foreign firm sells at low prices it automatically hurts

[11] Gunnar Niles and Adriaan ten Kate, *Trusting Antitrust to Dump Antidumping: Abolishing Antidumping in Free Trade Agreements Without Replacing it with Competition Law*, Journal of World Trade 31(6):29-51,1997.

competitors in the importing country. In practice injury may already be determined if imports have, say, tripled market share from two to six percent in a couple of years. From a competition point of view, the anti-dumping injury test is a typical example of protection of individual competitors to the detriment of the process of competition. No account is taken of the efficiency of the injured or the market power of the injurer. Moreover, the imposition of anti-dumping duty shielding the domestic market from import competition often grants the originally injured substantially more market power than that of the injurer before the import duties, leaving competition severely distorted.[13]

Pointing to another main difference between competition policy and anti-dumping it is said that competition authorities' concern with price discrimination refers more to the negative effects on downstream (secondary line) competition. If a firm sells an identical intermediate good at different prices to different users, competition between these users in their final goods market becomes distorted. In this case the user paying the lower price for the input obtains, a possibly unfair, competitive advantage. Anti-dumping law is not concerned with secondary line injury. If anything, dumped inputs favour downstream buyers in the importing country over their competitors from the exporter's home market. This makes the imposition of anti-dumping duties on the intermediate goods even more awkward.[14]

Opponents argue that it could be expected that if competition policy's predation standards were applied to dumping complaints, virtually none of these complaints would stand the scrutiny. The reasons are simple. An alleged dumper would rarely have enough market power to force all domestic producers and other exporters out of the market. Even if he should eventually succeed in doing so he would find it difficult to increase prices to monopoly levels afterwards because that would induce new competition from other exporting firms and countries. Entry or re-entry by domestic competitors is also not to be excluded. Thus while predatory pricing is extremely rare in a domestic context, it is even more unlikely to occur in international trade. Moreover, challenged dumpers in general do not even have the intention to monopolise foreign markets. In most cases their strategies of selling cheaply abroad rather reflect situations of excess capacity at home, of meeting competition in the importing country or of simply trying to get a foothold in a new market.

The point that virtually no dumping case would pass the scrutiny of competition standard is confirmed by a number of empirical studies. The most important of these studies is a report to the

[12] *Ibid* at 36.
[13] *Ibid*

OECD, which thoroughly analyses anti-dumping practice in the US, Canada Europe and Australia. The report's findings are devastating: in the overwhelming majority of cases where anti-dumping procedures were applied, there was no plausible threat to competition in the domestic market. Instead, anti-dumping actions in these cases led to competition reducing outcomes, including the application of duties, undertakings to raise import prices, voluntary export restraints and encouragement of collusion between domestic competitors.[15]

However, some contend that anti-dumping can be made more competition friendly by applying a more rigorous approach in determining material injury to domestic industry as that which affects its health. In fact European Community while determining material injury is also assessing the impact on overall competitive conditions of market.[16]

Antidumping duties were introduced by developed countries to protect their industries against the low priced imports. United States took the initiative of introducing provisions relating to antidumping duties in the Havana Charter as an exception to the tariff bindings.[17] For United States, Article VI served as *recognition* for imposition of antidumping duties which otherwise would have contravened the MFN rule. Developing countries supported the inclusion of provision relating to antidumping duties under the GATT because they wanted the levy of antidumping duties to be under international *regulation.* Because of these diverse objectives, antidumping issues became one of the most divisive disputes brought to GATT, both before and during the Uruguay Round. Right from the beginning a clear division was evident between the fundamental aims of those countries whose exports were most commonly exposed to antidumping action (developing countries), and those which took such action (mostly developed countries). The first group wanted the antidumping rules to be as tight and explicit as possible, allowing the minimum transparency. The second group wanted to retain and even expand their discretion to meet what they saw as much changed patterns of international trade, in which new practices were being used by companies to get around the present rules of antidumping code and thereby cause injury to domestic industry, their proposals tended to be the most radical and controversial.

---

[14] *ibid* at 34.
[15] Rodney de C. Grey ,*The relationship between Anti-Dumping Policy and Competition Policy*, for UNCTAD Revised/31 May 1999.
[16] John H. Jackson, *World Trade And The Law of GATT* 403, (1969).
[17] The article as included in the original GATT differed from the Geneva ITO draft. This was one of the few commercial policy articles of part II of GATT that, although drawn from the Geneva ITO draft, was changed substantively before inclusion in GATT. The major difference was the addition in GATT of a paragraph on the subject of domestic price stabilisation systems relating to primary commodities. This was the only provision in Article VI which was relevant for the developing countries.

GATT does not "outlaw" dumping but it does "recognise" that dumping is to be condemned under certain circumstances. Although an attempt to add a clause to GATT that specifically obligated contracting parties to prevent dumping by their commercial enterprises failed, a 1955 Working Party report adopted by the Contracting Parties stated: " In connection with the effect of Article VI on the practice of dumping itself, they agreed that it follows from paragraph 1 of Article VI that Contracting parties should, within the framework of their legislation, refrain from encouraging dumping, as defined in that paragraph, by private commercial enterprises."[18] But there have been no further commitments in GATT against dumping. Underlying the GATT approach to antidumping duties is the fact that dumping itself is not against GATT obligations. This may partly result from the fact that dumping may be accomplished by private firms and GATT obligations generally apply to governments. But even 1955 proposal to add a clause reading "Contracting Parties shall refrain from any action that might cause or encourage dumping of this kind"[19] failed[20]. The GATT approach was to leave these dumping measures generally legal, but to arm importing nations with an exception to GATT obligations to enable them to defend themselves against these practices by antidumping duties. Article VI of the GATT which deals with dumping is something of an anomaly: in essence it is an exception to GATT, allowing certain measures that would otherwise be a violation of GATT[21]. But because the circumstances in which these measures are allowed are so carefully circumscribed, this article in effect imposes positive obligations upon GATT Contracting Parties. Consequently, the antidumping duties provision of GATT are more appropriately discussed as an obligation upon members than as an exception to GATT duties, although they are a hybrid between these two GATT provisions.[22]

In the Kennedy Round "Antidumping Code" came into existence. This Code officially entitled "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," set forth certain definition of the terms used in Article VI and established certain procedures that nations must follow before imposing antidumping duties. This Agreement was further elaborated in the Tokyo

[18] GATT, 3d supp. BISD. 223,at para 4 (1955).
[19] New Zealand Proposal, GATT Doc. SR.9/41, 2 (1955).
[20] John H. Jackson, *World Trade And The Law of GATT* (1969)
[21] Because it contravenes the MFN treatment and tariff bindings. Antidumping duties are said to contravene MFN obligations because it is left to the importing country to determine whether it would take any action against the dumped imports or not. However, it has been defended by Viner (*Dumping-A Problem in International Trade,* 300, (1923)) on the ground that this in effect does not discriminate between countries but between goods. Khurshid Hyder (Hasan), *Equality of Treatment and Trade Discrimination in International Law,*93 (1968).

[22] John H. Jackson, *World Trade And The Law of GATT* 411, (1969)

Round Code and the Uruguay Round Code.[23] "The antidumping negotiations provide a classic example of a story in which it is hard to see the wood for the trees; the detail tends to obscure the broad picture. To a great extent the substance of the negotiations as of the antidumping code itself was made up of discussion of highly technical and apparently minor points. In antidumping actions however, success or failure may well turn on technical matters. If for example, the fact of dumping can be established on the basis of very few sales at a low price, a complaint is more likely to be accepted as justified than if the rules require judgement to be based on a weighted average of prices over a certain period and in more than one region of country. The acceptability of statistical sampling techniques to learn the views of an industry, by putting questions to a comparatively small number of companies, or the rules on how lack of response to such questions should be interpreted, may strongly influence whether a fragmented domestic industry is rules to be suffering from dumping. Rules on what volumes of sales shall be judged negligible, and what margin of dumping shall be considered minimal, can be as important to decisions on who shall be hit by antidumping duties."[24]

During the Uruguay Round the suppliers among which Asian participants were most vocal and active, continued to argue that the antidumping rules were being stretched and abused to achieve results that had never been intended, thereby hampering fair trade. They sought stricter provisions on both when and how governments could take antidumping action. The importers-principally the United States and the European Communities-insisted that their domestic products were being injured by unfair dumping practices, and that the remedies provided by the Code were inadequate. They wanted new rules, in particular, to counter circumvention of antidumping action, to deal with "surges" in imports just before action was taken, and to punish repeated dumping. Each side strongly disliked most of others proposals. In this climate of mutual distrust, each side in the antidumping negotiations believed that the other was condoning unfair trade practices, and that concessions to their demands

[23] "Article VI and the Antidumping Agreement are part of the same treaty: the WTO Agreement. In application of the customary rules of interpretation of the international law, we are bound to interpret Article VI of the GATT 1994as part of the WTO Agreement and, pursuant to Article 31 of the Vienna Convention, the Anti-dumping Agreement as part of inseparable package of rights and obligations" and that Article VI should not be interpreted in a way that would deprive either Article VI or the Antidumping of meaning. However this does not prevent us from making findings in relation to Article VI only. We can make finding under Article VI without at the same time having to make findings under the provisions of the Antidumping Agreement, and vice versa. "
"The official title of the Antidumping Agreement is Agreement on implementation of Article VI of the GATT 1994". This Agreement is essential for the interpretation of Article VI. Articles 1 and 18.1 of the Antidumping Agreement confirm the close link between Article VI and the Anti-dumping Agreement. Moreover as was recalled by the Appellate body in the case on Brazil-Desiccated Coconut the WTO Agreement is a single treaty instrument which was accepted by the Article VI since Article 31.2 of the Vienna Convention provides that "the context for the purpose of the interpretation of a treaty shall comprise [---] the text, including its preamble and annexes---". We are therefore not only entitled to consider the Antidumping Agreement, but we are also required to do so under the general principles of interpretation of public international law."

[24] John Croome, *Reshaping The World Trading System: A History of the Uruguay Round*, 208, (1995).

could even throw into doubt the value or desirability of market access commitments under negotiation elsewhere in the Round.

The tentative Agreement on antidumping in the Draft Final Act was an arbitrated text, not a negotiated one. Carefully treading a middle path, the draft offered some tightening of disciplines on findings of dumping and injury, as well as on the initiation and ending of antidumping action, balanced by compensating innovations that allowed action against circumvention and explicitly accepted some current practices not provided for in the existing code.

OBJECT OF THE PRESENT STUDY: In fact the general approach of provisions relating to antidumping in the GATT has been to balance the rights of the importing country to safeguard its domestic industries and the principle of free trade. Thus, Article VI of the GATT recognises antidumping duties as an exception to the tariff bindings under the GATT. Article VI and the Antidumping Agreement recognise the right of importing Members to safeguard their industries against what is termed as unfair trade practice and it is left to the discretion of the importing country whether it wants to levy antidumping duties or not. But this discretion is not absolute, it is regulated by the Article VI of the GATT and the Antidumping Agreement both in its substantive and procedural aspects. Importing Member can exercise its right to impose anti-dumping duties only if after an investigation conducted according to Antidumping Agreement it is found that:

1. The imported goods are dumped that is sold below the normal value,
2. There is an injury,
3. Injury is caused by dumping.

Again the process of finding the existence of dumping, injury and causal link is also regulated by Article VI of GATT and the Antidumping Agreement. The history of development from Article VI of GATT to Uruguay Round Antidumping Code is a story of tightening the regulatory disciplines under which the Members can levy antidumping duties. In fact the general approach of provisions relating to antidumping in the GATT has been to balance the rights of the importing country to safeguard the its domestic industries and the principle of free Thus, Article VI of the GATT recognises antidumping duties as an exception to the tariff bindings under the GATT. Article VI and the Antidumping Agreement recognise the right of importing Members to safeguard their industries against what is termed as unfair trade practice. Thus, it is left to the discretion of the importing country whether it wants to levy antidumping duties or not. But this discretion is not absolute, it is regulated by the

Article VI of the GATT and the Antidumping Agreement both in its substantive and procedural aspects.

The present work is an explorative study of the evolution of this balance between the right of the members to take antidumping measures and the regulation of that right so that it is not abused as a garb for protectionist measures. The work explores its object by examining the development of antidumping provisions in the GATT from Article VI to the Uruguay Round Antidumping Code. The work explores its object in two ways:

1. By examining the development of antidumping provisions in the GATT from Article VI to the Uruguay Round Antidumping Code.
2. By examining how and how far the legal regime set up by the GATT regulates the right of Members to take antidumping measures.

In short the work is a legalistic study of the gradual evolution of the balance between the recognition of the right of the Member to take antidumping measures and the regulation of that right by the World Trade Organisation.

RESEARCH METHODOLOGY: The present work is a theoretical analytical study of provisions relating to antidumping measures in the GATT. The provisions relating to antidumping measures are analysed in their legal and their developmental aspects.

Apart from the bare provisions the research and analysis consists of examination of the cases decided by the GATT Panel and the Dispute Settlement Body under the WTO. In addition views of various writers and the suggestions given by the Members for reform of the present Antidumping Agreement is also included.

Thus, the work is based on primary as well as secondary sources. While the primary sources consist of Agreements, the decided cases and the suggestions of the Members, secondary sources consist of Articles, Books and documents containing the negotiation proceedings.

The work is an intensive examination of the statutory and judicial development of the antidumping provision. Therefore division and subdivision has accordingly been made keeping the purpose of the work in mind.

For Reference Harvard Blue Book style has been adopted.

Chapter I

ARTICLE VI OF THE GATT

I

Antidumping Regulations before Article VI of the GATT 1948: Antidumping law was introduced by Canada in the year 1903. Soon thereafter Newzealand in 1905, Australia in 1906 and the Union of South Africa in 1914 came up with legislations which empowered them to take antidumping measures. Thereafter Section 801 of the American Revenue Act of 1916 was enacted which prohibited predatory dumping. The common feature of these laws was that none of them required actual or potential injury before action could be taken. But soon thereafter, in 1921 four countries(United Kingdom, USA, Newzealand, and Australia) enacted anti-dumping legislation. Three of these countries made some form of injury a prerequisite for imposition of duties as well. The British safeguarding of Industries Act provided that employment in a United Kingdom industry had to be or had likely to be seriously affected by foreign articles sold below the cost of production. The Australian Industries Preservation Act required that detriment might result to an Australian industry by reason of dumped imports. The New Zealand anti-dumping law did not contain an injury requirement. The American Anti-Dumping Act of 1921, as originally presented in the House of Representatives, did not contain an injury standard. An injury standard was included in a Senate proposal and was eventually adopted by the House of Representatives. According to J. Viner the American law was superior to the Canadian law because, "The limitation of anti-dumping duties to a product which injures or is likely to injure an American industry leaves it open to a wise customs administration to refrain from interference with all dumping whose benefit by the American customer is not clearly offset in part at least by an injury actual or prospective, to American industry."[25]

Thus, inclusion of the requirement of injury signified that countries recognised the fact that if one sector of the economy was being harmed by dumping there is another sector which might be benefited by it and preventive action should not be taken unless it was very necessary.

Internationally the League of Nations became interested in dumping in the 1920s. In a Memorandum on Dumping written for the League in 1926,[26] Viner remarked that dumping duties

[25] J. Viner, *Dumping: Problem in International Trade,*(1966), 263. Quoted in Angelo Pangratis and Edwin Vermulst, "Injury in Anti-Dumping Proceedings: The Need to Look Beyond the Uruguay Round Results" Journal of World Trade, 28(5):61-96,1994.at 63.

[26] J. Viner, *Memorandum on Dumping,* 36 League of Nations O. J.L. 1926.

should be applied only to goods of a kind which were produced on a substantial scale in the importing country, unless there was evidence that the dumped imports were responsible for the lack of development of a domestic industry. Furthermore he advised that the application of the duties should be contingent upon the existence of a distinct probability that the continuance of dumping would result in substantial injury to domestic industries.[27]

In 1946, the United Nations Economic and Social Council (Ecosoc) established a preparatory committee to prepare an agenda for a United Nations Conference on Trade and Development. During the first session of the committee in London, the United States submitted a Suggested Charter for an International Trade Organisation of the United Nations. Article 11 of the Charter provided that as a general rule each party would undertake not to impose anti-dumping duties unless it first determined "---that the dumping---[would be] such as to injure a domestic industry , or -----[would be] such as to prevent the establishment of a domestic industry."[28]

The preparatory committee in turn established a drafting committee which met at Lake Success in New York and tightened the phrase like or similar product to like product and added the adjective material to injury. However the remaining terminology remained virtually the same in a subsequent Geneva Draft, which became Article 34 of the Havana Charter and Article VI of the GATT.[29]

Article VI of the GATT 1948: Article VI of the GATT does not outlaw dumping *per se*. It only recognises the right of Members to protect their domestic industries against injurious dumping. Members "may" impose antidumping duties to counter the effect of injurious dumping. [30] But this antidumping duty can not be more than margin of dumping which means that the purpose of antidumping duty is curative so that competitive equilibrium is re-established. Members can not take measures that are in the nature of penalty. In order to legitimately be take antidumping measure a Member has to prove that:

1. There is dumping,

---

[27] Quoted in Angelo Pangratis and Edwin Vermulst, "Injury in Anti-Dumping Proceedings: The Need to Look Beyond the uruguay Round Results" Journal of World Trade, 28(5):61-96,1994at 63.

[28] *ibid.* at 64.

[29] U.N. Doc. EPCT/C.II/12,at 48 (1946); GATT, 3d Supp. BISD 83 (1955).

[30] The word 'may' was interpreted in the two cases decided by the WTO Panel and Appellate Body as permitting the imorting country to levy antidumping duties as a curative measure. It does not permit to penalise the exporting firms.*United States – Anti-Dumping Act of 1916-Complaint by the European Communities,* WT/DS136/R, Report of the Panel adopted on 31 March 2000 and *United States – Anti-Dumping Act of 1916-Complaint by Japan* WT/DS162/R Report of the Panel adopted on29 May 2000.
WT/DS136/AB/R and WT/DS162/AB/R Report of the Appellate body adopted on 28 August 2000.

2. There is injury,

3. Injury is caused by dumping.

Dumping according to Article VI of the GATT means, " products of one country are introduced in to the commerce of another country at less than the normal value of the products". A product is considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another -

(a) is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country, or,

(b) in the absence of such domestic price, is less than either

(i) the highest comparable price for the like product for export to any third country in the ordinary course of trade, or

(ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit

Due allowance shall be made in each case for differences in conditions and terms of sale, for differences in taxation, and for other differences affecting price comparability.[31]

Contracting Parties were authorised[32] to levy antidumping duties to protect their domestic industries. Protective nature of the antidumping duties was reinforced by providing that they should not exceed the margin of dumping.

Para 7 of Article VI provides an exception to the provision of Article VI. It says " A system for the stabilisation of the domestic price or of the return to domestic producers of a primary commodity, independently of the movements of export prices, which results at times in sale of the commodity for export at a price lower than the comparable price charged for the like commodity to buyers in the domestic market, shall be presumed not to result in material injury within the meaning of paragraph 6 if it is determined by consultation among the contracting parties substantially interested in the (a) commodity concerned that:

(a) the system has also resulted in the sale of the commodity for export at a price higher than the comparable price charged for the like commodity to buyers in the domestic market, and

(b) the system is so operated, either because of the effective regulation of production, or otherwise, as not to stimulate exports unduly or otherwise seriously prejudice the interests of other contracting

[31] Article VI:1

[32] It was emphasised in the Swedish Anti-dumping duties that Article VI only permits the Contracting Parties to impose antidumping duties, it does not compel them. The word 'may' in Article VI was later once again interpreted in by the WTO

parties."

II

CASES DCIDED UNDER ARTICLE VI

Only one case was decided under Article VI, that is *Swedish Anti dumping Duties*[33]

SWEDISH ANTIDUMPING DUTIES[34]

This was the only case which came up before the GATT Panel under Article VI. The facts were that on 29 May 1954, the Swedish Government introduced anti-dumping duties on the importation of nylon stockings. In accordance with this Decree, an anti-dumping duty was levied whenever the invoice price was lower than the relevant minimum price ("The basic price") fixed by the Swedish Government. The importer was entitled to obtain a refund of that duty if the case of dumping was not established. The Italian complaint was related to that Decree. However, a new decree was issued on 15 October 1954. The main difference between the new decree and the preceding one was that the basic prices were no longer a determining factor for the assessment of the anti-dumping duty but were retained as an administrative device enabling the Swedish Customs Authorities to exempt from anti-dumping inquires any consignment the price of which was higher than the basic price; the actual determination of dumping policies and the levying of anti-dumping duty were related to the concept of normal value which was defined in terms similar to those of Article VI of the General Agreement. The anti-dumping duty was assessed in relation to the basic price only when basic price was lower than the normal value of the imported product. In spite of the changes introduced in the Swedish regulations, the Italian Government maintained its complaint on the ground that, even though the basic prices had become an administrative device, the maintenance of that system was inconsistent with Article VI and other provisions of the Agreement and the administration of that system had in effect impaired benefits which should accrue to Italy under the General Agreement. The Italian delegation contended that the system of basic prices, as an anti-dumping procedure, represented by itself an infringement of the provisions of the General Agreement for the following reasons:

- it discriminated against low-cost producers and deprived them of the competitive advantages to which they were entitled under the general most-favoured-nation clause;

Panel and Appellate Body as being permissive in nature in the sense that it gives the Members the discretion whether to take antidumping measures or not. It does not authorise action out of Article VI and the AD Agreement.

[33] Report adopted on 26 February L/328 - 3S/81

- that system did not take into account the differences existing in the various exporting countries or the actual price differences between the various qualities of goods on the exporting market; the fixing of uniform prices irrespective of the country of supply and the averaging of different prices of products could not be reconciled with the provisions of Article VI of the General Agreement;

- Since the Swedish Customs Authorities were authorised to prevent the entry of goods in the market if the import price was higher than the basic price, until it was established that there was no dumping, it was contended the Decree reversed the onus of the proof since the customs authorities were authorised to prevent the import of goods without establishing even a *prima facie* case of dumping. The importer was in effect prevented from clearing the goods without delay or added costs and was placed at a legal disadvantage by that administrative technique.
- the official character of these basic prices would tend to influence unduly the decisions by the Customs Authorities and render ineffective the formal protection which the decree appeared to afford to exporters by providing that the levying and assessment of anti-dumping duties would be related to normal prices as defined in Article VI of the General Agreement;

The Panel held that Article VI only entitles a country to levy antidumping duties if the imports are found to be dumped it does not oblige an importing country to levy an anti-dumping duty whenever there is a case of dumping, or to treat in the same manner all suppliers who resort to such practices.. If the low-cost producer is actually dumping, he foregoes the protection embodied in the most-favoured-nation clause. The importing country is only entitled to levy an anti-dumping duty when there is material injury to a domestic industry or at least a threat of such an injury. If, therefore, the importing country considers that the imports above a certain price are not prejudicial to its domestic industry, the text of paragraph 6 does not oblige it to levy an anti-dumping duty on imports coming from high-cost suppliers, but, on the contrary, prevents it from doing so. On the other hand, if the price at which the imports of the low-cost producers are sold is prejudicial to the domestic industry, the levying of an anti-dumping duty is perfectly permissible, provided, of course, that the case of dumping is clearly established. The Panel recognised that the basic price system would have a serious discriminatory effect if consignments of the goods exported by the low-cost producers had been delayed and subjected to uncertainties by the application of that system and the case for dumping were not established in the course of the inquiry. The fact that the low-cost producer would thus have been at a disadvantage whereas the high-cost producer would have been able to enter his goods freely even at dumping prices would clearly discriminate against the low-cost producer. As regards the second argument relating to the fact that the basic price system

[34] Report adopted on 26 February L/328 - 3S/81

was unrelated to the actual prices on the domestic markets of the various exporting countries, the Panel was of the opinion that this feature of the scheme would not necessarily be inconsistent with the provisions of Article VI so long as the basic price was equal to or lower than the actual price on the market of the lowest cost producer. If that condition was fulfilled, no anti-dumping duty will be levied contrary to the provision of Article VI. The Swedish representative stressed that the basic prices were fixed in accordance with that principle. The Panel recommended that Swedish authorities endeavour to settle cases within 20 days (instead of six or seven months) and the Swedish representative accepted this recommendation.

On the question of onus of proof the panel held that it was not competent to decide on legal issues relating investigation procedures adopted by the Swedish authorities. However, Panel opined, "On the other hand, it was clear from the wording of Article VI that no anti-dumping duties should be levied unless certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged."[35]

The opinion of the Panel recognises the exceptional nature of the provision under Article VI. Since Article VI is considered as an exception to the principle of MFN and tariff bindings therefore importing country is supposed to prove that the measures were taken in accordance with the exceptional provisions.[36]

In the Kennedy Round two issues of this case were addressed. Article 5(d) provided, "An antidumping duty proceeding shall not hinder the procedures of customs clearance." Further, Article 8 (d) provided rule for basic price system. "Within a basic price system the following rules shall apply, provided that their application is consistent with the other provisions of this Code: If several suppliers from one or more countries are involved, antidumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that, for products which are sold below this already established basic price, a new anti-dumping investigation shall be carried out in each particular case, when so demanded by the interested parties and the demand is

[35] Report of the Panel, Para 15.

supported by relevant evidence. In cases where no dumping is found, antidumping duties collected shall be reimbursed as quickly as possible. Further-more, if it can be found tat the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible."

[36] Edwin Vermulst and Nario Komuro, *Anti-Dumping Disputes in the GATT/WTO: Navigating Dire Straits*, Journal of World Trade,31(1): 5-33, 1997 at19-20.

CHAPTER II

THE KENNEDY ROUND ANTIDUMPING CODE OF 1967

In the Kennedy Round tariffs and non-tariff barriers were to be subject of negotiation, but only a few of the non-tariff barrier were actually discussed. Of these, the only generalised, multilateral standard to evolve was the "Antidumping Code," as the resulting Agreement was popularly called. This Code officially entitled "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade," set forth certain definitions of the terms used in Article VI and established standards for the procedures that nations use to impose the antidumping duties. It was explained by Article 1 that the Code was not an amendment to GATT. It provided, "The imposition of antidumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations." and applied only to those countries that accepted it.[37]

PURPOSE OF THE CODE: Purpose of the Code was set out in the Preamble of the Code:

1. Anti-dumping practices should not constitute an unjustifiable impediment to international trade and that antidumping duties 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,
2. It is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases; and
3. Article VI of the General Agreement should be interpreted and applied in such a way as to to provide greater uniformity and certainty in the implementation.

Thus, while Article VI laid down the basic principles, the purpose of the Code was to set up rules so that the investigation and application of the antidumping measures do not become a cover for barrier against imports.

DETERMINATION OF DUMPING: Definition of dumping was given in Article VI of the

[37] John H. Jackson, *World Trade and the Law of the GATT*, 406,(1969). Article 13 of the Code provided, " This Agreement shall be open for acceptance, by signature or otherwise, by contracting parties to the General Agreement and by the European Community. The Agreement shall enter into force on 1 July 1968 for each Party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance. Article 14 further provided that "Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code.

GATT. Article 2(a) of the Code repeated the same definition. Therefore determination of dumping depends on the examination of following ingredients:

(a) **That the export price is less than the normal value:** in order to determine that the export price is less than the normal value, it is necessary to determine:

(i) **Normal value:** Normal value is to be determined on the basis of:

(a) sales in the domestic market. In the absence of sales in the ordinary course in the home market it had to be determined on the basis of

(b) price of the like product exported to any third country which may be the highest such export price which is representative price, or

(c) constructed normal value: Normal value had to be constructed with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. The addition for profit could not exceed the profit normally realised on sales of products of the same general rule, the addition for profit could not exceed the profit normally realised on sales or products of the same general category in the domestic market of the country of origin.

(ii) **Export price:** The Code provided rule for construction of export price in the absence of reliable export price. "In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine."[38]

(iii) **Comparison:** For the determination of margin of dumping normal value and export price had to be compared. "In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country of origin) or, if applicable the price established pursuant to the provision of Article VI:1(b) of the General Agreement the two prices shall be compared at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for the differences in taxation, and for the other differences affecting price comparability. In the cases referred to in Article 2(c) allowance for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made."[39] However, in cases where products were not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products were sold from the country of export to the

[38] Article 2(e).
[39] Article 2(f).

country of importation shall normally be compared with the comparable price in the country of export. But comparison could be made with the price in the country of origin. If for example, the products are merely transhipped through the country of export, or there is no comparable price for them in the country of export.

(b) **in the ordinary course of trade**

(c) **for the like product:** Like product was defined in Article 2 (b) of the Code as a product which is "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."

DETEMINATION OF INJURY, THREAT OF INJURY AND MATERIAL RETARDATION IN THE ESTABLISHMENT OF AN INDUSTRY: Following principles were laid down regarding determination of injury:

1. Determination of injury or threat of injury should be based on positive evidence and not on mere allegations or hypothetical possibilities. Threat of injury had to be based on conjecture or remote possibility. It was provided that the change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent. It was specially provided that in case of threat of material injury application of antidumping duty should be studied and decided with special care.

2. Injury should be shown to be demonstrably be caused by dumped imports. For determining this two things had to be proved:

(a). that the evaluation of the effects of the dumped imports on the industry in question was based on examination of all factors having bearing on the value of the industry in question, such as: development and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty paid price was lower or higher than the comparable price for the like product prevailing in the course of normal commercial transactions in the importing country), export performance, employment, volume of dumped and other imports, utilisation of capacity of domestic industry, and productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

(b). That the injury is caused by dumped imports. For this all other factors which, individually or in combination, could adversely affect the industry had to be examined, for example: the volume and prices of undumped imports of the product in question, competition between the domestic producers

themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.

3. In the case of retardation in the establishment of a new industry in the country of importation, convincing evidence of the forth-coming establishment of an industry had to be shown, for example that the plans for a new industry have reached a fairly advanced stage , a factory was being constructed or machinery had been ordered.

4. The effect of the dumped imports had to be assessed in relation to the domestic production of the like product when available data permitted separate identification of production in terms of such criteria as: the production process, the producers' realisations, profits. When the domestic production of the like product had no separate identity in these terms the effect of the dumped imports was to be assessed by the examination of the production of the narrowest group or range of products, which included the like product, for which the necessary information can be provided.

Domestic industry was constituted of domestic producers as a whole of the like products or to those of them whose collective output of the like products constitutes a major proportion of the total domestic production of those products except that:

(a) When producers were also importers of the allegedly dumped imports then they did not form part of the domestic industry.

(b) in exceptional circumstances a country could, for the production in question, be divided into two or more competitive markets and the producers within each market was regarded as a separate industry, if, because of transport costs, all the producers within such a market sold all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country was sold in that market or if there existed special regional marketing conditions (for example traditional patterns of distribution or consumer tastes) which resulted in an equal degree of isolation of the producers in such a market from the rest of the industry, provided however, that injury might be found in such circumstances only if there was injury to all or almost all of the total production of the product in the market as defined.

INITIATION AND CONDUCT OF INVESTIGATION: The most important part to accomplish the purpose of the Code was initiation and conduct of investigation. Article 5 and 6 of the Code provided rules for them.

INITIATION OF INVESTIGATION: Investigation was normally to be initiated on a request on behalf of the domestic industry affected. There were two exceptions to this rule:

1. In special circumstances authorities could initiate the investigation on their own initiative.

2. Article 12 provided for antidumping action o behalf of third countries.

The request for initiation had to be supported by evidence of both dumping and injury and authorities were required to examine it simultaneously upon initiation of investigation and thereafter. Application was to be rejected and investigation terminated if

1. There was absence of sufficient evidence of dumping or injury
2. The margin of dumping or injury was negligible.

CONDUCT OF INVESTIGATION: Conduct of investigation can be examined under two heads:

1. **Rights to interested parties:**

(a) to present evidence orally or in writing.

(b) To see all non-confidential information

(c) Protection of confidential information

(d) Right to defend their interests.

2 **Rights to the investigating authorities:**

(a) If the authorities felt the request for confidentiality was not warranted and the party was not willing to disclose the information even in generalised or summarised form they could disregard such information unless it was proved by a reliable source that information was true.

(b) Right to carry out investigation in other country for the purpose of verification or to obtain further information. However, they had to obtain the consent of the concerned government and had too notify the representative of the concerned government.

(c) If the interested party held back some information final finding could be made on the basis of facts available.

(d) The investigation procedure need not hinder the authorities to make a preliminary determination and apply provisional measures.

The authorities were obligated to notify the interested parties of the decision to initiate the investigation and also their decision of imposition of antidumping duties alongwith reasons therefor.

REMEDIES:

1.**Price Undertaking:** Antidumping proceedings could be terminated without imposition of antidumping duties or provisional measures if:

(a) the exporter gave a voluntary undertaking to raise prices to cover the dumping margin and to cease exports in the area at dumped prices.

(b) The authorities find the acceptance of undertaking practicable.

However the investigation of injury was to continue if the exporters so desired. In case of negative determination of injury, the undertaking was to lapse unless otherwise desired by the exporter.

2. Antidumping Duties: Antidumping duty was not to exceed margin of dumping. Instead if lesser duty was sufficient to remedy the injury, lesser duty was held to be desirable. It was further provided, in Article 8(b), "When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of then product concerned. If however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either the suppliers involved, or, if this is impracticable, all the supplying countries involved."

Article 9 provided that antidumping duties had to remain in force only as long as it was necessary to counteract dumping which was causing injury. The investigating authorities had had to review the need for continued imposition of antidumping duties either on their own initiative or on request of interested parties substantiated by evidence of the need for review.

3. Provisional Measures: Provisional measures could be taken only after preliminary affirmative decision of dumping and consequent injury. It could remain in force for 3 months and in no case more than 6 months. Provisional measures could take the form of provisional duty or a security-by-deposit or bond equal to the antidumping duty provisionally estimated margin of dumping.

PRINCIPLE OF RETROACTIVITY: Article 11 provided principles of Retroactivity.

Antidumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under Articles 8(a) and 10(a),[40] respectively, enters into force, except that in cases:

(a) Where a determination of material injury (but not of a threat of material injury, or of a material retardation in the establishment of an industry) is made or where the provisional measures consist of provisional duties and the dumped imports carried out during the period of their application would, in the absence of these provisional measures, have caused material injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

[40] Article 10 provided rules for provisional measures.

If the anti-dumping duty fixed in the final decision if higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) Where appraisement is suspended for the product in question for reasons which arose before the initiation of the dumping case and which are unrelated to the question of dumping, retroactive assessment of antidumping duties may extend back to a period not more than 120 days before the submission of the complaint.

(iii) Where for the dumped product in question the authorities determine

(a) either that there is a history of dumping which caused material injury or that the importer was, or should have been, aware that the exporter practices dumping and that such dumping would cause material injury, and

(b) that the material injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to assess an antidumping duty retroactively on those imports,

the duty may be assessed on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

The 1967 Code was first attempt to set up rules for taking antidumping measures. However, there was no case under the 1967 Code adopted by the Contracting Parties.

CHAPTER III

THE TOKYO ROUND CODE OF 1979[41]

The 1967 Code was the first step towards imposition of procedural restraints on the antidumping investigations. However, it had left much to be desired and the investigating authorities still had enough discretion which was working against the interests of the exporting firms. The Tokyo Round Code of 1979 tried to remove many of the deficiencies existing in the 1967 Code.

I

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE

1. INITIATION AND CONDUCT OF INVESTIGATION: Article 1 expressly specified that the domestic authorities have not only to justify the conduct and actual outcome of the investigation but also the initiation of the investigation. Moreover, Article 5 of the Code now explicitly provided that investigation had to be initiated only when sufficient evidence was available. It was not that requirement that the evidence should be sufficient was absent in the 1967 Code. Article 6(f) of that Code providing for notification provided," Once the competent authorities are satisfied that there is sufficient evidence to justify initiating an investigation pursuant to Article 5---". However, the 1979 code made the requirement clearer. Other significant changes regarding rules on initiation was that evidence for injury was defined and the requirement of causal link was more clearly and separately provided.

Regarding **conduct of investigation** Article 6 of the 1979 Code introduced many changes. The Code increased the number of persons to be notified and included, Party or Parties the products of which were subject to investigation, and the complainant in the list. Interests of the importing country was also taken care of by adding Article 6(8) which provided that in cases in which any interested party refused access to, or otherwise did not provide, necessary information within a reasonable period or significantly impeded the investigation, preliminary and final findings, affirmative or negative, may

[41] As per Article 16(4) of the Agreement it entered into force on 1 January, 1980 for the governments which accepted or acceded to it by that date. For each other government it entered into force on the thirtieth day following the date of its acceptance or accession to the Agreement.

be made on the basis of the facts available. The authorities were authorised to request the Parties to provide non-confidential summary and if the request was not complied a summary of reasons for it had to be provided by the Parties. However, footnote to the Article provided that the request for confidentiality should not be arbitrarily rejected. Interests of the exporting country was also taken care of providing a time period for completion of investigation.

An important aspect in the initiation and conduct of investigation is **determination of domestic industry**. The Code introduced some changes in this respect also. Under sub-para1 of para 1, producers related to exporters were excluded from the calculation of domestic industry. Under subpara2 of para1 clearer rules for identifying a domestic industry were formulated when the domestic industry of country as a whole was not treated as such. A new para 2 was added which provided rules for levying of antidumping duties when only industry of a particular area was pleaded to be affected.

2. DETERMINATION OF INJURY Article 3 provided for Determination of Injury. It was now explicitly provided that determination of injury had to be based on objective examination and what was required to be examined in the determination of injury. While the 1967 Code provided that it should be examined that dumping was the cause of injury it was not clear how it was to be examined. The 1979 Code by providing that examination should be made of volume of dumped imports and their effect on prices in the domestic market for like products made it clearer. It was now provided how the examination of volume of dumped imports and effect on prices had to be examined. Provision regarding consequential link of dumping and injury was now made more specific and clear. However, there was now no provision explaining how the retardation of the establishment of industry was to be determined.

3. REMEDIES: In the area of remedies or antidumping measures the Code introduced following changes:

(a). Price Undertakings: It was more clearly provided that provisional measures would not be imposed unless an investigation within the meaning of Article 5 has been initiated although the words "Proceedings may be terminated" denoted the same meaning.

- Article 7(1) of the 1979 Code now provided that for voluntary undertakings exporter had to cease exports in the area in question at dumped prices so that the authorities are satisfied that the injurious effect of dumping is eliminated. The 1967 Code only provided that margin of dumping should be eliminated.

- The 1979 Code now provided that authorities may ask for relevant information from exporter regarding fulfilment of price undertakings and in case of violation provisional and definitive antidumping duties may be levied.
- Time-limit was now prescribed for Undertakings and they were subject to review.
- Provision for notification of termination of proceedings and undertakings was added
- One significant change was addition of Para 5 providing for notification.

(b). Duration of Anti-dumping Duties: The important change introduced in Article 9 of the 1979 Code was that by adding that antidumping duties were to remain in force "to the extent necessary", it was provided that the review for the continued imposition of antidumping duty was to be taken not only with regard to the time but also as to the amount.

(c). Provisional measures: The 1979 Code provided for following changes:

- It was now provided that provisional measures would be imposed only if the authorities judge that they are necessary to prevent injury during the period of investigation.
- Normal period for provisional measure was reduced from four months to three months.

4. Special and differential treatment for developing countries: Article 13 was a new provision introduced in the Tokyo Round Code. It provided for special consideration to the conditions of developing countries: "It is recognised that special regard must be given by developed countries to the special situation of developing countries when considering the application of anti-dumping measures under this Code. Possibilities of constructive remedies provided for by this Code shall be explored before applying antidumping duties where they would affect the essential interests of developing countries."

5. Committee on Antidumping Practices: Article 17 of the 1967 Code expressed the desirability for Committee on Anti-Dumping Practices. Article 14 of the 1979 Code made an elaborate provision for its establishment.

(a). Composition of the Committee: The committee was to be composed of representatives from each of the Parties. It was to elect its own Chairman and had to meet not less than twice a year and otherwise as envisaged by relevant provisions of the Agreement at the request of any Party. The

Committee could set up subsidiary bodies as appropriate. The GATT secretariat was to act as the secretariat to the committee.

(b). Functions of the Committee: The committee had to carry out responsibilities as assigned to it under the Agreement or by the parties. Parties were given the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. To enhance transparency it was provided that parties were to report without delay to the committee all preliminary or final anti dumping action taken, and the reports were made available in the GATT secretariat for inspection by government representatives. The Parties were also to submit, on a semi-annual basis, reports of any anti-dumping actions taken within the proceeding six months. Committee had a significant role under Article 17 in cases of conciliation and dispute settlement.

(c). Powers of the committee: In carrying out their functions, the Committee and any subsidiary bodies could consult with and seek information from any source they deemed appropriate after informing the Party involved. The Committee or any subsidiary seeking the information had to contain the consent of the Party and any firm to be consulted.

6. Consultation, Conciliation and Dispute Settlement:

(a).Consultation: Parties were obliged to afford sympathetic consideration to, and adequate opportunity for consultation regarding, representations made by another Party with respect to any matter affecting the operation of the Agreement. If any Party considered that any benefit accruing to it directly or indirectly, under the Agreement was being nullified or impaired, or that the achievement of any objective of the Agreement was being impeded, by another Party or Parties, it could, with a view to reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Party or Parties in question. Parties were obliged to afford sympathetic consideration to any request from another Party for consultation. The Parties concerned had to initiate consultation promptly.

(b).Conciliation: If any Party considered that the consultation pursuant to paragraph 2 had failed to achieve a mutually agreed solution and final action had been taken by the administering authorities of the importing country to levy definitive antidumping duties or to accept price undertakings, it could refer the matter to the Committee for conciliation. Provisional measures could also be referred if it had a significant impact and the Party considered that the measure was taken contrary to the provisions of paragraph 1 of Article 10 of the Agreement. In cases where matters were referred to the Committee for

conciliation, the Committee was to meet within thirty days to review the matter, and through its good offices, was obliged to encourage the Parties involved to develop a mutually acceptable solution. It was the duty of the Parties to make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation.

(c).Dispute Settlement: In case of failure of mutually agreed solution within 3 months, the committee had to at the request of any party to the dispute, establish a panel to examine the matter based upon:

" (a) a written statement of the party making the request indicating how a benefit accruing to it directly or indirectly under this Agreement has been nullified or impaired, or that the achieving of the objective of the Agreement is being impeded , and

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

The settlement of disputes was governed by the provisions of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance. Selection of Panel members was done from Parties not Parties to the dispute and amongst the persons having relevant experience.

There was provision for protection of the confidentiality of any confidential information. "Confidential information provided to the Panel shall not be revealed without formal authorisation from the person or authority providing the information. Where such information is requested from the panel but release of such information by the panel is not authorised, a non-confidential summary of the information, authorised by the authority or person providing the information, will be provided."

Under the new Code there was provision for reservation whereby the party could with the consent of other Parties enter reservations to a any of the provisions of the Code[42], and the provision for Amendments.[43]

II

CASES DECIDED BY THE GATT PANEL

[42] Article 16(3)

[43] Article 16(8). It said, "The Parties may amend this Agreement having regard, inter alia, to experiences gained in its implementation. Such an amendment, once the Parties have concurred in accordance with procedures established by the Committee, shall not come into force for any Party until it has been accepted by such Party.

Four cases were decided by the GATT Panel relating to antidumping which were adopted by the Contracting Parties. The first case *United States-Imposition of Anti-dumping duties of Fresh Chilled Atlantic Salmon from Norway*[44] dealt with issues relating to investigation, determination of dumping, determination of injury and review of antidumping duties. The next case *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*[45] dealt with determination of injury. The case of *EC - Imposition of Antidumping Duties on Imports of Cotton Yarn From Brazil*[46] dealt with issues of determination of dumping, determination of injury and special and differential treatment for developing countries. In the case of *EEC-Parts and Components*[47], Panel did not give any ruling on any matter relating to antidumping as none were raised by the parties but the case involved an important issue of anti-circumvention duties that was very important in the Uruguay Round negotiations.

UNITED STATES- IMPOSITION OF ANTIDUMPING DUTIES ON IMPORTS OF FRESH CHILLED ATALANTIC SALMON FROM NORWAY[48]

The dispute concerned the imposition by the United States of an anti-dumping duty order on imports of fresh and chilled Atlantic salmon from Norway. The anti-dumping duty was initiated by the Department of Commerce after the Department had received a petition for the initiation of an investigation from 'The Coalition for Fair Atlantic Salmon Trade', comprised of domestic producers of fresh and chilled Atlantic salmon. As indicated in the public notice of the initiation of this investigation, the product covered by the investigation was the species Atlantic salmon. All other species of salmon were excluded. The Federal Register Notice of the affirmative preliminary determination of dumping explained that, for seven out of the eight investigated exporters, the volume of home market sales was insufficient to constitute a viable basis for the calculation of the normal value. For these exporters, the provisional normal value was established on the basis of export prices to EEC countries. The Notice also indicated that, at the time of the preliminary determination, the Department of Commerce was investigating an allegation by the petitioner that the export sales to the EEC markets used as a basis for the calculation of the provisional normal value were made at prices below costs of production and that, for the purpose of its investigation

[44] ADP/87 , Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994.
[45] ADP/92 Report of the Panel adopted by the Committee on Anti-Dumping Practices on 2 April 1993

[46] ADP/137, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 4 July 1995.

[47] L/6657-37S/132 Report by the Panel adopted on 16 May 1990

[48] ADP/87 , Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994

of this allegation, the Department had on 21 August 1990 "delivered cost of production questionnaires to eleven fish farmers who reportedly supplied the eight exporters with the subject merchandise during the period of investigation".[49] An affirmative final determination of dumping ("sales at less than fair value") in this investigation was issued by the Department of Commerce. As explained in the Federal Register Notice of the final affirmative determination of dumping, the normal value used for comparison with export prices was determined as follows. Following the allegation by the petitioner that export sales of Atlantic salmon to EEC markets were made at prices below the costs of production, the Department compared the prices of the third country sales to the costs of production of salmon. These costs of production were calculated as the sum of (1) the simple average of the costs of production of farmers from whom the Department had obtained cost of production information through a sampling procedure, and (2) the exporter's selling general and administrative expenses. Generally, where the Department found for an individual exporter that more than 90 per cent of the third country sales were at prices below cost of production, the normal value was established on the basis of a constructed value. The constructed normal value for salmon sold by each exporter was calculated as the sum of (1) the simple average of the farmers' costs of production and (2) the exporter's selling, general and administrative expenses, profit and packing. The Notice explained that for all exporters, profit equal to the statutory minimum 8 per cent of the cost of production was applied and that in all cases, for salmon sold on or after January 1, 1990, a five NOK/kg. cost was added to the CV (constructed value) before profit. On 30 April 1990, the Department of Commerce issued Section A questionnaires to eight exporters of Norwegian salmon who accounted for more than 60 per cent of imports of Atlantic salmon from Norway during the period of investigation. Included in these Section A questionnaires was a request to the exporters to provide the name and address of each salmon farm from whom they purchased salmon for export to the United States during the POI (period of investigation). This information was requested so that the Department of Commerce could quickly identify these farmers as respondents, if it turned out that the farmers rather than the exporters should be the principal respondents in the investigation. The Department of Commerce also issued a special questionnaire to three entities involved in the production and sale of salmon in Norway for purposes of determining whether salmon farmers had knowledge, at the time of their sales to exporters, of the ultimate destination of the salmon. Norwegian salmon exporters generally did not farm salmon and that Norwegian salmon farmers generally did not export salmon. In order to obtain further information on the farmers' possible knowledge about the ultimate destination of the salmon sold to the exporters, the Department of Commerce issued a supplemental questionnaire to the Norwegian fish farmers' organisation, Fiskeoppdrettemes Salgslag (FOS). Based on data provided by the FOS in response to this questionnaire, the Department selected a sample of eight

[49]55 Fed.Reg., 3 October 1990, p.40418.

farms which were provided with a modified Section A questionnaire. The Department determined, based on a review of the responses by these eight farms and other information collected up to that point in the investigation, that Norwegian salmon farmers did not generally know the ultimate market into which their product was sold. The petitioner in the investigation requested the Department of Commerce to determine whether export sales of Norwegian salmon to the EEC were at prices below costs of production. In support of this request, the petitioner alleged that actual Norwegian sales prices (the prices submitted by the exporters in their Section B responses) were below the average costs of production reported by a Norwegian Government study. The Department of Commerce accepted this request. Because of the structure of the Norwegian industry and the close interrelationship between the exporters and the farms, the Department decided to investigate the farms' costs of production. For the purpose of the investigation of the farms' costs of production, it was decided to develop a sample of farms for each exporter, each sample to be drawn from a universe of farms with which the exporter had actually dealt during the period of investigation. The farms were selected for each exporter from the list of farms submitted by the exporters in their responses to Section A of the questionnaire. Eleven firms were selected. Counsel for the Norwegian respondents reported that several of the farms selected by the Department for purposes of its costs of production investigation had not sold any salmon during the period of investigation to the exporters to which they had been linked. The Department determined that it could not develop new samples of farms for each exporter because it was not possible to determine from the lists provided by the exporters in response to the Section A questionnaire, which farms actually had sold salmon to the individual exporters during the period of investigation and there was insufficient time left in the investigation to develop a new sample, present questionnaires to new farms and analyse and verify the responses. The Department instead decided to proceed to collect costs of production information from the remaining fish farms selected for the survey, i.e. the seven farms which actually had supplied salmon to the exporters during the period of investigation, and to develop an average cost of production from these remaining farms. A Department of Commerce memorandum dealt with the question whether this average costs of production figure should be calculated as a simple, or a weighted average of the costs of production of these farmers (i.e. whether the individual costs of production figures should be assigned a weight proportional to the share in total production volume in Norway of the different size categories of the farms in the sample). The Department found that no basis to weight costs of farms of different sizes and accordingly decided to use a simple average of the costs of production figures of the farms in the sample. USITC issued final determination for the purpose of both the anti-dumping duty investigation of imports of fresh and chilled Atlantic salmon from Norway, in which it concluded that an industry in the United States was materially injured by reason of imports from

Norway of fresh and chilled Atlantic salmon which had been found by the Department of Commerce to be subsidised by the Government of Norway and sold in the United States at less than fair value.

Norway requested the Panel to find that the imposition by the United States of an anti-dumping duty order on imports of fresh and chilled Atlantic salmon from Norway was inconsistent with the obligations of the United States under the Agreement. In particular, Norway requested the Panel to find that:

- the initiation and conduct of the anti-dumping duty investigation was inconsistent with the requirements of Articles 5 and 6 of the Agreement;

- the affirmative final determination by the Department of Commerce of the existence of dumping was inconsistent with the requirements of Articles 2:4, 2:6, 6:1 and 8:3 of the Agreement and with the requirements of Article III of the General Agreement;

- the affirmative final determination of injury by the USITC was inconsistent with Article 3 of the Agreement; and

- the continued imposition of the anti-dumping duty order was inconsistent with Article 9:1 of the Agreement.

1. INVESTIGATION

(a). INITIATION OF INVESTIGATION:

Norway claimed that the initiation by the United States of the antidumping investigation was inconsistent with Article 5:1 because the United States authorities had failed to satisfy themselves before the initiation that the request for the initiation had been filed on behalf of the domestic industry. Norway stated that the practice applied by the Department of Commerce in this case, that unless a substantial portion of the industry comes forth to oppose a petition, the Department reasonably assumes that the industry, or 'a major proportion' thereof, supports the petition, was inconsistent with United States obligations under Article 5:1. Norway argued that there was no information on the record indicating that the United States authorities had taken any steps to satisfy themselves prior to the initiation of the investigation (or at any other time) that the petition had been filed on behalf of the industry affected.

The United States argued that the petition had provided a satisfactory statement of industry support. In light of the certified statement that the major proportion of the domestic industry supported the petition, and the lack of significant opposition to the petition, the Department of Commerce had, prior to initiation, considered itself to be satisfied that the petition was filed on behalf of the domestic industry. Furthermore, facts obtained by the Department of Commerce and the USITC during the investigation had supported the decision to initiate.

The Panel noted that the requirements of Article 5:1 clearly implied a duty for the authorities to evaluate each such written request to ascertain whether it contained the required information, and to screen out those requests that failed to provide it. The Panel also noted that the Agreement did not provide precise guidance as to the procedural steps to be taken for such an evaluation, and considered that the question of how this requirement is to be met depends on the circumstances of each particular case. In the Panel's view, this question, or in this case the steps the United States was required to take as a prerequisite to initiating an investigation, had to be evaluated on the basis of the information before the investigating authorities at the time of the initiation decision. The Panel noted that the written request for the initiation of an anti-dumping investigation had been made with a legal certification as to its accuracy and completeness. It had been submitted by twenty-one firms representing well over the majority of all domestic production of Atlantic salmon. As of the date of the initiation decision, none of these firms had made known a change in its position; in the Panel's view, changes in position either way by firms in the domestic industry were irrelevant to its examination of the initiation decision under Article 5:1 if such changes took place after that decision had been made. The Panel considered that in the facts of the case, the Department of Commerce could reasonably have relied on the statements in the certified petition that these firms accounted for well over a majority of production of Atlantic salmon and that these firms supported and had authorised the petition.

(b).CONDUCT OF INVESTIGATION:

Regarding conduct of investigation Norway raised two specific procedural aspects of the investigation conducted by the Department of Commerce in support of its general claim that the United States had failed to follow fair and equitable procedures regarding:

- the period of time given by the Department to exporters to submit responses to a part of the questionnaire and,
- the onerous nature of the questionnaire and verification procedures used by the Department.

(b.a) Insufficient time for response: Norway argued that the United States had acted inconsistently with Article 6:1 of the Agreement because the Norwegian exporters under investigation had been given fifteen days to respond to Section A of the questionnaire issued by the Department of Commerce instead of a period of thirty days, as provided for in a Recommendation of the Committee on Anti-Dumping Practices regarding time limits for responses to questionnaires.[50] Norway contended that, as a result of the insufficient time given to respond to this Section A of the questionnaire, the Norwegian exporters had been unable to identify in an accurate manner the farms from which they had purchased salmon for export to the United States during the period of investigation. Norway pointed out that although, at the time of the receipt of the responses to Section A of the questionnaire, the Department of Commerce had been informed by the respondents that the lists of these farms were not entirely correct, it had not taken any steps to seek corrections to these lists. However, at a later stage of the investigations the Department had concluded that the lists of farms provided by the exporters were flawed because these lists included farms which had not supplied salmon to the exporters during the period of investigation.

The United States argued that the exporters had been given sufficient time to respond to Section A of the questionnaire and that the errors in the information provided by these exporters could therefore not be attributed to the allegedly insufficient period of fifteen days given to the exporters to respond to this Section. Some exporters had requested, and had been granted, an extension of this response period and the Department of Commerce had allowed exporters to correct the lists of supplying farms subsequent to their initial responses.

The Panel noted that Norway's claim regarding the allegedly insufficient period of time allowed by the Department of Commerce to exporters to respond to Section A of the questionnaire was based on Article 6:1 of the Agreement. Panel noted that the Department had provided the three exporters who had asked for extension with more than thirty days to provide information in response to Section A of its questionnaire. Nothing in the information before the Panel indicated that, if other exporters had at the same time submitted similar corrections to the initial lists of farmers, the Department would have rejected such corrections. The Panel pointed out that under Article 6:1 investigating authorities were required to give "ample opportunity" to interested parties to present evidence in writing or, upon justification, orally. The Panel found that it could not reasonably be argued that it was inconsistent with this requirement if investigating authorities set an initial time period for responses to questionnaires and then left it to respondents to request an extension of this period, if considered necessary by the respondents. Panel further pointed out that at least three exporters had provided the Department of

[50]BISD 30S/30.

Commerce with corrections to their initial questionnaire responses. These corrections had been submitted well after the expiration of the initial period for the filing of the questionnaire responses. Panel noted that all exporters had been represented by the same legal counsel and there was nothing in the information before the Panel to indicate that corrections made by other exporters would not have been accepted. Therefore the Panel concluded that the United States had not acted inconsistently with its obligations under Article 6:1 of the Agreement with respect to the time period granted to the Norwegian exporters to respond to Section A of the questionnaire of the Department of Commerce.

(b.b) Onerous nature of questionnaires and verification procedures: Norway's next claim was that in order to respond to the questionnaires Norwegian respondents needed to have access to computers and that during verification, the Norwegian respondents had been required to make available photocopiers. Norway had also argued that as a result of the calculation of constructed normal values of the exporters on the basis of costs of production of farmers, in those instances in which the Department of Commerce had found the responses provided by the farmers to be insufficient and had relied on "the facts available" for purposes of calculating these costs of production, the exporters had not been allowed to present their views on this information, contrary to Article 6:1 of the Agreement. With respect to this claim of Norway regarding the allegedly onerous nature of the questionnaires and of the verification procedures used by the Department of Commerce, the Panel noted that there was no provision in the Agreement which specifically addressed the question of the type of technical aspects of questionnaire and verification procedures raised by Norway. For example, there was no provision in the Agreement regulating the medium in which responses to questionnaires were to be submitted by respondents. The Panel pointed out, however, that Article 6:8 of the Agreement could be relevant in this context. If investigating authorities made their findings in a particular case "on the basis of the facts available" within the meaning of Article 6:8, a review by a panel of whether the authorities had acted within their rights under this provision could take into account as a relevant factor the nature of the information requirements imposed by the investigating authorities on respondents.

2. DETERMIANTION OF DUMPING:

Norway claimed that the substantive aspects of the methodology followed by the Department of Commerce in its final determination of dumping of imports of Atlantic salmon from Norway. Norway had contested the consistency with the Agreement of this determination on grounds pertaining to the following issues:

- use of constructed values, rather than export prices to third countries for purposes of determining normal values;

- calculation of costs of production on the basis of the costs of production of the salmon farmers, rather than on the basis of the acquisition prices paid by the exporters;

- sampling techniques used by the Department of Commerce in the selection of the Norwegian salmon farmers for purposes of its costs of production investigation;

- use of a simple, rather than a weighted average of the costs of production data obtained on the basis of the sample;

- use of "the facts available" as a basis for the calculation of the costs of production of one of the Norwegian salmon farms;

- inclusion in the constructed normal values of a "freezing charge"; and

- comparison of normal values and export prices.

(a).Export prices to third countries versus constructed normal values: Norway claimed that, by determining the normal value of the imports of Atlantic salmon under investigation on the basis of constructed values rather than on the basis of prices at which Atlantic salmon was sold for export from Norway to third countries, the United States had acted inconsistently with its obligations under the Agreement.

In examining Norway's claim, the Panel noted that the pertinent provisions regarding the determination of normal values were Articles 2:1 and 2:4 of the Agreement. According to the Panel it followed from these provisions, read together, that the normal value was in the first place to be established on the basis of "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Only in the circumstances defined at the beginning of Article 2:4 was it permissible to resort to the use of the alternative methods for determining normal value which were specified in that provision. In those circumstances, Article 2:4 provided for the use of "a comparable price of the like product when exported to any third country..." or "the cost of production in

the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits." Article 2:4 thus meant that there was no order of preference between the use of export prices to a third country and a "constructed" normal value in cases where the normal value could not be established on the basis of domestic sales prices in the exporting country. This provision did not require that investigating authorities resort to the use of a constructed normal value only after having given consideration to the possible use of export prices to a third country; nor did it condition the use of constructed values upon a finding that export sales to third countries were not in the ordinary course of trade. The Panel noted in this connection that, as far as the absence of an order of preference between the two alternative methods for establishing the normal value was concerned, Article 2:4 of the Agreement was identical to Article VI:1(b) of the General Agreement. Panel pointed out that A Report of the Group of Experts on Anti-Dumping and Countervailing Duties, adopted on 13 May 1959, stated that: "The Group was of the opinion that paragraph 1(b)(i) and paragraph 1(b)(ii) laid down alternative and equal criteria to be used at the discretion of the importing country but only after it had failed to establish a normal market value under paragraph 1(a) of Article VI."[51]

Therefore the Panel concluded that by using constructed normal values rather than export prices of Atlantic salmon sold to third countries for the purpose of determining normal values for seven of the exporters under investigation, the United States had not acted inconsistently with its obligations under Article 2:4 the Agreement.

(b). Calculation of costs of production on the basis of the costs of production of the salmon farmers rather than on the basis of the acquisition prices paid by the exporters of salmon: Norway argued that in calculating the costs of production of Atlantic salmon as the costs of production of the Norwegian salmon farmers, rather than as the acquisition prices paid by the Norwegian exporters, the United States had acted inconsistently with its obligations under the Agreement. Norway argued that the inclusion in these constructed normal values of the costs of production of the Norwegian salmon farmers instead of the acquisition prices paid by the Norwegian exporters of salmon was inconsistent with the requirement that equitable and open procedures be followed in anti-dumping investigations. In support of this argument, Norway pointed out that the exporters set the prices of their export sales to various markets and had no knowledge of the costs of production of each of the many individual farmers from which they purchased salmon and that the farmers had no knowledge of the ultimate destination of the salmon sold to these exporters. Norway also observed that in determining the costs of production of the salmon farmers, the Department of Commerce had relied on the acquisition prices paid by these

[51]BISD 8S/145, 148.

farmers in their purchases of smolt (where these prices were arms-length prices) and had argued that the Department's refusal to rely on the acquisition prices paid by the exporters for the salmon purchased from the salmon farmers was inconsistent with the use of acquisition prices of smolt for the purpose of the calculation of the farmers' costs of production.

The United States pointed out that under Article 2:4 of the Agreement constructed normal values had to be based on "the cost of production in the country of origin" and therefore, there was no basis in the Agreement for Norway's view that the Department of Commerce should have relied on the acquisition costs incurred by the Norwegian salmon exporters rather than on the costs of production of the Norwegian salmon farmers. US pointed out that exporters did not produce Atlantic salmon, therefore the only manner in which the Department could calculate the costs of production consistently with Article 2:4 was by using the costs of production incurred by the actual producers, i.e. the Norwegian salmon farmers. The United States had also argued that it was irrelevant in this context whether the exporters had knowledge of the costs of production of individual salmon farmers and whether the farmers had knowledge of the destination of the salmon sold to exporters.

The Panel noted that in its affirmative final determination of dumping in the investigation of imports of Atlantic salmon from Norway, the Department of Commerce had calculated constructed normal values for exporters under investigation as the sum of (1) the simple average of the costs of production of a number of Norwegian salmon farmers_and (2) the exporter's selling, general and administrative expenses, profit and packing. Panel pointed out that under Article 2.4 read in its context, the term "cost of production" referred to the cost of production "of the like product", i.e. in this case Atlantic salmon. Panel noted that the question before it was whether in the circumstances of the case before it the term "cost of production in the country of origin" in Article 2:4 necessarily had to be interpreted as meaning the acquisition prices paid by the exporters, rather than the costs of production incurred by the salmon farmers. Panel noted that the purchase of Atlantic salmon by the exporters from the salmon farmers could not be considered to amount to the purchase of an input for use by the actual producers of Atlantic salmon. According to Panel while the acquisition price paid by the exporters to purchase Atlantic salmon from the salmon farmers represented a cost to the exporters, it would be inconsistent with the plain meaning of the term "cost of production in the country of origin" to interpret this term as requiring investigating authorities to determine the cost of production on the basis of this cost to the exporters of acquiring the product, rather than on the basis of the cost of production incurred by the actual producers of the product. With respect to Norway's argument concerning the lack of knowledge of exporters of the costs of production of individual salmon farmers and the lack of knowledge of the farmers of the

ultimate destination of their sales of Atlantic salmon, the Panel found that there was no information before it indicating that in the circumstances of this case these factors were relevant to the calculation of "cost of production in the country of origin" under Article 2:4. For instance, there was no evidence that costs of production of salmon in Norway varied by destination of the sales. Therefore the Panel concluded that by including in the constructed values the costs of production incurred by the Norwegian farmers of Atlantic salmon, rather than the costs of acquisition incurred by the Norwegian exporters of Atlantic salmon, the United States had not acted inconsistently with its obligations under Article 2:4 of the Agreement.

(c). Sampling techniques used by the Department of Commerce in the selection of the Norwegian salmon farmers for purposes of its cost of production investigation: Norway claimed that the calculation by the Department of Commerce of the cost of production of the Norwegian salmon farmers was inconsistent with the obligations of the United States under Articles 2:4 and 8:3 of the Agreement as a result of the sampling methodology used by the Department of Commerce. In its calculation of constructed normal values for investigated exporters, the Department of Commerce had determined the costs of production of Norwegian salmon on the basis of a simple average of the costs of production figures obtained through a sample of seven investigated salmon farmers in Norway. Norway argued that this sample of seven salmon farmers was statistically invalid and had resulted in an overstated cost of production figure, in violation of Articles 2:4 and 8:3 of the Agreement, in particular because of the limited number of the farmers included in the sample and the failure of the Department of Commerce to stratify the sample by size of farm. In this latter respect, Norway argued that the largest farms in Norway had by far the lowest cost of production per kg. As evidence of the fact that the cost of production calculated by the Department of Commerce was excessive, Norway pointed to the fact that this cost of production figure was much higher than the cost of production figure calculated by the EEC in its anti-dumping investigation of imports of Atlantic salmon from Norway and than cost of production data reported in annual surveys by the Norwegian Directorate for Fisheries.

The United States argued that the Department of Commerce had initially constructed individual samples for each exporter under investigation of Norwegian farms which had supplied salmon to that exporter during the period of investigation. These individual samples together comprised a total of eleven farms. While these samples had been stratified by geographic location, the evidence before the Department indicated that, since a large majority of Norwegian farms were within a similar size range, there was no basis to stratify these samples by farm size. According to the US the Department of Commerce had been forced to abandon its plan to use individual samples after learning in August 1990

that the lists of farms (provided by the exporters) from which these farms had been drawn contained farms which had not actually supplied salmon to exporters during the period of investigation. US contended that since at that time it was too late to develop new samples and that, there was a high probability that any new samples would also include farms which had not supplied salmon to the exporters during the period of investigation, the Department of Commerce had decided to treat the seven remaining farms as a single sample and to develop an average cost of production figure for these seven farms. According to the US the erroneous information provided by the exporters on farms from which they had purchased salmon during the period of investigation had left the Department of Commerce with no choice but to proceed on the basis of the information before it, as authorised under Article 6:8 of the Agreement. US contended that in the light of information before the Department regarding the size of most salmon farms in Norway, this single sample of seven farms could reasonably be considered to be representative of the Norwegian industry and that the Norwegian parties to this investigation had never objected to the Department's decision to proceed with a single sample of seven farms.

The Panel noted that Norway's claim regarding the inconsistency of the farm sample with Articles 2:4 and 8:3 pertained not to the use of samples *per se* but to the consistency with the Agreement of the specific sampling methodology used by the United States under the circumstances of the case before the Panel. The Panel noted that the fact that the Agreement contained no specific provisions explicitly addressing the use of sampling techniques in anti-dumping investigations did not mean that there was no basis in the Agreement upon which the Panel could review those aspects of the sampling methodology employed by the United States in this case which had been raised by Norway. Panel pointed out that Article 2:4 defined the elements of a constructed normal value as "... the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs for profits." Therefore according to the Panel it had to decide whether, as a result of alleged defects of the sampling methodology used by the Department of Commerce, "the cost of production in the country of origin" had been calculated inconsistently with Article 2:4.

Panel pointed out that by definition, the purpose of a sample was to obtain information on the characteristics of the population from which the sample was drawn. Panel noted that in resorting to a sampling procedure, for purposes of calculating the costs of production of Atlantic salmon in Norway, the Department of Commerce had to be satisfied on the basis of the information before it that the results yielded by this sampling procedure would not be significantly different than the results obtained through an investigation of the total population of Norwegian salmon farms.

Panel noted that in determining the number of farms to be included in the original samples the Department of Commerce had been guided by considerations relating to the time available for the completion of its investigation within the statutory time-limits. According to Panel while such considerations pertaining to the need for a timely completion of anti-dumping investigations were relevant and legitimate[52] it was significant that there was no information before it indicating if and how, in addition to considerations regarding the time available for the completion of its investigation, in determining the number of farms to be included in the samples for the exporters, the Department of Commerce had also taken into account how many farms per exporter needed to be selected with a view to ensuring that these samples could reasonably be considered to be representative of the populations of farms in question. Panel pointed out that from the outset the Norwegian respondents had raised a concern regarding the number of farms selected per exporter. The respondents had pointed out that even theoretically an examination of one farm per exporter could not constitute a sample. The respondents also had urged the Department to use a sample of forty-one salmon farms developed by the EEC for purposes of its anti-dumping investigation. In addition, the Norwegian respondents had argued before the Department that there were wide variations of costs of production between individual salmon farmers in Norway and had referred in this context to information gathered by the Government of Norway in annual surveys of the profitability of the Norwegian salmon industry. The Panel noted that the Department of Commerce had thus been presented with a potentially significant issue as to the number of farms to be included in its samples for the purpose of ensuring that these samples would be representative. Panel held that the issue had not been properly considered by the Department.

Regarding United States' contention that its reliance on a single sample of seven farms, after it had been forced to abandon its original plan for individual samples for each exporter, was a valid exercise of its rights under Article 6:8 of the Agreement, Panel noted that if there were information before the Panel indicating that the Department of Commerce, in constructing the original samples, had reasonably considered how many farms per exporter needed to be selected in order to obtain representative results and if in that situation, the Department of Commerce had encountered difficulties as a result of non co-operation or erroneous information provided by interested parties, Article 6:8 might have been relevant to the Panel's examination of the consistency with Article 2:4 of the sampling procedure used by the Department of Commerce. But as this was not the factual situation before the Panel, Panel therefore found that under the circumstances the argument of the United States regarding Article 6:8 of the

[52]In this connection the Panel noted that Article 5:1 of the Agreement provided that "Investigations shall, except in special circumstances, be concluded within one year after their initiation".

Agreement was not relevant to the Panel's examination of the consistency with Article 2:4 of the sampling methodology of the Department of Commerce.

The Panel concluded that United States had acted inconsistently with its obligations under Article 2:4 of the Agreement with respect to the calculation of the cost of production in the country of origin, by reason of the apparent failure of the Department of Commerce to consider the question of the number of the farms to be included in the samples from the perspective of how the Department was to ensure that these samples would be representative.

Regarding Norway's argument that the Department of Commerce failed to stratify its sample(s) by size of farm, Panel noted that the documents before the Panel did not indicate that Norway had ever stated a specific concern regarding the decision by the Department not to stratify the samples by farm size.

(d). Use of a simple, rather than a weighted average of the cost of production data obtained on the basis of the farm sample: Norway complained against the calculation by the Department of Commerce of a simple, rather than a weighted, average of the costs of the production of the seven Norwegian salmon farms which had been included in the Department's costs of production analysis. Norway argued that the Department of Commerce should have weighted the costs of production of the seven farms in the sample by the relative production volumes of the individual farms in order to account for significant cost differences per kg. between large and small farms.

The United States argued that the Department of Commerce had properly decided to use a simple average of the costs of production of the seven Norwegian salmon farms in light of information before the Department (provided by the Government of Norway) indicating that 96 per cent of salmon production in Norway took place in small farms. One of the seven farms in the sample, the Bremnes farm, was one of the largest in Norway and had accounted for a greater share of the combined production volume of the seven farms in the sample than the share of total production in Norway generally accounted for by large farms. Consequently, the use of an average costs of production figure weighted by the relative production volumes of each of the farms in the sample would have given much greater importance to this large farm than large farms generally occupied in the Norwegian industry as a whole.

The Panel noted that the logic of Norway's argument that greater weight should have been assigned to the costs of large farms in the sample than to the costs of small farms required that there be evidence of

record showing that the Department of Commerce had before it information concerning the relative importance of various categories of sizes of farms in the Norwegian salmon industry and concerning differences between large and small farms in costs of production per kg. of salmon. This information would also have to provide a basis to conclude that the small farms were over-represented in the sample, compared to their relative importance in the Norwegian salmon industry overall. According to the Panel in the absence of such information, there would be no basis to argue that by failing to assign greater weight to the costs of large farms the Department of Commerce had calculated costs of production in a manner that disproportionately reflected the higher costs of production per kg of small farms.

Therefore the Panel concluded that the Department of Commerce had not acted unreasonably in the light of the information before it when it decided that there was no basis to assign a greater weight to the cost of production figures of the large farms in the sample than to the costs of production figures of the small farms.

(e). Use of "the facts available" as a basis for the calculation of the costs of production of one of the Norwegian farms: Norway claimed that the United States had acted inconsistently with its obligations under Article 2:4 and 8:3 of the Agreement when the Department of Commerce had rejected the questionnaire responses of one farm, Nordsvalaks, and had attributed to this farm the highest costs of production figure calculated for any of the other six salmon farms in the sample as "the best information available". The stated basis of the decision by the Department of Commerce not to accept the information provided by Nordsvalaks concerned this farms' alleged failure to report in its questionnaire information on transactions with a related party. Norway argued that Nordsvalaks failure to report transactions with this related party had been caused by the unclear and ambiguous wording of the respective item of the questionnaire. According to Norway in view of the fact that Nordsvalaks and this related party shared joint costs and revenues on a 50/50 basis and that officials of the Department of Commerce had verified the questionnaire responses provided by Nordsvalaks, the Department could have easily corrected the data for Nordsvalaks to take into account the related party transactions. Norway contended that the imputation to the Nordsvalaks farm of the highest costs of production of any of the remaining six farms in the sample had been particularly detrimental given that this farm was the second lowest cost producer among the farms in the sample.

The United States argued that despite the clear and unambiguous wording of the Department of Commerce's questionnaire, the Nordsvalaks farm had failed to report that it was related to another salmon farm. The existence of this relationship had raised questions regarding the proper allocation of

costs and expenses between Nordsvalaks and the related party, questions which would have necessitated an entirely new response both from Nordsvalaks and from the related party. Under these circumstances, it was within the rights of the United States under Article 6:8 for the Department to disregard the information provided by Nordsvalaks and to base its calculation of costs of production for this farm "on the facts available". The United States denied that the Department had in fact verified the data provided by Nordsvalaks; there was therefore, according to the United States no basis for Norway's statement that this farm was the second lowest cost producer in the sample.

The Panel noted that the arguments made by the parties involved the relationship between the substantive provisions of the Agreement invoked by Norway and the provisions in Article 6:8 invoked by the United States. In the case under consideration, the substantive provision in question was Article 2:4 of the Agreement, and in particular the reference to the "cost of production in the country of origin" as one of the components of a constructed normal value. Therefore, "the facts available" used by the United States under Article 6:8 had to be relevant to the determination of the "cost of production in the country of origin" in a manner consistent with Article 2:4. According to the Panel even if it was assumed that the United States could reasonably have found that Nordsvalaks had not provided necessary information within a reasonable period of time and that it was therefore necessary to make its findings regarding the costs of production of Nordsvalaks "on the basis of the facts available", an analysis of whether the United States had acted within its rights under Article 6:8 also required an examination of the data used for Nordsvalaks costs of production in the light of the stated purpose of the sample of seven farms. The Panel noted that it could not be argued that, when the Department of Commerce had imputed to Nordsvalaks the highest (verified) cost of production figure found for any of the remaining six farms, it had not relied on "a fact available". The Panel pointed out that a reasonable exercise of the discretion enjoyed by the United States under Article 6:8 with regard to the choice of "the facts available" would have required that the Department take into account the purpose of its calculation of costs of production of the seven salmon farms. The actual verified costs of production per kg. for the six remaining farms in the sample had differed significantly and the imputation of the highest of these figures to Nordsvalaks had a significant impact on the average cost of production figure. According to the Panel since the sample was used by the Department of Commerce to compute a single average "cost of production in the country of origin" figure to be included in the calculation of the constructed normal values of most of the exporters under investigation, the Department should have considered how its choice of "the facts available" for determining the costs of production of Nordsvalaks would affect the representativenes of the results of the sample. There was no information before the Panel indicating how the Department had considered this aspect in its decision with regard to the choice of "the facts available" for Nordsvalaks.

Therefore the Panel concluded that the United States had not acted within its rights under Article 6:8 by imputing to Nordsvalaks the highest costs of production figure found for any other farm in the sample without considering how this would affect the representativenes of the results of the sample, and had thereby acted inconsistently with its obligations under Article 2:4 of the Agreement.

(f). Inclusion in the constructed normal values of a "freezing charge": Norway's claim concerned the treatment by the Department of Commerce of a NOK 5/kg. freezing charge for the purposes of its calculation of constructed normal values. Norway argued that the treatment by the Department of Commerce of this freezing charge was inconsistent with the requirement of a fair and equitable treatment of the Norwegian exporters and also referred to the provisions of Article 2:4 of the Agreement. Norway argued that the NOK 5/kg. charge was not paid by farmers but by exporters. Therefore, this fee did not represent a cost incurred by producers of Atlantic salmon. In addition, Norway had referred to the objective of the freezing programme; since the fee was charged to finance the freezing of fresh Atlantic salmon, the fee should be treated as part of the costs of freezing salmon and not as part of the costs of producing fresh Atlantic salmon.

The United States argued that the evidence before the Department of Commerce indicated that the freezing charge was paid by the Norwegian salmon farmers rather than by the exporters. According to the US the fact that the fee was charged to finance a programme concerning frozen salmon was irrelevant for the purpose of determining whether the fee was a cost of producing fresh Atlantic salmon.

The Panel noted that a key factual element of Norway's argument was that the freezing charge was paid not by the producers of Atlantic salmon (i.e. the salmon farmers) but by the exporters. The Panel reviewed the documentation before it and considered that, based on information provided by the Norwegian respondents, the Department of Commerce could reasonably have found that that the freezing charge was paid by the salmon farmers, rather than by the exporters. The Panel noted in this respect that even if the freezing charge had not been paid by farmers but by the exporters it would be far from clear that under Article 2:4 this charge could not have been included as one of the other components of the constructed normal values. Panel noted that this charge was levied on all sales of fresh salmon by the farmers to the exporters and that the total amount of charges paid by the farmers thus depended upon the amount of salmon sold to the exporters therefore this charge could not be considered to be unrelated to the costs of production of fresh salmon, as had been argued by Norway. Therefore, the Panel concluded that, by including a freezing charge of NOK 5/Kg. in the computation of the costs of

production of Atlantic salmon, the United States had not acted inconsistently with its obligations under Article 2:4 of the Agreement.

(g). Comparison of normal values and export prices: Norway's claim was that in comparing average (constructed) normal values to individual prices of Atlantic salmon sold for export to the United States in different weight categories, the United States had acted inconsistently with its obligations under the Agreement. According to the Panel there were two aspects of this claim:

(a) whether the United States had acted inconsistently with its obligations under the Agreement by failing to take account of differences in weight categories in the comparison between normal values and export prices.

(b) whether the comparison of average normal values with individual export prices *per se* was inconsistent with the obligations of the United States under the Agreement.

(g.a)Alleged failure of the United States to take account of differences in weight categories: Norway contended that in comparing normal values and export prices the United States had failed to take into account difference in weight categories between Atlantic salmon produced and sold in Norway and Atlantic salmon sold for export to the United States. Norway's claim was based both on Article 2:4 and Article 2:6 of the Agreement. Panel noted that Norway's argument was that the Department of Commerce should have taken account of these differences either by calculating separate constructed values for each weight category or, if a single constructed value was used, by comparing this single constructed value to an average export price across different weight categories.

Panel noted that in those cases in which normal values were constructed, the basis of these constructed values was a single cost of production per kg which did not distinguish between different weight categories of salmon. From the information before the Panel it appeared that other elements of these constructed normal values (e.g. the amount for profits) had not been differentiated to reflect price differences per kg between different weight categories of Atlantic salmon.

Panel further noted that where normal values had been based on export prices to third countries, the Department of Commerce had made price comparisons for salmon of identical weight categories. The Panel found that this indicated that the Department was aware that differences in weight categories could affect the comparability between these export prices to third countries and the export prices to the United States. The Panel could find nothing in the information of record before it to explain why, if the

differences in weight categories were a relevant factor in those instances in which normal values were based on prices, such differences were not considered relevant by the Department of Commerce where normal values were constructed. According to the Panel while it might be factually correct, as pointed out by the United States, that the costs of production per kg. did not vary by weight of salmon, prices of Atlantic salmon per kg. did vary by weight category. According to the Panel since under the Agreement a constructed value was a proxy for a price-based normal value, the fact that costs of production per kg. did not vary by weight could not, without further explanation, constitute a basis to conclude that differences in weight did not need to be taken into account when normal values were constructed. In this connection the Panel observed that the provisions in Article 2:6 regarding the comparison of normal values and export prices applied both to cases in which price based normal values were used and to cases in which constructed normal values were used.

Therefore the Panel concluded that the Department of Commerce had not properly considered the role of differences in weight as a factor which possibly affected the comparability between the constructed normal values and export prices and for which due allowance might have to be made under Article 2:6 of the Agreement and this aspect of the final determination of dumping was inconsistent with the obligations of the United States under Article 2:6 of the Agreement.

(g.b)Comparison of average normal values to individual export prices: Norway argued that a comparison between average normal values and individual export prices inherently was inconsistent with the requirement of Article 2:6 of the Agreement that a fair comparison be made between normal values and export prices. Norway argued that neither the Agreement nor Article VI of the General Agreement authorised a comparison between an average normal value and individual export prices. According to Norway this method of comparing normal values and export prices had inevitably created margins of dumping where no margins would have been found if the United States had compared average normal values to average export prices. Norway also argued that the fact that Atlantic salmon was a perishable product was an additional reason why a comparison between an average normal value and individual export prices was unfair.

The United States argued that there was no provision in the Agreement which prohibited a comparison between an average normal value and individual export prices; while a "fair comparison" was required under Article 2:6 of the Agreement, no particular methodology was mandated to satisfy this standard. The United States argued that many Parties applying anti-dumping measures used this method of comparing average normal values to individual export prices and that the methodology advocated by

Norway would make it difficult to remedy instances in which dumping was occurring only in particular product lines, or time periods, or with respect to particular customers or regional markets. With regard to Norway's argument that Atlantic salmon was a perishable product, the United States argued that the Department of Commerce had properly determined, based on the evidence of record, that Atlantic salmon was not perishable.

The Panel noted that this interpretation of Article 2:6 would not permit a conclusion that a method whereby average normal values were compared to individual export prices was *per se* inconsistent with Article 2:6. According to the Panel the "fairness" of such a method would have to be evaluated in the light of the circumstances of each case. Panel noted that an essential element in Norway's claim was the view that a comparison of average normal values with individual export prices inevitably created margins of dumping where no margins of dumping would be found if normal values and export prices were compared on an average-to-average basis. According to the Panel in these general terms this view was not correct in that the alleged bias resulting from a method under which average normal values were compared to individual export prices depended upon the pattern of prices in the domestic market and in the export market Panel pointed out that for this alleged bias to occur, there would have to be a number of individual export prices above the average normal value. If export prices were uniformly below the average normal value, this bias could not occur.

The Panel therefore noted that, assuming that the concept of a "fair comparison" in the first sentence in Article 2:6 provided a basis upon which it could review the comparison made by the Department of Commerce of average normal values to individual export prices, the information before it did not permit it to find that under the circumstances of this case this method had been inconsistent with this concept of a "fair comparison". The Panel therefore concluded that in comparing average normal values to individual export prices, the United States had not acted inconsistently with its obligations under Article 2:6 of the Agreement. The question of a possible inconsistency with Article 8:3 therefore did not arise.

3. DETERMINATION OF INJURY

1. Failure of objective examination of existence of injury: Norway claimed was that the USITC's finding of a negative impact of imports on the domestic industry had not resulted from an "objective examination" (Article 3:1) of "all relevant facts having a bearing on the state of the industry" (Article 3:3). In support of its view that the findings made by the USITC with respect to the negative impact of the imports from Norway on the domestic industry in the United States were

unfounded, Norway had referred to several facts before the USITC which in the view of Norway indicated that this industry had expanded significantly since it had first begun production in 1984. Thus, Norway had pointed to data concerning annual increases in the volume of domestic production capacity to produce juvenile Atlantic salmon, shipments, and employment in the Atlantic salmon industry in the United States. The United States had argued that the USITC's finding concerning the impact of the imports from Norway on the domestic industry had resulted from a consideration of all the factors specified in Article 3:3 and was supported by the evidence of record. The Panel noted that in its determination the USITC had discussed several indicators pertaining to the "condition of the industry" and had concluded from this discussion that the US domestic industry was experiencing material injury. The USITC then had separately examined the question of whether material injury was caused "by reason of" the imports from Norway. As the Panel understood Norway's arguments, Norway's objections raised under Articles 3:1 and 3:3 pertained to the first part of the USITC's analysis, i.e. the analysis of the "condition of the industry". The Panel examined whether the USITC's finding that the domestic industry was experiencing material injury had involved "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry", as provided for in Article 3:3. The Panel concluded that in light of its review of the analysis undertaken by the USITC that the USITC had not failed to carry out "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry "as provided for in Article 3:3. The factors considered by the USITC (consumption, production, production capacity, shipments, employment sales, profits and operating losses, cash flow) were specifically mentioned in the (illustrative) list of "relevant economic factors and indices" in Article 3:3. The Panel further observed that the statements made by the USITC on the negative financial performance of the industry were supported by the data before the USITC. Therefore, these statements could not be considered not to be based on positive evidence. Having found that the statements made by the USITC on the financial performance of the industry were supported by the facts on record, the Panel considered that the arguments presented by Norway on the USITC's conclusions regarding the negative impact of the imports on the industry pertained to the weighing of the evidence before the USITC. However, it followed from the last sentence of Article 3:3 that the positive developments reflected in the indicators referred to by Norway could not *per se* have precluded the USITC from finding that the domestic Atlantic salmon industry was experiencing material injury. The Panel noted that these indicators had been discussed explicitly in the USITC's determination. In the view of the Panel, the USITC had provided a reasonable explanation of why, in light of the negative financial performance of the industry, the industry was experiencing material injury, notwithstanding the growth of certain non-financial indicators. The Panel therefore could not find that the USITC had not carried out an objective examination of the evidence before it. For the same reasons, the Panel also did not consider

that, as contended by Norway, the USITC had improperly "allowed a few factors to give decisive guidance". According to the Panel the USITC had explicitly discussed all the evidence before it regarding the condition of the domestic industry and had reasonably explained its conclusion regarding the relative weight to be accorded to the facts before it concerning financial and non-financial indicators. In light of the foregoing considerations, the Panel concluded that the findings of the USITC regarding the condition of the domestic Atlantic salmon industry were not inconsistent with the obligations of the United States under Articles 3:1 and 3:3 of the Agreement.

2. Finding of increase in the volume of dumped imports: Norway's next claim concerned volume of dumped imports;

- Whether there was an increase in the volume of dumped imports in absolute and relative terms,
- Whether the finding of increase in volume of dumped imports was made on the basis of positive evidence as required by Art. 3.1,
- Whether the increase in the volume was significant as required by Article 3.2?

The United States had argued that the USITC had properly considered whether there had been a significant increase of the volume of imports of Atlantic salmon from Norway, as required by Article 3:2, and that the USITC's conclusion that these imports had increased significantly was supported by the evidence of record.

(a) Examination of increase in volume: The Panel first examined whether, as required by Article 3:2, the USITC had considered whether there had been a significant increase in the volume of dumped imports, either in relative or in absolute terms. The Panel noted in this connection Norway's argument that the USITC had considered the significance of the level of the volume of imports from Norway throughout the period of investigation (1987-1990) rather than the significance of any increase in that volume. Panel found that the USITC had specifically considered changes in import volume both in absolute terms and in relative terms and had indicated that it considered the increase in the absolute volume of imports from 1987 to 1989 to be significant. While the USITC had also considered the significance of "the volumes of imports from Norway over the period of investigation", the text of the USITC's determination made it clear that the USITC had not considered the significance of the volumes of imports in lieu of a consideration of the significance of the increase in these volumes. The Panel therefore found that the USITC had not failed to consider whether there had been a significant increase in the volume of the subject imports, as required by Article 3:2.

(b). Whether finding of increase in volume based on positive evidence: The Panel found that the statements made on the volume of imports from Norway in the text of the USITC's determination were supported by the data and noted in this respect that it had not been argued by Norway that these data were not factually correct. The Panel therefore considered that the statements by the USITC on the evolution of the volume of imports from Norway were based on positive evidence.

(c). Whether Increase in volume was significant: The Panel noted that Norway's principal claim regarding the USITC's findings on the evolution of the volume of imports was that, when analysed in the context of other facts before the USITC, the increase from 1987 to 1989 in the absolute volume of imports of Atlantic salmon from Norway was not significant within the meaning of Article 3:2. In this connection, Norway had argued that, for purposes of determining the significance of the increase in the absolute volume of imports from 1987 to 1989, the USITC should have taken into account the fact that the market share in the United States of Norwegian imports had declined over the investigation period, while the market share of third countries and of US domestic producers had increased. Furthermore, the absolute volume of imports from Norway had started to decline in late 1989, well before the initiation of this anti-dumping duty investigation and application of any provisional measures. In Norway's view, Article 3:2 of the Agreement did not permit a finding of a significant increase in the volume of imports where (1) the absolute volume of imports at the end of the investigation period was not higher than at the beginning of that period and the facts demonstrated that the decline in absolute import volume was not the result of the initiation of the investigation and application of provisional measures, and (2) the relative volume of imports declined throughout the period of investigation. In examining the legal and factual aspects of Norway's argument that, under the circumstances of this case, Article 3:2 did not permit a finding of a significant increase of import volume, the Panel first observed that Article 3:2 of the Agreement did not contain a requirement that imports from third countries not subject to investigation be considered as part of an examination of the significance of an increase in the volume of imports from a country whose imports were the subject of an anti-dumping duty investigation. A consideration of the volume imports from such third countries might be relevant for the purpose of determining the existence of a causal relationship between the allegedly dumped imports under investigation and material injury to a domestic industry. In that context, such imports might be relevant as one of the "other factors" referred to in Article 3:4. Footnote 5 expressly identified as one of these possible "other factors" "the volume and prices of imports not sold at dumping prices". Likewise, the consideration of the market share of domestic producers was expressly mentioned in Article 3:3 as part of the analysis of the impact of the imports on the domestic industry concerned, but was not a mandatory factor under Article 3:2. The Panel considered Norway's argument that the significance of the

increase in the absolute volume of imports of Atlantic salmon from Norway from 1987 to 1989 was limited, inter alia, because of the subsequent decline in the absolute volume of these imports starting in late 1989.

The Panel noted that the USITC had explained that it had accorded less weight to the more recent decline in the absolute volume of imports of Atlantic salmon from Norway because of the fact that this decline appeared to be largely the result of the filing of the petition and/or the imposition of provisional anti-dumping and countervailing duties.

The Panel noted that Norway had contested that, as stated by the USITC, the decline in the volume of imports from Norway was largely the result of the initiation of the investigation and/or the imposition of provisional measures. Norway had argued that this decline had begun well before the initiation of this investigation in March 1990. In light of the data, presented by Norway, the Panel considered that there was no clearly discernible level of a declining absolute volume of imports in the period prior to the initiation of the countervailing duty investigation and that imports started to decline considerably only in July 1990. The Panel therefore found that the USITC had not made an error of fact in its statements on the evolution of the absolute volume of imports in 1990.

The Panel consequently considered that there was neither a legal nor a factual basis for the view that, in the circumstances of this case, Article 3:2 did not permit a finding of a significant increase in the volume of imports. Panel noted that the USITC had not failed to carry out such an objective examination: the USITC had considered the decline in the volume of imports from Norway in the latter part of the investigation period and had reasonably explained why it had accorded less weight to this decline. In determining that this decline deserved less weight, the USITC had not committed errors of fact.

3. Examination of depression of prices due to dumped imports: Norway next claimed that the finding of the USITC that imports of Atlantic salmon from Norway had significantly depressed prices of the like domestic product was inconsistent with Article 3:1, which required an objective examination of the effect of the allegedly dumped imports on prices for domestic like products and positive evidence as the basis of an affirmative determination, and with Article 3:2, which required that investigating authorities consider, inter alia, whether the effect of the allegedly dumped imports was to depress prices of domestic like products to a significant degree.

The United States had argued that, consistently with Article 3:2, the USITC had considered whether the subject imports from Norway had significantly depressed domestic prices of Atlantic salmon in the United States and that its findings on this issue were supported by the evidence on record.

The Panel noted that the text of the determination by the USITC on its face, demonstrated that the USITC had not failed to consider the price effects of the imports of Atlantic salmon from Norway in terms of one of the factors explicitly identified in the second sentence of Article 3:2 of the Agreement. The Panel then examined whether the finding by the USITC of significant price depression caused by imports of Atlantic salmon from Norway was based on positive evidence, as required by Article 3:1.In this connection, the Panel first considered the stated factual basis of the finding of the USITC that domestic prices for Atlantic salmon in the United States had fallen up to a third or even more between mid- to late 1988 and the end of 1989. As indicated in the text of the USITC's determination, in making this statement the USITC had relied upon public information on prices in the US market and on price data gathered on the basis of responses to questionnaires. While these figures appeared to support the finding by the USITC regarding the extent of the decline of domestic prices in 1988 and 1989, the Panel noted Norway's argument that the data presented in these figures could not be properly relied upon in an analysis of the effects of imports on domestic prices because these data pertained not to US domestic prices but to combined US/Canadian prices. The Panel observed that this information had not been the only source relied upon by the USITC; the USITC had also relied upon price data obtained through responses to questionnaires. Unlike the published price information, the responses to these questionnaires had provided data specifically on US domestic prices. The Panel reviewed the data derived from these questionnaire responses and found that it was factually correct.

The Panel then examined the factual basis of the finding of the USITC that "prices for the like product closely tracked prices for Norwegian Atlantic salmon over much of the period" and that "... until late 1990 prices for Norwegian and US Atlantic salmon followed a very similar pattern.".[53] The Panel noted that the Annex to the determination by the USITC contained the following statement on the pattern of prices of domestic and imported Atlantic salmon: "US/Canadian and Norwegian price trends for Atlantic salmon were similar from mid-1988 through mid-1989 (figures 5-7). In 1990, the two trends began to diverge, and US/Canadian prices seem to have followed Chilean Atlantic salmon prices more closely."[54]

[53]USITC Determination, p.19 and p.20.
[54]USITC Determination, p.A-55.

The Panel considered that the data supported this statement. In particular, these data indicated that the two price trends had begun to diverge only in 1990, with Norwegian prices increasing and domestic prices decreasing. The Panel therefore considered that the findings of the USITC on the similarity of the price trends of domestic and Norwegian Atlantic salmon "over much of the investigation period" were based on positive evidence.

With respect to the link between imports from Norway and the development of domestic prices, the Panel observed that the USITC had referred to several factors in explaining its finding that the imports of Atlantic salmon from Norway had played a role in the decline of domestic prices. Firstly, the USITC had pointed out that the decline in US prices for Atlantic salmon in 1988 and 1989 was due in large part to the oversupply in the US market, and that imports from Norway had accounted for a large portion of the increased imports in 1989. Secondly, the USITC had noted that, while Norwegian Atlantic salmon was generally sold at prices higher than domestic Atlantic salmon, imports of Atlantic salmon from Norway had nevertheless had a depressing effect on domestic prices because of the high degree of substitutability of domestic and Norwegian Atlantic salmon, which the USITC characterised as a "near commodity type product". The Panel found that the USITC's statement regarding the proportion of the increased volume of imports of Atlantic salmon in 1989 accounted for by imports from Norway was supported by the data before the USITC. The Panel also noted that in 1989 imports of Atlantic salmon from Norway had accounted for 62.5 per cent of the US domestic market by value and for 60.2 per cent of the US domestic market by quantity. Furthermore, Norway had not contested the factual correctness of the USITC's statement that domestic and Norwegian Atlantic salmon were highly substitutable.

The Panel then turned to the arguments presented by Norway to contest the legal and factual sufficiency of the USITC's finding that imports of Atlantic salmon from Norway had contributed to price depression in the US market.

The Panel considered that the fact that domestic prices were lower than prices of imported products did not *per se* preclude a finding under Article 3:2 that the imports had a significant depressing effect on domestic prices. The USITC had not ignored the fact that prices of Atlantic salmon imported from Norway were generally higher than prices of domestic Atlantic salmon but had found that, because of the high degree of substitutability of domestic and imported Atlantic salmon, this did not mean that the imports had not depressed domestic prices. The Panel further considered that the fact that domestic prices in the United States had fallen after mid-1990 while prices of imports from Norway had risen, did not invalidate the finding of the USITC that domestic prices had closely tracked Norwegian prices "over

much of the [investigation] period". This divergent price movement had occurred during a relatively short period in the period of investigation (1987-1990). The Panel noted Norway's argument that the fact that Atlantic salmon was a highly substitutable product implied that imports from third countries, rather than the higher priced imports from Norway, had depressed domestic prices in the United States. However, the Panel considered that when products sold at different prices were substitutable this did not necessarily imply that consumers would buy the lower priced product. Rather, substitutability meant that an expansion of supply of either product would affect prices of the products for which this product could be substituted. In this respect the Panel noted the increase in the absolute volume of imports of Atlantic salmon from Norway in the United States from 1987 to 1989. The Panel further observed that, while it was factually correct that imports from third countries had increased over the investigation period, in each of the calendar years covered by this period Norway had been the biggest supplier to the US market. The Panel considered that Article 3:2 did not require, as a condition of a finding of significant price depression by imports under investigation, that the authorities determine that the suppliers in question were price leader in the market. Therefore, Norway's argument regarding the possible effect of imports from third countries on prices of imports of Atlantic salmon from Norway did not detract from the fact that the USITC's finding of significant price depression was based on positive evidence. The Panel noted that Article 3:2 treated price undercutting and price depression as separate possible effects of imports on domestic prices, without giving any greater weight to either of the two. The fact that the USITC's determination did not indicate whether the declines of domestic prices had been preceded by price undercutting by the imports from Norway, therefore did not mean that the USITC's finding of significant price depression by the imports from Norway was not based on positive evidence.

In light of the foregoing considerations, the Panel concluded that the finding of the USITC that imports of Atlantic salmon from Norway had a significant price depressing effect in the US market was not inconsistent with the obligations of the United States under Articles 3:1 and 3:2 of the Agreement.

4. Causal relationship: Norway based this claim on three main grounds.

- In making this determination the USITC had failed to ensure that injuries caused by factors other than the imports from Norway were not attributed to these imports.
- The USITC had failed to demonstrate that material injury was caused to the domestic industry in the United States by the imports of Norway "through the effects of dumping".

(a).Whether dumped imports the only cause of injury to domestic industry: Norway argued that any material injury to the domestic Atlantic salmon industry in the United States was caused by factors other than imports from Norway. In this connection, Norway mentioned the significant increase of the volume of imports of Atlantic salmon from third countries, increased supplies of substitute products, and internal problems in the United States domestic industry such as the inability of domestic producers to market Atlantic salmon on a year-round basis. These factors had been raised in the proceedings before the USITC but had been disregarded by the USITC in its determination. According to Norway, the treatment of these factors by the USITC was inconsistent with Article 3:4, which required that in order to demonstrate that dumped imports were causing material injury to a domestic industry, investigating authorities carry out a "thorough examination" (rather than a mere consideration) of all possible causes of material injury to the domestic industry and "isolate" and "exclude" the effects of such other possible causes of injury from the effects of the imports under investigation.

According to the US the USITC had explicitly considered the alternative factors mentioned by the Norwegian respondents and determined that, while these factors might have had an adverse impact on the industry, material injury was caused by the imports from Norway. In the view of the United States, Article 3:4 of the Agreement did not require that imports under investigation be "the" or the sole cause of material injury. Nor did this provision require investigating authorities to carry out a thorough examination of all possible causes of injury in order to exclude injury caused by factors other than imports under investigation.

Panel found that, as a matter of fact, the USITC had not "disregarded" possible other causes of injury. The USITC had expressly recognised that some of these factors might have "adversely affected" the domestic industry but that this did not detract from the fact that material injury was (also) caused by the imports from Norway subject to investigation. According to the Panel, the primary focus of the requirement in Article 3:4 of a demonstration of a causal relationship between imports under investigation and material injury to a domestic industry was on the analysis of the factors set forth in Articles 3:2 and 3:3, i.e. the volume and price effects of the imports, and their consequent impact on the domestic industry. Under Article 3:4 the USITC was required not to attribute injuries caused by other factors to the imports from Norway. In the view of the Panel this did not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the USITC should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by these factors from the injury caused by the imports from Norway. Rather, it meant that the USITC

was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports. The Panel noted in this respect that Norway had argued that any material injury to the domestic Atlantic salmon industry in the United States was caused by factors other than imports from Norway, including (i) the significant increase in the volume of imports of Atlantic salmon from third countries; (ii) the effects of the increased supplies of substitute products, and (iii) the effects of internal problems in the domestic industry in the United States. The Panel considered on the basis of this examination of the data contained or referred to in the USITC Determination with regard to these alternative causes of material injury mentioned by Norway, that the USITC had not failed to conduct an examination of these factors sufficient to ensure that it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports. The Panel concluded, in the light of the foregoing considerations, that the analysis by the USITC of factors other than the imports from Norway under investigation was not inconsistent with the obligations of the United States under Article 3:4 of the Agreement.

(b). Whether injury the "effect" of dumping: Another issue in this case was whether material injury was caused by the imports from Norway "through the effects of dumping". Norway claimed that the USITC's affirmative final determination of injury in the case was inconsistent with the obligations of the United States under Article 3:4 because the USITC had not determined whether material injury was caused by the imports from Norway "through the effects of dumping". Norway's argument was essentially that, in order to give effect to the phrase "through the effects of dumping" in the first sentence of Article 3:4, this sentence had to be interpreted to require that the injury analysis extend to factors other than those described in Articles 3:2 and 3:3. As an example of an additional element the consideration of which was required to give effect to the phrase "through the effects of dumping", Norway had mentioned the margin of dumping found in a given case. The United States had argued that footnote 4 to Article 3:4 defined "the effects of dumping" in the first sentence of Article 3:4 as the effects of the imports under investigation, as described in Articles 3:2 and 3:3 of the Agreement. Under this interpretation, in order to give effect to the phrase "through the effects of dumping" it was not necessary to analyse any factors other than the effects of the imports as set forth in Articles 3:2 and 3:3. The Panel considered that the key legal question in this respect concerned the relationship between the term "through the effects of dumping" and the effects of dumped imports described in Articles 3:2 and 3:3. Under the interpretation presented by Norway, the Agreement required an analysis

in each case of whether and how the effects of the imports under Articles 3:2 and 3:3 were the "effects of dumping"; under the interpretation advanced by the United States, the effects of the imports under Articles 3:2 and 3:3 by definition were the "effects of dumping". The Panel noted that, if the text of footnote 4 was included in the first sentence of Article 3:4, this sentence could be rewritten as follows: "It must be demonstrated that the dumped imports are, through the effects as set forth in paragraphs 2 and 3 of this Article of dumping, causing injury within the meaning of this Agreement." What needed to be demonstrated according to this sentence was that "the dumped imports are causing injury within the meaning of this Agreement". This demonstration required an analysis of the "effects as set forth in paragraphs 2 and 3 of this Article of dumping". In other words, dumped imports cause injury through the effects described in Articles 3:2 and 3:3. However, this sentence did not state that it must be demonstrated that "the effects as set forth in paragraphs 2 and 3 of this Article" are "the effects of dumping". Rather, it defined "the effects of dumping" as the effects described in Articles 3:2 and 3:3, i.e. the volume and price effects of the dumped imports and consequent impact of these imports on the domestic industry. The Panel noted Norway's argument that, if Article 3:4 required only an analysis of the effects of imports under Articles 3:2 and 3:3, there would be no distinction between the determination of the existence of material injury and the determination of the cause of injury. The Panel considered that the principle of effective treaty interpretation required that effect be given to the entire term "through the effects as set forth in paragraphs 2 and 3 of this Article of dumping." Moreover, Article 3 did not treat the factors set forth in Articles 3:2 and 3:3 only as indicia of the existence of material injury but also as indicia of a causal relationship between the dumped imports and material injury to a domestic industry. The text of the first sentence of Article 3:4 made it clear that "the dumped imports" were at the centre of the causation analysis required under this provision. Therefore, Article 3 did not treat "the effects of the dumping" as the cause of material injury and the effects of the imports under Articles 3:2 and 3:3 as mere indicators of the existence of material injury.

The Panel concluded that by treating the "effects of dumping" in the first sentence of Article 3:4 to mean the effects of dumped imports, set forth in Articles 3:2 and 3:3, the USITC had not acted inconsistently with the obligations of the United States under Article 3:4.

4.VIOLATION OF ARTICLE 9.1

Norway claimed that the continued imposition of the anti-dumping duty order was inconsistent with the provision in Article 9:1 that "an anti-dumping duty shall remain in force only as long as, and to the extent necessary to counteract dumping which is causing injury." According to Norway, the United States was under an obligation to terminate the anti-dumping duties on imports of Atlantic

salmon from Norway because, at the time of the affirmative final determination of injury by the USITC no material injury was caused to the domestic industry in the United States by imports from Norway and, imports of Atlantic salmon from Norway were no longer causing any present material injury to this industry. The United States contended that Norway was factually incorrect in contending that at the time of the final determination by the USITC no material injury to the domestic industry in the United States had been caused by the imports from Norway. Regarding events occurring subsequent to the imposition of the anti-dumping duty order, the United States argued that Norway could seek a review by the investigating authorities of the United States of the need for the continuation of this anti-dumping duty order. According to the United States lack of injury following the imposition of anti-dumping duties was not surprising since the Agreement presumed that these duties might remove the injury caused to the domestic industry by these imports.

The Panel noted that 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. An interpretation of Article 9 consistent with other provisions of the Agreement required that in considering whether a Party was acting inconsistently with Article 9:1, account be taken of the effect of the imposition of the anti-dumping duties. Therefore the Panel concluded that the continued imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway was not inconsistent with the obligations of the United States under Article 9:1 of the Agreement.

COMMENT ON THE CASE

This case is important for many reasons. Three issues raised in the case became the source of new provisions in the Uruguay Round Agreement. First of all on the issue of verification wherein Norway claimed that in order to answer to the questionnaires it needed to have access to computers. Pointed to the deficiency in the Code in this regard Panel noted that there was no provision in the Agreement which specifically addressed the question of the type of technical aspects of questionnaire and verification procedures raised by Norway. The Panel pointed out, however, that Article 6:8 of the Agreement could be relevant in this context. If investigating authorities made their findings in a particular case "on the basis of the facts available" within the meaning of Article 6:8, a review by a panel of whether the authorities had acted within their rights under this provision could take into account as a relevant factor the nature of the information requirements imposed by the investigating authorities on respondents.

Under the Uruguay Round Antidumping Agreement Annex II has been added laying down rules for "Best Information available in terms of Paragraph 8 of Article 6". Para 2 of the Annex provides that," The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble."

Another important deficiency which came into light was absence of rules on sampling. Article 6.10 of the Uruguay Round Antidumping Agreement lays down detailed rules for sampling.

Panel ruling in this case was one of the basis for Horlick and Clarke to conclude that GATT panels have not only "refused to rule on whether Article VI is an exception but they have placed a burden of proof on the complaining party that cannot be met."[55] According to these authors Norway should have proved that the comparisons of weighted-average normal values with export prices on a transaction-by-transaction basis, as made by the Commerce Department, not in theory but in actual circumstances of the case, led to overstatement of the dumping margins. It was argued that while it may actually be possible for a complaining government, in co-operation with its exporters, to calculate the difference between a weighted-average-to-weighted-average comparison and a weighted average normal value or export price on a transaction-by-transaction basis comparison, this is not the case for a comparison with a transaction-to-transaction method. This is because domestic and export sales will never have been made in a perfectly symmetrical manner and there will therefore always be days where export sales were made while no comparable sales were made on the same day in the home market. The complaining government will have no way of knowing which days the importing country authorities then would have

[55] G.Horlick and P. Clarke, *Standards for Panels Reviewing Anti-Dumping Determination under the GATT and the WTO,* in E.-U. Petersmann, *International Trade Law and the GATT/WTO Dispute Setllement System,* at 16 (1997),. Referred in Edwin Vermulst and Nario Komuro, *Antidumping Disputes in the GATT/WTO:Navigating Dire Straits,* Journal of World Trade, 31(1)5-33, 1997.

used had they adopted a transaction-to-transaction method. Therefore it was contended that apart from the onus of proof issue this aspect of the Panel decision was ill-considered on pure procedural fairness grounds.[56]

However the wording of Article 2.4(2) has been revised and "future Panels are likely to hold that, if importing country authorities deviate from he general principle of either comparing weighted-average-to-weighted-average or comparing transaction-to-transaction, the burden of proof of justification for such deviation rests with them."[57]

Another important decision of the Panel was regarding the causal link. Panel held that the investigating authority need not examine that dumped imports are the only cause of injury. What it had to examine that dumping was one of the causes of injury and while determining the amount of liability the injury caused due to other causes had to be deducted. The decision has been overruled by the Appellate body in the case of *United States- Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*[58] and it has been held that the investigating authority has to find that dumping is the only cause of injury for the purpose of antidumping measures.

KOREA - ANTI-DUMPING DUTIES ON IMPORTS OF POLYACETAL RESINS FROM THE UNITED STATES[59]

The dispute before the Panel concerned the imposition by Korea an antidumping duty on imports of Polycetal resins (PAR) from the United States and Japan. While earlier the Korean market for PAR was served entirely by imports later on Korea Engineering Plastics ("KEP") began producing PAR mainly for domestic market. The production and market share of KEP increased with concomitant decrease in the share of imports from the US and Japanese companies. The prices of both imported and domestically produced PAR declined. KEP after further increasing its production capacity filed an antidumping petition against the US and Japanese producers. The Korean Trade Commission ("KTC") made an affirmative finding of injury as defined in Art. 10-1 of Customs Act.[60]

---

[56] Edwin Vermulst and Nario Komuro, *Antidumping Disputes in the GATT/WTO:Navigating Dire Straits*, Journal of World Trade, 31(1)5-33, 1997.

[57] *ibid.* at 21.

[58] WT/DS184/AB/R adopted on 24 July 2001

[59] Report of the Panel ADP/92 adopted by the Committee on Anti-Dumping Practices on 2 April 1993.

[60] Article 10-1 of the Customs Act was as follows: "In cases where the importation of foreign goods for sale at a price lower than the normal value causes or threatens to cause material injury to a domestic industry or materially retards the establishment of a domestic industry (hereinafter in this Article referred to as "material injury, etc."), if deemed necessary to protect the domestic industry concerned, a duty may be imposed ... ".

ISSUES: The case was related to determination of injury by Korean investigating authority. Speicifucally following issues were involved:

- There was no clear indication regarding the nature of injury. Whether determination was made regarding present material injury, threat of material injury or material retardation in the establishment of industry.
- Whether there was sufficient basis of determination of injury.

1. THE NATURE OF INJURY

US alleged that KTC failed to state whether determination was based on a finding of present material injury, threat of material injury or material retardation of the establishment of an industry which meant that demonstration of a causal relationship between dumped imports and injury as required under Article 3:4 was not possible.

Korea pointed out that, although the different bases for the KTC's affirmative determination had not been stated expressly in this determination, it was clear from the reference made by the KTC to "material injury, etc. as defined in Article 10-1 of the Customs Act" that the KTC's determination had encompassed affirmative findings on all three standards of injury and it was clear from the text of the determination where the analysis relevant to the findings on each of these alternative standards could be found. Korea also argued that the transcript of the voting session of the KTC clearly indicated the separate opinions of each of the four KTC Commissioners who had voted in the affirmative.

Panel held that while it could be inferred from the text that the determination had involved a consideration of factors and evidence relevant to all three standards of injury, the section of the determination which examined the existence of a causal relationship between the imports and injury to the domestic industry did not distinguish between the questions of present material injury, threat of material injury and material retardation of the establishment of a domestic industry. Panel further held that if it was argued that the KTC had made a finding of injury based simultaneously on all three standards of injury, it would necessarily mean that KTC's statement was internally contradictory because the KTC could not logically have found that a domestic industry was being injured by dumped imports (which presupposed that such an industry was already established) and at the same time that the establishment of a domestic industry was materially retarded by those imports. Therefore the Panel concluded that since KTC's injury determination did not contain specific conclusions on each of the three standards of injury discussed in the determination and it did not explain the relationship between the

analysis of these injury standards therefore it was inconsistent with Korea's obligations under Articles 3 and 8:5 of the Agreement.

2. INSUFFICIENT BASIS FOR THE DETERMINATION OF INJURY

(a).Present material injury: US contended that in so far as the determination was the result of a finding of present material injury, the determination was inconsistent with Korea's obligations under Articles 3.1, 3.3 and 3.4 of the Agreement because of the KTC's failure to base its findings on positive evidence, the lack of an objective examination of certain factors and the attributive to the imports under investigation of effects caused by other factors.

Korea submitted that the KTC's finding of present material injury was based on positive evidence of the relevant factors under Article 3. Korea considered that the KTC had properly relied upon factors such as the deterioration of the financial condition of the domestic industry and the increase in inventories. According to Korea, the arguments of the United States amounted to a simple disagreement with the KTC's view on the significance of certain factual evidence before it.

Panel noted that the discussion in the KTC's determination of the condition of the domestic industry included as relevant indicators the industry's capacity utilisation, inventories, sales and market, the evaluation of domestic prices, sales revenue and net profit. While capacity utilisation had improved and there was an increase in the inventories , KTC found that there was substantial loss of sales revenue. United States contended that KTC's conclusion on substantial loss of sales revenue was not based on positive evidence because the KTC had failed to take into account the impact of the increased volume of sales on the sales revenue of the domestic industry. According to the US, had the KTC examined both elements of sales revenue, i.e. prices and volume of sales, it would have found a substantial gain in sales revenue. US contended that the KTC's disregard of the volume of sales in its examination of sales revenue reflected the KTC's presumption that it was normal for the domestic industry to gain market share in a market that was in a process of import substitution.

Panel held that sales revenue logically was a function of both prices and volumes of sales. Therefore, the evidence on declining revenue logically was a function of both prices and volumes of sales. Therefore the evidence on declining domestic prices by itself could not constitute positive evidence to conclude that there had been an actual substantial loss in sales revenue over the investigation period. Panel noted that while volume of sales has consistently increased, sales decreased by 8%. Korea had contended that without the price effects of the dumped imports, the industry's sales revenue would have

been higher. Panel held that this argument required an examination of the volume of sales. According to the Panel the apparent failure of the KTC to consider the impact of sales volume on sales revenue meant that the determination did not provide sufficient reasoning as to the connection between the KTC's reference to the decline in domestic prices and the KTC's finding on the substantial loss of sales revenue. Therefore, the Panel concluded that the KTC's finding of a substantial loss of sales revenue could not be considered to have been adequately substantiated by positive evidence and was therefore inconsistent with Korea's obligations under Article 3:1 of the Agreement.

With regard to the KTC's reliance on profits as an indication of present injury to the domestic industry the US argued that, in so far as the KTC had found that the net profit realised by the industry was insufficient to cover investments and generate reserves for the industry's future development and growth, that finding could not support a finding of present material injury. US contended that there was no evidence that the industry had in fact been prevented from undertaking planned expenditures.

According to Korea the reference in Article 3:3 to the concept of "growth" meant that consideration could be given to an industry's ability to generate sufficient funds for research and development. Panel noted that the key element in the KTC's evaluation of the net profit as an indicator of injury to the domestic industry was that this profit did not permit the industry to maintain "normal operations and development". Panel further held that it could not be inferred from the text of the determination how and to what extent the KTC had evaluated the information in finding that the level of profit was insufficient to permit the industry to maintain normal operations and development.

Similarly on the question of the KTC's use of increase in inventories as an indication of Panel held that there was no clear statement in the determination indicating that the KTC had found that the increase in inventories was not only caused by the industry's need to produce at full capacity and by the evolution of sales in the investigation period but also by the effects of the imports.

(b). Threat of Material Injury: Regarding threat of material injury, the United States claimed with regard to the inadequacy of the analysis in the KTC's determination as a basis for a finding of a threat of material injury was that this analysis did not include a consideration of whether there was a clearly foreseen and imminent change of circumstances, as required under Article 3:6.

The Panel observed that apart from the requirements of Article 3:1 regarding positive evidence and an objective examination of certain factors, a determination of a threat of material injury was in particular

subject to the requirements of Article 3:6. According to the Panel it followed from the text of Article 3:6 that a proper examination of whether a threat of material injury was caused by dumped imports necessitated a prospective analysis of a present situation with a view to determining whether a "change in circumstances" was "clearly foreseen and imminent". In light of the interpretation of Article 3:6 the Panel then examined whether the KTC's determination included an analysis of relevant future developments regarding the condition of the domestic industry and the volume and price effects of the imports under investigation. Panel noted that the text of the KTC's injury determination indicated that the KTC had analysed the likely condition of the domestic industry in the future.

With regard to the argument of United States that the analysis of the projected performance of the domestic industry was inconsistent with Article 3 because of the exclusion by the KTC of "favourable market forces that are beyond the domestic industry's control, Panel noted that under Article 3:3 while the relative weight to be accorded to each of these factors depended upon the circumstances of each particular case, the overall context of an analysis of the specific factors mentioned in Article 3:3 was that of "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The wording of Article 3:3 did not support the view that factors which were beyond the industry's control were, by definition, not "relevant economic factors and indices having a bearing on the state of the industry". The Panel therefore considered that insofar as the KTC's decision not to take account of factors such as declining costs of materials was based on the ground that such factors were beyond the domestic industry's control, the KTC had failed to evaluate relevant economic factors and indices having a bearing on the state of the industry. In this respect, the KTC's examination of the "projected performance" of the domestic industry was inconsistent with Korea's obligations under Article 3:3 of the Agreement.

Panel noted that there was no discussion in the text of the KTC's determination of the likely evolution of the volume of imports under investigation as part of an analysis of whether these imports constituted a threat of material injury. In this connection, the Panel noted Korea's argument that the capacity of the foreign producers to supply the Korean market was one of the factors supporting an affirmative finding of a threat of material injury. Korea argued that the respondents had the capacity to supply 100 per cent of the demand in the Korean market, that in the past they had supplied 100 per cent of the demand in the Korean market, and that there was no evidence that they would not again seek to do so in the absence of

competition from the domestic producer in Korea. Panel noted that the text of the KTC's determination did not discuss the foreign producers' capacity to supply the Korean market.[61]

Panel noted that this analysis of the price effects of the imports was retrospective in nature. Based on an examination of price developments over the investigation period, the KTC had concluded that "the import price caused the domestic price to be suppressed and depressed". The Panel found nothing in this analysis indicating how the KTC had considered the likely future price effects of the imports under consideration as part of an analysis of a threat of material injury caused by the imports under investigation.

The Panel concluded that, by reason of the lack of any prospective analysis of developments regarding the volume and price effects of the imports under consideration, the KTC's injury determination, to the extent it was based on an affirmative finding of a threat of material injury caused by the imports subject to investigation, was inconsistent with Korea's obligations under Articles 3:1 and 3:6 of the Agreement.

Therefore the Panel concluded that the KTC's examination of the projected performance of the domestic industry was inconsistent with Article 3:3 because of the KTC's treatment of favourable market forces beyond the control of the domestic industry such as declining costs of materials and interest rates. The determination did not include an examination and evidence of the future evolution of the volume of imports and price effects of these imports. Therefore, according to the Panel if the KTC's determination involved a finding of a threat of material injury caused by the imports subject to investigation, that finding was inconsistent with Articles 3:1, 3:3 and 3:6 of the Agreement.

(c). Material retardation in the establishment of industry: On the issue of material retardation in the establishment of industry the United States argued that the statement in the KTC's determination that the domestic industry "does not seem to have attained stable operations (a reasonable break-even point)"[62] was contradicted by other statements in the determination and in the KTC staff report. The United States contended it was illogical to treat a producer as not being an "established" industry where

[61] The Panel noted, however, that had the text of the determination reflected a reliance by the KTC on foreign producers' capacity to supply the Korean market, it would have been necessary to decide whether a reference to the capacity of foreign producers to supply the Korean market, rather than the likelihood that such capacity would actually be used to increase supplies to that market, was consistent with Article 3:6 of the Agreement. While Korea had argued that reliance on capacity of foreign producers to supply the Korean market was consistent with the Recommendation of the Committee on Anti-Dumping Practices, this Recommendation provided for the consideration of whether there existed "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."[61] This indicated that capacity *per se* was not a sufficient factor in considering the likelihood of increased import volumes.

[62] Report of the Panel para 292.

that producer had become the single dominant producer and accounted for a majority of all sales in the market. In addition to finding that the industry was not yet established, the KTC was required to find that the establishment of the industry was materially retarded, and that the imports caused such material retardation. However, the KTC's determination did not contain such findings.

Korea argued that the finding of the KTC that the domestic industry had not attained "stable operations" was not in contradiction with other statements in the determination. According to Korea given that the domestic producer had only recently entered the market and in view of the poor financial results of that producer in the first two years, the KTC had properly found that the domestic industry was not established The role of imports subject to investigation in causing material retardation of the establishment of the industry was dealt with in the determination. Finally, the data on the profits of the industry in the full year 1990 were taken from the audited financial statement of the producer submitted to the KTC and were part of the record.

The Panel noted Korea's arguement that the KTC's finding that the domestic industry had reached "normal operations" did not mean that the KTC had found that the industry was established. According to Korea the statement of the KTC that the industry had reached "normal operations" meant that the industry's production operations had reached their normal level but not that the industry was established in the sense of being "viable".

It appeared to the Panel that the argument of the United States on the inconsistency of the KTC's finding that the industry had not attained "stable operations" with the statements of the KTC would be well founded if this finding pertained to the industry with a production capacity of 10,000 tons. The Panel noted that the text of the KTC's determination was not entirely clear on this point. According to the Panel since at the beginning of the section on material retardation the KTC had noted that "the domestic industry currently has a total production capacity of 20,000 tons", the statement by the KTC that the industry did not seem to have attained "stable operations" could be read to pertain to a production capacity of 20,000 tons. According to the Panel if read in this manner, this statement was not in contradiction with the statement earlier in the determination that the industry had reached "normal operations" and with information in the KTC staff report.

Regarding US argument that in its discussion of material retardation the KTC had relied upon data regarding the financial condition of the industry in the full year 1990 whereas for other indicators the KTC had only examined data for the period 1 January 1989-31 March 1990, Panel noted that while the

time frame used by the KTC in its analysis of certain indicators of material retardation of the establishment of an industry included the full year 1990, the section of the KTC's determination which discussed the causal relationship between the imports under investigation and injury to the domestic industry only covered the period 1 January 1989-31 March 1990. Panel noted that the causation section of the KTC's determination did not specifically discuss the role of the imports under investigation in causing material retardation of the establishment of a domestic industry. However, if as argued by Korea the analysis in this section was to be read as also pertaining to the role of the imports under investigation in causing material retardation of the establishment of a domestic industry, the discrepancy between the time frame for the consideration of certain indicators of material retardation and the time frame for the consideration of the volume and price effects of the imports under investigation meant that this analysis could not be said to provide a proper basis for finding that material retardation of the establishment of an industry was caused by the imports under investigation. The Panel therefore concluded that, leaving aside the issue of the factual basis of the KTC's findings on the financial losses in 1990 and on the increase in inventories after the first quarter of 1990, the KTC's determination was inconsistent with Article 3:4 of the Agreement insofar as it was based on a finding of material retardation of the establishment of a domestic industry. The Panel however noted that under the "break-even" analysis performed by the Korean authorities it seemed possible to find material retardation of the establishment of an industry whenever an industry expanded its production capacity of the like product. The Panel concluded that, to the extent the KTC's determination was based on a finding of material retardation of the establishment of a domestic industry, this determination was inconsistent with Korea's obligations under Articles 3:4 of the Agreement.

Therefore the Panel concluded that the KTC's determination of injury in respect of imports of polyacetal resins from the United States was inconsistent with Articles 3 and 8:5 of the Agreement because of the absence of specific conclusions in respect of each of the standards of injury discussed in its determination and the lack of explanation of the relationship between the KTC's analyses under these standards. Panel further concluded that the KTC's finding that there was present material injury to a domestic industry in Korea was inconsistent with the requirement of positive evidence under Article 3:1 of the Agreement in that the determination did not provide sufficient reasoning as to the connection between the reference to the decline of domestic prices and the KTC's finding of a substantial loss of sales revenue and did not enable the Panel to determine how the KTC had evaluated the information before it in finding that the net profit of the industry in 1989 was insufficient. The finding was also inconsistent with Article 3:4 of the Agreement because of the KTC's failure to explain the role of the imports under investigation as a cause of the increase in inventories. Panel next concluded that insofar

the KTC's affirmative determination included a finding of a threat of material injury caused by the imports under investigation, that finding was inconsistent with Article 3:3 of the Agreement because of the KTC's treatment of factors beyond the control of the domestic industry, such as declining costs of materials and interest rates, and inconsistent with Articles 3:1 and 3:6 because of the apparent lack of a prospective analysis of the volume and price effects of the imports under investigation. Panel held that KTC's affirmative determination included a finding of material retardation of the establishment of an industry, that finding was inconsistent with Article 3:4 of the Agreement because of the discrepancy between the time frame for the consideration of profits and inventories and the time frame for the consideration of the volume and price effects of the imports under investigation.

COMMENT ON THE CASE

Panel ruling in the case tightened the rules regarding determination of injury. The ruling reinforced the purpose of Article VI and the Code, that, antidumping duties should be imposed only to protect the domestic industry against injury. The requirement of injury justifies the necessity for the imposition of antidumping duties, it is not merely a procedural requirement. Therefore it cannot be interpreted to justify an action in which the investigating authorities are free to find any type of injury present, future or material retardation in the establishment of industry. Panel rightly held that such a provision is internally contradictory, as present material injury and material retardation in the establishment of injury cannot be found at the same time.

EC - IMPOSITION OF ANTIDUMPING DUTIES ON IMPORTS OF COTTON YARN FROM BRAZIL[63]

The case concerned with the imposition of antidumping duties on cotton yarn from Brazil by the European Communities. In this case during the investigation period for dumping the official exchange rate between the cruzado and the United States dollar was temporarily frozen by the Brazilian authorities for January, February and March. In April, May and June 1989, the cruzado was allowed to depreciate gradually. For the rest of 1989, the cruzado depreciated more freely against the dollar. In its calculations the EC used the official cruzado to United States dollar exchange rates published by *Fundacao do Instituto Brasileiro de Geograpfia e Estatistica* (FIBGE), a public organisation linked to the Brazilian Ministry of Planning. The EC made its dumping calculation for the three sampled exporters by comparing each export transaction with an average monthly normal value expressed in

[63] ADP/137, Report of the Panel adopted on 4 July 1995.

cruzados; for one company (Kanebo), the EC used actual returns in cruzado, and for the other two it used end-of-month official exchange rates for the dumping calculation. For October, November and December 1989, the EC calculated normal values for Nisshinbo and Kanebo on the basis of costs of production, on the grounds that domestic sales in those months had not been made in the ordinary course of trade. Brazil requested the Panel to find that the EC, in imposing and maintaining anti-dumping duties on imports of cotton yarn from Brazil, had violated the following provisions of the Agreement:

- Article 2:4, by failing to consider the particular market situation prevailing in Brazil;
- Article 2:4 by incorrectly determining that certain domestic sales were not made in the ordinary course of trade;
- Article 2:6, by failing to effect a fair comparison between normal value and export price;
- Articles 3:1 and 3:2, by not basing the injury findings on "positive evidence", and not making an objective examination of the relevant facts;
- Articles 3:2, 3:3 and 3:4, by not giving a reasonable explanation of how the facts supported the injury determination;
- Articles 3:2, 3:3 and 3:4, by failing to take into account that quotas agreed under the bilateral textile agreement precluded a finding of injury, especially in light of the provisions of Article 13;
- Article 3:2 in combination with Article 8:2, by discriminating against Brazilian exporters;
- Article 13, by not giving due consideration to the status of Brazil as a developing country.

1. DETERMINATION OF DUMPING

(a). Failure of consideration of Particular Market situation by the EC: Brazil claimed that the EC had failed to properly consider the particular market situation prevailing in Brazil and had thereby acted inconsistently with Article 2:4. Brazil noted that due to very high inflation, the Brazilian Government froze the exchange rate in an attempt to decrease the money supply and to control inflation which continued for a period of three months alongwith the continuation of domestic inflation. Receipts from export sales when converted into Cr$, remained stable. Following the unfreezing of the exchange

rate, the Cr$ depreciated. Brazil argued that this combination of a fixed exchange rate and domestic inflation led to a gross distortion in the comparison between domestic prices (when used as the basis of normal value) and export prices, and this resulted in an inflated dumping margin. Brazil contended that when the EC determined normal value based on domestic sales prices, the EC had acted inconsistently with the Agreement. The EC had based normal value on domestic sales prices because the EC had misinterpreted the phrase "particular market situation" in Article 2:4 to mean circumstances having an impact only on the sales in the domestic market of the exporting country and had decided that the exchange rate freeze was irrelevant to the determination of normal value. Brazil argued the phrase "particular market situation" in Article 2:4 was not limited to the situation in the domestic market, but included external factors. Brazil further argued that Article 2:4 was also concerned with ensuring a "proper comparison" with the export price. Brazil argued that the requirement of "proper comparison" in Article 2:4 also applied to the choice between constructed normal value or third country sales as alternative methods for establishing normal value. Where the external factors were such that a proper comparison with a normal value could not be achieved on the basis of one of the alternative methods set down in Article 2:4, but a proper comparison could be obtained by the use of the other method provided for in that Article, that other method must be used. Brazil said that where the EC had used constructed normal values in this investigation and had then compared those normal values with the export prices it had breached Article 2:4 as this comparison did not "permit a proper comparison".

The EC argued that Article 2:4 was concerned with the establishing of normal value in certain cases. The phrase "particular market situation" was not intended to cover both high inflation in the domestic market and "freezing" of the exchange rate. Moreover, a situation occurring outside Brazil could not be considered to be a "particular market situation" under Article 2:4 unless it had an impact on sales made within Brazil. Therefore, the freezing of Brazil's exchange rate would be relevant to the determination of normal value only if the freezing was shown to have had an impact on domestic sales. The EC further argued that the Agreement required that the normal value and the export price must first be determined and *then* be compared. That requirement made clear that the determination of normal value and export price were distinct and separate steps. EC argued if the negotiators of the Agreement had intended that circumstances having an effect on the export market alone could create a "particular market situation", the negotiators would have made clear that in such a situation third country sales should be used as the basis of normal values. This was because the use of a constructed normal value would not eliminate the effect of such external factors in the export market on the domestic market.

Panel held that a "particular market situation" was only relevant insofar as it had the effect of rendering the sales themselves unfit to permit a proper comparison, therefore, Article 2:4 specified that there must be something intrinsic to the nature of the sales themselves that dictates they cannot permit a proper comparison. According to the Panel even if it was assumed that an exchange rate was relevant under Article 2:4, it would be necessary, to establish that it affects the domestic sales themselves in such a way that they would not permit a proper comparison. Since Brazil had not advanced any such argument, therefore, the Panel concluded on the basis of Brazil's submission, that this did not demonstrate that the EC had acted inconsistently with the requirements of Article 2:4. The Panel recalled that Brazil had also argued that if domestic sales were used as the basis of normal value without either an allowance being made pursuant to Article 2:6 for the distorting effect of the exchange rate, or third country sales being used as the basis of normal value, those domestic sales would "not permit a proper comparison" with export prices (under Article 2:4). The Panel understood Brazil's other argument to be that the term "proper comparison" was modified by the requirement that due allowances be made under Article 2:6 and that the EC should have used third country sales as the basis of normal value. In the Panel's view, the obligation in Article 2:6 became operative only after selection of either constructed normal value or third country sales as the basis from which it was then possible to proceed to the determination of the comparable price. The wording of Article 2:6 second sentence dictates this view: "due allowance" can only be made in respect of a basis that has already been established. The words "due allowance" in Article 2:6 made clear that the requirements of the second sentence could not apply to the choice of the basis itself of a comparable price, which is strictly governed by the requirements of Article 2:4. The Panel noted that Brazil had also argued that the EC's decision to construct certain normal values was also in breach of Article 2:4, because the EC had failed to comply with the phrase "... permit a proper comparison" when deciding whether to use a constructed normal value or third country sales as the basis for normal value. The Panel understood Brazil's argument in this respect to mean that for the EC to comply with the phrase "permit a proper comparison", it had to use third country sales as the basis of normal value. In the Panel's view, Article 2:4 provides for two methods that parties can have recourse to in case where there were no domestic sales in the ordinary course of trade or because of the particular market situation such sales would not permit a proper comparison, i.e. third country sales or constructed normal values. Article 2:4 establishes no legal hierarchy between the two alternative methods. Therefore the Panel dismissed Brazil's claim that the EC had failed to properly consider the particular market situation prevailing in Brazil and had thereby acted inconsistently with Article 2:4.

(b). Violation of Article 2:6 of the Code: Brazil next claimed that the EC had violated Article 2:6 of the Agreement because:

it had failed to take into account distortions arising from high domestic inflation combined with frozen exchange rates in comparing normal value and export price. Brazil said that during the first three months of the investigation period the Brazilian Government had frozen the exchange rate and later on the freeze had been lifted, and the Cr$ had depreciated. Brazil argued that in the circumstances of this case, the use of the official exchange rate by the EC in comparing normal value and export price, introduced a gross distortion into the comparison of normal value with export price. The EC had failed to make adjustments to take account of those gross distortions. Brazil said that appropriate adjustments could have been made to the normal value by the use of an alternative (indexed or lagged) exchange rate to the official exchange rate selected by the EC, or by many other methods. Brazil argued that if a difference affecting price comparability was not the subject of an allowance, Article 2:6 would be breached. The EC contended that the Agreement did not require the investigating authorities to take into account exchange rate fluctuations or freezing as such. The EC first had sought to use actual returns received by exporters. Actual returns were used in the case of one exporter from Brazil. When information on actual returns was not provided by the exporter, or could not be identified, official exchange rates were used. The EC argued that the so-called "zeroing" related to a process of averaging the determined dumping margins for each exporter. There was no obligation under the Agreement to take account of so-called "negative dumping margins". Investigating authorities were only required to consider sales which were at less than normal value. Panel held that the objective of Article 2:6 second sentence is, thus, to establish two accurate prices, the amount of which is expressed in the respective currency of each market and is independent of and prior to the application of the exchange rate. The exchange rate in itself is not a difference affecting price comparability. According to the Panel the use of an accurate exchange rate was not, a matter of making an "allowance" for a "difference". In the Panel's view the application of an exchange rate did not amount to the making of a compensatory adjustment in accordance with the ordinary meaning of the word "allowance". Application of an exchange rate to those prices is not a matter of making allowance for a difference but would obviate the need to do so precisely because its purpose and effect would eliminate any such difference. Consequently, the Panel dismissed Brazil's argument that the exchange rate freeze was required to be the subject of a due allowance under the second sentence of Article 2:6.

2. Brazil also argued that the EC's practice of so-called "zeroing"[64] in this case was inconsistent with Article 2:6 in that the EC had failed to make due allowance for a difference affecting price

[64] In "zeroing" the EC established an average normal value for each exporter. It then compared the export price for individual export transactions during that period to that average normal value. When the comparison revealed that the export price was less than the normal value, the EC considered that the exported goods were dumped. When the comparison of the average normal value and the export price revealed that the export price was equal to or greater than the normal value the EC considered that dumping did not occur. After comparison of all export transactions with the average normal value the EC then calculated a

comparability. Brazil argued that in a high inflation environment, high positive and negative dumping margins would occur. As the EC's so-called "zeroing" methodology gave no "credit" for negative dumping, the result was a particularly prejudicial effect on the dumping margin. Brazil argued that the EC's failure to make a due allowance to take account of the effect of the EC's so-called "zeroing" methodology when applied to Brazil's inflationary circumstances resulted in the EC acting inconsistently with Article 2:6. According to the Panel the second sentence of Article 2:6 required that allowances necessary to ensure price comparability be made prior to the actual comparison of the prices, in order to eliminate differences which could affect the subsequent comparison. The Panel considered that "zeroing" did not arise at the point at which the actual determination of the relevant prices was undertaken pursuant to the second sentence of Article 2:6. In the Panel's view, "zeroing" was undertaken subsequently to the making of allowances necessary to ensure price comparability in accordance with the obligation contained in second sentence of Article 2:6. It related to the subsequent stage of actual comparison of prices; a stage which was not governed by the second sentence of Article 2:6. Therefore, the Panel dismissed Brazil's argument that the EC failed to make due allowances for the effects of its so-called "zeroing" methodology.

2. DETERMINATION OF INJURY

(a). Reliability of Data used by the EC- Brazil next claimed that the EC had breached its obligations under Articles 3:1 and 3:2 by not basing its findings of injury on positive evidence and not making an objective examination of the relevant facts. Brazil argued that the data used by the EC as evidence of import volume was unreliable, and thereby did not represent positive evidence of import volume. Brazil made two arguments in support of its claim. Brazil's main argument was that Brazilian export data (hereinafter referred to as "Cacex"), compiled under strict surveillance pursuant to the Arrangement Regarding International Trade in Textiles,[65] showed a much lower volume of exports to the EC than Eurostat data during the years under investigation. Brazil argued that if Cacex data had been used as the basis of import volume, Brazil would have been found to have had *de minimis* import volume.

The Panel noted that Brazil's arguments concerning the incorrectness of Eurostat data related to differences between Cacex and Eurostat data. Cacex data was *export* data. Eurostat data was *import* data. Articles 3:1 and 3:2 required the investigating authorities to consider the effects of the dumped *imports*. Nowhere in Article 3 were investigating authorities required to consider *exports*. The Panel did

---

weighted average margin of dumping for the exporter by totalling the amount of dumping for the individual export transactions and dividing this total by the c.i.f. value of all the export sales of that exporter.

not rule out that export data could be a relevant consideration for doubting the accuracy of import data; this however, could not happen in the absence of other evidence. Accordingly, the Panel dismissed Brazil's arguments based merely on the differences between Eurostat *import* data and Cacex *export* data. Accordingly, the Panel concluded that Brazil had failed to establish that the EC had breached its obligations in Articles 3:1 and 3:2 to base its findings of injury on positive evidence and to make an objective examination of all relevant facts and dismissed Brazil's claim.

(b). Whether facts supported injury analysis: Brazil next claimed that the EC had violated Articles 3:2, 3:3 and 3:4, because the facts stated in an injury analysis must reasonably support the determination that is reached, and the EC's decision was not in conformity with that requirement. The Panel noted that Brazil particularised its claim as that the EC had found Brazil's imports of cotton yarn to be causing injury despite the Brazilian imports of cotton yarn having the lowest level of price undercutting, a finding of a decrease in the volume of Brazilian imports of cotton yarn (in absolute and relative terms), and the fact that the export price in US$ of Brazilian exports was comparatively stable, and actually increased in the investigation period. Brazil argued that the EC had made a manifestly erroneous interpretation of the facts, in that these facts precluded a finding of material injury caused by Brazilian imports. Brazil also argued that when the EC had conducted its analysis of a causal link between Brazilian dumped imports and the injury suffered by the EC industry, the EC had violated Article 3:4 because it had failed to reasonably explain how other causes of injury, particularly numerous non-dumped imports from countries not under investigation had been taken into account. Brazil noted that the EC had determined that the investigation did not reveal any factors other than the dumped imports which caused material injury to the Community industry. Brazil noted that the EC's findings clearly showed the existence of numerous non-dumped imports from countries not under investigation which undercut the Community producer's prices. The EC argued that Articles 3:2 and 3:3 permitted affirmative injury findings to be made even if not all the factors required to be considered were found to be present. The EC argued that it had considered all the factors that it was required to by Articles 3:2 and 3:3.

The Panel noted that Brazil had not argued that the EC's findings of price depression and price undercutting were not properly reached. In the Panel's view Brazil had argued that, as its imports had the lowest level of undercutting, the EC was effectively precluded from finding that Brazil's imports caused injury. Panel held that provided that "effects" (whether volume *or* price effects, *or* both) as provided for in Article 3:2 and relevant economic factors showing that industry was suffering material injury as

[65]The Arrangement Regarding International Trade in Textiles is colloquially known as the Multifibre Agreement, or "MFA".

provided in Article 3:3, were present, and those "effects" were found to have caused the material injury suffered by the local industry, under Article 3:4, the investigating authorities were properly entitled to make a finding that the dumped imports had caused material injury. According to the Panel under Articles 3:2 and 3:4 a finding of an increase in volume of dumped imports by the investigating authorities was not necessary for them to make a finding of material injury caused by dumped imports nor was there any requirement under Article 3:4 that if imports from a particular source had the lowest level of price effects a finding of injury in relation to those imports was precluded. The Panel concluded that whether or not Brazilian imports had increased in volume and whether or not Brazilian imports had the lowest level of price "effects" pursuant to Article 3:2 did not establish that the EC's finding was inconsistent with the Agreement. Therefore, the Panel dismissed Brazil's argument.

The Panel then turned to Brazil's argument that its dumped imports had decreased in volume, and due to that the injury finding was not reasonably supported by the facts. In the Provisional Determination the EC determined that there had been an overall increase in the volume and market share of cumulated dumped imports. The Panel held that provided that one "factor" or type of price effect was established it was not necessary that an increase in volume also be found before the investigating authority could establish whether the dumped imports had caused material injury to the EC industry and the presence of a decrease in volume did not of itself preclude a finding that the dumped imports had caused material injury to the EC industry. Accordingly, the Panel dismissed this argument by Brazil.

The Panel next turned to Brazil's argument that Brazil's export prices were stable during the investigation period, and because of that the facts stated in the injury analysis did not reasonably support the finding made. The Panel recalled that in the Definitive Determination the EC had based its finding of injury caused by the dumped imports on price undercutting. The Panel considered that stable prices could be consistent with the establishment of price effects in accordance with Article 3:2 based on price undercutting. The Panel held that Brazil's argument was not inconsistent with a finding of material injury caused by the price undercutting. Accordingly, the Panel dismissed this argument by Brazil.

The Panel next turned to Brazil's argument that the EC's findings clearly showed the existence of numerous non-dumped imports from countries not under investigation which undercut the Community producers' prices, and due to the existence of those non-dumped imports a finding of injury was not reasonably supported by the facts. Panel noted that in the Provisional Determination the EC had found that there was no evidence of any significant market disruption relating to imports from the only other significant importer not subject to the investigation (Switzerland). The Panel recalled that in this

context, Brazil had also not argued that there were sources of non-dumped imports other than those identified by the EC, nor had it argued that Brazil was not responsible for the injury attributed to it by the EC. The Panel noted that in the Provisional Determination the EC had concluded that the material injury suffered by the EC industry was not caused by any "other factors", and was only caused by the dumped imports. The Panel, therefore, dismissed Brazil's argument related to numerous non-dumped imports.

3.VIOLATION OF ARTICLE 13

Finally Brazil resorted to Article 13 of the Code. Brazil claimed that the EC had breached Article 13 of the Agreement by not giving "special regard" to the "special situation" of Brazil and not exploring the possibility of constructive remedies proposed by Brazilian exporters.

Brazil argued that the obligation to have special regard to special situation of developing countries applied at each stage of investigation process. According to Brazil, Article 13 imposed two obligations;

1. To have special regard to the special situation of developing countries when considering the application of measures under the Agreement and,
2. To explore constructive remedies.

Brazil claimed that the obligation to have special regard to the special situation of developing countries existed at each stage of investigation and the words "... when considering the application of anti-dumping measures..." did not mean that the obligation under Article 13 only arose immediately prior to the imposition of anti-dumping duties. These words should be interpreted to mean at any stage during the investigation process. Therefore, Article 13 interrelated with all the other provisions of the Agreement. The third recital of the preamble to the Agreement were to be taken into account during an investigation. Brazil also argued that the positioning of Article 13, at the end of Part I of the Agreement, was consistent with Article 13 being a statement of general principle. If it was accepted that Article 13 created a broad obligation that applied throughout the investigation process, Brazil argued that in applying the terms of Article 2:6, without having "special regard" to the "special situation" of Brazil, the EC had breached Article 13. This was because the EC failed to give meaningful regard to the special situation of the exchange rate freeze in deciding what due allowances to make. The EC had also failed to adequately explain its failure to take the exchange rate freeze into account. The failure to make adjustments, and to explain why it had not done so had affected the essential trade interests of Brazil.

The second obligation created by Article 13 was to explore possibilities of constructive remedies before applying anti-dumping duties. Brazil said that Article 13 created an obligation to seek out a solution other than the imposition of anti-dumping duties. Brazil also argued that the words "... constructive remedies provided for by this Code ..." were not intended to be limited to a reference to undertakings alone otherwise a cross reference to Article 7 (which dealt with undertakings) would have been inserted. In this context Brazil noted that Part IV of the GATT 1947, required that developed country contracting parties give effect to the principles and objectives stated in Article XXXVI in their dealings with less developed country contracting parties.

EC contended that the first sentence of Article 13 only obligated it to *"consider"* the special situation of the developing country as a whole taking into account the fact that it was a developing country and not any isolated incident. The EC also argued that Article 13 provided that "constructive remedies" must be remedies provided by the Agreement. Therefore "constructive remedies" could only include price undertakings. In addition, the obligation was to consider only the possibility of entering into undertakings. There was no obligation to enter into an undertaking, and the EC had considered the possibility of entering into undertakings. Consequently, it had discharged its obligations under Article 13. EC contended that any obligation contained in the first sentence of Article 13 only arose at the time of consideration of imposition of measures. The word "measures" clearly limited the obligation to the stage following conclusion of an investigation. Article 10 of the Agreement referred to "Provisional measures". The first sentence of Article 10:1 confirmed that the obligation under Article 13 only arose after an investigation. Article 10:2 defined what provisional measures could consist of. Therefore, the obligation of Article 13 first sentence only applied once an investigation was completed, prior to imposition of anti-dumping duty, and not at the stage of investigation of dumping or injury. The second obligation contained in the second sentence only arose when the essential interests of a developing country could be affected by the imposition of anti-dumping duties. Such a situation could arise if dumping duties were imposed by the only purchaser of the only exported product of a developing country. Whilst cotton yarn was an important product for regions of Brazil, cotton yarn was not Brazil's exclusive source of foreign exchange, nor was the EC its only purchaser.

The Panel held that Article 13 should be interpreted as a whole. In the view of the Panel, even assuming that an obligation was imposed by the first sentence of Article 13, its wording contained no operative language delineating the extent of the obligation. Such language was only to be found in the second sentence of Article 13 whereby it was stipulated that "possibilities of constructive remedies

provided for by this Code shall be explored before applying anti-dumping duties where they would affect the essential interests of developing countries". Panel noticed that Art. 13 required two things;

1. that the application of anti-dumping measures "would affect the essential interests of developing countries",
2. if the application of anti-dumping measures "would affect the essential interests of developing countries", the obligation that then arose was to explore the "possibilities" of "constructive remedies".

The Panel was of the view that "essential interests" was defined by its context, like the phrase "special situation of developing countries" in the first sentence of Article 13. The Panel considered that the essential interests of a developing country which could be affected by the imposition of anti-dumping duties could include a strategic industry dependent on export trade. If cotton yarn was such an industry in Brazil, the essential precondition to the activation of the particular obligation contained in the second sentence of Article 13 was satisfied. The obligation that then arose was to explore the "possibilities" of "constructive remedies". It was clear from the words "possibilities" and "explored" that the investigating authorities were not required to adopt constructive remedies merely because they were proposed.

The Panel said the adjustments or allowances mentioned by Brazil had been adjustments or allowances to the normal value and export price. Such adjustments or allowances were not consistent with the interpretation that "constructive remedies" should be remedies provided for by the Agreement which could resolve an anti-dumping investigation in which it had already been established that imports were dumped, that material injury had been suffered by the domestic industry and that there was a causal link between the two. Those adjustments or allowances mentioned by Brazil were only relevant to the stage of investigation of dumping or injury, whereas the "constructive remedies" in the context of Article 13 only applied once an investigation was completed. Equally, a determination of negligible margins of dumping or low volume of market share, was required, pursuant to Article 5:3, to be made at a stage of the investigation process prior to the time at which parties were obliged to consider the possibility of constructive remedies; consequently, they should not be considered as "constructive remedies provided for by this Code" either.

In the view of the Panel at the stage of considering the application of anti-dumping duties, the EC had considered whether it could enter a quantitative undertaking and had considered that such an undertaking would not eliminate the injury caused by the dumped imports. The Panel finally concluded that Brazil had not, through its claims and arguments in support of those claims, established that the imposition of

anti-dumping duties on imports of cotton yarn from Brazil by the EC was inconsistent with the EC's obligations under the Agreement.

COMMENT ON THE CASE

Exchange rate variations affect the determination of dumping.[66] In this case handling of exchange rate variation by the EC was challenged by Brazil. The Code did not have any specific rule in this regard which however, did not hinder the Panel in reaching a conclusion on the basis of general principle of fair comparison. However, in the Uruguay Round AD Agreement Article 2.4.1 has been added laying down rule regarding conversion of currencies.

Another important aspect of this case was that obligation with regard to developing countries was specified. It was held by the Panel against the contention of Brazil that the obligation to examine the special situation of developing countries arises only after the investigation is over and the authorities deliberating regarding the antidumping measures to be used. Again the Panel held that once the authorities have concluded that application of antidumping measures would affect the essential interest of developing countries then it was the obligation of the importing country to explore the possibility of constructive measures. This obligation on the developed countries members was reinforced in the case of *European Communities— Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*[67]

EEC - REGULATION ON IMPORTS OF PARTS AND COMPONENTS[68]:

In this case certain products which were subject to anti-dumping duties were being imported into the EC into separate parts and were being assembled by the "screwdriver plants" established in the EC by the exporting country. EC alleged that it was circumvention of antidumping duties as it was finally the same product that was being sold in the EC market at dumped prices. Therefore EC came up with a regulation whereby it imposed antidumping duties upon products thus assembled. Japan challenged the regulation. EC defended it under Article XX[69] of the GATT but did not invoke Article VI of the GATT. The United States however, in its third party comments tried to defend the Regulation under Article VI saying that when Article VI and the 1979 Code were drafted the mode of production and commerce were relatively simple and in the new era when there was a diversification of production the definition of domestic

[66] Jong Bum Kim, *Currency Conversion in the Anti-dumping Agreement*, Journal of World Trade 34(4):125-136, 2000.
[67] WT/DS141/R, Report of the panel adopted on 30 October 2000

[68] L/6657-37S/132 Report by the Panel adopted on 16 May 1990

[69] Article XX titled 'General Exceptions' authorises GATT Members to ban imports in order to protect, among other things, public morals, human, animal, plant life or helath.

industry needed a new look. United States said that the purpose of Article VI was to prevent injury to the domestic industry and importation in this way was injuring the domestic industry. However, since EC did not defend the Regulation under Article VI the Panel did not make any findings on it.

COMMENT ON THE CASE

The case is important for anti-circumvention duties. Anti-circumvention duties became one of the bone of contentions between the member countries in the Uruguay Round negotiations. While EC and US wanted to have an anti-circumvention provision under the Agreement, legitimising such measures, many countries including Japan opposed it[70]. The Dunkel Text included substantial provisions concerning anti-circumvention measures but no final agreement could be reached among the delegations. Moreover the provisions were so complex that both the EC and the US considered that they would be of no practical value.[71] Therefore these provisions were dropped from the final text. Instead the parties agreed to a Ministerial Declaration recognising the problem of circumvention and referring the matter to the Committee for Antidumping Practices for resolution.[72] EC and US have claimed that this permits them to continue to apply anti-circumvention measures. EC interpreted this declaration as permitting, "individual Members to deal with the [circumvention problem unilaterally, pending a multilateral solution via the GATT Anti-Dumping Committee."[73]

However it has been contended by some that Article 18.1 permits the imposition of antidumping duties only in accordance with the provisions of the Agreement, and there is no provision permitting anti-circumvention measures or the imposition of antidumping duties on products which have not been fully investigated and found to be dumped and causing injury.[74]

---

[70] Simon Holmes, *Anti-Circumvention under the European Union's New Anti-Dumping Rules*, Journal of World Trade, 29(3):161-180, ,1995 at164.
[71] ibid.
[72] Decision on Anticircumvention, Final Act, at 401; Referred in Gary N. Horlick and Eleanor C. Shea, *The World Trade Organisation Antidumping Agreement,* Journal of World Trade , 29(1): 5-31, 1995 at 28.
[73] Para 10(a) and para 2 of the Commissions Explanatory Meorandum.
[74] Gary N. Horlick and Eleanor C. Shea, *The World Trade Organisation Antidumping Agreement* Journal of World Trade , 29(1):5-31, 1995at 28.

CHAPTER IV

THE URUGUAY ROUND ANTI-DUMPING AGREEMENT

The Tokyo Round of AD Code was further modified in the light of shortcomings brought to light in the cases and suggestions made by the parties.

I

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

The present Agreement does not have any Preamble. Article 1of the Agreement providing for principles is the same as the 1979 Code.[75]

1. INVESTIGATION

(a).Initiation of investigation: The Antidumping Agreement includes new provisions concerning the initiation of an antidumping investigation which are intended to make the process more transparent and fair, and to protect against frivolous claims. Article 5.2 providing for initiation of investigation adds, that "simple assertion unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements." In addition Article 5.2 lists in detail the information that must be included in the application before an investigation may be initiated. Article 5.3 now explicitly provides that "the authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation." It provides a list of factors on which information should be provided as is reasonably available to the applicant.

(b).Conduct of investigation: Article 6 now requires that foreign producers or exporters receiving questionnaires in an antidumping investigation shall be granted at least thirty days for reply. "The explicit requirement in the new Agreement should protect against unfairness and abuse by

[75] "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated 1 and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations."

administering authorities."[76] It is now provided that authorities shall also give notice regarding submission of relevant evidence. Specific time for submission of evidence has been provided. The new Agreement provides that the authorities shall provide written text of the application to exporters and governments of exporting Members. Oral information shall be taken into account only to the extent that it is subsequently reduced in writing. It is now made compulsory for the authorities to ask for non-confidential summary which gives reasonable understanding of the information submitted in confidence. Now the industrial users and consumer organisations etc. should be given an opportunity to present their views and authorities shall provide necessary assistance if practicable to interested parties particularly small companies. It is now provided that interested parties should be informed of the facts under consideration before the final findings. 'Interested Parties' is now defined. The Annex I now provides rules for verification of the information. Annex II now provides rules for to be followed in case the investigating authority takes recourse to facts available. Rules for sampling is also provided.

2. DETERMINATION OF DUMPING: Article 2 providing "Determination of Dumping" includes significant additions in the rules for determination of dumping. While Article 2.1 providing for definition of dumping is the same as Article 2(1) of the 1979 Code Article 2.2 has been slightly changed from the corresponding provision of Article 2(4) of the 1979 Code. It specifies one more situation when normal value can be constructed, that is when the low volume of sales in the domestic market of exporting country does not allow a proper comparison. Another significant addition is that the comparison in case with third country has to with an *appropriate* third country. Footnote 2 to the Uruguay Round Agreement explains when sales of the like product destined for consumption in the domestic market of the exporting country can be considered a sufficient quantity for the determination of the normal value. According to the Agreement if the sales destined for consumption in the domestic market of the exporting country constitute 5 percent or more of the sales of the product under consideration to the importing Member, they will be considered to be sufficient in quantity for the determination of normal value. The Agreement however, adds a proviso that a ratio less than 5% will be acceptable in case the evidence demonstrates that domestic sales at such lower ratio are of sufficient magnitude to provide for a proper comparison.

Significant additions made by the new Agreement are Articles 2.2.1, 2.2.1.1 and 2.2.2.

[76] Gary N. Horlick and Eleanor C.Shea, *The World Trade Organisation Antidumping Agreement*, Journal of World Trade, 29(1):5-31, 1995 at 24.

(a).Ordinary Course of Trade: The AD Agreement does not define ordinary course of trade. Article 2.2.1, however, provides a limited explanation when, for reason of price, sales of the like product in the domestic market of the exporting country or sales to a third country at prices below fixed and variable per unit costs of production plus administrative, selling and general costs can not be treated in the ordinary course of trade. The Article provides three conditions:

1. If such sales were made within an extended period of time. Footnote 4 to the Agreement defines extended period of time as normally one year and in no case be less than six months.
2. If such sales were made in substantial quantities. Footnote 5 to the Agreement defines substantial quantities. It says that sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.
3. If such sales were at prices which did not provide for the recovery of all costs within a reasonable period of time. However, if prices, which were below per unit costs at the time of sale, were above weighted average per unit costs for the period of investigation, they will be considered to provide for recovery of costs within a reasonable period of time.

(b). Construction of Normal Value: Articles 2.2.1.1 and 2.2.2 provide rules for construction of normal value. Normal value has to be constructed on the basis of costs of production plus amount of administrative, selling and general costs and reasonable amount for profits. Article 2.2.1.1provides how the cost shall be calculated.

1. The first principle is regarding the data to be relied upon. Costs have to be calculated on the basis of records kept by the exporter or producer under investigation. But the condition for reliance on these records is that they are made in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.
2. The second principle is regarding what allocations are to be considered in the calculation of costs. In this regard the article says that the authorities should consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilised by the exporter or producer, in particular in relation to establishing appropriate amortisation and depreciation periods and allowances for capital expenditures and other development costs. However, allocations historically not utilised by the exporter or producer have also to be taken into account. In this regard t he article

provides that unless already reflected in the cost allocations costs should be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[77]

Article 2.2.2 provides how amounts for administrative, selling and general costs and for profits shall be determined. The article provides two methods, they can be based on actual data or in the absence of it they have to be determined according to the rules provided in the article. Thus, the amounts for administrative, selling and general costs and profits, have to be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. In the absence of actual data, they have to determined on the basis of

(i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

(c). Fair Comparison: Provision for fair comparison between export price and normal value is made in Article 2.4. Not only Article 2.4 has been made clearer than Article 2(6) of the 1979 Code but two more paras, 2.4.1 and 2.4.2 have been added specifying the rules regarding fair comparison. "A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[78] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing,

[77] Footnote 6 to the Agreement provides, "The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation."

[78] Footnote 7 to the Agreement provides, "It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate."
adjustments that have been already made under this provision.

should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties."[79]

When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[80] , provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

Article 2.4.2 provides, "Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison."

3. DETRMINAION OF INJURY:

Article 3 provides rules for determination of injury.[81] The Agreement has made some significant changes in the provision regarding determination of injury.

1. Article 3.3 has been added which authorises the authorities to cumulatively assess of the effects of dumped imports where products of more than one country are simultaneously subject to antidumping investigation if it is determined that:

---

[79] Article 2.4

[80] Footnote 8 to the Agreement provides." Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale."

[81] Footnote 9 of the Agreement defines injury, "Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article."

(a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and

(b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

2. Article 3.4 has been slightly changed from the corresponding provision of Article 3(3) of the 1979 Code, It provides that all relevant economic factors having an effect on the domestic industry has to be evaluated. It further gives an inclusive list of factors and indices which may have bearing on the state of industry. The factors enumerated in the list are "actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments." The list is preceded by the word "include" in place of the word "such as" which was used in the 1979 Code. The change of the terminology has made evaluation of the factors in the list mandatory[82]. However, the list is not exhaustive, and it is specified that one or several of these factors may not necessarily give decisive guidance.

3. Some changes are introduced in Article 3.5 which was Article 3(4) of the 1979 Code. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

4. Article 3.7 providing for threat of injury includes a list of factors which the authorities should consider in making a determination of threat of material injury. The list is inclusive. Article 3.7 now says, "A threat of material 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. In making a determination regarding the

[82] Mexico-HFCS, WT/DS132/R Report of the panel adopted on28 January 2000, Thailand-AD on Angles Shapes, WT/DS122/R Report of the Panel adopted on 28 September 2000.

existence of a threat of material injury, the authorities should consider, inter alia such factors as:

a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation;

) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports.

ii) Whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and

v) Inventories of the product being investigated

No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur."

4. DEFINITION OF DOMESTIC INDUSTRY:

Article 4 defining the domestic Industry is the same as the corresponding provision of the 1979 Code[83], except for two changes.

1. While the 1979 Code defined domestic industry for the purposes of determining injury the present Agreement defines domestic industry for the purposes of the Agreement.
2. The term related[84] is now defined by footnote 11 to the Agreement. Under the 1979 Code footnote to Article 4 only said, "An understanding among parties should be developed defining the word "related" as used in this Code." Footnote 11 to the present Agreement says, that producers shall be deemed to be related to exporters or importers only if ;

(a) one of them directly or indirectly controls the other; or

(b) both of them are directly or indirectly controlled by a third person; or

(c) together they directly or indirectly control a third person,

The above assumption is subject to the condition that there have to be grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. One shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

Sufficient evidence was now defined.

[83] Article 4 of the 1979 Code.

[84] Producers who are related to the exporters are not to be counted among the producers comprising the domestic industry.

The 1979 Code provided that investigation shall be terminated if the margin f dumping is negligible. The present Agreement defines the negligible or *de minimis* margin under Para 8 of Article 5.
The present Agreement now provides that period if investigation can be extended in special circumstances only upto 18 months.

5. REMEDIES

1.Provisional measures: Article 7 provides for provisional measures. Under the new Agreement an addition has been made specifying that provisional measures may be applied only if investigation has been initiated in accordance with Article 5 of the AD Agreement and notice has been given and parties have been provided with the opportunity to defend their interests. Provisional measures now cannot be applied before 60 days from the date of initiation of investigation. Regarding the duration of provisional measures it has been added that if the authorities in the course of investigation examine whether a duty lower than the margin of dumping would be sufficient to remove injury, the normal period of application of provisional measure may be six month which may be extended to nine months.

2. Price Undertakings: Para 1 of Article 8 adds that it "is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry." Now preliminary affirmative finding of dumping and injury is necessary for price undertaking to be sought and to be accepted. Earlier initiation of investigation was enough. In case of rejection of price undertaking, under Article 8.3 "other reasons" have been specified to include policy reasons also. It is also provided that if possible the authorities would provide the reasons for rejection of undertaking and also provide the exporter the opportunity to make comments thereon. The Agreement now provides that undertaking shall lapse in case of negative determination of dumping or injury is made. Earlier Codes provided for lapse of undertakings in case of negative determination of injury of threat thereof.

3. Antidumping duty: Under the present Agreement time limits are provided for determining the final liability and refund of excess duties collected. Rules are provided for levying antidumping duties under Article 9.4 on individual exporters, when sampling is resorted to during the investigation. Rules are also provided under Article 9.5 for review if the exporters and producers of the exporting Member prove that they did not export during the period of investigation.

Antidumping duties are curative and not a penalty. Therefore its application is limited as to the amount as well as to time. Article 11 providing for duration and review of antidumping duties and price undertakings[85] limits the application of the duties as to and price undertakings as to time. The important addition in the Uruguay Round Agreement is the addition of para 3 in Article 11 known as he "Sunset clause". It says that definitive anti-dumping duty has to be terminated at the end of five years from its imposition (or from the date of the most recent review under Article 11.2 if that review has covered both dumping and injury, or under Article 11.3), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury[86]. The duty can remain in force pending the outcome of such a review. Another additions is that it has been specified that provisions of Article 6 regarding evidence and procedure will apply in the review proceeding. The review has to be carried out expeditiously and should normally be concluded within 12 months of the date of initiation of the review[87].

6. RETROACTIVITY: The Agreement says that antidumping duties and provisional measures shall be applied on products which enter for consumption after the time when the decision taken concerning provisional duties and imposition of final duties enters into force, subject to some exceptions set out in Article 10 where the duty can be imposed retroactively. While the provision is largely the same as in the 1979 Code it has three additions. First, one more conditions has been added in case of levy of antidumping duty prior to the date of application of provisional measures. Thus, under Article 10.6(ii) a definitive antidumping duty may be levied on products which entered for consumption not more than 90 days prior to the date of application of provisional measures if the authorities determine that the injury is caused by massive dumped imports of a products in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied. However, the importers concerned should be given an opportunity to comment. If there is sufficient evidence that the above conditions are satisfied then the authorities are authorised under Article 10.7 to take such measures after the initiation of investigation

[85] Under the 1979 Code the provision for review of price undertaking was provided in Article 7 of the Code itself where provision for price undertaking was provided.
[86] Footnote 22 to the Agreement says, "When the amount of the anti-dumping duty is assessed on a retrospective basis, a finding in the most recent assessment proceeding under subparagraph 3.1 of Article 9 that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty."
[87] Article 11.4.

as may be necessary to collect anti-dumping duties retroactively. No duty can be levied retroactively on products entered for consumption prior to the date of initiation of the investigation.[88]

7. PUBLIC NOTICE: Article 12 providing for Public Notice and Explanation of Determinations is a **new addition** under the present Agreement.

Public notice of initiation of investigation: Once the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5,

1. a public notice has to be given
2. Following should be notified

(i) the Member or Members the products of which are subject to such investigation and

(ii) other interested parties known to the investigating authorities to have an interest therein.[89]

Article 12.1.1specifies the particulars which a public notice of the initiation of an investigation has to contain, or otherwise should be made available through a separate report[90]. The public notice or any separate report should contain adequate information on the following:

(i) the name of the exporting country or countries and the product involved;

(ii) the date of initiation of the investigation;

(iii) the basis on which dumping is alleged in the application;

(iv) a summary of the factors on which the allegation of injury is based;

(v) the address to which representations by interested parties should be directed;

(vi) the time-limits allowed to interested parties for making their views known.

Public notice of preliminary or final determination etc.: Article 12.2 provides rule regarding public notice of any preliminary or final determination, either affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. The notice should set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. The notices and reports have to be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein.

---

[88] Article 10.8

[89] Article 12.1.

[90] Footnote 23 says, "Where authorities provide information and explanations under the provisions of this Article in a separate report, they shall ensure that such report is readily available to the public."

Public notice of provisional measure: Article 12.2.1sets out the nature of the notice regarding the imposition of provisional measure and particulars which the notice should contain. Regarding the nature of the notice it provides that it should set forth, or otherwise make available through a separate report,

1. sufficiently detailed explanations for the preliminary determinations on dumping and injury and
2. refer to the matters of fact and law which have led to arguments being accepted or rejected.

Regarding the particulars of the notice the article says it should contain:[91]

(i) the names of the suppliers, or when this is impracticable, the supplying countries involved;

(ii) a description of the product which is sufficient for customs purposes;

(iii) the margins of dumping established and a full explanation of the reasons for the methodology used in the establishment and comparison of the export price and the normal value under Article 2;

(iv) considerations relevant to the injury determination as set out in Article 3;

(v) the main reasons leading to the determination.

These requirements are subject to the requirement of protection of confidential information.

Public notice of conclusion or suspension of an investigation: Public notice regarding the suspension of investigation or affirmative determination affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking must contain, or otherwise must be made available through a separate report,

1. all relevant information on the matters of fact and law
2. Reasons which have led to the imposition of final measures or the acceptance of a price undertaking
3. The information regarding public notice of provisional measures,
4. The reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers, and
5. The basis for any decision made under subparagraph 10.2 of Article 6.[92]

The above requirements are subject to the condition of protection confidential information. In particular, In case the investigation is terminated or suspended following the acceptance of an

[91] Article 12.2.1.

[92] Article 6.10.2 provides for individual examination of margin of dumping unless the number of exporters or producers is very large.

undertaking pursuant to Article 8, the public notice signifying this decision shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.[93]

The provisions under Article 12 regarding public notice also apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively. [94]

8. JUDICIAL REVIEW: Article 13 providing for Judicial Review is also a **new addition** under the present Agreement. It says that Members who have antidumping legislation should maintain judicial, arbitral or administrative tribunals or procedures, independent of the authorities responsible for the determination or review in question, for the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11.

9. COMMITTEE ON ANTIDUMPING PRACTICES: Article 16 provides for Committee on Anti-Dumping Practices is also largely the same as the corresponding provision in the 1979 Code except for two changes:

1. Para 4 of Article 16[95] adds that the "semi-annual reports shall be submitted on an agreed standard form".
2. Article 16(5) has been added which obligates the Members to notify the Committee which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and also its domestic procedures governing the initiation and conduct of such investigations.

10. CONSULTATION AND DISPUTE SETTLEMENT: Article 17 providing for Consultation and Dispute Settlement has introduced some significant changes compared to its corresponding provision under the 1979 Code.

1. The present Agreement neither obligates the Parties to "initiate consultation promptly" or to "make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation" or the Committee to "through its good offices, shall encourage the Parties involved to develop a mutually acceptable solution". The difference is due to the fact that while earlier it was the duty of the Committee on Anti dumping Practices to resolve the problem between the parties the present Agreement is part of the integrated WTO Agreement including its provisions relating to dispute settlement.

---

[93] Art.12.2.3.
[94] Article 12.3.
[95] Corresponding to para 4 of Article14 of the 1979 Code.

2. While previously it was the Committee on Antidumping practices that established the Panel now it is the responsibility of the Dispute Settlement Body.

3. The present Agreement further clarifies the role of the Panel under Article 17.6. It says that the work of the Panel is to determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation should not be overturned. The Agreement has to be interpreted in accordance with the customary rules of interpretation of public international law. If the relevant provision of the agreement can be interpreted in more than one permissible way the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The significant change is that now the Antidumping Agreement is part of the Treaty establishing the WTO. Therefore it applies to all Members. Members cannot make reservations under the Agreement and have to bring their laws into conformity with the Agreement.[96]

II

CASES DECIDED BY THE PANEL AND THE APPELLATE BODY

There is gradual increase in the number of antidumping disputes referred to the GATT/WTO Panel. Under the Uruguay Round Agreement more than ten cases have so far been decided by the Panel and the Appellate Body. While *Guatemala-Cement I*[97] and *Guatemala- Cement II*[98] and *Argentina-Antidumping duty on Ceramic tiles from Italy*[99] basically dealt with the investigation procedure, the two cases on *United States-Antidumping Act of 1916*[100] dealt with the consistency of the US Statute with the AD Agreement. The *DRAMS Case*[101] dealt with review and revocation of antidumping duty, and the case of *United States-Antidumping duties on Stainless Steel Plate etc. from Korea* [102] dealt with determination of dumping. There were cases which dealt with multiple issues like the case of *Mexico-HFCS*[103] dealt with issues like initiation of investigation, determination of injury and

[96] Article 18 of the AD Agreement.
[97] WT/DS60/R. Report of the Panel adopted on 19 June 1998

[98] WT/DS156/R Report of the Panel adopted on 24 October 2000
[99] WT/DS189/R Report of the Panel adopted on 28 September 2001
[100] WT/DS136/R and WT/DS162/R
[101] WT/DS99/R Report of the Panel adopted on 29 January 1999
[102] WT/DS179/R Report of the Panel adopted on 22 December 2000.
[103] WT/DS132/R Report of the panel adopted on28 January 2000,

imposition of provisional measures etc., *United States-Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*[104] dealt with conduct of investigation, determination of dumping and injury, principle of retroactivity etc. *Thailand-Antidumping on Angles Shapes from Poland*[105] dealt with issues of initiation of investigation, determination of dumping. *EC-bedlinen*[106] cases dealt with determination of dumping and injury, initiation of investigation, special provision for developing countries etc.

GUATEMALA- ANTI-DUMPING INVESTIGATION REGARDING GREY PORTLAND CEMENT FROM MEXICO[107]

This was the first case under the Uruguay Round Agreement. It concerned the initiation and subsequent conduct by Guatemala's Ministry of Economy ("Ministry") of an anti-dumping investigation against imports of grey portland cement from Cruz Azul, a Mexican producer. Cementos Progreso SA ("Cementos Progreso"), the only cement producer in Guatemala, filed a request for an anti-dumping investigation. Based on these requests, the Ministry published a notice of initiation of an anti-dumping investigation regarding allegedly dumped imports of grey portland cement from Cruz Azul of Mexico. The Ministry notified the Government of Mexico of the initiation of the investigation. While the publication was on11 January, notification was on 22 January 1996. On 16 August 1996, Guatemala imposed a provisional anti-dumping duty of 38.72% on imports of type I (PM) grey portland cement from Cruz Azul of Mexico. The provisional duty was imposed on the basis of a preliminary affirmative determination of threat of injury. On 17 January 1997, Guatemala imposed a definitive anti-dumping duty of 89.54% on imports of grey portland cement from Cruz Azul of Mexico.

Panel was requested to examine the following issues in this case:

- Whether Panel can examine consistency with the AD Agreement only the specific three measure(antidumping duty, provisional measures and price undertakings) or consistency of particular aspects of the initiation or conduct could also be examined.
- Whether initiation of investigation was in accordance with the Antidumping Agreement.

[104] WT/DS184/R Report of the Panel adopted on 28 February 2001
[105] WT/DS122/R, Report of the Appellate Body adopted on 28 September 2000
[106] WT/DS141/R Report of the panel adopted on 30 October 2000
[107] WT/DS60/R. Report of the Panel adopted on 19 June 1998

1. WHETHER PANEL WAS COMPETENT TO DECIDE

The first issue involved examination of relationship between dispute settlement procedure of the AD Agreement and the Dispute Settlement Understanding ("DSU"). In this case after the imposition of the provisional anti-dumping duty but before the imposition of the definitive anti-dumping duty, Mexico requested consultations with Guatemala under Article 4 of the DSU and Article 17.3 of the AD Agreement. Relying on Articles 1 and 17.4 of the AD Agreement and Articles 4 (consultations), 6.2 (request for establishment), and 19.1 (recommendations) of the Dispute Settlement Understanding, Guatemala argued, that a Panel may be established only to examine the consistency with WTO obligations of a particular measure or measures, identified in a request for consultations and in the request for establishment of a panel, and to make recommendations concerning such measure or measures. Guatemala argued that the final anti-dumping measure imposed on imports of cement from Cruz Azul was not before the Panel because Mexico did not identify that measure in its request for consultations or in its request for establishment of the Panel. The provisional measure imposed by Guatemala, which was identified in the request for consultations and the request for establishment, was not before the Panel because Mexico did not assert and demonstrate that it had a "significant impact". There was no price undertaking at issue. Guatemala argued that, because none of the three types of identified "measure" was properly before the Panel Mexico's complaint must be rejected.

Panel noted that Article 1.2 of the DSU provides to the extent that there is a difference between the DSU and Article 17.4 of the AD Agreement, Article 17.4 prevails. Panel pointed out that Article 17.4 of the AD Agreement on its face does not provide that a Panel can be sought with respect only to a specific type of identified "measure". It provides that if consultations under Article 17.3 have failed, and if a final action to levy definitive anti-dumping duties has been taken or a price undertaking accepted, the "matter" may be referred to the Dispute Settlement Body ("DSB") under Article 17.4. Similarly, if a provisional measure has a significant impact, and is considered to have been taken contrary to Article 7.1 of the AD Agreement, "such matter" may be referred to the DSB. Panel disagreed with what it termed as restrictive interpretation of Article 17.4 given by Guatemala that the "matter" must relate to the consistency of a "measure" - provisional or final, or price undertaking - with the AD Agreement. According to Panel the "matter" which may be referred to the DSB is that "matter" with respect to which a Member requested consultations under Article 17.3 of the AD Agreement. Article 17.3 itself is not limited to consultations with respect to a specific type of measure, but is much broader in scope. The text of Article 17.3 does not on its face require that there be a "measure" about which consultations are requested, but only that there be nullification or impairment of some benefit. Such nullification or impairment of a benefit could plainly arise in a situation where a

procedural obligation under the AD Agreement is not respected by the investigating authorities of a Member.

The Panel noted that although Article 17.3 is not identified as a special or additional rule or procedure on dispute settlement in Appendix 2 of the DSU, it is specifically referred to in Article 17.4, which provides that if "the consultations pursuant to paragraph 3 of Article 17 have failed to achieve a mutually agreed solution..." the matter may be referred to the DSB. According to the Panel this reference requires that Article 17.3 must be interpreted so as to give effect to the provisions of Article 17.4, which prevail over any inconsistent provisions of the DSU. Thus, if Article 17.3 requires something different from the corresponding Article 4 of the DSU, the provisions of Article 17.3 must prevail, otherwise Article 17.4 would not be given full effect. To the extent that Article 17.4 may require different procedures than does the DSU, Article 17.3 must be read so as to give effect to such different procedures. Moreover, Article 17.5, which governs the establishment of panels in disputes under the AD Agreement, does not require that the request for establishment "identify the specific measures at issue", as does its corollary, Article 6 of the DSU. Instead, Article 17.5, which is again a special and additional rule which takes precedence over conflicting provisions of the DSU, This provision is phrased in the same language as Article 17.3, supporting the conclusion that the "matter" consulted about under Article 17.3, the "matter" referred to the DSB under Article 17.4, and the "matter" to be examined by a panel under Article 17.5, is in each instance the same matter, and is not limited to provisional or final measures or price undertakings. "This interpretation of the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to anti-dumping cases, taking account of the peculiarities of challenges to anti-dumping investigations and determinations, that replaces the more general approach of the DSU. The AD Agreement sets forth a series of procedural and substantive obligations on Members in initiating and conducting investigations and imposing measures."[108] The Panel concluded that Article 17.4 was a timing provision, establishing when a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of a panel. In Panel's view this interpretation avoids a meaningless and purely formal requirement that a Member seek consultations concerning the final action to levy definitive anti-dumping duties, and wait the requisite time period before requesting establishment of a panel, in those situations where the issues of concern have already been identified and consultations have been held. If the substance of the final action to levy definitive anti-dumping duties itself is a "matter" concerning the Member, then further or additional consultations would have to be requested and held, before a request for a panel could be made.

[108] Report of the Panel, para 7.16

According to the Panel the use of the term "measure" in the DSU should be understood as a shorthand reference to the many and varied situations in which obligations under the WTO Agreements might not be fulfilled by a Member, giving rise to a dispute, for which a resolution process is provided in the DSU. This would comport with the overall intention of the drafters of the WTO Agreements to create an integrated system governing multilateral trade relations, including an effective system for the settlement of disputes.

2.INITIATION OF INVESTIGATION

There were three issues to be decided on the question of initiation of investigation:

- What is the requirement under Article 5.2. Whether evidence that is reasonably available to the applicant is sufficient to initiate the investigation or there is some objective criteria of the requirement of sufficiency.
- Whether the condition of Article 2 and Article 3 also apply in judging the adequacy and accuracy of the information provided under Article 5.2.
- What is the role of the Panel in judging whether initiation of investigation was justified as per the requirements of the Agreement.

(a). Whether evidence reasonably available to applicant sufficient for the initiation of investigation: Mexico claimed that Guatemala violated Articles 5.2 and 5.3 of the AD Agreement by initiating the anti-dumping investigation without sufficient evidence of dumping, threat of injury and causal link, to justify the initiation. Mexico pointed out that simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. Article 5.2 requires that the application "shall contain such information as is reasonably available to the applicant" regarding a detailed series of elements. Mexico claimed that in case of failure of fulfilment of this requirement Article 5.8 applies which states that " An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case." Guatemala argued that Article 5.8 applies only to investigations that have already been initiated. Guatemala contended that if the information supplied in the application is all that is reasonably available to the applicant as required by Article 5.2, the investigating authority is justified in initiating the investigation. Thus, Guatemala conditioned the sufficiency of the evidence to initiate on whether the information in the application was all the information reasonably available to the applicant.

Accepting the contention of Mexico Panel held that the fact that the applicant has provided, in the application, all the information that is "reasonably available" to it on the factors set forth in Article 5.2(i) - (iv) is not determinative of whether there is sufficient evidence to justify initiation. According to the Panel, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied. It was however pointed out that investigations may be initiated in cases where "sufficient evidence" is not "reasonably available" to the applicant because there is nothing in the Agreement to prevent an investigating authority from seeking evidence and information on its own, that would allow any gaps in the evidence set forth in the application to be filled. But such action by the investigating authority was not required by the AD Agreement. If an authority chose to refrain from such action, the "reasonably available" language in Article 5.2 did not permit the initiation of an investigation based on evidence and information which, while all that is "reasonably available" to the applicant is not, objectively judged, sufficient to justify initiation. Panel found that in this case the applicant had requested that the Ministry obtain certain information on import volumes it was unable to obtain itself which the Ministry did only after it had initiated the investigation based on the information in the application.

(b) Whether Art.2 and 3 apply in judging the adequacy and accuracy of the information: Parties largely agreed that the application must contain evidence and information on the essential elements of dumping, injury, and causal link, but they disagreed on what types of evidence and information are required. Mexico argued that the substantive provisions governing determinations of dumping and injury in Articles 2.1, 2.4, and 3.7, must be taken into account in evaluating the evidence in an application to determine its sufficiency. Guatemala, on the other hand, argued that Article 2 does not apply to the decision whether to initiate an investigation, but only to the preliminary or final determination of dumping, and that while Articles 3.2 and 3.4 apply to the decision to initiate, by virtue of being referenced in Article 5.2(iv), Article 3.7 is not so referenced, and therefore does not apply to the decision whether to initiate. Thus, according to Guatemala, information of the type referred to in Articles 2 and 3.7 need not be included in the application, and was not relevant to the evaluation of whether there was sufficient evidence to justify initiation. Rejecting the interpretation given by Guatemala, Panel held that in assessing whether there was sufficient evidence of dumping to justify initiation, an investigating authority can not ignore the provisions of Article 2 of the AD Agreement. Article 5.2 of the Agreement requires an application to include evidence of "dumping" and Article 5.3 requires a determination that there is "sufficient" evidence to justify initiation. Article 2 of the AD Agreement sets forth the technical elements of

calculation of dumping, including the requirements for determining normal value, export price, and adjustments required for a fair comparison. According to the Panel the reference in Article 5.2 to "dumping" must be read as a reference to dumping as it is defined in Article 2. This did not mean that the evidence provided in the application had to be of the quantity and quality that would be necessary to make a preliminary or final determination of dumping. Panel noted that there was no evidence or information in the application on the factors relevant to threat of material injury set forth in Article 3.7 of the AD Agreement. Regarding Guatemala's argument that Article 5.2 did not require that the application provide information on the four factors set forth in Article 3.7, Panel stated that although it recognised that there was no specific reference in Article 5.2 to the factors enumerated in Article 3.7 regarding threat of injury, such as there was to the factors set forth in Articles 3.2 and 3.4 regarding injury, it did not accept the view that the lack of a specific reference to Article 3.7 meant that an applicant was not required to submit such information as was reasonably available to the applicant on the question of threat of material injury, if threat of material injury was alleged in the application. According to the Panel such an interpretation of the Agreement was entirely impermissible, as it would be inconsistent with the text, as well as the object and purpose, of Article 5.2 as a whole. Panel pointed out that the chapeau of Article 5.2 provided, in pertinent part: "An application under paragraph 1 shall include evidence of ... *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement...". Article 5.2(iv) explicitly refers to Article 3.2, which elaborates on certain factors to be considered in evaluating "injury" and footnote 9 to Article 3 of the Agreement specified.

(b.a) Whether there was sufficient evidence of dumping: In the facts of the case, Panel found that the retail price of grey Portland cement in Mexico was substantiated by two invoices showing the prices for two separate sales. The price of imported Mexican cement in Guatemala was substantiated by import certificates, invoices and bills of lading for two transactions on the same date in August 1995. Panel noted that there is no indication that any other information on dumping was available to or considered by the Ministry. The two invoices reflected two separate sales at the retail level of one sack of cement of unspecified weight each. The import documents reflected two separate import transactions at the distributor (or wholesale) level of several thousand sacks of cement, each sack weighing 94 pounds (42.6 kilograms). The alleged margin of dumping was calculated in the application by comparing the average retail price for the cement bought in Mexico (converted into Guatemalan Quetzales at then current rates) with the average c.i.f. value of the cement imported into Guatemala (converted into Guatemalan Quetzales at then current rates). The Ministry had recommended initiation based on this information. Panel held that this comparison ignored obvious problems with the data: (1) the transactions involved significantly different volumes; and (2) the

transactions occurred at different levels of trade. Agreeing with Guatemala that there was not a "minimum" of documentation which must be submitted to substantiate an assertion of dumping, it did not mean that any documentation would be sufficient to justify initiation in a particular case. Guatemala also argued that the considerations outlined were addressed only in Article 2 of the AD Agreement, which was not referenced in Article 5.2, and was therefore irrelevant to the determination to initiate. Panel held that based on an unbiased and objective evaluation of the information before it, the Ministry could not properly have determined that there was sufficient evidence of dumping to justify the initiation of the investigation. Panel further held that evidence of the relevant type was, required in such cases where it was obvious on the face of the application that the normal value and export price alleged in the application would require adjustments in order to effectuate a fair comparison. At a minimum, there should be some recognition that a fair comparison will require such adjustments. Guatemala had argued that at the time of initiation, it was not possible to make adjustments, as the precise information needed was within the control of the exporting company, which according to Guatemala had the burden of showing that adjustments should be made. Rejecting this argument Panel noted that Article 2.4 imposes an obligation for investigating authorities to make a fair comparison. Investigating authorities can expect that exporters will provide the information necessary to make adjustments, and demonstrate that particular differences for which adjustments are sought affect price comparability but the authorities cannot, ignore the question of a fair comparison in determining whether there was sufficient evidence of dumping to justify initiation, particularly when the need for adjustments was apparent on the face of the application. Panel also noted that the exporting country or company might not even be aware that an application has been filed and the initiation of an investigation is being considered, and is in any event generally not a participant in the initiation decision, and can therefore not provide this information prior to initiation. Panel noted that it was apparent on the face of the application that the alleged normal value and the alleged export price were not comparable for purposes of considering whether dumping exists without adjustment. Panel pointed out that while it would not expect the authorities to have, at the initiation stage, precise information on the adjustments to be made, that there was not even any recognition that the normal value and export price alleged in the application were not comparable, nor any indication that more information on the issue was requested from the applicant or otherwise sought by the Ministry. Therefore, the Panel held that based on an unbiased and objective evaluation of the evidence and information before it in this case, the Ministry could not properly have determined that there was sufficient evidence of dumping to justify the initiation of the investigation.

(b.b) Whether there was sufficient evidence of injury: On the question of threat of material injury the Panel found that the only information before the Ministry on the volume of the allegedly dumped imports consisted of the documentation concerning two importation of cement into Guatemala through a single customs post on the same date in August 1995. There were statements in the application that the volume of imports was massive, and that imports may have been entering through other customs posts. Panel noted that these assertions were unsubstantiated by any relevant evidence in the application. Nor was there any indication in the evaluation prepared by the two advisors, or in the Resolution of the Director, that any evidence or information beyond that contained in the application was considered in making the determination to initiate. Guatemala argued before the Panel that the two import certificates demonstrated that imports were massive in light of the average daily consumption of cement in Guatemala. However, there was no information in the application from which average daily consumption of cement in Guatemala could be determined. Nor was there any indication in the evaluation prepared by the two advisors, or in the Resolution of the Director, that the consumption of cement in Guatemala was either known, or considered, in making the determination to initiate. There was no indication that the volume of imports represented by the two import certificates was compared to consumption in Guatemala, or that an assessment that those imports were "massive" was made at the time of initiation. Panel noted that the Ministry appeared to have accepted the characterisation of the applicant in this regard and there was nothing in the application to substantiate the claims of the domestic industry even though such information as employment levels and ability to finance expansions and other projects, was exclusively in the hands of the applicant, in whose interest it would be to provide such information to substantiate its claim of threat of injury. Therefore the Panel concluded that an unbiased and objective investigating authority could not properly determine that the evidence of threat of injury before the Ministry was sufficient to justify initiation. Rejecting the suggestion regarding that the concerns of domestic producers to keep sensitive business information confidential the Panel pointed out that both the AD Agreement and Guatemalan law provide for confidential treatment of information where warranted. Thus, the fact that relevant information is considered confidential does not justify the failure to submit such relevant information with the application to substantiate the assertions therein. Guatemala argued before the panel that an applicant is not required to include "documentary evidence" of the threat of injury. Guatemala had also argued that Cementos Progreso was facing a threat of material injury was substantiated by the declaration that if dumped imports continued to be sold at dumped prices, Cementos Progreso would have to cancel plans to expand and modernise its production plant. Panel held that it was not "substantiation" of the assertions, but merely statements of the applicant. "Sufficient evidence to justify initiation" must, mean something whose "accuracy and adequacy" could be objectively

evaluated as required by Article 5.3 of the AD Agreement. Mere statements do not fall into this category of information. Panel also noted that there was no indication as to what evaluation was made of the "accuracy and adequacy" of these statements. Relevant evidence might have included information on any increase in the volume of imports either in absolute terms or relative to production or consumption in Guatemala, as set forth in Article 3.2 of the AD Agreement, referenced in Article 5.2(iv). The only information on the volume of imports was the documentation reflecting two importation, and assertions concerning possible imports through other customs posts. There was no information in the application, or apparently otherwise available to the Ministry, concerning consumption in Guatemala. The only information in the application concerned the capacity of Cementos Progreso. Panel further noted that evidence to substantiate the allegation of threat of material injury might have included information on the relevant economic factors and indices having a bearing on the state of the industry set forth in Article 3.4 of the AD Agreement, that is, actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. Panel pointed out that this information was uniquely within the control of the applicant. The application contained statements concerning some of these factors, but no specific or quantifiable information. There was no information in the application concerning the level of sales enjoyed by Cementos Progreso, or its profits. While a statement was made that the allegedly dumped imports were directly affecting investment planning by the company, there was no information concerning ability to raise capital or otherwise fund investments, which might support the statement. Therefore the Panel concluded that the statements made by the applicant regarding the effects of allegedly dumped imports on investment planning for plant improvements and expansion were unsupported by relevant evidence. Thus, the Panel held that based on an unbiased and objective evaluation of the evidence and information before it in the case, the Ministry could not properly have determined that there was sufficient evidence of injury, that is threat of injury, to justify the initiation of the investigation.

On the question of causal link Panel concluded that in the absence of sufficient evidence on dumping and injury it could not be concluded that there was sufficient evidence on causal link.

Guatemala **appealed** against the decision of the Panel[109]. The Appellate Body disagreed with the Panel's reasoning on the issue of whether Panel can examine consistency with the AD Agreement only

[109] WT/DS60/AB/R adopted on 2 November 1998.

the specific three measure or consistency of particular aspects of the initiation or conduct could also be examined. Appellate body pointed out that Art. 1.1 of the DSU reads in relevant part: "The rules and procedures of this Understanding shall apply to disputes brought pursuant to the consultation and dispute settlement provisions of the agreements listed in Appendix 1 to this Understanding."

Article 1.2 of the DSU provides: "The rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered Agreements as are identified in Appendix 2 to this Understanding. To the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail."

Article 6.2 of the DSU provides: "The request for the establishment of a panel shall be made in writing. It shall ... identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."

Appellate body noted that while Paragraphs 4 through 7 of Article 17 are listed as special or additional rules and procedures in Appendix 2 of the DSU; paragraphs 1 through 3 of Article 17 are not.

On the issue of relationship between Article 17 of the AD Agreement and rules and procedures of DSU, the Appellate Body noted that Article 1.1 of the DSU establishes an integrated dispute settlement system which applies to all of the agreements listed in Appendix 1 to the DSU (the "covered agreements"). The DSU is a coherent system of rules and procedures for dispute settlement which applies to "disputes brought pursuant to the consultation and dispute settlement provisions of the covered agreements. The Anti-Dumping Agreement is a covered agreement listed in Appendix 1 of the DSU; the rules and procedures of the DSU, therefore, apply to disputes brought pursuant to the consultation and dispute settlement provisions contained in Article 17 of that Agreement. Under Article 17.3 of the Anti-Dumping Agreement, consultations may be requested by a Member, if that Member "considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members". Article 17.3 of the Anti-Dumping Agreement is not listed in Appendix 2 of the DSU as a special or additional rule and procedure. According to the Appellate Body it is not listed because it provides the legal basis for consultations to be requested by a complaining Member under the Anti-Dumping Agreement. It is the equivalent provision in the Anti-Dumping Agreement to Articles XXII

and XXIII of the GATT 1994, which serve as the basis for consultations and dispute settlement under the GATT 1994, under most of the other agreements in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organisation (the "WTO Agreement"), and under the Agreement on Trade-Related Aspects of Intellectual Property Rights (the "TRIPS Agreement").

Appellate body held that if there is no "difference", then the rules and procedures of the DSU apply together with the special or additional provisions of the covered agreement. According to the Appellate body it is only where the provisions of the DSU and the special or additional rules and procedures of a covered agreement cannot be read as complementing each other that the special or additional provisions are to prevail. A special or additional provision should only be found to prevail over a provision of the DSU in a situation where adherence to one provision will lead to a violation of the other provision, that is, in the case of a conflict between them.

According to the Appellate body, the special or additional provisions listed in Appendix 2 of the DSU are designed to deal with the particularities of dispute settlement relating to obligations arising under a specific covered agreement. But "To read Article 17 of the Anti-Dumping Agreement as replacing the DSU system as a whole is to deny the integrated nature of the WTO dispute settlement system established by Article 1.1 of the DSU."[110] Appellate body further noted that to suggest, as the Panel has, that Article 17 of the Anti-Dumping Agreement replaces the "more general approach of the DSU" amounted denial of the application of the often more detailed provisions of the DSU to anti-dumping disputes. "The Panel's conclusion is reminiscent of the fragmented dispute settlement mechanisms that characterised the previous GATT 1947 and Tokyo Round agreements; it does not reflect the integrated dispute settlement system established in the WTO."[111]

Appellate Body also disagreed with the alternate line of reasoning given by the Panel wherein the Panel had given the term "measure" a broad reading. Appellate Body noted that it appeared that the Panel read the term "measure" as synonymous with allegations of violations of the GATT 1994 and the other covered agreements which blurred the distinction between a "measure" and "claims" of nullification or impairment of benefits. Appellate Body held that Article 6.2 of the DSU requires that both the "measure at issue" and the "legal basis for the complaint" (or the "claims") be identified in a request for the establishment of a panel. Therefore the Panel's reasoning that it would suffice (in effect), under Article 6.2 of the DSU, for a panel request to identify only the "legal basis for the

[110] Appellate Body Report, Para 67.
[111] *Ibid.*

complaint", without identifying the "specific measure at issue" was inconsistent with the plain language of Article 6.2 of the DSU.

Appellate body noted that Article 17.4 of the Anti-Dumping Agreement allows a Member to refer a "matter" to the DSB when certain specified conditions are satisfied. The word "matter" also appears in paragraphs 2, 3, 5 and 6 of Article 17. It is the key concept in defining the scope of a dispute that may be referred to the DSB under the Anti-Dumping Agreement and, therefore, in identifying the parameters of a Panel's terms of reference in an anti-dumping dispute. According to the Appellate Body the "matter referred to the DSB", consists of two elements:

1.the specific measures at issue and

2.the legal basis of the complaint or the claims.[112]

Appellate Body held that Article 17.5 of the Anti-Dumping Agreement and the provisions of Article 6.2 of the DSU are complimentary rather than inconsistent and the fact that Article 17.5 contains additional requirements, which are not mentioned in Article 6.2 of the DSU, does not nullify, or render inapplicable, the specific requirements of Article 6.2 of the DSU in disputes brought under the Anti-Dumping Agreement. A Panel request made concerning a dispute brought under the Anti-Dumping Agreement must therefore comply with the relevant dispute settlement provisions of both that Agreement and the DSU. Thus, according to the Appellate Body, when a "matter" is referred to the DSB by a complaining party under Article 17.4 of the Anti-Dumping Agreement, the Panel request must meet the requirements of Articles 17.4 and 17.5 of the Anti-Dumping Agreement as well as Article 6.2 of the DSU.

Disagreeing with the Panel's ruling that Article 17.4 of the Anti-Dumping Agreement is a "timing provision" rather than "a provision setting forth the appropriate subject of a request for establishment of a panel" the Appellate Body held that where a complaining Member wishes to make any claims concerning an action taken, or not taken, in the course of an anti-dumping investigation under the provisions of the Anti-Dumping Agreement, Article 6.2 of the DSU requires "the specific measures at

[112]Referring to the previous Panel reports the Appellate Body noted that in *Brazil - Coconut*, Appellate Body had agreed with previous panels established under the GATT 1947, as well as under the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, "that the 'matter' referred to a panel for consideration consists of the specific claims stated by the parties to the dispute in the relevant documents specified in the terms of reference." Again in *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway* the panel found that "the 'matter' consisted of the specific claims stated by Norway & with respect to the imposition of these duties". A distinction is therefore to be drawn between the "measure" and the "claims". Taken together, the "measure" and the "claims" made concerning that measure constitute the "matter referred to the DSB", which forms the basis for a panel's terms of reference.

issue" to be identified in the panel request, Appellate Body noted that Article 1 of the Anti-Dumping Agreement makes a distinction between an "anti-dumping measure" and "investigations". It provides, in part, that:

"An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement--------"

Appellate Body noted that Article 17.4 of the Anti-Dumping Agreement specifies the types of measure" which may be referred as part of a "matter" to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. Under Article 17.4, a "matter" may be referred to the DSB only if one of the relevant three anti-dumping measures is in place. According to the Appellate Body, this provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the Anti-Dumping Agreement to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. Appellate body clarified that this requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the claims that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the Anti-Dumping Agreement because there is a difference between the specific measures at issue in the case of the Anti-Dumping Agreement, one of the three types of anti-dumping measure described in Article 17.4 -- and the claims or the legal basis of the complaint referred to the DSB relating to those specific measures. "In coming to this conclusion, we note that the language of Article 17.4 of the Anti-Dumping Agreement is unique to that Agreement."[113]

Following its reasoning the Appellate body concluded that the Panel erred in finding that Mexico did not need to identify "specific measures at issue" in this dispute. "We find that in disputes under the Anti-Dumping Agreement relating to the initiation and conduct of anti-dumping investigations, a definitive anti-dumping duty, the acceptance of a price undertaking or a provisional measure must be identified as part of the matter referred to the DSB pursuant to the provisions of Article 17.4 of the Anti-Dumping Agreement and Article 6.2 of the DSU."[114]

[113] Appellate Body Report Para 79.
[114] Appellate Body Report Para 80.

Appellate Body then examined whether Panel's term of reference entitled it to consider the claims made by Mexico concerning the initiation and subsequent conduct of the investigation by the Guatemalan authority. The Panel's terms of reference in this case were defined exclusively by reference to the request for establishment of a panel submitted by Mexico to the DSB. Appellate Body held that the Panel was entitled to examine Mexico's claims concerning the initiation and conduct of the investigation in this case only if the panel request properly identified a relevant anti-dumping measure as the "specific measure at issue" in accordance with Article 6.2 of the DSU.

The Appellate Body noted that although it was clear from its Panel request that Mexico made legal claims relating to the three mentioned actions in the investigation by the Guatemalan authority, it was not apparent from the language of its panel request whether Mexico properly identified one of the three types of measure specified in Article 17.4 of the Anti-Dumping Agreement as the specific measure at issue in the dispute. Appellate Body noted that Mexico's panel request did not identify the final anti-dumping duty as the "specific measure at issue", as is required by Article 6.2 of the DSU. Mexico's panel request referred only to the three actions taken during the course of the investigation by the Guatemalan authority as the "matters in issue", and did not specifically identify the final, definitive anti-dumping duty. Appellate Body found that the provisional measure was also not properly identified as the specific measure at issue in Mexico's panel request. Appellate Body further pointed out that since this case did not involve the acceptance of a price undertaking, therefore, the Panel erred in finding that it was entitled to examine Mexico's claims concerning Guatemala's three actions relating to the initiation and conduct of the anti-dumping investigation. In view of its erroneous interpretation of Article 17.4 of the Anti-Dumping Agreement and of Article 6.2 of the DSU, the Panel did not consider whether Mexico had properly identified a relevant anti-dumping measure in its panel request and, therefore, it erred in finding that this dispute was properly before it.

COMMENT ON THE CASE

The case is important for both the Appellate Body decision on the competence of the Panel and the Panel decision on the initiation of the investigation. Appellate Body's decision not only reinforces the integrated dispute settlement system of which Article 17.4 of the Antidumping Agreement is a part but also puts an end to the possibility of the abuse of the dispute settlement system by exporting country. If the Panel decision had become the rule any time during the investigation the exporting country could have approached the DSB which would have impeded the investigation process. Moreover unless the some measures are taken the exporting firm should not have a cause of complaint because under the Agreement even after a positive finding the importing country may not take any

antidumping measure.

On the issue of initiation of investigation the Panel held that the meaning of sufficient evidence is not restricted to the evidence reasonably available to the complainant. There was a positive obligation on the investigating authority to examine the accuracy and adequacy of evidence. This ruling was later on followed in the *Mexico-HFCS*[115] case. The ruling re-establishes the purpose of the Agreement that exporting firms should not be harassed by frivolous complaints, thereby hindering free trade.

GUATEMALA– DEFINITIVE ANTI-DUMPING MEASURES ON GREY PORTLAND CEMENT FROM MEXICO[116]

After the decision of the Appellate Body Mexico complained against the definitive anti-dumping measure imposed by Guatemala's Ministry of Economy ("Ministry"), as well as the actions that preceded it, in particular the anti-dumping investigation against imports of grey Portland cement from Cruz Azul, a Mexican producer. There were certain facts which would require mention here as this case covered some more issues. During the conduct of investigation the Ministry requested certain import data from Guatemala's Directorate-General of Customs by letter. The Ministry then transmitted questionnaires to interested parties, including Cruz Azul and Cementos Progreso, with a response originally due on 11 March 1996. In answer to Cruz Azul's request, the Ministry extended the deadline for submission of the questionnaire responses until 17 May 1996. Cruz Azul filed a response on 13 May 1996. The original investigation period set forth in the published notice of initiation ran from 1 June 1995 to 30 November 1995. On 4 October 1996, the Ministry extended the investigation period to include the period 1 December 1995 to 31 May 1996. On 14 October 1996, the Ministry issued supplemental questionnaires to Cruz Azul and Cementos Progreso, requesting that Cruz Azul provide cost data and other information for the extended investigation period. A verification visit was scheduled to take place from 3 - 6 December 1996. This verification visit was cancelled by the Ministry shortly after it commenced on 3 December 1996, in the face of Cruz Azul's refusal to accept named non-governmental experts. On 17 January 1997, Guatemala imposed a definitive anti-dumping duty of 89.54% on imports of grey Portland cement from Cruz Azul of Mexico. The definitive measure was imposed on the basis of a determination of dumping and consequent injury.

Following issues were involved in this case:

- Whether initiation of investigation was consistent with the Anti-Dumping Agreement.

[115] WT/DS132/R Report of the panel adopted on28 January 2000.
[116] WT/DS156/R Report of the Panel adopted on 24 October 2000.

- Whether conduct of investigation was consistent with the Antidumping Agreement
- Whether finding of injury was consistent with the Antidumping Agreement.

The issue of initiation involved same arguments and finding as that of *Guatemala- Anti-dumping Investigation Regarding Portland Cement From Mexico.*[117]

2.CONDUCT OF INVESTIGATION

(a).Failure to set time limits for arguments etc.: Mexico claimed that the Ministry violated Article 6.1 by failing to set a time-limit for the presentation of arguments and evidence during the final stage of the investigation. Panel held that Mexico's claim was without merit as a matter of law. According to the Panel Article 6.1 of the AD Agreement does not require investigating authorities to set time-limits for the presentation of arguments and evidence during the final stage of the investigation. The only time-limit provided for in Article 6.1 is that contained in Article 6.1.1, whereby exporters shall be given at least 30 days for replying to questionnaires. Article 6.1 simply requires that interested parties shall have "ample" opportunity to present evidence and "full" opportunity to defend their interests. Interested parties may have such opportunity without the investigating authority setting time limits for the submission of evidence. According to the Panel these provisions impose substantive obligations, without requiring those obligations to be met through any particular form (except as provided for in sub-paragraphs 1 through 3 of Article 6.1).

(b). Failure to set time limit for provisional measures: Mexico argued that the Ministry's public notice of initiation granted interested parties 30 days in which to defend their interests, whereas no such time-limit was included in the public notice concerning the imposition of a provisional measure. Panel noted that Article 12.1.1(vi) explicitly provides that a public notice of the initiation of an investigation shall include adequate information on the "time-limits allowed to interested parties for making their views known". No such obligation is included in Article 12.2.1, concerning the contents of public notices on the imposition of provisional measures. According to the Panel Article 12.2.1 constitutes useful context in the examination of Mexico's claim under Article 6.1because the fact that there is no requirement for investigating authorities to include time-limits for the submission of evidence in the public notice of their preliminary determinations confirmed its the conclusion that Article 6.1 does not require any time limits to be set.

(c). Whether there was failure in the examination of accuracy of information: Mexico claimed that the Ministry failed to satisfy itself of the accuracy of the information used by the Ministry

[117] WT/DS60/R. Report of the Panel adopted on 19 June 1998.

in its final determination, contrary to Article 6.6 and Annex II(7) of the AD Agreement. Mexico claimed that the Ministry's failure to satisfy itself of the accuracy of the information used to determine normal value violated paragraph 7 of Annex II, since the Ministry failed to act with "special circumspection" with regard to the best information available used as a basis for that determination. Mexico claimed that the Ministry's failure to satisfy itself of the accuracy of the information used to determine injury violated Article 6.6, because: (i) the Ministry examined the maximum and minimum amounts of imports during the period of investigation ("POI"), rather than comparing the trend in imports during the POI with the trend in the previous comparable period; (ii) the import data concerning tariff heading 2523.29.00 used by the Ministry included products other than that under investigation; the import data concerning tariff heading 2523.29.00 included non-dumped imports from Mexico, and imports from countries other than Mexico. Guatemala replied that the Ministry used data supplied by Cruz Azul for calculating the volume of imports. The Ministry therefore did not take into account imports from other countries, or imports of other types of cement not subject to the investigation. With regard to the accuracy of the information used to determine normal value, Guatemala argued that the Ministry was entitled to use the "best information available", consistent with Article 6.8 of the AD Agreement. As regards that "best information available", Guatemala asserted that the Ministry used four invoices as the basis for its calculations and Mexico did not suggest that those invoices were fraudulent during the course of the Ministry's investigation.

With regard to Mexico's claim under Annex II, Panel found that that the Ministry's recourse to "best information available" was contrary to Article 6.8 of the AD Agreement, read in light of Annex II(3). With regard to Mexico's claim under Article 6.6, Panel noted that it was important to distinguish between the accuracy of information, and the substantive relevance of such information. Once an investigating authority had determined what information was of substantive relevance to its investigation, Article 6.6 required the investigating authority to satisfy itself (except when "best information available" is used) that the substantively relevant information was accurate. Thus, Article 6.6 applied once an initial determination had been made that the information is of substantive relevance to the investigation. Article 6.6 provides no guidance in respect of the initial determination of whether information is, or is not, of substantive relevance to the investigation. Panel noted that in fact Mexico was questioning the substantive relevance of that data since Mexico argued that the Ministry should have used other data the Panel therefore rejected Mexico's claim under Article 6.6 of the AD Agreement.

(d). Was the verification visit inconsistent with AD Agreement: Mexico claimed that the Ministry's verification visit to Cruz Azul was inconsistent with Article 6.7 and Annex I (2), (3), (7) and (8) of the AD Agreement because the Ministry intended to conduct the verification visit with the participation of non-governmental experts with an obvious conflict of interest, because the Ministry sought to proceed with the verification without the express agreement of Cruz Azul to the terms of the verification, because the Ministry failed to notify the Government of Mexico of the participation of non-governmental experts, and because the Ministry sought to verify information that had not been submitted by Cruz Azul. Guatemala contended that Mexico's claims were without foundation. Guatemala argued that Article 6.7 is silent on the permissible scope of a verification, and Annex I(7 and 8) does not support Mexico's position. Guatemala asserted that Cruz Azul's failure to provide the cost data requested by the Ministry would have justified the Ministry in immediately applying the "best information available" rule. Instead, Guatemala stated that the Ministry acted in good faith, and provided Cruz Azul with one last chance to supply the cost data during the verification. Guatemala noted that Annex I(7) refers to "any further information which needs to be provided", interpreting this to mean that an investigating authority may seek "further information" during the course of an investigation. Guatemala argued that the Ministry notified the Government of Mexico of its intention to include non-governmental experts in its verification team in a letter dated 26 November 1996 (addressed to Cruz Azul, but copied to the Government of Mexico). According to Guatemala, Mexico acknowledged having received a copy of its letter. Guatemala claimed that it was not required to explain the exceptional circumstances which necessitated the inclusion of non-governmental experts, and that in any event Mexico knew that non-governmental experts were required because this was the Ministry's first investigation. Guatemala denied that the non-governmental experts had any conflict of interest, because Cruz Azul was not an interested party in any of the US proceedings in which the non-governmental experts at issue had participated. Guatemala also asserted that the conflict-of-interest issue was in any event irrelevant, since Cruz Azul refused to allow any verification of cost data, whether or not the verification team included non-governmental experts.

(d.a) Inclusion of non-governmental experts with an alleged conflict of interest in the verification team: Panel held that it was entirely reasonable for Cruz Azul to object to the inclusion in the Ministry's verification team of two non-governmental experts who had a conflict of interest but pointed out that none of the provisions cited by Mexico explicitly prohibit such conduct. Therefore the panel noted that it was unable to find that the Ministry violated Article 6.7 and Annex I (2), (3), (7) and (8) of the AD Agreement by including non-governmental experts with a conflict of interest in its verification team.

(d.b) Alleged failure to notify Mexico of the inclusion of non-governmental experts: Panel noted that according to Paragraph 2 of Annex I of the AD Agreement the Ministry was obligated to inform the Mexican authorities of its intention to include non-governmental experts in the verification team for the Ministry's visit to Cruz Azul. After the evaluation of evidence, Panel noted that in principle, Mexico bore the burden to prove that the Ministry failed to inform it of the inclusion of non-governmental experts in the Ministry's verification team but held that in practice the burden was impossible for Mexico to meet because one simply cannot prove that one was not informed of something. Panel held that although Mexico could not establish definitively that it was not informed by the Ministry of the Ministry's intention to include non-governmental experts in its verification team, there was sufficient evidence before it to suggest strongly that it was not so informed. According to the Panel although an investigating authority should normally be able to demonstrate that it complied with a formal requirement to inform the authorities of another Member, Guatemala had failed to rebut the strong suggestion that it failed to do so. Panel pointed out that the letter referred to by Guatemala suggested strongly that Mexico was not notified by Guatemala. Therefore the Panel concluded that the Ministry violated paragraph 2 of Annex I of the AD Agreement by failing to inform the Government of Mexico of the inclusion of non-governmental experts in the Ministry's verification team.

Agreeing with Guatemala Panel held that whereas paragraph 2 of Annex I requires the exporting Member to be "so informed", the logical conclusion from the structure of that provision was that the exporting Member need only be informed of the intention to include non-governmental experts in the investigating team. If the intention of the drafters had been to impose an obligation on authorities to inform exporting Members of the "exceptional circumstances" at issue, presumably the first sentence of Annex I(2) would have been drafted in a manner that clearly provided for that obligation. Therefore Panel rejected Mexico's claim that Guatemala violated Annex I(2) by the Ministry's failure to inform Mexico of the exceptional circumstances justifying the need to include non-governmental experts in the Ministry's verification team.

(d.c) Scope of the verification: Mexico claimed that the Ministry violated Article 6.7 and Annex I(7) of the AD Agreement by seeking to verify certain information (concerning the extended period of investigation) not submitted by Cruz Azul in its questionnaire responses. Mexico claimed that the Ministry should have limited itself to verifying the information submitted by Cruz Azul, and obtaining further details concerning this information. According to Mexico, under no circumstances was the

Ministry entitled to require or review additional information. Mexico noted that paragraph 7 of Annex I of the AD Agreement provides in relevant part that "the main purpose of the on-the-spot investigation was to verify information provided or to seek further details". According to Mexico, the "further details" referred to in that provision were details concerning information already "provided" in the questionnaire response. Guatemala interpreted to "any further information which needs to be provided", and interpreted it to mean that an investigating authority may seek "further information" during the course of an investigation.

Panel noted that when examining verification visits scheduled by investigating authorities in the territory of other Members, it is important to read Article 6.7 and Annex I as a whole. According to the Panel although Annex I(7) provides that the "main purpose" of the verification visit is to verify information already provided, or to obtain further details in respect of that information, it also provides that an investigating authority may "prior to the visit ... advise the firms concerned ... of any further information which needs to be provided". Since there would be little point in advising a firm of "further information ... to be provided" in advance of the verification visit if the investigating authority were precluded from examining that "further information" during the visit, Panel noted that the phrase "further information ... to be provided" refers to information to be provided during the course of the verification. According to the Panel Mexico's view that an investigating authority may only verify information submitted prior to the verification visit is not consistent with this interpretation of Annex I(7). Therefore the Panel held that the "information obtained" must refer to information obtained during the course of the verification visit, since it is only information obtained during the course of a verification visit which may prompt a request for further details during the course of the verification visit.

e. Failure to provide access to certain documents: Mexico claimed that the Ministry violated Articles 6.1.2, 6.2 and 6.4 of the AD Agreement by

(a) refusing Cruz Azul access to the file, and

(b) failing to promptly provide Cruz Azul with a copy of a submission made by Cementos Progreso.

Mexico also claimed that the Ministry violated Article 6.4 by

(c) failing to provide Cruz Azul with copies of the file, and

(d) failing to provide Cruz Azul with a full record of the 19 December 1996 public hearing.

(e.a) Denial to access file: On the issue of alleged denial of access to the file Mexico claimed that the Ministry refused Cruz Azul access to the file on and submitted a notarial deed to that effect, in

support of its claim. Guatemala argued that Cruz Azul was provided access to the file. In this regard, Guatemala claimed that under Guatemalan law interested parties have a constitutional right to access the file in question. Guatemala argued that the fact that Cruz Azul had timely access to the file was demonstrated by its numerous submissions in which it alluded to evidence in the file. Guatemala also argued that the Ministry was never shown a copy of the notarial deed.

The Panel noted that if Cruz Azul wanted to review evidence submitted by Cementos Progreso, it would have to have access to the file to do so. In these circumstances, regular and routine access to the file is required by Articles 6.1.2 and 6.4. In the factual circumstances set forth in the notarial deed of 4 November 1996, Panel held that that the circumstances were indicative of a pattern of behaviour which would prevent regular and routine access to the file, and which would fail to ensure that evidence presented by one interested party would be "made available promptly" to other interested parties (consistent with Article 6.1.2), and which would fail to ensure that interested parties have "timely opportunities" to see information relevant to the presentation of their cases (consistent with Article 6.4). Guatemala tried to rebut the *prima facie* case by arguing that the fact that Cruz Azul had sufficient access to the file was demonstrated by numerous submissions which referred to evidence in the file. But the Panel held that the fact that Cruz Azul may have had access to the file on certain occasions did not demonstrate that Cruz Azul had regular and routine access to the file.

(e.b)Failure to promptly provide submission of the other party: Mexico claimed that the Ministry violated Articles 6.1.2 and 6.4 by failing to provide Cruz Azul promptly with a copy of the submission made by Cementos Progreso at public hearing only after 20 days. Guatemala contended that the Ministry was justified in delaying Cruz Azul's access to Cementos Progreso's submission at the December 1996 public hearing because of the possibility that the submission contained confidential information. Guatemala argued that any submission prepared by Cruz Azul in response to Cementos Progreso's submission would not have been "practicable", since it would have been submitted too late to be taken into account by the investigating authority (because of the alleged closure of the Ministry's record prior to that date).

The Panel noted that in principle, a 20-day delay was inconsistent with the Ministry's Article 6.1.2 obligation to make the submission available to Cruz Azul "promptly". Guatemala argued that "the Ministry had a valid reason for not giving Cruz Azul immediate access to this document". In particular, Guatemala argued that "it was reasonable for the Ministry to conclude that the lengthy written submission of 19 December prepared by Cementos Progreso would contain confidential

information that "ought not to be revealed to Cruz Azul". In this regard, the Panel noted that the obligation in Article 6.1.2 is qualified by the words "[s]ubject to the requirement to protect confidential information" therefore, evidence presented by one interested party need not be made available "promptly" to other interested parties if it is "confidential". However, insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. Panel noted that Article 6.5 reserves special treatment for "confidential" information only "upon good cause shown", and the requisite "good cause" must be shown by the interested party which submitted the information at issue. Guatemala did not demonstrate, or even argued, that Cementos Progreso requested confidential treatment for its submission, or that "good cause" for confidential treatment was otherwise shown. Panel further noted that the Article 6.1.2 proviso regarding the "requirement to protect confidential information", when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility - which is unsubstantiated by any request for confidential treatment from the party submitting the evidence - that the evidence contains confidential information. Therefore the Panel concluded that the Ministry violated Article 6.1.2 of the AD Agreement by failing to make Cementos Progreso's 19 December 1996 submission available to Cruz Azul.

(e.c) Failure to provide copies of file: On the issue of alleged failure to provide copies of the file Mexico claimed that the Ministry violated Article 6.4 of the AD Agreement by failing to provide Cruz Azul with two copies of the file. In response to a question from the Panel, Guatemala contended that the relevant copies were not provided because Cruz Azul did not pay the required fee, even though the Ministry's communication indicated that copies would be at the expense of the party requesting the copy.

Panel found that Cruz Azul had requested two copies of the file and that Cruz Azul offered to pay for those copies. According to the Panel there are various ways in which an investigating authority could satisfy the Article 6.4 obligation to provide "whenever practicable ... timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases ...". In the present case, the Ministry chose to offer interested parties copies of the file, against payment of a fee. There was no evidence to suggest that the Ministry even informed Cruz Azul how much each copy of the file would cost. According to the Panel, an investigating authority cannot "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases" if it conditions the provision of copies on the payment of a fee without at least informing the

requesting party how much the fee would be, or without at least providing the requesting party with the information it would need to calculate the fee for itself. Therefore the Panel concluded that the Ministry did not comply with its Article 6.4 obligation to "provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases".

(e.d) Failure to provide complete copy of record of public hearing: Mexico claimed that the Ministry violated Article 6.4 of the AD Agreement by failing to provide Cruz Azul with a complete copy of the Ministry's record of the public hearing. Guatemala did not admit that the copy of the record was incomplete. Even if it were incomplete, Guatemala argued that Cruz Azul could have requested a complete copy as soon as it realised that there had been an omission. Guatemala also argued that Cruz Azul did not bring the matter to the attention of the Ministry during the investigation, and that the matter was only raised in the present WTO dispute settlement proceedings. Panel noted that evidence demonstrated that the record of the 19 December 1996 public hearing provided by the Ministry to Cruz Azul was incomplete as the pages in between were missing. However, the Panel held that despite the factual accuracy of Mexico's argument, it did not amount to a violation of Article 6.4 of the AD Agreement, as Mexico failed to adduce any evidence that the Ministry's failure to provide a full copy of its record of the public hearing was anything other than inadvertent. According to the Panel although an interested party is entitled to see a full version of the investigating authority's record of any public hearing, it was not inconceivable that an investigating authority which chooses to provide interested parties with a copy of the record could inadvertently fail to provide a complete copy.

(f). Confidential treatment of certain documents: Mexico claimed that the Ministry violated Articles 6.1, 6.2, 6.3, 6.5, 6.5.1 and 6.5.2 of the AD Agreement in according confidential treatment to certain information submitted by Cementos Progreso. Mexico's claims concerned (1) information submitted during the verification visit at Cementos Progreso, and (2) information submitted by Cementos Progreso at the 19 December 1996 public hearing. Guatemala claimed that, in its handling of the information supplied by Cementos Progreso, the Ministry complied with Articles 6.5.1 and 6.5.2 of the AD Agreement. Guatemala asserted that the documents submitted by Cementos Progreso were clearly of a confidential nature and could not be summarized in accordance with Article 6.5.1.

Regarding Mexico's claim that the Ministry violated Article 6.5.2 by accepting to provide confidential treatment for certain information submitted during the verification visit at Cementos Progreso, despite Cementos Progreso failing to justify its request for confidential treatment, Panel

noted that Article 6.5.2 does not require any justification to be provided by the interested party requesting confidential treatment. If any such obligation exists, it derives from Article 6.5, not 6.5.2. Panel pointed out that Mexico had not based the claim on Article 6.5. Article 6.5.2 speaks only to events when "the authorities find that a request for confidentiality is not warranted". Since there was nothing to suggest that the Ministry found that Cementos Progreso's request for confidentiality of the relevant information was not warranted, Article 6.5.2 would appear not to apply in the factual circumstances of the case. The Panel accordingly rejected Mexico's Article 6.5.2 claim. Panel rejected Mexico's claim under Articles 6.1, 6.2, 6.4, 6.5, 6.5.1 and 6.5.2 of the AD Agreement that (1) the Ministry failed to require Cementos Progreso to provide non-confidential summaries of information that was "susceptible of summary" (within the meaning of Article 6.5.1), (2) the Ministry failed to require Cementos Progreso to provide reasons why the information - if it was not "susceptible of summary" -could not be made public. Panel pointed out that Mexico's claims concerned information which was not generally capable of summarisation "in sufficient detail to permit a reasonable understanding of the substance".

With regard to Mexico's claims that the Ministry failed to require Cementos Progreso to provide reasons why the information - which was not "susceptible of summary" - could not be made public, Panel noted that although Article 6.5.1 does not explicitly provide that "the authorities shall require" interested parties to provide a statement of the reasons why summarisation is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. According to the Panel it is not possible to conclude that the obligation concerning the need to provide a statement of reasons is an obligation imposed exclusively on the interested party submitting the information, and not the investigating authority, since the AD Agreement is not addressed at interested parties. The AD Agreement imposes obligations on WTO Members and their investigating authorities. Therefore the Panel held that Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarisation is not possible. Panel noted that Guatemala failed to adduce any evidence that the requisite statement of reasons was provided by Cementos Progreso, or that the Ministry even required Cementos Progreso to provide such a statement of reasons. Therefore the Panel concluded that the Ministry violated Article 6.5.1 of the AD Agreement by failing to require Cementos Progreso to provide a statement of the reasons why summarisation of the relevant information was not possible.

On the issue of information submitted by Cementos Progreso at public hearing Mexico claimed that the Ministry violated Articles 6.5, 6.5.1 and 6.5.2 of the AD Agreement by granting Cementos Progreso's 19 December 1996 submission confidential treatment on its own initiative. Panel noted that the text of Article 6.5 distinguishes between two types of confidential information: (1) "information which is by nature confidential", and (2) information "which is provided on a confidential basis". Article 6.5 then provides that the provision of confidential treatment is conditional on "good cause" being shown. Panel noted that logically, one might expect that "good cause" for confidential treatment of information which is "by nature confidential" could be presumed, and that "good cause" need only be shown for information which is not "by nature confidential" (but for which confidential treatment is nonetheless sought). Panel held that Article 6.5 is not drafted in a way which suggests this approach. Instead, the requirement to show "good cause" appears to apply for both types of confidential information, such that even information "which is by nature confidential" cannot be afforded confidential treatment unless "good cause" has been shown. According to the Panel since Guatemala had not demonstrated, or even argued, that Cementos Progreso requested confidential treatment for its 19 December 1996 submission, let alone that Cementos Progreso showed "good cause" for confidential treatment of that submission therefore the Ministry violated Article 6.5 of the AD Agreement by granting Cementos Progreso's submission confidential treatment on its own initiative.

(g). Extension of the period of investigation: Mexico challenged the Ministry's decision to extend the period of investigation (POI) because it claimed that the extension was not justified in either fact or law. Mexico alleged in particular that Cruz Azul did not know the legal grounds for the extension of the POI, and that the Ministry did not respond to requests for information from Cruz Azul concerning the extension. Mexico claimed that, as a result, Cruz Azul was not able to defend its interests in respect of the extension of the POI, contrary to Articles 6.1 and 6.2 of the AD Agreement. Mexico also asserted that the extension of the POI imposed an excessive and unreasonable burden on the exporter. Mexico claimed that, since the investigating authority should specify in detail the information required from interested parties "as soon as possible after the initiation of the investigation" (Annex II(1)), investigating authorities are effectively precluded from extending the POI during the course of the investigation. Mexico claimed that the extension of the POI during the course of an investigation, and after the imposition of provisional measures, is contrary to the logic of the structure of investigations. Changing the POI between the preliminary and final determinations can completely distort the investigation, because the data used to determine dumping, injury or threat of injury, and causal link in each case will not be the same. Guatemala argued that no provision of the AD Agreement imposes any requirements on the investigating authority with respect to the POI.

Guatemala asserted that the investigating authority has absolute discretion regarding the selection of the POI, which it may vary from case to case. Concerning Mexico's claim that the extension imposed an excessive and unreasonable burden on Cruz Azul, Guatemala pointed out that Cruz Azul did not request any extension of the time allowed for responding to the supplementary questionnaire. Guatemala also denied that Annex II(1) of the AD Agreement prevents investigating authorities from extending the POI during the course of the investigation. Guatemala argued that it was an unacceptable proposition, since it would prevent investigating authorities from requesting information in addition to that requested at the time of initiation. Guatemala argued that such a proposition would render the implementation of Articles 7.4 and 9.1 (lesser duty rule) and 10.2 (post-provisional measure information necessary to determine the effects of imports) more difficult, if not impossible. Guatemala also argued that the AD Agreement recognises the need to use as much up-to-date information as possible, particularly with respect to threat of injury. Furthermore, Guatemala claimed that the Ministry notified Cruz Azul of the information requested and granted Cruz Azul ample opportunity to submit in writing all the evidence it considered appropriate. Panel did not agree with the argument that paragraph 1 of Annex II, or any other provision of the AD Agreement, prevents an investigating authority from extending the POI during the course of an investigation and agreed with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation. Panel pointed out that the extension of POI may in certain cases lead to negative findings of dumping and/or injury, to the benefit of exporters. The fact that the POI may be extended after the imposition of provisional measures is not necessarily problematic, since even without any extension of the POI there is no guarantee that the factual basis for the preliminary determination will be the same as that of the final determination. The factual basis may change, for example, if a preliminary affirmative determination of injury is made on the basis of data provided by the complainant, and if some (or all) of that data are shown to be erroneous during verification of the domestic industry. In such cases differences in the factual bases of the preliminary and final determinations would normally be necessary in order to preserve the integrity of the investigation. Although Annex II(1) provides that interested parties should be informed of the information required by the investigating authority "as soon as possible after the initiation of the investigation", this does not mean that information concerning a particular period of time may only be required if the request for that information is made immediately after initiation. Panel interpreted the first sentence of paragraph 1 of Annex II to mean that any request for specific information should be communicated to interested parties "as soon as possible". Since Mexico had not advanced any argument that it was possible for the Ministry to have requested information concerning the extended

POI before it actually did so, Panel rejected Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under paragraph 1 of Annex II of the AD Agreement.

Mexico claimed that the Ministry violated Articles 6.1 and 6.2 by extending the POI, because Cruz Azul was not informed of the reasons for the extension, and was not provided with an opportunity to comment on that extension. Addressing Mexico's Article 6.1 claim Panel noted that Mexico's interpretation of that provision was too expansive. The plain language of Article 6.1 merely required that interested parties be given (1) notice of the information which the authorities require, and (2) ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation. Panel noted that Cruz Azul had two weeks' notice of the information required by the Ministry in respect of the extended POI.

Regarding, Mexico's claim that Cruz Azul was denied any opportunity to comment on the extension of the POI *per se*, Panel pointed out that Article 6.1 does not explicitly require the provision of opportunities for interested parties to comment on decisions taken by the investigating authority in respect of the information it requires. Therefore Panel rejected Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under Article 6.1 of the AD Agreement.

Mexico claimed that the Ministry violated Article 6.2 because Cruz Azul was not given any opportunity to comment on Cementos Progreso's request for extension of the POI. Panel pointed out that there was no evidence before it to suggest that Cruz Azul even knew that Cementos Progreso had requested an extension of the POI. According to the Panel the first sentence of Article 6.2 of the AD Agreement is a fundamental due process provision therefore when a request for an extension of the POI comes from one interested party, due process requires that the investigating authority seeks the views of other interested parties before acting on that request. Failure to respect the requirements of due process would conflict with the requirement to provide interested parties with "a full opportunity for the defence of their interests", consistent with Article 6.2. An interested party is not able to defend its interests if it is prevented from commenting on requests made by other interested parties in pursuit of their interests. There was no evidence to suggest that the Ministry sought the views of Cruz Azul, or other interested parties, before deciding to extend the POI. Accordingly, Panel concluded that by extending the POI pursuant to a request from Cementos Progreso without seeking the views of other interested parties in respect of that request, the Ministry failed to provide Cruz Azul with "a full opportunity for the defence of [its] interests", contrary to Guatemala's obligations under Article 6.2 of the AD Agreement.

(h). Failure to inform "essential facts": The Ministry did not inform Cruz Azul promptly of the "essential facts under consideration" that would be taken into account for the definitive anti-dumping measure, contrary to Articles 6.1, 6.2 and 6.9. Guatemala claimed that the "essential facts under consideration" were disclosed to Cruz Azul. Guatemala asserted that, in a notice. Guatemala therefore argued that the "essential facts" were in the file, to which interested parties had access. In addition, Guatemala claimed that the "essential facts" were already disclosed in a detailed report setting out the factual basis for the Ministry's preliminary determination, and that the parties could comment on these "essential facts" at the 19 December 1996 public hearing. Guatemala argued that the Ministry was permitted to proceed expeditiously under Article 6.14, rather than delaying the final determination in order to issue "another description of the essential facts".

Panel held that the alleged disclosure by the Ministry of the "essential facts" forming the basis of the Ministry's preliminary determination did not meet the requirements of Article 6.9. Article 6.9 provides explicitly for disclosure of the "essential facts ... which form the basis for the decision whether to apply definitive measures. Disclosure of the "essential facts" forming the basis of a preliminary determination is clearly inadequate in circumstances where the factual basis of the provisional measure is significantly different from the factual basis of the definitive measure. In the present case, the preliminary measure was based on a preliminary determination of threat of material injury, whereas the final determination was based on actual material injury. Panel noted that the Ministry's preliminary determination was based on a POI different from that used for its final determination, since the POI was extended. Referring to the United States' assertion that "[i]n the course of an anti-dumping investigation, the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination", Panel held that if the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination, it failed to see how disclosure of the "essential facts" forming the basis of the preliminary determination could amount to disclosure of the "essential facts" forming the basis of the final determination, since the "bulk" of the "essential facts" underlying the final determination would not yet have been gathered. With regard to Guatemala's argument that the Ministry disclosed the "essential facts" by making copies of the file available to interested parties Panel noted that an investigating authority's file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. The difficulty for an interested party with access to the file, is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for

interested parties. According to the Panel an interested party will not know whether a particular fact is "important" or not unless the investigating authority has explicitly identified it as one of the "essential facts" which form the basis of the authority's decision whether to impose definitive measures. If the disclosure of "essential facts" under Article 6.9 could be undertaken simply by providing access to all information in the file, there would be little, if any, practical difference between Article 6.9 and Article 6.4. "We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide "timely opportunities for interested parties to see all information that is relevant to the presentation of their cases ... and that is used by the authorities ..."[118] in order to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures".[119] In light of these considerations, we do not consider that the Ministry could comply with the requirement to "inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures" simply by offering to provide interested parties with copies of all information in the file."[120]

(i). Change in the nature of determination without providing information and the right to defend: Mexico claimed that the Ministry violated Articles 6.1, 6.2 and 6.9 of the AD Agreement by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing Cruz Azul of that change, and without giving Cruz Azul a full and ample opportunity to defend itself. Mexico argued that during the course of the investigation and up until the public hearing which the Ministry held with the parties, i.e. 11 months after the initiation of the investigation, Cruz Azul did not know that the Ministry had changed the examination and determination of threat of material injury. Mexico asserted that Cruz Azul was therefore denied an opportunity to exercise the right of defence given under Article 6.1, 6.2 and 6.9, including the opportunity to provide relevant information and evidence that might have counteracted the determination of injury by the authority.

According to Guatemala, Mexico was essentially suggesting that an investigating authority must inform the exporter of its intention to base its final determination on threat of injury or material injury in order that the exporter may have an adequate opportunity to defend its interests. Guatemala argued that there is no support for this argument in the AD Agreement. Article 6.1, 6.2 and 6.9 contain nothing to suggest that an investigating authority must inform an exporter of the legal basis for the

[118] Report of the Panel para 8.230
[119] *ibid.*

final determination prior to notice of that determination being given. According to Guatemala, Article 5 of the AD Agreement itself provides the legal basis for a final determination, in that the final determination may be based either on threat of material injury or actual material injury. Guatemala argued that Cruz Azul never provided any evidence that it had not been engaged in dumping or that Cementos Progreso had not been adversely affected by the dumped imports, and that Mexico had not informed the Panel that Cruz Azul was not engaged in dumping or that Cementos Progreso was not materially injured. According to Guatemala, when the preliminary determination was issued it was clear that Cementos Progreso was being threatened with material injury. When the final determination was issued, the files showed that Cementos Progreso had already been injured.

Panel held that that an investigating authority need not inform interested parties in advance when, having issued a preliminary affirmative determination on the basis of threat of material injury, it subsequently makes a final determination of actual material injury. According to the Panel no provision of the Agreement requires an investigating authority to inform interested parties, during the course of the investigation, that it has changed the legal basis for its injury determination. Investigating authorities are instead required to forward to interested parties a public notice, or a separate report, setting forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities", consistent with Article 12.2 of the AD Agreement. If decisions on issues of law had to be disclosed to interested parties during the course of the investigation, there would be little need for interested parties to receive the notice provided for in Article 12.2. To the extent that there is any difference between the preliminary determination of injury and the final determination of injury, that change will be apparent to interested parties comparing the public notice of the investigating authority's preliminary determination with the public notice of its final determination. Panel noted that Mexico's claim was based on Articles 6.1, 6.2 and 6.9 of the AD Agreement. According to the Panel the express wording of Article 12.2 only imposes such a specific obligation on investigating authorities at the end of the investigation. Therefore the Panel rejected Mexico's claim that the Ministry violated Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing Cruz Azul of that change.

2.DETERMINATION OF INJURY

---

[120] *ibid*

Mexico claimed that determination of injury by Guatemalan authority was not consistent with the Anti-Dumping Agreement.

(a). Violation of Article 3.2 in considering the volume of dumped imports: According to Mexico, the evaluation by Guatemala of the volume of dumped imports was not consistent with Article 3.2 of the AD Agreement for a number of reasons.

1. Guatemala confined itself to considering the maximum and minimum volumes imported during the investigation period. Guatemala contended that it examined the volume of dumped imports both in absolute and in relative terms. Cruz Azul's share in domestic consumption went from one per cent of the Guatemalan market to 21 per cent of the market with a high of 32 per cent in between. Guatemala argued that it properly examined the rate at which import volumes were increasing as required by Article 3.2. Panel noted that the Ministry did a month by month examination of the total volume of imports of grey portland cement as well as of the volume of Mexican imports. Although in the text of the resolution Guatemala reported the end to end and highest and lowest point results of their analysis of the volume of dumped imports, it was evident from the Injury Report that the authorities considered the situation during each of the intervening months during the period they chose for data collection. Therefore the Panel did not agree with Mexico's assertion that "Guatemala confined itself to maximum and minimum volumes imported during the investigation period" and thus Guatemala did not act inconsistently with Article 3.2 in this respect.

2. Mexico claimed that Guatemala used a data collection period of one year and failed to compare the volume of dumped imports during that period to earlier periods in order to analyse long-term trends in imports. Guatemala argued that there was no need to evaluate import trends for periods prior to 1995 as there were simply no imports of Cruz Azul cement until June 1995. Panel pointed out that a recommendation of the Committee on Anti-Dumping Practices calls on Members to use a data collection period of at least three years. This recommendation reflects the common practice of Members.[121] According to the Panel, there is no provision in the Agreement which specifies the precise duration of the period of data collection. Thus, it cannot be said *a priori* that the use of a one-year period of data collection would not be consistent with the requirement of Article 3.2 to consider whether there has been a significant increase in the volume of dumped imports in the circumstances of

[121] The recommendation provides that: "(c) the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, and should include the entirety of the period of data collection for the dumping investigation; " (Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the ADP Committee on 5 May 2000, G/ADP/6).

a particular case. Panel further noted that the record of the investigation supported Guatemala's conclusion. According to the Panel under these circumstances, while a longer data collection period might have been preferable, it cannot be held that the use by Guatemala of a one-year data collection period was inconsistent with Guatemala's obligation under Article 3.2 to consider whether there was a significant increase in dumped imports.

3. Mexico claimed that Guatemala erroneously determined the volume of imports of grey portland cement from Mexico by including imports of the product under investigation from sources other than Mexico and by including other types of cement not under investigation, for example, grey cement or slow-setting cement, which are imported under the same tariff heading. . Guatemala violated Articles 3.1, 3.2, and 3.5 by failing to take into account certain imports of the product under investigation imported by MATINSA, an importer associated with the petitioner, Cementos Progreso. Guatemala contended that it took MATINSA's imports into account and concluded that they did not weaken its determination of injury caused by cement imports from Cruz Azul. Guatemala also contended that it did not disregard the existence of other types of cement, imported under tariff heading 2523.29.00. In its analysis, the Ministry only considered imports from Cruz Azul. The Ministry noted that imports from Cruz Azul represented 91 per cent of total imports of grey cement into Guatemala during the investigation period. The Ministry did not assume that all the imports under this tariff heading were from Cruz Azul.

Panel noted that Guatemala had argued that imports by MATINSA of the product under investigation were insignificant as they represent only 0.003 per cent of MATINSA's total imports. According to the Panel there were inconsistencies in this assertion. Panel noted that there was an inconsistency as to the total volume of imports during the period of investigation by MATINSA. Guatemala asserted that total imports by MATINSA for the period of investigation were 117,223.83 tons, while in the Final Determination the figure for total imports by MATINSA was of 79,426 tons. Panel further noted that there was also an inconsistency as to the volume of imports of MATINSA's imports of type I pozzolanic cement. Guatemala argued that imports of type I pozzolanic cement by MATINSA were 348.5 tons, while the evidence presented by Mexico indicated that these imports were at least 16,766.71 tons during the period of investigation. Panel held that even if it was assumed that Guatemala's figures for total imports and type I pozzolanic cement imports by MATINSA were correct, there was also an inconsistency as to the calculation of the proportion of imports of type I pozzolanic cement in MATINSA's total imports. Guatemala had contended that imports of type I pozzolanic cement were 0.003 per cent of total imports by MATINSA. According to the Panel even if it was assumed that the correct figure for total imports by MATINSA was the higher of the two

reported (i.e. 117,223.83 tons), the 348.5 tons imports of type I pozzolanic cement by MATINSA would represent 0.297 per cent of total imports by MATINSA not 0.003 per cent as alleged by Guatemala. Panel therefore, concluded that Guatemala failed to rebut the *prima facie* case of violation of Article 3.1, 3.2 and 3.5 established by Mexico and therefore violated Articles 3.1, 3.2 and 3.5 by wrongly characterizing some imports by MATINSA as not of the like product and failing to take into account these imports in its determination of injury and causality.

(b). Examination of price trends: Mexico next claimed that Guatemala did not comply with Article 3.2 of the AD Agreement because in its final affirmative determination of injury it included a series of assertions concerning the price trends without having any elements to uphold its determination. Specifically Mexico argued Guatemala lacked evidence to: i) support a determination that the price of the grey portland cement imported from Mexico undercut the price of domestic grey portland cement manufactured by Cementos Progreso; ii) substantiate a determination that the effect of the imports on the domestic production had led to a significant reduction or prevented an increase, or; iii) support the finding that the alleged dumping, was the cause of any negative effect on domestic prices and not other elements. Mexico argued that this lack of support was evidenced by the fact that Guatemala did not compare the domestic like product prices for the period of investigation with the prices for the previous year to establish that the dumped Mexican imports were causing the price depression. Mexico also claimed that the Ministry's analysis of the effect on the prices was erroneously done at the regional level only, and not at the national level in violation of Article 3.2. Mexico based its claim on the statement in the final determination by Guatemala that the difference between the prices actually charged for the domestic product and the ceiling price fixed by the government was greater in the western region of Guatemala bordering with Mexico.

Guatemala asserted that it examined information on prices at both wholesale and retail level in Guatemala during the investigation period. This examination revealed significant price undercutting by Cruz Azul at both levels. Then it examined whether imports from Cruz Azul were depressing prices or preventing price increases in Guatemala to a significant degree.

Regarding the regional evaluation of the effect the dumped imports had on the prices of the domestic like product Panel noted that the mere fact that Guatemala mentioned that the greatest differential between the government fixed ceiling price and the actual price was felt in certain areas did not mean that the analysis was limited to these regions alone, to the exclusion of Guatemala as a whole. According to the Panel there was only one producer of cement in Guatemala, thus, even if the

negative effect of the dumped imports on the prices of the domestic like product was only evidenced in the region bordering Mexico, this could still be viewed as causing injury to Cementos Progreso. Therefore, the Panel held that Guatemala acted in accordance with its obligation under Article 3.2 to conduct an examination of the effect the dumped imports had on the domestic industry.

(c). Impact of imports on domestic industry: Mexico claimed that Guatemala made an incorrect determination of the alleged impact of the dumped imports on sales of grey Portland cement by the domestic industry. Among other arguments Mexico contended that Guatemala had failed to consider whether the domestic industry experienced a decline in their returns on investment and a negative effect on their ability to raise capital. Other arguments by Mexico with respect to the adequacy of the examination of the impact of the imports on the domestic industry included Guatemala's failure to consider the potential decline in the factors listed in Article 3.4, as well as, inconsistent and inappropriate comparisons by Guatemala between data pertaining to the period of investigation and data outside the period of investigation. Guatemala contended that it based its final determination on positive evidence and an objective examination of, the consequent impact of Cruz Azul imports on the domestic industry, in accordance with Article 3.1 and 3.4 of the Anti-Dumping Agreement.

Panel pointed out that it is essential, in order to satisfy the requirements in Article 3.4, to examine each of the factors listed in that provision. According to the Panel Article 3.4 establishes a rebuttable presumption that those factors listed are relevant in giving guidance on whether the dumped imports have had an effect on the domestic industry. It is only after consideration of the listed factors that the investigating authority may dismiss some of them as not being relevant for the particular industry, thus in effect rebutting the presumption established in Article 3.4. According to the Panel consideration of the factors in Article 3.4 must be apparent in the determination so the Panel may assess whether the authority acted in accordance with Article 3.4 at the time of the investigation. Panel pointed out that Guatemala's final determination, contained some discussion concerning investment and the risks to investors for the period of investigation but the paragraph was just a discussion of the operative balance of Cementos Progreso and did not pertain to the specific factors of return on investment and ability to raise capital. With respect to factors of return on investments and ability to raise capital, Panel noted that there was no indication in the determination that Guatemala considered these factors in the injury determination. Therefore Panel held that Guatemala acted inconsistently with Article 3.4 in its examination of the impact of the dumped imports on the domestic industry, by failing to examine all relevant factors listed in Article 3.4.

COMMENT ON THE CASE

In this case Panel has tried to maintain the delicate balance between the requirement of transparency and fair procedure on the one hand and the practical need of the investigating authority to effectively conduct the investigation.

UNITED STATES-ANTIDUMPING DUTY ON DYNAMIC RANDOM ACCESS MEMORY SEMICONDUCTORS (DRAMS) OF ONE MEGABIT OR ABOVE FROM KOREA,[122]

In this case Korea challenged section 353.25(a) (2) of the United States Department of Commerce Regulation made under Section 751(d) of the Tariff Act of 1930 (as amended) which provided that the Secretary of Commerce may revoke an order in part if the secretary concludes that:

(i) One or more producers or resellers covered by the order have sold the merchandise at not less than foreign market value for a period of at least three consecutive years

(ii) It is not likely that those persons will in the future sell the merchandise at less than foreign market value; and

(iii) There will be an immediate reinstatement of duty in case of dumping again.

Korea claimed that in three consecutive reviews Korean firms have been found to be not dumping but still the duty was not revoked because the petitioners could not satisfy the authorities that there is no likelihood of dumping in future. The case involved three issues:

- Whether cessation of dumping necessitates revocation of anti-dumping duties
- Whether examination of prospect of dumping is valid under Art. 11.2
- Whether the no-likelihood criteria of recurrence of dumping under the US law was valid

1.Whether cessation of dumping necessitates revocation of antidumping duties

Korea claimed that Article VI and Anti-dumping agreement allow for imposition of anti-dumping duty only to offset dumping that is causing injury. Since for three years Korean companies were found to be not dumping therefore there was no injury caused by such dumping and that US was under an obligation to revoke the duty. Korea further contended that para 1 of Article 11 which is the basic provision lays down a general rule regarding revocation and Para 2 then sets forth certain specific

[122] WT/DS99/R Report of the Panel adopted on 29 January 1999

administrative requirements and imposes certain obligations on authorities which they are required to fulfil. Each of the three sentence that compose paragraph 2 is a directive commanding certain conduct by administering authorities to effect the general rule set forth in para1[123].

United States contended that Article 11.1 does not establish any independent obligation on members to revoke the anti-dumping duty. It states a general rule which informs the rest of Art.11. The specific obligations established in Art.11 are set forth in Articles 11.2 through 11.5. Moreover, Art.11.2 does not prescribe specific circumstances that must lead to revocation. United States further argued that the biggest change occasioned by the Uruguay Round in the area of review and revocation of anti-dumping duty is the addition of a third Para to Art.11 and Koreas' interpretation of Article 11.1 and 11.2 would render 11.3 and footnote 22 superfluous.

Korea contended that while paras 1and 2 require revocation after a member has found that a respondent has not dumped for three and on half consecutive years; Para3 in contrast, requires Members either to revoke a duty or to re-establish that dumping is causing injury through sunset reviews within five years of the most recent dumping, injury and causation findings. Importantly, this provision applies even where a member has found that a Respondent has engaged in significant dumping in every single review period leading up to sunset review.

Rejecting Koreas' argument the Panel held that the second sentence of Article 11.2 requires an investigating authority to examine whether the continued imposition of duty is necessary to offset dumping. The word continued covers a temporal relationship between past and future. And it would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset present dumping. Moreover, in conducting an Article 11.2 injury review, an investigating authority may examine the causal link between injury and dumped imports. If, in the context of review of such causal link, the only injury under examination is injury that may recur following revocation, an investigating must necessarily examine and establish whether that future injury would be caused by dumping with a commensurately prospective timeframe. For these reasons the panel held that Article 11.2 does not a priori precludes a justification of continued imposition of anti-dumping duties when there is no present dumping.

[123] Korea noted that Footnote 22 to Article 11.3 does grant authorities the quite limited discretion in sunset reviews to maintain a duty if, based on the recent retrospective assessment no margin is found. The Footnote is not relevant in this proceeding, because this is not a sunset review covered by Article 11.3 and, even if it were the US authorities found no margin for three consecutive years.

Panel agreed with US that Korea's textual interpretation renders part of Article 11.3 ineffective as the sunset provision in Article 11.3 of the AD Agreement envisages inter alia an examination of whether the expiry of an anti-dumping duty would be likely to lead to continuation or recurrence of dumping. If as argued by Korea, an anti-dumping duty must be revoked as soon as present dumping is found to have ceased, the possibility of the expiry of that duty causing dumping to recur could never arise. This is because reference to expiry in Article 11.3 assumes that dumping has ceased, but may recur as a result of revocation. Furthermore Korea's argument that Article 11.2 requires immediate revocation of anti-dumping duty in case of a finding of "no dumping" is also inconsistent with note 22 of the Anti-Dumping Agreement. If Korea's interpretation of Article 11.2 were accurate, then an anti-dumping duty upon making such a finding, and note 22 would be meaningless. Panel held that this confirms the finding that the absence of present dumping does not in and of itself require the immediate termination of anti-dumping duty pursuant to Article 11.2.

3.Whether examination of prospect of dumping is valid under Art. 11.2

Korea's next claim was claimed that although under Article 11.3 examination of prospect of dumping was valid, speculation as to whether dumping will recur was not permitted under Art. 11.2 which required examination of prospect of recurrence of injury. Therefore, the no likelihood / not likely criteria of dumping under the US law was violative of Art. 11.2 as it focuses on whether dumping will recur in the future. Para 2 provides for a review of whether the continued imposition of the duty is necessary to offset dumping." The words "is" and "offset" are the keys to this inquiry. The negotiators chose the present tense verb "is" and tied it to another present tense verb "offset" which presumes that dumping is occurring. They did not select either "will be" for "is" or "prevent" for "offset" Nor did they permit a forward looking likely analysis. The fact that the negotiators specifically provided for a forward looking analysis of dumping and applied the word "likely " to cover both dumping and injury in para3, but not in para2 confirms that such an analysis is not permitted under Para 2 of Article11. The use of present tense language coupled with the omission of the likely to continue or recur provision indicates that a forward looking analysis is not permitted in regard to para 2 dumping reviews. For purposes of Article 11.2 then, the question of whether a duty is "necessary to counteract dumping," as set out in para1, is answered by reference to whether continued imposition of the duty is necessary to offset dumping".

However, the panel agreeing with the US held that the second sentence of Article 11.2 requires an investigating authority to examine whether the continued imposition of the duty is necessary to offset

dumping. The word continued covers a temporal relationship between past and future. The word continued would be redundant if the investigating authority were restricted to considering only whether the duty was necessary to offset present dumping. Thus the inclusion of the word continued signifies that the investigating authority is entitled to examine whether imposition of the duty may be applied henceforth to offset dumping.

With regard to injury Article 11.2 provides for a review "whether the injury would be likely to continue or recur if the duty were removed or varied which would require examination of causal link between injury and dumped imports. If in the context of a review of such a causal link, the only injury under examination is injury that may recur following revocation (future rather than present injury), an investigating authority must necessarily be examining whether that future injury would be caused by dumping with commensurately prospective timeframe. To do so the investigating authority would first need to have established a status regarding the prospects of dumping.

3.Whether the no-likelihood criteria of recurrence of dumping under the US law was valid

Another issue in DRAM'S case was whether the requirement of proof of no likelihood of dumping is not valid under the Anti-dumping Agreement as it shifts the burden of proof on the respondent. The regulations applied by the DOC allow the secretary to revoke the anti-dumping duties if it finds that among other things, it is not likely that the respondents will in the future dump. US courts reviewing these regulations have found that the Respondent bears the burden of proving that it is not likely to dump in the future (or, alternatively that there is no likelihood of dumping.[124]

Korea claimed that by applying a revocation requirement that the company subject to an anti-dumping duty prove that it is not likely to dump in the future, the US has shifted the burden of proof away from the Member imposing the duty in violation of Article11 of the AD Agreement. First, the "no likelihood/not likely criterion is inconsistent with the text of para 2 of Article 11. US has turned the likely standard on its head, transmogrifying it to not likely and requiring respondents to bear the burden of proving the standard even though para2 clearly imposes the burden on members.

Agreeing with Korea, the panel pointed out that the not likely approach adopted by US is not equivalent to the likely to recur approach. A failure to find that an event is not likely is not

[124] E.g., Sanyo Electric Co. v. United States, 15 C.I.T. 609 (Ex. ROK-50); Toshiba, 15 C.I.T. at 600 and 603 (Ex. ROK-5); Manufacturas Industriales,666 F. Supp. at 1566 (Ex. ROK-7).

equivalent to a finding that the event is likely. There is a clear conceptual distinction between establishing something as positive finding and failing to establish something as a negative finding. It is perfectly possible that one could not determine that someone was unlikely to dump and find that they were also likely to dump. But the former determination does not in and of itself amount to a demonstrable basis for concluding the latter. Panel observed that a finding that an event is not likely implies a greater degree of certainty that the event will occur than a finding that the event is not "not likely". While mathematical certainty of recurrence of dumping is not required, the conclusion must still be demonstrable on the basis of the evidence adduced. Panel further observed that in this case it was not even established that recurrence of dumping is likely. Absent any other rationale it amounts to an effective presumption that, in the absence of finding that recurrence of dumping is not likely anti-dumping duties may be continued to be imposed. But presumption by definition exists only where there is no requirement of justification or proof. Therefore, the requirement was manifestly irreconcilable with the requirements of meeting a standard of necessity which involves demonstrability on the basis of the evidence adduced.

For these reasons the panel found that the not likely criterion operates to effectively require the continued imposition of anti-dumping duties, and prevents revocation, in circumstances inconsistent with and outside of those provided for in Article11.2

COMMENT ON THE CASE

The Panel rightly rejected the first two arguments of Korea. Concerned Member is not competent to find whether injury will occur in future on the basis of dumping which has occurred in the past. For finding possibility of injury in future there has to be possibility of dumping in future to establish a rational causal relationship. Therefore the panel rightly concluded that the finding regarding recurrence of injury in future under Article 11.2 necessitates finding regarding recurrence of dumping in future.

As to the sunset clause of Article 11.3 the Panel again rightly rejected Korea's argument that it provides for revocation even if there is continued dumping and re-establishment of duty thereafter in case causal relationship is established. Panel rightly supported US argument that Korea's interpretation of Article 11.1 and 11.2 renders clause 3 superfluous. Para 3 presumes a situation where dumping has ceased and warrants its continuation even after five years in case there is a "request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping or injury". The word

recurrence shows that the Article presumes that dumping has ceased. This argument is reinforced by the fact that five years have not to be necessarily counted from the date of imposition but may be counted from the date most recent review under Paragraph 2 or under paragraph 3 if that review has covered both dumping and injury.

As for the issue of no likelihood criteria the panel rightly declared the US law against Article VI and Article 11 because while it is possible for a respondent to argue against the likelihood of dumping on the basis of market conditions and its past behaviour it is very difficult to prove that there was no likelihood of its dumping in future. As in the present case past behaviour may not be very useful because Korean companies were found not to be dumping for past three years. Moreover it shifts the burden of proof on the respondent and allows subjectivity to play a major role in reaching at the final decision by the concerned authorities while the whole thrust of Article VI and AD Agreement is that certain facts have to be established with certainty before the decision to levy a duty is taken because Article VI and the AD Agreement are considered to be an exception to the general principles of GATT.[125]

Thus, the Panel decision in DRAMS case reinforces the delicate balance, which the Agreement tries to create between the interests of the injured Member country and that of the free world market, governed by international commercial rules.

Here it can be pointed out that in the case of *Norway Salmon*[126] also the Panel had held that just because injury has ceased due to antidumping duty does not mean that antidumping duty should be immediately revoked. This would frustrate he whole purpose of antidumping duty which is protective in nature.

MEXICO– ANTI-DUMPING INVESTIGATION OF HIGH FRUCTOSE CORN SYRUP (HFCS) FROM THE UNITED STATES[127]

The case concerned the imposition of definitive anti-dumping duties by SECOFI on imports of high-fructose corn syrup, originating in the United States. Mexico's National Chamber of Sugar and Alcohol Industries (Sugar Chamber) filed an application for an anti-dumping investigation with

[125] See comments on the case of *Swedish antidumping duties* and *Norway Salmon.*
[126] ADP/87 , Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994.

[127] WT/DS132/R Report of the panel adopted on28 January 2000.

SECOFI complaining that imports of HFCS from the United States were being exported to Mexico at dumped prices and threatened Mexico's sugar industry with material injury. On 27 February 1997, SECOFI published a notice in Mexico's *Diario Oficial* announcing the initiation of an anti-dumping investigation on imports of HFCS, originating in the United States. SECOFI established the period from 1 January 1996 to 31 December 1996 as the period of investigation. SECOFI published a notice announcing a preliminary determination imposing provisional anti-dumping duties. SECOFI held disclosure meetings with parties regarding the preliminary determination. SECOFI verified the information submitted by the Sugar Chamber and several importing and exporting companies. One importing company (Almex) and the United States Corn Refiners Association (CRA), an association of U.S. producers of corn products, including HFCS, requested SECOFI to terminate the investigation, arguing that an alleged agreement between Mexican sugar producers and soft-drink bottlers, dating from September 1997, restraining the latter's consumption of imported HFCS eliminated any threat of injury. The CRA did not provide SECOFI with a copy of the alleged agreement. SECOFI made an inquiry to the Sugar Chamber regarding the existence of the alleged agreement. The Sugar Chamber replied to SECOFI's inquiry, denying the existence of the alleged agreement. On 23 January 1998, SECOFI published a notice announcing the final determination imposing definitive anti-dumping duties. The notice entrusted the Ministry of Finance and Public Credit with collecting the definitive anti-dumping duties, levying such duties retroactively to the imposition of the provisional duties.

Following issues were involved in this case:

- Whether the application contained sufficient evidence of material injury within the meaning of Article 5.2 of the AD Agreement.
- Whether initiation of investigation was consistent with the AD Agreement.
- Whether SECOFI's initiation notice met the requirements of Articles 12.1 and 12.1.1 of the AD Agreement.
- Whether SECOFI correctly determined domestic industry for the purpose of determining threat of material injury.
- Whether a specific analysis of the impact of the dumped imports on the domestic industry is required in a threat of injury determination, and if so, what is the nature of the analysis required.
- Whether the extension by SECOFI of the period of application of the provisional measure beyond six months violated Article 7.4 of the AD Agreement.
- Whether SECOFI failed to provide any findings of fact and conclusions of law for its retroactive application of anti-dumping duties in this threat of injury case.

1.INITIATION OF INVESTIGATION

(a). Whether the application contained sufficient evidence of threat of material injury: The United States claimed that, contrary to the requirements of Article 5.2 of the AD Agreement, the application filed by the Sugar Chamber requesting the initiation of an anti-dumping investigation did not contain sufficient evidence of threat of material injury, because it lacked sufficient information regarding the likely impact of allegedly dumped imports of HFCS on the domestic industry, and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. In addition, the United States argued that, because the application did not contain sufficient evidence regarding the alleged threat of injury, it did not contain sufficient evidence of the causal link between the allegedly dumped imports and the alleged threat of injury. Mexico stated that the application submitted by the Sugar Chamber contained the information that was reasonably available to it and that it included sufficient information concerning dumping, threat of injury and a causal relationship between the two as well as evidence concerning the factors and indices mentioned in Article 5.2(i) to (iv) of the AD Agreement. Mexico contended that Article 5.2(iv) of the AD Agreement expressly stipulates that the application must contain information on "the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3". Mexico argued that the ordinary meaning of the terms "relevant" and "such as" in Article 5.2(iv) makes it clear that the requirement was not a strict one as regards the factors and indices. The reference to Articles 3.2 and 3.4 of the AD Agreement was simply illustrative. Mexico further argued that that Article 3.7 was a specific provision which set forth the factors which an investigating authority must take into account in determining whether there was a threat of injury. In the case of an application for initiation of an investigation specifically relating to threat of injury, the investigating authority must consider, in particular, the factors in Article 3.7 of the AD Agreement. Thus, the presence of information in the application concerning the Article 3.7 factors was extremely important, and the Sugar Chamber's application contained such information. According to Mexico Article 5.2(iv) authorises the investigating authority, to determine the relevant indices and factors by which the consequent impact of the dumped imports can be evaluated. Mexico argued that SECOFI carried out a comprehensive analysis of the information submitted in order to reach the conclusion that the application submitted by the Sugar Chamber met the requirements of Article 5.2 of the AD Agreement.

The Panel held that in a case where threat of injury is alleged the main issue in dispute between the parties is, what is the information concerning the factors set forth in Article 3.4 of the AD Agreement, and what is the information regarding the existence of a causal link, that must be provided in the

application, pursuant to Article 5.2(iv). But the inclusion in Article 5.2(iv) of the word "relevant" and the phrase "such as" in the reference to the factors and indices in Articles 3.2 and 3.4 makes it clear that an application is not required to contain information on all the factors and indices set forth in Articles 3.2 and 3.4. Rather, Article 5.2(iv) requires that the application contain information on factors and indices relating to the impact of imports on the domestic industry, and refers to Articles 3.2 and 3.4 as illustrative of factors which may be relevant. Which factors and indices are relevant to demonstrate the consequent impact of imports on the domestic industry will vary depending on the nature of the allegations made by the industry, and the nature of the industry itself. Panel held that if the industry provides information reasonably available to it concerning factors which are relevant to the allegation of injury (or threat of injury) it makes in the application, and the information concerning those factors demonstrates, that is, "shows evidence of", the consequent impact of dumped imports on the domestic industry, Article 5.2(iv) is satisfied. The quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination of injury.

Panel noted that an application which was consistent with the requirements of Article 5.2 will not necessarily contain sufficient evidence to justify initiation under Article 5.3. The application submitted by the Sugar Chamber contained information on relevant Article 3.4 factors, and that information showed evidence of the allegations of threat of injury and causal link in the application. The application contained information showing increases in imports, and information showing that market prices for sugar did not reach the maximum price level, while HFCS was priced below sugar, HFCS substitutes for sugar, and producers in the United States could reduce their prices. The application also contained information, *inter alia*, on the Mexican sugar producers' production, sales, exports, imports, consumption, inventories and employment; cash flow, financial situation, income, production costs and financial ratios; installed capacity; and investment projects in the sugar industry. Regarding US argument that an application alleging only threat of material injury must contain some "meaningful analysis" of the likely impact of allegedly dumped imports on the domestic industry, which the Sugar Chamber's application did not contain, Panel held that Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While recognising that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, Panel held that Article 5.2 cannot be read as requiring such an analysis in the application itself. This information, if read in the light of the allegations, provides evidence in support of the allegation that dumped imports of HFCS from the United States threatened material injury to the Mexican sugar industry.

On the basis of above reasoning the Panel concluded that the Sugar Chamber's application was consistent with the requirements of Article 5.2(iv) of the AD Agreement.

(b). Whether SECOFI evaluated the accuracy and adequacy of evidence: The United States claimed that the initiation of the investigation was inconsistent with Article 5 of the AD Agreement. Contrary to Article 5.2 of the AD Agreement, the application submitted by the petitioner contained self-contradictory information, including the unsubstantiated, simple assertion that HFCS was not being produced in Mexico. By accepting the accuracy of this assertion and initiating in accordance with it, SECOFI violated Article 5.3 of the AD Agreement, which requires an authority to "examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation". SECOFI's failure to examine the evidence regarding the threshold issue of like product, necessarily also prevented it from determining that the application was made "by or on behalf of the domestic industry", in violation of Articles 5.1 and 5.4 of the AD Agreement. The application also contained information that reported domestic production of HFCS during the period of investigation (1996) and from as early as 1995. Yet, neither the initiation notice nor documents contemporaneous with the pre-initiation time period, demonstrated that SECOFI examined the accuracy and adequacy of the Sugar Chamber's contradictory information, or that SECOFI determined on what basis it found the application to contain sufficient evidence to justify initiation. The United States asserted that, since there was no evidence in its administrative record or in the initiation notice indicating the required determination was made prior to initiation, Mexico was attempting to rely on a confidential working paper. The United States argued that the Panel should attach no relevance to this document. The United States argued that it was well-settled that investigating authorities cannot base their determinations on "extra-record" documents that are not shared with the parties to an anti-dumping investigation.

Mexico contended that, while it was true that the application for initiation contained indications that there was no domestic production of HFCS or that such production was "practically" non-existent, it could not be implied from those indications that the Sugar Chamber was either affirming or "flatly denying" the existence of such production, as the United States suggested, since as the United States itself pointed out, the annexes of the application contained information concerning the existence of domestic production of HFCS during the period of investigation, which was examined by SECOFI together with the rest of the information in the application, in conformity with Article 5.3 of the AD Agreement. Mexico further argued that, SECOFI considered as decisive information contained in

various Articles and papers annexed to the application, which clearly pointed to the involvement of the companies Almex and Arancia in the production of HFCS in Mexico; particularly, information published by the United States Department of Agriculture (USDA) concerning, *inter alia,* the establishment of HFCS distribution centres and manufacturing plants in Mexico. According to Mexico, the latter was considered to be a most reliable piece of information since it came from a government source, which was not trying to demonstrate any particular trend. Mexico observed that, in conformity with Article 5.2 of the AD Agreement, the Sugar Chamber also provided, as part of its application for initiation, information containing import statistics by company, obtained from the Ministry of Finance and Public Credit (SHCP), and copies of the corresponding import documentation and invoices. Thus, while realising that Almex and Arancia were HFCS producers in Mexico, SECOFI became aware at the same time, when examining the other items of evidence in the application for initiation, that the two companies were also the leading importers of the product subject to investigation. In other words, while examining the accuracy and adequacy of the evidence submitted in the application as required of the investigating authority under Article 5.3 of the AD Agreement, SECOFI learned in parallel that the companies Almex and Arancia had produced HFCS in Mexico during the period of investigation and that the two companies had become the leading importers of the allegedly dumped product. Mexico asserted that documents showed that prior to the initiation of the investigation SECOFI had learned of the existence of a domestic production of HFCS in Mexico by the companies Almex and Arancia, and confirmed that SECOFI had collected and examined information in addition to that provided by the Sugar Chamber, in order to verify that these companies were the leading importers of HFCS. In Mexico's view, the fact that the public notice did not contain the information that the United States would have liked it to contain concerning the determination of the relevant domestic industry did not imply that the investigating authorities did not examine the evidence contained in the annexes to the petitioner's application pointing to HFCS production in Mexico during the period of investigation.

The Panel found that the application filed by the Sugar Chamber was consistent with the requirements of Article 5.2. Panel noted that what constitutes "sufficient evidence" to justify the initiation of an anti-dumping investigation is not defined in the AD Agreement. Panel noted that the Panel in Guatemala case agreed with the view expressed by the Panel in *Softwood Lumber Case*[128] that the quantum and quality of evidence required at the time of initiation is less than that required for a preliminary, or final, determination of dumping, injury, and causation, made after investigation. Panel noted that SECOFI had before it information provided by the applicant, as well as information it

[128] BISD 40S/358

obtained itself, concerning increases in imports, price effects of imports, and the condition of the domestic sugar industry. SECOFI, in the notice of initiation, observed that HFCS was used as a sweetener, substituting for sugar, had almost entirely replaced sugar as a sweetener in soft-drinks in the United States over a ten year period, was priced significantly below sugar, and that imports from the United States had increased significantly since 1994, and accounted for an increasing share of consumption in the industrial sector of the sugar market in Mexico. SECOFI also noted that US producers had significant available capacity, and that Mexico was an attractive market for US producers of HFCS. SECOFI observed that there was information concerning the adverse effects the industry could suffer should the growing trend of low-priced HFCS imports continue. The notice of initiation did not analyse or discuss the information concerning factors relevant to assessing the consequent impact of imports on the domestic industry under Article 3.4. But the information was contained in the application, and was explicitly referred to in the notice. Panel pointed out that there was no basis to conclude that SECOFI ignored this information. Panel held that the AD Agreement does not require the investigating authority to have or consider information on all the Article 3.4 factors in order to determine that there is sufficient evidence to justify initiation. Noting that it would certainly have found it preferable had SECOFI proceeded further to analyse the likely future impact of imports on the condition of the domestic sugar industry, still it could not be concluded that it failed to comply with the obligation to examine the evidence in this regard to determine that there was sufficient evidence to justify initiation. Therefore the Panel concluded that the initiation of the investigation was consistent with the requirements of Article 5.3 of the AD Agreement.

On the issue that SECOFI failed to resolve a conflict in the evidence concerning whether there was domestic production of HFCS, which was an essential element of the conclusion that the relevant domestic industry for purposes of considering injury was the Mexican sugar industry, and consequently an essential element underpinning the initiation. Panel noted that Article 5.3 only requires the investigating authority to determine whether there is sufficient evidence to justify initiation and it (the Panel) had already concluded that SECOFI made such a determination consistently with the requirements of Article 5.3. According to the Panel Article 5.3 does not impose an obligation on the investigating authority to set out its resolution of all underlying issues considered in making that determination. Panel pointed out that this conclusion was bolstered by consideration of the differences between the public notices required at the initiation of an investigation, and following a preliminary or final determination. Panel pointed out that in notices of preliminary and final determinations, pursuant to Articles 12.2 and 12.2.2, the investigating authority is required to set forth findings and conclusions reached on all issues of fact and law considered material, as well as respond

to the arguments of parties. A notice of initiation, on the other hand, pursuant to Article 12.1, must set forth specific information regarding certain factors, but need not contain explanations of or reasons for the resolution of all questions of fact underlying the determination that there is sufficient evidence to justify initiation. According to the Panel this distinction, follows from the fact that the notice of initiation merely begins the process of investigation, putting the public on notice of the fact of initiation, and the product, countries, parties, and allegations involved. The interested parties, in addition to the notice of initiation, are provided a non-confidential version of the application pursuant to Article 6.1.3, which provides more detailed information relevant to their participation in the investigation. During the investigation, parties are entitled to participate in the proceeding, make their arguments to the investigating authority, and have access to certain information developed in the investigation. However, at the point of preliminary or final determination, when a stage of the process of investigation is completed, the investigating authority reaches its conclusions based on the information and arguments developed to that point in the investigation, and preliminary or definitive Anti -dumping measures are either imposed or not. The parties', and the public's, interest in a full understanding of the reasons for the imposition of measures, or of a negative determination, is much greater, and the requirement in Article 12.2 that the investigating authority set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material" is directed at that interest. Therefore the Panel concluded that Article 5.3 does not establish a requirement for the investigating authority to state specifically the resolution of questions concerning the exclusion of certain producers involved in defining the relevant domestic industry in the course of examining the accuracy and adequacy of the evidence to determine whether there was sufficient evidence to justify initiation. Regarding the issue whether SECOFI should have made the substance of MEXICO-13 which demonstrated SECOFI's analysis and conclusion regarding the definition of the relevant domestic industry known to the parties at initiation, pursuant to Article 6.4, Panel held that the obligation imposed on the investigating authority under that provision must take into account the stage of the proceeding, and the substantive obligations of the investigating authority at that point. Panel noted that pursuant to Article 6.1.3, the investigating authority is required to provide the parties with a copy of the application, due regard being paid to the requirement to protect confidential information as provided for in Article 6.5. The parties in this case were provided with a non-confidential version of the application, which included information relied upon in MEXICO-13. While not addressed in any detail, the notice of initiation did refer, to the information on HFCS production capacity, which was referred to in MEXICO-13. SECOFI found that the Sugar Chamber had standing, and initiated the investigation, that SECOFI was satisfied that the sugar producers comprised the relevant domestic industry. According to the Panel Article 6.4 cannot be interpreted to impose an

independent obligation on the investigating authority to issue explanations or conclusions that are not required to be issued under Article 5.3. Thus, Panel held that MEXICO-13 was relevant to a particular question of fact at issue – the existence of domestic production of HFCS – the resolution of which permitted the exclusion of two HFCS producers from consideration as the relevant domestic industry. Therefore Panel concluded that MEXICO-13, together with the notice of initiation, did demonstrate that SECOFI examined the evidence concerning the underlying question of fact, and resolved the issue of whether there was domestic production of HFCS, and concluded that the two Mexican producers of HFCS should not be considered the relevant domestic industry based on their status as importers of HFCS. According to the Panel Article 5.3 could not be interpreted to require the investigating authority to issue an explanation of how it has resolved all underlying questions of fact at initiation. That is a requirement that arises at later stages of the proceeding, and is explicitly set forth in Article 12.2. "Although we consider it would be beneficial for investigating authorities to consider and decide such questions explicitly, and make their reasons known at initiation, at least to the parties to the investigation, we can find no requirement to do so in the text of the AD Agreement."[129]

(c). Whether initiation notice was in accordance with the AD Agreement: The United States claimed that SECOFI's initiation notice did not meet the requirements of Articles 12.1 and 12.1.1 of the AD Agreement because it failed to set forth the actual basis of the definition of the relevant domestic industry, since it did not state that SECOFI had excluded two companies from consideration as the domestic industry. The United States noted that a notice of initiation must contain "a summary of the factors on which the allegation of injury is based"[130]. United States claimed that the identity of the relevant domestic industry was an essential factor on which any allegation of injury must be based. Therefore, when an investigating authority excluded companies producing the like product from the domestic industry pursuant to Article 4.1(i) of the AD Agreement, the notice of initiation must include a statement of the investigating authority's conclusions in this regard. United States stated that it was particularly important in the present case because the applicant industry did not produce a product identical to the allegedly dumped imports, and there was contradictory information in the application regarding domestic production of the identical product. In the United States' view, the failure of the initiation notice to set forth this information meant that it was misleadingly silent on the factors that led SECOFI to conclude that there was sufficient information to initiate an investigation. The notices of the preliminary and final determinations stated that SECOFI knew that there was domestic production of HFCS, but excluded the Mexican producers of HFCS

[129] Report of the Panel , Para 7.110
[130] 12.1.1(iii)

from consideration as the relevant domestic industry because they were also the principal importers of the allegedly dumped HFCS from the United States. The United States asserted that, in a case such as this, in which the complaining industry admittedly did not produce a product identical to the imported product under investigation, and there were domestic producers who did, it was imperative that the investigating authority define the domestic industry and make decisions concerning exclusion of producers who were themselves importers of the allegedly dumped products with care, and must provide adequate information about what it did. In the United States' view, the initiation notice provided no information let alone adequate information summarising the factors upon which SECOFI excluded the two Mexican HFCS producers.

Mexico contended that the United States' argument rested on an excessive interpretation of Article 12.1.1(iv) of the AD Agreement, was based on a misreading of the notice of initiation, and demonstrated a failure to grasp the distinctions between the requirements of Article 12.1, governing notices of initiation, and Article 12.2, governing notices of preliminary and final determinations. Mexico argued that Article 12.1.1(iv) of the AD Agreement required that public notices of initiation contain information summarising the factors on which the allegation of injury or threat of injury were based, but did not require that such notices contain information concerning the factors relevant to the definition of the relevant domestic industry, let alone specific information concerning the basis on which SECOFI excluded Mexican HFCS producers from consideration as the relevant domestic industry. Although the investigating authority must define the relevant domestic industry in respect of which the allegation of injury must be made, this did not, in Mexico's view, mean that Article 12.1.1 of the AD Agreement can be interpreted as requiring that the notice of initiation must contain information concerning "factors relevant to the allegations concerning the relevant domestic industry". Mexico asserted that the definition of the relevant domestic industry is established prior to the initiation of an investigation, and it is in accordance with this prior determination that it is decided to initiate the investigation and issue the corresponding notice of initiation, which must include the information summarising the grounds for the allegation of injury to the domestic industry previously defined as relevant.

Accepting Mexico's argument Panel held that Article 12.1.1 could not reasonably be read to require that the notice of initiation contain an explanation of the factors underlying, or the investigating authority's conclusion regarding, the definition of the relevant domestic industry. Panel pointed out that Article 12.1 required that a public notice of initiation shall be given "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation

pursuant to Article 5". Article 12.1.1required that the notice (or separate report) contain "adequate information" on specific items, set forth in sub-parts (i)-(vi). Panel held that the phrase in Article 12.1.1(iv) "a summary of the factors on which the allegation of injury is based" could not reasonably be read to encompass a requirement that the notice of initiation contain a summary of the allegations pertaining to the specific issue of the definition of the relevant domestic industry. Still less could it reasonably be read to establish a requirement that the notice of initiation contain a summary of the allegations on the even more particular point of exclusion of some producers from consideration as the relevant domestic industry. Panel noted that Article 12.1.1(iv) merely requires that the notice of initiation contain "a *summary* of the factors on which the *allegation* of injury is based". It did not require a summary of the *conclusion* of the investigating authority regarding the definition of the relevant domestic industry. Nor did it require a summary of the factors and analysis on which the investigating authority based its conclusion regarding exclusion of some producers from consideration as the relevant domestic industry.

2.DETERMINATION OF THREAT OF INJURY

(a). Was SECOFI's consideration of portion of domestic industry of purposes of determination of threat of injury flawed: The United States claimed that SECOFI concluded in the final determination that the relevant domestic industry for purposes of its threat of injury determination consisted of Mexican sugar producers. The United States argued that SECOFI's analysis of threat of injury was fundamentally flawed, because SECOFI considered only a portion of the industry's production, that serving the industrial market for sugar, and never considered the impact of dumped imports on the domestic industry as a whole. In the United States' view, while the AD Agreement does not preclude an analysis of a particular market served by a domestic industry in the context of an examination of "all relevant economic factors and indices having a bearing on the state of the industry"[131], it does not permit a determination of material injury or threat thereof to a part of the domestic industry's production to be equated with injury or threat to the industry as a whole. The United States argued the AD Agreement requires an assessment of material injury or threat thereof to be based upon the impact of dumped imports on the entire domestic industry (or a substantial portion thereof). US pointed out that the AD Agreement explicitly provides for only two circumstances in which it may be relevant and permissible to examine less than the entire domestic industry: (1) exclusion of related parties and (2) division of the Member's territory into smaller competitive regions. According to US neither of these circumstances justified SECOFI's decision in this case to

focus its threat analysis in the final determination solely on the part of the domestic industry's production serving the industrial sugar market. The United States also contended that Article 3.6 of the AD Agreement, relied on by Mexico, does not permit an examination of less than the whole domestic industry. According to US that Article only permits the assessment of a broader base of production that includes the domestic production of the like product, when it is impossible to obtain financial and production information that is specific to production of the like product. The United States maintained that information concerning the entire domestic industry – the domestic industry "as a whole", or information concerning producers accounting for a major proportion of domestic production, must therefore form the foundation of an assessment of material injury or threat thereof under Articles 3.2, 3.4, and 3.7 of the AD Agreement. According to the US by focussing only on domestic producers' production of sugar sold in the industrial market, SECOFI simply failed to address the question of threat of injury to the industry it had defined as the relevant industry.

Mexico argued that SECOFI considered in its analysis all sugar producers and thus made a determination of threat of injury to the domestic industry as a whole. Mexico acknowledged that SECOFI separately identified the production consumed by the industrial sector from production consumed by the household sector, in view of the specific competition of the former with HFCS imports, and considered that information particularly relevant. Mexico argued that SECOFI had sufficient information for separate identification of domestic sugar production sold in the industrial sector and production sold in the household sector, which allowed it to consider the threat of injury to production sold in the industrial sector of the market, relying on Article 3.6 of the AD Agreement. Mexico asserted that the affirmative threat of injury determination would not have involved a substantial change if household consumption had also been taken into consideration.

The Panel noted that SECOFI defined the domestic industry as "manufacturers of cane sugar". Thus, SECOFI was required, by the explicit terms of the AD Agreement, to consider and determine the question of threat of material injury with respect to that industry. Panel noted that in determining threat of injury, SECOFI concluded that there was a significant rate of increased imports of HFCS from the United States, indicating the likelihood of substantially increased importation, based on a finding that dumped imports had increased substantially both absolutely and in relative terms. However, SECOFI excluded sales to household users from sugar consumption for purposes of calculating market share. In the same way SECOFI concluded that imports were entering at prices that would have a significant depressing effect on domestic prices, likely increasing demand for further

[131] Article 3.4

imports, on the basis of a finding that the prices of subject imports were significantly below Mexican sugar prices during the period of investigation. However, SECOFI calculated the average domestic prices of standard and refined sugar once again excluding sales to household users. Thus, SECOFI's analysis and findings concerning market share and prices were based on information accounting for only 53 per cent of the production of the domestic industry, and not on information regarding the domestic industry as a whole, and thus were not consistent with the requirements of Article 3.1, 3.2 and 3.7 of the AD Agreement. According to the Panel it was important to differentiate the consideration of factors relevant to the injury analysis on a sectoral basis, so as to gain a better understanding of the actual functioning of the domestic industry and its specific markets and thus of the impact of imports on the industry, from the determination of injury or threat of injury on the basis of information regarding only production sold in one specific market sector, to the exclusion of the remainder of the domestic industry's production. According to the panel there is nothing in the AD Agreement which precludes a sectoral analysis of the industry and/or market. In many cases, such an analysis can yield a better understanding of the effects of imports, and more thoroughly reasoned analysis and conclusion. Panel noted that this does not mean that an analysis limited to that portion of the domestic industry's production sold in one market sector is sufficient for establishing injury or threat of injury to the domestic industry, consistently with the AD Agreement. Panel noted that it was undisputed in this case that SECOFI defined the domestic industry as consisting of all sugar producers. What SECOFI failed to do, however, was assess the question of injury to those producers on the basis of their production of the like product, sugar. Instead, it assessed the question of threat of injury only with reference to that portion of sugar producers' production that was sold in the industrial market, and took no account of the fact that almost half of production was sold in the household market. Panel accepted that a conclusion that there is injury or threat of injury to a specific sector could be indicative of injury or the threat of injury to the industry, as long as the sector in question were sufficiently representative of the industry concerned as a whole. Panel noted that if this is the basis of the investigating authority's determination, there must be an explanation of why the information and conclusions relating to the specific market sector are considered by the investigating authority to be representative of the domestic industry as a whole.

(b).Whether analysis of factors under Art. 3.4 is required for determination of threat of injury under Art. 3.7: The United States contended that SECOFI's final determination of threat of material injury was insufficient to satisfy the requirements of Article 3 of the AD Agreement. According to the United States a determination of threat of injury cannot be based only on an examination of the factors set forth in Article 3.7 of the AD Agreement, which is what the United

States contended SECOFI did in the case. The United States argued, that a determination of threat of injury also requires an assessment of the impact of imports on the domestic industry through an examination of the relevant economic factors set forth in Article 3.4. The United States drew attention to the fact that footnote 9 to the AD Agreement defines the term "injury" to include threat of material injury. In the United States' view, Article 3.4, which sets forth the factors to be considered in examining the impact of imports on the domestic industry applies on its face to a determination of threat of injury. The United States also argued that, even if Article 3.4 addressed only "material injury", rather than "injury" defined to include threat, and even if Article 3.4 did not on its face address "potential" impact with respect to certain factors, Article 3.7 itself would still require an examination of the likelihood of future "material injury" and the imminent prospects for the kinds of effects that would give rise to a current material injury determination. The United States pointed out that Article 3.7 provides that: (1) "[t]he change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent", and (2) the investigating authorities must conclude that "further dumped exports are imminent and that, unless protective action is taken, material injury would occur". In the view of the United States, SECOFI could not properly reach either of these conclusions without considering the economic factors set forth in Article 3.4. In addition, the United States argued that limiting threat of injury analysis to an examination of Article 3.7 factors ignores the nonexclusive terms of Article 3.7 itself. Article 3.7 only states that in making a threat determination the investigating authority "should consider, inter alia, such factors as" the enumerated factors set forth in Article 3.7(i)-(iv). The use of permissive, rather than mandatory, language (i.e., "should consider"), and of the term "inter alia" (i.e., "among other things"), clearly implies that a number of factors other than those specifically enumerated may also be relevant to a threat determination.

Mexico contended that SECOFI's final determination of threat of injury was based on an assessment of the impact of dumped HCFS imports on the domestic sugar industry, including an assessment of the relevant factors set forth in Articles 3.2, 3.4 and 3.7. In particular, Mexico asserted that the final determination addressed the following:

(a) The rate of increase of dumped imports, their effect on the domestic market, and the likelihood of an increase in such imports in the future;

(b) the exporter's freely disposable capacity and the likelihood and imminence of further exports to Mexico, considering the availability of other markets to absorb such exports;

(c) the prices of the imports, their likely effect on domestic prices and the likelihood that in the future the dumped prices would increase the demand for future imports;

(d) HFCS inventories;

(e) domestic sales;

(f) increasing market share of the imports under investigation;

(g) factors affecting domestic prices;

(h) magnitude of the margin of dumping;

(i) return on investments; and

(j) cash flow.

Mexico claimed that SECOFI properly established the factors to be considered in examining the impact of the dumped imports. In doing so, SECOFI gave greater weight to the Article 3.7 factors, because they were fundamental in concluding that imports of HFCS at dumped prices would substantially increase in the immediate future, thus creating a situation in which such imports would cause injury. Mexico argued that SECOFI's comprehensive examination of all the factors deemed relevant demonstrated that there was a threat of injury to the domestic industry and that, unless antidumping measures were imposed, imports at dumped prices would continue and cause material injury to such industry.

Panel noted that it was undisputed that Mexico considered the factors set out in Article 3.7 in making its final determination of threat of injury. The parties were also in general agreement that some consideration of the impact of the dumped imports on the domestic industry was required in making a final determination of threat of material injury. The difference between the parties was on how this consideration is to be conducted, and whether in fact SECOFI undertook such consideration. Panel pointed out that Article 3.7 sets forth several factors which must be considered, among others, in making a determination regarding the existence of threat of injury. Article 3.7 then concludes: "No one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur". According to the Panel this language recognises that factors other than those set out in Article 3.7 itself will necessarily be relevant to the determination. Panel further noted that in making a determination regarding the threat of material injury, the investigating authority must conclude that "material injury would occur" in the absence of an anti-dumping duty or price undertaking and a determination that material injury would occur cannot, be made solely on the basis of consideration of the Article 3.7 factors, it must include consideration of the likely impact of further dumped imports on the domestic industry.

Panel held that while an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the "consequent impact" of continued dumped imports on the domestic industry is likely to be. Therefore an analysis of the consequent impact of imports is required in a threat of material injury determination. On the question of the nature of the analysis required, Panel noted that Article 3.4 of the AD Agreement sets forth factors to be evaluated in the examination of the impact of dumped imports on the domestic industry. The examination of these factors was mandatory. While all factors might not be relevant in particular case, yet all the factors had to be evaluated even though actual determination might be based on some of the mentioned factors only. Panel further held that evaluation of all the factors must be apparent from the text of the determination. Panel further noted that even if a consideration of all the Article 3.4 factors were not required in a threat of injury determination by the text of the AD Agreement, Article 3.7 would nonetheless require that the investigating authorities consider relevant economic factors concerning the impact of imports on the domestic industry, in order to reach a reasoned conclusion regarding threat of material injury. Such an analysis would be necessary in order to explain the present, and anticipated future, condition of the domestic industry sufficiently to support the conclusion that "material injury would occur", as provided in Article 3.7, unless protective action is taken. Panel noted that analysis could not take into account only factors which support an affirmative determination, but would have to account for all relevant factors, including those which detract from an affirmative determination, and explain why the particular factors considered were deemed relevant.

On the question whether SECOFI's conclusion of threat of material injury, specifically with respect to analysis of the impact of dumped imports on the domestic industry, as reflected in its final determination, satisfied the requirements of Articles 3.7 and 3.4, Panel noted that SECOFI specifically acknowledged that it did not have sufficient information at its disposal to evaluate the general situation of investment projects in the sugar industry. SECOFI concluded that in the event of continuing dumped imports the cash flow and the capacity to pay of the sugar mills would be adversely affected but there was no analysis of the state of the domestic industry's finances, or its ability to generate funds in order to pay off debts. SECOFI dismissed arguments made by the exporters attributing the threat of injury to factors other than the dumped imports; in particular, excessive indebtedness, excess inventories, and domestic production surpluses and concluded that such problems do not "eliminate or

exclude" threat of injury being caused by the dumped imports. Panel noted that there was no analysis of the actual or projected level of indebtedness of the industry, or its ability to service its debt, either in the past, or projected for the future. Panel further pointed out that the final determination reflected no meaningful analysis of a number of the Article 3.4 factors: the Mexican sugar industry's profits, output, productivity, utilisation of capacity, employment, wages, growth, or ability to raise capital. Moreover, there was no analysis of the condition of the Mexican sugar industry during the period of investigation, or projected for the near future. Therefore the Panel held that it was not possible, by reading the final determination, to understand the overall condition of the domestic industry with respect to the Article 3.4 factors and without an understanding of the condition of the industry, it was not possible, for SECOFI to have come to a reasoned conclusion, based on an objective evaluation of the facts, concerning the likely impact of dumped imports. Such a conclusion must reflect the projected impact of further imports on the particular domestic industry, in light of its condition. SECOFI concluded that imports were likely to increase, based on the increases during the period of investigation, and the available capacity of the exporting producers, but there was no meaningful analysis, based on facts, concerning the likely impact of further dumped imports on the domestic industry in the final determination, e.g., whether such increased imports were likely to account for an increased share of the growing Mexican market, have an effect on production or sales of sugar, or affect the profits of the domestic producers, etc, in such a manner as to constitute material injury. SECOFI also concluded that the dumped imports undersold the domestic product during the period of investigation, and that the dumping margins were responsible for the low prices of the dumped imports. SECOFI therefore concluded that a jump in demand for dumped imports could be expected, forcing sugar prices downward. However, the Panel noted that there was no discussion of movements in prices of either Mexican sugar or the dumped imports – that was, there was no discussion of whether sugar prices had been "forced downward" during the period of investigation, which left the conclusion that dumped imports in the future would force prices down in the realm of speculation. Merely that imports are likely to continue to be priced below the domestic product does not necessarily lead to the conclusion that there is a threat of injury. If the price level of the domestic product generates sufficient revenues and profits, injury may be unlikely. Therefore the Panel concluded that SECOFI's determination of threat of material injury failed to adequately address the factors set forth in Article 3.4 concerning the impact of the dumped imports on the domestic industry and thus it was inconsistent with Mexico's obligations under Article 3.1, 3.4 and 3.7 of the AD Agreement.

3. PROVISIONAL MEASURES

The next issue in this case was that the provisional anti-dumping measure imposed by SECOFI on imports of HFCS from the United States on 25 June 1997 was not terminated until 24 January 1998, more than six months later. The United States claimed that the extension by SECOFI of the period of application of the provisional measure beyond six months violated Article 7.4 of the AD Agreement, and noted that there was nothing in the final determination explaining the action. Mexico stated that although the provisional measure was applied for longer than the six-month period provided for in Article 7.4 of the AD Agreement, it was applied for the shortest possible period in the spirit of Article VI of the GATT 1994. Mexico maintained that SECOFI considered that suspension of the provisional measure at the end of the six month period would not only further expose the domestic industry threatened by dumped imports but would also favour dumping, even if only for a short period. Mexico argued since Article VI condemns dumping if there is a threat of injury to the domestic industry, the choice not to terminate the provisional measure was justified. According to Mexico the choice was made with the certainty that the final determination would be adopted shortly. Mexico pointed out that SECOFI conducted the investigation in a shorter time than that provided for in Article 5.10 of the AD Agreement, therefore, the application of the provisional measure for the additional period could not be construed as an attempt to set up a barrier to normal trade.

Panel noted that the language of Article 7.4 is clear and explicit on the question of the allowable duration of a provisional measure.[132] Unless exporters representing a significant percentage of the trade involved request an extension of the period of application, Article 7.4 limits the period of application of a provisional measure to a period no longer than six months, and provides no basis for extension of that period. Panel pointed out that Mexico had relied on general assertions of its good intentions and that the additional period of application of the provisional measure was for the shortest time possible. According to the Panel the AD Agreement contains specific rules for the implementation of Article VI of GATT 1994 with respect, to the period of application of provisional measures. Those rules are binding on all Members, and arguments based on references to the "spirit" of the GATT 1994 are unavailing to justify a failure to comply with those rules. Therefore the Panel concluded that in light of the specific limitation on the period of application of provisional measures contained in Article 7.4, the application of the provisional measure beyond the six month period was inconsistent with Mexico's obligations under Article 7.4 of the AD Agreement.

[132] "The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty

that it applied anti-dumping duties for the period of application of the provisional measure in order to prevent injury to the domestic industry, in conformity with Article 10.2 of the AD Agreement.

Panel noted that Mexico's interpretation of Article 10.2, would, as a practical matter, effectively allow the retroactive levying of final duties in every case in which a provisional measure is imposed and there is a final determination of threat of material injury. According to the Panel, it is clear from the language of Article 10.2 itself, and its context (in particular Article 10.4), that retroactive imposition of anti-dumping duties is permissible only in those instances in which the particular conditions set forth in Article 10.2 of the Agreement exist. Panel further pointed out that while Article 10.2 does not explicitly require a "determination" that "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury", there must be some specific statement in the final determination of the investigating authority from which a reviewing panel can discern that the issue addressed in Article 10.2 was properly considered and decided. Article 12.2 of the AD Agreement requires that the public notice of any final determination "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities". Article 12.3 further specifies that the "provisions of [Article 12] shall apply *mutatis mutandis* to ... decisions under Article 10 to apply duties retroactively". Thus, the investigating authority must set out in sufficient detail its findings and conclusions on the issue of whether "the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury" before final anti-dumping duties may, consistently with Article 10.2 of the AD Agreement, be levied for the period during which a provisional measure was in place. Panel noted that there was no analysis of the situation that would have existed in the domestic industry in the absence of provisional measures and there was no record of SECOFI's establishment or evaluation of the facts concerning this issue. According to the Panel the directive to another Governmental body to collect final anti-dumping duties could not reasonably be read as findings and conclusions by SECOFI establishing and evaluating facts leading to the conclusion that in the absence of provisional measures, material injury to the Mexican sugar industry would have occurred. The Panel concluded that the retroactive levying of final anti-dumping duties in the case was inconsistent with Article 10.2 of the AD Agreement and the failure expeditiously to release bonds and/or cash deposits collected under the provisional measure was inconsistent with Article 10.4 of the AD Agreement. In addition Panel also agreed with the US claim that the lack of any findings or conclusions on this issue was inconsistent with Mexico's obligations under Article 12.2 and Article 12.2.2.

4.RETROACTIVE APPLICATION OF ANTIDUMPING DUTIES

United States next claimed that SECOFI found threat of material injury in its final determination. In such a case, the United States argued that, pursuant to Article 10.2 of the AD Agreement, Mexico was entitled to levy anti-dumping duties for the period of application of the provisional measure only if it made a finding that the effect of the dumped imports would, in the absence of the provisional measures imposed, have led to a determination of injury to the domestic industry. The United States asserted that SECOFI failed to make such a finding, but nonetheless imposed provisional measures retroactive to the date of the preliminary determination, thereby violating Article 10.2. The United States further contended that SECOFI also violated Article 10.4 of the AD Agreement by failing expeditiously to release the bonds posted and/or return the cash deposits paid on entries of HFCS into Mexico between the effective dates of SECOFI's preliminary and final determinations. The United States argued that, having failed to make a finding that the effect of the dumped imports would, in the absence of the provisional measure imposed, have led to a determination of injury to the domestic industry, SECOFI was precluded from imposing anti-dumping duties for the period of application of the preliminary measure, and therefore was required by Article 10.4 to release any bonds posted and/or return any cash deposits paid pursuant to the provisional measure. Mexico argued that it applied anti-dumping duties for the period of application of the provisional measure in order to prevent injury to the domestic industry, in conformity with Article 10.2 of the AD Agreement. Consequently, Mexico argued that the question of the release of bonds and/or return of cash payments under Article 10.4 did not arise. Mexico contended that, while SECOFI may not have set out its determination in precisely the terms the United States would have liked, SECOFI's analysis and examination of the issue of material injury caused by dumped HFCS imports in the absence of a provisional measure were evidenced throughout the various proceedings carried out in the course of the investigation and were shown in the administrative file. Mexico asserted that it was apparent from the findings of fact and conclusions of law that injury would actually have been caused to the domestic sugar industry in the absence of provisional anti-dumping duties. In Mexico's view, the entirety of the findings and conclusions enabled SECOFI to make a final determination of threat of injury and decide to levy anti-dumping duties retroactively. Mexico also pointed out that at the time of the preliminary determination, the increase in imports of dumped HFCS was already a reality. Therefore, according to Mexico, the situation referred to in Article 10.2 of the AD Agreement had been considered by SECOFI since the preliminary stage of the investigation, when it determined that it was necessary to apply a provisional measure to prevent injury being caused during the investigation. Mexico argued

---

lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively".

COMMENT ON THE CASE

The two decisions by the Panel in the *Guatemala-Cement case*[133] and in the present case on the question of requisite information for initiation of investigation have struck a balance between the obligation on the domestic industry to provide basic information to support the allegation, so that baseless petitions are not filed resulting in harassment of the exporting firms and practical limitations on the domestic industry in collecting the information. Thus the Panel ruled that for initiation of investigation the quantum of evidence has not to be same as required for preliminary and final determination. Panel also held that the requirement that the application should be supported by evidence and the duty of the investigating authority under Art. 5.3 to examine the adequacy and accuracy of evidence does not mean that it had to contain an analysis of the evidence also, although it was added that in many cases it would be desirable yet it was not required by the Agreement. Thus, the two cases have helped much to clarify the law regarding the valid initiation of the investigation. However, as it will be pointed out later after the *EC-bed linen case*[134] it was felt that rule regarding initiation of investigation needs further improvement so as to avoid hardship to the exporting firms.

On the issue of provisional measures Panel reinforced the rule based system provided by the AD Agreement and held that general statement regarding good faith and purpose of the provision does not legitimises an act which is plainly against the Agreement. Thus the Agreement provides a time-limit for the application of provisional measures therefore Members can not exceed it unless they follow the procedure provided by the Agreement. Thus, Panel reiterated the purpose of the Agreement which is to curb the discretionary powers of the Members and replace it with a rule based system which would ensure that AD measures are not taken unless necessary.

UNITED STATES – ANTI-DUMPING ACT OF 1916-COMPLAINT BY THE EUROPEAN COMMUNITIES[135] AND UNITED STATES – ANTI-DUMPING ACT OF 1916-COMPLAINT BY JAPAN[136]

[133] WT/DS60/R. Report of the Panel adopted on 19 June 1998, WT/DS156/R Report of the Panel adopted on 24 October 2000

[134] WT/DS141/R Report of the panel adopted on 30 October 2000

[135] WT/DS136/R Report of the Panel adopted on31 March 2000

[136] WT/DS162/R Report of the Panel adopted on 29 May 2000

These two cases involved the issue of consistency of the US Revenue Act of 1916 with the Anti-Dumping Agreement. The two cases involved similar issues. The 1916 Act prohibited a form of international price discrimination, which had two basic components:

(a) An importer must have sold a foreign-produced product within the United States at a price which is "substantially less" than the price at which the same product is sold in the country of the foreign producer.

(b) The importer must have undertaken this price discrimination "commonly and systematically."

It was a condition for criminal or civil liability under the 1916 Act that the importer must have undertaken this price discrimination with "an intent of destroying or injuring an industry in the United States, or of preventing the establishment of an industry in the United States, or of restraining or monopolising any part of trade and commerce in such articles in the United States." Another characteristic of the 1916 Act was that it provided for a private right of action in federal district court and the remedy of treble damages for a private complainant, based on the injury sustained by that complainant in its business or property, as well as for criminal penalties in an action brought by the US government.

Following issues were involved in these cases:

- Whether panel could examine the consistency of domestic law against the AD Agreement
- Relationship of Article VI of the GATT and the AD Agreement.
- The 1916 Act was an antidumping statute or antitrust statute.
- Whether antidumping duty is the only remedy sanctioned by the AD Agreement.
- Whether provision regarding determination of dumping was violated.
- Whether provision regarding determination of injury was violated.
- Whether Articles 4 and 5 of the AD Agreement were violated.

1.WHETHER PANEL COULD EXAMINE THE CONSISTENCY OF DOEMSTIC LAW AGAINST THE AD AGREEMENT

The first issue involved was whether the Panel could review the consistency of an Act in the light of Appellate Body decision in the *Guatemala I case*[137]. Panel held that it could review the consistency of the Act and it does not go against the Appellate Body decision in the *Guatemala I Case*. Panel said that in that case the Appellate body held that only specific measures preliminary measures price undertakings or final measures can be challenged because the findings of the Appellate Body in

Guatemala-Cement were limited to the taking of action in situations contemplated in Article 17.4. They could not be – and actually were not - intended to exclude the review of anti-dumping laws as such. Panel further pointed out that Article 18.4 mandates that each member shall bring its laws and regulations in conformity with the requirements of Antidumping Agreement. Therefore Panel could examine the consistency of a Members laws and regulations with Article VI and the Antidumping Agreement.

2. RELATIONSHIP OF ARTICLE VI AND THE AD AGREEMENT

Next issue was whether Panel could make findings on Article VI of the GATT independent of Antidumping Agreement. In this regard Panel noted that the complainant had made claims based on the violation of provisions of Article VI and the Anti-Dumping Agreement and Article VI and the Anti-Dumping Agreement are part of the same treaty: the WTO Agreement. "In application of the customary rules of interpretation of international law, we are bound to interpret Article VI of the GATT 1994 as part of the WTO Agreement and, pursuant to Article 31 of the Vienna Convention, the Anti-Dumping Agreement forms part of the context of Article VI. This implies that we must look at Article VI and the Anti-Dumping Agreement as part of an "inseparable package of rights and obligations" and that Article VI should not be interpreted in a way that would deprive either Article VI or the Anti-Dumping Agreement of meaning."[138] Therefore Panel concluded that it can make findings under Article VI without, at the same time, having to make findings under the provisions of the Anti-Dumping Agreement, and *vice-versa*. "However, the fact that Article VI and the Anti-Dumping Agreement represent an inseparable package of rights and disciplines requires that we interpret each of the provisions invoked by Japan in its claims in conjunction with the other relevant provisions of this "inseparable package", so as to give meaning to all of them."[139]

3.WHTHER 1916 ACT WAS AN ANTIDUMPING STATUTE OR ANTITRUST STATUTE

The next issue was whether the 1916 Act was antidumping Act or Anti-trust statute. Japan claimed that the 1916 Act addresses international price discrimination like an antidumping statute. United States contended that the 1916 Act was an antitrust statute and addressed a specific type of price discrimination involving predatory intent and therefor did not fall within the scope of Article VI. The United States further argued that the 1916 Act[140] had additional requirements compared with Article

---

[137] WT/DS60/R. Report of the Panel adopted on 19 June 1998,
[138] Report of the Panel, Para 6.93
[139] Report of the Panel, Para 6.94.
[140] The 1916 Act defined thus price discrimination, "It shall be unlawful for any person *importing or assisting in importing* any articles from any foreign country into the United States, commonly and systematically to import, sell or cause to be imported or sold such articles within the United States *at a price substantially less than the actual market value or wholesale*

VI because the 1916 Act requires the price difference to be "substantial" and the importation and sales to be done "commonly and systematically" and the 1916 Act included additional requirements that are not found in Article VI, which make it an instrument addressing specific forms of price discrimination in an anti-trust context.

Panel pointed out that for measures to be applied under Article VI, three conditions have to be met: that there must be (a) "dumping", i.e. the pricing practice at the origin of the application of Article VI; (b) material injury or threat of material injury to an established domestic industry or material retardation of the establishment of a domestic industry, i.e. the effect of the dumping; and (c) a causal link between the two. Article VI and the Anti-Dumping Agreement separate these conditions. Panel further noted that dumping within the meaning of Article VI exists when there is a price difference between like products sold in two markets, one of which is not within the jurisdiction of the same Member. In addition, the price of the products in the country of exportation must be lower than the price of the like products in the country of production or in a third country to which they are exported. Article VI:1(a) and (b) confirm that no qualification applies to the definition of the price difference requirement. There is no requirement that the export price be above or below fixed or variable costs or that price undercutting, price suppression or price depression be identified for "dumping" to exist, even though they may be considered for injury purposes. In other words, dumping exist as soon as there is a price difference, as small as it may be, subject to the *de minimis* provisions of the Anti-Dumping Agreement. Panel further noted that that the 1916 Act is premised on a comparison between two prices, one in the United States, the other in the country of production of the product or in a third country where the product is also sold. There is consequently a very close similarity between the definition of dumping in Article VI and the transnational price discrimination test found in the 1916 Act. Panel further noted that the fact additional requirements make a finding of dumping more difficult does not affect the applicability of Article VI as long as the test of the 1916 Act requires a price difference between two markets, each located in the territory of a different Member. Members remain free to apply requirements which make the imposition of measures more difficult, but they may not exempt themselves from the rules and disciplines of the WTO Agreement when counteracting dumping as such. Panel further noted that conditions which make the establishment of dumping more difficult, such as the requirement of substantial price difference and of common and systematic dumping are such as to make the price discrimination test of the 1916 Act fall outside the scope of the

---

price of such articles, at the time of exportation to the United States, in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported after adding to such market value or wholesale price, freight, duty, and other charges and expenses necessarily incident to the importation and sale thereof in the United States..."

definition of Article VI:1. Pointing to other differences between the 1916 Act and Article VI, Panel noted that the 1916 Act relied not only on the actual market value but also on wholesale price. Panel held that the meaning of the terms "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country" found in Article VI:1(a) is broad enough to include the phrase "principal markets of the country of [...] production [of the imported merchandise]" or of "other foreign countries to which they are commonly exported". Panel further noted that the 1916 Act also referred to sales on the "principal markets" of "other foreign countries to which they are commonly exported" which may not be the "highest comparable price for the like product for export to any third country in the ordinary course of trade" found in Article VI:1(b) but according to the Panel the criteria of Article VI:1 are sufficiently broad to encompass such sales. Pointing to further difference that the criteria used in the 1916 Act do not refer to other concepts that could be differentiated from those found in Article VI:1 and that the 1916 Act did not refer to the possibility to use a "constructed" normal value, within the meaning of Article VI:1(b)(ii). According to the Panel it only made the transnational price discrimination test in the 1916 Act "narrower" than the definition of "dumping" in Article VI:1. It did not make it fall outside the scope of that article. Pointing to the provisions for adjustments in the 1916 Act, Panel held that even though the adjustments were not those found in the last sub-paragraph of Article VI:1, they do not affect the scope of the price discrimination test in the 1916 Act in relation to Article VI. On the contrary, they confirmed the similarity of the two texts as far as the identification of the pricing practice at issue was concerned. Noting the United States argument that the prices to be considered under the 1916 Act were not the same as those considered under Article VI and the Anti-Dumping Agreement because while the 1916 Act provided that the US import price was the price at which the product at issue was imported or sold *within* the United States, the US import price found in the Article VI definition of dumping, as further described in Article 2 of the Anti-Dumping Agreement, is normally the price in the United States that is "made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time" as the price in the exporting country or third country used to establish the *normal value*, with due allowances made for price comparability purposes. US further pointed out that foreign price under the 1916 Act was similar to, but nevertheless different from, the foreign price found in the Article VI definition of dumping,
as further described in Article 2 of the Anti-Dumping Agreement. Panel held that the terms of Article VI are sufficiently broad to include the types of prices used in the 1916 Act. According to the panel there is nothing in the types of prices referred to in the 1916 Act that would be of such a nature that they would be specific to anti-trust, to the exclusion of anti-dumping. On the contrary, the type of prices on which the 1916 Act was based meets the criteria of "normal value" and "export price" within

the meaning of Article VI and the Anti-Dumping Agreement. According to the Panel the differences, instead of making the 1916 Act fall outside the scope of Article VI, should rather be seen as violations of the requirements of the Anti-Dumping Agreement. Panel further noted that the 1916 Act might be having antitrust objective but does not *per se* fall outside the scope of Article VI.

4.WHETHER ANTIDUMPING DUTY IS THE ONLY REMEDY SANCTIONED BY THE AD AGREEMENT

The next issue was whether Anti-Dumping duties were the only remedy sanctioned by the Antidumping Agreement. US argued that the terms of Article VI:2 do not support the claim of the EC that duties are the only remedies allowed to counteract dumping. According to US Article VI:2 only states that a Member "may" levy an anti dumping duty to offset or prevent dumping. The directive in Article VI:2 is permissive and unqualified. In other paragraphs of Article VI, such as paragraph 5and 6(a), where express prohibitions are stated, the word "shall" is used. According to the US the negotiating history is evidence that recourse to other remedies was allowed. It also noted that a paragraph similar to paragraph 7 of Article VI, which had been removed at the early stage of the GATT 1947, was reintroduced in Article 16.1 of the Tokyo Round Agreement on anti dumping. This inclusion and that of Article 18.1 in the WTO anti dumping Agreement is evidence that Article VI:2 does not mean what the EC and Japan claimed it says. The EC and Japanese interpretation makes those provisions superfluous. According to US the plain language of Article 1 and 18.1 shows that these provisions do not merely interpret Article VI, but, rather, go beyond it by imposing a limitation on anti-dumping measures where Article VI:2 has none. EC and Japan argued that the only reason why the word "may" in Article VI:2 was used, is because it was not intended that WTO Members should be obliged to impose anti dumping duties. For the EC and Japan negotiating history confirms that remedies under Article VI were intentionally limited to anti dumping duties. The introduction of Article 16.1 of the Tokyo Round AD Agreement cannot be argued to have changed the meaning of Article VI. According to the EC and Japan ,on the contrary it confirms it. The reason for this was that the Tokyo Round AD Agreement and the GATT 1947 were distinct sets of rules, with different membership and separate means of enforcement.

Panel noted that the ordinary meanings of the verb "may" as an auxiliary verb include "have ability or power to, can". Taken on its own, this verb could mean that Members have the possibility only to impose duties or that they have a choice between duties and other types of measures. If the word "may" was used in the first meaning, it could be argued that the term "only should have been added right after it so as to limit its meaning. But the Panel pointed out that such an argument disregards the

immediate context of the word "may". The terms "in order to offset or prevent dumping" set up the framework in which the term "may" must be understood. By specifying that the purpose of anti dumping measures is to "offset" dumping, not to impose punitive measures, Article VI:2 first sentence limits the meaning of the word "may" to giving Members the choice between a duty equal to the dumping margin and a lower duty, not between anti dumping duties and other measures. Panel held that the thrust of Article VI:2, first sentence, is to make imposition of duties facultative and to limit in any event that amount to the dumping margin. If, as suggested by the US, the sentence had been meant to allow other measures than anti dumping duties, it is reasonable to expect that it would have been specified. Article VI was meant to regulate the use of anti dumping by WTO Members. It would have been logical to list the other possible sanctions, especially if those sanctions could be more severe than the imposition of offsetting duties. Therefore the Panel concluded that the ordinary meaning of the terms of the first sentence of Article VI:2 support the view that anti dumping duties are the only type of remedies allowed under Article VI.

5.WHETHER PROVISION REGARDING DETERMINATION OF DUMPING WAS VIOLATED

Japan and EC next claimed that the 1916 Act prohibits the importation of products at a price "substantially less" than the "actual value or wholesale price of [the products] [...] in the principal markets of the country of their production, or of other foreign countries to which they are commonly exported [...]." In contrast, Article VI:1(a) of the GATT 1994 and Article 2.1 and 2.2 of the Anti-Dumping Agreement require that the first benchmark against which the price of the imported product is compared be the actual price of the product for sale in the exporting country. Under Article VI:1(a) and Article 2.1, the primary and preferred benchmark for comparison is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country". Panel noted that nothing in the terms of the 1916 Act would prevent the introduction in practice of an order of precedence between the "actual value or wholesale price of [the products] [...] in the principal markets of the country of their production" and the actual value or wholesale price of [the products] [...] in the principal markets of other foreign countries to which they are commonly exported" compatible with the requirement of Article VI:1 of the GATT 1994 and Article 2 of the Anti-Dumping Agreement. Japan and EC also contended that Article 2.4.1 of the Anti-Dumping Agreement provides that those against whom dumping is alleged can have protection against currency fluctuations. The 1916 Act provides no such protection. Panel again noted that nothing in the terms of the 1916 Act would prevent the use of that mechanism in the actual application of the 1916 Act. Panel pointed out that pursuant to the doctrine established by the US Supreme Court in *Murray v. Schooner Charming*

Betsy[141], in the absence of conflict, US judges should, whenever possible, interpret US laws in conformity with the international obligations of the United States. This doctrine would imply that any judge before whom claims similar to those of Japan would be raised, would be expected to interpret the 1916 Act in conformity with the US obligations under Article 2 of the Anti-Dumping Agreement, provided there is no conflict between the relevant US legislation and international law.

6.WHETHER PROVISON FOR DETERMINATION OF INJURY VIOLATED

Japan and EC next claimed that Articles VI:1 and VI:6(a) of the GATT 1994, and Article 3 of the Anti-Dumping Agreement, require a Member to find that a given dumping practice causes or threatens to cause material injury to its domestic industry (or retards the establishment of a domestic industry) before applying an anti-dumping measure. These articles also set forth criteria which define and govern the determination of injury. In contrast, the 1916 Act only requires a showing of intent. The intent requirement in the 1916 Act is defined as an intent to destroy or injure a United States industry or to prevent its establishment. Thus, the 1916 Act contains no requirement similar to "material injury" within the meaning of Article VI of the GATT 1994 and the Anti-Dumping Agreement. Panel noted that in certain circumstances, the existence of an intent to injure may be more difficult to prove than the existence of actual injury. The United States executive branch early considered that the requirement of an "intent" made the imposition of remedies under the 1916 Act almost impossible. Panel further noted that the existence of an "intent" may not always imply the existence of actual injury, actual threat of injury or actual retardation. Interpreting the term "injuring an industry or [...] preventing the establishment of an industry in the United States" in the 1916 Act as meaning "causing material injury or materially retarding the establishment of a domestic industry" as in Article VI of the GATT 1994 might be possible under US law. For these reasons Panel held that the 1916 Act, to the extent that it provided for the identification of an "intent" on the part of the defendant rather than for the actual injury requirements of Article VI, was not compatible with Article VI:1 of the GATT 1994.

7.WHETHER ARTICLES 4 AND 5 WERE VIOLATED

Japan and EC next claimed that as evidenced by the most recent cases initiated under the 1916 Act, a complaint under the 1916 Act can be initiated by a single United States producer contrary to Article 4 and 5.1 of the Anti-Dumping Agreement. It was again contended that Article 5 also requires that applications contain evidence of the three elements of dumping, injury and causation, and sets a *de minimis* threshold applicable to the dumping element. The 1916 Act contains none of these elements. On the contrary, Japan and EC argued that, under the US Federal Rules of Civil Procedure 8(a)(2), a

[141] 6 U.S. (2 cranch) 64, 118 (1804).

complainant under the 1916 Act needs only to present a short and plain statement of its claims. Article 5.10 of the Anti-Dumping Agreement requires Members to complete their investigations and decide whether or not to impose duties within 18 months. The 1916 Act contains no such deadline. Panel noted that civil proceedings under the 1916 Act are available to "any person injured in his business or property" by reason of a violation of the 1916 Act. This term was nowhere qualified by a statement that this person should be sufficiently representative of an industry of the United States, within the meaning of Article 4 of the Anti-Dumping Agreement. Panel further noted that the 1916 Act refers to the intent of destroying or injuring an *industry* in the United States, or of preventing the establishment of an industry in the United States. Panel noted that there was no evidence that a minimum representation level for a given industry must be established by the complainant before filing a case before a federal court. Panel pointed out that all cases so far had in fact, been initiated by individual companies under their own responsibility. The fact that, in certain cases, these companies may have represented a very large portion of the US industry in the economic sector concerned was not linked to any legal requirement of representation under the 1916 Act and was most probably fortuitous. Panel held that in light of the terms of the 1916 Act, especially the term "any person injured in his business or property" there was no reason to believe that US federal courts will be in a position to interpret that provision – which conflicts with the terms of the Anti-Dumping Agreement - to meet the requirements of Articles 4 and 5 of the Anti-Dumping Agreement in terms of representation of the complainants.

Regarding the argument that the requirement of Article 5.2 that applications contain evidence of the three elements of dumping, injury and causation, Panel noted that the US did not contest the Japanese and EC argument therefore concluded that there was no obligation for a complainant under the 1916 Act to respect the obligations of Article 5.2 of the Anti-Dumping Agreement in terms of the type of evidence to be included in an application. Regarding the argument that Article 5.10 of the Anti-Dumping Agreement requires Members to complete their investigations and decide whether or not to impose duties within 18 months and that the 1916 Act contains no such deadline Panel noted that the fact that the 1916 Act does not include a deadline for the completion of proceedings is not as such sufficient to establish a violation.

United States appealed against the decision of the Panel[142]. However, the Appellate Body approved the ruling of the Panel on all issues.

COMMENT ON THE CASE

[142] WT/DS136/AB/R, WT/DS162/AB/R Report of the Appellate Body adopted on 28 August 2000.

The two cases are important for clarifying the nature and purpose of the Agreement. Panel's ruling that if the Act provided for more stringent procedure it could not be said to contravene the Agreement if it is not against the nature of any provision of the Agreement. The ruling reflected the fact that the purpose of the antidumping provision under the WTO is to provide the Members the right to take antidumping measures under strict procedural safeguards. If a Member had more strict requirements under its domestic law it was not a contravention of the Agreement. However, the ruling on the issue of determination of injury clarified that the stringency of requirements alone cannot protect a statue if it is against the purpose of the Agreement. Thus, even though intent to injure is more difficult to prove than actual injury, Panel held it against the Agreement as the purpose of the AD Agreement is protective. It gives the Members right to counter the effect of dumping and re-establishing the competitive equilibrium. The Agreement does not outlaw dumping *per se*, therefore if dumping does not have any injurious effect then no action can be taken against the exporting firm whatever might have been its intentions. The protective nature of the Agreement was again highlighted on the issue whether antidumping duties are the only remedy sanctioned by the Agreement. Panel's ruling that the word 'may' in Article VI:1 only permits the Members to take antidumping measures provided in the Agreement and it does not allow them to penalise the exporting firms, reflects the nature of Article VI and the AD Agreement that they only recognise the right of Members to protect their domestic industry, they do not outlaw dumping. The purpose of Article VI and the AD dumping Agreement is to regulate that right in the interest of free trade, in no case they are intended to arm the Members with the right to penalise the exporting firms.

THAILAND– ANTI-DUMPING DUTIES ON ANGLES, SHAPES AND SECTIONS OF IRON OR NON-ALLOY STEEL AND H-BEAMS FROM POLAND[143]

The case concerned the imposition of definitive anti-dumping duties by Thailand on H-beams from Poland. Siam Yamato Steel Co. Ltd. ("SYS"), the sole Thai producer of H-beams, filed an application with Thailand's Ministry of Commerce for the imposition of anti-dumping duties on H-beams originating in Poland. On 17 July 1996, a representative of the Government of Poland met with officials from the Department of Business Economics ("DBE"). On 30 August 1996, the DBE published a notice of initiation of an anti-dumping investigation on H-beams originating in Poland, and forwarded a copy of that notice to the Polish Embassy in Bangkok and to the Polish firms. The Department of Foreign Trade ("DFT") and the Department of Internal Trade ("DIT") established their

[143] WT/DS122/R Report of the Panel adopted on 28 September 2000.

respective periods of investigation as 1 July 1995 to 30 June 1996, and the DIT also collected certain information for 1994 to 1996. On 18 October 1996, Poland requested consultations with Thailand under Article 17.2 of the AD Agreement. On 14 November 1996, Thailand replied to this request in writing, summarizing discussions that had taken place between the Governments of Poland and Thailand prior to the initiation of the investigation. In this letter, Thailand expressed the view that the 17 July 1996 meeting was a legitimate form of official notification to the Government of Poland pursuant to Article 5.5 of the AD Agreement. Thailand imposed provisional anti-dumping duties on imports of H-beams originating in Poland, and published notices to that effect . On 20 January 1997, Thailand forwarded to the Polish respondent companies -- Huta Katowice ("HK") and Stalexport notifications concerning the preliminary determinations of dumping and injury, as well as the notice of provisional anti-dumping duties. Verification of questionnaire responses was conducted in Poland by Thai officials during 16-18 April 1997. The DFT transmitted to HK confidential disclosure of dumping findings. On 26 May 1997, the DFT published a notice of the application of a definitive anti-dumping duty on imports of H-beams originating in Poland.

Following issues were involved in this case:

- Whether there was sufficient evidence to justify initiation of investigation under Article 5.2 and 5.3 of the AD Agreement.
- Whether Thailand violated its obligations under Article 5.5 AD read in conjunction with Article 12.1 AD by not providing proper or timely notification to Poland regarding the filing of the application for initiation of the Thai anti-dumping investigation.
- Whether the use of methodologies in the subparas (i) to (iii) would *ipso facto* yield reasonable results or there was a separate criterion of reasonability required by the code.
- Whether the determination of injury by Thai authorities was consistent with Article 3 of the AD Agreement.

1. INITIATION OF INVESTIGATION

(a) Lack of sufficient information: Poland alleged that the Thai authorities did not have sufficient evidence to justify initiation of the investigation under Articles 5.2 and 5.3 of the AD Agreement. Poland argued that the application was insufficient under the chapeau of Article 5.2 as it did not contain data, evidence or analysis regarding the existence of injury or a causal link between dumped imports and injury. According to Poland the application contained nothing more than "simple assertion" in the form of raw numerical data, and did not contain "information on the evolution of the

volume of the allegedly dumped imports, the effect of the imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry", as required by Article 5.2(iv).

Panel found that SYS filled out a standard form "anti-dumping complainant application form" provided by the Thai investigating authorities and that the non-confidential version of the application submitted by SYS on its face contained "evidence" pertaining to the issues of injury and causal link. The body of the non-confidential application itself contained a section entitled "injury determination", therefore the Panel concluded that the application contained certain data, evidence and information that was relevant to the issues of injury and causal link, including certain of the factors mentioned in Articles 3.2 and 3.4 of the AD Agreement. Similarly Panel found that, Poland's allegation with respect to dumping to be baseless. Panel noted that although there was no explanation or analysis of much of this data in the application or its annexes pertaining to dumping, it followed panel's decision in *Mexico – HFCS* that Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations.[144]

(b). Failure to provide timely notification: Poland next argued that, in violation of its obligations under Article 5.5 AD Agreement read in conjunction with Article 12.1 AD Agreement, Thailand did not provide proper or timely notification to Poland regarding the filing of the application for initiation of the Thai anti-dumping investigation. Poland recognised that this claim was based on a disagreement with Thailand as to the content of a discussion held between government officials from Thailand and Poland. According to Poland, due to the difficulty for a panel to rule on something that was communicated orally, Article 5.5 should be read to require written notice which was not provided in this case. Thailand argued that the meeting between government officials from Thailand and Poland complied with the requirements of Article 5.5 AD Agreement with respect to the timing, form, and content of the notification. With respect to timing, Thailand submitted that it notified Poland less than one month after the receipt of the application and six weeks before the decision to initiate the investigation. With respect to form, Thailand submitted that the text of Article 5.5 AD Agreement does not specify whether notification should be written or oral. With respect to content, Thailand noted that the language of Article 5.5 AD Agreement is vague and gives no indication of what should be notified.

[144]"While we recognise that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself" Mexico HFCS WT/DS132/R Report of the panel adopted on28 January 2000.

Panel pointed out that with respect to the timing of the notification required under Article 5.5, the second sentence of Article 5.5 provides that "after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned." Footnote 1 of the AD Agreement defines the term "initiated" as "the procedural action by which a Member formally commences an investigation as provided in Article 5." Together, these provisions make it clear that at a point in time between two specified events, the authorities of the importing Member must notify the exporting Member. According to the Panel the 17 July 1996 meeting fell within the "window" of time envisaged by Article 5.5 and therefore satisfied the timing requirements imposed by Article 5.5. Panel further noted that Article 5.5 AD does not specify the form that the notification must take. According to the Panel the form of the notification under Article 5.5 must be sufficient for the importing Member to "inform" or "make known" to the exporting Member certain facts. While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the AD Agreement, the text of Article 5.5 does not expressly require that the notification be in writing. Panel held that a formal meeting between government officials could satisfy the notification requirement of Article 5.5, provided that the meeting is sufficiently documented to support meaningful review by a panel. Therefore the Panel concluded that that the fact that Thailand notified Poland under Article 5.5 orally in the course of a meeting between government officials, rather than in written form, does not render the notification inconsistent with Article 5.5. With respect to the content of the notification, Panel noted that the text of Article 5.5 does not specify the contents of the notification. According to the Panel since the text of the provision specifies that notification necessarily follows the receipt of a properly documented application, the fact of the receipt of a properly documented application would be an essential element of the contents of the notification. Panel noted that any notification provided in this case was provided orally in the course of a meeting between government officials. The only written evidence on the Panel record relating to the content of any such notification was an internal Thai government note summarising the meeting and several subsequent communications from the Thai government to the Polish government. Panel pointed out that both Articles 5.5 and 12.1 contain a requirement to notify the government of the exporting Member concerned of certain events connected with the initiation of an investigation at a certain point in time but the requirements as to the timing, form and content of these notifications is different. Article 5.5 makes it clear that the notification referred to in that provision must take place "after receipt of a properly documented application and before proceeding to initiate an investigation". By

contrast, Article 12.1 of the AD Agreement concerns notification of initiation, as it requires notification to "the Member or Members the products of which are subject to such investigation...", "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 ..." and requires "public notice" of initiation. According to the Panel since Article 12.1 provides that such "public notice" must "contain, or otherwise make available through a separate report, adequate information....", the notice must presumably be in writing. Furthermore, Article 12 involves the notification of a decision to initiate, which a Member may not yet have taken at the time of an Article 5.5 notification. Therefore the Panel concluded that Thailand did not act inconsistently with the respect to the timing, form and content of the notification under Article 5.5 of the AD Agreement in informing Poland orally in the course of the 17 July 1996 meeting between government officials of Thailand and Poland that Thailand had received an application from SYS for initiation of an anti-dumping investigation with respect to imports of H-beams from Poland.

2.DETERMINATION OF DUMPING

(a). Reasonable results under Article 2.2.2(i)-(ii): Poland claimed that Thailand violated Art. 2.2 and Art. VI:1 (b)(ii) of GATT 1994 by including an unreasonable amount for profit in the constructed normal value calculation. In Poland's view, applying the methodologies set forth in Art. 2.2.2 (i)-(ii) does not yield results that are *ipso facto* reasonable, at most there is a rebuttable presumption that the results generated by these methodologies are reasonable. According to Poland, the result of any calculation using any of these methodologies must be evaluated to determine whether it is "reasonable" in the sense of Art. 2.2, on the basis of other evidence on the record of the investigation. Poland argued that there were several other much lower profit figures on the record that could and should have been used by Thailand instead of the 36.3% on HK'S total H-beam sales. Poland contended that the text of Art.2.2.2 supported its argument that Art.2.2 and Art. 2.2.2 require a separate "reasonability" test. Poland pointed out that while the chapeau of Article 2.2.2 states that the methodologies therein are "for the purpose of paragraph 2" of Art. 2 (i.e. The determination of a "reasonability amount" for profit), the second sentence of the chapeau states that the methodologies in subparagraphs (i)-(iii) "may" be used. If the use of such methodologies were required, this sentence like the first sentence of the chapeau of Art.2.2.2 would have used the word "shall". Poland also cited Art. 2.2.2(iii) in support of its argument, noting that this provision states that "the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin" i.e. expressly providing that even reasonable methodologies may sometimes yield results that are not "fairly usable"

or "reasonable". According to Poland the ceiling imposed by subpara (iii) was stricter than that of the 'reasonableness' standard which otherwise flows from Art. 2.2 to each provision thereunder.

Thailand contended that the profit margin used by the Thai investigating authority was "reasonable" as required by Art. 2.2 of AD Agreement and that no separate "reasonability" "test" was required under Article 2.2 and 2.2.2. Thailand argued that if one of the methodologies outlined in 2.2.2(i)-(iii) was used where the relevant conditions for doing so were met, i.e., when the preferred method of calculating profit (that in the chapeau of Art. 2.2.2) could not be used, then the result is reasonable *per se*. Thus, Thailand asserted that when the conditions for using Art. 2.2.2(i)-(iii) are met there is no permissible way to measure profit other than one of these methodologies. Thailand disagreed to the proposition that the word "may" in any way links the term "reasonable" in Art. 2.2 to the calculation methods of Art. 2.2.2. According to Thailand "may" means "is permitted to" where the preferred methodologies in the chapeau of Art. 2.2.2 (which normally "shall" be used) cannot be used. Thailand argued that rather than constraining the level of constructed value and thus the level of dumping margin, the word "reasonable" lays a role in effecting the purpose of the AD Agreement i.e. to neutralise the impact of dumped imports. Thus, according to Thailand reasonable must mean " as close as possible to the actual dumping margin." Thailand pointed out that if under Art. 2.2.2(i) an investigating authority used a lower profit amount than the actual one, it would mask rather than accurately represent the dumping that was actually occurring, and thus would be unreasonable because it would not be accurate. Thailand pointed out that Poland had offered no particular method for determining whether a particular level of profit was "reasonable" and that HK's actual profit rate exceeded 35% on H-beams and was virtually the same on JIS H-beams. Thailand further argued that due to virtual identity of profit levels the profit level from one product within the same general category was not causing an unreasonable high profit level for the category that was then attributed to the then like product. According to Thailand if a price based comparison had been made using prices for all sales of H-beams, the result would have been essentially the same as final dumping margin established on the basis of constructed normal value.

Panel disagreed with Poland's argument that the methodologies set forth in Art. 2.2.2 are not reasonable *per se*, but that the results of applying any of these methodologies are, at best rebuttably presumed to be reasonable. Panel pointed out that the ordinary meaning of the text indicated that, if one of the methodologies is applied the result is by definition reasonable. Panel further pointed out that the phrase "for the purpose of para 2" is without qualification in the text. According to the Panel the phrase is straightforward and means that Art. 2.2.2 gives the specific instructions as to how to fulfil

the basic but unelaborated requirement in Art. 2.2 to use no more than a reasonable amount for profit. Panel further pointed out that the chapeau of Art. 2.2.2 provides that when the methodology in the chapeau "cannot" be used, one of the methodologies in sub-paragraphs (i), (ii) or(iii) "may" be used. Rejecting Poland's argument that the word "may" only provides for the possibility of using such methodologies and implies that any results derived thereby would be subject to a reasonability test arising under Article 2.2, Panel held that the word "may" constitutes authorisation to use the methodologies in the sub-paragraphs where the methodology in the chapeau, which is the preferred methodology cannot be used. In Panel's view sub-para (iii) further confirms this view which permits the use of any other reasonable method" subject to a defined cap. Panel reasoned that if application of methodologies in (i)or (ii) by itself were not sufficient to satisfy the reasonability requirement of Art. 2.2, the word "other" in sub-para(iii) would be redundant. According to Panel its conclusion was reinforced by the presence of the cap in sub-para(iii) and the absence of any cap in subpara (i) and (ii). Subpara (iii) makes clear that the drafters knew how to include such a constraint and were aware that it might be necessary in certain circumstances. According to Panel the fact that drafters chose not to do so in other subparas of Art. 2.2.2 demonstrates that no such separate constraint exists in respect of these subparas. Pointing to the requirement in the chapeau of Art. 2.2.2 as well as in subparas (i) and (iii). Panel noted that actual data of a separate reasonability test is both illogical and superfluous where the Agreement requires the use of a specific types of actual data. That is, where actual data are used and the other requirements of the relevant provisions are fulfilled a correct or accurate result is obtained and the requirement to use actual data is itself the mechanism that ensures reasonability in the sense of Art.2.2 of that result. By contrast under subpara (iii) where no specific methodology or data source is required and the use of 'any other reasonable method" is permitted, the provision itself contains what is in effect a separate reasonability test namely the cap on the profit amount based on the actual experience of other exporters or producers. Therefore, the Panel concluded, that Art. 2.2.2 is requirement that actual data be used (and its establishment of a cap where this is not the case) are intended precisely to avoid the subjective judgements by national authorities as to the "reasonability" of given amounts used in constructed value calculations.

Panel further noted that Thailand found no evidence of any significant differences between the two types of H-beams and argued on this basis that all H-beams could have been dumped. Thailand had pointed out that if all H-beams had been treated as a single like product, the margin of dumping based on price to price comparison for the like product so defined would have been virtually the same as that based on constructed value, given the Thai authorities' finding that the Polish home market prices for JIS &DIN H-beams were very similar. Therefore the Panel concluded that there was no evidence that

Thailand's application of Art.2.2.2 (i) in any way distorted the outcome of dumping investigation. Noting that the underlying goal of the constructed normal value rules is to ensure a result as close as possible to what would be obtained on the basis of a price- to price comparison, Panel held that there was no factual evidence that the profit figure used by Thailand was unreasonable.

(b). The issue of like product: In this case the Polish respondent companies produced/ and/or sold two types of H-beams, those produced to JIS specifications ("JIS H-beams") and those produced to DIN specifications ("DIN H-beams"). DIN H-beams accounted for the large majority of the respondent companies' H-beams sales in Poland, and JIS H-beams accounted for the large majority of these companies' H-beams sales in Thailand. The Polish respondent companies argued during the investigation that JIS and DIN H-beams were not like products due to physical and production process differences. The Thai authorities accepted this argument and on this basis found that HK'S home market sales of the like product (JIS H-beams) accounted for less than 5% of its sales to Thailand. Thus the authorities calculated the preliminary margin for HK on the basis of a constructed normal value. In respect of the amount for profit, Thailand followed the methodology set forth in AD Agreement Art. 2.2.2(I), with the "same general category of products" for which the amount for profit was determined defined as HK'S total H-beam sales (JIS&DIN). The Thai authorities found at verification that the physical and production differences between JIS and DIN H-beams were less than had been argued by the Polish respondents, i.e., that H-beams were "broadly similar irrespective of standard" as substantiated by independent reports prepared by specialised engineering institutes. The authorities also found that the production lines for JIS & DIN H-beams were treated as separate for cost purposes, as the practice of HK was to average out all costs of H-beams irrespective of the production lines concerned and that the stock cards did not differentiate between the different product lines. The Thai authorities nevertheless continued to use constructed normal value for the final dumping determination, again using HK'S profits on sales of all H-beams (36.3%) as the profit amount for the "same general category of products" in calculating the constructed normal value. In this context, the Thai authorities found that the profit margin for the like product (JIS H-beams) was almost identical to that for all H-beams as a whole.

Poland argued that in applying sub-para (i) of Art. 2.2.2, Thailand violated the requirement to calculate profit amounts on "the same general category of products". In particular Poland argued that the Thai authorities utilised the wrong sales and production data, that is HK's data on H-beams only. According to Poland, Thailand had an obligation to use HK's production and sales data not just for H-beams, but more broadly for all products of the "same general category"-which the narrowest grouping would have been "Angles shapes and sections of iron or non-alloy steel under this "general category" but

which did not constitute the entirety of that category. According to Poland Art. 2.2.2(i) would not allow for a narrower category than the "narrowest general category"(i.e. HS 7216) because "small" market segments are more likely to be unrepresentative" than larger ones. On the other hand, according to Poland, the most general category-all products of a company-would satisfy the requirement of Art.2.2.2(i). Poland noted that there were no data on the record pertaining to profits for the category identified by Poland (HS7216), and submitted that in the absence of such data, the company-wide average profit margin for HK (4.55%) was a proper (if---imperfect) surrogate.

Thailand contended that Art. 2.2.2 (i) does not provide for any particular breadth of definition of "same general category of products", put leaves the decision to use a narrower general rather than a broader general category to the reasonable discretion of the investigating authorities. Thailand argued that in a case where the investigating authority has information on both H-beams and "all products", it would make more sense to choose the narrower category of products", because broader and broader categories will encompass products less and less "like" the products for which a profit is sought to be calculated. As a result, the broader the general category definition, the greater the likelihood that the profit calculation will be inaccurate. According to Thailand all H-beams constitute an obvious, natural category, and the respondent must have the burden to show why there was a major discrepancy caused by using the methodology in Art. 2.2.2(i), particularly when the respondent was costing all H-beams in a single accounting database and the investigating authorities find that profits on the like product in the home market are virtually identical to profits for t he same general category of products, i.e., all H-beams.

Panel noted that the text of Art. 2.2.2(i) simply refers without elaboration to "the same or general category of products" produced by the producer or exporter under investigation. Thus, the text of this sub-para provides no precise guidance as to the required breadth or narrowness of the product category, and therefore provides no support for Poland's argument that a broader rather than a narrower definition is required. The Panel further noted that certain amount of guidance could be found in other provisions of Art. 2.2.2 in particular the chapeau and its overall structure. In general Articles 2.2. and 2.2.2 concern the establishment of an appropriate proxy for the price "of the like product in the ordinary course of trade in the domestic market of the exporting country" when that price cannot be used. As such, as the drafting of the provisions make clear the preferred methodology which is set forth in the chapeau is to use actual data of the export or producer under investigation for the like product. Where this is not possible, subpara (i) &(ii) respectively provide for the database to be broadened, either as to the product (i.e, the same general category of products produced by the producer or exporter in question) or as to the

producer (i.e., other producers or exporters subject to investigation in respect of the like product) but not both. This confirms that the intention of these provisions is to obtain results that appropriate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.

Panel held that this indicated that the use under subpara (i) of a narrower rather than a broader "same general category of products " was certainly permitted. "Indeed the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[145] Panel further noted that additional support could be found in Art. 3.6 which provides that when available data on criteria such as the production process, producers' sales and profits "do not permit the separate identification of production of the like product " the effects of the dumped imports shall be assessed by the examination of the production of the like product, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided". Panel held that although this provision concerns information relevant to injury rather than dumping still Art. 3.6 provides constructed support for the conclusion that the use of a narrower rather than a broader category is permitted. Panel also added that it did not mean to suggest that the use of the narrowest possible category including the like product is required under Art. 2.2.2(i). Rejecting Poland's argument that a broader category was more likely than a narrower one to yield "representative" results the Panel held that as a matter of logic the opposite more often is likely to be true. According to Panel the broader the category, the more products other than the like products will be included, and thus, the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product. Panel further held that since HK produced a very wide range of products other than H-beams therefore the company-wide data could not accurately represent the like product.

3.DETERMINATION OF INJURY

The next issue was whether the determination of injury by Thai authorities was consistent with Article 3 of the AD Agreement.

(a).Whether determination of injury was based on positive evidence and objective examination: Poland argued that Article 3.1, 3.2 and 3.4 were violated because t he determination

was not based on "positive evidence" and did not involve an "objective examination" of the volume and effects on prices of Polish imports, and the impact of those imports and the impact of those imports on SYS. According to Poland Thailand violated Article 3.5 by not demonstrating that Polish imports were causing injury. With respect to Article 3.1 Poland argued that contradictions in the investigation data showed that the decision was not based on positive evidence and on objective examination of the facts. Poland complained about the discrepancies in the factual evidence in the non-confidential record, and the contradictions between this evidence and the evidence contained in the confidential record. Poland argued that the evidence and the consideration of that evidence by the Thai authorities did not support an injury finding. Poland objected to investigating authorities claiming "to base their determination on documents outside the record that were not shared in any coherent form or manner with the parties to an investigation and argued that the panel should not permit the use in prerequisites for an antidumping determination.

Thailand contended that the Thai authorities final determination of injury involved an objective examination of the impact of dumped imports from Poland on the Thai domestic industry consistent with Article 3.1 of AD Agreement. According to Thailand significant amount of "positive" evidence on which the final injury determination was based was contained in the record of the investigation and was reported in the respective notices, letters and disclosures provided to interested parties. According to Thailand the confidential factual record on which the Thai authorities based its determination contained positive evidence that the Thai authorities objectively examined with respect to all of the factors listed in Article 3.1 of the AD Agreement. Thailand admitted there were errors in data on the record but said that most of them were typographical or translation errors in the English translations.

According to Panel the textual requirements in Article 3.1 that a determination of injury be based on "positive evidence" and involve an "objective examination", in light of this standard of review places a considerable responsibility upon the investigating authorities to establish an adequate factual bases for the determination as well as to provide a reasoned explanation for the determination. Panel concluded that the textual reference to "positive evidence" and the requirement of an "objective examination" in Article 3.1 requires that the reasoning supporting the determination be "formally or explicitly stated" in documents in the record of the AD investigation to which interested parties have access at least from the time of the final determination and the factual bias relied upon by the authorities must be discernible from those documents. According to the Panel without timely access to relevant information in the course of the investigation and to the essential facts prior to the final determination,

[145] Report of the Panel, para 7.113.

interested parties would be denied a meaningful opportunity to defend their interests during the investigation. On the basis of this principle Panel examined whether Thai authorities findings as to the volume of dumped imports and price effects was based on "positive evidence" and "objective examination".

(a.a) Whether finding of increase on volume of dumped imports was based on positive evidence and objective examination: Poland pointed out that Article 3.2 requires that an investigating authority must "find" a "significant" increase in the volume of dumped imports. Poland argued that there was no statement or evidence that the Thai authorities "considered" whether there had been a significant increase in imports and no finding that the increase in the volume of dumped imports was "significant". Poland contended that the Thai law at the time of the AD investigation was inconsistent with the AD Agreement as it did not require any "finding" of "significance". Questioning the import statistics during the investigation Poland argued that the finding in the final determination that imports "continuously increased" was wrong because imports from Poland moved up and down through the period of investigation. According to Poland the data in the record of the investigation pertaining to imports and market share including the statement in the final determination and other record documents about those data were contradictory. Therefore Poland argued that the Thai authorities' determination was not made on the basis of "positive evidence" and an "objective examination" of the increase in the subject imports.

Thailand submitted that it acted consistently with its obligation under the first sentence of Article 3:2 AD Agreement: the record of the investigation showed that the Thai investigating authorities considered whether there had been a significant increase in dumped imports in absolute terms. Regarding the statement in the final determination that the import volumes from Poland increased continuously", Thailand cited to record evidence of annual import volumes from 1994 through the investigation period. With regard to inconsistent figures for domestic demand and the market share of Polish imports in the confidential record and in the non-confidential record Thailand stated that they were typographical errors and in the English translation. Thailand stated that correct figures for both total SYS domestic sales and total imports were provided in confidential documents to the CDS Committee.

With regard to the issue whether an explicit "finding" of a "significant" increase in dumped imports was required, Panel noted that the text of Article 3.2 requires that the investigating authorities "consider whether there has been a significant increase in dumped imports". Panel concluded that the textual term "consider" in Article 3.2 does not require an explicit "finding" or "determination" by the

investigating authorities as to whether the increase in dumped imports is "significant". However, Panel noted that it must be apparent in relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.

On the issue whether Thailand considered that there had been a significant increase in dumped imports, Panel noted that there was factual support on the record for the Thai authorities' statement that the subject imports increased continuously. Panel noted that only on the basis of quarterly import data for one of the 12 month periods considered by the authorities did Poland argue that import volume "moved up and down" during the period considered. According to Panel in spite of the fluctuation within that period, the quarterly import volume at the end of the period was considerably higher than at the beginning. According to the Panel it was clear on the face of Article 3.2 that a quarterly analysis of the trend in import volume is not required and no particular analytical approach is required or even alluded to in Article 3.2. Panel held that since on an annual basis over a multi-year period imports from Poland increased in every period examined, therefore quarter-to-quarter fluctuations in import volumes during one of the 12 month periods examined could not invalidate the Thai authorities' finding that the import volume of the subject imports increased continuously". On the basis of various statements in the relevant documents concerning the import volume, whether the Thai authorities "considered" whether there had been a "significant" increase in those imports Panel held that the statements indicate that the authorities did consider the "significance" of the increase in imports. The authorities went beyond a mere recitation of trends in the abstract and put the import figures into context. The confidential "information for final determination" further confirmed that Thailand considered whether there had been a "significant" increase in the volume of the dumped imports. Panel noted that the first sentence of Article 3.2 requires that, with regard to the 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 Member. Thailand contended that the Thai authorities considered whether there had been a significant increase in absolute terms. According to the Panel it is sufficient for the purposes of this provision for the investigating authorities to consider whether there has been a significant absolute increase, and that in this case it was clear from Thailand's analysis as set forth in the relevant documents that its consideration of the significance of the increase in imports focused on the absolute, rather than the relative, increase.

(b.b)Whether determination of price effect was based on "positive evidence" and "objective examination": Poland challenged Thailand's findings concerning the effect of the dumped imports on prices in the Thai market on two grounds:

1. Poland contended that Article 3.2 second sentence requires a finding of "significant" effects of the dumped imports on prices. According to Poland the Thai authorities made no such finding and the Thai law at the time of antidumping investigation was inconsistent with the AD Agreement as it did not require any "finding" of "significance".
2. Poland argued that the record data did not support Thailand's findings. Poland argued that the confidential data that it received in connection with the dispute made clear that the non-confidential summaries of the price-related data disclosed to the Polish respondents during the investigation contained errors which were misleading as to the basis for Thailand's determination regarding the price effects of imports. Thus, Poland argued, the Thai authorities' determination was not made on the basis of "positive evidence" and on "objective examination" of the price effects of the subject imports.

Thailand contended that it acted consistently with its obligation under the second sentence of Article 3.2: Thailand argued that the Thai authorities did consider, based on confidential information on the record, whether the dumped Polish imports were significantly underselling the Thai products and/or whether the effect of dumped Polish imports was to cause price suppression or depression to a significant degree. Thailand acknowledged that there were some discrepancies in certain price data but attributed them to incorrect references to the time periods involved (calendar year versus investigation period) or to inadvertent typographical errors in (the non-confidential disclosure document – the "Proposed Final Determination" – provided to Poland during the investigation).

On the question whether the data supported the Thai authorities' findings as to the effects of imports on prices in the Thai market for H-beams, Panel held that although the error was inadvertent it was material in the context both of the anti-dumping investigation and of the dispute because the error called into question the factual basis for the Thai authorities' findings concerning price trends, which led Poland to believe that those authorities had erred in making those findings. Panel further pointed out that in its comments concerning the draft final determination, Poland relied upon the erroneous figure for the second quarter of 1996 in support of one of its arguments, and that Thailand did not avail itself of this opportunity to correct Poland's misapprehension, which according to the Panel suggested that Thailand itself may not have been aware of and did not take note of this error at that time. Rejecting Thailand's argument that "If the establishment of the facts is proper, it is irrelevant whether,

in the end, the facts turn out to be different than established"[146] Panel held that although there is an important difference between the substance of an investigation, i.e., what was actually done, and its more formal aspect, i.e., how this substance is disclosed in relevant documents summarising the investigation, yet the information made public, and referred to as the basis for the published determination, must accurately reflect the underlying data of record, as it is the published information and analysis that constitute an authority's communication of its findings and the factual basis thereof to the general public, including to interested parties. The Panel concluded that the disclosed facts cannot be considered to be "properly established" if they are inaccurate especially where virtually all of the data of record are confidential and must not be disclosed by the administering authority, and therefore are not capable of independent verification by interested parties. In such a case, the responsibility of an authority to ensure the accuracy and clarity of the public summaries of data and statements of reasoning made available to the interested parties in the investigation is particularly significant.

Panel finally concluded that the issues that Poland had raised concerning the Thai authorities' findings of price undercutting and price depression were factual issues. Due to certain errors in the data as disclosed to Poland, as well as the conclusory nature of the statements in the documents disclosed to Poland concerning the existence of underselling and the coincidence in the trends of the Polish and Thai companies' prices for H-beams (i.e., price depression), those documents did not demonstrate that the facts were properly established on the basis of positive evidence or that the authorities could have reached their conclusions through an objective examination of those facts. Therefore the Panel held that Thailand acted inconsistently with its obligation in the second sentence of Article 3.2 and Article 3.1 to consider, on the basis of positive evidence, whether there had been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports was otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

(c). Whether impact of dumped imports on domestic industry was properly established: Poland argued that Thailand fails to even mention several factors that it was obligated to evaluate under Article 3.4 "actual and potential declines in productivity", "the magnitude of the margin of dumping", "actual and potential negative effects on wages". Poland further argued that all of the factors examined by Thailand unambiguously supported a finding of no injury, that the Thai

[146] Response by Thailand to Panel Question 50, Annex 2- 6. 198 Exhibit Thailand-67.

authorities chose not to present evidence regarding profits, losses, profitability or cash flow, and that the "'imperative'" of preserving and expanding SYS's market share and total sales was not among the factors specified in Article 3 as a basis for a legal finding of injury. According to Poland, Thailand failed to establish the material facts (as some contradict one another), failed to evaluate the facts in an unbiased and objective manner (as several factors were ignored) and failed to meet the legal standard of Article 3.4 requiring evaluation of all relevant economic factors and indices. Thailand contended that the record of the investigation demonstrated that the Thai authorities complied with Article 3.4 by evaluating all relevant factors, including profits, losses, profitability and cash flow. Rejecting Poland's argument that all factors would have to indicate injury in order for an injury finding to be sustainable, Thailand argued that the AD Agreement only requires investigating authorities to consider all relevant factors therefore it is all relevant factors, rather than all factors listed, that must be considered under Article 3.4. Thailand argued that the list of factors in Article 3.4 is illustrative only, and that no change in meaning was intended in the change in drafting from the "such as" that appeared in the corresponding provision in the Tokyo Round Antidumping Code to the "including" of the present Article 3.4 of the AD Agreement.

(c.a) Whether the text of Article 3.4 is mandatory: Panel held that that the text of Article 3.4 is mandatory. The text of Article 3.4 explicitly mandates that: "The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including..." Rejecting Thailand's argument Panel held that the term "such as" is defined as "[o]f the kind, degree, category being or about to be specified" ... "for example"[147]. By contrast, the verb "include" is defined to mean "enclose"; "contain as part of a whole or as a subordinate element; contain by implication, involve"; or "place in a class or category; treat or regard as part of a whole"[148]. Therefore, according to the Panel the Article 3.4 phrase "shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including..." introduces a mandatory list of relevant factors which must be evaluated in every case. According to the Panel the change that occurred in the wording of the relevant provision during the Uruguay Round (from "such as" to "including") was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory. Panel however noted that the second sentence of Article 3.4 states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Therefore, according to the Panel in a given case, certain factors may be more

[147] *The New Shorter Oxford English Dictionary* (Oxford University Press, 1993).
[148] *Ibid.*

relevant than others, and the weight to be attributed to any given factor may vary from case to case and there may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required.

Panel held that neither the presence of semi-colons separating certain groups of factors in the text of Article 3.4, nor the presence of the word "or" within the first and fourth of these groups render the mandatory list in Article 3.4 a list of only four "factors". According to the Panel the two "ors" appear within -- rather than between -- the groups of factors separated by semi-colons. The first "or" in Article 3.4 appears at the end of a group of factors that may indicate declines in the domestic industry (i.e. "actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity". Panel held that the use of the word "or" here is textually linked to the phrase "actual and potential decline", and may indicate that such "declines" need not occur in respect of each and every one of the factors listed in this group in order to support a finding of injury. Therefore that the use of the term "or" here does not detract from the textual requirement that "all relevant economic factors" be evaluated. This first group of factors in Article 3.4 contains factors that all relate to, and are indicative of, the state of the industry. The second "or," appears in the phrase "ability to raise capital or investments". According to the Panel this "or" indicates that the factor that an investigating authority must examine is "ability to raise capital" or "ability to raise investments", or both. On the basis of this textual analysis of Article 3.4, Panel held that each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities. Panel pointed out that the mandatory nature of the list in Article 3.4 contrasts with Article 3.5 of the AD Agreement, where the word "may" is used. The list of factors in that provision is preceded by the phrase "Factors which may be relevant in this respect include therefore the text of that provision indicates that the list of factors in that provision is illustrative.

With regard to the question that the extent to which the required evaluation of all "relevant" factors must be reflected in the text of the final determination and other documents forming the basis for review Poland, argued that an evaluation of all relevant factors must be apparent in the final determination. Only when all factors listed in Article 3.4 are considered, weighed and discussed would facts be "properly established" and "objectively" evaluated. Poland argued that a factor is "relevant" whether or not it supports an affirmative finding of injury. Factors are relevant when they have a bearing on the state of the industry and that authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. According to Poland in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, a

mere "checklist approach" need not be established that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority.

(c.b) Whether Thai authorities considered all relevant factors: The next question was whether the Thai authorities considered all relevant factors i.e., whether the Thai investigating authorities considered productivity, the magnitude of the margin of dumping; actual and potential negative effects on wages; and actual and potential negative effects on the ability to raise capital or investments. On the issue of productivity Panel pointed to the statement in the final determination that "it is possible that economy of scale is yet to be reached"[149] which made the consideration of "productivity" by the Thai investigating authorities apparent in the documents forming the basis of review. In addition Panel pointed out that other information on the Panel record further confirmed that the Thai investigating authorities used "economy of scale" as a proxy for considering productivity in the particular circumstances of the case and thus concluded that the Thai investigating authorities did not fail to consider "productivity". However, regarding the magnitude of margin of dumping and actual and potential negative effects on wages and actual and potential negative effects on the ability to raise capital or investments the Panel could find no evidence on record supporting Thailand's argument that Thai authorities considered this factor and therefore it held that Thai investigating authorities failed to consider the magnitude of the margin of dumping and actual and potential negative effects on wages and actual and potential negative effects on the ability to raise capital or investments as required by Article 3.4 of the AD Agreement. Panel noted that although consideration of certain of these Article 3.4 factors might be apparent in certain of the confidential documents submitted by Thailand to the Panel, it declined to base the review of the consistency of the determination with Article 3.4 on such documents.

(c.c) Whether remaining relevant factors were considered: Poland alleged that the factors that the Thai authorities considered were not evaluated adequately for the purposes of Article 3.4. According to Poland virtually all factors that were considered by the Thai investigating authorities unequivocally pointed to no material injury, and that SYS had unrealistic market expectations given its recent market entry. Thailand responded that factors other than those focused on by Poland showed injury, that Poland merely disputed the weight given to those factors by the Thai investigating authorities and that Thailand's evaluation was unbiased and objective. Panel noted that the factual evidence before the Thai investigating authorities indicated that from 1995 to the POI, SYS' capacity remained constant while numerous factors indicative of the state of the industry moved positively,

including production, capacity utilisation, sales (both domestic and export sales), market share, inventories and employment. Panel noted that while such positive trends in a number of factors during the POI would not necessarily preclude the investigating authorities from making an affirmative determination of injury, but, such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. According to the Panel such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the POI. Thai investigating authorities invoked three factors that they perceived as relevant "counterpoint" to certain positive injury trends and to which they attributed considerable weight in reaching their determination of injury: (i) inability to attain "timely cost recovery"; (ii) "economy of scale"; and (iii) the "preservation and expansion of SYS' "market share". Panel noted that the statements made with regard to the factors were conclusory. With respect to SYS's stated inability to attain "timely cost recovery", Panel noted that in the view of the Thai authorities this finding was inter-linked with and predicated upon their findings concerning the price effects of imports. Panel further noted that the disclosed facts did not provide positive evidence in support of those latter findings, and that the authorities could not have reached their conclusions through an objective examination of those facts. Therefore the Panel concluded that to the extent that the Thai authorities' finding concerning cost recovery depended on their findings concerning price effects, it also was not properly supported on the basis of positive evidence by the disclosed facts. Regarding the second factor "economy of scale" Panel noted that according to the final determination, "it is possible that economy of scale is yet to be reached"[150], the Thai investigating authorities appeared uncertain as to whether or not "economy of scale" had indeed been achieved. According to the Panel, in the light of positive trends in so many factors, an explanation of injury was not adequate when there was no definitive position taken by the authorities as to one of the few factors deemed by the investigating authorities to be relevant in establishing injury. The third "counterpoint" relied upon by the Thai investigating authorities to support the affirmative injury determination was the perceived "imperative that that the domestic industry's market share be preserved and expanded to attain the sale level in keeping with its production at a level that it can continue to be in business."[151] Panel pointed out that Article 3.4 lists "market share" as a relevant factor having a bearing on the state of the industry that must be evaluated by the investigating authorities. Where the domestic industry consists of one producer, the market share of imports relative to the domestic industry will necessarily be inversely

[149] Exhibit Thailand-46, para 2.5
[150] Thailand-46.

proportional to the market share of that one producer. Therefore according to the Panel that an evaluation of the market share of a domestic producer, in and of itself, does not indicate a biased or unobjective evaluation, particularly if this is but one of the factors duly evaluated and weighed among the totality of factors by the investigating authorities under Article 3.4. Panel also noted that the factual evidence before the Thai investigating authorities showed that SYS's market share increased from approximately 50% in 1995 to 56% in the POI. According to the Panel the documents forming the basis for its review did not provide a sufficiently compelling explanation of why, in the face of positive trends in so many injury factors, it was imperative that the domestic industry's market share be preserved and expanded. Panel finally concluded that there was absence of even a minimally satisfactory explanation of how the factors relied upon by the Thai authorities supported their affirmative injury determination.

(d). Whether causal link was properly established: Poland challenged Thailand's determination of causation under Article 3.5 of the AD Agreement. Poland's challenge was based on two main grounds:

1. Poland alleged that the evidence relied upon by Thailand failed to establish any causal connection between Polish imports and any alleged injury to the Thai domestic industry.
2. Poland asserted that Thailand failed to consider other factors besides Polish imports that might have contributed to the condition of the Thai industry therefore the determination was not based on "positive evidence" or an "objective examination" of the causal relationship between dumped imports and injury.

Thailand contended that Poland failed to establish a *prima facie* case of violation of Article 3.5. Thailand further contended that the record of the investigation proved that it complied with Article 3.5 by demonstrating the causal link between dumped Polish imports and injury. Thailand argued that Poland disagreed with the weight attributed to various factors by the Thai authorities. According to Thailand, its investigating authorities complied with Article 3.5 of the AD Agreement by examining known factors other than dumped imports that may have caused injury to the domestic industry and found, in each case, that they were not causing injury to the domestic industry.

On the first issue Panel noted that in the final determination, the Thai investigating authorities found that dumped imports increased and that there was sustained underselling and that these factors

[151] Exhibit Thailand-46

"demonstrate the influence of Polish imports upon the Thai domestic market"[152] and resulted in price undercutting and price suppression and that this finding pertaining to the influence of Polish imports on the Thai market was fundamental to the determination by the Thai investigating authorities of the causal relationship between the dumped imports and the state of its domestic industry. Panel held that in the absence of supported findings on price effects in the case, there was no basis for this finding by the Thai investigating authorities with respect to the causal relationship.

On the second issue Poland argued that Thailand failed to consider whether any injury to the Thai industry was caused by factors other than Polish imports. Poland alleged that there was no examination in the final determination of the influence of non-Polish imports, the level of demand of the local construction industry, the highly aggressive nature of SYS' entry into the H-beam market, domestic industry productivity and cost structure, technology developments, market realities in SYS export markets, or the Kobe earthquake, and no explanation of why these factors were outweighed by any other factors elsewhere in the record. Poland asserted that the final injury determination was thus inadequate on its face. Poland also alleged both that factors other than Polish imports were not examined and that the evaluation of these factors was not adequate, particularly in light of certain confidential evidence concerning prices in export markets. According to Poland in order for an evaluation to be objective and based upon positive evidence, an investigating authority has the affirmative responsibility to seek all available information concerning the potential effects of "known" factors other than dumped imports that might be causing injury. Poland contended that the obligation extends beyond those factors raised by the responding party in an investigation. Thailand contended that it complied with Article 3.5of the AD Agreement by examining known factors other than dumped imports that may have caused injury to the domestic industry and found in each case that they were not causing injury to the domestic industry. The text of Article 3.5 refers to "known" factors other than the dumped imports which at the same time are injuring the domestic industry but does not make clear how factors are "known" or are to become "known" to the investigating authorities. Panel further held that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on* their own initiative the effects of all possible factors other than imports that may be causing injury to the domestic industry under investigation. According to the Panel the language of the text of Article 3.5 ("factors which *may* be relevant... include...") is in stark contrast to the specific and mandatory language of Article 3.4. The text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative. Thus, while the listed factors in Article 3.5 might be relevant in many cases, and the list contains useful guidance as to the kinds of

[152] Referred in the Report of the Panel para 7.264

factors other than imports that might cause injury to the domestic industry, the specific list in Article 3.5 is not itself mandatory. Article 3.5 therefore mandates the investigating authorities to examine other known factors and gives an illustrative list of such factors. In addition, it mandates the authority not to attribute to dumped imports injury caused by such other factors. Poland had not indicated on what basis these factors were "known" to the Thai investigating authorities, and had not directed where in the record of the Thai AD investigation it raised these factors and made them "known" to the Thai investigating authorities yet, in light of the disclosed factual basis and the analysis contained in the relevant documents, Panel held that Thailand had not "failed to examine" certain possible causes of injury other than Polish imports identified by Poland, including: world-wide demand for H-beams. The Thai authorities examined these factors and concluded that they were not causing injury to the domestic market. Therefore there was no support for Poland's argument that the Thai authorities attributed to Polish imports any injury allegedly caused by such other possible factors. Poland argued that, even if the Thai authorities were only obligated to consider those factors that were clearly brought to their attention by interested parties, the Thai authorities failed to consider certain such factors. Poland specifically identified the Kobe earthquake and the resulting effect on world prices in the course of the investigation. According to Poland "Thailand's "secret data" indicated that its authorities were clearly aware of the impact of changes in the global steel market on its domestic industry". Thailand contended that the Thai authorities were aware at the time of the investigation of global market conditions and their effect on prices. Thailand argued that to the extent the Kobe earthquake contributed to the conditions in the global market for H-beams was addressed by the authorities during the investigation. Thailand argued that the final determination discussed the examination by the Thai investigating authorities of global demand (on which the Kobe earthquake would have an effect). Panel noted that the final determination contained a statement with respect to other possible causes of material injury: " Siam Yamato Steel has entered the market when the global and domestic demand were high. Later, the global demand had contracted but domestic demand still expanded. Together with the fact that during the POI, over 40 per cent of sales were from export, therefore, the global demand for H-beams cannot be a cause of injury to the company during the POI."[153] According to the Panel although it would certainly have preferred a more robust examination of global demand including an explicit evaluation of the Kobe earthquake and its effect on world prices and demand as a possible other causal factor of injury, it did not consider that Article 3.5 requires that the documents forming the basis for review expressly use the precise terminology with which a given factor was raised during the investigation, nor an express indication that the investigating authorities have examined all underlying or contributory causal elements which may comprise or influence a given

[153] Exhibit Thailand-46, para. 2-4.

causal factor (in this case, global demand). Therefore Panel held that this statement in the final determination relating to global demand made the consideration of global demand (on which the Kobe earthquake would have an effect) by the Thai authorities of this factor under Article 3.5 apparent in the text of the final determination. Panel therefore, held that the Thai investigating authorities did not act inconsistently with Article 3.5 in their treatment of factors other than dumped imports as possible causes of injury under Article 3.5.

Panel however, concluded that since the finding by the Thai authorities of the causal relationship between dumped imports and any possible injury was based upon (i) their findings concerning the price effects of dumped imports were inconsistent with Article 3.2, second sentence and Article 3.1; and (ii) their findings concerning injury, which were inconsistent with Articles 3.4 and 3.1, therefore, the determination of the causal relationship between dumped imports and injury was inconsistent with Thailand's obligations under Article 3.5 and 3.1.

Thailand appealed against the decision of the panel.[154] Following issues were involved in the appeal:

whether the Panel erred in finding that:

- That Panel could base its review only on the non-confidential data
- That the list of Article. 3.4 is mandatory
- The question of burden of proof.

(a). Whether Panel review could be based only on non-confidential data: On this issue Panel had held that in reviewing the final determination of injury, the panel should base its review on the reasoning and analysis reflected in the final determination and in communications and disclosures to which the Polish firms had access in the course of the investigation or at the time of the final determination. With respect to facts that it should take into account, the Panel said that it could take into account to the extent that it can be discerned from the foregoing documents whether and how it was relied upon by the Thai investigating authorities in reaching their determination all of the factual evidence submitted to the Thai investigating authorities in the course of the Thai AD investigation to the extent that it forms part of the Panel record included information that was treated as confidential by the Thai investigating authorities pursuant to Article 6.5 of the AD Agreement. However the panel

[154] WT/DS122/AB/R Report of the Appellate Body adopted on 12 March 2001

declined to base the review on confidential reasoning or analysis that might have formed part of the record of the Thai AD investigation, but to which the Polish firms (and/or their legal counsel) did not have access at the time of the final determination. Reversing the Panel decision the Appellate Body held that an anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the Anti-Dumping Agreement, involves the collection and assessment of both confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the Anti-Dumping Agreement must be based on the totality of that evidence and there is nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information. According to the Appellate Body this view is supported by the language used in 3.7 that a threat of material injury must be "based on facts and not merely on allegation, conjecture or remote possibility" which shows that it is the nature of the evidence that is being addressed in Article 3.7. A similar requirement for an investigating authority is used in Article 5.2, which requires that an application for initiation of an anti-dumping investigation may not be based on "[s]imple assertion, unsubstantiated by relevant evidence". Article 5.3 requires an investigating authority to "examine the accuracy and adequacy" of the evidence provided in such an application. Appellate Body further pointed out that the wording of Article 17.5 does not specifically exclude from panel examination facts made available to domestic authorities, but not disclosed or discernible to interested parties by the time of the final determination. According to the Appellate Body a panel must examine the facts before it, whether in confidential documents or non-confidential documents. Appellate Body further pointed out that there is a connection between Articles 17.6(i) and 17.5(ii) as the facts of the matter referred to in Article 17.6(i) are "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" under Article 17.5(ii) and such facts do not exclude confidential facts made available to the authorities of the importing Member. Appellate Body noted that Article 6.5 explicitly recognises the submission of confidential information to investigating authorities and its treatment and protection by those authorities. Article 12, in paragraphs 2.1, 2.2 and 2.3, also recognises the use, treatment and protection of confidential information by investigating authorities. The "facts" referred to in Articles 17.5(ii) and 17.6(i) therefore embrace "all facts confidential and non-confidential", made available to the authorities of the importing Member in conformity with the domestic procedures of that Member.

(b). Whether the list of Article 3.4 is mandatory: Thailand appealed to reverse the Panel ruling that it is mandatory that all of the listed factors in Article 3.4 be considered by an investigating authority. According to Thailand, its interpretation of Article 3.4 was a "permissible" interpretation.

However the Appellate Body agreed with the Panel's analysis and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.

(c). Burden of Proof: Thailand claimed that the Panel failed to articulate clearly the roles of the Parties (and itself) under the burden of proof. According to Thailand, the Panel failed to make, either expressly or implicitly, the required findings regarding whether Poland had presented a prima facie, case and whether Thailand had effectively refuted such case. Thailand also argued that, because the claims of Poland were not sufficiently clear, the Panel through its questioning of the parties improperly assumed the burden of making Poland's case, thus improperly substituting itself as prosecutor. With respect to the standard of review, Thailand claimed that the Panel misinterpreted its role under the specific standard of review established by Article 17.6(i) of the Anti-Dumping Agreement. Thailand argued that the Panel significantly broadened its examination to include an assessment of all of the facts leading to Thailand's determinations of dumping, injury, and causal link. According to Thailand it is not the task of the Panel itself to examine whether the facts were properly established, and the Panel's belief regarding the basis of a determination is not relevant. Appellate Body held that a panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a prima facie case. Therefore according to the Appellate Body, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof. Appellate Body further held that Article 17.6(i) does not prevent a panel from examining whether a Member has complied with its obligations under Article 3.1. in evaluating whether a Member has complied with this obligation, a panel must examine whether the injury determination was based on positive evidence, and whether the injury determination involved an objective evaluation. According to the Appellate Body to the extent that the Panel examined the facts in assessing whether Thailand's injury determination was consistent with Article 3.1, the Panel correctly conducted its examination consistently with the applicable standard of review under Article 17.6(i) of the Anti-Dumping Agreement.

COMMENT ON THE CASE

The case is important for may reasons. First of all on the interpretation of Article 3.4 Panel and Appellate body established that the replacement of the term "such as" which was used in the Tokyo Round Code by the word "including" in the present Agreement, makes the list of factors under Article 3.4 mandatory. Panel correctly interpreted the new provision which is aimed at making the provisions regarding the establishment of injury to the domestic industry more transparent and stringent.

However, Panel's ruling on Article 3.5 left some ambiguity. While Panel rightly decided that the list of factors under Article 3.5 is not mandatory yet the finding that the it is not the duty of investigating authority to examine factors which might be causing injury but which are not known to the investigating authority left the rule on causal link vague, especially in the light of Panel decision in the *Norway-Salmon case*[155]. The ambiguity was however, removed in the case of *United States- AD duties on imports of Hot-Rolled Steel from Japan*[156]. In that case the Appellate body overruling the Norway-Salmon decision held that it has to be examined whether other causes of injury are not attributed to dumped imports. However the two decisions combined(the decision in the present case and in the US-Imports of Steel from Japan) establish that while it is the duty of the investigating authority to see that injury due to other factors are not attributed to dumped imports yet it is not the duty f the investigating authority to search for the factors. This it s submitted leaves the provision without teeth. If Article 3.5 imposes a positive obligation on the investigating authority then it becomes the duty of the investigating authority to examine what other possible factors might be causing injury.

Another important ruling was regarding like product. Panel held that in examination of likeness of product narrower category of product would yield more accurate result. Some writers have argued that the panel decision in the decision in the case of *Korea- Taxes on Alcoholic Beverages*[157] and *Japan-Taxes on Alcoholic Beverages*[158] should be adopted in case of antidumping cases also In these cases Panel and Appellate body held that what counts in defining "like" or "directly competitive or substitutable products" is competition in the market place which is determined from the consumer's perspective. It has been contended, "This approach is attractive in that it ensures that the determination of the class of products subject to the GATT rule is made with an eye to the purpose of that rule, which is ultimately about ensuring fair competitive conditions between imported and domestic products."[159] According to this view antidumping is designed to correct injurious situation in the market. Therefore, the "market-based" approach taken in the *Liquor Taxes* cases help to ensure that antidumping measures are tailored to that objective.

The case is important on the issue of burden of proof also. The complaining party has the obligation establish prima facie case in support of its case. The extent of obligation was clarified by the Appellate

[155] ADP/87 , Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994
[156] WT/DS184/R Report of the Panel adopted on 28 February 2001

[157] WT/DS75/R adopted on 17 September 1998, and WT/DS75/AB/R, Appellate Body Report Adopted on 18 January 1999.
[158] WT/DS8/R Report of the Panel adopted on, 11July 1996, WT/DS8/AB/R.Report of the Appellate Body adopted on 4October 1996
[159] Marco Bronckers and Natalie Mcnelis, *Rethinking the "Like Product" Definition in WTO Antidumping Law*, Journal of World Trade 33(3):73-91, 1999 at 76.

Body ruling that a Panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a prima facie case. Therefore according to the Appellate Body, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof.[160]

Another important decision of the Appellate body was that in evaluating whether investigating authority has fulfilled its obligation under the AD Agreement Panel can take into account the confidential information also.

EUROPEAN COMMUNITIES- ANTI-DUMPING DUTIES ON IMPORTS OF COTTON-TYPE BED LINEN FROM INDIA[161]

The case concerned the imposition of definitive anti-dumping duties by the European Communities on cotton-type bed linen from India. On 30 July 1996, the Committee of the Cotton and Allied Textile Industries of the European Communities ("Eurocoton") – the EC federation of national producers' associations of cotton textile products – filed an application with the European Communities for the imposition of anti-dumping duties on cotton-type bed linen from India. On 13 September 1996, the European Communities published notice of the initiation of an anti-dumping investigation regarding imports of cotton-type bed linen originating in India. In view of the large number of Indian producers and exporters, the European Communities conducted its analysis of dumping based on a sample of Indian exporters. The European Communities also established a reserve sample, to be used in the event companies included in the main sample subsequently refused to co-operate. The European Communities established normal value based on constructed value for all investigated Indian producers. One company, Bombay Dyeing, was found to have representative domestic sales of cotton-type bed linen taken as a whole. Five types comparable to those exported to the European Communities were sold in representative quantities on the domestic market. Those five types were found not to be sold in the ordinary course of trade. Therefore, constructed values were calculated for all the types sold by Bombay Dyeing. For the other investigated Indian producers, the information for SG&A and profit used in the constructed normal value was that of Bombay Dyeing. Export price was established by reference to the prices actually paid or payable in the EC market. The weighted average

[160] G.Horlick and P. Clarke, *Standards for Panels Reviewing Anti-Dumping Determination under the GATT and the WTO*, in E.-U. Petersmann, *International Trade Law and the GATT/WTO Dispute Settlement System*, at 16 (1997)
[161] WT/DS141/R Report of the panel adopted on 30 October 2000.

constructed normal value by type was compared with weighted average export price by type for the investigated Indian producers, and a dumping margin was calculated for each such producer. The complaint listed companies that produced bed linen in the European Communities. The European Communities excluded certain complainant companies. The 35 remaining companies were found to represent a major proportion of total Community production of bed linen in the investigation period and were, therefore, deemed to make up the Community industry. Due to the number of companies in the Community industry, the European Communities established a sample. This sample comprised 17 of the 35 companies in the Community industry, representing 20.7% of total Community production and 61.6% of the production of the Community industry. The European Communities found that the Community industry suffered declining and inadequate profitability and price depression and, accordingly, reached the conclusion that the Community industry had suffered material injury. The European Communities found a direct causal link between the increased volume and the price effects of the dumped imports and the material injury suffered by the Community industry, demonstrated, according to the European Communities, by the existence of heavy undercutting resulting in a significant increase in the market share of the dumped imports and corresponding negative consequences on volumes and prices of sales of Community producers. Notice of the final affirmative determination was published on 28 November 1997. Injury margins were determined to be above the level of dumping margins in all cases, and therefore definitive anti-dumping duties in the amount of the dumping margins determined, ranging from 2.6% to 24.7%, depending on the exporter in question, were imposed on imports of cotton-type bed linen originating in India. Certain handloom products were exempted from the application of the definitive duties, provided a certificate of handloom origin in the required form was provided. Provisional duties were not definitively collected.

Following issues were involved in this case:

- Whether the application had the requisite support of the domestic industry.
- Whether EC authorities examined the accuracy and adequacy of the information submitted.
- Whether the results of a proper calculation under Art. 2.2.2(ii) are subject to a separate test of "reasonability " under Art. 2.2 before they may be used in constructing normal value or other producers.
- Whether there is any hierarchy between Article 2.2.2(i)-(iii).
- Whether Art. 2.2.2(ii) permits calculation on the basis of a single amount from one producer as the data to be used pursuant to that article.
- Whether EC's practice of zeroing was inconsistent with Article 2.4.2.

- Whether Art. 2.2.2 (ii) requires use of production and sales amounts "incurred and realised" on transactions in the ordinary course of trade or production and sales amounts "incurred and realised" on all transactions.
- Whether EC acted inconsistently with Art. 3.1 and 3.4 and3.5 of the AD Agreement by presuming that all imports of during the investigation period and prior to that were dumped.
- Whether EC failed to consider all injury factors mentioned in Art. 3.4 of the AD Agreement for the purpose of its determination of the impact of the dumped imports on the domestic industry concerned.
- Whether EC acted inconsistently with Art. 3.4 by considering information relating to different groupings of EC producers of bed linen in evaluating certain of the factors under Art. 3.4.
- Whether EC fulfilled its obligations under Article 15.

1.INITIATION OF INVESTIGATION

(a). Whether application had requisite support of domestic industry: India challenged the European Communities' standing determination that the application was supported by producers accounting for at least 25 per cent of total EC production of the like product on the ground that

(i) in assessing the level of support for the application filed by Eurocoton, the European Communities wrongly considered the support expressed by producers' associations on behalf of their members. In India's view, while it is possible for an association of producers to file a complaint, it is not permissible, under Article 5.4 of the AD Agreement, for the support of a producers' association to be substituted for support expressed by its members, the producers of the like product. Thus, in India's view, only the expressions of support by individual producers, and not those of producers' associations, may be considered in determining whether there was sufficient support for an application under Article 5.4 of the AD Agreement.

(ii) India claimed that the European Communities failed to examine the level of support prior to initiating the investigation. In this regard, India argued that the information in the non-confidential file, and the information submitted by the European Communities, concerning the expressions of support by individual producers of the like product, suggested that those expressions of support were not received prior to initiation. India relied on conflicts in the dates of the letters of support themselves, and the headers and footers imposed by sending and receiving fax machines, which were not evident on the copies of these documents in the non-confidential file. India acknowledged that, if the letters of support from individual producers were accepted as fact the necessary level of support would have existed, but maintained that the European Communities could not have made the standing

examination before initiation, an error which can not be corrected after the fact. India also argued that the European Communities could not have determined standing prior to initiation based on the different numbers of producers which (a) were listed in the application as supporting the complaint (46), (b) actively expressed support for the application either directly or through producers association and were considered in the standing determination (38), and (c) were considered as the domestic industry (35). India claimed that the decisions defining the 38 producers group took place only after initiation, but that the European Communities relied on the production of the 38 producers in justifying its standing determination after the fact. In support of this contention, India contended that the volume of production referenced in a note to the file dated 12 September 1996 referred to the production of the 38 producers, and thus could only have been produced after the initiation, and back-dated.

The European Communities maintained that it properly made the standing determination required by Article 5.4 of the Anti-dumping Agreement. The European Communities disagreed with India's view that the support of domestic producers for an application must be expressed by each producer itself directly to the investigating authorities, and, in particular, that support expressed by an association of producers does not count. The European Communities argued that India's position imposes unnecessary and unworkable limitations that are not intended by the text of the AD Agreement. According to the EC the provision explicitly envisages that the *application* may be made *on behalf of* the domestic industry. Therefore, the European Communities argued that the phrase "expressed *by* domestic producers", considered in its context, and in the light of the object and purpose of the Agreement, may include expressions of support by a trade association. The European Communities asserted that even without considering the support expressed by trade associations on behalf of their member-producers, the information on the record demonstrated that the 25 per cent threshold set in Article 5.4 of the AD Agreement was satisfied. According to the European Communities the record was clear that the individual expressions of support were received prior to initiation, and that the apparent confusion of dates in the letters themselves and the fax headers and footers was a result of photocopying. In addition, the European Communities argued that the investigating authority had estimated total EC production of bed linen, on the basis of statistical information available to it from Eurocoton and Eurostat, as between 123,917 and 130,128 tonnes. Production of the 38 producers whom the European Communities considered as having expressed support for the application was 45,952 tonnes, or 34 per cent of that total. The European Communities pointed out that the burden of proof in this regard was on India, and argued that there was no basis for finding that the European Communities erred in concluding that the information before the

investigating authority at initiation indicated that producers accounting for a sufficient percentage of production of the like product supported the application to justify the determination of standing made by the EC authorities. The European Communities offered to submit to the Panel, for its inspection, in India's presence, the originals of the disputed faxes.

The United States as third party although agreed with India that Article 5.4 places certain affirmative obligations upon the authorities to evaluate the evidence concerning standing prior to initiating an anti-dumping investigation and establishes numeric standards which the authorities must find to have been met prior to initiation, it did not think that Article 5.4 does not address from whom the authorities may receive this evidence. According to the US the evidence which may be considered by the authorities in making any determinations and the parties entitled to provide such evidence are discussed in Article 6 of the Agreement. The United States pointed out that Article 6.11(iii) of the AD Agreement makes clear that trade and business associations qualify as interested parties, provided that a majority of their members produce the like product in the territory of the importing Member. The AD Agreement provides that these associations shall have the full opportunity to defend their interests. The United States noted that the AD Agreement does, provide a limited counter-balance to trade and business associations representing their members. Article 6.6 requires the authorities to satisfy themselves as to the accuracy of the information provided by interested parties upon which their findings are based. Nevertheless, if the authorities had, in fact, confirmed the accuracy of the representations, contrary to the position of India, the AD Agreement, according to the United States, does not prohibit reliance on the representations of the associations to determine the necessary level of support. The United States contended that the European Communities' interpretation of the Agreement was permissible under Article 17.6(ii) of the AD Agreement.

According to the Panel as with Article 5.3, Article 5.4 of the AD Agreement requires that the investigating authorities make certain determinations before an investigation may be initiated, and establishes the substance of the determinations to be made, including that the application is supported by producers accounting for at least 25 per cent of domestic production, but does not set out any specific requirements as to the process by which that determination must be made. Panel pointed out that whether the necessary examination of the degree of support for the application was carried out prior to the initiation can only be assessed by reference to the determination that was actually made, and the evidence before the authority at the time it made the determination. In this case, the EC investigating authority concluded that the application was supported by producers accounting for more than 25 per cent of total EC production of bed linen. Panel noted that the documents submitted by the

parties were photocopies, and in some cases photocopies of photocopies, of faxes of (1) letters of support sent by individual producers of bed linen to the investigating authority indicating support for the application, (2) letters of support sent by national associations of producers of bed linen to the investigating authority expressing support on behalf of individual producers listed in annexes, and (3) letters of support from national associations of producers of bed linen sent to the investigating authority expressing support on behalf of their members. All of the letters themselves were dated prior to the initiation of the investigation by the European Communities. Panel noted that based on the letters themselves, individual producers of bed linen individually communicating support for the application directly to the investigating authorities accounted for 26.7 per cent of total EC production of bed linen which was more than the minimum necessary under Article 5.4 of the AD Agreement to find sufficient support for the application. Panel declined to grant India's request to conclude that the letters were not, in fact, received by the EC investigating authority prior to initiation, that the EC investigating authority did not, in fact, examine them prior to initiation, and that the European Communities has tried to cover this fundamental error by manufacturing evidence *post hoc* and misrepresenting the facts before the Panel. While recognising that the dates in the fax headers and footers in the photocopied documents submitted were inconsistent with one another and with the dates of the letters themselves, Panel noted that they were all prior to the relevant date, that of initiation.

(b). Examination of adequacy and accuracy of evidence: The next issue in this case was what were the parameters of the requirement to "examine" the accuracy and adequacy of the evidence, and on what basis can it be assessed whether the necessary examination was carried out.

India claimed that the European Communities failed to examine the accuracy and adequacy of the evidence in the complaint before initiating the anti-dumping investigation, as required by Article 5.3. India did not claim that there was lack of sufficient evidence in the application. India's claim was based on the first bedlinen investigation which was terminated because of the lack of evidence of injury. According to India since the case largely involved the same countries, period and product therefore the fact of withdrawal of the first bedlinen complaint should have been taken into account by the investigating authorities in examining the accuracy and adequacy of the evidence. India argued that, while an investigating authority is not required to conduct any particular sort of investigation prior to determining whether there is sufficient evidence, since there is an obligation to "examine" the evidence in the application, that evidence could in itself never be the only element to justify the initiation of an investigation. The European Communities argued that Article 5.3 must be considered in light of Article 5.2 of the AD Agreement. The European Communities contended that, taken

together, these provisions suggest that evidence will be adequate if it covers the topics listed in Article 5.2, and will be accurate if it is sufficiently credible. Furthermore, in regard to injury, the European Communities observed that Panel in *Mexico-HFCS*[162] concluded there is no need for the investigating authority "to have or consider information on all the Article 3.4 factors. United States as third party stated that the premise of each aspect of Articles 5.2 and 5.3 is that the information covered is "evidence". According to the United States the earlier investigation can not be considered "evidence" within the meaning of Articles 5.2 and 5.3 because of three reasons. First, the earlier investigation was terminated based upon the withdrawal of the application without any final determination by the investigating authorities. Second, that earlier investigation, although it may have involved the same products, involved a different mix of countries. Finally, each bed linen investigation constituted a separate proceeding for which a separate record was established by the European Communities. The European Communities was obligated, consistent with the Agreement, to base its determination on its assessment of the facts of the matter which were before it. To the extent that it did so, and its decision was based on an unbiased and objective evaluation of the facts before it, consistent with the standard contained in Article 17.6(i), that decision should not be overturned.

The Panel pointed out that there was evidence submitted to the EC authorities in the application, and that the application was sufficient under Article 5.2 of the AD Agreement. It was also clear, from the language of the EC notice of initiation, that the European Communities determined that there was sufficient evidence to justify the initiation.[163] The European Communities had asserted that it did, take into account the circumstances of the previous bed linen investigation, but that nothing in those circumstances precluded the conclusion that there was sufficient evidence to justify initiation. India claimed that the European Communities failed to examine the accuracy and adequacy of the evidence before initiating the investigation. Panel held that it was difficult to see a basis on which a violation of Article 5.3 could be found based purely on the claim that the investigating authorities failed to examine the accuracy and adequacy of the evidence in the application unless it concluded that the text of Article 5.3 establishes a specific process requirement, that is, a requirement as to how the examination of the evidence must be conducted. It was also difficult to see a basis on which a violation of Article 5.3 could be found on the basis of India's claim unless it was concluded that Article 5.3 establishes how the fact of and sufficiency of that examination must be made known, beyond the notice required by Article 12.1, which was not an issue in the case. Panel noted that no such requirements could be found in the text of Article 5.3. Panel pointed out that Article 5.3 requires

[162] WT/DS132/R Report of the panel adopted on28 January 2000.
[163] India had not challenged it.

an investigating authority to examine the evidence, and that the examination has a purpose – to determine whether there is sufficient evidence to justify initiation of the investigation but Article 5.3 says nothing regarding the nature of the examination to be carried out. Nor does it say anything requiring an explanation of how that examination was carried out. The Panel concluded that the only basis, on which a panel can determine whether a Member's investigating authority has examined the accuracy and adequacy of the information in the application is by reference to the determination that examination is in aid of - the determination whether there is sufficient evidence to justify initiation. That is, if the investigating authority properly determined that there was sufficient evidence to justify initiation, that determination can only be made based on an examination of the accuracy and adequacy of the information in the application, and consideration of additional evidence (if any) before it. Panel noted that India had made no claim that the European Communities violated Article 5.3 of the AD Agreement by initiating this investigation without sufficient evidence to justify doing so. Panel held that it was difficult to imagine how a defending Member might demonstrate that it has "examined" evidence in the face of India's allegations in this dispute, except by reference to the determination that there was sufficient evidence to justify initiation, which was not at issue. Panel held that the mere fact that the EC investigating authorities initiated the investigation indicated that they examined the evidence in the application to determine that it was sufficient to justify initiation. Therefore the Panel concluded that the European Communities did not violate Article 5.3 of the AD Agreement by failing to examine the accuracy and adequacy of the information in the application

2. DETERMIANTION OF DUMPING

(a) Whether separate reasonability test is required to test the results of examination under Article 2.2.2 (ii): India claimed that EC acted inconsistently with Article 2.2 by applying the SG&A (Selling, General and Administrative costs) and profit which were incorrectly determined under Art.2.2.2(ii) even though they were clearly not "reasonable". India noted that Art.2.2.2 lays down how the amounts for administrative, selling and general costs and profits are to be determined but does not explain how the reasonable amounts for SG&A and or profits are to be determined. India argued that the word reasonable in Art. 2.2 has a separate function, and the reasonableness test of Art. 2.2 is an independent, overarching requirement in addition to the requirements of Art. 2.2.2 rather than a rule concretised by Art. 2.2.2. According to India, reasonable must be interpreted as a substantive requirement. Whatever method under Art. 2.2.2 is used Art. 2.2 requires that the result must be "reasonable". India contended that Art. 2.2.2(iii) contains an implicit definition of the notion of "reasonable", which can be used to test the results reached under the methods set out in the chapeau and paras (i) and (ii) of Art. 2.2.2. India pointed out that some producers had sales of other products

under the same general category(textiles). According to India in comparison with all other profit rates that were relevant in the context of the bedlinen proceedings, the figure of 18,65% which was applied by the EC was a complete anomaly and did not reflect the profits actually realised by the bedlinen producers inside and outside India. The figure was 3 times higher than the average profit rates determined for the other two countries involved in the investigation as well as that of the EC's own bed linen industry. India claimed that if the word reasonable is defined by reference to the criteria set out in the Art. 2.2.2(iii) the profit rate established for other Indian producers was unreasonable.

EC contended that the methods of calculating SG&A and profits that are set out in Art.2.2.2 (i)-(iii) provide for the determination of a reasonable amount for administrative, selling and general costs and for profits. According to EC those options represent particular and detailed formulations of what constitutes "reasonable" amounts. According to the EC the limitation set out in the third option-provided that "the amount for profit so established shall not exceed--" applies only to the third option, and not to other two. According to the EC if the drafter had wished to apply the proviso to all the options they would have attached it to the chapeau of Art. 2.2.2. Rejecting India's argument that option (iii) defines what is reasonable EC contended that options (i) and (ii) are formulae that produce reasonable solutions. EC further pointed out that the application of these formulae would always produce reasonable solutions. EC further pointed out that it was the intention of the drafters that the application of these formulae would always produce figures SG&A and for profits that meet the standard of reasonability specified in the last sentence of the chapeau of Art. 2.2. According to EC, the words "any other reasonable method in option (iii) clearly refer to methods other than those described in the preceding options (i)and (ii), which are in themselves reasonable and do not need to be qualified as such. EC argued that the wording of these options implies that the results obtained through the options (i) and (ii) are presumed to satisfy the standard of reasonability. EC contended that India had presented no relevant evidence to rebut the presumption that the results obtained through the application of option (ii) were reasonable. EC suggested that the 3 options in Art. 2.2.2 are intended to produce approximations of the amounts that would emerge from applying the formulae in the chapeau, the SG&A and profits of a producer selling the like product in its own market. This is intended to allow investigating authorities to construct a normal value that is as close as possible to the normal value that would have been established on the basis of domestic prices, had there been comparable sales in the ordinary course of trade. EC pointed out that Bombay Dyeing had representative sales in the Indian Market. According to EC it can be an uncommon situation that an Indian producer can have 80% of the domestic market for the bedlinen and make a profit of over 18% while numerous other producers ignore this market and devote themselves to others but that does not

make the results arising form the use of data from this company *ipso facto* unreasonable. EC argued that it would have been unreasonable to ignore this company and choose another source, which would be less typical of sellers in that market.

The United States argued that Articles 2.2 and 2.2.2 of the Agreement set forth the requirement for calculating profit when normal value is based on constructed value instead of prices. According to US Art. 2.2 provides for the addition to costs of production of a reasonable amount of profit. Art. 2.2.2 sets forth several explicit options for how a reasonable profit may be determined. US contended that there is no limitation in the Agreement on the amount for constructed value profit. According to US with one exception- sub-para (iii)- the methodologies in Art. 2.2.2 limit how the authorities may determine the profit amount, not the amount of the profit itself. The "profit cap" in sub-para (iii) is necessary to impose some limitations on other reasonable methodologies for determining profit not specifically articulated in the Agreement. US pointed out that sub-part (iii) does not expressly or implicitly impose a similar limitation upon the preferred profit methodology in the chapeau or the alternatives in sub-parts(i) or(ii).

Panel pointed out that the text indicates that the methodologies set out in Art. 2.2.2 are outlined "for the purpose of" calculating a reasonable profit amount pursuant to Art. 2.2. There is no specific language establishing a separate reasonability rest, or indicating how such a test should be conducted. Therefore Panel concluded that there is no textual basis for such a requirement. According to Panel the ordinary meaning of the text indicates that if one of the methods of Art. 2.2.2 is properly applied the results are by definition "reasonable" as required by Art. 2.2. Panel noted that Art. 2.2.2(iii) provides for the use of "any other reasonable method", without specifying such method, subject to a cap, defined as "the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". According to the Panel the inclusion of a cap where the methodology is not defined indicates that where the methodology is defined in sub-paras (i) and (ii), the application of those methodologies yields reasonable results, otherwise, the Panel noted, the drafters, would have included some explicit constraints on the results as they did for sub-paras(iii). Panel held that the limitation set out in para (iii) is triggered only when a Member does not apply one of the methods set out in the chapeau or in paras (i) and (ii) of Art. 2.2.2. According to the Panel since no specific method is outlined in para (iii) that the limitation on the profit rate exists in that provision. Rejecting India's argument that even where the chapeau methodology is applied, which requires the use of actual data concerning the product under investigation, the results are subject to a separate reasonability test, Panel held that an important object and purpose of Art.

2.2.2 is to base the calculation of the profit amount on actual data. According to Panel while the method set out in paras (i) and (ii) are derivatives of the chapeau methodology, where actual data are used as required and the calculation is correct, the results obtained themselves reflect objective reality. "Thus, the use of actual data itself ensures that subjective judgements about the reasonability of the results do not affect the calculation of constructed or normal value."[164] Panel further held that the standard of reasonability proposed by India-the Art. 2.2.2(iii) profit cap- was arbitrary in the context of the reality of the results obtained under paras(i)and (ii). Panel noted that there was no objective basis for concluding that the benchmarks suggested by India were more reasonable than the amount determined on the basis of actual data. According to Panel, merely because the other profit rates were lower does not make them more "reasonable" than the rate actually calculated and applied by EC.

(b) Whether there is any hierarchy between Art. 2.2.2 (i)-(iii): India argued that EC applied 2.2.2(ii) which was not available to EC, instead of 2.2.2(i), which was available. According to India the action violated the spirit and structure of Articles 2.2.2 and 2.2. India argued that AD Agreement reveals a gradually declining scale in the order of options as far as the relation with the producer is concerned. The first option set out in the chapeau of Art.2.2.2 is the actual dumping situation and the fourth option (Art. 2.2.2(iii)) is the most alternative method. According to India recourse to the options provided for in Art.2.2.2 (ii) &(iii) would normally deprive an exporter not only of the possibility of verifying the calculation of his own dumping margin, but also of the possibility of preventing dumping, because he would never know whether he is dumping in the first place. According to India that is why those provisions are ranked such that their use is less available than Art. 2.2.2 and 2.2.2(i). India argued that on the basis of the wording of Art.2.2.2, as well as the concept of dumping, Art.2.2.2 establishes a preference for the use of producer-specific data.

EC contended that ordinary meaning of the text of Art. 2.2.2 does not indicate any priority between the three options. EC claimed that as per correct interpretation of Art.2.2.2, Members have complete discretion to choose between the options. EC further contended that although a particular producer and exporter is an important element in the calculation of normal value so is the particular product. Commenting on India's argument regarding certain disadvantages for the exporter / producer by using options (ii) or (iii), EC claimed that protecting the interests of the exporter/ producer is arguably one of the purposes implicit in the AD Agreement but other are equally plausible. Explaining its contention EC said that compared to option (ii), the use of option (i) would involve much greater investigative efforts with consequent inconvenience and delays for all concerned. In contrast the data relevant to

[164] Report of the Panel para 6.99.

option (iii) would already be in the hands of the investigating authorities. The EC claimed that it would be more in accordance with the object and purpose of the AD Agreement to conclude that the text leaves Members free to decide whether to give priority to option (i) or option(ii).

Panel held that there is nothing in the text of Art.2.2.2 that would indicate that there is a hierarchy among the methodological options listed in subparas (i)-(iii). According to the Panel although the options are listed in a sequence, it is an inherent characteristic of any list, and does not in itself entail any reference of any option over others. Panel noted that if the drafters wished to indicate a hierarchy among the three options they would have done so in a manner that made that hierarchy explicit. Panel held that paras(i)-(iii) provide three alternative methods for calculating the profit amount which are intended to constitute close approximations of the general rule set out in chapeau 2.2.2. According to Panel there is no basis on which to judge which of the three options is better. Panel noted that each of the three options is in some sense "imperfect" in comparison with the chapeau methodology, there is no meaningful way to judge which option is less imperfect-or of greater authority- than another and thus, no obvious basis for a hierarchy.

(c). whether Art. 2.2.2(ii) permits calculation on the basis of a single amount from one producer as the data to be used pursuant to that article: India argued that all definitions of the word "average" entail that the group set of which the average is to be calculated should consist of more than one unit. According to India the fact Article 2.2.2(ii) uses the words "weighted average", i.e., an average that attributes statistical weight to each of the parameters being summarised into a single value, only stresses the fact that more than one factor needs to be taken into account. India argued that "amounts" in Art. 2.2.2(ii) refers to "the amounts for administrative, selling and general costs for profits". It is therefore the amounts for "administrative, selling and general costs and for profits" from "other producers or exporters" for which a "weighted average" needs to be established. But EC applied just one amount from one producer as the data to be used pursuant to Art.2.2.2(ii).

EC contended that provisions containing the word "average" (or the words "weighted average") does not become inapplicable if the circumstances are such that the class of data that is to be "averaged" contains only one item. Giving the example of Art. 2.4.2 EC argued that it uses the notion of a "weighted average normal value with a weighted average of price of all comparable export transactions." According to EC comparison could be made if either side of the comparison contained only one sale. EC argued that this interpretation of Art. 2.2.2 entails focusing on the use of the word "amounts" rather than amount. According to EC since the first sentence of the chapeau of Art. 2.2.2

refers to an individual "exporter or producer", it would be surprising if there were more than one amount for "administrative, selling and general costs" and one amount for "profits". EC contended that the word "amounts" most plausibly reflects the fact that there would be two amounts (one for each type) for each exporter or producer. EC further contended that a plural phrase is often used with the intention of including the case where there is only one such person or thing.

Panel agreed with the interpretation given by EC. Panel noted that Art. 2.2.2(i) maintains the focus on the producer being investigated, but allows consideration of data concerning a broader range of products, while Art. 2.2.2(ii) maintains the focus on the like product, but allows consideration of other producers or exporters. The third option, Article 2.2.2 (iii) allows any other reasonable method, subject to a cap on the results. As to India's argument regarding the phrase "weighted average", Panel held that the phrase "weighted average" and other producers and exporters do not constitute two separate requirements. According to the Panel the concept of weighted average is relevant only when there is information from more than one other producer or exporter available to be considered. Panel noted that the obligation to consider a weighted average of the information of other producers or exporters eliminates the possibility of a result oriented or otherwise available data. When the data available is only from one source such a possibility does not arise. Panel pointed out that the "interpretation argued by India would limit the analytical options available to investigating authorities for determination of the profit rate and SG&A in the constructed normal value in a manner we cannot see as mandated by the text."[165]

(d). Zeroing: The practice of zeroing arises in situations where an investigating authority makes multiple comparisons of export price and normal value, and then aggregates the results of these individual comparisons to calculate a dumping margin for the product as a whole. EC compared weighted averages of export prices and normal value for each of several models or product types of bed linen. The comparisons for the different models in some cases showed the export price to be lower than the normal value, and in some cases showed the export price to be higher than the normal value. EC then calculated a weighted average dumping margin for cotton type bed linen, on the basis of results obtained in the comparisons by model. In the course of this part of the calculation the EC summed up the total value of the dumping- the total "dumping amount"- on the investigated imports. The EC calculated the dumping amounts by multiplying the value of imports of each model by the margin of price difference for each model. The EC counted as zero the dumping amount for those models where the margin was negative. The EC then divided the total dumping amount by the value of

the exports involved, including the value of those models for which the individual margin was negative, and the dumping amount was thus counted as zero. India challenged under Art. 2.4.2 the assignment of a value of zero to the comparisons where there was negative margin.

India argued that the EC acted inconsistently with Article 2.4.2 of the AD Agreement by zeroing "negative dumping" amounts for certain types of bed linen in calculating the overall weighted average dumping margin for the like product bed linen. India contended that EC effectively averaged only within a model and not between models, and thus, did not compare a weighted average normal value to a weighted average of prices of all comparable export transactions, as required by Art. 2.4.2 of the AD Agreement. India claimed that Art. 2.4.2 provides for three possibilities to establish a dumping margin:

1. A comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions;
2. A comparison of normal value and export prices on transaction-to-transaction basis;or
3. A comparison of the normal value established on a weighted average basis to prices of individual export transactions (in certain specific cases).

India claimed that EC opted to apply the first option in establishing the dumping margin in this case, but did not properly make this comparison by engaging in the practice of zeroing. India contended the language of Art. 2.4.2 precludes excluding certain amounts from the calculation simply because they showed "negative" dumping. According to India the word "average" relates to the total of given amounts and not to a number of given amounts from which a selection can be made as to which ones are to be averaged. India argued that the use of the word "all" in Art. 2.4.2 underlines this idea. India further contended that the practice of attributing a zero value to "negative dumping" for the eventual calculation of overall dumping margin is contrary to the concept of weighting and distorts the process of actually weighting dumping margins. According to India the method used by the EC will always lead to a higher dumping margin compared to the method envisaged by the Agreement. India noted that in the situation where all models are dumped, the results would be the same but pointed out that this situation did not occur in the bed linen case. India pointed out that in this case since all models in the bed linen proceeding were not dumped the zeroing of "negative dumping" margins calculated for certain product types resulted in the overstatement of the dumping margins for four companies, and for one company a finding of dumping where dumping did not exist.

---

[165] Report of the Panel para 6.71.

EC contended that the practice of "zeroing"" as applied in this case recognises that the process of calculating dumping margins is directed at dumping and therefore the EC's methodology focuses on those product types where dumping has been found. EC pointed out that the types of products that are found to have margins less than zero are kept in calculation (at notional zero margins), on a weighted average basis, of the overall dumping margin for the like product, and thereby reduce the overall weighted average dumping margin determined for that product. EC pointed to the need to consider all "comparable" export transactions based on the principle of comparing averages for those products that are comparable. EC noted that Art. 2.4.2 refers to "the existence of margins of dumping" making clear that the process of comparing weighted averages will normally conclude with more than one dumping margin. EC contended that the process of determining a single dumping margin, on which the collection of the duty is based, from these margins does not, fall within the express terms of Art. 2.4.2 but is left to the discretion of Members. EC disagreed with India's contention that its methodology will always lead to a higher margin.

Panel noted that Art. 2.4.2 requires that normally the existence of margins of dumping is to be established on the basis of a comparison of weighted average normal value with a weighted average of prices of all comparable export transactions" or on the basis of individual transactions. Panel disagreed with EC's view that this provision does not address the question of what to do with multiple margins determined on the basis of comparisons for different model within the like product. EC had argued that his "subsequent stage" of the calculation does not fall within the scope of Article 2.4.2, the methodology to be applied in arriving at the dumping margin for the like product as a whole in a case where multiple comparisons are made is within the discretion of the Member conducting the investigation. Disagreeing with this view Panel held that the language of Article 2.4.2 specifically establishes the permissible bases for establishing the "existence of margins of dumping". Panel pointed out that in light of Art. 2.1 of the AD Agreement the margins of dumping established under Art. 2.4.2, based on the comparison methodologies set forth, must relate to the ultimate question being addressed :whether the product at issue is being dumped. According to the Panel a determination that there is dumping can only be established for the product at issue, and not for individual transactions concerning that product, or discrete models of that product. Panel further pointed out that Art. 2.4.2 specifies that the weighted average normal value shall be compared with a "weighted average of all comparable export transactions". Panel noted that the EC's calculation of the final weighted dumping margin for the product did not rest on a comparison with the prices of all comparable export transactions. By counting as zero the results of comparisons showing a "negative" margin, the EC in effect, changed the prices of the export transactions in those comparisons. Panel held that it was

impermissible to "zero" such "negative" margins in establishing the existence of dumping for the product under investigation since it has the effect of changing the results of an otherwise proper comparison. Panel noted that this effect arises because the zeroing effectively counts the weighted average export price to be equal to the weighted average normal value for those models for which negative margins were found in the comparison, despite the fact that it was, in reality higher than the weighted average normal value. According to the Panel this is equivalent of manipulating the individual export prices counted in calculating the weighted average, in order to arrive at a weighted average, normal value. Therefore the Panel concluded that an overall dumping margin calculated on the basis of zeroing "negative" margins determined for some models was not based on comparisons which fully reflected all comparable export prices, and was therefore calculated inconsistently with the requirements of Art. 2.4.2. Panel, however, noted that Art. 2.4.2 does not so expressly prohibits "zeroing" but it does not mean that the practice is permitted if it produces results inconsistent with the obligations set forth in that Article. Panel further noted that read in light of the obligation in the Art. 2.4 to make a fair comparison, the specific requirements to make comparisons at the same level of trade and at as nearly as possible at the same time, and the obligation to make due allowance for differences affecting price comparability, the use of the word "comparable" in Art. 2.4.2 indicates that investigating authorities may ensure comparability either by making necessary adjustments under Art. 2.4 or by making comparisons for models which are, themselves comparable. But in arriving at a conclusion whether the product as a whole is being dumped, Art.2.4.2 obligates an investigating authority to make its determination in a way which fully accounts for the export prices on all comparable transactions and EC's methodology which focused on those models which were, in its view, dumped, and took less than full account of those models where the comparison resulted in a negative margin, did not accomplish the goal. Referring to the EC's argument that Art. 2.4.2 refers to the establishment of "the existence of margins of dumping" in the plural panel noted that a dumping margin is established for the product under investigation, and not for individual models being compared as the basis of the establishment of dumping margin.

(e) Whether SG&A amount only in the ordinary course of trade was to be included: According to India Art. 2.2.2(ii) expressly indicates that the entire purpose of the provision is to provide for a different and alternative basis contained in the chapeau of Art. 2.2.2 upon which to establish SG&A and profits. India pointed out that the second sentence of the chapeau of Art. 2.2.2(ii) expressly states that one is only entitled to resort to methodology under Art. 2.2.2(ii) when the basis under the chapeau of Art.2.2.2 "cannot" be used. India asserted that it is clearly an "either-or" situation. India pointed out that the definition of amounts for SG&A and profits in the first sentence

of the chapeau includes the words "ordinary course of trade". According to India, since those words appear after the words "based on", that requirement was clearly intended to form part of the basis or foundation for the specific method provided under the chapeau, but only for that method. The words "such amounts" in the second sentence of the chapeau cannot be taken to refer back to SG&A and profits "in the ordinary course of trade", but instead SG&A and profits as a whole.

EC contended that the real issue was whether the authorities are entitled to limit the data they would consider for the purposes of constructing the normal value. According to the EC the excluded classes of data were in the case of SG&A, data from sales that were unrepresentative and/ or unprofitable. These classes correspond to the concepts mentioned in the opening clauses of Art. 2.2, which makes it clear that one object and purpose of this part of the AD Agreement is to avoid reliance on sales that fall into either of these categories. EC contended that the basic principle of the "ordinary course of trade" is expressed in Art.2.2 . According to EC it is two part principle: data associated with sales that are unprofitable, or are unrepresentative are not reliable. According to EC for reasons of consistency the principle applies to all provisions falling within Art. 2.2 including 2.2.2(ii).

Panel held that there is no reference in Art.2.2.2 (ii) to sales in the ordinary course of trade therefore exclusion of sales not in the ordinary course of trade is not mandated by Art.2.2.2. But the Panel did not agree with EC's contention that it was required to exclude those sales in its determination of the profit rate, merely that it was permitted to do so, based on the general principle allowing the exclusion of sales not in the ordinary course of trade from the calculation of normal value. According to Panel this principle applies to all provisions falling within Art.2.2 including Art.2.2.2(ii). Panel held that a Member is not obligated to exclude sales not in the ordinary course of trade for purposes of determining the profit rate under the subparagraphs of Art.2.2.2 merely because such exclusion is not prohibited by the text. " In our view, to read 2.2.2 as prohibiting the exclusion of sales not in the ordinary course of trade might, in some cases, yield results under the alternatives set out in paragrpaphs (i) and (ii) that would be contradictory to a basic principle contained in the chapeau methodology."[166]. Panel noted that Art.2 establishes as a general principle that members may base their calculations of normal value only on sales made in the ordinary course of trade. According to Panel absent a specific prohibition, it is permissible to interpret the sub-para of Art.2.2.2 to allow application of this general principle in the specific case of a profit rate determination under Art 2.2.2(ii). Panel pointed out that if India's argument was accepted, a prohibition on the exclusion of sales not in the ordinary course of trade might result in a constructed value being based on data

[166] Report of the Panel para 6.85.

concerning the very sales that could not be considered in determining normal value. Application of the methods in paras (i)-(iii) might yield results inconsistent with the basic principles of Art.2.2. Panel pointed out that the ordinary course of trade limitation forecloses the possibility of calculating profits on the basis of sales at prices below cost. The profit amount on sales at prices below cost would be negative. According to the Panel to require the calculation of constructed normal value including such sales would not be in keeping with the overall object and purpose of the provision, that is to establish methodologies for the determination of a reasonable amount for profit to be used in the calculation of a constructed normal value. If sales that are considered not in the ordinary course of trade because they are below cost were used for the calculation of the profit rate, the constructed value could be equal to cost and thus would not include a reasonable amount for profit. This would render the calculation of a constructed value meaningless, and not consistent with Art. 2.2. Panel further pointed out that one reason an investigating authority would construct a normal value is because the actual sales of the investigated exporter or producer are deemed inappropriate to serve as the basis of normal value because they are made below cost. Therefore the Panel concluded that an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible and the European Communities did not err in its application of paragraph (ii) by using data only on transactions in the ordinary course of trade.

3. DETERMINATION OF INJURY

On the issue of injury India claimed that EC presumed that:

1. For the purposes of the injury determination that all imports of the product concerned during the investigation period were dumped.
2. That imports during the entire period of the injury investigation (1 jan1992-30june1996) as well as imports prior to that period were dumped.

With regard to the first assumption India claimed that much of the bedlinen exported from India during the investigation period was not or should have been found not to be dumped. With regard to the second assumption, India claimed that there was no investigation covering those periods on the basis of which a finding of dumping could have been made, and thus imports before the period of the dumping investigation clearly cannot be assumed to be dumped. According to India inclusion of non-dumped imports in the analysis of injury and causation was inconsistent with Articles 3.1, 3.2, 3.4, 3.5 and 3.6.

India pointed out that the EC cumulated the volume of all imports from the three countries under investigation-Egypt, India and Pakistan-and not just the volume of imports that was the subject of dumped transactions. India claimed that if the EC had not zeroed, the imports from one company would have been for 28.5% of the volume of Indian bed linen exports by sampled companies. According to India it was clear that the total amount of non-dumped imports accounted for more than one-third of India's exports. India argued that if it was assumed that the percentages of non-dumped imports from Egypt and Pakistan were of similar order of magnitude it indicated that the total market share of dumped imports was overstated by more than a fifth. With respect to the imports during years prior to the dumping investigation period, India argued t hat as no finding of dumping was ever made for any imports during that period, it was incorrect for the EC to consider imports of bed linen from India in the years preceding the dumping investigation period as dumped. India argued that EC failed with reference to Art. 3.5 to determine to what extent injuries caused by other factors were responsible for the injury allegedly suffered by the domestic industry. Therefore the establishment of the facts considered under Art. 3.5 was not proper and/or the evaluation of those facts was not unbiased and objective. According to India the term "dumped imports" in Art. 3.5 has the same meaning as in Art. 3.4, therefore the EC acted inconsistently with Art. 3.5 by automatically considering all imports of bedlinen from India between 1992 and 30 June 1995 as dumped.

EC argued that the term "dumped imports" as used in Art. 3 of the AD Agreement includes all the imports of the product in question from the country that is found to be dumping, as opposed to only those transactions that are dumped. According to the EC, the interpretation of the term "dumped imports" proposed by India raised doubts because of its uncertainty. EC argued that if each transaction was to be allocated to a dumped or a non-dumped classification, there is no provision to cope with the situation where an exporter conceals the volume of dumping by varying the prices from one consignment to another, possibly in collusion with the importer. There could be further need for sub-categorisation by exporter in that case. EC cited Art.2.1,3.1 and 5.7 of the Antidumping Agreement as contextual support for its view that dumping and injury causation issues are to be analysed on a product and country rather than transaction basis. According to EC, it is not possible to isolate the effects of individual transactions in a single product market, and the market situation is determined by the overall impact of imports. According to the EC since injury has to be investigated before it is established which transactions are dumped, that the term "dumped products" used in connection with the injury provisions of Art. 3 must refer to all imports of the product under investigation. According to EC the AD Agreement intends national authorities to gather information covering a lengthy period, since the investigation period used to assess dumping would not be enough to assess trends in the

volume of imports. EC pointed out that Art. 3.2 is for the benefit of exporters because it sets conditions that must be satisfied before causation is established. EC argued that on India's interpretation, in order to apply this provision the exporters would have to provide not just one, but several years price data in order to establish whether dumping was occurring throughout the longer period for which import volumes are considered. According to EC this interpretation instead of benefiting exporters would in many cases make the provision unworkable. Rejecting India's argument that EC assumed imports prior to the dumping investigation period to be dumped and found injury caused by those imports, EC contended that there was nothing in either the EC Regulation, or any other statement by EC authorities that supported the view that it reached such a conclusion. EC argued that imports in years preceding the dumping investigation period were examined in order to put the situation during that period into context. EC argued that the phrase "injury investigation period" was used by it to the longer period over which t he condition of the industry is evaluated, but the condition it did not imply dumping during that period. Regarding Indian contention that EC "at several instances puts great emphasis on companies allegedly disappeared from the EC market in the period 1992-POI" the EC drew attention to the statement in the Regulations that the principal basis for the finding of material injury was the reduced profitability and price suppression of the community industry as observed among the sampled companies. EC contended that the information on the contraction in the number of producers showed that what might otherwise have seemed a contradiction was in fact a realistic scenario. The EC authorities found injury principally because of the domestic industry's reduce profitability and price suppressions, and the data of the disappeared companies was relevant to explaining the improved position of the industry with regard to sales and market shares.

The Panel pointed out that while Art.3.1 requires consideration of the volume, price and consequent impact of dumped imports on the domestic industry and sets out the general requirements for a determination of injury succeeding sections of Art. 3 provide more specific guidance for such determinations. Art. 3.4 and 3.5 similarly require consideration of dumped imports. Panel held that dumping is a determination made with reference to a product from a particular producer /exporter, and not with reference to individual transactions. The determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, the conclusion applies to all imports of that product from such sources at least over the period for which dumping was considered. Therefore according to the Panel the investigating authority is entitled to consider all such imports in its analysis of "dumped imports" under Art. 3.1 and 3.4 and3.5 of the AD Agreement. Panel noted that Art 9.2 lends support to its

conclusion and further pointed out that an "assessment of the volume, price effects, and consequent impact only of imports attributable to transactions for which a positive margin was calculated would be in many cases impossible or at least impracticable.

(b). Did the EC consider the factors under Article 3.4: India claimed that EC failed to consider all injury factors mentioned in Art. 3.4 of the AD Agreement for the purpose of its determination of the impact of the dumped imports on the domestic industry concerned. India claimed that EC did not consider the productivity; return on investments; utilisation of capacity; magnitude of margin of dumping; cash flow; inventories; wages; growth; and ability to raise capital or investments. According to India the word "shall" connotes that evaluation mentioned in Art. 3.4 shall by necessity include all relevant-----factors". The word "all" indicates that all relevant factors must be included in this "evaluation". India argued that the word "all" is given further meaning by the word "including" which means that at a minimum, the factors and indices listed after the word "including" must be evaluated.

EC contended that it had evaluated the factors listed in Art. 3.4. EC argued that the factors listed in Art. 3.4 are negative in character and, as such, were properly evaluated during the investigation. EC pointed out that the one feature that stands out in a close examination of the terms of Art. 3.4 is that the listed factors are explicitly concerned with indications of injury, not the absence of injury. Of fifteen factors only two are not qualified by the words "decline" or "negative effects". EC argued that the opening clause of Art. 3.4-which speaks of the "impact of dumped imports"-reinforces this interpretation of the listed factors. According to the EC the purpose of the examination under Art. 3.4 is to determine what is wrong with the domestic industry, not what is right with it. According to EC, the wording of Art. 3.4 refers almost exclusively to negative factors and "comprehensive evaluation" requirement if it existed applies only to such factors. EC claimed that profits and prices were the two principal negative factors identified by the EC authorities in the bed linen proceeding and they were thoroughly examined and evaluated. EC pointed various reasons for concluding that Art. 3.4 does not require that every one of the listed factors need be evaluated in every investigation. EC pointed to the use of the words "relevant" and "have a bearing on the state of the industry" in Art. 3.4 as well as the last sentence of the provision, which states: "This list is not exhaustive, nor can one or several of these factors give decisive guidance." EC also underlined the use of the word "including" and emphasised on what it called the "nature" of the list, explaining that it is "broken into parts by semicolons, and the word 'or' is used to indicate that not all of the factors need be "considered". According to the EC not only do the factors differ in importance from case to case, it is possible to deduce that certain of them

are inherently likely to be more significant than others and that findings on some may make findings on others superfluous. The EC argued that the obligation in Art. 3.4 to consider injury factors does not exist in isolation and in particular account must be taken of Articles 6.13 and 6.14, which deal with the difficulties experienced by interested parties-particularly small companies-in supplying information requested and the need for a Member to proceed expeditiously in its investigation, respectively. EC noted that the aspects of the evaluation required by Art. 3.4 may have to be limited in order to observe the spirit of Art. 6.13. According to the EC the decision on the limits to be set on the obligation in Art. 3.4 is a matter of judgement that must be exercised by the investigating authorities.

Japan as third party argued that the language of Art. 3.4 requires all listed factors to be considered, and the list of factors is the minimum that must be evaluated by the investigating authorities. The degree of importance of each factor may vary from case to case, but all of the listed factors must be fully considered and evaluated in each case. According to Japan its interpretation finds support in the change in the language of the provision over time. The change from the phrase "such as" in the comparable provision of the Tokyo Round AD Code to the word "including" in the AD Agreement underscores the interpretative significance of the word "including". According to Japan, because "including" means "part of a whole", the factors after the word "including" must be viewed as a subset of a potentially larger group of factors that must be evaluated by the authorities. US as third party argued that while in light of Art . 12.2, investigating authorities are not required in each case to make a specific finding on each enumerated factor in Art. 3.2 and 3.4, it should be discernible from the authorities' determination that they evaluated each of the enumerated factors. This objective may be achieved when a determination, through its demonstration why the authorities relied on the specific factors they found to be material in the case thereby discloses why other factors on which they do not make specific findings were accorded little weight. According to US the "relevance of Art. 3.4 factors extends beyond supporting an injury determination. Art. 3.4 states that "all relevant economic factors and indices having a bearing on the state of the industry" must be evaluated. Therefore, even if a factor does not lend support to an affirmative injury determination the authority must evaluate it so long as it sheds light on the condition of the domestic industry.

Panel held that the use of the phrase "shall include" in Art.3.4 suggests that the evaluation of the listed factors in that provision is properly interpreted as mandatory in all cases. According to the Panel the ordinary meaning of the provision is that the examination of the impact of dumped imports must include an evaluation of all the listed factors in Art. 3.4. Panel held that the terms "relevant" and the phrase "having a bearing on the state of the industry" precede the introduction of the list of factors.

According to Panel the text of Art. 3.4 indicates that the listed factors are *a priori* "relevant factors "having a bearing on the state of the state of the industry", and therefore must be evaluated in all cases. With regard to the use of the word "including" Panel held that it only emphasises that there may be other relevant economic factors and indices having a bearing on the state of the industry" among "all" such factors that must be evaluated. Panel accepted the Japanese argument in this regard that change in the wording that was introduced in the Uruguay Round supports an interpretation of the current text of Art. 3.4 as setting forth a list that is mandatory, and not merely indicative or illustrative. With regard to the use of the semicolons in the list of factors in Art. 3.4 Panel held that neither the presence of semicolons separating certain groups of factors in the text of Article 3.4 nor the presence of the word "or" within the first and fourth of these groups, serves to render the mandatory list in Art. 3.4 a list of only four "factors". Panel pointed that the two "ors" appear within-rather than between-the groups of factors separated by semicolons and consequently concluded that the use of the term 'or" does not detract from the mandatory nature of the textual requirement that "all relevant economic factors" shall be evaluated. With respect to the second "or" Panel noted that it appears in the phrase "ability to raise capital or investments", which clearly indicates that the factor that an investigating authority must examine is the "ability to raise capital" or the "ability to raise investments" or both. With regard to EC's argument that not all factors listed in Article 3.4 "being solely negative in character" need to be evaluated Panel held that each of the factors to be evaluated may be found to indicate material injury, or not, "to the industry. Therefore the Panel concluded that each of the 15 factors listed in Art. 3.4 of the Agreement must be evaluated by the investigating authorities in each case in examining the impact of the dumped imports on the domestic industry concerned. In this regard Panel cited Mexico Panel's decision

Panel found that EC provisional Regulation addressed production; sales by volume; sales by value; market share; price development; profitability, and employment. The other factors listed in Art. 3.4-productivity; return on investments, utilisation of capacity; the magnitude of margin of dumping; cash flow; inventories; wages; growth; ability to raise capital or investments-were not even referred to in that section. Panel found that data was not even collected for all the factors listed in Art. 3.4. Panel held that while not all factors will be, or will be equally, "relevant", in the sense of bearing on the state of the industry, in all cases, nonetheless, in a particular case, a particular factor either is or is not relevant to the determination of whether there is injury, depending on the particular facts and circumstances of the industry in question. It is because, the process of determining the relevance of a factor may be little different from that of evaluating it that the authorities' assessment of the lack of relevance of a factor, that is, the conclusion that it has no (or little) bearing on the determination of

injury, should that be the case, must be as apparent from the determination as the authorities' evaluation of a factor that does bear on the determination of injury. Otherwise, it becomes impossible to determine which of the many factors that have a bearing on the state of the industry actually were considered to weigh in the determination of injury and were evaluated by the investigating authority. Panel noted that, where factors set forth in Article 3.4 were not even referred to in the determination being reviewed, if there was nothing in the determination to indicate that the authorities considered them not to be relevant, the requirements of Article 3.4 were not satisfied.

(c). Whether EC properly identified the domestic industry for injury-evaluation: India's claimed that the EC acted inconsistently with Art. 3.4 by considering information relating to different groupings of EC producers of bed linen in evaluating certain of the factors under Art. 3.4. India pointed out that EC after defining the "community industry" as a group of 35 producers selected a sample of 17 of those 35 for purposes of the injury investigation but did not consistently base the injury analysis of the sample group.

EC argued that Art. 4.1 provides Members with two options for defining the domestic industry, either the "domestic producers as a whole" of the like product, or "those of them whose collective output of the products constitutes a major proportion of the total domestic production of those like products". It was pointed out that in EC practice, a "major proportion" is defined by reference to the standing requirements of Art. 5.4 of the Agreement, that is, producers accounting for at least 25% of the domestic production. EC stated that in the bed linen investigation, it applied the second option, defining as the "community industry" a group of 35 producers of bed linen supporting the application whose collective output constituted more than 25% of EC production of the like product. EC said that because of the number of the companies in the community industry it decided to resort to sampling. An initial list of 19 companies was decided upon for inclusion in the sample, which was subsequently reduced to 17 companies. The EC collected and analysed data for the examination of injury to the community industry at three levels, i.e., for the sampled companies, for the community industry, and for all EC producers of bed linen. EC noted that the conclusions drawn from evidence must ultimately concern the domestic industry as defined in the investigation, but argued that there is no intrinsic limit to the types of evidence that may be used to arrive at such conclusions. According to EC it cannot be excluded *ab initio* that the condition of EC producers of bed linen as a whole may provide evidence of the condition of those producers who comprise the domestic industry. EC emphasised that the principal basis for the finding of the material injury was the reduced profitability and price suppression of the community industry as observed among the sampled companies.

US pointed out that the EC in applied its Regulation on the definition of the domestic industry, in this case in a manner which violated Art. 4 of the AD Agreement and therefore the entire injury analysis was based on a flawed premise. According to US, the EC's position that Art. 4.1 allows two equally valid options for defining the domestic industry-either producers as a whole, or producers of a major proportion of domestic production was wrong. According to US the second option is not a separate basis for defining industry, but is a provision which allows determination to be made in situations where information for the industry as a whole is not available, so long as that information relates to producers of a major proportion of domestic production. US argued that t he EC's industry definition limited the domestic industry to those producers that came forward to affirmatively pursue the investigation, and thus was fundamentally skewed. According to US a proper definition of domestic industry and Art. 4.1 would have required EC to define the domestic industry as all EC producers of the like product and obtain information from that universe of producers, or at least from a sample drawn from that universe of producers. Therefore, with respect to India's claim that the EC acted impermissibly by considering some information concerning all EC producers, the US in contrast contended that the EC acted inconsistently with the AD Agreement by not including all EC producers of bed linen inn the domestic industry for the purpose of evaluating factors such as price and impact under Art. 3.1, 3.2, 3.4 and 3.5. US argued that the EC's definition of domestic industry conflated the 'domestic industry" definition of Art. 4.1 with the standing determination under Art. 5.4 and therefore misconstrued the relationship between the two provisions. According to US if Art. 4.1 were intended to define the domestic industry as those producers who expressly supported the petition, an injury investigation would be mostly a *pro forma* exercise in which the authorities would simply check whether petitioning firms really were materially injured. Art. 5.4 does not provide a basis for the creation of such a self-selecting industry and does not purport to define the term "a major proportion" as used in Art. 4.1. US further contended that Art. 3.1 reflects that Art. 4.1establishes a preference for basing an injury determination on examination of the domestic producers as a whole. Art. 3.4 and 3.5 specifically direct that an injury analysis shall concern "the domestic industry". US argued that these provisions do not contemplate that an authority will at its discretion use one industry definition in a determination examining injury and another definition in that determination for other purposes. Panel did not give any ruling on this contention as the claim was not raised by India.

Panel noted that EC defined the domestic industry by starting with the list of companies which supported the application. After eliminating seven found not to be complainants and excluding several others for various reasons, the EC arrived at a group of 35 companies whose production of bed linen

the EC considered to constitute a "major proportion" of total EC production of the like product. The EC defined this group as the "community industry". The EC decided to establish a sample of this community industry, and in consultation with the complainant an initial list of 19 producers was arrived at which was subsequently reduced to 17 producers. These 17 companies represented 20.7 % of total EC production of bedlinen, and 61.6% of the production of the Community industry. The EC investigating authorities considered this sample to be representative of the domestic industry. The EC collected information concerning injury with respect to three groups of companies-all EC producers of bed linen for trends concerning production, consumption, imports, exports, and market share; the community industry for trends concerning production, sales by value, and employment; and the sample for trends concerning prices and profitability. In its analysis of factors regarding the state of the domestic industry, the EC authorities considered data for the three levels where available for the various factors. Panel pointed out that it was required to determine that having selected a sample, the EC was precluded as a matter of law from considering in its analysis under Art. 3.4, any information for any factor for any producers of bed linen not included in the sample. One aspect of the claim related to the those producers of bedlinen who while not included in the sample set selected by the investigating authorities, were members of the "community industry" as defined by the EC. A second aspect of the claim related to those EC producers of bedlinen who were not members of the "community industry" as defined by the EC.

Panel held that it was clear from the language of AD Agreement in particular Articles 3.1, 3.4 and 3.5 that the determination of injury has to be reached for the reached for the domestic industry that is the subject of the investigation. Article 3.4 specifically requires that "the examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the sate of the industry---." Panel pointed out that EC defined the domestic industry as 35 producers of the like product. According to the Panel it would anomalous to conclude that, because the EC chose to consider a sample of the domestic industry, it was required to close its eyes to and ignore other information available to it concerning the domestic industry it had defined. According to the Panel such a conclusion would be inconsistent with the fundamental underlying principle that antidumping investigations should be fair and that investigating authorities should base their conclusions on an objective evaluation of the evidence and it was possible to have an objective evaluation of the evidence if some of the evidence is required to be ignored, even though it relates precisely to the issues to be resolved. Therefore the Panel concluded that EC did not violate 3.1, 3.4, 3.5 of the AD Agreement by taking into account in its analysis information regarding

India claimed that the reference to remedies provided for by the AD Agreement indicates that such remedies may consist of, among others, the non-imposition of anti-dumping measures, or an undertaking. India rejected the notion that any procedural mechanisms, such as simplified questionnaires or extensions of time, can ever satisfy the requirements of the second sentence of Article 15. Egypt, Japan and United States also put forward their arguments as third party. Egypt argued that Article 15 of the AD Agreement obligated the European Communities to explore the possibilities of constructive remedies before applying anti-dumping duties, and that the European Communities failed to comply with this provision, as it did not suggest to the Egyptian exporters the possibility of, for instance, price undertakings. According to Egypt Article 15 imposes a legal obligation on developed countries any time they contemplate imposing anti-dumping duties, and it is therefore up to those developed countries then to suggest to the developing countries involved whether or not they would be interested in offering price undertakings.

In response to a question from the Panel, Japan asserted that the requirements of Article 15 do not go beyond those of Article 8.3 of the AD Agreement, that the "constructive remedies under this Agreement" referred to in Article 15 would include price undertakings, and that Article 15 imposes no specific obligations on developed country Members. The United States submitted that Article 15 of the AD Agreement, while providing for procedural safeguards, did not require any particular substantive outcome, or any specific accommodations to be made on the basis of developing country status. United States contended that the second sentence of Article 15 does not impose anything other than a procedural obligation to "explore" possibilities of constructive remedies. The word "explore" cannot fairly be read to imply an obligation to reach a particular substantive outcome; it merely requires consideration of these possibilities. With regard to the timing of such exploration under Article 15, the United States pointed out that the reference in Article 15 to "applying anti-dumping duties" relates to the actual imposition and collection of anti-dumping duties pursuant to Article 9 of the Agreement, which did not occur until the European Communities made its final determination of dumping and injury. The imposition of provisional measures, which may be provisional anti-dumping duties, is a separate and earlier step which is distinct from the application of anti-dumping duties themselves. If the "possibilities" to be explored include price undertakings, this exploration can only occur after any provisional determination by the investigating authorities, in light of the language of Article 8.2 of the AD Agreement. In response to the Panel's questions, the United States observed that, in its view, the Article 15 and Article 8.3 obligations were complementary, and that the Article 15 obligation did not extend beyond the Article 8.3 obligation. In addition, the United States suggested that a developing country might be obligated to identify those instances in which its essential interests would be

affected, so that the developed country Member considering the imposition of anti-dumping duties would know to consider possible constructive remedies before imposing duties.

India further asserted that the European Communities acted inconsistently with Article 15 of the AD Agreement by not exploring possibilities of a constructive remedy prior to the imposition of anti-dumping duties (provisional or final) and by not reacting to detailed arguments from Indian exporters pertaining to Article 15. India contended that, despite repeated and detailed arguments by the Indian parties stressing the importance of the bed linen and textile industries to India's economy, the European Communities failed to even mention India's status as a developing country, let alone consider or comment on possibilities of constructive remedies. India also pointed out that Texprocil, the Cotton Textiles Export Promotion Council of India, acting on behalf of Indian producers and exporters, had communicated to the European Communities its desire, and that of its members, to offer price undertakings. India charges that this offer was rejected by the European Communities without substantive consideration.

The European Communities agreed that the second sentence of Article 15 imposes a legal obligation on Members and also that bed-linen producers were part of the textile industry, that this is an "essential interest" of India, and that anti-dumping duties would "affect" this interest.
The European Communities asserted that its practice, when developing countries were involved in an anti-dumping investigation, was to give special consideration to the possibility of accepting undertakings from their exporters. In this case, the European Communities argued, the reason no undertaking was accepted was that none had been offered by the exporters within the time limits set by the EC Regulation. Under EC procedures, undertakings had to be offered during the 10 day period following the disclosure of the confidential final dumping margin calculations for investigated producers. In this case, such disclosure was made on 3 October 1997. The European Communities asserted that these time limits were a reflection of those imposed by Article 5.10 of the AD Agreement, and the general obligation to manage investigations expeditiously (Article 6.14 of the AD Agreement). The European Communities pointed out that the offer from Texprocil referred to by India was made on the last day, under the normal EC schedule, for acceptance of offers of undertakings, and was not in fact an offer of an undertaking by any producer, but merely an expression by the producers association Texprocil of intent to offer an undertaking. The European Communities asserts that its authorities waited nine days, but no further details concerning such offers was made, as Texprocil's letter had indicated would be the case, and thus the European Communities replied that it would no

longer be able consider any offers of undertakings, as it was necessary to proceed to conclude the investigation.

Panel noted that Article 1 of the AD Agreement, provides that: "An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement." Therefore the phrase "before applying anti-dumping duties" in Article 15 meant before the application of definitive anti-dumping measures. Considering the whole of the AD Agreement, Panel concluded that the term "provisional measures" is consistently used where the intention is to refer to measures imposed before the end of the investigative process. Anti-Dumping Agreement clearly distinguishes between provisional measures and anti-dumping duties, which term consistently refers to definitive measures. Panel noted that there is no instance in the Agreement where the term "anti-dumping duties" is used in a context in which it can reasonably be understood to refer to provisional measures. Thus, the ordinary meaning of the term "anti-dumping duties" in Article 15 refers to the imposition of definitive anti-dumping measures at the end of the investigative process. Panel further held that consideration of practical elements reinforces this conclusion. Provisional measures are based on a preliminary determination of dumping, injury, and causal link. While it was permitted, and might be in a foreign producer's or exporter's interest to offer or enter into an undertaking at this stage of the proceeding, it did not mean that Article 15 could be understood to require developed country Members to explore the possibilities of price undertakings prior to imposition of provisional measures. In addition to the fact that such exploration may result in delay or distraction from the continuation of the investigation, in some cases, a price undertaking based on the preliminary determination of dumping could be subject to revision in light of the final determination of dumping. However, unlike a provisional duty or security, which must, under Article 10.3, be refunded or released in the event the final dumping margin is lower than the preliminarily calculated margin (as is frequently the case), a "provisional" price undertaking could not be retroactively revised. Panel noted that it did not consider that an interpretation of Article 15 which could, in some cases, have negative effects on the very parties it is intended to benefit, producers and exporters in developing countries, is required.

On the nature of obligation on the developed countries the Panel pointed out that the term "explore", is defined, "investigate; examine scrutinise". Therefore while the exact parameters of the term are difficult to establish, the concept of "explore" clearly does not imply any particular outcome. Article 15 does not require that "constructive remedies" must be explored, but rather that the "possibilities" of such remedies must be explored, which further suggests that the exploration may conclude that no

possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, and in light of the object and purpose of Article 15, Panel concluded that the "exploration" of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Panel following the decision of the GATT Panel in the case of *Brazil-EC Cotton Yarn* held that Article 15 imposed no obligation to actually provide or accept any constructive remedy that may be identified and/or offered however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.

Panel pointed out that the term "constructive remedies" as used in Article 15 was limited to constructive remedies "provided for under this Agreement". India had declined to offer concrete suggestions as to other possible "constructive remedies under this Agreement" that might be available under Article 15. In India's view, the obligation was on the European Communities to find and propose such remedies to developing countries prior to imposition of anti-dumping measures. In this regard, India having asserted that the European Communities failed to engage in some action which it was obligated to undertake, Panel held it was part of India's burden to present a prima facie case of violation to indicate what actions it believes should have been undertaken. Panel did not agree with India's suggestion that a "constructive remedy" might be a decision not to impose anti-dumping duties at all. Article 15 referred to "remedies" in respect of injurious dumping. A decision not to impose an anti-dumping duty, while clearly within the authority of a Member under Article 9.1 of the AD Agreement was not a "remedy" of any type, constructive or otherwise.

Panel further held "We cannot come to any conclusions as to what might be encompassed by the phrase "constructive remedies provided for under this Agreement" - that is, means of counteracting the effects of injurious dumping - except by reference to the Agreement itself. The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute "constructive remedies" within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute "constructive remedies" under Article 15, as none have been proposed to us."[167] This opinion of the Panel leaves open the possibility of other constructive remedies.

[167] Report of the Panel, para 6.229.

On the issue of whether the EC authorities actively considered with an open mind the possibilities of price undertakings with Indian exporters prior to the imposition of final anti-dumping measures in the bed linen investigation Panel found that no formal proposal of a price undertaking was made. However, in light of the expressed desire of the Indian producers to offer undertakings, Panel held that the European Communities should have made some response upon receipt of the letter from counsel for Texprocil. The rejection expressed in the European Communities' letter did not, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand. Therefore that Panel held that the European Communities did not explore the possibilities of constructive remedies prior to imposing anti-dumping duties. "In our view, the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding – there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement. Pure passivity is not sufficient, in our view, to satisfy the obligation to "explore" possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned. Thus, we consider that the failure of the European Communities to respond in some fashion other than bare rejection, particularly once the desire to offer undertakings had been communicated to it, constituted a failure to "explore possibilities of constructive remedies", and therefore conclude that the European Communities failed to act consistently with its obligations under Article 15 of the AD Agreement."

With respect to almost all of its substantive claims of violation of the AD Agreement, India claimed that the European Communities failed adequately to explain its decisions relating to those matters in the Definitive Regulation. India asserts that the Definitive Regulation does not set forth the European Communities' reasoning as to why it applied relevant provisions of its domestic legislation and the AD Agreement in the way it did, which in India's view is inconsistent with the requirements of the AD Agreement. India also argues that the European Communities failed adequately to explain its choices of methodology, analysis, and conclusions on questions of fact, and failed adequately to explain why it rejected arguments by the Indian exporters. Panel held that in cases where EC was found deficient in the fulfilment of substantive obligations, there was no need to address the claim under Article 12.2.2 and in other cases Panel held that EC had fulfilled its obligations under this provision.

European Communities and India **appealed** against the Panel ruling[168]. Two issues were raised in the appeal:

- Whether the Panel erred in finding that the practice of "zeroing" when establishing "the existence of margins of dumping", as applied by the European Communities in the anti-dumping investigation at issue in the dispute, was inconsistent with Article 2.4.2 of the Anti-Dumping Agreement; and
- Whether the Panel erred in finding that:

(1) the method for calculating amounts for administrative, selling and general costs and profits provided for in Article 2.2.2(ii) of the Anti-Dumping Agreement may be applied where there is data on administrative, selling and general costs and profits for only one other exporter or producer; and
(2) in calculating the amount for profits under Article 2.2.2(ii) of the Anti-Dumping Agreement, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.[169]

(a). The Practice of zeroing as applied in the case: EC argued that that the Panel was mistaken about the ordinary meaning of Article 2.4.2. According to the European Communities, Article 2.4.2 requires a comparison with a "weighted average of prices of all comparable export transactions" which is not the same as requiring a comparison with a weighted average of all export transactions. Emphasising on the presence in Article 2.4.2 of the word "comparable", the European Communities contended that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. Therefore, according to the European Communities there are two stages in calculating margins of dumping in such an anti-dumping investigation, and contended that Article 2.4.2 provides no guidance as to how the "margins of dumping" for each of the types or models should be combined in the second stage in order to calculate an overall margin of dumping for the product under investigation. On this reasoning, the European Communities asserted that, as "zeroing" takes place during this second stage of the domestic anti-dumping process, "zeroing" cannot be inconsistent with Article 2.4.2. Therefore, according to the European Communities the Panel failed to give proper meaning to the word "comparable" as well as to the comparability requirement in Article 2.4.2 and erroneously applied Article 2.4.2 to the calculation of the overall margin of dumping for the product under investigation, and erred in its overall analysis of the issue on the premise that dumping margins can be established only for a product.

[168] WT/DS141/AB/R Report of the Appellate Body adopted on 1 March 2001.
[169] Report of the Appellate Body, Para 42.

Appellate Body pointed out that from the wording of Article 2.1 it is clear that AD Agreement concerns dumping of a product therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a product. The European Communities clearly identified cotton-type bed linen as the product under investigation and having defined the product as it did, the European Communities was bound to treat that product consistently thereafter in accordance with that definition. According to the Appellate Body there was nothing in Article 2.4.2 or in any other provision of the Antidumping Agreement that provides for the establishment of "the existence of margins of dumping" for types or models of the product under investigation; to the contrary, all references to the establishment of "the existence of margins of dumping" are references to the product that is subject of the investigation. Appellate Body again pointed out that there is nothing in Article 2.4.2 to support the notion that, in an antidumping investigation, two different stages are envisaged or distinguished in any way by this provision of the Anti-Dumping Agreement, nor to justify the distinctions among types or models of the same product on the basis of these "two stages". According to the Appellate Body the method used to calculate the margins of dumping,, these margins must be, and can only be, established for the product under investigation as a whole. Thus, the Appellate Body disagreed with the EC that Article 2.4.2 provides no guidance as to how to calculate an overall margin of dumping for the product under investigation.

Appellate Body further held that when "zeroing", the European Communities counted as zero the "dumping margins" for those models where the "dumping margin" was "negative". Agreeing with the Panel Appellate Body pointed out that for those models, the European Communities counted "the weighted average export price to be equal to the weighted average normal value and despite the fact that it was, in reality, higher, did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where "negative dumping margins" were found. Instead, the European Communities treated those export prices as if they were less than what they were, which inflated the result from the calculation of the margin of dumping. Therefore, the Appellate Body held that the European Communities did not establish "the existence of margins of dumping" for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions-for all transactions involving all models or types of the product under investigation. Appellate Body further noted that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transactions - such as the practice of "zeroing" - is not a "fair comparison" between export price and normal value, as required by Article

2.4 and by Article 2.4.2. Appellate Body further held that the word "comparable" in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of "a comparison of the weighted average normal value with the weighted average of prices of all comparable export transactions". Appellate Body pointed out that all types or models falling within the scope of a "like" product must necessarily be "comparable", and export transactions involving those types or models must therefore be considered "comparable export transactions" within the meaning of Article 2.4.2. Appellate Body further pointed out that this interpretation of the word "comparable" in Article 2.4.2 is reinforced by the context of this provision. Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value. According to the Appellate Body this is a general obligation that informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made "subject to the provisions governing fair comparison in [Article 2.4]". Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that "due allowance" be made for differences affecting "price comparability". Appellate Body further noted that Article 2.4 requires investigating authorities to make due allowance for "differences in and physical characteristics". According to the Appellate Body the word "comparable" in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value.

EC had argued that this interpretation would not allow Members to counter dumping "targeted" to certain types of the product under investigation. Appellate Body held that the provision of Article 2.4.2 allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. Neither Article 2.4.2, second sentence, nor any other provision of the Anti-Dumping Agreement refers to dumping "targeted" to certain "models" or "types" of the same product under investigation. According to the Appellate Body the drafters of the Anti-Dumping Agreement intended to authorise Members to respond to such kind of "targeted" dumping, they would have done so explicitly in Article 2.4.2, second sentence. Appellate Body noted that the European Communities had not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Appellate Body further pointed out that if the European Communities wanted to address, dumping of certain types or models of bed linen, it could have defined, or redefined, the product under investigation in a narrower way.

(b). Interpretation of Article 2.2.2(ii): Two issues were involved regarding interpretation of Article 2.2.2(ii).

(a) Whether the method of calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only one other exporter or producer.

(b) Whether, in calculating the amount for profits under Article 2.2.2(ii), a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

With regard to the first issue India argued that the text of Article 2.2.2(ii), and, in particular, the use of the terms "amounts" and "exporters or producers" in the plural, in combination with the reference to a "weighted average" of the "amounts", indicates that Article 2.2.2(ii) cannot be applied where there is data for only one other exporter or producer. With respect to the second issue relating to the exclusion of sales by other exporters or producers that are not made in the ordinary course of trade, India argued that the text of Article 2.2.2(ii) states that the amount for profits must be based on "amounts incurred and realised", and that nothing in these terms suggests that they relate only to profitable sales. According to India, this reading of Article 2.2.2(ii) is confirmed by the chapeau of Article 2.2.2, which, in contrast with Article 2.2.2(ii), explicitly excludes sales made outside the ordinary course of trade.

Appellate Body disagreed with Panel's reasoning.[170] According to the Appellate Body the phrase "weighted average" in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase "other exporters or producers" in the plural as including the singular case. According to the Appellate Body the use of the phrase "weighted average" in Article 2.2.2(ii) makes it impossible to read "other exporters or producers" as "one exporter or producer". According to the Appellate Body an "average" of amounts for SG&A and profits cannot be calculated on the basis of data on SG&A and profits relating to only one exporter or producer. Appellate Body further held that the textual directive to "weight" the average further supports its view because the "average" which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. Therefore according to the Appellate Body it is not possible to calculate the "weighted average" relating to only one exporter or producer. The requirement to calculate a "weighted average" in Article 2.2.2(ii) is, the key to interpreting that provision. It is indispensable to the calculation method set forth in this provision, and, thus, it is

[170] Panel held that "the phrase "other exporters or producers": as a general matter, admits of an understanding where the plural form includes the singular case - the case where there is only one other producer or exporter. & In this context, we do not consider that the reference to other producers or exporters in the plural necessarily must be understood to preclude resort to option (ii) in the case where there is only one other producer or exporter of the like product." Panel Report, para. 6.70.

indispensable to the entire provision - which deals only with the mechanics of that calculation. Appellate Body disagreed with the Panel that "the concept of weighted averaging is relevant only when there is information from more than one other producer or exporter available to be considered."[171] According to the Appellate Body there is no justification, textual or otherwise, for concluding that amounts for SG&A and profits are to be determined on the basis of the weighted average some of the time but not all of the time. "In so interpreting Article 2.2.2(ii), the Panel, in effect, reads the requirement of calculating a "weighted average" out of the text in some circumstances. In those circumstances, this would substantially empty the phrase "weighted average" of meaning."[172] According to the Appellate Body the use of the phrase "weighted average", combined with the use of the words "amounts" and "exporters or producers" in the plural in the text of Article 2.2.2(ii), anticipates the use of data from more than one exporter or producer therefore the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available.

On the second issue the Appellate Body held that in referring to "the actual amounts incurred and realised", Article 2.2.2(ii) does not make any exceptions or qualifications. According to the Appellate Body the ordinary meaning of the phrase "actual amounts incurred and realised" includes the SG&A actually incurred, and the profits or losses actually realised by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. Appellate Body held that there is no basis in Article 2.2.2(ii) for excluding some amounts that were actually incurred or realised from the "actual amounts incurred or realised" therefore in the calculation of the "weighted average", all of "the actual amounts incurred and realised" by other exporters or producers must be included, regardless of whether those amounts are incurred and realised on production and sales made in the ordinary course of trade or not. Thus, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the "weighted average" under Article 2.2.2(ii). Giving further arguments Appellate Body pointed out that the method set out in Article 2.2.2(ii) is one of three alternative methods which may be applied only in circumstances where the amounts for SG&A and profits cannot be determined by the principal method set out in the chapeau of Article 2.2.2.45 In setting out this principal method, the first sentence of the chapeau of Article 2.2.2 states: For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary

---

[171] Panel Report, para. 6.71.

[172] Report of the Appellate Body, Para 75.

course of trade of the like product by the exporter or producer under investigation. In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to "actual data pertaining to production and sales in the ordinary course of trade". Thus, the drafters of the Anti-Dumping Agreement have made clear that sales not in the ordinary course of trade are to be excluded when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2. According to the Appellate Body the exclusion in the chapeau signifies that, where there is no such explicit exclusion elsewhere in the same Article of the Anti-Dumping Agreement, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an alternative calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements which do not call for the exclusion of sales not made in the ordinary course of trade. Therefore, reading into the text of Article 2.2.2(ii) a requirement provided for in the chapeau of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii). Thus, Appellate Body reversed the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the Anti-Dumping Agreement, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

COMMENT ON THE CASE

The case is important for many reasons. Two issues raised in the case has prompted Declaration in Doha Ministerial Conference regarding the. First of all India complained that EC did not examine the adequacy and accuracy of data as it did not take into account the previous investigation which were terminated due to lack of sufficient evidence. Panel while holding that EC did not fail to examine the accuracy and adequacy of data did not give any specific ruling on this issue. In the Doha Declaration it has been stated "investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed."

Next on the issue of special and differential treatment for developing countries the Declaration states that "while Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 is a mandatory provision, the modalities for its application would benefit from clarification. Accordingly, the Committee on Anti-Dumping Practices is

instructed, through its working group on Implementation, to examine this issue and to draw up appropriate recommendations within twelve months on how to operationalise this provision."

UNITED STATES-ANTI-DUMPING MEASURES ON STAINLESS STEEL PLATE IN COILS AND STAINLESS STEEL SHEET AND STRIP FROM KOERA[173]

This case concerned the imposition of definitive anti-dumping duties by the DOC on imports of Plate and Sheet from Korea. The DOC imposed definitive duties on Plate and Sheet through separate proceedings.

The facts related to plate proceedings were that on 31 March 1998, a number of U.S. steel companies and U.S. steel workers' associations filed an anti-dumping application with the DOC alleging that imports of Plate from Korea and five other countries were being exported to the United States at less than their fair value and that such imports were materially injuring an industry in the United States. The DOC issued investigation questionnaires to two Korean companies, including Pohang Iron and Steel Company ("POSCO"). The DOC published a preliminary affirmative dumping determination, and instructed the U.S. Customs Service to require a cash deposit or the posting of a bond on imports of Plate from Korea, equal to the calculated dumping margins (2.77% for both POSCO and all the other Korean exporters). Later the DOC verified the sales data and the cost data submitted by POSCO. The DOC published a final affirmative dumping determination, and instructed the U.S. Customs Service to continue requiring a cash deposit or the posting of a bond on imports of Plate from Korea, equal to the calculated dumping margins (16.26% for both POSCO and all the other Korean exporters). On 4 May 1999, the United States International Trade Commission informed the DOC of its final affirmative injury determination concerning imports of Plate from the six investigated countries, including Korea.

Regarding sheet investigations the facts were that a number of U.S. steel companies and U.S. steel workers' associations filed an anti-dumping application with the DOC alleging that imports of Sheet from Korea and seven other countries were being exported to the United States at less than their fair value and that such imports were materially injuring an industry in the United States. The DOC published a preliminary affirmative dumping determination, and instructed the U.S. Customs Service to require a cash deposit or the posting of a bond on imports of Sheet from Korea, equal to the

calculated dumping margins (12.35% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.35% for all the other Korean exporters). On 28 December 1998, POSCO filed a brief before the DOC alleging that the Department had made "significant ministerial errors" in the calculation of POSCO's dumping margin for the purpose of the preliminary determination. After reviewing these allegations, the DOC published an amendment to its preliminary determination, which revised the cash deposit rate for POSCO to 3.92%. The DOC then verified the cost data and the sales data submitted by POSCO. The DOC published a final affirmative dumping determination, and instructed the U.S. Customs Service to continue requiring a cash deposit or the posting of a bond on imports of Sheet from Korea, equal to the calculated dumping margins (12.12% for POSCO, 0% for Inchon, 58.79% for Taihan, and 12.12% for all the other Korean exporters).

Following issues were involved in this case:

- Whether the amount for unpaid sales deducted by the US in constructing an export price was a cost incurred between importation and resale" within the meaning of Article 2.4 of the Anti-dumping Agreement.
- Whether Art. 2.4.2 prohibits the comparison of multiple averages with multiple averages.
- Whether differences the phrase under Article 2.4 referring to the "terms and conditions of sale encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to any certain sales.
- Whether DOC'S treatment of the amounts unpaid by the US company as "direct selling expenses" was an adjustment not permitted by Art. 2.4 of the AD Agreement.
- Did the DOC perform unnecessary currency conversion within the meaning of Article 2.4.

1.CAN THE COST OF UNPAID SALES BE DEEMED TO AFFECT PRICE COMPARABILITY

Korea claimed that the DOC's treatment of the amounts unpaid by a company as "direct selling expenses" was an adjustment not permitted by Article 2.4 of the AD Agreement. According to Korea Article 2.4 permits adjustments only to account for differences that affect prices. The cost of unpaid sales is not one of the five factors deemed by Article 2.4 to affect price comparability. In particular, the term "conditions and terms of sale" refers to the agreed-upon bundle of rights and obligations under a sales agreement, and failure to pay amounts due is not a "condition" or "term" of a contract but is rather a *breach* of a contract. Nor do the unpaid amounts represent an "other difference . . .

[173] WT/DS179/R Report of the Panel adopted on 22 December 2000.

demonstrated to affect price comparability" within the meaning of Article 2.4. Because POSCO did not know that a particular customer would fail to pay at the time it set its prices, the subsequent failure to pay did not affect the prices that POSCO set.

The United States contended that its treatment of the cost of unpaid sales was consistent with Article 2.4. The United States first noted that certain US sales were made through the associated importer POSAM. For these sales it constructed an export price by deducting from the price charged to the first independent buyer in the United States the expenses and profits associated with the transaction between that buyer and the associated importer, including an allocated portion of the bad debt expense. In respect of these sales, therefore, the bad debt expense was not an adjustment to export price under the "due allowance" provision of Article 2.4, but rather a deduction made to construct an export price under Article 2.3. In respect of those sales for which it did make adjustments, the United States contended that bad debt represents a "difference in conditions and terms of sale" for which due allowance shall be made pursuant to Article 2.4. According to the United States the term "differences in conditions and terms of sale" encompasses differences in costs associated with the terms of the sales contract and other expenses that are directly related to the sale, i.e., but for the sale the expense would not be incurred. The United States argued that whenever a seller sells on credit, it accepts a credit expense, including any bad debt that may result from the sale. As for the amount of the bad debt allowance, the United States contended that the only practicable method for making such allowances is based on the exporter's actual expense during the period of investigation.

Panel noted that the only rules governing the methodology for construction of an export price are given in Art. 2.4 of the AD Agreement which specifies that, "in the cases referred to in para 3, allowances for costs including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made." Panel held that allowances in respect of construction of the export price are separate and distinct from allowances for differences which affect price comparability and are governed by different substantive rules.[174] On the question whether the deduction from the price charged by POSAM to independent purchasers of an allocated amount of the unpaid sales an

[174] US had contended that because Art. 2.4 provides that allowances for costs and profits "should" be made in constructing an export price, that provision is non-mandatory, and that this provision of Art. 2.4 could not provide a basis for claim of violation. Disagreeing with US Panel held that the term "should" in its ordinary meaning is generally non-mandatory, but that the AD Agreement does not require such allowances does not mean that a Member is free to make any allowances it desires, including allowances not specified in Art. 2.4. According to the Panel Art. 2.4 authorises certain specific allowances, therefore allowances not within the scope of that authorisation cannot be made. "If a Member were free to make any additional allowances it desired there would be no effective disciplines on the methodology for construction of an export price and the provision in question would in our view be reduced to inutility." Report of the Panel para. 6.94

allowance for "costs,, including duties and taxes, incurred between importation and resale" such that it was authorised by the fourth sentence of Art. 2.4, Panel held that costs related to the resale transaction but not incurred in a temporal sense between the date of importation and resale could as a general matter be considered to be "incurred between importation and resale" and thus deducted in order to construct an export price. Panel also accepted that an amount to cover the risk of non-payment might be considered to be such a cost. But the Panel held that this interpretation of costs "incurred between importation and resale " could not be stretched to include costs that not only were not incurred in an accounting sense after the date of resale but which were entirely unforeseen at that time.[175] Panel pointed out that the costs arising from the failure of American Company were incurred in a temporal sense after the date of resale and the unpaid sales arose as a result of the unforeseen bankruptcy of a single customer. Therefore the Panel held that the amount for unpaid sales deducted by the US in constructing an export price was not a cost "incurred between importation and resale" within the meaning of Article 2.4 of the Anti-dumping Agreement.

2. DOES ART. 2.4.2 PROHIBIT COMPARISON OF MUTLIPLE AVERAGES WITH MULTIPLE AVERAGES

Korea's claimed that in the preliminary determinations in the Plate &Steel investigations, the DOC used a single averaging period covering the whole of POI into two sub-periods, corresponding to the pre-and post-devaluation periods. The DOC calculated a weighted average margin of dumping for each sub-period. When combined the margins of dumping calculated for the sub-periods to determine an overall margin of dumping for the entire POI, the DOC treated sub-periods where the average export price was higher than the average normal value as sub-periods of zero dumping. Korea argued that Art. 2.4.2 prohibits the comparison of multiple averages with multiple averages. Korea contended that Art. 2.4.2 which uses the words "a weighted average" obligates a Member to either compare a single weighted average normal value with single weighted average export price, or compare individual home market transactions to individual export transactions. According to Korea, it was confirmed by the reference to "all comparable export transactions" in Art. 2.4.2, as there can be only one average if it takes into account all data. Korea noted that the DOC acted inconsistently with Art. 2.4.2 because it did not compare a single weighted average export price, but rather divided the POI

[175] Panel conceded that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Art. 2.4 and actual bad debt experience during the period of investigation might be evidence relevant to establishing the existence of such a differences. But the Panel noted that the US did not treat actual experience with respect to levels of unpaid sales as evidence of different levels of risk in the two markets in the investigation, it had stated that it was the DOC's practice to treat bad debt as a direct selling expense when the expense was incurred in respect of the subject merchandise.

into sub-periods and calculated a separate dumping margin for each sub-period.

US contended that the transactions included in the averages under Art. 2.4.2 must be "comparable". According to US the reason for this limitation is the inclusion in the averages to be compared of sales that are not comparable could result in a dumping margin based on factors not related to dumping. US noted that Art. 2.4.2 is subject to the provisions of Art. 2.4 which requires that export price and normal value be compared "at the same level of trade-- in respect of sales made at as nearly as possible the same time" and the allowance be made for differences in physical characteristics. Therefore according to US, a member may create multiple averages in order to ensure that comparisons are not distorted by averaging of non-comparable transactions involving different models or at different levels of trade. US argued that in stating that comparisons should be "in respect of sales made at as nearly as possible the same time", Art. 2.4 recognises that time is a fundamental aspect of comparability. According to US Art. 2.4.2 could permissibly be interpreted as expressing a preference for daily averages an approach that would be similar to the transaction -by transaction methodology approved by Ar.2.4.2. US asserted that since dollar values of pre and post devaluation home market sales were sharply different, the DOC permissibly determined that sales before and after the devaluation were not comparable and that it was therefore appropriate to divide the POI into sub-periods and calculate a margin of dumping for each sub-period.

Panel held that Art. 2.4.2 instead of prohibiting the use of multiple averaging *per se* provides that the existence of dumping shall be established "on the basis of comparison of a weighted average normal value with a weighted average of all comparable export transactions". Panel clarified that the reference in the singular to "a weighted average normal value" means that there must be a single weighted average normal value and export price in respect of comparable transactions. It does not mean that a Member is required to compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value. Panel pointed out that the Chapeau of Art. 2.4 states that "a fair comparison shall be made between the export price and the normal value." According to the Panel the provisions of Art. 2..4.2 must be read against the background of this basic principle and an interpretation of Art. 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle. Panel pointed out that the meaning of the term "comparable" can be established by examination of other provisions of Art. 2 of the AD Agreement that address the issue of comparability. Panel noted that Art. 2.4 of the AD Agreement

provides that the comparison between the export price and the normal value shall be made "in respect of sales made at as nearly as possible the same time". According to the Panel, it was clear that the timing of sales may have implications in respect of the comparability of export and home market transactions. In the context of weighted average comparisons, Panel held that the requirement that a comparison be made between sales made at as nearly as possible the same time requires as a general matter that the periods on the basis of which the weighted average export price are calculated must be the same. Rejecting US argument that the "same time" requirement of Art. 2.4 implies a preference for shorter rather than longer averaging periods, Panel contended that if the requirement to compare sales at "as nearly as possible the same time" means that sales within an averaging period covering a POI are not comparable, then a Member presumably would be obligated to break a POI into as many sub-periods as possible. "Yet to interpret the word "comparable" when combined with the requirement that sales be compared "at as nearly as possible the same time", to obligate Members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Art. 2.4.2 authorisation to perform average to average comparisons out of the AD Agreement leaving Members with only the second option, the comparison of normal values and export prices on a transaction-by-transaction basis."[176] However, the Panel accepted that there may be a situation where changes in normal value, export price or constructed export price during the course of POI anew combined with differences in the relative weights by volume within the POI of sales in the home market as compared to the export market, the use of weighted averages for the entire POI could indicate the existence of margin of dumping that did not reflect the situation at any given moment within the POI. According to the Panel in such situation a Member might be justified in concluding that differences in timing of sales in the home markets give rise to a problem of comparability that could be addressed through multiple averaging periods. But the Panel clarified that such a situation arises only when two elements are present:

1. A change in prices, and
2. Difference in the relative weights by volume within the POI of sales in the home market as compared to the export market.

"Thus while a change in normal value, export price nor constructed export price may be necessary condition for the conclusion that the passage of time affects comparability in the case of an average-to-average comparison, the existence of such a change is not in itself a sufficient condition to conclude that the export transactions are not comparable to the normal value." [177] Panel noted that in DOC's

[176] Report of the Panel, para 6.122.
[177] Report of the Panel, para 6.123.

determination while difference in prices in dollar was shown as a reason to divide up the POI, the existence of a difference in the relative weights by volume of sales within the POI between the home and export markets was not shown.

3. DID US VIOLATE ARTICLE 2.4 BY INDUGING IN DOUBLE CURRENCY CONVERSION

Korea claimed that certain sales by POSCO in the Korean market were ordered and invoiced in US dollars but were paid in Korean won. Some shipping invoices and all tax invoices relating the sales also reflected a won price, using a calculation based upon the Korean Exchange Bank's exchange rate as of the date of invoice. The won price was recorded in POSCO's accounting records. Since local sales were made pursuant to letters of credit, payment was made some months after invoice date; the parties disagreed as to what the record in the two investigations showed with respect to the basis for the won amounts actually paid. POSCO reported local sales in won in its initial questionnaire responses. In subsequent supplemental questionnaire responses, POSCO modified its home market sales listing to report local sales in dollars. In legal briefs submitted to the DOC in both investigations POSCO argued that the DOC should calculate normal value on the basis of the US dollar price at which local sales were invoiced. The petitioners disagreed. In its final determinations in the plate and sheet investigations, the DOC used as the basis for its calculation of the normal value the won prices recorded in POSCO's accounting records. The DOC converted the won. Korea contended that DOC performed "double conversion" of local sales by converting the dollar amounts appearing in the invoices into won at one exchange rate and converting them back into dollars at a different exchange rate. Korea contended that Art. 2.4 of the AD Agreement permits currency conversion only when such conversions are "required" i.e., when there is no other reasonable alternative. According to Korea the "double conversion" by the DOC was unnecessary, as it could simply have used the original dollar prices in the invoices.

US argued that the phrase " when the comparison under para 4 requires a conversion of currencies" in Article 2.4.1 establishes the condition under which the rules that follows will apply, but it cannot be read to require that currency conversion be avoided in any particular circumstances, particularly where the transaction occurs in a foreign currency.

Panel noted that Article 2.4.1 sets forth rules with respect to the conversion of currencies to be applied "[w]hen the comparison under paragraph 4 requires a conversion of currencies . . . ." While Article

2.4.1 does not spell out the precise circumstances under which currency conversions are to be avoided, and it does establish a general self-evident - principle that currency conversions are permitted only where they are required in order to effect a comparison between the export price and the normal value. According to the Panel a contrary interpretation would call into doubt the utility of the introductory clause of Article 2.4.1. If the drafters had not intended to establish a rule that currency conversions be performed only when required, they could easily have drafted Article 2.4.1 to provide that "Currency conversions should be made using the rate of exchange on the date of sale ...."

With regard to Plate investigation Panel noted that the invoices were expressed in dollars but the payments were made in won. Panel noted that Korea's argument, was dependent upon a particular factual predicate: that the amount of won actually paid in respect of local sales was determined by applying the market rate of exchange at the time of payment to the dollar amount stated in the invoice. The DOC was not however aware at the time of its final determination in the *Plate* investigation that this was the case. Rather, the DOC considered at the time of its final determination that the actual won amount paid was the amount charged to the sales ledger, which in turn was derived by converting the dollar amount invoiced to won at the Korean Exchange Bank exchange rate prevailing *at the time of invoice*, and that there was no evidence in the record suggesting to the contrary. The DOC explained in its determination, it had verified certain local sales. For these sales, while the customers were invoiced in dollars (and sometimes also in won), payment was made in won, and the value of the merchandise was charged to the sales ledger in won, based upon the exchange rate prevailing on the date of invoice. The *Plate* final analysis memorandum that was the basis of the final determination indicated that the date of payment for the sales was some months later. Therefore, the record before the DOC indicated that the won amount the customer would pay on a given date was fixed some months earlier based upon the won/dollar exchange rate prevailing on the earlier date, irrespective of subsequent changes in the dollar/won exchange rate. The DOC's determination then noted that the exchange rate used by POSCO on the earlier date did not correspond to the market exchange rate used by the DOC. Again, the *Plate* final analysis memorandum indicated that the DOC was comparing POSCO's exchange rate on the date of invoice both to the DOC's exchange rate on that date and to its exchange rate on the date of payment. The DOC concluded that local sales were made in won because the amount to be paid was fixed in won on the date of invoice irrespective of subsequent movements in the won/dollar exchange rate between the date of invoice and the date of payment. Korea had emphasised that the order sheets for local sales, which were verified by the DOC, reflected a dollar amount but no won amount. Korea contended that this supported its view that local sales were negotiated as well as invoiced in dollars. Panel noted that while the fact that order sheets showed sales in dollars and not in won might be a

relevant consideration in other circumstances, the fact remained that – based on the record as placed before the DOC – a won amount was fixed at the date of invoice and this won amount was controlling as to the amount to be paid several months later. Panel pointed out that the DOC determined that the date of invoice rather than the date of order confirmation was the "date of sale" because it was at the time of invoice that POSCO established the material terms of sale. In support of this view, POSCO had argued that "all POSCO's sales were subject to change between order and shipment". Therefore according to the Panel, the fact that the orders for local sales were expressed in dollars was less than conclusive as to whether the sales were won or dollar sales. Therefore the Panel concluded that an unbiased and objective investigating authority evaluating the evidence before the DOC in the *Plate* investigation could properly have determined that the local sales in question were made in won.

In the Sheet investigation Korea argued that the Department should have calculated normal value for "local" sales made in the home market based on the US dollar price at which those sales were invoiced. Korea contended that that although POSCO is paid in Korean won, the amount of payment was based on the US dollar invoiced price. Korea contended that because POSCO's local sales were denominated and invoiced in US dollars, the invoiced prices did not require conversion to won for US comparison purposes, and that the conversion of the US dollar price to won and then back to dollars was not only unnecessary, but would significantly distort the margin. As in the *Plate* investigation, the issue before the DOC in *Sheet* was whether it should use the dollar-invoiced price for local sales or whether it should use the won price which was charged to the sales ledger and reflected in the tax and certain shipping invoices.

There was a significant factual difference between the two investigations. The record in the *Plate* investigation suggested that the won prices initially reported by POSCO represented the won amounts actually paid. In the *Sheet* investigation, on the other hand, the DOC verified, and recorded in its Verification Report, that the won amounts reported by POSCO were *not* in fact the amounts actually paid: On the basis of this Verification Report, it was clear that the DOC in the *Sheet* investigation was fully aware that the won amounts reported by POSCO in respect of local sales were in fact different from the won amounts actually paid.

The United States argued that "the only suggestion that [the invoiced and paid] amounts differed came late in the proceeding amid conflicting information". It contended that POSCO only reported the invoice price and neither informed the United States nor claimed that the amount paid differed from the amount invoiced. Panel noted that unlike in the *Plate* investigation, POSCO in the *Sheet* investigation reported dollar amounts ("for ease of verification") in addition to won amounts in its

initial questionnaire response. This triggered a supplemental questionnaire from the DOC in response to which POSCO provided information suggesting that the won price paid was not the same as that invoiced.

The Panel pointed out that the sales verification report was dated 6 April 1999 and related to verification performed in February. It thus predated the final determination in the *Sheet* investigation by several months. Moreover, the Verification Report did not suggest a hint of doubt about the manner in which local sales were handled. A page extracted from POSCO's accounts and attached to the Verification Report listed dozens of exchange rate losses related to local sales. Panel noted that at this point, therefore, the record clearly showed that the amount of won actually paid in the case of local sales differed from the amount initially reported by POSCO and appearing on POSCO's tax invoices. According to the Panel it was clear from the record in the *Sheet* investigation that the won price which the DOC considered to be the price in which local sales were denominated was in no sense controlling. Rather, the won amount ultimately paid would be determined by converting the dollar amount appearing on the invoice into won at the rate of exchange prevailing on the date of payment. Thus, the dollar amount appearing on the invoices was controlling, while the won equivalent appearing on the tax and certain shipping invoices and noted in POSCO's accounts played no role in determining the amount the purchaser ultimately would pay. Panel agreed with Korea that there was no logical basis under these circumstances to consider that the sales in question were denominated in won.

COMMENT ON THE CASE

The *Brazil-Cotton Yarn*[178] case highlighted the need for a rule regarding exchange rate fluctuations and currency conversion. As a result Article 2.4.1 was added in the Uruguay Round Agreement providing rule for currency conversion. However this provision is considered inadequate by critics. As the case highlighted more technical issues might be involved in currency conversion which may affect fair comparison. "Although the Agreement permits the conversion of currency when it is necessary for the price comparison , it does not provide sufficient guidelines to guard against potential distortion in the dumping margin calculation resulting from conversion."[179] One of the deficiency pointed is that the regulation deals only with currency appreciation and not with currency depreciation.[180] Another suggestion given is that the Agreement should clarify whether the exchange rate on the date of sale in

[178] ADP/137, Report of the Panel adopted on 4 July 1995.

[179] Jong Bum Kim, *Currency Conversion in the Antidumping Agreement*, Journal of World Trade 34(4):125-136, 2000.

[180] *ibid.* It was pointed out that depreciation of currency by the South-East Asian countries after the economic crisis might have led to dumping in India market. *Liberalisation and Foreign Trade: Danger Signals*, 1052, Economic and Political Weekly May 4, 1996.

the export market, or on the date of sale in the home market, is used for conversion. It has been suggested that the Agreement should be amended so that when the conversion is done, an investigating authority is required to se the rate of exchange on the date of sale of the subject merchandise whose price is being converted. Fluctuations in the exchange rate should be clearly defined in Article 2.4.1 to avoid varying practices among countries. A movement of exchange rates that is regarded as fluctuations in a month's time span cannot be regarded as fluctuations if the time span is expanded to three months or to a year. To distinguish fluctuation in the exchange rate movement from a normal exchange rate movement, the Agreement should clearly specify the benchmark rate as well as the allowed deviation of the daily rate from the benchmark rate.[181]

US-ANTI-DUMPING MEASURES ON CERTATAIN HOT ROLLED STEEL PRODUCTS FROM JAPAN[182]

The case concerned the imposition by the United States of anti-dumping measures on imports of certain hot-rolled flat-rolled-carbon-quality steel products ("hot-rolled steel") from Japan. Several US steel manufacturing companies, the United Steelworkers of America, and the Independent Steelworkers Union filed petitions for the imposition of anti-dumping duties on imports of certain hot-rolled steel products from Brazil, Japan, and Russia. The petitions also alleged that critical circumstances existed with regard to imports from Japan. The United States International Trade Commission ("USITC") instituted its investigation to determine whether there is a reasonable indication that an industry in the United States is materially injured or threatened with material injury, or the establishment of an industry in the United States is materially retarded by reason of imports from the three countries of certain hot-rolled steel products that are alleged to be sold in the United States at less than fair value. The United States Department of Commerce ("USDOC") determined that it was not practicable to examine all known producers/exporters and conducted its investigation on the basis of a sample of Japanese producers. Based on information concerning production volumes from all six Japanese producers, Kawasaki Steel Corporation ("KSC"), Nippon Steel Corporation ("NSC"), and NKK Corporation ("NKK") were selected for individual investigation and calculation of a dumping margin *(i.*e, the "investigated respondents"), as these three companies accounted for more than 90 per cent of all known exports of the subject merchandise during the period of investigation. USITC issued an affirmative preliminary determination, finding a reasonable indication that the US industry was threatened with material injury by reason of hot-rolled steel imports from Brazil, Japan,

[181] Supra note 93, 135-136.
[182] WT/DS184/R Report of the Panel adopted on 28 February 2001

and Russia. USDOC issued its affirmative preliminary critical circumstances determination, finding that there is a reasonable basis to believe or suspect that critical circumstances exist for imports of hot-rolled steel from Japan and Russia. Based on its determination, USDOC stated that, upon issuance of an affirmative preliminary dumping determination, Commerce would direct the US Customs Service to suspend liquidation of all entries of Japanese hot-rolled steel for a period of ninety days prior to the preliminary dumping determination. No specific measures were put into effect at this stage. USDOC issued a preliminary affirmative dumping determination, finding that hot-rolled steel from Japan was sold in the United States at dumped prices. The USDOC thus calculated the preliminary margins of dumping: KSC 67.59%, NSC 25.14%, NKK 30.63% and All Others Rate 35.06%. The "All Others" rate, applicable to companies not investigated, was calculated as the weighted average of the margins calculated for the three investigated respondents. Pursuant to its earlier critical circumstances finding, USDOC ordered suspension of liquidation and posting of cash deposits or bonds for entries made 90 days prior to the 19 February 1999 effective date of the preliminary determination of dumping, that is, retroactive to 21 November 1998. USDOC published its final determination that respondents were selling hot-rolled steel in the United States at the margins of dumping of KSC 67.14%, NSC 19.65%, NKK 17.86% and All Others Rate 29.30%. USDOC also made a final negative determination of critical circumstances as to NSC and NKK based on the fact that they had final dumping margins below the 25 per cent threshold used to impute importer knowledge of dumping. However, USDOC continued to find that critical circumstances existed as to KSC and the "all others" companies. Following USDOC's preliminary determination of dumping, and while USDOC was conducting the final dumping investigation, USITC instituted and conducted the final injury investigation. Following collection of information, submission of briefs by interested parties and a public hearing USITC voted unanimously on 11 June 1999, that the US industry was materially injured or threatened with material injury by reason of hot-rolled steel imports from Japan. USITC then published its final affirmative determination of injury. USITC also made a negative determination with respect to critical circumstances, concluding that the increase in imports in a short period of time was not sufficient to warrant a finding that the imports would undermine the remedial effects of the anti-dumping duty order. Since USITC had not found critical circumstances to exist, USDOC ordered the refund of any cash deposits and/or release of any guarantees provided for the period of the preliminary critical circumstances finding, 21 November 1998 - 19 February 1999.

In this case following issues were involved:

- Whether the "arm's length test" applied by the US was an unreasonable basis for determining whether such sales were in the ordinary course of trade.

- Whether the USITC injury and causation analysis was inconsistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement.
- Whether USITC consideration of domestic industry was inconsistent with Articles 3 and 4 of the Antidumping Agreement.
- Whether US DOC's preliminary circumstances finding was inconsistent with Art. 10.1, 10.6 and 10.7 of the AD Agreement.

1.FAILURE TO PROVIDE TIME LIMIT FOR INFORMATION

USDOC disregarded certain information submitted by the three Japanese companies (NSC, NKK and KSC) and resorted to facts available in making its determination. With regard to NSC and NKK, US contended that they were submitted after the time limit prescribed for submission of information. Japan pleaded that the term "reasonable period" permits flexibility considering the circumstances of the case. However, US contended that Article 6.8 and Annex II do not provide any definition of "reasonable period" and time provided by the USDOC was reasonable. Panel held that the information was submitted before verification in accordance with para 3 of Annex II and therefore they could have been used for verification. Therefore Panel concluded that USDOC violated Article 6.8 and Annex II.

With regard to KSC US stated that it failed to co-operate since it did not provide relevant information. USDOC concluded that KSC had failed to act to the best of its ability in seeking the requested data from CSI, and therefore determined to apply adverse facts available in determining the dumping margin attributable to sales to CSI.Panel held that USDOC's conclusion that KSC failed to act to the best of its ability to comply with the request for information in this case went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II. CSI (California Steel Industries), from whom KSC was to collect the information, was a petitioner in the investigation of hot-rolled steel imports from Japan, and thus had interests directly opposed to those of KSC. Similarly, CVRD,(Companhia Vale de Rio Doce) KSC's joint venture partner in CSI, was itself KSC's competitor in the US market for the steel products under investigation, and thus also had interests adverse to those of KSC. Therefore the Panel held that USDOC erred in applying the adverse facts available in this case.[183]

[183] In this case Japan had argued against the US practice of application of adverse facts stating that AD Agreement permits only the application of facts available. Panel did not give any ruling on the issue. It is submitted that the US practice is against the very purpose of the AD Agreement. The Agreement permits the use of facts available to facilitate investigation, it does not intend to penalise the parties.

2. SALES IN THE ORDINARY COURSE OF TRADE[184]

Japan pointed out that Section 773 of the US Tariff Act of 1930 defines normal value as the "price at which the foreign like product is first sold (or in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and to the extent practicable, at the same level of trade as the export price or constructed export price." US law defines "ordinary course of trade" as the conditions and practice which, for a reasonable time prior to the exportation of the subject merchandise have been normal in the trade under consideration with respect to merchandise of the same class or kind." The statute also contains an exception to this rule which authorises the replacement of sales to an affiliated reseller with sales by an affiliated reseller. Specifically, "If the foreign like product is sold or in the absence of sales, offered for sale through affiliated party may be used in determining normal value. Section 771(33) defines affiliated parties to include companies in which a party as little as 5% of the outstanding voting stock." Upon rejecting sales to an affiliate for failing the arm's length test, USDOC has two options: it can discard the sales in its calculation of normal value, or it can replace the sales with the affiliate's resales-assuming such sales have also been reported to USDOC by the respondent. Since 1993, USDOC had followed a practice of considering sales of a product to an affiliated customer to be at "arm's length" and thus included in the calculation of normal value only if the weighted average price for all sales of the product to the affiliated customer are 99.5% or more of the weighted average price of sales of the product to non-affiliated customers. This practice is known as the "arm's length test" or "99.5 %test". If sales to an affiliate fail the arm's length, USDOCA has adopted a practice of excluding such sales from its calculation of normal value and in some instances, replacing such sales with the affiliate's resales assuming such sales have also been reported by the respondent. In this case the USDOC applied the 99.5% arm's length test to the respondent's sales to affiliated customers and the vast majority of the respondents' reported sales to affiliated customers failed the 99.5% test. USDOC therefore excluded these sales from its calculation of normal value, noting that they were "outside the ordinary course of trade" and sometimes replaced them with the affiliates downstream resales, sometime with no adjustment for any resulting differences in level of trade. USDOC affirmed this decision in its final determination. USDOC's use of the 99.5% test, as well as the substitution of sales to affiliates with the affiliates' resales, inflated each respondent's dumping margins.

Japan challenged the USDOC's established practice in this regard, and USDOC's application of that

[184] Another issue in the case was violation of Article 9.4. The decision of the Panel was an issue in the appeal. Appellate Body upheld the Panel reasoning. A detailed discussion of the issue has been done in the Appellate Body decision.

practice in the investigation of imports of hot rolled steel from Japan. Japan contended that the "arm's length test" applied by the US was an unreasonable basis for determining whether such sales were in the ordinary course of trade and that Art. 2 does not allow a Member to treat sales that fail the arm's length as outside the ordinary course of trade. Japan argued that there is nothing in the AD Agreement that supports the premises of the arm's length test-that sales made to affiliates at average prices more than 0.5% below the average prices for the same product sold to unaffiliated customers are outside the "ordinary course of trade". According to Japan a 0.5% point average price differential is too small a difference upon which to base a finding that sales to affiliates are made in the ordinary course of trade. Japan contended that Art. 2.2 of the AD Agreement makes clear that the exclusion of sales outside the ordinary course of trade is a rigorous undertaking and that the arm's length test is too mechanical and not consistent with the rigorous tests applicable to determining whether sales below cost may be considered outside the ordinary course of trade. Japan argued that Art. 2 of the AD Agreement prescribes what an authority shall do if there are no home market sales in the ordinary course of trade. In Japan's view Art. 2.2 does not permit the replacement of home market sales to an affiliate with the affiliate's resales, it provides that in such a case, the authorities must compare export price either with sales to a third country or with the constructed value. Japan contended that only Art. 2.3 of the AD Agreement concerning export price expressly provides for the possibility that the investigating authority may construct a price on the basis of the price at which the product is first resold to an independent buyer. Japan argued that the absence of such a power in Art. 2.2 of the AD Agreement implies that the US DOC practice is not permitted in the context of a determination of normal value.

Japan contended that US DOC practice to exclude sales that fail the "arm's length test" also violates the requirement of Art. 2.4 of the AD Agreement to make a fair comparison " between normal value and export price. Japan argued that a "fair" comparison does not permit statistically arbitrary rules that reject low priced sales from the calculation of normal value thereby artificially inflating the dumping margin. Japan claimed that the test had two main problems:

(i) It testes only for lower prices and considers higher prices to be normal

(ii) It failed to account for the degree of variability in prices producing absurd outcomes.

Japan claimed that a standard deviation analysis that captured both the frequency and the magnitude of the narration or some other statistically valid test could ensure a fair comparison. Japan further contended that the use of downstream sales[185] to replace home market sales that failed the arm's length test also violated the requirement of Art. 2.4 that a fair comparison be made with the respondent's US

[185] In case of sales to affiliates USITC substituted those sales by subsequent sales to other persons. These sales are referred as downstream sales.

sales. Japan argued that prices of downstream sales can only be higher than the prices of the producer's own direct sales, and the downstream home-market sales were often made at a different level of trade and therefore cannot be compared in a fair manner to export sales made directly to unaffiliated customers.

The US argued that Art. 2.1 of the AD Agreement which required that normal value be based on sales made in the ordinary course of trade, allows for more than one permissible interpretation and US DOC's arm's length test of sales to affiliates is one way of examining whether sales were made in the ordinary course of trade. The US asserted that it is generally recognised that sales to affiliates are suspect and it is expressly recognised in Art. 2.3 of the AD Agreement that association may lead to prices that are unreliable. US contended that in the absence of any guidance in the AD Agreement on how to assess whether sales are outside the ordinary course of trade it cannot be argued that a difference of 0.5% points between the prices of sales to affiliated and unaffiliated customers is too small. US submitted that the authority is free under the AD Agreement to consider a difference of 0.5% significant. US contended that USDOC's arm's length test which compared the average price of sales to each affiliated customer was preferable to the alternative suggested by Japan, because it focused on relationship between the seller and the customer not on particular product. US claimed that the standard deviation analysis suggested by Japan would lower the threshold and provide no certainty that sales included in the calculation of normal value were not affected by the relationship between the seller and the buyer. US further contended that USDOC's weighted average methodology was consistent with the way dumping margins are normally calculated under the AD Agreement. US argued that Art. 2.2 of the AD Agreement does not give a definition of the ordinary course of trade and only deals with the situation where there are no such sales or insufficient sales. US contended that Art. 2.2.3 of the AD Agreement expresses a clear preference for actual home market sales over sales to a third country or a construction based on cost of production. US asserted that the downstream sales it used to replace excluded sales to affiliates were in fact " sales in the ordinary course of trade" in the home market, and as such were preferable to the alternatives provided for in Art. 2.2. US claimed that Japan's argument would lead to the absurd result that as soon as sales are made to affiliates, normal value would have to be either constructed based on cost of production or based on sales to third countries.

Brazil and Korea and Chile as third party argued that the test was biased because US DOC disregarded only lower priced sales guaranteeing that higher priced sales remained in the database for the calculation of normal value.

Panel pointed out that AD Agreement does not define the concept of "ordinary course of trade" either in Art. 2.1 or elsewhere and establishes no general test for determining whether sales are made in the ordinary course of trade or not. However, the Panel noted that Art. 2.2.1 of the Agreement does provide that sales made below cost may be treated as not in the ordinary course of trade and disregarded in calculating normal value if certain conditions are satisfied. Panel pointed out that the arm's length test only tested whether prices to affiliated customers are lower, on average, than prices to unaffiliated customers. Panel noted out that it cannot be assumed that affiliation only results in sales that are outside the ordinary course of trade because they are lower priced on average than sales to unaffiliated persons. According to Panel one example of prices to affiliated customers that are higher as a result of affiliation, and might be considered not in the ordinary course of trade, would be where priced between affiliated are established in order to allocate profits, and consequently tax burdens among affiliates. These prices might on average be higher than price to unaffiliated customers, but would not be caught by the USDOC's arm's length test Panel held that the result of arm's length test is the exclusion from the determination of normal value of prices that are on average lower. As a result the application of the arm's length test will only skew the normal value upward, thereby making a finding of dumping or a higher margin of dumping more likely. Therefore according to Panel the arm's length test did not rest on a permissible interpretation of the term "sales in the ordinary course of trade".

On the issue of replacement in the calculation of normal value, of "excluded" sales by downstream sales panel noted that it was important to keep in mind the overall object and purpose of the AD Agreement to establish rules for the imposition of the anti dumping duties. Among these is the obligation, set out in Art. 6.10, to "as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation". Panel held that the "comparable price in the ordinary course of trade" on the basis of which normal value is to be determined under Art. 2.1 must be the price of the sales by each known exporter or producer for which a dumping margin is calculated. Panel noted that the "replacement" prices used in this case in the calculation of normal value for investigated Japanese producers were the prices of sales made by affiliates of the companies being investigated for purposes of determining whether dumping was occurring and if so, the margin of dumping. According to the Panel it might be true that those sales were in the broad sense, in the ordinary course of trade but they were not sales which may be taken into account in determining normal value for the companies for which dumping margins were being established, as they are not sales in the ordinary course of trade of those companies. Panel pointed out that the alternative methods for the calculation of normal value and export price provided for in

Articles 2.2 and 2.3 of the AD Agreement are not the same. It could not be concluded that because Art. 2.3 allows for the construction of an export price on the basis of a first resale to an independent buyer, a similar action must be allowed for the determination of normal value. Panel noted that there was no attempt to make allowances for costs, including duties and taxes, incurred between the original sale to the affiliated purchaser and the first resale to an independent buyer, as is required when export price is constructed pursuant to Art. 2.3. The consideration of level of trade does not compensate for this lack. Panel concluded that the replacement of excluded sales by investigated companies to affiliates with the downstream sales by those affiliates in the calculation of normal value was consistent with the AD Agreement.

3. DETERMINATION OF INJURY

Japan claimed that the USITC injury and causation analysis was inconsistent with Articles 3.1, 3.4 and 3.5 of the AD Agreement since it focused on data for only two years of the normal three year period of investigation and ignored or marginalised alternative causes of injury. Japan contended that instead of pursuing its traditional three-year analysis USITC compared industry data for 1998 with those of 1997. According to Japan if the three year analysis had been applied in the hot-rolled steel case it would have revealed that virtually all the domestic industry performance indices improved between 1996 and 1998. According to Japan the base year 1997 which was used by the USITC in the investigation happened to be the best year the industry had experienced in a decade and any comparison with this record breaking year almost guaranteed an affirmative determination of injury. According to Japan by manipulating the period of investigation, USITC violated Article 3.1 by failing to base its material injury determination upon "positive evidence" and an "objective examination". USITC violated Article 3.4 of the AD Agreement by failing to consider and to "make apparent" its consideration of the Article 3.4 factors for the first year of the period. USITC determination was also inconsistent with Article 3.5 of the AD Agreement by failing to conduct a proper causation analysis that covered the full three year period and took into account the injury trends for this three year period. Japan also contended that USITC acted inconsistently with Article 3.5 of the AD Agreement by inadequately analysing "other" causes of injury.[186] According to Japan USITC failed to isolate the injury caused by the alternative factors in order to ensure that such injury is not attributed to dumped imports.

[186] Japan in particular referred to the strike at General Motors (the largest steel consumer in US) in 1998, the increased capacity and production by low cost mini-mills, and faltering demand for pipe and tube due to collapsing oil prices. Japan also contended that USITC did not consider the price effects of non-subject imports, as explicitly required by Article 3.5 of the Agreement.

US asserted that USITC conducted an objective examination of data covering a period of investigation of three years and thoroughly examined possible known alternative causes of injury. USITC based its causal analysis on an evaluation of the changes in all relevant factors over a period of three years and the data used also covered three years. US disagreed with Japan's assertion that 1997 was an exceptionally good year for the US industry which would preclude any fair comparison with information for that year. According to the US many factors started to decline in 1996 and continued to decline in 1997 and 1998.US argued that in 1998 productivity was higher and costs lower than in 1997, but nevertheless domestic industry performance indicators indicated a sharp decline in 1998. According to US, USITC reliance on recent trends was not unique but customary since the most recent data are in general more relevant and probative for the state of the industry. According to US the USITC's comparison of 1997 and 1998 data reflected its evaluation of the probative value of the 1996-1998 data in view of the changes in demand in the market that occurred since 1996. US further argued that in accordance with Article 3.5 of the AD Agreement, the USITC examined all relevant factors and ensured that injury caused by other factors was not attributed to dumped imports. US asserted that Article 3.5 of the AD Agreement does not require that a separate determination be made of the effects of the alternative causes and it is not required to quantify injury from other causes. US cited the report of the Panel in *United States-Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon for Norway*[187] which found that the authority is not required to demonstrate that dumped imports are the sole cause of material injury to an industry. According to US investigating authority is also not required to identify the extent of the injury caused by alternative factors. The USITC examined other known alternative causes and thus complied with the requirement of Article 3.5 of the AD Agreement.

Panel noted there were two issues to be discussed:

1. Did USITC properly discuss and evaluate data covering the whole period of investigation.
2. Did USITC examine all known factors other than dumped imports and ensure that injuries caused by these factors were not attributed to the dumped imports.

On the first issue Panel noted that throughout the USITC report there were various instances in which USITC did discuss trends in the data for the three-year period. Panel noted that Japan's argument was mainly based on the section of the USITC report that examined the impact of the subject imports on the domestic industry, and in particular, the data concerning the financial performance of the industry.

[187] ADP/87 , Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994

Panel noted that with regard to most factors the data which were collected for all three years were explicitly discussed and evaluated in the determination for all three years, 1996,1997 and 1998. According to the Panel in this case it was not improper of USITC to focus on the sudden and dramatic decline in the industry performance from 1997 to 1998, at a time when demand was still increasing. The period USITC considered explicitly (1997-1998) was the most recent period, and was the period that coincides with the period of the alleged dumped imports. Regarding Japan's suggestion that USITC should have made a static end-point-to-end point comparison, comparing 1996 levels to 1998 levels, Panel noted that such a comparison by ignoring intervening changes in circumstances and conditions in which the industry was operating, would present a less complete picture of the impact of dumped imports. According to Panel a proper evaluation of the impact of dumped imports on the domestic industry is dynamic in nature and takes account of changes in the market that determine the current state of industry. Therefore Panel held merely because it did not explicitly address production, sales and financial performance during 1996 did not undermine the adequacy of the USITC's evaluation of the relevant economic factors, in light of its analysis and explanations, so as to render its examination of the impact of dumped imports on the domestic industry inconsistent with the AD Agreement.

On the issue whether USITC established a causal relationship between the dumped imports and the injury to the domestic industry consistently with Article 3.5 of the AD Agreement, Panel noted that USITC report showed that USITC did consider the impact of increase in capacity of mini-mills and the ensuing expansion of US Steel supply, the increased competition within the domestic industry and found that it only partially explained the substantially declines in the domestic industry's performance in 1998. Panel noted that USITC also explicitly addressed the effect on the industry of the strike at General Motors in 1998 considering it as a condition of competition and that despite the strike the consumption increased in 1998. According to the panel the investigating authority is obliged to consider the impact of imports on industry as a whole, which the USITC did with respect to changes in demand. Thus Panel disagreed with Japan that a failure on part of USITC to discuss a decline in one particular aspect of demand, in a case in which the overall increase in demand for the product was thoroughly examined and discussed in examining the impact of imports constituted a violation of Article 3.5 of the AD Agreement. Japan argued that USITC failed to examine the prices of non-dumped imports and only collected information on the volume of non-subject imports. According to Japan Article 3.5 requires consideration of the volume and prices of imports not sold at dumping prices. Panel noted that USITC examined non-subject imports and found that they maintained a stable presence in the US market throughout the period of investigation. Panel disagreed with Japan on the

issue that Article 3.5 of the AD Agreement requires that the investigating authority explicitly examine the volume and price effects of non-subject imports. Panel noted that Article 3.5 provides in relevant part that "factors which may be relevant in this respect include inter alia, the volume and prices of imports not sold at dumping prices". Therefore the obligation imposed by Article 3.5 in this respect is to examine any known factors which at the same time are injuring the domestic industry, and includes volumes and pries of imports not sold at dumped prices among the examples of potential other factors injuring the industry. Panel pointed out that Japan did not present a prima facie case that the prices of the non-dumped imports were a known factor injuring the industry or that they were otherwise relevant to USITC's examination of the effects of other known factors that might be causing injury.

Regarding Japan's allegation that USITC failed to ensure that injury caused by other known factors was not attributed to dumped imports Panel pointed out that Article 3.5 of the AD Agreement requires the investigating authority to demonstrate that dumped imports are, through the effects of dumping, as set forth in Article 3.2 and 3.4 causing injury within the meaning of the Agreement. Panel noted that Article 3.5 warns against quick and overly simplistic conclusions by requiring the investigating authorities to consider and examine other known factors that are at the same time injuring the domestic industry before determining that dumped imports are causing material injury within the meaning of Articles3.2 and 3.4. Panel held that it does not suffice to merely consider these other factors the authorities must also make sure that imports are not regarded as causing injuries that are in fact caused by these other factors. Panel pointed out that the Agreement uses the plural "injuries" which indicates that many factors may be injuring the industry in various ways. According to Panel the authority is to examine and ensure that these other factors do not break the causal link that appeared to exist between dumped imports and material injury on the basis of an examination of the volume and effects of the dumped imports under Article 3.2 ad 3.4 of the AD Agreement.

Panel concluded that USITC did examine other known factors that were at the same time causing injuries to the industry, such as GM strike and intra-industry competition. According to the Panel the effects of the strike could only have been minimal was supported by the facts since both on a merchant market basis and overall, demand was still increasing and the amount of hot rolled steel affected by the strike was relatively small. USITC also recognised that 'increased competition within the domestic industry has contributed to the domestic industry's poorer performance in 1998", but concluded that "it only partially explains the substantial declines in the domestic industry's performance in 1998". Therefore the Panel concluded that the USITC's analysis of the effects of the dumped imports on the domestic industry, in light of, and taking into account other factors on the state of the industry was

consistent with the requirement of Article 3.5 of the AD Agreement to demonstrate a causal relationship between dumped imports and material injury without attributing injuries caused by other factors to the dumped imports.

4.DETERMINATION OF DOMESTIC INDUSTRY

(a). Whether US considered domestic industry as a whole: Japan pointed out that Section 771(7) (c) (iv)of the US Tariff Act of 1930 required that an authority consider a domestic industry in its entirety throughout its injury and causation analysis. Japan argued that under the captive production provision, the USITC must focus its injury analysis on the merchant market and potentially may find material injury on the basis of the merchant market even if the industry as a whole is not experiencing material injury. Japan contended that given the mandatory nature of the captive production provision- and, therefore, the lack of discretion the USITC has in whether to apply the provision- it was inconsistent with Articles 3 and 4 on its face, regardless of its application in the case. Japan contended that US statute was inconsistent with Articles 4.1 of the AD Agreement because the definition of domestic industry in Article 4.1 requires authorities to consider domestic producers as a whole and their overall output. Japan argued that captive production provision and its mandatory focus on merchant market data necessarily precludes any balanced assessment of the data of an industry as a whole and more specifically ignores the attenuated nature of import competition in the captive market. According to Japan the captive production provision forces the USITC to ignore the economic reality that the greater the importance of the captive market, i.e. the higher the proportion of domestic production of the like product consumed in downstream captive production, the less likelihood there is that imports that compete only on the merchant market could possibly affect the industry's overall performance. Japan argued that the captive production provision exaggerates the market share of imports relative to all domestic production and therefore was inconsistent with Art. 3.2 of the Agreement. Japan contended that t he captive production provision narrowed the analysis to the merchant market. According to Japan the captive production provision also violated Art. 3.4 of the AD Agreement since it required the authority to evaluate t he key factors mentioned in Art. 3.4 based on narrow segment of the industry, rather than the industry as a whole as provided for in that provision. Japan argued that the statutory provision left no discretion to consider fully both the merchant market and the overall industry, nor did it require an explanation of how the merchant market related to the industry as a whole nor was representative of it. Japan claimed that captive production provision was inconsistent with Article 3.5 of the AD Agreement, which requires the establishment of a causal link between dumped imports and injury to the industry, because it requires the USITC to ignore the "shielding" effect of captive production and to focus instead on the injury to that portion of the

industry serving the merchant market thus making it impossible for USITC to consider fully "all relevant evidence before the authorities" as Article 3.5 of the AD Agreement requires. Japan argued that t he captive production provision violated the requirement in Article 3.6 of the AD Agreement to analyse the effect of imports on all domestic production. According to Japan the captive production provision did not allow for an objective examination as required by Article 3.1 since an examination can only be objective if it takes into consideration all information concerning the industry as a whole.

US argued that the US statute explicitly requires that USITC examine the industry as a whole. According to the US the definition given in the US statute of the domestic industry is similar to that of Article 4.1 of the AD Agreement and neither the captive production provision requires the exclusion of any other segment of the market nor does it require that emphasis be placed on some factors more than on others. US argued that the refined analysis suggested by the captive production provision was consistent with Articles 3.1 and 3.4 of the AD Agreement. It only operated as an analytical tool to reveal the impact of imports on a segment of the industry when those segment were a significant indicator of the state of the industry as a whole, and it therefore improved the required overall industry analysis. US further argued that the captive production provision was consistent with Articles 3.4, 3.5 and 3.6 of the AD Agreement. US pointed out that Article 3.4 of the AD Agreement distinguishes between the effect of imports on sales and their effect on output and captive production provision made this type of distinction only. US rejected Japan's argument that the captive production focus violated Articles 3.5 and 3.6 of the AD Agreement which require consideration of the effect of dumped imports on domestic production as a whole, since the US statutory provision also required such an overall industry analysis.

Panel held that the requirement to make a determination of injury to domestic industry read in light of the definition of domestic industry of Article 4.1 of the AD Agreement, implies that the injury must be analysed with regard to domestic producers as a whole of the like product or to those whose collective output constitutes a major proportion of the total domestic production of those products. According to the Panel the AD Agreement requires an investigating authority to make a final determination as to injury as defined in the Agreement to the industry as a whole but it does not prescribe a particular method of analysis. Specific circumstances might call for specific attention to be given to various aspects of the industry's performance or to specific segments of the industry, as long as the end result of the analysis is consistent with the Agreement's requirement to examine and evaluate all relevant factors having a bearing on the state of the industry and demonstrate a causal relationship between the dumped imports and the injury to the domestic industry. On the question

whether the US "captive production" provision was on its face inconsistent with the established requirement of the Agreement to determine injury for the industry as a whole, Panel noted that the captive production provision required USITC to concentrate in chief on the merchant market when considering market share and financial performance of the industry. According to the Panel such a specific direction to focus the analysis of certain factors with attention for a particular segment of the domestic market did not necessarily imply that the overall injury analysis is not performed with respect to the industry as a whole. Panel pointed out that the statute did not require a general and exclusive focus on the merchant market when considering market share and industry performance, but only a "primary" focus. According to the Panel the US law required the USITC to make a determination whether there is material injury to the domestic industry, and to provide guidance on the analysis to be undertaken in making that determination. The captive production provision was one of the latter sections and therefore defined an analytical step that must, in certain circumstances, be undertaken along the way to making the statutorily required determination of material injury to the domestic industry as a whole. It did not affect the nature of the determination of injury that must be made, only the analysis underlying that determination. Panel noted that although there was no guarantee that the analysis would result in a determination consistent with US obligations under the AD Agreement, it did not require any action inconsistent with those obligations. Therefore the Panel concluded that the captive production provision was not on its face inconsistent with Articles 3 and 4 of the AD Agreement.

(b). Did concentration on captive production affect the analysis of injury: Another issue in this case was whether USITC's application of the Captive Production provision in the case consistent with Articles 3 and 4 of the AD Agreement. Japan claimed that the application of the captive production provision in the case violated various provisions of Article 3 and 4 of the AD Agreement. Japan argued that three commissioners considered the captive production provision applicable and focused primarily on the merchant market in their analysis and the fourth commissioner *de facto* considered the merchant market data in parallel with data on the industry as a whole. Japan claimed that the focus on the merchant market fundamentally altered the results of the investigation and distorted the commissioners' judgement. According to Japan under a balanced analysis USITC would have considered both the merchant and the captive segments of the industry. Japan claimed that the USITC did not make an objective examination as required by Article 3.1 of the AD Agreement since it did not focus on domestic producers as a whole. The USITC's focused analysis also violated Articles 3.2, 3.4, 3.5 and 3.6 of the AD Agreement since it failed to examine all relevant evidence concerning the industry as a whole.

United States contended that the USITC analysis in the case was not inconsistent with the AD Agreement by virtue of the application of the captive production provision by three of the six Commissioners. US pointed out that all six Commissioners made affirmative determinations, five of current material injury and one of threat of material injury, while only three applied the captive production provision. According to US it implied that that the application of the provision in the case did not change the outcome, which was in case affirmative. US contended that USITC did not fail to make its determination on the basis of the basis of the domestic industry as a whole and information on the relevant economic factors was considered with respect to both the merchant market and the industry as a whole. US asserted that USITC found that both in the merchant market and with regard to the industry overall, consumption rose as did the volume of imports. US noted that declining financial trends that the USITC established in the merchant market also appeared in the overall industry analysis. Contrary to Japan's claim that USITC did not "relate its merchant market finding to producers as a whole," US argued that USITC determination showed how a primary focus on the merchant market for certain factors was consistent with such an analysis of the industry as a whole. US further contended that USITC compared the performance in the merchant market with overall performance of those domestic producers (integrated producers) most shielded from import competition and USITC found their operating income to be falling both from merchant market sales and overall. Thus, according to US captive production provision was irrelevant to the affirmative finding of USITC.

Panel noted that USITC report discussed various conditions of competition before entering into the examination of the volume of the imports, their effect on prices and the overall impact of the dumped imports on the domestic industry. USITC considered captive production to be one of the relevant conditions of competition. The report contained data concerning both the industry as a whole and the merchant market in particular. Panel noted that USITC appeared to have discussed the data independently from the application of the captive production provision which required only a focus on the merchant market with regard to market share and factors affecting financial performance. Therefore the Panel concluded that USITC considered data for the domestic industry as a whole as well as merchant market data. According to the Panel the mere fact that the analysis also included a discussion with regard to a certain segment of the industry most affected by the subject imports does not necessarily imply that the analysis was faulty.

5. VIOLATION OF ARTICLE 10

Japan next claimed that US DOC's preliminary circumstances finding was inconsistent with Art. 10.1, 10.6 and 10.7 of the AD Agreement because

1. USITC had preliminarily found only a threat of injury to the industry while Art. 10.6 of the AD Agreement requires evidence of current injury; and
2. the preliminary determination of critical circumstances was not supported by sufficient evidence as required by Article 10.7 of the Anti dumping Agreement.

According to Japan USDOC lacked sufficient evidence of massive dumped imports over a relatively short period. According to Japan USDOC departed from its normal practice of assessing the period before and immediately after the filing of a petition, and instead picked a period of five months preceding and following April 1998 as the basis for determining whether there were massive dumped imports over a relatively short period". Japan argued that this date was arbitrarily chosen on the basis of press reports that allegedly announced the likely filing of a petition for anti dumping measures by US products. Japan asserted that the evidentiary standard in the US statute governing preliminary critical circumstances findings was inconsistent with the "sufficient evidence" standard of Art. 10.7 of the AD Agreement. Japan argued that the US Statute did not require evidence of all conditions set forth in Article 10.6 of the AD Agreement. Japan claimed that the USDOC preliminary critical circumstances determination was also inconsistent with Art. 10.1 of the Anti dumping Agreement since it allowed for the possibility that AD duties would be levied retroactively in spite of the fact that the requirements of Article 10.6 and 10.7 of the Anti dumping Agreement had not been satisfied.

Japan argued that the US statutory provision governing preliminary critical circumstances determinations, section 773(e) of the Tariff Act 1930, as amended, was inconsistent with Article 10.7 of the Anti dumping Agreement. That Article requires that the authorities "have sufficient evidence" that the conditions set forth in paragraph 6 of Article 10 of the Anti dumping Agreement are satisfied. Japan argued that section 773(e) of the Tariff Act of 1930, as amended sets a lower evidentiary standard by requiring only a "reasonable basis to believe or suspect" that certain conditions are satisfied, rather than "sufficient evidence" that those conditions are satisfied. Japan further argued that US statutory provisions governing critical circumstances determinations do not require all of the findings of fact required by Article 10.6 of the AD Agreement. Japan referred to the absence in the US Statute of a requirement to make a preliminary finding of dumping and of an assessment of whether the remedial effect of the AD duty is undermined by the dumped imports. Japan noted that the US statute also does not require sufficient evidence of the causal link between massive imports and injury.

US contended that Article 10.6 and 10.7 of the AD Agreement expressly authorise that preliminary critical circumstances determinations be made based on a threat of material injury to domestic industry. US noted that Footnote 9 of the Anti dumping Agreement defines "injury" as "material injury to a domestic industry or threat of material injury to a domestic industry, unless otherwise specified". US pointed out that Art. 10.6 of the AD Agreement does not "otherwise specify", therefore Article 10.6 of the AD Agreement includes both material injury and threat thereof. US argued that Articles 10.6 and 10.7 of the AD Agreement permit "such measures be taken as may be necessary to collect antidumping duties retroactively" to be taken at any time after the initiation of the investigation. US asserted that USDOC had sufficient evidence that the importers knew or should have known that the exporter was practising dumping. United States argued that since the AD Agreement does not dictate how to determine whether the importers were aware that products were being dumped, it was reasonable and permissible to deduce such knowledge from the degree of the dumping margin as preliminarily established.[188] US asserted that USDOC also had sufficient evidence of massive imports over a short period of time. USDOC compared two six months periods and established that there was an increase in imports of 100%. According to US nothing in the AD Agreement dictates which date to choose to assess whether there have been massive imports over a short period. Therefore USDOC was permitted to choose a date on which it became common knowledge that Anti dumping proceedings would be initiated in the near future, and the date of April 1998 was therefore reasonable. US further contended that the evidentiary standard under section 773(e) of the Tariff Act of 1930 requiring "a reasonable basis to believe or suspect " is similar to that of "sufficient evidence" and both are used interchangeably by USDOC. US claimed that it was not a lower evidentiary standard.

Panel noted that on 8 April 1998, USDOC issued a policy bulletin stating that USDOC would if adequate evidence of critical circumstances was available, issue preliminary critical circumstances determinations prior to preliminary dumping determinations. On 30 November 1998, issued an affirmative preliminary critical circumstances determinations regarding imports of hot-rolled steel from Japan. Although USDOC made a preliminary determination of critical circumstances, no measures "necessary to collect anti-dumping duties retroactively" were actually taken until the preliminary determination of dumping by USDOC, effective 19 February 1999. USDOC made a second and final critical circumstances determination as part of its final determination of injury, which determined whether critical circumstances existed that warranted the retroactive application of duties to 90 days prior to the date of application of provisional measures. USITC in its final injury

[188] 25%

determination of 23 June 1999 made a negative critical circumstances finding. Therefore anti dumping duties were ultimately not collected retroactively.

With regard to Japan's claim that the US statute did not require that evidence of all the conditions of Article 10.6 of the AD Agreement were satisfied as is required by Article 10.7, Panel noted that rather than being conditions set out in Article 10.6 the findings of dumping and injury are a preconditions for any definitive duty to be applied. Panel noted that Article 10.7 of the AD Agreement provides that certain preliminary measures may be taken "after initiation". According to the Panel it implied that at the time of the critical circumstances determination, the authority has already determined, under Article 5.3, that the petition contained sufficient information of dumping, injury and a causal link to justify the initiation of the investigation. Panel further noted that for a preliminary critical circumstances determination, Article 10.7 requires, in addition, sufficient evidence of the specific conditions of Article 10.6 as set forth in 10.6(i) and (ii).

Noting that the US statute governing preliminary critical circumstances determinations does not expressly refer to the question whether massive dumped imports seriously undermine the remedial effect of the duty, Panel held that the Agreement does not require that a separate determination be made with regard to this aspect of Article 10.7. Rather than a "condition" of Article 10.6 of which there must be sufficient evidence in order to act under Article 10.7 the requirement establishes the conclusion that must be reached in order to justify retroactive application of the anti dumping duty under Article 10.6. According to the Panel consideration of this question at the preliminary stage of deciding whether to apply measures under Article 10.7 would only be speculative. Panel pointed out that the possible undermining of the remedial effect of a definitive anti dumping duty is not a question of which evidence would be available at the very early stages of an investigation, after initiation, when the determination under Article 10.7 may be made and authorised precautionary measures taken. The conclusion that the remedial effect of a definitive duty would be undermined by the effect of massive dumped imports can only meaningfully be addressed at the end of the investigation, when it was determined that the imposition of a definitive anti dumping measure is warranted, based on a final determination of dumping, injury and causal link. Panel pointed out that the US regulation set out in 19 CFR 351.206(b) provided that in assessing whether imports of the subject merchandise have been massive, USDOC had to examine the volume and value of the imports, the seasonal trends and share of domestic consumption accounted for by the imports, and establish that imports over a relatively short period of time may be determined based on the knowledge of exporters that an anti dumping proceeding was likely or had been initiated. Panel noted that Article 10.6(ii) of the AD Agreement

provides that injury must be caused by massive dumped imports "which in light of the timing and the volume of the dumped imports and other circumstances (such as rapid build up of inventories) is likely to seriously undermine the remedial effect of the definitive Anti dumping duty to be applied". Therefore the Panel pointed out that the Agreement requires that the likelihood that the remedial effect of the duty will be undermined be assessed in light of timing and volume of the dumped imports. Panel concluded that by requiring that the assessment of massive dumping in a relatively short period be made in light of the exporters' knowledge of an initiation or a likely initiation, USDOC addresses whether massive imports are likely to seriously undermine the remedial effect of the duty.

On the second issue the Panel noted that Article 10.7 does not define sufficient evidence. However, Article 5.3 also reflects this standard, in requiring that the authorities examine the accuracy and adequacy of the evidence provided in the application to determine "whether there is sufficient evidence to justify the initiation of an investigation". The Panel in *Mexico-HFCS*[189] quoted with approval from the Panel's report in *Guatemala- Cement I*[190] case that the type of evidence needed to justify initiation is the same as that needed to make a preliminary or final determination of threat of injury, although the quality and quantity is less. Panel noted that what constitutes "sufficient evidence" must be addressed in light of timing and effect of the measure imposed or determination made. Evidence that is sufficient to warrant initiation of an investigation may not be sufficient to conclude that provisional measures may be imposed. In a similar vein the possible effect of the measure an authority is entitled to take under Article 10.7 of the AD Agreement informs what constitutes sufficient evidence. Whether evidence is sufficient or not cannot be determined in the abstract, it is determined by what the evidence is used for. According to the Panel Article 10.7 allows the authority to take certain necessary measures of a purely conservatory or precautionary kind which serve the purpose of preserving the possibility of later deciding to collect duties retroactively under Article 10.6. Unlike provisional measures, Article 10.7 measures are not primarily intended to prevent injury being caused during the investigation. They are taken in order to make subsequent retroactive duty collection possible as a practical matter. Measures taken under Article 10.7 are not based on evaluation of the same criteria as final measures that may be imposed at the end of the investigation. They are of a different kind-they preserve the possibility of imposing anti dumping duties retroactively, on the basis of a determination additional to the ultimate final determination. Panel noted that its decision was reinforced by the fact that, unlike provisional measures, which can only be imposed after a preliminary affirmative determination of dumping and injury, Article 10.7 measures may be taken at any time

[189] WT/DS132/R Report of the panel adopted on28 January 2000.
[190] WT/DS60/R. Report of the Panel adopted on 19 June 1998.

"after initiating an investigation". According to the Panel in light of the timing and effect of the measures that are taken on the basis of Article 10.7, Article 10.7 requirement of "sufficient evidence that the conditions of Article 10.6 are satisfied" does not require an authority to first make a preliminary affirmative determination within the meaning of Article 7 of the AD Agreement of dumping and consequent injury to a domestic industry. If it were necessary to wait until after such a preliminary determination, there would be no purpose served by Article 10.7 determination. The opportunity to preserve the possibility of applying duties to a period prior to the preliminary determination would be lost, and the provisional measure that could be applied on the basis of the preliminary affirmative determination under Article 7 would prevent further injury during the course of the investigation. Panel further noted that the requirement in Article 7 that provisional measures may not be applied until 60 days after initiation cannot be reconciled with the right under Article 10.6, to apply duties retroactively to 90 days prior to the date on which a provisional measure is imposed, if a preliminary affirmative is a prerequisite to the Article 10.7 measures which preserve the possibility of retroactive application of duties under Article 10.6.

Panel pointed out that Japan did not challenge the initiation of the investigation, which was pursuant to Article 5.3, based on a determination that there was a sufficient evidence of dumping injury and a causal link. According to the Panel given the precautionary nature of the measures that may be taken under Article 10.7, there was no reason to suppose why the same information might not justify a determination of sufficient evidence of dumping and consequent injury in the context of Article 10.6 as required by Article 10.7.

Agreeing with US Panel noted that Article 10.6 itself refers to a determination that an importer knew or should have known that there was dumping that would cause injury. The term injury under the Agreement includes threat of material injury or material retardation of the establishment of an industry, unless otherwise specified. Panel noted that since Article 10.6 does not otherwise specify, therefore sufficient evidence of threat of injury would be enough to justify a determination to apply protective measures under Article 10.7. Panel noted that the role of Article 10.7 in the overall context of the AD Agreement confirms this interpretation. According to the Panel Article 10.7 is aimed at preserving the possibility to impose and collect anti dumping duties retroactively to 90 days prior to the date of application of provisional measures. Therefore, Article 10.7 preserves the option provided in Article 10.6 to impose definitive duties even beyond the date of provisional measures. " Assume *arguando* Article 10.7 were understood to require sufficient evidence of actual material injury. In a

situation in which, at the time Article 10.7 measures are being considered, there is evidence only of threat of material injury, no measures under Article 10.7 could be taken. Assume further that in this same investigation, there was a final determination of actual material injury caused by dumped imports. At that point, it would be impossible to apply definitive anti dumping duties retroactively, even assuming the conditions set out in Article 10.6 were satisfied, as the necessary underlying Article 10.7 measures had not been taken. Thus, in a sense Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the status quo- they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant."[191]

Panel pointed out that the third condition of Article 10.6 of which sufficient evidence is required by Article 10.7 is that the injury be caused by massive dumped imports in a relatively short period of time. Panel noted that USDOC assessed the question whether there were massive dumped imports in a relatively short time by comparing imports during a period of five months preceding and following April 1998. That date was established based on press reports which, USDOC concluded, established that importers, exporters and producers knew or should have known that an anti dumping investigation was likely. USDOC found an increase of imports of hot rolled steel of more than 100% between the period December 1997-April 1998 and May-September 1998. Panel pointed out that the Agreement does not determine what period should be used in order to assess whether there were massive imports over a short period of time. Japan had argued that the latter part of Article 10.6(ii) of the AD Agreement, referring to whether the injury caused by massive imports is likely to seriously undermine the remedial effect of the duty, implies that the period for comparison is the months before and after the initiation of the investigation. Japan had further contended that since the duty cannot be imposed retroactively to the period before the initiation, the remedial effect of the duty cannot be undermined by massive imports before initiation. Disagreeing with Japan's argument Panel noted that Article 10.7 allows for certain necessary measures to be taken at any time after initiation of the investigation. In order to be able to make any determination concerning whether there are massive dumped imports, a comparison of data is necessary. However, if a Member were required to wait until information concerning the volume of imports for some period after initiation were available, this right to act at any time after initiation would be vitiated. By the time the necessary information on import volumes for even a brief period after initiation were available, as a practical matter the possibility to impose final duties retroactively to initiation would be lost, as there would be no Article 10.7 measures in place. Moreover as with the situation if a Member were required to wait the minimum 60 days and make a preliminary determination under Article 7 before applying measures under Article 10.7 the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.

[191] Report of the Panel, Para 7.163

According to the Panel the remedial effect of the definitive duty could be undermined by massive imports that entered the country before the initiation of the investigation but at a time at which it had become clear that an investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed. After considering the information on which USDOC had based its preliminary critical circumstances determination Panel held that an objective and unbiased investigating authority would, on the basis of the evidence before USDOC determine that there was sufficient evidence that the conditions set forth in Article 10.6 were satisfied, and its preliminary critical circumstances determination was therefore consistent with Article 10.7 and hence consistent with Article 10.1.

United States and Japan **appealed** against the Panel decision[192]. Following issues were involved in the appeal:

- Whether responses submitted after the expiry of the given time limit can be disregarded.
- Whether there was violation of Article 9.4
- Whether Arm's length test as applied by the United States Contravened the AD Agreement
- Whether Captive Production Provision contravene the AD Agreement
- Whether the Panel ruling on non-attribution clause contravene the AD Agreement.

On the first issue the United States argued that USDOC was entitled to reject NSC's and NKK's weight conversion factors because they were submitted after the deadlines for questionnaire responses. According to the United States Article 6.8 permits investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data. United States contended that Annex II of the Anti-Dumping Agreement makes clear that investigating authorities must use information supplied by responding exporters provided that three separate requirements are met: the information must be submitted in a timely manner, that is, within applicable deadlines; it must be verifiable; and it must be usable by the authorities without undue difficulty. According to the United States the Panel, wrongly read the first requirement of timeliness out of Article 6.8, thereby preventing investigating authorities, in practice, from establishing and enforcing reasonable deadlines for the submission of information. The United States added that the Panel's interpretation of Article 6.8 ignores Article 6.1.1 of the Anti-Dumping Agreement which specifically provides for the use of pre-established deadlines for questionnaire responses. For the United States, it is decisive that the weight conversion factors were submitted after the relevant deadlines for questionnaire responses, as the deadlines established by USDOC were in themselves reasonable.

[192] WT/DS184/AB/R adopted on 24 July 2001.

Appellate Body held that under Art. 6.1.1 authorities can set up time limits which have to be extended "upon good cause shown" and where granting such an extension is "practicable". Appellate Body further noted that Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using "facts" which are otherwise "available" to the investigating authorities. According to Article 6.8, where the interested parties do not "significantly impede" the investigation, recourse may be had to facts available only if an interested party fails to submit necessary information "within a reasonable period". Appellate Body further noted that neither Article 6.8 nor paragraph 1 of Annex II expressly addresses the question of when the investigating authorities are entitled to reject information submitted by interested parties, as USDOC did in this case. According to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. According to the Appellate Body it follows that if these conditions are met, investigating authorities are not entitled to reject information submitted, when making a determination. One of these conditions is that information must be submitted "in a timely fashion". Appellate Body further held that "timeliness" under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and 6.8, and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Elaborating on the meaning of "reasonable time" and "reasonable period" Appellate Body held a "reasonable period" must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of "reasonableness", and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit. "In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits

fixed by investigating authorities. Instead, Articles 6.1.1 and 6.8, and Annex II of the Anti-Dumping Agreement, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account."[193]

The Appellate Body noted that in this case, the Panel found that USDOC had rejected the weight conversion factors submitted by NSC and NKK for the sole reason that they were submitted after the deadline for submission of the questionnaire responses. According to the Panel, USDOC made no effort to determine whether, notwithstanding the fact that the weight conversion factors were received after the applicable deadlines, they were nevertheless submitted "within a reasonable period"[194]. According to the Appellate Body, the approach taken by the United States case excludes the very possibility, recognised by Articles 6.1.1 and 6.8 and Annex II of the Anti-Dumping Agreement, that USDOC might be required, by these provisions, to extend the time-limits and accept the information submitted, as requested by NSC and NKK. Therefore, the Appellate Body concluded that USDOC acted inconsistently with Article 6.8 of the Anti-Dumping Agreement through its failure to consider whether, in the light of all the facts and circumstances, the weight conversion factors submitted by NSC and NKK were submitted within a reasonable period of time.

On the issue whether KSC, another company failed to co-operate, Appellate Body pointed out that Paragraph 7 of Annex II indicates that a lack of "co-operation" by an interested party may, by virtue of the use made of facts available, lead to a result that is "less favourable" to the interested party than would have been the case had that interested party co-operated but Paragraph 7 of Annex II does not indicate what degree of "cooperation" investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a "less favourable" Appellate Body noted that paragraph 5 of Annex II prohibits investigating authorities from discarding information that is "not ideal in all respects" if the interested party that supplied the information has, nevertheless, acted "to the best of its ability". which suggests that the level of cooperation required of interested parties is a high one - interested parties must act to the "best" of their abilities. Appellate Body , However, pointed out that paragraph 2 of Annex II authorises investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be "maintained" if complying with that request would impose an "unreasonable extra burden " on the interested party, that is, would "entail unreasonable additional cost

[193] Report of the Appellate Body, Para 86.
[194] Panel Report, para. 7.55.

and trouble ". "This provision requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the Anti-Dumping Agreement, as well as the other covered agreements. This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable."[195] "We, therefore, see paragraphs 2 and 5 of Annex II of the Anti-Dumping Agreement as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort - to the "best of their abilities" - from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon absolute standards or impose unreasonable burdens upon those exporters."[196] Appellate Body further pointed to Article 6.13 which provides that "The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable." Appellate Body held that Article 6.13 thus underscores that "cooperation" is a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist interested parties in supplying information. If the investigating authorities fail to "take due account" of genuine "difficulties" experienced by interested parties, and made known to the investigating authorities, they cannot fault the interested parties concerned for a lack of cooperation.

Following this principle Appellate Body noted that the information requested by USDOC was neither known to, nor in the possession of, KSC; related to the prices and costs of CSI; resulted from CSI's own operations and not KSC's; and was known only to, and in the possession only of, CSI. KSC made several attempts to obtain the requested information from CSI. KSC also repeatedly reported to USDOC its difficulties in obtaining information from CSI. However, USDOC took no steps to assist KSC to overcome these difficulties, or to make allowances for the resulting deficiencies in the information supplied. USDOC declined to allow KSC to attend a meeting with petitioners' counsel to discuss the issue. USDOC did not take any steps to secure the necessary information by requesting it directly from CSI. Appellate Body pointed out, Articles 6.1 and 6.11 of the Agreement contemplate precisely such an approach. Appellate Body noted that in contrast to USDOC's reluctance to take any

[195] Report of the Appellate Body, Para 101.
[196] Report of the Appellate Body, Para 102.

available step, pursuant to Article 6.13 of the Anti-Dumping Agreement, to assist KSC in obtaining the information from CSI, USDOC expected KSC to have exhausted all legal means at its disposal to compel CSI to divulge the requested information, within the short time-limits of the investigation. Appellate Body therefore, upheld the Panel's finding that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement in applying "adverse" facts available to KSC's sales to CSI.

2. Violation of Article 9.4: United States next appealed against the ruling of the Panel that the provision and application of section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, was, inconsistent with Article 9.4 of the Anti-Dumping Agreement "insofar as it requires the consideration of margins based in part on facts available in the calculation of the all others rate"; and that, in maintaining section 735(c)(5)(A) following the entry into force of the Anti-Dumping Agreement, the United States acted inconsistently with Article 18.4 of that Agreement as well as with Article XVI:4 of the WTO Agreement.[197] The United States contended that the Panel's interpretation was inconsistent with the text, context, and object and purpose of Article 9.4, and lead to the "absurd" result that all margins which are based, even in very small part, on facts available, must be excluded from the calculation of the "all others" rate.

Appellate Body noted that Article 9.4 applies only in cases where investigating authorities have used "sampling", that is, where investigating authorities have, in accordance with Article 6.10 of the Anti-Dumping Agreement, limited their investigation to a select group of exporters or producers. In such cases, the investigating authorities may determine an anti-dumping duty rate to be applied to those exporters and producers who were not included in the investigated sample. The rate so established is referred to as the "all others" rate. Appellate Body further noted that Article 9.4 does not prescribe any method that WTO Members must use to establish the "all others" rate that is actually applied to exporters or producers that are not investigated. Rather, Article 9.4 simply identifies a maximum limit, or ceiling, which investigating authorities "shall not exceed" in establishing an "all others" rate. Sub-paragraph (i) of Article 9.4 states the general rule that the relevant ceiling is to be established by calculating a "weighted average margin of dumping established" with respect to those exporters or producers who were investigated. But, the Appellate Body pointed out that the clause beginning with "provided that", which follows this sub-paragraph, qualifies this general rule. This qualifying language mandates that, "for the purpose of this paragraph", investigating authorities "shall disregard ", first, zero and *de minimis* margins and, second, "margins established under the

---

[197] Panel Report, para. 7.90.

circumstances referred to in paragraph 8 of Article 6." Thus, in determining the amount of the ceiling for the "all others" rate, Article 9.4 establishes two prohibitions. The first prevents investigating authorities from calculating the "all others" ceiling using zero or *de minimis* margins; while the second precludes investigating authorities from calculating that ceiling using "margins established under the circumstances referred to" in Article 6.8. Appellate Body noted that the United States' appeal is founded on the contention that the phrase "all others" rate, namely "margins established under the circumstances referred to in paragraph 8 of Article 6" should be interpreted to cover only those margins which are calculated entirely on the basis of the facts available, that is, where both components of the calculation of a dumping margin - normal value and export price - are determined exclusively using facts available but the Panel found that the phrase in Article 9.4 excludes, from the calculation of the ceiling for the "all others" rate, any margins which are calculated, even in part, using facts available. Appellate Body pointed out that word "margins", which appears in Article 2.4.2 of the AD Agreement, has been interpreted in *European Communities - Bed Linen*[198] as the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product. This margin reflects a comparison that is based upon examination of all of the relevant home market and export market transactions. Appellate Body further noted that the phrase "margins established under the circumstances referred to in paragraph 8 of Article 6" permits investigating authorities, in certain situations, to reach "preliminary or final determinations on the basis of the facts available". There is no requirement in Article 6.8 that resort to facts available be limited to situations where there is no information whatsoever which can be used to calculate a margin. Thus, the application of Article 6.8, authorizing the use of facts available, is not confined to cases where the entire margin is established using only facts available. Under Article 6.8, investigating authorities are entitled to have recourse to facts available whenever an interested party does not provide some necessary information within a reasonable period, or significantly impedes the investigation. Whenever such a situation exists, investigating authorities may remedy the lack of any necessary information by drawing appropriately from the "facts available" even in situations to cure the lack of a very small amount of information. Regarding the word "established" in the phrase "margins established under the circumstances" Appellate Body disagreed with US interpretation that the word should be read as if it were qualified by the word "entirely", or "exclusively", or "wholly": only where a margin is established "entirely" under the "circumstances" of Article 6.8 must that margin be disregarded. According to the Appellate Body Article 9.4 establishes a prohibition, in calculating the ceiling for the all others rate, on using "margins established under the circumstances

[198] WT/DS141/R Report of the panel adopted on 30 October 2000.

referred to" in Article 6.8. According to the Appellate Body nothing in the text of Article 9.4 supports the United States' argument that the scope of this prohibition should be narrowed so that it would be limited to excluding only margins established "entirely" on the basis of facts available. Appellate Body further pointed out that Article 6.8 applies even in situations where only limited use is made of facts available therefore to read Article 9.4 in the way the argued by United States is to overlook the many situations where Article 6.8 allows a margin to be calculated, in part, using facts available. Appellate Body pointed out that in some circumstances, as set forth in paragraph 7 of Annex II of the Anti-Dumping Agreement, "if an interested party does not co-operate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did co-operate." Article 9.4 seeks to prevent the exporters, who were not asked to co-operate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to "all others" were calculated - due to the failure of investigated parties to supply certain information - using margins "established" even in part on the basis of the facts available.

Thus, Appellate Body upheld Panel's ruling that since section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, required the inclusion of margins established, in part, on the basis of facts available, in the calculation of the "all others" rate, and to the extent that this results in an "all others" rate in excess of the maximum allowable rate under Article 9.4 it was inconsistent with Article 9.4 of the Anti-Dumping Agreement and consequently the United States acted inconsistently with Article 18.4 of that Agreement and with Article XVI:4 of the WTO Agreement. Appellate Body also upheld the Panel's finding that the United States' application of the method set forth in section 735(c)(5)(A) of the Tariff Act of 1930, as amended, to determine the "all others" rate in this case was inconsistent with United States' obligations under the Anti-Dumping Agreement because it was based on a method that included, in the calculation of the "all others" rate, margins established, in part, using facts available.

3. Arm's length test: United States next appealed against the Panel ruling that the United States acted inconsistently with its obligations under Article 2.1of the AD Agreement in applying the arm's length test and by replacing, in its calculation of normal value, the sales excluded under the arm's length test, with downstream sales made by the affiliated parties to independent purchasers. Appellate Body while agreeing with Panel's conclusion gave a slightly different reasoning. According to the Appellate body although the AD Agreement affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not "in the ordinary

course of trade" that discretion is not without limits. In particular the discretion must be exercised in an even-handed way that is fair to all parties affected by an anti dumping investigation. If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect even-handedly the fact that both high and low priced sales between affiliates might not be in the ordinary course of trade. According to the Appellate body under the 99.5% test a great range of low priced sales to affiliates could be excluded from the calculation of normal value because they were deemed not to be in the ordinary course of trade. The effect of the test was to minimise to an extreme degree, possible downward distortion of normal value that might result from sales to affiliates. Appellate body noted that as regards high priced sales between affiliates although the US had argued that it applied a rule to such sales but it was a rule different from the one applied to low priced sales. The rule applied by the US to high priced sales between affiliates was that such sales were excluded from the calculation of normal value only if they were " aberrationally" or "artificially" high (the aberrrationally high test). But the appellate body noted that neither did the USDOC have any standard nor even guidelines for determining the threshold of aberrationally prices or for informing exporters when USDOC might consider prices to be aberrationally high. Moreover, USDOC did not systematically test for aberrationally high priced sales. As the system functioned the exporters had to request the exclusion of individual, high priced sales and the exporters bore the burden of deminstrating that in the circumstances, the price is aberrationally high. Appellate body noted that under the aberrationally high test a far smaller range of high priced sales between affiliates could be excluded as not in the ordinary course of trade, than the 99.5 % test excluded for low priced sales. With low priced transactions, which were below the very narrow 0.5% downward range were excluded whereas only abberrationally high prices were excluded. USDOC systematically tested for low- priced sales and it assumed that sales below the 0.5% downward range were not in the ordinary course of trade." Under the practice applied by USDOC exporters had no right to demonstrate that such sales were in fact, in the ordinary course of trade. By contrast high priced sales were automatically included unless the exporter demonstrated that the sales price is aberrationally high.

Appellate Body further noted that exporters would rarely be appraised of the threshold figure, applied by USDOC, for determining whether prices were high therefore it would be extremely difficult for exporters to know which of their sales are aberrationally high. Therefore the burden placed on exporters to demonstrate that prices were aberrtationally high was therefore very difficult to satisfy. Appellate body pointed out that under Art. 2.1 it is for the investigating authorities and not exporters to ensure that the calculation of normal value is based on sales made in the ordinary course of trade as they are responsible for making a determination of dumping. " It therefore seems open to

serious doubt whether USDOC, under the aberrationally high test can place on exporters the burden of demonstrating that prices were aberrationally high.

Therefore the Appellate Body held that there was a lack of even-handedness in the two tests applied by the US, in the case to establish whether sales made to affiliates were in the ordinary course of trade. The combined application of the two rules operated systematically to raise normal value, through automatic exclusion of marginally low priced sales, coupled with the automatic inclusion of all high priced sales except those proved upon request to be aberrationally high priced. The application of the two tests therefore disadvantaged exporters. Therefore the Appellate body upheld the panel's ruling that the application of the 99.5% test "does not rest on a permissible interpretation of the term sales in the ordinary course of trade."

But the Appellate Body reversed the Panel's findings with regard to downstream sales. Appellate body held that the issue raised concerned the calculation of normal value under Art. 2.1 of the AD Agreement and not Art. 2.2 of that Agreement. Appellate Body pointed out that the text of Art. 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be in the ordinary course of trade; second it must be of the like product third, the product must be destined for consumption in the exporting country; and fourth the price must be comparable. Appellate Body pointed out that the text of Art. 2.1 is silent as to who the parties to the relevant sales transaction should be. Thus, Art, 2.1 does not expressly mandate that the sale be made by the exporter when a margin of dumping is being calculated. Nor does Art. 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliate of the exporter and independent buyers. Therefore the Appellate Body held that if all the explicit conditions in Art. 2.1 of the AD Agreement are satisfied the identity of the seller of the like product is not a ground for precluding the use of downstream sales transaction when calculating normal value. Appellate Body clarified that it does not suggest that the identity of the seller was irrelevant in calculating normal value under Art. 2.1 of the AD Agreement. To assure that prices are " comparable" the AD Agreement provides a mechanism, in Art. 2.4 which allows investigating authorities to take full account of the fact as appropriate that the sale was not made by the exporter or producer itself, but was made by another party. Art. 2.4 requires that a fair comparison be made between export price and normal value. This comparison "shall be made at the same level of trade, normally at the ex-factory level". In making a "fair comparison" Art. 2.4 mandates that due account be taken of differences in the " levels of trade" at which normal value and export price are calculated. The use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price.

Therefore the Appellate Body held that when investigating authorities decide to use downstream sales to independent buyers to calculate normal value under a particular duty to ensure the fairness of the comparison because it is more than likely that downstream sales will contain additional price components which could distort the comparison.[199]

5. Captive Production Provision: Japan appealed against the Panel ruling that the captive production provision was not, on its face, inconsistent with Articles 3 and 4 of the Anti-Dumping Agreement and that the captive production provision was applied consistently with Articles 3.1, 3.4, 3.5, 3.6, and 4.1 of the Anti-Dumping Agreement. Appellate Body noted that investigating authorities are directed to investigate and examine imports in relation to the "domestic industry", the "domestic market for like products" and "domestic producers of [like] products". The investigation and examination must focus on the totality of the "domestic industry" and not simply on one part, sector or segment of the domestic industry. Appellate Body further noted that the thrust of the investigating authorities' obligation, in Article 3.1, lies in the requirement that they base their determination on "positive evidence" and conduct an "objective examination". According to the Appellate Body, the term "positive evidence" relates to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible. According to the Appellate Body The term "objective examination" aims at a different aspect of the investigating authorities' determination. While the term "positive evidence" focuses on the facts underpinning and justifying the injury determination, the term "objective examination" is concerned with the investigative process itself. The word "examination" relates to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word "objective", which qualifies the word "examination", indicates essentially that the "examination" process must conform to the dictates of the basic principles of good faith and fundamental fairness. Appellate Body further noted that the obligation of evaluation imposed on investigating authorities, by Article 3.4, is not confined to the listed factors, but extends to "all relevant economic factors". In the same way it was perfectly

[199] Appellate Body pointed out that its reading of Art. 2.1 of the AD Agreement was not altered by Art. 6.10 or 2.3 of the AD Agreement. Article 6.10 of the Agreement provides that the investigating authorities " shall as a rule, determine an individual margin of dumping for each known exporter or producer concerned." The downstream sales price which may be used to calculate normal value do enable a margin of dumping to be calculated for the "like product produced by a particular exporter. The downstream sale used involves an affiliate of the exporter concerned and the sale of the " like product" produced by that exporter by making the allowances required under Art. 2.4 of the AD Agreement, the investigating authorities should in effect arrive at a price which corresponds to the ex-factory price of the like product for the specific exporter concerned as required by that provision. Art. 2.3 expressly provides for the use of downstream sales in constructing export price, when " the export price is unreliable because of association". AB held that irrespective of the terms of Art. 2.3 it was satisfied that Art. 2.1 does not preclude the use of downstream sales in the ordinary course of trade in calculating normal value.

compatible with Article 3.4 for investigating authorities to undertake, or for a Member to require its investigating authorities to undertake, an evaluation of particular parts, sectors or segments within a domestic industry. Such a sectoral analysis may be highly pertinent, from an economic perspective, in assessing the state of an industry as a whole. Articles 3.1 and 3.4 indicate that the investigating authorities must determine, objectively, and on the basis of positive evidence, the importance to be attached to each potentially relevant factor and the weight to be attached to it. In every investigation, this determination turns on the "bearing" that the relevant factors have "on the state of the [domestic] industry". According to the Appellate Body nothing in the Anti-Dumping Agreement prevents the United States from directing its investigating authorities to evaluate the potential relevance of the structure of a domestic industry, and, in particular, the importance to that industry, as a whole, of the fact that the production of certain domestic producers is captively consumed, while the production of other domestic producers competes directly with imports in the merchant market. The captive production provision does not, by itself, require an exclusive focus on the merchant market, nor does it compel a selective approach to the analysis of the merchant market that excludes an equivalent examination of the captive market. The provision also does not itself mandate that particular weight be accorded to data pertaining to the merchant market. The provision allows the USITC to examine the merchant market and the captive market, with the same degree of care and attention, as part of a broader examination of the domestic industry as a whole. The provision does not alter the requirement in the same statute for the USITC to reach a final determination concerning the domestic industry as a whole. The captive production provision allows investigating authorities to take account of the need to ensure an "objective examination", and of the need to evaluate, and make a determination concerning, the domestic industry as a whole. Therefore the Appellate Body for different reasons upheld the Panel's finding that the 'captive production' provision, was not [on its face] inconsistent with Articles [3 and 4] of the AD Agreement.

Regarding the application of the provision Appellate Body noted that the USITC Report contained data for, the merchant market and for the overall market. The USITC's injury analysis also contained reference to data for the merchant market and for the overall market. In particular, in its examination of market share and of each of the financial performance indicators, the USITC mentioned data pertaining to the merchant market and the overall market. But while the USITC Report included frequent reference to data for the merchant market, it did not contain, describe, or otherwise refer to, data for the captive market. At the oral hearing, the United States stated that the examination of the data for the captive market was subsumed within the examination of the domestic market as a whole, even though the merchant market was the subject of separate and express examination. Appellate

Body noted that although the aggregate data for the industry as a whole included data for every part of the industry but without further analysis to disaggregate this data, the data relating to the captive market remained unknown. The mere fact that the aggregate data for the industry as a whole included data for every part of the industry did not overcome the fact that the USITC Report disclosed no analysis of the significance of the data for the captive market. Thus, there was no explanation by the USITC of the state of the part of the domestic industry that was shielded from direct competition with imports, nor any explanation of the significance of that shielding for the domestic industry as a whole. Further, the USITC Report did not exhibit any "comparative analysis" or "juxtaposition" of the merchant and the captive markets which, the United States said, was contemplated by the captive production provision. But in the examination provided of the merchant market, there was an explanation of the poor state of that part of the domestic industry which is not shielded from the effects of imports. According to the Appellate Body in the absence of a satisfactory explanation, Article 3.1 of the Anti-Dumping Agreement does not entitle investigating authorities to conduct a selective examination of one part of a domestic industry. Where one part of an industry is the subject of separate examination, the other parts should also be examined in like manner. The USITC examined the merchant market, without also examining the captive market in like or comparable manner, and that the USITC provided no adequate explanation for its failure to do so. Therefore the Appellate Body reversed the Panel ruling that the application of the provision regarding the captive production was not inconsistent with United States' obligation under Article 3.1 and 3.4 the AD Agreement.

6. The requirement of causal link: Japan next appealed against the Panel ruling that US did not act against is obligations under Article 3.5 of the AD Agreement. According to Japan the Panel erred because it did not correctly interpret the non-attribution language in Article 3.5 of the Anti-Dumping Agreement because that provision means that the effects of the "other" causal factors must be "separated" and "distinguished", and that their "bearing" on the domestic industry must be assessed. Appellate Body noted that the non-attribution language in Article 3.5 of the Anti-Dumping Agreement applies solely in situations where dumped imports and other known factors are causing injury to the domestic industry at the same time. In order that investigating authorities, applying Article 3.5, are able to ensure that the injurious effects of the other known factors are not "attributed" to dumped imports, they must appropriately assess the injurious effects of those other factors. Logically, such an assessment must involve separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports. Appellate Body further noted that the particular methods and approaches by which WTO Members choose to carry out the process of separating and

distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement. What the Agreement requires is simply that the obligations in Article 3.5 be respected when a determination of injury is made. Appellate Body pointed out that by following the panel in *United States - Atlantic Salmon Anti-Dumping Duties*, the Panel, in effect, took the view that the USITC was not required to separate and distinguish the injurious effects of the other factors from the injurious effects of dumped imports, and that the nature and extent of the injurious effects of the other known factors need not be identified at all. According to the Appellate Body this is precisely what the non-attribution language in Article 3.5 of the Anti-Dumping Agreement requires, in order to ensure that determinations regarding dumped imports are not based on mere assumptions about the effects of those imports, as distinguished from the effects of the other factors. Therefore the Appellate Body concluded that the Panel erred in its interpretation of the non-attribution language in Article 3.5 of the Anti-Dumping Agreement by finding that this language does not require the investigating authorities to separate and distinguish the injurious effects of the other known causal factors from the injurious effects of the dumped imports and in particular the Panel erred by following the interpretative approach set forth by the panel in *United States - Atlantic Salmon Anti-Dumping Duties.*

(continued)

COMMENT ON THE CASE

The most important aspect of this case is Appellate Body's regarding non-attributive language in Article 3.5. Appellate Body overruled Panel decision in *Norway-Salmon case*[200] that domestic industry need not identify other causes of injury in determining whether domestic industry is injured by the dumped imports. In the *Norway-Salmon case* Panel held that investigating authority need not establish that dumped imports were the only cause of injury, it is enough that they were one of the causes of injury. In the present case while the Panel followed the *Norway-Salmon* decision, Appellate Body rightly overruled it. The whole purpose of causal link is to establish that injury is caused by dumping. Other causes of injury have to be identified in determination of injury so that they are not attributed to dumped imports.

However the Panel ruling on Article 10.7 (which was not an issue in the appeal) took into account the interest of the importing country

ARGENTINA- AD INVESTIGATION OF CERAMIC TILES FROM ITALY[201]

The dispute concerned the imposition of definitive anti-dumping measures by the Argentine Ministry of the Economy on imports of ceramic floor tiles from Italy. The Dirección de Competencia Desleal ("DCD" – Directorate of Unfair Trade) was responsible conducting investigation and making determination. Assopiastrelle, the association of Italian producers of ceramic tiles, requested the DCD to limit the calculation of individual dumping margins to four or five exporters accounting for around 70 per cent of the exports of the subject product from Italy to Argentina. The DCD accepted this request. Four Italian exporters filed responses to the investigation questionnaire: Ceramica Bismantova "(Bismantova"), Ceramiche Casalgrande ("Casalgrande"), Ceramiche Caesar ("Caesar"), and Marazzi Ceramiche ("Marazzi"). On 24 March 1999, the DCD issued an affirmative preliminary determination ("Preliminary Dumping Determination"). In that determination, the DCD disregarded the questionnaire replies submitted by the above-mentioned exporters. The DCD proceeded to determine the dumping margin on the basis of the information available on the record, other than that presented

[200] ADP/87 . Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994

[201] WT/DS189/R Report of the Panel adopted on 28 September 2001

by the exporters.[202] As the DCD applied the same set of "facts available" to the four exporters concerned, they all were assessed the same dumping margin. On 23 September 1999, the DCD issued an affirmative final determination ("Final Dumping Determination"). In this determination, the DCD relied predominantly on the information available on the record, other than that presented by the exporters.[203] As the DCD applied the same set of "facts available" to the four exporters concerned, an identical dumping margin was assessed for all of them. The Ministry of the Economy, based upon the affirmative final determination regarding the existence of dumping issued by the DCD and the affirmative final determination regarding the existence of injury and causality issued by the CNCE imposed definitive anti-dumping measures on imports of ceramic tiles originating in Italy for a period of three years. Such measures took the form of specific anti-dumping duties to be collected as the absolute difference between the FOB price invoiced in any one shipment and a designated "minimum export price" also fixed in FOB terms, whenever the former price is lower than the latter. Each of the three size categories used for the dumping margin calculations was assigned its own "minimum export price".

The EC requested the Panel to find that the anti-dumping measures applied by Argentina with respect to imports of *porcellanato* originating in Italy were inconsistent with Article 6.8 and Annex II, and Articles 6.10, 2.4, and 6.9 of the AD Agreement.

Specifically following issues were involved in this case:

- Whether Argentina violated AD Agreement in disregarding the information provided by the exporters.
- Whether Argentina violated the AD Agreement by failing to disclose essential facts under consideration.
- What is the purpose of confidential information and whether EC failed to provide non-confidential summary.
- Whether Argentina violated the AD Agreement by failing to calculate individual margin of dumping for each exporter.
- Whether Argentina violated AD Agreement by failing to make due allowance for differences in physical characteristics of the product.

1. DISREGARD OF INFORMATION PROVIDED BY THE EXPORTER

EC claimed that contrary to Article 6.8 the DCD disregarded the information concerning normal

[202] The DCD calculated three separate dumping margins for the subject product, on account of three different size-categories: tiles of 20 cm by 20 cm, tiles of 30 cm by 30 cm, and tiles of 40 cm by 40 cm

value and export price provided by the four Italian exporters included in the sample and instead relied on information from other sources such as the petitioner and importers. Even though all four exporters included in the sample provided complete and timely responses to the questionnaires and agreed to the verification of the information submitted. The EC contended that paragraph 7 of Annex II explicitly recognises the hierarchy between primary and secondary sources. The EC argued that the primary source of information was the normal value and export price information supplied by the exporters concerned, and only under the specific circumstances set out in Article 6.8 is an authority allowed to resort to secondary source information. The EC also claimed that the Argentine authority never informed the exporters that their responses had been rejected, nor did it explain why the information was rejected, as required by paragraph 6 of Annex II of the AD Agreement.

Argentina submitted that the DCD was forced to resort to the use of facts available since the exporters significantly impeded the investigation and failed to provide the necessary information within a reasonable period, thereby *de facto* refusing access to necessary information. Argentina claimed that all three of the conditions of Article 6.8 of the AD Agreement applied. Argentina advanced four bases for its decision to disregard certain information submitted by the exporters and to resort to the use of facts available.

1. The exporters failed to provide complete non-confidential summaries of confidential information submitted by them, as required by Article 6.5.1 of the AD Agreement.
2. The exporters failed to provide sufficient documentation in support of the information provided in their questionnaire responses.
3. The exporters failed to comply with the formal requirements of the questionnaire, such as requirements to translate materials into Spanish and to express value in US$.
4. The exporters failed to provide requested information within a reasonable period[204].

The Panel pointed out that a basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination. This obligation is set forth in Article 6.1 of the AD Agreement which requires that

[203] As in the preliminary determination, the DCD calculated the dumping margin by size category.

[204] Argentina submitted that the DCD informed the exporters on several occasions that they had not provided the necessary information. Argentina points to the DCD's letter of 30 April 1999 in which additional elements of proof and additional public information were requested. A further letter was sent to the exporters on 22 June 1999 with a request to withdraw the request for confidential treatment of certain information or to provide more detailed summaries. A third and final letter of a similar nature was sent on 3 August 1999 with regard to cost of production information. Argentina claimed that these letters were warnings that the information provided was not sufficient.

interested parties be given notice of the information which the authorities require.[205] Thus it followed that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit. Panel further noted that this consideration was particularly relevant to the question of whether an authority is justified in resorting to the use of facts available under Article 6.8 of the AD Agreement. Paragraph 1 of Annex II of the AD Agreement on the "Use of Best Information Available in Terms of Paragraph 8 of Article 6" reiterates the obligation of Article 6.1.

Panel noted that the documentary evidence in the case had been required in order to verify the information supplied by the exporters in their questionnaire replies since the DCD decided not to conduct any on-the-spot verification in Italy. Panel held that if no on-the-spot verification was going to take place but certain documents were required for verification purposes, the authorities should inform the exporters of the nature of the information for which they required such evidence and of any further documents they required. After examining the requests to provide supporting documentation in the questionnaire on which Argentina based its argument the Panel found that the requests were very vague and general in nature and were made in the general introductory part of the questionnaire setting out the goals and objectives of the questionnaire and in the section entitled "General Instructions".

At the time of the preliminary determination, no supporting documentation (e.g. invoices, orders, price lists) had been submitted by the exporters. The EC stated that during the meeting with the case-handlers, the exporters were for the first time informed that the DCD was not going to conduct an on-the-spot verification. At that meeting, the EC asserted, the exporters or at least the two major exporters, Casalgrande and Bismantova, were requested to provide copies of the invoices covering an important number of sales. The EC argued that, in response to this request, the exporters concerned submitted copies of invoices covering approximately 50 per cent of the sales in Italy and to Argentina and third countries. Argentina, however, submitted that the DCD, in its final determination, found that the supporting documentation provided by the four exporting companies with regard to the information supplied concerning domestic sales of the product concerned only covered about 1.92 per cent of the total volume of domestic sales made by these four sampled exporters. After the submission of the invoices by the two largest Italian exporters, the DCD did not make any further request for additional supporting documentation.

The Panel pointed out that any clear request for supporting documentation was not made to the exporters and independent of any clear request, an interested party is not required to provide any particular

[205] "All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation

number of documents to support the information supplied. The case-handlers requested at least some exporters to provide certain supporting documentation. The Panel therefore rejected Argentina's argument that the exporters significantly impeded the investigation or refused access to necessary information by not providing more supporting documentation and that the DCD was not justified in disregarding in large part the information supplied by the exporters for this reason.
Panel pointed out that paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information. In this case, the exporters were never informed that in the absence of a certain number of supporting documents their information was going to be rejected, much less were they provided an opportunity to offer further explanations. Nor were the reasons for the rejection of such evidence or information given in any published determinations. Therefore the Panel held that the DCD also acted inconsistently with paragraph 6 of Annex II of the AD Agreement.

Argentina argued that the exporters failed to provide the requested information within a reasonable period. Argentina claimed that the late submission of information towards the end of the investigation constituted a failure to provide the information within a reasonable period which significantly impeded the investigation and entitled the DCD to resort to facts available under Article 6.8 of the AD Agreement.

The EC submitted that the exporters supplied the information in a timely manner. According to the EC, additional information was submitted late into the investigation because of the repeated requests for additional public information from the DCD. The EC stressed that in fact no new factual data was submitted, but rather confidential information provided at the time of the questionnaire response was declassified and supplied to the DCD together with supporting documentary evidence that was requested.

Panel noted that the exporters requested an extension of the deadline for the submission of information on two occasions only. Both times the authority granted the request. Therefore Panel after evaluation of evidence concluded that all of the information was submitted in a timely manner. Additional requests for information implied that additional information, consisting of non-confidential summaries as well as supporting documentation, would be submitted long after the deadline for the

in question".

submission of the questionnaire replies. In these circumstances, the exporters were not responsible for the additional requests for information. The Panel therefore concluded that the DCD was not justified in disregarding the exporter's information under Article 6.8 on this basis. Panel pointed out that Article 6.8 read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information. Since the DCD never informed the exporters that their information would be rejected for having failed to provide the information within a reasonable period, much less provided an opportunity to provide further explanations, nor were the reasons for the rejection of such evidence or information given in any published determinations, therefore the Panel held that the DCD acted inconsistently with paragraph 6 of Annex II of the AD Agreement. Argentina claimed that certain exporters provided information in Italian lire and not in US$ as requested by the questionnaire. Argentina further submitted that three of the four exporters[206] failed to provide a Spanish translation of their balance sheets while the exporters were clearly informed both in the general instructions of the questionnaire and in the follow-up letter of 30 April 1999 that all their information needed to be translated into Spanish in order for it to be taken into consideration. Argentina submitted that the unjustified refusals to provide the information in US$ and properly translated into Spanish significantly impeded the investigation. According to Argentina two exporters, Caesar and Marazzi, refused to provide the requested information with regard to exports to third countries (Annex IX of the questionnaire), and that Marazzi also failed to provide any information with regard to the cost structure for the exported goods (Annex XI). Argentina submitted that these firms thus refused to provide access to necessary information.

The EC contended that the exporters complied with all the formal requirements of the questionnaire. Although the EC acknowledged that certain individual exporters did not provide a translation of their balance sheets, but argued that this constituted a minor omission which could not have justified disregarding all of the exporters' information.

The Panel noted that the facts on the record show that in fact only one exporting company, Bismantova, provided certain information in one annex of the questionnaire reply in Italian lire rather than in US$. This exporting company provided the relevant exchange rates together with the information. Panel held that the fact that this company did not provide the information directly in US$ as required, according to the questionnaire's instructions, did not amount to significantly impeding the investigation, nor did it constitute a failure to provide necessary information. Panel accepted that in

[206] Marazzi was the only exporter that did provide such a translation of its balance sheet.

general it is important that translations be provided whenever requested, but noted that, the facts of the case indicated that what was not translated were certain lines of the balance sheets of three of the four exporting companies and the absence of translation of a balance sheet did not significantly impede the investigation. The translation which was provided by one of the exporting companies of its balance sheet was accepted while it contained only a minor translation from Italian into Spanish of two terms of the balance sheet. Therefore the Panel concluded that the DCD was not justified in disregarding the exporter's information because of a minor omission on the part of the exporters to translate certain parts of the balance sheets, as it did not significantly impede the investigation.

With regard to the two exporters which did not provide information under certain of the questionnaire's annexes, Panel pointed that the questionnaire explicitly allowed the exporters not to provide such information if there existed sufficient domestic sales made in the ordinary course of trade. The two exporting firms concerned, Caesar and Marazzi, expressly relied on this possibility. Panel found that Marazzi did not refuse to provide information under Annex XI either (cost of production for the subject product when exported), but rather it replied that the costs for domestically sold and exported products did not differ, except for differences in selling expenses. Therefore based on the facts of the case, Panel held that an unbiased and objective evaluation of these facts would have led the authority to the conclusion that these omissions did not amount to a refusal to provide necessary information, nor that the exporters concerned could be considered to have significantly impeded the investigation.

Panel therefore held that the DCD was not justified in disregarding the exporter's information under Article 6.8 of the AD Agreement for reasons relating to the failure to comply with certain formal requirements.

2. FAILURE TO DISCLOSE ESSENTIAL FACTS

EC claimed that Argentina failed to disclose the essential facts under consideration which formed the basis for the decision whether to apply definitive measures as required by Article 6.9 of the AD Agreement. According to the EC, Argentina merely invited interested parties to examine the public file. The EC claimed that the public file of an anti-dumping investigation essentially consists of often contradictory questionnaire responses and allegations of different interested parties and thus clearly does not identify the "essential facts" on which the decision to impose a measure is based. The EC argued that in this case the final dumping determination (unlike the final injury determination) was not available in the public file. Nor did the public file contain any other document prepared by the DCD which identified the "essential facts" that would form the basis for the final dumping determination.

Argentina argued that what is important is that the result envisaged by Article 6.9 is achieved, not how this result was achieved. Argentina claimed that the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices has discussed the kind of information which needs to be disclosed under Article 6.9. Argentina submitted that the fact that the Ad Hoc Group has not yet issued a recommendation on this matter demonstrates the diversity of criteria used by the Members in complying with this requirement. Argentina contended that in any case the exporters did not suffer any injury from this alleged lack of notification of the essential facts

Panel agreed with Argentina that the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways and Article 6.9 of the AD Agreement does not prescribe the manner in which the authority is to comply with this disclosure obligation.[207] Panel pointed out that under Article 6.9, these facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration.

Panel, however, concluded that the exporters could not be aware simply by reviewing the complete record of the investigation, that evidence submitted by petitioners and derived from secondary sources, rather than facts submitted by the exporters, would, despite the responses of the exporters to the DCD's information requests, form the primary basis for the determination of the existence and extent of dumping. The DCD thus failed to put the exporters on notice of an essential fact under consideration. Panel held that the DCD did not, by referring the exporters to the complete file of the investigation, fulfil its obligation under Article 6.9 to inform the exporters of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures".

3. CONFIDENTIAL INFORMATION

On the issue of confidentiality of information and non-confidential summaries the Panel was to decide two issues:

- Whether as argued by Argentina the authorities could not base their findings on confidential information?
- Whether EC had failed to provide requisite information?

(a). Whether authorities could base their findings on confidential information: On the first issue

Argentina argued that in order to reach objective and valid conclusions, an investigating authority may base its determination on confidential information only if a sufficiently detailed summary of this information is provided in accordance with Article 6.5.1 of the AD Agreement. According to Argentina, the exporters failed to provide complete non-confidential summaries. According to Argentina, by failing to provide sufficiently detailed non-confidential summaries, the exporters withheld necessary information and significantly impeded the investigation, and the DCD was therefore allowed under Article 6.8 to resort to facts available.

The EC contended that the exporters fully co-operated with the investigating authority and, instead of merely providing a detailed non-confidential summary, even disclosed all of the relevant confidential information. EC did not accept Argentina's argument that in the absence of a detailed non-confidential summary the authorities are not to rely on the confidential information submitted.

Panel held that the presence in the AD Agreement of a requirement to protect confidential information indicates that investigating authorities might need to rely on such information in making the determinations required under the AD Agreement. Panel pointed out that it would be contradictory to suggest that the AD Agreement creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice.

Panel noted that while for the purpose of transparency, Article 6.5.1 obliges an authority to require the parties providing confidential information to furnish non-confidential summaries which shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. "We consider that this is an important element of the AD Agreement which reflects the balance struck by the Agreement between the need to protect the confidentiality of certain information, on the one hand, and the need to ensure that all parties have a full opportunity to defend their interests, on the other."[208] But according to the Panel there was nothing in Article 6.5.1, nor elsewhere in Article 6.5, that authorises a Member to disregard confidential information solely on the basis that the non-confidential summary of that information contains insufficient detail to permit authorities to calculate normal value, export price and the margin of dumping.

---

[207]"The authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests".

[208] Report of the Panel para 6. 38

In the facts of the case, Panel noted that, even if the DCD had been entitled under Article 6.8 to resort to the facts available in a case where the exporters failed to declassify confidential information concerning normal value and export price or to provide adequate non-confidential summaries thereof, there was no factual basis on the record for Argentina's assertion that the exporters did not respond fully to the DCD's request for the declassification of the confidential information and failed to provide adequate non-confidential summaries thereof.

4. FAILURE TO CALCULATE INDIVIDUAL MARGIN OF DUMPING FOR EACH EXPORTER

EC claimed that the DCD did not determine an individual margin of dumping *for each of the four exporters* included in the sample, as required by Article 6.10 of the AD Agreement, but rather calculated dumping *margins for each of the three size* categories of *porcellanato* and imposed the same duty rate on all imports irrespective of the exporter concerned. The EC argued that Article 6.10 of the AD Agreement requires that as a rule an individual margin be established for each exporter or, in the case this is not practicable because of the large number of exporters for example, an individual margin is to be established for each exporter included in the sample. The EC also pointed to Article 9.4 in support of its argument that an individual margin of dumping should have been established for each of the four Italian exporters that formed part of the sample.[209]

Argentina argued that the information provided by the four exporters included in the sample was not sufficient to allow an individual dumping margin to be established for each exporter. Argentina submitted that the EC wrongly presupposed that it was possible to determine an individual margin for all four exporters included in the sample. Argentina pointed out that the exporters themselves through their representative organisation, Assopiastrelle, requested that the investigation be conducted on the basis of a sample to facilitate the task of the authority but it proved impossible for the DCD to determine an individual dumping margin for each of the four exporters. According to Argentina, two producers, Caesar and Marazzi, did not provide price information for tiles in the size categories 30 x 30 cm and 20 x 20 cm. Argentina further alleged that one exporter, Marazzi, did not submit

[209] Article 9.4 of the AD Agreement relates to the determination of an anti-dumping duty for those exporters not included in the sample, which shall not exceed "the weighted average margin of dumping established with respect to the selected exporters or producers". The EC argued that this suggests that for those exporters included in the sample individual margins shall be established which may then be averaged in order to determine the rate for the exporters outside the sample. According to EC Article 9.4 and its reference to weighted averages and *de minimis* margins presupposes the determination of individual margins for exporters included in the sample.

information with regard to the third size category (40 x 40 cm) either.[210] A third producer, Bismantova, reported that 56 per cent of its domestic sales for tiles in the category 30 x 30 cm and up to 93 per cent of the domestic sales in the 40 x 40 cm category were made to a related company, Rondine.

According to Argentina, the requirement to determine an individual dumping margin had to be read in light of the requirement under Article 2 of the AD Agreement to determine a dumping margin for the product subject to the investigation. Argentina submitted that the product under investigation was ceramic tiles in all their sizes, and the DCD from the outset calculated a dumping margin for each of the sizes that together formed the subject product (20 x 20 cm, 30 x 30 cm, 40 x 40 cm). According to Argentina, the exporters accepted this segmentation as they replied to the questionnaires without any objections in this respect. However, the exporters included in the sample failed to provide the necessary documents that would have allowed the DCD to determine such product/size specific margins. Argentina asserted that the DCD was therefore justified in looking for an alternative to supplement the missing necessary information.

Panel noted that

1. the first sentence of Article 6.10 of the AD Agreement sets forth a general rule that the authorities determine an individual margin of dumping for each known exporter or producer of the product under investigation.
2. the second sentence of Article 6.10 permits an investigating authority to deviate from the general rule by permitting the investigating authorities to "limit their examination either to a reasonable number of interested parties or products by using samples . . . or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated", in cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable.
3. Article 9.4 provides that, where the authorities have limited their examination in accordance with the second sentence of Article 6.10, the anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed an amount calculated on the basis of the margins of dumping for exporters or producers that were included in the examination.
4. Finally, in cases where the authorities have limited their examination under Article 6.10, subparagraph 2 of Article 6.10 provides that the authorities shall nevertheless determine an individual margin of dumping for any exporter not initially selected who submits the necessary information in

[210] Argentina pointed out that the exporters replied to the questionnaires without making any objection concerning the use of size as the determining parameter and they should therefore have provided information with regard to all size categories, as

time for that information to be considered, except where the number of exporters is so large that individual examination would be unduly burdensome to the authorities and prevent timely completion of the investigation.

Panel held that the general rule in the first sentence of Article 6.10, that individual margins of dumping be determined for each known exporter or producer of the product under investigation, was fully applicable to exporters who were selected for examination under the second sentence of Article 6.10. While the second sentence of Article 6.10 allowed an investigating authority to limit its examination to certain exporters or producers, it did not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that were examined. To the contrary, Article 9.4 provides that where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that are not examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 did not provide any methodology for determining the level of duties applicable to exporters or producers that were examined confirmed that the general rule requiring individual margins remained applicable to those exporters or producers. Panel noted that this conclusion was confirmed by Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. Even if producers not included in the original sample were entitled to an individual margin calculation, then it followed that producers that were included in the original sample were so entitled as well.[211]

Regarding Argentina's argument that for substantive reasons relating to the reliability of the information as well as the absence of information with regard to sales by certain exporters included in the sample, it was not possible for the DCD to determine a margin of dumping for each exporter individually, Panel noted that there was no explanation in the DCD's Final Determination or in any other document on the record as to why, it was not possible to determine an individual margin for each exporter that was investigated. Therefore Panel held that the DCD failed to provide any evaluation of

---

requested.

[211] The Panel in *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen")* stated:

> "the fact that Article 2.4.2 refers to the existence of margins of dumping in the plural is a general statement, taking account of the fact that, as is made clear in Article 6.10 and 9 of the AD Agreement, individual dumping margins are determined for each producer or exporter under investigation, and for each product under investigation". Report, *EC – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India ("EC – Bed Linen") EC – Bed Linen*, WT/DS141/R, adopted as reversed in part by WT/DS141/AB/R, 12 March 2001, para. 6.118.

the facts on the record that could have formed the basis for such a conclusion. Panel made the following observations in this regard:

- Panel observed that neither the DCD in its Final Determination nor Argentina in its submissions to the Panel provided any reasons why, with regard to the information provided by one exporter, Casalgrande, for which no discrepancies were noted, it was not possible to determine an individual margin of dumping.
- Panel noted that with regard to the other three exporters included in the sample, Bismantova, Caesar and Marazzi there were no valid reasons for not determining an individual margin of dumping under Article 6.10 for each of these companies for the product subject to the investigation. Argentina argued that in the case of Bismantova it was not possible to determine an individual margin of dumping because, for a certain size of tiles, up to 93 per cent of its domestic sales were made to a related party. Caesar, as the EC acknowledged, only reported domestic sales information concerning tiles of the size 40 x 40 cm, and did not provide any data on domestic sales of tiles of the two remaining size categories, 20 x 20 cm and 30 x 30 cm. Argentina submitted that it was for this reason that the DCD could not determine an exporter-specific margin of dumping for this exporter. Panel noted that while it might have been the case that Bismantova made an important part of its sales to a related party, this should not have impeded the DCD from determining an individual margin of dumping for this exporter. According to the Panel, the issue of domestic sales to a related party may lead, in certain cases, to the use of a constructed normal value or third country export price under Article 2 of the AD Agreement. "The question of sufficient domestic sales in the ordinary course of trade does not, in our view, stand in the way of an individual margin of dumping determination under Article 6.10 of the AD Agreement, be this based on normal value information consisting of prices of sales made in the home market, on third country export prices, or a construction of the normal value as defined in Article 2.2 of the AD Agreement.[212] The basis of the normal value determination has no bearing on the ability to calculate an individual dumping margin for the producer whose normal value is in question."[213]
- With regard to the two other exporting firms, Caesar and Marazzi, Panel noted that the facts on the record showed that Caesar only exported tiles of the size 40 x 40 cm to Argentina and therefore only reported similar size domestic sales. In accordance with the DCD's own analysis concerning the

---

[212] "We believe that the provisions of Article 2 concerning the determination of dumping and Article 6.8 AD Agreement concerning facts available are intended to allow the investigating authority to complete the data with regard to a particular exporter in order to determine a dumping margin in case the information provided is unreliable or necessary information is simply not provided. It is precisely because of Articles 2 and 6.8, among others, that it will remain possible to determine an individual margin of dumping for each exporter on the basis of facts."

[213] Report of the Panel, Para 6.96.

requirement of making a fair comparison between normal value and export price by adjusting for size, the DCD would have had to base its determination in any event on the information provided with regard to this one size category of 40 x 40 cm. According to the DCD's Final Determination, a third exporter, Marazzi, only provided lists of average prices without specifying total volumes sold or the total value of the sales. Panel noted that the DCD did not explain how this impeded it from determining an exporter-specific margin of dumping for Marazzi. If the DCD was dissatisfied with the information provided, it could have requested the exporter to provide additional and more specific information. It chose not to do so.

Argentina had argued that DCD's failure to determine an individual margin of dumping for all three exporters was based on the fact that the DCD did not possess sufficient information for each size category to determine a separate margin of dumping for each producer for each of the size categories. According to Argentina, the product subject to investigation was ceramic tiles in all sizes, or in other words, irrespective of size, and not ceramic tiles of 20 x 20 cm. 30 x 30 cm and 40 x 40 cm. As a consequence, the DCD was required to determine an individual margin of dumping for each exporter with regard to this product as a whole and not just a section of the product or a certain size category. Argentina specifically quoted the decision of the Appellate Body in the *EC –Bed Linen* case:
"Having defined the product as it did, the EC was bound to treat that product consistently thereafter in accordance with that definition. ... We see nothing in Article 2.4.2 or any other provision of the AD Agreement that provides for the establishment of "the existence of margins of dumping" for types or models of the product under investigation. ... Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the product under investigation as a whole".[214]

The

Panel held that it was important not to confuse the usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4 and the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole. According to the Panel the use of types or models was a valid method of ensuring a fair comparison between normal value and export price under Article 2.4. " We see nothing in the Appellate Body Report in the *EC – Bed Linen* case that suggests otherwise so long as the investigating authority goes on to determine a margin of dumping for the product as a whole. The product under investigation in the case before us is ceramic tiles of any size, and the authority was thus required to establish an individual dumping margin for each exporter for this product as a whole and not for each size category. Nor was the DCD entitled to

invoke any problems it encountered with regard to the use of such models, such as lack of information concerning a certain size category, as a reason for not determining an individual margin of dumping for the product as a whole, in this case ceramic floor tiles of any size from Italy. Therefore, even if the DCD was entitled to disregard data concerning certain size categories for one reason or another, this should not have stopped the DCD from determining an individual margin of dumping for each of the exporters included in the sample for the product subject to the investigation."[215]

Panel noted that even if Argentina had been entitled to determine margins of dumping with respect to each of three sizes of tile rather than with respect to the product subject to investigation as a whole, the DCD was not justified in not determining an individual margin for each exporter for each of the three sizes of tiles. According to the Panel even if the DCD were to have doubted the reliability of the information for one or two size categories in the case of Bismantova because of the significant quantity of sales made to a related party, this should not have impeded the DCD from determining an exporter specific margin of dumping for at least the one or two remaining size categories for which the DCD did not identify any problems. Similarly, in the case of Caesar, which only exported one size of tiles, Panel noted, the exporter should have at least received an individual margin for that size based on the information submitted.

Therefore the Panel concluded that the DCD should have determined an individual margin of dumping for each of the four exporters included in the sample and that the DCD acted inconsistently with Article 6.10 of the AD Agreement by not determining an individual margin of dumping for each of the four exporters included in the sample.

5.FAILURE TO MAKE DUE ALLOWANCE FOR DIFFERENCES IN PHYSICAL CHARACTERISTICS

The EC next claimed that the DCD failed to make due allowance for all the physical differences between the various models of *porcellanato* exported to Argentina and those sold domestically.[216] The EC noted that although the DCD acknowledged that differences in physical characteristics, not adjusted for, could have had a significant impact on price, it nevertheless, without any justification, rejected the exporters' request for a model-to-model comparison and failed to apply any alternative

[214] Appellate Body Report, *EC – Bed Linen*, para. 53.
[215] Report of the Panel, Para 6.99.

method for making due allowance for differences in physical characteristics affecting price comparability, thereby violating Article 2.4 of the AD Agreement. According to EC by failure to make the necessary adjustments, Argentina failed to make a fair comparison between normal value and export price as required by Article 2.4 of the AD Agreement.

Argentina contended that the DCD made due allowance for differences in physical characteristics affecting price comparability by distinguishing three types of ceramic tiles based on the one variable common to all models and types sold: size. Argentina argued that with 78 Italian producers selling a variety of models with different colours and designs, the DCD was justified to take into account the one parameter common to all models and on that basis the DCD distinguished three size categories. According to Argentina the exporters did not present any convincing reasons to invalidate the segregation of products on this basis and never objected to the determination of a margin of dumping per size category. Argentina submitted that, in light of the standard of review applicable to anti-dumping disputes set out in Article 17.6 of the AD Agreement, deference should be given to the national authority's methodology if it is based on a reasonable interpretation of the text of the Agreement. Argentina contended that Article 2.4 requires that the authority make due allowance for differences in physical characteristics in each case on its merits. Argentina pointed out that when the DCD requested the exporters to identify the product by model/type or code but the exporters merely referred to a catalogue containing an enormous number of models without any further explanation which made any *a posteriori* adjustments practically impossible for lack of information. According to Argentina the exporters also failed to give any market information per model or type of tiles and never submitted any concrete proposals for adjustments. Therefore, Argentina argued that the DCD's decision to distinguish the products on the basis of size was a reasonable and objective decision especially in light of the confidential nature and incomplete character of the information.

Panel noted that Article 2.4 places the obligation on the investigating authority to make due allowance, in each case on its merits, for differences which affect price comparability, including differences in physical characteristics. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. According to the Panel the requirement to make due allowance for such differences, in each case on its merits, means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a

[216] By way of example, the EC referred to a 100 per cent price difference between two types of unpolished 30 x 30 cm tiles. which was found in a price list relied upon by the DCD (Exhibit EC-5D) which according to the EC suggested that other

fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and to make adjustment where necessary. Panel noted that in the preliminary and final determination, the DCD acknowledged that there existed a large variety of types and models of ceramic tiles with significant price differences between them. But in spite of this acknowledgement, the DCD failed to make any further adjustments for these apparent differences in price caused by factors other than size. Neither did the DCD indicate to the parties what information it required in order to make these further adjustments. Panel further noted that in addition to accounting for size differences, the DCD's methodology took account of two other physical differences affecting price comparability. As to quality, the DCD collected data only on first-quality tiles, thereby avoiding the need to make adjustments for tile quality. By the same token, the DCD's methodology made due allowance for the degree of processing, in that data were collected only on unpolished tiles. According to the Panel in effect then, the DCD made due allowance within the meaning of Article 2.4 for three physical differences affecting price comparability but other important differences remained, as the DCD acknowledged in its final determination. Panel disagreed with Argentina's view that Article 2.4, through the qualifying language that due allowance shall be made "in each case" "on its merits", permits an investigating authority to adjust only for the most important of the physical differences that affect price comparability, even if making the remaining adjustments would have been complex. The DCD chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability but it did not do so. Therefore the Panel concluded that there were other factors significantly affecting price comparability and an objective and unbiased evaluation of the facts of the case would have required the DCD to make additional adjustments for physical differences affecting price comparability and the DCD acted inconsistently with Article 2.4 by failing to make adjustments for physical differences affecting price comparability.

COMMENT ON THE CASE

The case concerned conduct of investigation. Panel while interpreting the Agreement in light of its purpose tried to maintain the balance between the need for transparency and effective conduct of investigation. Thus the Panel held that the obligation to disclose essential facts does not mean that the investigating authority just displays the relevant documents. Investigating authority has to specifically point out the facts on which it is considering to make determination so that the interested party is able to defend its interests.

---

factors apart from size impacted prices.

Another important decision was that investigating authority cannot disregard confidential information in the determination of injury. Panel rightly held that the mechanism for protection of confidential information was made in view of fact that investigating authority may need certain information for the purposes of investigation yet it would not be in the interest of the party concerned to publicise it. However, it is submitted that Panel decision that even information which are by nature confidential can get protection only on good cause shown is not in accordance with the wording of the Agreement. The Agreement clearly distinguishes between two types of confidential information, one which are by nature confidential and the other which may get confidential treatment on good cause shown.

CONCLUSION

The study of international law of anti-dumping is the study of regulation of unfair trade practice. The purpose of WTO is maximise liberalisation of trade between countries within the sphere of internationally agreed rules. It's endeavour for liberalisation of trade includes removal of tariff as well as non-tariff barriers such as anti-dumping measures; its realm of rules condemn unfair trade practices such as dumping. Under Article VI of the GATT Contracting Parties recognise the right of the Members to condemn dumping *but* only if it causes or threatens injury to the domestic industry. Thus, the purpose of the recognition of regulation by Members of dumping is protection of their industry. This protective purpose was recognised in the case of *United States Antidumping Act of 1916*[217] where the Panel and the Appellate body held that although the intent to destroy domestic industry is more difficult to prove yet it is the actual effect on the domestic industry that is important for the purpose of Article VI of the GATT and the Agreement on Anti-dumping. Thus, the WTO does not outlaw dumping as such but only grants Members right to counter its effects in case it is hurting their domestic industries.

While the inclusion of provision relating to antidumping was a recognition of the right of the Members to impose anti-dumping measures, the detailed provisions specifying the procedures to be followed for valid imposition of antidumping measures is an indication that the right is subject to severe limitations. The development from Article VI of the GATT to the present Uruguay Round Antidumping Agreement is a story of strengthening of these procedural requirements.

Thus, Article VI of the GATT laid down the basic principles and defined the basic concepts like that of dumping and normal value. The basic principle was laid down that antidumping measures can be imposed only if it is found that (a) there is dumping (b) there is injury to the domestic industry and (c) the injury is caused by dumping. The other principle which was laid down was that imposition of antidumping duty was only permissive and no other action can be taken by the importing country to prevent dumping. This was made clear by the use of the word "may" in Article VI:2 which was explained as a permissive provision in the case of *United States-Anti-dumping Act of 1916.* It was further provided that antidumping duties could be levied only to "offset" dumping. Therefore no prohibitory action was permissible.[218]

---

[217] WT/DS136/R Report of the Panel adopted on31 March 2000, WT/DS162/R Report of the Panel adopted on 29 May 2000.
[218] The term "offset was discussed in the DRAMS case, WT/DS99/R. Report of the Panel adopted on 29 January 1999

However, it was soon realised that the process of determining the existence of dumping and consequent injury is more important in ensuring the fairness of outcome. Therefore progressively in 1967, 1979 and 1994 the Contracting Parties came out with Agreements on the Implementation of Article VI that laid down rules for determining rights and obligations of the Members in antidumping proceedings. Thus, the 1967 Code provided for more detailed rules for determining constructed normal value, constructed export price, fair comparison. The Code tried to establish clearer rules for determining causal link between dumped imports and the injury and that injury due to other causes may not be attributed to the dumped imports. Rules were provided for initiation and conduct of investigation as well with the provision that the rules for conduct of investigation were not intended to hinder the authorities from reaching a decision expeditiously. Interested parties were given the right to access the information and defend their interests, with the provision for preservation of confidentiality of information if needed. Provision for review of antidumping duties was also provided that ensured that antidumping duties would remain only to "offset" dumping. A significant development was provision for price undertaking and provisional measures. While price undertaking was advantageous to the exporters, provisional measures ensured that importing Member could take preventive measures unless the investigation concludes and final liability is determined.

These rules were further elaborated under the 1979 and 1994 Code. The purpose of the development has been to provide a fair and open procedure for investigation in addition to curbing the discretionary powers of the importing country in imposing and maintaining antidumping measures. Often provisions have been included in the Agreements when the need for them had been highlighted in cases before the Panels. Thus, the inclusion of provision regulating currency conversion, sampling and verification procedure under the 1994 Code.[219] Similarly the *EC-bedlinen*[220] case has prompted **Declaration at Doha** that "investigating authorities shall examine with special care any application for the initiation of an anti-dumping investigation where an investigation of the same product from the same member resulted in a negative finding within the 365 days prior to the filing of the application and that, unless this pre-initiation examination indicates that circumstances have changed, the investigation shall not proceed." Doha Declaration also refers to elaboration of provision under Article 15 which was also an issue in the *EC-bed linen* case. The case of *United States-Antidumping duties on Imports from*

---

[219] In addition to procedural obligations, substantive obligations have been imposed on the importing country. An important example of this is the provision for sunset review under the present Code.
[220] WT/DS141/R Report of the panel adopted on 30 October 2000.

Japan[221] has prompted a Declaration that "Article 5.8 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 does not specify the time-frame to be used in determining the volume of dumped imports, and that this lack of specificity creates uncertainties in the implementation of the provision. The Committee on Anti-Dumping Practices is instructed, through its working group on Implementation, to study this issue and draw up recommendations within 12 months, with a view to ensuring the maximum possible predictability and objectivity in the application of time frames."

Thus, the loopholes in the existing Agreement get highlighted in the cases which draws the attention of the Members for the need of an appropriate regulation.

As for the existing provisions, Panel and Appellate Body have most of the time given decision based on legalistic interpretation of the provisions and have tried to balance the rights and obligations of the parties keeping in view the purpose of the provision. A clear indication of the gradual change in the attitude towards the antidumping measures is the ruling on the issue of the causal link. While the Panel in the *Norway-Salmon* case said that it was necessary to prove that dumping was the sole cause of injury, the Appellate Body in the case of *United States-Antidumping duties on Imports from Japan* overruled that decision and held that the non-attributive language of Article 3.5 clearly warrants that injury due to other causes are not attributed to dumping.

If the nature of development of law of antidumping and the history of how the balance between the recognition of the right to take antidumping measures and regulation of that right has been maintained, is to be summed up in few words, it can be said that gradually the emphasis of antidumping provision has changed from positive right of countries to protect their industries into a negative provision ensuring that the right does not hinder free trade.[222] This is despite the fact that traditional opponents of antidumping measures, developing countries, have become one of the major users of it.[223]

---

[221] WT/DS184/R Report of the Panel adopted on 28 February 2001.

[222] Although it was understood that antidumping provision under Article VI is an exception to GATT, and Jackson [World Trade and the Law of GATT, 411,(1969)] said that it imposed positive obligation on the parties, yet this idea took many years and detailed rules under the AD Agreements to give it a crystallised form. Article VI of the GATT only defined the concepts and gave the Members right to take antidumping measures if certain basic conditions for the existence of the right were fulfilled. It is the detailed procedure for the determination of existence of those conditions through the AD Agreements that has resulted in the change in the emphasis of the nature of the right.

[223] While in the eighties more than 80% of the cases were initiated by the four traditional AD users (US, Canada, EC and Australia), recent years have seen developing countries become increasingly active. Thus, for example, in 1998, South Africa initiated 41 proceedings, India 30, Brazil 16 and Mexico 10. In1998 the four traditional users were responsible for only 34% of all initiations. Main targets of world-wide anti-dumping action in that same year were China (23 cases), Korea (22 cases) and the EC 7 Member States (42 cases). Of the 225 cases initiated during 1998, 143 targeted developing countries. A study examining the use of anti-dumping over the period1987-1997 concludes, among others, that:"...developing countries now

Antidumping measures were started by the developed countries and developing countries used to oppose them demanding greater curb on the powers of the countries in taking these measures. However, now the developing countries have become one of the major users of the antidumping measures. Some writers argue that it is helping the developing countries in transition stage in adapting themselves to the market economy[224]. Although the developing countries are no more opposed to antidumping measures as such, their interest as a developing country is taken care of by Article 15 of the AD Agreement. Antidumping Agreement is one of the few Uruguay Round Agreements providing for special and differential treatment for developing countries. So far provision for special and differential treatment for developing countries has been invoked in two cases. The provision was for the first time invoked in the *Brazil-Cotton Yarn case*[225] which came up before the GATT Panel under the Tokyo Round AD Code. In that case Article 13 of the Code was invoked which was similar to Article 15 of the present Agreement. In that case the panel decided that the obligation to consider special situation of the developing countries arises only after the investigation is over and investigating authorities are considering imposition of antidumping measures. The next case *EC-Bed linen*[226] came up under the present Agreement. In this case Panel found that EC had not fulfilled its obligation of exploring the possibilities of constructive remedies. Panel mentioned that the Agreement mentions only three types of measures provisional measures, price undertakings and final antidumping duties and India had not suggested any other constructive remedies which could have been discussed by the Panel. This opinion of the Panel leaves open the possibility of inclusion of other measures not mentioned in the present Agreement. Various suggestions have been given regarding the constructive remedies. Edwin Vermulist suggests *de minimis* margin should be made higher and additional procedural requirements should be provided prior to the initiation of investigation against developing countries[227]. Another possible measure can be leniency in the decision of imposition of provisional measures.[228]

---

initiate about half of the total number of anti-dumping cases, and some of them employ anti-dumping more actively than most of the developed country users." Jorge Miranda, Raul A. Torres and Mario Ruiz, *The International Use of Antidumping: 1987-1997*, Journal of World Trade 32(5): 5-71,1998.

[224] Jorge Miranda, Raul A. Torres and Mario Ruiz, *The International Use of Antidumping: 1987-1997*, Journal of World Trade 32(5): 5-71,1998.

[225] ADP/137, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 4 July 1995.

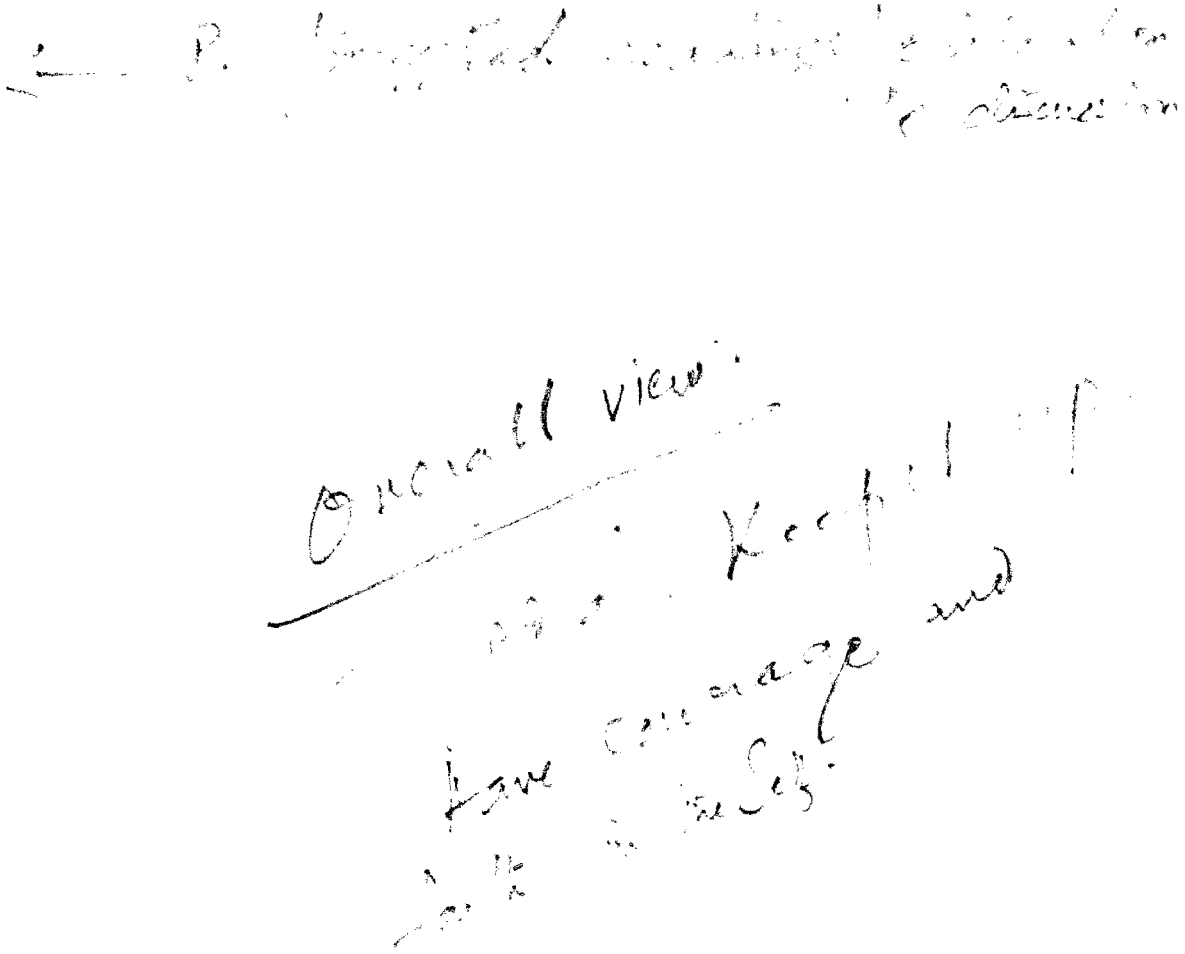
[226] WT/DS141/R Report of the panel adopted on 30 October 2000

[227] *Positive Agenda for AD/CVD*, UNCTAD Workshop on Development of Positive Agenda (Seoul 8-10June 1999.)

[228] Suggested by Prof. Jayagovind, National Law School of India University, Bangalore.

Some more suggestions have been made regarding amendment of the AD Agreement by Edwin Vermulst[229]

- The mandatory rule for review after a certain time should be further strengthened.
- Both the injury and dumping margins must be calculated and antidumping duty must reflect the lower of the two.
- Definition of dumping should be amended to include only predatory dumping.
- Rules regarding anti-circumvention duties should be included.



[229] Edwin Vermulst, *Positive Agenda for AD/CVD*, UNCTAD Workshop on Development of Positive Agenda (Seoul 8-10June 1999.)

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE[1] (1967)

The parties to this Agreement,

Considering that Ministers on 21 May 1963 agreed that a significant liberalization of world trade was desirable and that the comprehensive trade negotiations, the 1964 Trade Negotiations, should deal not only with tariffs but also with non-tariff barriers;

Recognizing that anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping duties 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;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases; and

Desiring to interpret the provisions of Article VI of the General Agreement and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation;

Hereby agree as follows:

PART I—ANTI-DUMPING CODE

Article 1

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement. The following provisions govern the application of this Article, in so far as action is taken under anti-dumping legislation or regulations.

[1] Agreement No. 103 in App. C; GATT Doc. L/2812 (1967). (The remainder of the footnotes to this section are designated by an asterisk (*) to denote that they are a part of the agreement.)

A. DETERMINATION OF DUMPING

Article 2

(a) For the purpose of this Code a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

(b) Throughout this Code the term "like product" ("produit similaire") shall be interpreted to mean 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.

(c) In the case where products are not imported directly from the country of origin but are exported to the country of importation from an intermediate country, the price at which the products are sold from the country of export to the country of importation shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely trans-shipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

(d) When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

bility. The change in circumstances which would create a situation in which the dumping would cause material injury must be clearly foreseen and imminent.[3*]

(f) With respect to cases where material injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

Article 4
Definition of Industry

(a) In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products except that

(i) when producers are importers of the allegedly dumped product the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances a country may, for the production in question, be divided into two or more competitive markets and the producers within each market regarded as a separate industry, if, because of transport costs, all the producers within such a market sell all or almost all of their production of the product in question in that market, and none, or almost none, of the product in question produced elsewhere in the country is sold in that market or if there exist special regional marketing conditions (for example, traditional patterns of distribution or consumer tastes) which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) Where two or more countries have reached such a level of integration that they have the characteristics of a single, unified market, the industry in the entire area of integration shall be taken to be the industry referred to in Article 4(a).

(c) The provisions of Article 3(d) shall be applicable to this Article.

[3*] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the products at dumped prices.

C. INVESTIGATION AND ADMINISTRATION PROCEDURES

Article 5
Initiation and Subsequent Investigation

(a) Investigations shall normally be initiated upon a request on behalf of the industry[4*] affected, supported by evidence both of dumping and of injury resulting therefrom for this industry. If in special circumstances the authorities concerned decide to initiate an investigation without having received such a request, they shall proceed only if they have evidence both on dumping and on injury resulting therefrom.

(b) Upon initiation of an investigation and thereafter, the evidence of both dumping and injury should be considered simultaneously. In any event the evidence of both dumping and injury shall be considered simultaneously in the decision whether or not to initiate an investigation, and thereafter, during the course of the investigation, starting on a date not later than the earliest date on which provisional measures may be applied, except in the cases provided for in Article 10(d) in which the authorities accept the request of the exporter and the importer.

(c) An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There should be immediate termination in cases where the margin of dumping or the volume of dumped imports, actual or potential, or the injury is negligible.

(d) An anti-dumping proceeding shall not hinder the procedures of customs clearance.

Article 6
Evidence

(a) The foreign suppliers and all other interested parties shall be given ample opportunity to present in writing all evidence that they consider useful in respect to the anti-dumping investigation in question. They shall also have the right, on justification, to present evidence orally.

(b) The authorities concerned shall provide opportunities for the complainant and the importers and exporters known to be concerned and the governments of the exporting countries, to see all information that is relevant to the presentation of their cases,

[4*] As defined in Article 4.

ing duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing country or customs territory. It is desirable that the imposition be permissive in all countries or customs territories parties to this Agreement, and that the duty be less than the margin, if such lesser duty would be adequate to remove the injury to the domestic industry.

(b) When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be levied, in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.

(c) The amount of the anti-dumping duty must not exceed the margin of dumping as established under Article 2. Therefore, if subsequent to the application of the anti-dumping duty it is found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(d) Within a basic price system the following rules shall apply provided that their application is consistent with the other provisions of this Code:

If several suppliers from one or more countries are involved, anti-dumping duties may be imposed on imports of the product in question found to have been dumped and to be causing injury from the country or countries concerned, the duty being equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. It is understood that for products which are sold below this already established basic price a new anti-dumping investigation shall be carried out in each particular case, when so demanded by the interested parties and the demand is supported by relevant evidence. In cases where no dumping is found, anti-dumping duties collected shall be reimbursed as quickly as possible. Furthermore, if it can be found that the duty so collected exceeds the actual dumping margin, the amount in excess of the margin shall be reimbursed as quickly as possible.

(e) When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in Article 4(a)(ii), anti-dumping duties shall only be definitively collected on the products in question consigned for final consumption to that area, except in cases where the exporter shall, prior to the imposition of anti-dumping duties, be given an opportunity to cease dumping in the area concerned. In such cases, if an adequate assurance to this effect is promptly given, anti-dumping duties shall not be imposed, provided, however, that if the assurance is not given or is not fulfilled, the duties may be imposed without limitation to an area.

Article 9

Duration of Anti-Dumping Duties

(a) An anti-dumping duty shall remain in force only as long as it is necessary in order to counteract dumping which is causing injury.

(b) The authorities concerned shall review the need for the continued imposition of the duty, where warranted, on their own initiative or if interested suppliers or importers of the product so request and submit information substantiating the need for review.

Article 10

Provisional Measures

(a) Provisional measures may be taken only when a preliminary decision has been taken that there is dumping and when there is sufficient evidence of injury.

(b) Provisional measures may take the form of a provisional duty or, preferably, a security—by deposit or bond—equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

(c) The authorities concerned shall inform representatives of the exporting country and the directly interested parties of their decisions regarding imposition of provisional measures indicating the reasons for such decisions and the criteria applied, and shall,

enter into force on 1 July 1968 for each party which has accepted it by that date. For each party accepting the Agreement after that date, it shall enter into force upon acceptance.

Article 14

Each party to this Agreement shall take all necessary steps, of a general or particular character, to ensure, not later than the date of the entry into force of the Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of the Anti-Dumping Code.

Article 15

Each party to this Agreement shall inform the CONTRACTING PARTIES to the General Agreement of any changes in its anti-dumping laws and regulations and in the administration of such laws and regulations.

Article 16

Each party to this Agreement shall report to the CONTRACTING PARTIES annually on the administration of its anti-dumping laws and regulations, giving summaries of the cases in which anti-dumping duties have been assessed definitively.

Article 17

The parties to this Agreement shall request the CONTRACTING PARTIES to establish a Committee on Anti-Dumping Practices composed of representatives of the parties to this Agreement. The Committee shall normally meet once each year for the purpose of affording parties to this Agreement the opportunity of consulting on matters relating to the administration of anti-dumping systems in any participating country or customs territory as it might affect the operation of the Anti-Dumping Code or the furtherance of its objectives. Such consultations shall be without prejudice to Articles XXII and XXIII of the General Agreement.

This Agreement shall be deposited with the Director-General to the CONTRACTING PARTIES who shall promptly furnish a certified copy thereof and a notification of each acceptance thereof to each contracting party to the General Agreement and to the European Economic Community.

This Agreement shall be registered in accordance with the provisions of Article 102 of the Charter of the United Nations.

DONE at Geneva this thirtieth day of June, one thousand nine hundred and sixty-seven, in a single copy, in the English and French languages, both texts being authentic.

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE (1979)

The Parties to this Agreement (hereinafter referred to as "Parties"),

Recognizing that anti-dumping practices should not constitute an unjustifiable impediment to international trade and that anti-dumping duties 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;

Considering that it is desirable to provide for equitable and open procedures as the basis for a full examination of dumping cases;

Taking into account the particular trade, development and financial needs of developing countries;

Desiring to interpret the provisions of Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "General Agreement" or "GATT") and to elaborate rules for their application in order to provide greater uniformity and certainty in their implementation; and

Desiring to provide for the speedy, effective and equitable settlement of disputes arising under this Agreement;

Hereby agree as follows:

PART I

ANTI-DUMPING CODE

Article 1

Principles

The imposition of an anti-dumping duty is a measure to be taken only under the circumstances provided for in Article VI of the General Agreement and pursuant to investigations initiated [1] and conducted in accordance

[1] The term "initiated" as used hereinafter means the procedural action by which a Party formally commences an investigation as provided in paragraph 6 of Article 6.

in the importing country. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing country, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3. 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. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

4. It must be demonstrated that the dumped imports are, through the effects [4] of dumping, causing injury within the meaning of this Code. There may be other factors [5] which at the same time are injuring the industry, and the injuries caused by other factors must not be attributed to the dumped imports.

5. The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of production in terms of such criteria as: the production process, the producers' realizations, profits. When the domestic production of the like product has no separate identity in these terms the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

6. 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. [6]

[4] As set forth in paragraphs 2 and 3 of this Article.

[5] Such factors include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

[6] One example, though not an exclusive one, is that there is convincing reason to believe that there will be, in the immediate future, substantially increased importations of the product at dumped prices.

7. With respect to cases where injury is threatened by dumped imports, the application of anti-dumping measures shall be studied and decided with special care.

Article 4

Definition of Industry

1. In determining injury the term "domestic industry" shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that

(i) when producers are related [7] to the exporters or importers or are themselves importers of the allegedly dumped product, the industry may be interpreted as referring to the rest of the producers;

(ii) in exceptional circumstances the territory of a Party may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if (*a*) the producers within such market sell all or almost all of their production of the product in question in that market, and (*b*) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market.

2. When the industry has been interpreted as referring to the producers in a certain area, i.e. a market as defined in paragraph 1(ii), anti-dumping duties shall be levied [8] only on the products in question consigned for final consumption to that area. When the constitutional law of the importing country does not permit the levying of anti-dumping duties on such a basis, the importing Party may levy the anti-dumping duties without limitation only if (1) the exporters shall have been given an opportunity to cease exporting at dumped prices to the area concerned or otherwise give assurances pursuant to Article 7 of this Code, and adequate assurances in this

[7] An understanding among Parties should be developed defining the word "related" as used in this Code.

[8] As used in this Code "levy" shall mean the definitive or final legal assessment or collection of a duty or tax.

5. In order to verify information provided or to obtain further details the authorities may carry out investigations in other countries as required, provided they obtain the agreement of the firms concerned and provided they notify the representatives of the government of the country in question and unless the latter object to the investigation.

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

7. Throughout the anti-dumping investigation all parties shall have a full opportunity for the defence of their interests. To this end, the authorities concerned shall, on request, provide opportunities for all directly interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.

8. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings [12], affirmative or negative, may be made on the basis of the facts available.

9. The provisions of this Article are not intended to prevent the authorities of a Party from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final findings, whether affirmative or negative, or from applying provisional or final measures, in accordance with the relevant provisions of this Code.

Article 7

Price Undertakings

1. Proceedings may [13] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease

[12] Because of different terms used under different systems in various countries the term "finding" is hereinafter used to mean a formal decision or determination.

[13] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 3.

exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping.

2. Price undertakings shall not be sought or accepted from exporters unless the authorities of the importing country have initiated an investigation in accordance with the provisions of Article 5 of this Code. Undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons.

3. If the undertakings are accepted, the investigation of injury shall nevertheless be completed if the exporter so desires or the authorities so decide. In such a case, if a determination of no injury or threat thereof is made, the undertaking shall automatically lapse except in cases where a determination of no threat of injury is due in large part to the existence of a price undertaking. In such cases the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Code.

4. Price undertakings may be suggested by the authorities of the importing country, but no exporter shall be forced to enter into such an undertaking. The fact that exporters do not offer such undertakings, or do not accept an invitation to do so, shall in no way prejudice the consideration of the case. However, the authorities are free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

5. 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. In case of violation of undertakings, the authorities of the importing country may take, under this Code in conformity with its provisions, expeditious actions which may constitute immediate application of provisional measures using the best information available. In such cases definitive duties may be levied in accordance with this Code on goods entered for consumption not more than ninety days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

6. Undertakings shall not remain in force any longer than anti-dumping duties could remain in force under this Code. The authorities of an importing country shall review the need for the continuation of any price undertaking, where warranted, on their own initiative or if interested exporters or importers of the product in question so request and submit positive information substantiating the need for such review.

Provisional measures shall not be applied unless the authorities concerned judge that they are necessary to prevent injury being caused during the period of investigation.

2. Provisional measures may take the form of a provisional duty or, preferably, a security — by cash deposit or bond — equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

3. The imposition of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved to a period not exceeding six months.

4. The relevant provisions of Article 8 shall be followed in the application of provisional measures.

Article 11

Retroactivity

1. Anti-dumping duties and provisional measures shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 8 and paragraph 1 of Article 10, respectively, enters into force, except that in cases:

(i) Where a final finding of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final finding of threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a finding of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

If the anti-dumping duty fixed in the final decision is higher than the provisionally paid duty, the difference shall not be collected. If the duty fixed in the final decision is lower than the provisionally paid duty or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

(ii) Where for the dumped product in question the authorities determine

(*a*) either that there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(*b*) that the injury is caused by sporadic dumping (massive dumped imports of a product in a relatively short period) to such an extent that, in order to preclude it recurring, it appears necessary to levy an anti-dumping duty retroactively on those imports,

the duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures.

2. Except as provided in paragraph 1 above where a finding of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the finding of threat of injury or material retardation and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

3. Where a final finding is negative any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

Article 12

Anti-Dumping Action on behalf of a Third Country

1. An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

2. Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

3. The authorities of the importing country in considering such an application shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

4. Parties shall make their best efforts to reach a mutually satisfactory solution throughout the period of conciliation.

5. If no mutually agreed solution has been reached after detailed examination by the Committee under paragraph 3 within three months, the Committee shall, at the request of any party to the dispute, establish a panel to examine the matter, based upon:

(*a*) a written statement of the Party making the request indicating how a benefit accruing to it, directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded, and

(*b*) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing country.

6. Confidential information provided to the panel shall not be revealed without formal authorization from the person or authority providing the information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the authority or person providing the information, will be provided.

7. Further to paragraphs 1-6 the settlement of disputes shall *mutatis mutandis* be governed by the provisions of the Understanding regarding Notification, Consultation, Dispute Settlement and Surveillance. Panel members shall have relevant experience and be selected from Parties not parties to the dispute.

PART III

Article 16

Final Provisions

1. No specific action against dumping of exports from another Party can be taken except in accordance with the provisions of the General Agreement, as interpreted by this Agreement. [16]

[16] This is not intended to preclude action under other relevant provisions of the General Agreement, as appropriate.

Acceptance and accession

2. (*a*) This Agreement shall be open for acceptance by signature or otherwise by governments contracting parties to the GATT and by the European Economic Community.

(*b*) This Agreement shall be open for acceptance by signature or otherwise by governments having provisionally acceded to the GATT, on terms related to the effective application of rights and obligations under this Agreement, which take into account rights and obligations in the instruments providing for their provisional accession.

(*c*) This Agreement shall be open to accession by any other government on terms, related to the effective application of rights and obligations under this Agreement, to be agreed between that government and the Parties, by the deposit with the Director-General to the CONTRACTING PARTIES to the GATT of an instrument of accession which states the terms so agreed.

(*d*) In regard to acceptance, the provisions of Article XXVI:5(*a*) and (*b*) of the General Agreement would be applicable.

Reservations

3. Reservations may not be entered in respect of any of the provisions of this Agreement without the consent of the other Parties.

Entry into force

4. This Agreement shall enter into force on 1 January 1980 for the governments [17] which have accepted or acceded to it by that date. For each other government it shall enter into force on the thirtieth day following the date of its acceptance or accession to this Agreement.

Denunciation of the 1967 Agreement

5. Acceptance of this Agreement shall carry denunciation of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, done at Geneva on 30 June 1967, which entered into force on 1 July 1968, for Parties to the 1967 Agreement. Such denunciation shall take effect for each Party to this Agreement on the date of entry into force of this Agreement for each such Party.

[17] The term "government" is deemed to include the competent authorities of the European Economic Community.

AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

Members hereby *agree* as follows:

PART I

Article 1

Principles

An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated[1] and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if

[1] The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5.

[2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

export prices to reflect sustained movements in exchange rates during the period of investigation.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean 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.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex 1 to GATT 1994.

Article 3

Determination of Injury[9]

3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

3.2 With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either

[9] Under this Agreement the term "injury" shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

in absolute terms or relative to production or consumption in the importing Member. With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance.

3.3 Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the investigating authorities may cumulatively assess the effects of such imports only if they determine that *(a)* the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in paragraph 8 of Article 5 and the volume of imports from each country is not negligible and *(b)* a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product.

3.4 The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

3.5 It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

3.6 The effect of the dumped imports shall be assessed in relation to the domestic production of the like product when available data permit the separate identification of that production on the basis of such criteria as the production process, producers' sales and profits. If such separate identification of that production is not possible, the effects of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products, which includes the like product, for which the necessary information can be provided.

3.7 A determination of a threat of material 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

and, to the extent possible, a description of the volume and value of domestic production of the like product accounted for by such producers;

(ii) a complete description of the allegedly dumped product, the names of the country or countries of origin or export in question, the identity of each known exporter or foreign producer and a list of known persons importing the product in question;

(iii) information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export (or, where appropriate, information on the prices at which the product is sold from the country or countries of origin or export to a third country or countries, or on the constructed value of the product) and information on export prices or, where appropriate, on the prices at which the product is first resold to an independent buyer in the territory of the importing Member;

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3.

5.3 The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

5.4 An investigation shall not be initiated pursuant to paragraph 1 unless the authorities have determined, on the basis of an examination of the degree of support for, or opposition to, the application expressed[13] by domestic producers of the like product, that the application has been made by or on behalf of the domestic industry.[14] The application shall be considered to have been made "by or on behalf of the domestic industry" if it is supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

5.5 The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to

[13] In the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques.

[14] Members are aware that in the territory of certain Members employees of domestic producers of the like product or representatives of those employees may make or support an application for an investigation under paragraph 1.

initiate an investigation, the authorities shall notify the government of the exporting Member concerned.

5.6 If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

5.7 The evidence of both dumping and injury shall be considered simultaneously *(a)* in the decision whether or not to initiate an investigation, and *(b)* thereafter, during the course of the investigation, starting on a date not later than the earliest date on which in accordance with the provisions of this Agreement provisional measures may be applied.

5.8 An application under paragraph 1 shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence of either dumping or of injury to justify proceeding with the case. There shall be immediate termination in cases where the authorities determine that the margin of dumping is *de minimis*, or that the volume of dumped imports, actual or potential, or the injury, is negligible. The margin of dumping shall be considered to be *de minimis* if this margin is less than 2 per cent, expressed as a percentage of the export price. The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

5.9 An anti-dumping proceeding shall not hinder the procedures of customs clearance.

5.10 Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15]

[15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Mem-

In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

Article 7

Provisional Measures

7.1 Provisional measures may be applied only if:

(i) an investigation has been initiated in accordance with the provisions of Article 5, a public notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments;

(ii) a preliminary affirmative determination has been made of dumping and consequent injury to a domestic industry; and

(iii) the authorities concerned judge such measures necessary to prevent injury being caused during the investigation.

7.2 Provisional measures may take the form of a provisional duty or, preferably, a security - by cash deposit or bond - equal to the amount of the anti-dumping duty provisionally estimated, being not greater than the provisionally estimated margin of dumping. Withholding of appraisement is an appropriate provisional measure, provided that the normal duty and the estimated amount of the anti-dumping duty be indicated and as long as the withholding of appraisement is subject to the same conditions as other provisional measures.

7.3 Provisional measures shall not be applied sooner than 60 days from the date of initiation of the investigation.

7.4 The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

7.5 The relevant provisions of Article 9 shall be followed in the application of provisional measures.

Article 8

Price Undertakings

8.1 Proceedings may[19] be suspended or terminated without the imposition of provisional measures or anti-dumping duties upon receipt of satisfactory voluntary undertakings from any exporter to revise its prices or to cease exports to the area in question at dumped prices so that the authorities are satisfied that the injurious effect of the dumping is eliminated. Price increases under such undertakings shall not be higher than necessary to eliminate the margin of dumping. It is desirable that the price increases be less than the margin of dumping if such increases would be adequate to remove the injury to the domestic industry.

[19] The word "may" shall not be interpreted to allow the simultaneous continuation of proceedings with the implementation of price undertakings except as provided in paragraph 4.

9.4 When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:

(i) the weighted average margin of dumping established with respect to the selected exporters or producers or,

(ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,

provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

9.5 If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

Article 10

Retroactivity

10.1 Provisional measures and anti-dumping duties shall only be applied to products which enter for consumption after the time when the decision taken under paragraph 1 of Article 7 and paragraph 1 of Article 9, respectively, enters into force, subject to the exceptions set out in this Article.

10.2 Where a final determination of injury (but not of a threat thereof or of a material retardation of the establishment of an industry) is made or, in the case of a final determination of a threat of injury, where the effect of the dumped imports would, in the absence of the provisional measures, have led to a determination of injury, anti-dumping duties may be levied retroactively for the period for which provisional measures, if any, have been applied.

10.3 If the definitive anti-dumping duty is higher than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall not be collected. If the definitive duty is lower than the provisional duty paid or payable, or the amount estimated for the purpose of the security, the difference shall be reimbursed or the duty recalculated, as the case may be.

10.4 Except as provided in paragraph 2, where a determination of threat of injury or material retardation is made (but no injury has yet occurred) a definitive anti-dumping duty may be imposed only from the date of the determination of threat of injury or material retardation, and any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.5 Where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner.

10.6 A definitive anti-dumping duty may be levied on products which were entered for consumption not more than 90 days prior to the date of application of provisional measures, when the authorities determine for the dumped product in question that:

(i) there is a history of dumping which caused injury or that the importer was, or should have been, aware that the exporter practises dumping and that such dumping would cause injury, and

(ii) the injury is caused by massive dumped imports of a product in a relatively short time which in light of the timing and the volume of the dumped imports and other circumstances (such as a rapid build-up of inventories of the imported product) is likely to seriously undermine the remedial effect of the definitive anti-dumping duty to be applied, provided that the importers concerned have been given an opportunity to comment.

10.7 The authorities may, after initiating an investigation, take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as provided for in paragraph 6, once they have sufficient evidence that the conditions set forth in that paragraph are satisfied.

10.8 No duties shall be levied retroactively pursuant to paragraph 6 on products entered for consumption prior to the date of initiation of the investigation.

Article 11

Duration and Review of Anti-Dumping Duties and Price Undertakings

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

11.2 The authorities shall review the need for the continued imposition of the duty, where warranted, on their own initiative or, provided that a reasonable period of time has elapsed since the imposition of the definitive anti-dumping duty, upon request by any interested party which submits positive information substantiating the need for a

made by the exporters and importers, and the basis for any decision made under subparagraph 10.2 of Article 6.

12.2.3 A public notice of the termination or suspension of an investigation following the acceptance of an undertaking pursuant to Article 8 shall include, or otherwise make available through a separate report, the non-confidential part of this undertaking.

12.3 The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.

Article 13

Judicial Review

Each Member whose national legislation contains provisions on anti-dumping measures shall maintain judicial, arbitral or administrative tribunals or procedures for the purpose, inter alia, of the prompt review of administrative actions relating to final determinations and reviews of determinations within the meaning of Article 11. Such tribunals or procedures shall be independent of the authorities responsible for the determination or review in question.

Article 14

Anti-Dumping Action on Behalf of a Third Country

14.1 An application for anti-dumping action on behalf of a third country shall be made by the authorities of the third country requesting action.

14.2 Such an application shall be supported by price information to show that the imports are being dumped and by detailed information to show that the alleged dumping is causing injury to the domestic industry concerned in the third country. The government of the third country shall afford all assistance to the authorities of the importing country to obtain any further information which the latter may require.

14.3 In considering such an application, the authorities of the importing country shall consider the effects of the alleged dumping on the industry concerned as a whole in the third country; that is to say, the injury shall not be assessed in relation only to the effect of the alleged dumping on the industry's exports to the importing country or even on the industry's total exports.

14.4 The decision whether or not to proceed with a case shall rest with the importing country. If the importing country decides that it is prepared to take action, the initiation of the approach to the Council for Trade in Goods seeking its approval for such action shall rest with the importing country.

Article 15

Developing Country Members

It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the

application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

PART II

Article 16

Committee on Anti-Dumping Practices

16.1 There is hereby established a Committee on Anti-Dumping Practices (referred to in this Agreement as the "Committee") composed of representatives from each of the Members. The Committee shall elect its own Chairman and shall meet not less than twice a year and otherwise as envisaged by relevant provisions of this Agreement at the request of any Member. The Committee shall carry out responsibilities as assigned to it under this Agreement or by the Members and it shall afford Members the opportunity of consulting on any matters relating to the operation of the Agreement or the furtherance of its objectives. The WTO Secretariat shall act as the secretariat to the Committee.

16.2 The Committee may set up subsidiary bodies as appropriate.

16.3 In carrying out their functions, the Committee and any subsidiary bodies may consult with and seek information from any source they deem appropriate. However, before the Committee or a subsidiary body seeks such information from a source within the jurisdiction of a Member, it shall inform the Member involved. It shall obtain the consent of the Member and any firm to be consulted.

16.4 Members shall report without delay to the Committee all preliminary or final anti-dumping actions taken. Such reports shall be available in the Secretariat for inspection by other Members. Members shall also submit, on a semi-annual basis, reports of any anti-dumping actions taken within the preceding six months. The semi-annual reports shall be submitted on an agreed standard form.

16.5 Each Member shall notify the Committee (a) which of its authorities are competent to initiate and conduct investigations referred to in Article 5 and (b) its domestic procedures governing the initiation and conduct of such investigations.

Article 17

Consultation and Dispute Settlement

17.1 Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement.

17.2 Each Member shall afford sympathetic consideration to, and shall afford adequate opportunity for consultation regarding, representations made by another Member with respect to any matter affecting the operation of this Agreement.

17.3 If any Member considers that any benefit accruing to it, directly or indirectly, under this Agreement is being nullified or impaired, or that the achievement of any objective is being impeded, by another Member or Members, it may, with a view to

2. If in exceptional circumstances it is intended to include non-governmental experts in the investigating team, the firms and the authorities of the exporting Member should be so informed. Such non-governmental experts should be subject to effective sanctions for breach of confidentiality requirements.

3. It should be standard practice to obtain explicit agreement of the firms concerned in the exporting Member before the visit is finally scheduled.

4. As soon as the agreement of the firms concerned has been obtained, the investigating authorities should notify the authorities of the exporting Member of the names and addresses of the firms to be visited and the dates agreed.

5. Sufficient advance notice should be given to the firms in question before the visit is made.

6. Visits to explain the questionnaire should only be made at the request of an exporting firm. Such a visit may only be made if *(a)* the authorities of the importing Member notify the representatives of the Member in question and *(b)* the latter do not object to the visit.

7. As the main purpose of the on-the-spot investigation is to verify information provided or to obtain further details, it should be carried out after the response to the questionnaire has been received unless the firm agrees to the contrary and the government of the exporting Member is informed by the investigating authorities of the anticipated visit and does not object to it; further, it should be standard practice prior to the visit to advise the firms concerned of the general nature of the information to be verified and of any further information which needs to be provided, though this should not preclude requests to be made on the spot for further details to be provided in the light of information obtained.

8. Enquiries or questions put by the authorities or firms of the exporting Members and essential to a successful on-the-spot investigation should, whenever possible, be answered before the visit is made.

ANNEX II

BEST INFORMATION AVAILABLE IN TERMS OF PARAGRAPH 8 OF ARTICLE 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

BIBLIOGRAPHY

BOOKS:

Croome John, *Reshaping The World Trading System: A History Of Uruguay Round* World Trade Organisation (1995)

Goyal, Arun and Noor Mohd ed.. *WTO In The New Millennium*, Academy of Business Studies , (5th ed. 2001).

Gupta, R.K. *Safeguards Countervailing and Antidumping Measures: Against Imports and Exports*, Academy of Business Studies, (1998).

Hasan, Khurshid Hyder, *Equality Of Treatment And Trade Discrimination In International Law,* Martinus Nijhoff/The Hague (1968)

Jackson, John H. *World Trade And The Law Of GATT*, The Bobbs- Merrill Company, Inc.(1969).

ARTICLES:

Bronckers, Macro C.E.J. *Rehabilitating Antidumping and Other Trade Remedies through Cost-Benefit Analysis* Journal of World Trade 30 (2): 5-37,1996.

Bronckers, Marco and Natalie McNels, "Rethinking the 'Like Product' Definition in WTO Antidumping Law", *Journal of World Trade* 33(3) 73-91,1999.

Hoekman, Bernard and Petros C. Mavroidis, "Dumping, Antidumping and Antitrust" *Journal of World Trade* 30(1):27-51, 1996.

Horlick, Gary N. and Eleanor C. Shea, *The World Trade Organisation Antidumping Agreement* Journal of World Trade, 29 (1):5-31,1995.

Huang, Hsin C., H. Bruce Huff and Ihn H. Uhm, *Microeconomic Analysis for Determination of Injury: Recent Beef Trade Disputes Adjudicated by the Canadian International Trade Tribunal,* Journal of World Trade,30(2):133-160, 1996.

Klett, Daniel W. and Todd T. Schneider, *Price Sensitivity and ITC Injury Determinations: A Matter of Definition* Journal of World Trade 28(2): 95-112, 1994.

Kohn, James A. *The Antidumping Act: Its Administration and Place in American Trade Policy,* Michigan Law Review [vol. 60: 1962] 407.

Kufuor, Kofi Oteng "The Developing Countries and the Shaping of GATT/WTO Antidumping Law" *Journal of World Trade* 32(6): 167-197, 1998.
Liberalisation and Foreign Trade: Danger Signals Economic and Political Weekly May 4, 1996 p.1052.

Miranda, Jorge, Raul A. Torres and Mario Ruiz, *The International Use of Antidumping: 1987-1997* Journal of World Trade 32(5): 5-71, 1998.

Morgan Clarisse, *Competition Policy and Anti-Dumping: Is it Time for a Reality Check* Journal of World Trade, 30(5):61-88, 1996.

Niels, Gunnar and Adriaan ten Kate: "Trusting Antitrust to Dump Antidumping: Abolishing Antidumping in Free Trade Agreements Without Replacing it with Competition Law" *Journal of World Trade* 31(6):29-52, 1997.

Palmeter, David *A Commentary on the WTO Anti-Dumping Code* Journal of World Trade, 30 (4): 43-69, 1996.

Pangratis, Angelos and Edwin Vermulst, *Injury in Anti-dumping Proceedings: The need to Look Beyond The Uruguay Round Results* Journal of World Trade 28(5): 61-96, 1994.

Rafat, Feraidon and Mehdi Salehizadeh, "Dumping: The Influence of Currency Movements", *Journal of World Trade* 28(3):181-193, 1994.

Satapathy, C. *WTO Agreement on Anti-Dumping: Misuse and Case for Review* Economic and Political Weekly,August 7, 1997. P. 2210

Trebilcock, Michael J. "Competition Policy and Trade Policy: Mediating the Interface" *Journal of World Trade*, 71-106.

Vermulst Edwin and Nario Komuro *Anti-dumping Disputes in the GATT/WTO: Navigating Dire Straits* Journal of World Trade; 31(1):5-33, 1997.

Vermulst, Edwin "Adopting and Implementing Anti-Dumping Laws: Some Suggestions for Developing Countries" *Journal of World Trade* 31(2):5-23, 1997.

Vermulst, Edwin "Positive Agenda for AD/CVD", UNCTAD Workshop on Development of Positive Agenda (Seoul 8-10June 1999.)

Vermulst, Edwin and Bart Driessen, *New Battle Lines in the Anti-Dumping War: Recent Movements on the European Front,* Journal of World Trade, 31(3):135-157, 1997.

Zhu, Xiaohua "Antidumping Measures: Time to Roll Them Back" *Economic and Political Weekly*, May 3 1997 p.936.