

<b>1 ARTICLE 17 .....</b>	<b>2</b>
1.1 Text of Article 17 .....	2
1.2 General .....	3
1.2.1 Concurrent application of Article 17 of the Anti-Dumping Agreement and the rules and procedures of the DSU.....	3
1.2.2 Challenge against anti-dumping legislation as such .....	4
1.2.3 Mandatory versus discretionary legislation .....	6
1.2.3.1 General .....	6
1.2.3.2 Rejection of the distinction? .....	7
1.2.4 Challenge of a "practice" as such .....	9
1.3 Article 17.1.....	9
1.3.1 "settlement of disputes" .....	9
1.4 Article 17.2.....	10
1.4.1 "any matter affecting the operation of this Agreement" .....	10
1.5 Article 17.3.....	10
1.5.1 Exclusion of Article 17.3 of the Anti-Dumping Agreement from Appendix 2 of the DSU .....	10
1.6 Article 17.4.....	10
1.6.1 Scope of Article 17.4: "if final action has been taken" .....	10
1.6.2 Concept of "matter" .....	13
1.6.3 Claims.....	14
1.6.3.1 Abandoned claims .....	15
1.7 Article 17.5.....	16
1.7.1 Article 17.5(i).....	16
1.7.2 Article 17.5(ii).....	16
1.7.2.1 General .....	16
1.7.2.2 Documents not available to the investigating authorities.....	16
1.7.2.3 Undisclosed facts .....	17
1.7.2.4 Documents created for the purpose of a dispute .....	17
1.7.2.5 A respondent's reliance on another investigating authority's determination concerning the same product to substantiate its own investigating authority's determination before a WTO panel .....	17
1.7.3 Relationship with other paragraphs of Article 17 .....	18
1.8 Article 17.6.....	18
1.8.1 Ministerial Decision .....	18
1.8.2 Relationship with the standard of review in Article 11 of the DSU.....	20
1.8.3 Article 17.6(i).....	21
1.8.3.1 General .....	21
1.8.3.2 "establishment of the facts was proper" .....	23
1.8.3.2.1 Record of the investigating authority .....	23
1.8.3.2.1.1 General.....	23

1.8.3.2.1.2	Whether a document formed part of the record .....	23
1.8.3.2.2	Treatment of undisclosed facts.....	24
1.8.3.3	"the evaluation of facts was unbiased and objective" .....	25
1.8.3.4	Relevance of the different roles of panels and investigating authorities .....	25
1.8.3.5	No <i>ex post</i> rationalization.....	26
1.8.3.6	Relationship of Article 17.6(i) with Article 11 of the DSU .....	26
1.8.3.7	Standard of proof.....	30
1.8.3.8	Panels' use of record evidence not explicitly cited by an investigating authority in its determination .....	32
1.8.3.9	Whether adverse inferences may be drawn by an investigating authority and by a WTO panel in the light of an allegation that certain interested parties acted in bad faith.....	34
1.8.4	Article 17.6(ii) .....	35
1.8.4.1	First sentence: customary rules of interpretation .....	35
1.8.4.2	Second sentence: more than one permissible interpretation .....	35
1.8.4.3	Relationship with standard of review in Article 11 of the DSU .....	41
1.8.5	Relationship between subparagraphs (i) and (ii) of Article 17.6 .....	41
1.9	Relationship with other provisions of the Anti-Dumping Agreement.....	42
1.9.1	Article 3 .....	42
1.9.2	Article 5 .....	42
1.9.3	Article 7 .....	42
1.9.4	Article 18.....	42
1.10	Relationship with other WTO Agreements .....	42
1.10.1	GATT 1994.....	42
1.10.1.1	Articles XXII and XXIII.....	42
1.10.2	DSU .....	43
1.10.2.1	Article 1 .....	43
1.10.2.2	Article 3.8 .....	43
1.10.2.3	Article 6.2 .....	43
1.10.2.4	Article 7 .....	43
1.10.2.5	Article 11 .....	43
1.10.2.6	Article 19.1 .....	44

## **1 ARTICLE 17**

### **1.1 Text of Article 17**

#### ***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 reaching a mutually satisfactory resolution of the matter, request in writing consultations with the Member or Members in question. Each Member shall afford sympathetic consideration to any request from another Member for consultation.

17.4 If the Member that requested consultations considers that the consultations pursuant to paragraph 3 have failed to achieve a mutually agreed solution, and if final action has been taken by the administering authorities of the importing Member to levy definitive anti-dumping duties or to accept price undertakings, it may refer the matter to the Dispute Settlement Body ("DSB"). When a provisional measure has a significant impact and the Member that requested consultations considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB.

17.5 The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon:

- (i) a written statement of the Member 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
- (ii) the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.

17.6 In examining the matter referred to in paragraph 5:

- (i) in its assessment of the facts of the matter, the panel shall 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 shall not be overturned;
- (ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

17.7 Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such 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 person, body or authority providing the information, shall be provided.

## **1.2 General**

### **1.2.1 Concurrent application of Article 17 of the Anti-Dumping Agreement and the rules and procedures of the DSU**

1. The Appellate Body in *Guatemala – Cement I* rejected the finding by the Panel that "the provisions of Article 17 provides for a coherent set of rules for dispute settlement specific to

anti-dumping cases, ... that *replaces* the more general approach of the DSU (emphasis added)."<sup>1</sup> The Appellate Body first held that the special or additional rules within the meaning of Article 1.2 shall prevail over the provisions of the DSU only "to the extent that there is a difference between the two sets of provisions":

"Article 1.2 of the DSU provides that 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.' (emphasis added) It states, furthermore, that these special or additional rules and procedures 'shall prevail' over the provisions of the DSU '[t]o the extent that there is a *difference* between' the two sets of provisions (emphasis added) Accordingly, 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. In our view, 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 the one provision will lead to a violation of the other provision, that is, in the case of a *conflict* between them. An interpreter must, therefore, identify an *inconsistency* or a *difference* between a provision of the DSU and a special or additional provision of a covered agreement *before* concluding that the latter *prevails* and that the provision of the DSU does not apply.

We see the special or additional rules and procedures of a particular covered agreement as fitting together with the generally applicable rules and procedures of the DSU to form a comprehensive, integrated dispute settlement system for the *WTO Agreement*. 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, while Article 1 of the DSU seeks to establish an integrated and comprehensive dispute settlement system for all of the covered agreements of the *WTO Agreement* as a whole. It is, therefore, only in the specific circumstance where a provision of the DSU and a special or additional provision of another covered agreement are mutually inconsistent that the special or additional provision may be read to *prevail* over the provision of the DSU."<sup>2</sup>

2. The Appellate Body in *Guatemala – Cement I* then found that Article 17 of the Anti-Dumping Agreement does not replace the "more general approach of the DSU":

"Clearly, the consultation and dispute settlement provisions of a covered agreement are not meant to *replace*, as a coherent system of dispute settlement for that agreement, the rules and procedures of the DSU. 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. To suggest, as the Panel has, that Article 17 of the *Anti-Dumping Agreement* replaces the 'more general approach of the DSU' is also to deny 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 characterized the previous GATT 1947 and Tokyo Round agreements; it does not reflect the *integrated* dispute settlement system established in the WTO."<sup>3</sup>

### 1.2.2 Challenge against anti-dumping legislation as such

3. One of the main issues which arose in the *US – 1916 Act* dispute was whether an anti-dumping statute could, in the light of Article 17 of the Anti-Dumping Agreement, be challenged "as such", rather than a specific *application* of such a statute in a particular anti-dumping

<sup>1</sup> Appellate Body Report, *Guatemala – Cement I*, para. 58 (quoting the Panel Report, *Guatemala – Cement I*, para. 7.16).

<sup>2</sup> Appellate Body Report, *Guatemala – Cement I*, paras. 65-66.

<sup>3</sup> Appellate Body Report, *Guatemala – Cement I*, para. 67. See also Panel Report, *US – 1916 Act (EC)*, para. 5.21; Panel Report, *US – 1916 Act (Japan)*, para. 6.85, and Appellate Body Report, *US – Hot-Rolled Steel*, para. 51.

investigation. Discussing the legal basis for claims brought under the Anti-Dumping Agreement, the Appellate Body in *US – 1916 Act* stated:

"Article 17 of the *Anti-Dumping Agreement* addresses dispute settlement under that Agreement. Just as Articles XXII and XXIII of the GATT 1994 create a legal basis for claims in disputes relating to provisions of the GATT 1994, so also Article 17 establishes the basis for dispute settlement claims relating to provisions of the *Anti-Dumping Agreement*. In the same way that Article XXIII of the GATT 1994 allows a WTO Member to challenge *legislation* as such, Article 17 of the *Anti-Dumping Agreement* is properly to be regarded as allowing a challenge to legislation as such, unless this possibility is excluded. No such *express* exclusion is found in Article 17 or elsewhere in the *Anti-Dumping Agreement*."<sup>4</sup>

4. In considering whether Article 17 contains an implicit restriction on challenges to anti-dumping legislation as such, the Appellate Body, in *US – 1916 Act*, noted the following:

"Article 17.1 refers, without qualification, to 'the settlement of disputes' under the *Anti-Dumping Agreement*. Article 17.1 does not distinguish between disputes relating to Anti-Dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. Article 17.1 therefore implies that Members can challenge the consistency of legislation as such with the *Anti-Dumping Agreement* unless this action is excluded by Article 17.

Similarly, Article 17.2 of the *Anti-Dumping Agreement* does not distinguish between disputes relating to anti-dumping legislation as such and disputes relating to anti-dumping measures taken in the implementation of such legislation. On the contrary, it refers to consultations with respect to 'any matter affecting the operation of this Agreement'.

...

Article 17.3 does not explicitly address challenges to legislation as such. ... Articles XXII and XXIII allow challenges to be brought under the GATT 1994 against legislation as such. Since Article 17.3 is the 'equivalent provision' to Articles XXII and XXIII of the GATT 1994, Article 17.3 provides further support for our view that challenges may be brought under the *Anti-Dumping Agreement* against legislation as such unless such challenges are otherwise excluded."<sup>5</sup>

5. After finding that Article 17.3 supported its view that challenges may be brought under the Anti-Dumping Agreement against legislation as such, unless such challenges are explicitly excluded, the Appellate Body also addressed Article 17.4:

"Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such."<sup>6</sup>

6. The Appellate Body in *US – 1916 Act* finally referred to Articles 18.1 and 18.4 of the Anti-Dumping Agreement as contextual support for its reading of Article 17 as allowing Members to bring claims against anti-dumping legislation as such:

"Nothing in Article 18.4 or elsewhere in the *Anti-Dumping Agreement* excludes the obligation set out in Article 18.4 from the scope of matters that may be submitted to dispute settlement.

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<sup>4</sup> Appellate Body Report, *US – 1916 Act*, para. 62.

<sup>5</sup> Appellate Body Report, *US – 1916 Act*, paras. 64-65, and 68.

<sup>6</sup> Appellate Body Report, *US – 1916 Act*, para. 74.

If a Member could not bring a claim of inconsistency under the *Anti-Dumping Agreement* against legislation as such until one of the three anti-dumping measures specified in Article 17.4 had been adopted and was also challenged, then examination of the consistency with Article 18.4 of anti-dumping legislation as such would be deferred, and the effectiveness of Article 18.4 would be diminished.

...

Article 18.1 contains a prohibition on 'specific action against dumping' when such action is not taken in accordance with the provisions of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*. Specific action against dumping could take a wide variety of forms. If specific action against dumping is taken in a form other than a form authorized under Article VI of the GATT 1994, as interpreted by the *Anti-Dumping Agreement*, such action will violate Article 18.1. We find nothing, however, in Article 18.1 or elsewhere in the *Anti-Dumping Agreement*, to suggest that the consistency of such action with Article 18.1 may only be challenged when one of the three measures specified in Article 17.4 has been adopted. Indeed, such an interpretation must be wrong since it implies that, if a Member's legislation provides for a response to dumping that does *not* consist of one of the three measures listed in Article 17.4, then it would be impossible to test the consistency of that legislation, and of particular responses thereunder, with Article 18.1 of the *Anti-Dumping Agreement*.<sup>7</sup>

7. In *US – Hot-Rolled Steel*, Japan had challenged Section 735(c)(5)(A) of the United States Tariff Act of 1930, as amended, which provided for a method for calculating the "all others" rate as inconsistent with Article 9.4. The Panel found that Section 735(c)(5)(A), as amended, was, *on its face*, inconsistent with Article 9.4 "in so far as it requires the consideration of margins based in part on facts available in the calculation of the all others rate". The Panel further found that, in maintaining this Section following the entry into force of the Anti-Dumping Agreement, the United States had acted inconsistently with Article 18.4 of this Agreement as well as with Article XVI:4 of the WTO Agreement.<sup>8</sup> The Appellate Body upheld these findings.<sup>9</sup>

### 1.2.3 Mandatory versus discretionary legislation<sup>10</sup>

#### 1.2.3.1 General

8. The Appellate Body and the Panels addressed the issue of mandatory versus discretionary legislation with respect to the United States Antidumping Act of 1916. This United States legislation provided for civil and criminal proceedings to counteract predatory pricing from abroad. In addition, the Panel in *US – 1916 Act (EC)*, in a finding explicitly endorsed by the Appellate Body<sup>11</sup>, rejected the United States' argument, according to which the 1916 Act was a non-mandatory law, because the US Department of Justice had the discretion to initiate, or not, a case under the 1916 Act:

"The EC also refers to the panel report in *EC – Audio Cassettes*, which was not adopted. This report stated why the mere fact that the initiation of anti-dumping investigations was discretionary would not make the EC legislation non-mandatory. The panel stated that:

'[it] did not consider in any event that its task in this case was to determine whether the EC's Basic Regulation was non-mandatory in the sense that the initiation of investigations and impositions of duties were not mandatory functions. Should panels accept this approach, they would be precluded from ever reviewing the content of a party's anti-dumping legislation.'

<sup>7</sup> Appellate Body Report, *US – 1916 Act*, paras. 78-81.

<sup>8</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.90.

<sup>9</sup> Appellate Body Report, *US – Hot-Rolled Steel*, para. 129.

<sup>10</sup> This Section only refers to the analysis of this issue in anti-dumping-related disputes. For a detailed analysis of this issue in the WTO jurisprudence, see the Section on Article 6 of the DSU.

<sup>11</sup> Appellate Body Report, *US – 1916 Act*, para. 91.

The *EC – Audio Cassettes* panel based its reasoning on the fact that this would undermine the obligation contained in Article 16.6 of the Tokyo Round Anti-Dumping Agreement. That provision provided that parties had to bring their laws, regulations and administrative procedures into conformity with the provisions of the Tokyo Round Anti-Dumping Agreement. We note that almost identical terms are found in Article 18.4 of the WTO Anti-Dumping Agreement. ...

...

Since we found that Article VI and the WTO Anti-Dumping Agreement are applicable to the 1916 Act, we consider that the reasoning of the panel in the *EC – Audio Cassettes* case should apply in the present case. Interpreting the provisions of Article 18.4 differently would undermine the obligations contained in that Article and would be contrary to the general principle of useful effect by making all the disciplines of the Anti-Dumping Agreement non-enforceable as soon as a Member would claim that the investigating authority has discretion to initiate or not an anti-dumping investigation."<sup>12</sup>

9. In *US – DRAMS*, Korea challenged certain certification requirements under the United States anti-dumping law. The provision challenged by Korea required exporters to certify, upon removal of anti-dumping duties, that they agreed to the reinstatement of the anti-dumping duties on the products of their company if, after revocation of the original anti-dumping duties, the United States authorities found dumping. The Panel rejected the Korean arguments, noting that the certification requirement was not a mandatory requirement for revocation under United States anti-dumping law in general. The Panel held that other provisions of United States anti-dumping law and regulations of the United States authorities made revocation of an anti-dumping order possible contingent upon a different set of requirements, not including the certification requirement:

"We note section 751(b) of the 1930 Tariff Act (as amended) and section 353.25(d) of the DOC's regulations, whereby an anti-dumping order may be revoked on the basis of 'changed circumstances'. We note that neither of these provisions imposes a certification requirement. In other words, an anti-dumping order may be revoked under these provisions absent fulfilment of the section 353.25(a)(2)(iii) certification requirement. We also note that Korea has not challenged the consistency of these provisions with the WTO Agreement. Thus, because of the existence of legislative avenues for Article 11.2-type reviews that do not impose a certification requirement, and which have not been found inconsistent with the WTO Agreement, we are precluded from finding that the section 353.25(a)(2)(iii) certification requirement in and of itself amounts to a mandatory requirement inconsistent with Article 11.2 of the *AD Agreement*."<sup>13</sup>

10. In *US – Section 129(c)(1) URAA*, Canada had claimed that certain United States legislation as such violated WTO law. The Panel, in deviating from the approach taken by the panel in *US – Export Restraints*,<sup>14</sup> decided to analyse first whether the United States legislation at issue was mandatory, before analysing whether the behaviour mandated would be inconsistent with the relevant WTO provisions.<sup>15</sup>

### 1.2.3.2 Rejection of the distinction?

11. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, for the first time, did not follow the traditional mandatory versus discretionary rule and found that it saw no reason for concluding that, in principle, non-mandatory measures cannot be challenged "as such". In this

<sup>12</sup> Panel Report, *US – 1916 Act (EC)*, para. 6.168. See also Panel Reports, *US – 1916 Act (Japan)*, paras. 6.188-6.189; and *US – Steel Plate*, paras. 7.88-7.89 and 8.3. In this case, the Panel concluded that the "practice" of the US authorities concerning the application of "total facts available" (Article 6.8 *Anti-Dumping Agreement*) is not a measure which can give rise to an independent claim of violation of the Anti-Dumping Agreement. See Panel Report, *US – Section 129(c)(1) URAA*, para. 6.22.

<sup>13</sup> Panel Report, *US – DRAMS*, para. 6.53.

<sup>14</sup> Panel Report, *US – Section 129(c)(1) URAA*, footnote 72.

<sup>15</sup> Panel Report, *US – Section 129(c)(1) URAA*, paras. 6.22-6.25.

case, the measure at issue was the United States Sunset Policy Bulletin which the Panel had found not to be challengeable as such because it was not mandatory for the competent authorities. The Appellate Body disagreed:

"We also believe that the provisions of Article 18.4 of the Anti-Dumping Agreement are relevant to the question of the type of measures that may, as such, be submitted to dispute settlement under that Agreement. Article 18.4 contains an explicit obligation for Members to 'take all necessary steps, of a general or particular character' to ensure that their 'laws, regulations and administrative procedures' are in conformity with the obligations set forth in the Anti-Dumping Agreement. Taken as a whole, the phrase 'laws, regulations and administrative procedures' seems to us to encompass the entire body of generally applicable rules, norms and standards adopted by Members in connection with the conduct of anti-dumping proceedings.<sup>16</sup> If some of these types of measure could not, as such, be subject to dispute settlement under the Anti-Dumping Agreement, it would frustrate the obligation of 'conformity' set forth in Article 18.4.

This analysis leads us to conclude that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the *Anti-Dumping Agreement*, for finding that only certain types of measure can, as such, be challenged in dispute settlement proceedings under the *Anti-Dumping Agreement*. Hence we see no reason for concluding that, in principle, non-mandatory measures cannot be challenged 'as such'. To the extent that the Panel's findings in paragraphs 7.145, 7.195, and 7.246 of the Panel Report suggest otherwise, we consider them to be in error.

We observe, too, that allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members to resort to dispute settlement to 'preserve [their] rights and obligations ... under the covered agreements, and to clarify the existing provisions of those agreements'. As long as a Member respects the principles set forth in Articles 3.7 and 3.10 of the DSU, namely, to exercise their 'judgement as to whether action under these procedures would be fruitful' and to engage in dispute settlement in good faith, then that Member is entitled to request a panel to examine measures that the Member considers nullify or impair its benefits. We do not think that panels are obliged, as a preliminary jurisdictional matter, to examine whether the challenged measure is mandatory. This issue is relevant, if at all, only as part of the panel's assessment of whether the measure is, as such, inconsistent with particular obligations. It is to this issue that we now turn."<sup>17</sup>

12. In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body, referring to its previous report in *US – 1916 Act* where it did follow mandatory/discretionary rule, indicated that it had yet to pronounce itself generally upon the continuing relevance of such a distinction and warned against its "mechanic application":

"We explained in *US – 1916 Act* that this analytical tool existed prior to the establishment of the WTO, and that a number of GATT panels had used it as a technique for evaluating claims brought against legislation as such. As the Panel seemed to acknowledge, we have not, as yet, been required to pronounce generally upon the continuing relevance or significance of the mandatory/discretionary distinction. Nor do we consider that this appeal calls for us to undertake a comprehensive examination of this distinction. We do, nevertheless, wish to observe that, as with any such analytical tool, the import of the 'mandatory/discretionary

<sup>16</sup> (footnote original) We observe that the scope of each element in the phrase "laws, regulations and administrative procedures" must be determined for purposes of WTO law and not simply by reference to the label given to various instruments under the domestic law of each WTO Member. This determination must be based on the content and substance of the instrument, and not merely on its form or nomenclature. Otherwise, the obligations set forth in Article 18.4 would vary from Member to Member depending on each Member's domestic law and practice.

<sup>17</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras. 87-89.



distinction' may vary from case to case. For this reason, we also wish to caution against the application of this distinction in a mechanistic fashion."<sup>18</sup>

#### **1.2.4 Challenge of a "practice" as such**

13. In *US – Export Restraints*, Canada had claimed that the US "practice" of treating export restraints as meeting the "financial contribution" requirement of Article 1.1(a)(1)(iv) of the SCM Agreement was a measure and could be challenged as such. Canada defined US "practice" as "an institutional commitment to follow declared interpretations or methodologies that is reflected in cumulative determinations" and claimed that this "practice" has an "operational existence in and of itself". The Panel considered whether the alleged US practice required the US authorities to treat export restraints in a certain way and therefore had "independent operational status". The Panel, which concluded that there was no measure in the form of US practice, indicated:

"[W]hile Canada may be right that under US law, 'practice must normally be followed, and those affected by US [CVD] law ... therefore have reason to expect that it will be', past practice can be departed from as long as a reasoned explanation, which prevents such practice from achieving independent operational status in the sense of *doing* something or *requiring* some particular action. The argument that expectations are created on the part of foreign governments, exporters, consumers, and petitioners as a result of any particular practice that the DOC 'normally' follows would not be sufficient to accord such a practice an independent operational existence. Nor do we see how the DOC's references in its determinations to its practice gives 'legal effect to that 'practice' as determinative of the interpretations and methodologies it applies'. US 'practice' therefore does not appear to have independent operational status such that it could independently give rise to a WTO violation as alleged by Canada."<sup>19</sup>

14. In *US – Hot-Rolled Steel*, Japan had also challenged the "general" practice of the US investigating authorities regarding total facts available. The Panel did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based because it concluded that Japan's claim in this regard was outside its terms of reference. Indeed, the Panel found that there was no mention of such a claim in Japan's request for the establishment of a panel.<sup>20</sup>

15. In *US – Steel Plate*, the United States, referring to the Panel's decision in *US – Export Restraints*, argued that the United States "practice" (in this case its practice as regards total facts available) could not be the subject of a claim because it did not have "independent operational status" and therefore it was not a "measure".<sup>21</sup> India, on the contrary, claimed that a "practice" becomes a "measure" through repeated similar responses to the same situation.<sup>22</sup> The Panel concluded that "[t]he challenged practice in this case is, in our view, no different from that considered in the *US – Export Restraints* case. It can be departed from so long as a reasoned explanation is given. It therefore lacks independent operational status, as it cannot require USDOC to do something, or refrain from doing something."<sup>23</sup>

### **1.3 Article 17.1**

#### **1.3.1 "settlement of disputes"**

16. Article 17.1 was discussed by the Appellate Body in *US – 1916 Act*. See paragraph 4 above.

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<sup>18</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 93.

<sup>19</sup> Panel Report, *US – Export Restraints*, para. 8.126.

<sup>20</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.22.

<sup>21</sup> Panel Report, *US – Steel Plate*, para. 7.14.

<sup>22</sup> Panel Report, *US – Steel Plate*, para. 7.15.

<sup>23</sup> Panel Report, *US – Steel Plate*, para. 7.23.

## 1.4 Article 17.2

### 1.4.1 "any matter affecting the operation of this Agreement"

17. Article 17.2 was discussed by the Appellate Body in *US – 1916 Act*. See paragraph 4 above.

## 1.5 Article 17.3

### 1.5.1 Exclusion of Article 17.3 of the Anti-Dumping Agreement from Appendix 2 of the DSU

18. In analysing the Panel's interpretation of the relationship between Article 17 of the Anti-Dumping Agreement and the DSU, the Appellate Body in *Guatemala – Cement I* referred to the exclusion of Article 17.3 from Appendix 2 of the DSU, which lists the special or additional rules and procedures contained in 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 ... [Article 17.3] is not listed [in Appendix 2 of the DSU,] precisely because it provides the legal basis for consultations to be requested by a complaining Member under the *Anti-Dumping Agreement*. Indeed, 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 ... *WTO Agreement*, and under the ... *TRIPS Agreement*."<sup>24</sup>

## 1.6 Article 17.4

### 1.6.1 Scope of Article 17.4: "if final action has been taken"

19. In *Guatemala – Cement I*, Mexico's complaint related to various aspects of the anti-dumping investigation by Guatemala applied in a specific case. Guatemala requested that the complaint be rejected, because (i) while a provisional anti-dumping measure was identified in the request for panel establishment, Mexico had not asserted and demonstrated that the measure had had a "significant impact" as required under Article 17.4, and (ii) neither of a final anti-dumping measure and a price undertaking had been identified in Mexico's request for the establishment of the panel.

20. The Panel in *Guatemala – Cement I* found that Article 17.4 of the Anti-Dumping Agreement is a "timing provision", meaning that Article 17.4 established *when* a panel may be requested, rather than a provision setting forth the appropriate subject of a request for establishment of a panel.<sup>25</sup> The Appellate Body disagreed with this finding and stated that "Article 6.2 of the DSU requires 'the specific measures at issue' to be identified in the Panel request."<sup>26</sup> In determining what may constitute a "specific measure" for the purposes of the Anti-Dumping Agreement, the Appellate Body in *Guatemala – Cement I* stated:

"According to Article 17.4, a 'matter' may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. 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. 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

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<sup>24</sup> Appellate Body Report, *Guatemala – Cement I*, para. 64.

<sup>25</sup> Appellate Body Report, *Guatemala – Cement I*, para. 77 (quoting the Panel Report, *Guatemala – Cement I*, para. 7.15).

<sup>26</sup> Appellate Body Report, *Guatemala – Cement I*, para. 77.

achievement of any objective in a dispute under the *Anti-Dumping Agreement*. As we have observed earlier, 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.

[I]n 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."<sup>27</sup>

21. In *US – 1916 Act*, the Panel and the Appellate Body were called upon to determine whether the Anti-Dumping Agreement allowed challenges to anti-dumping legislation "as such", rather than merely to the specific application of such legislation in individual anti-dumping investigations. The Panel in *US – 1916 Act* found that it had jurisdiction to consider claims "as such".<sup>28</sup> The United States based its objections to the Panel's jurisdiction on Article 17.4. More specifically, the United States argued that Members could not bring a claim of inconsistency with the Anti-Dumping Agreement "against legislation as such independently from a claim with respect to one of the three measures identified in Article 17.4, i.e. a definitive anti-dumping duty, a price undertaking, or a provisional measure."<sup>29</sup> The United States relied on the Appellate Body's findings in *Guatemala – Cement I*, where the Appellate Body had held that "[a]ccording to Article 17.4, a 'matter' may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. 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."<sup>30</sup> The Appellate Body upheld the Panels' findings; in doing so, it first clarified its own findings in *Guatemala – Cement I*:

"In *Guatemala – Cement*, Mexico had challenged Guatemala's *initiation* of anti-dumping proceedings, and its *conduct* of the investigation, without identifying any of the measures listed in Article 17.4. ...

Nothing in our Report in *Guatemala – Cement* suggests that Article 17.4 precludes review of anti-dumping legislation as such. Rather, in that case, we simply found that, for Mexico to challenge Guatemala's initiation and conduct of the anti-dumping investigation, Mexico was required to identify one of the three anti-dumping measures listed in Article 17.4 in its request for establishment of a panel. Since it did not do so, the panel in that case did not have jurisdiction."<sup>31</sup>

22. After clarifying its own findings in *Guatemala – Cement I* with respect to Article 17.4, the Appellate Body turned to the considerations underlying the restrictions contained in Article 17.4:

"In the context of dispute settlement proceedings regarding an anti-dumping investigation, there is tension between, on the one hand, a complaining Member's right to seek redress when illegal action affects its economic operators and, on the other hand, the risk that a responding Member may be harassed or its resources squandered if dispute settlement proceedings could be initiated against it in respect of each step, however small, taken in the course of an anti-dumping investigation, even before any concrete measure had been adopted.<sup>32</sup> In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping investigation

<sup>27</sup> Appellate Body Report, *Guatemala – Cement I*, paras. 79-80.

<sup>28</sup> Panel Report, *US – 1916 Act (EC)*, para. 5.27; Panel Report, *US – 1916 Act (Japan)*, para. 6.91.

<sup>29</sup> Appellate Body Report, *US – 1916 Act*, para. 55.

<sup>30</sup> Appellate Body Report, *Guatemala – Cement I*, para. 79. See also *ibid.* para. 20.

<sup>31</sup> Appellate Body Report, *US – 1916*, paras. 71-72.

<sup>32</sup> (*footnote original*) An unrestricted right to have recourse to dispute settlement during an anti-dumping investigation would allow a multiplicity of dispute settlement proceedings arising out of the same investigation, leading to repeated disruption of that investigation.

to cases in which a Member's request for establishment of a panel identifies a definitive anti-dumping duty, a price undertaking or a provisional measure<sup>33</sup>, Article 17.4 strikes a balance between these competing considerations.

Therefore, Article 17.4 sets out certain conditions that must exist before a Member can challenge action taken by a national investigating authority in the context of an anti-dumping investigation. However, Article 17.4 does not address or affect a Member's right to bring a claim of inconsistency with the *Anti-Dumping Agreement* against anti-dumping legislation as such."<sup>34</sup>

23. After setting out the function of Article 17.4 within the Anti-Dumping Agreement, the Appellate Body also stated that it failed to see, in the light of firmly established GATT and WTO jurisprudence according to which claims can be brought against legislation as such, which particular characteristics should distinguish anti-dumping legislation from other legislation so as to render the established case law practice inapplicable in the context of anti-dumping legislation. Finally, the Appellate Body also referred to Articles 18.1 and 18.4 as context for its findings.<sup>35</sup>

24. In *Mexico – Corn Syrup*, the question arose whether, in a dispute where the specific measure challenged is a definitive anti-dumping duty, a Member may assert a claim of violation of Article 7.4, which establishes maximum time-periods for the imposition of provisional measures. Article 17.4 establishes the possibility of challenging definitive anti-dumping duties, price undertakings or provisional measures; with respect to the latter, Article 17.4 establishes that "[w]hen a provisional measure has a significant impact and [a] Member ... considers that the measure was taken contrary to the provisions of paragraph 1 of Article 7, that Member may also refer such matter to the DSB". The Panel discussed to what extent the United States' claim under Article 7.4 was "related to" Mexico's definitive anti-dumping duty:

"The Appellate Body Report in *Guatemala – Cement* indicates that a complainant may, having identified a specific anti-dumping duty in its request for establishment, bring any claims under the *AD Agreement relating to* that specific measure. That there should be a relationship between the measure challenged in a dispute and the claims asserted in that dispute would appear necessary, given that Article 19.1 of the DSU requires that, 'where a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with the agreement'.

[W]e consider that the United States' claim under Article 7.4 of the *AD Agreement* is nevertheless *related to* Mexico's definitive anti-dumping duty. In this regard, we recall that, under Article 10 of the *AD Agreement*, a provisional measure represents a basis under which a Member may, if the requisite conditions are met, levy anti-dumping duties retroactively. At the same time, a Member may not, except in the circumstances provided for in Article 10.6 of the *AD Agreement*, retroactively levy a definitive anti-dumping duty for a period during which provisional measures were not applied. Consequently, because the period of time for which a provisional measure is applied is generally determinative of the period for which a definitive anti-dumping duty may be levied retroactively, we consider that a claim regarding the duration of a provisional measure relates to the definitive anti-dumping duty."<sup>36</sup>

25. The Panel in *Mexico – Corn Syrup* then considered the fact that Article 17.4 refers only to paragraph 1 of Article 7 and decided that it would be incorrect to interpret Article 17.4 in a manner "which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the *AD Agreement*":

"Read literally, this provision could be taken to mean that in a dispute where the specific measure being challenged is a provisional measure, the *only* claim that a

<sup>33</sup> (footnote original) Once one of the three types of measure listed in Article 17.4 is identified in the request for establishment of a panel, a Member may challenge the consistency of any preceding action taken by an investigating authority in the course of an anti-dumping investigation.

<sup>34</sup> Appellate Body Report, *US – 1916 Act*, paras. 73-74.

<sup>35</sup> Appellate Body Report, *US – 1916 Act*, paras. 75-83.

<sup>36</sup> Panel Report, *Mexico – Corn Syrup*, paras. 7.52-7.53.

Member may pursue is a claim under Article 7.1 of the *AD Agreement* (and not a claim under Article 7.4 of the *AD Agreement*). If this conclusion is correct, a ruling that a claim under Article 7.4 could not be pursued in a dispute where the specific measure challenged is a definitive anti-dumping duty would mean that a Member would never be able to pursue an Article 7.4 claim. In our view, it would be incorrect to interpret Article 17.4 of the *AD Agreement* in a manner which would leave Members without any possibility to pursue dispute settlement in respect of a claim alleging a violation of a requirement of the *AD Agreement*.<sup>37</sup>

26. The Appellate Body in *US – Continued Zeroing* found that "continued zeroing" is a measure susceptible of challenge in dispute settlement. Noting that "Articles 17.3 and 17.4 of the Anti-Dumping Agreement are also relevant" to this issue,<sup>38</sup> the Appellate Body then characterized "continued zeroing" as "the use of the zeroing methodology in successive proceedings":

"[T]he measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations; rather, they are the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue. It is with respect to this ongoing conduct that the European Communities brought its challenge, seeking its cessation. ...In our view, the European Communities, in seeking an effective resolution of its dispute with the United States, is entitled to frame the subject of its challenge in such a way as to bring the ongoing conduct, regarding the use of the zeroing methodology in these 18 cases, under the scrutiny of WTO dispute settlement."<sup>39</sup>

27. In the dispute on *US – Orange Juice (Brazil)*, the United States argued that "continued zeroing" does not amount to "final action" within the meaning of Article 17.4, and therefore a claim regarding continued zeroing could not be referred to dispute settlement. Recalling the Appellate Body's findings in *US – Continued Zeroing*, and noting that "Brazil's complaint is focused on the USDOC's alleged 'use of zeroing' in multiple proceedings, under the orange juice anti-dumping duty order, as a single 'ongoing conduct' measure", the Panel stated:

"In our view, an 'ongoing conduct' measure is broader than the type of conduct envisaged under Article 17.4 of the AD Agreement, and as such, falls outside of its scope of operation.

... [T]he evidence Brazil has advanced in support of the existence of the alleged 'continued zeroing' measure includes instances where the United States authorities have, in fact, levied definitive anti-dumping duties. Thus, Brazil does not challenge the alleged 'continued zeroing' measure in the absence of any connection between this alleged measure and 'final action'. On the contrary, the evidence of United States' 'final action' lies at the heart of Brazil's complaint.

In conclusion, we find that ... the inclusion of Brazil's claim against the alleged "continued zeroing" measure in our terms of reference is not inconsistent with the requirements of Article 17.4 of the AD Agreement."<sup>40</sup>

### 1.6.2 Concept of "matter"

28. The Appellate Body described the word "matter" in paragraphs 2, 3, 4, 5, and 6 of Article 17 as "the key concept in defining the scope of a dispute that may be referred to the DSB

<sup>37</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.54.

<sup>38</sup> Appellate Body Report, *Continued Zeroing*, para. 177.

<sup>39</sup> Appellate Body Report, *Continued Zeroing*, para. 181.

<sup>40</sup> Panel Report, *US – Orange Juice (Brazil)*, paras. 7.47-7.49.

under the *Anti-Dumping Agreement* and, therefore, in identifying the parameters of a Panel's terms of reference in an anti-dumping dispute."<sup>41</sup> Regarding the ordinary meaning of "matter", the Appellate Body in *Guatemala – Cement I* stated that "the most appropriate [ordinary meaning] in this context is 'substance' or 'subject-matter'. Although the ordinary meaning is rather broad, it indicates that the 'matter' is the substance or subject-matter of the dispute."<sup>42</sup> The Appellate Body then linked the term "matter" to a panel's terms of reference under Article 7 of the DSU and defined matter as consisting of: (i) the specific measures at issue and (ii) the legal basis of the complaint or the claims:

"The word 'matter' appears in Article 7 of the DSU, which provides the standard terms of reference for Panels. Under this provision, the task of a Panel is to examine 'the matter referred to the DSB'. These words closely echo those of Article 17.4 of the *Anti-Dumping Agreement* and, in view of the integrated nature of the dispute settlement system, form part of the context of that provision. Article 7 of the DSU itself does not shed any further light on the meaning of the term 'matter'. However, when that provision is read together with Article 6.2 of the DSU, the precise meaning of the term 'matter' becomes clear. Article 6.2 specifies the requirements under which a complaining Member may refer a 'matter' to the DSB: in order to establish a Panel to hear its complaint, a Member must make, in writing, a 'request for the establishment of a Panel' (a 'Panel request'). In addition to being the document which enables the DSB to establish a Panel, the Panel request is also usually identified in the Panel's terms of reference as the document setting out 'the matter referred to the DSB'. Thus, 'the matter referred to the DSB' for the purposes of Article 7 of the DSU and Article 17.4 of the *Anti-Dumping Agreement* must be the 'matter' identified in the request for the establishment of a Panel under Article 6.2 of the DSU. That provision requires the complaining Member, in a Panel request, to 'identify the *specific measures at issue* and provide a brief summary of the *legal basis of the complaint* sufficient to present the problem clearly.' (emphasis added) The 'matter' referred to the DSB, therefore, consists of two elements: the specific *measures at issue* and the *legal basis of the complaint* (or the *claims*).

In our Report in *Brazil – Coconut*, we agreed with previous Panels established under the GATT 1947, as well as under the [AD Agreement], '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.' Statements in two of the Panel reports cited by us in that case clarify further the relationship between the 'matter', the 'measures' at issue and the 'claims'. 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*'. (emphasis added) 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."<sup>43</sup>

### 1.6.3 Claims

29. Noting that Article 17.4 does not refer to "claims", the Panel in *Mexico – Corn Syrup* stated that "Article 17.4 does not, in our view, set out any further or additional requirements with respect to the degree of specificity with which claims must be set forth in a request for establishment challenging a final anti-dumping measure."<sup>44</sup> The Panel concluded that "a request for establishment that satisfies the requirements of Article 6.2 of the *DSU* in this regard also satisfies the requirements of Article 17.4 of the *AD Agreement*."<sup>45</sup>

30. In *US – Hot-Rolled Steel*, the issue arose whether the "general" practice of the United States investigating authorities regarding best facts available was within the terms of reference of

<sup>41</sup> Appellate Body Report, *Guatemala – Cement I*, para. 70.

<sup>42</sup> Appellate Body Report, *Guatemala – Cement I*, para. 71.

<sup>43</sup> Appellate Body Report, *Guatemala – Cement I*, paras. 72-73.

<sup>44</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.14.

<sup>45</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.14. With respect to specificity of requests for the establishment of a panel, see the Section on Article 6 of the DSU.

the Panel. The Panel, which did not rule on whether a general practice could be challenged separately from the statutory measure on which it is based, concluded that Japan's claim in this regard was outside its terms of reference because there was no mention of such a claim in Japan's request for the establishment of a panel.<sup>46</sup>

31. As regards the concept of claims or legal basis of the complaint, see the Sections on Articles 6 and 7 of the DSU.

#### 1.6.3.1 Abandoned claims

32. In *US – Steel Plate*, India indicated in its first written submission that it would not pursue several claims that had been set out in its request for establishment of the Panel. However, India subsequently changed its position and informed the Panel of its intention to pursue one of these claims during the first substantive meeting of the Panel with the parties and in its rebuttal submission. In spite of the lack of specific objection by the United States which had noted that the claim was within the Panel's terms of reference, the Panel concluded that it would not rule on India's abandoned claim:

"This situation is not explicitly addressed in either the DSU or any previous panel or Appellate Body report. We do note, however, the ruling of the Appellate Body in *Bananas* to the effect that a claim may not be raised for the first time in a first written submission, if it was not in the request for establishment. One element of the Appellate Body's decision in that regard was the notice aspect of the request for establishment. The request for establishment is relied upon by Members in deciding whether to participate in the dispute as third parties. To allow a claim to be introduced in a first written submission would deprive Members who did not choose to participate as third parties from presenting their views with respect to such a new claim.

The situation here is, in our view, analogous. That is, to allow a party to resurrect a claim it had explicitly stated, in its first written submission, that it would not pursue would, in the absence of significant adjustments in the Panel's procedures, deprive other Members participating in the dispute settlement proceeding of their full opportunities to defend their interest with respect to that claim. Paragraphs 4 and 7 of Appendix 3 to the DSU provide that parties shall 'present the facts of the case and their arguments' in the first written submission, and that written rebuttals shall be submitted prior to the second meeting. These procedures, in our view, envision that initial arguments regarding a claim should be presented for the first time in the first written submission, and not at the meeting of the panel with the parties or in rebuttal submissions.

With respect to the interests of third parties, the unfairness of allowing a claim to be argued for the first time at the meeting of the panel with the parties, or in rebuttal submissions, is even more pronounced. In such a circumstance, third parties would be entirely precluded from responding to arguments with respect to such a resurrected claim, as they would not have access to those arguments under the normal panel procedures set out in paragraph 6 of Appendix 3 to the DSU. Further, India has identified no extenuating circumstances to justify the reversal of its abandonment of this claim.<sup>47</sup> Thus, in our view, it would be inappropriate in these circumstances to allow India to resurrect its claim in this manner. Therefore, we will not rule on India's claim under *AD Agreement* Articles 6.6 and 6.8 and Annex II, paragraph 7 regarding failure to exercise special circumspection in using information supplied in the petition."<sup>48</sup>

<sup>46</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.22.

<sup>47</sup> (footnote original) This is **not**, for example, a case where a complainant obtained, through the dispute settlement process, information in support of a claim to which it did not otherwise have access.

<sup>48</sup> Panel Report, *US – Steel Plate*, paras. 7.27-7.29.



## 1.7 Article 17.5

### 1.7.1 Article 17.5(i)

33. In considering what requirements, if any, must be fulfilled by virtue of Article 17.5(i) of the Anti-Dumping Agreement in addition to requirements existing under Article 6.2 of the DSU, the Panel in *Mexico – Corn Syrup* stated:

"In our view, Article 17.5(i) does not require a complaining Member to use the words 'nullify' or 'impair' in a request for establishment. However, it must be clear from the request that an allegation of nullification or impairment is being made, and the request must explicitly indicate how benefits accruing to the complaining Member are being nullified or impaired."<sup>49</sup>

34. The Panel in *Mexico – Corn Syrup* went on to state that, in its view:

"A request for establishment that alleges violations of the *AD Agreement* which, if demonstrated, will constitute a *prima facie* case of nullification or impairment under Article 3.8 of the *DSU*, contains a sufficient allegation of nullification or impairment for purposes of Article 17.5(i). In addition, as noted above, the request must indicate how benefits accruing to the complaining Member are being nullified or impaired."<sup>50</sup>

### 1.7.2 Article 17.5(ii)

#### 1.7.2.1 General

35. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator stated that "[t]he 'facts' referred to in Article 17.5(ii) are what a panel may examine during the panel proceedings, not what a complainant must spell out in the panel request".<sup>51</sup>

#### 1.7.2.2 Documents not available to the investigating authorities

36. In *US – Hot-Rolled Steel*, the Panel found that, under Article 17.5(ii), "a panel may not, when examining a claim of violation of the *AD Agreement* in a particular determination, consider facts or evidence presented to it by a party in an attempt to demonstrate error in the determination concerning questions that were investigated and decided by the authorities, unless they had been made available in conformity with the appropriate domestic procedures to the authorities of the investigating country during the investigation".<sup>52</sup> The Panel further concluded that its duty not to consider new evidence with respect to claims under the Anti-Dumping Agreement "flows not only from Article 17.5(ii), but also from the fact that a panel is not to perform a *de novo* review of the issues considered and decided by the investigating authorities".<sup>53</sup>

37. The Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* held that the Panel had not erred by not taking into consideration evidence presented by the defendant during the Panel proceedings but which was not part of the record of the investigation at issue:

"Turning to our analysis, we note, as a preliminary matter, that the letter from the case-handler to the compliance Panel on which the European Union relies is not a part of the record of the investigation, but, instead, a document prepared specifically for the purposes of the current WTO dispute settlement proceedings. The Appellate Body has stated that a panel must examine whether the conclusions reached by the investigating authority are reasoned and adequate, and that such an examination must be critical and based on the information contained on the record and the explanations given by the authority in its published report. Thus, the letter of the case-handler referred to above does not constitute evidence that the Panel could

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<sup>49</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.26.

<sup>50</sup> Panel Report, *Mexico – Corn Syrup*, para. 7.28.

<sup>51</sup> Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.70.

<sup>52</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.6.

<sup>53</sup> Panel Report, *US – Hot-Rolled Steel*, para. 7.7. See also Panel Report, *Egypt – Steel Rebar*, paras. 7.15-7.21.



properly have relied on in determining whether the Commission had objectively assessed 'good cause' for the purposes of Article 6.5 of the Anti-Dumping Agreement. Rather, the letter constitutes *ex post* rationalization by the European Union."<sup>54</sup>

38. The Panel in *EU – Biodiesel (Argentina)* declined to take into consideration data that had arguably been used by the investigating authority in verifying other data because it was not part of the record of the investigation.<sup>55</sup>

### 1.7.2.3 Undisclosed facts

39. In *Thailand – H-Beams*, in reversing the Panel's finding that an injury determination must be based exclusively upon evidence disclosed to, or discernible by, the parties to the investigation, the Appellate Body explained the scope of facts which panels are required to review pursuant to Article 17.5(ii), as follows:

"Article 17.5 specifies that a panel's examination must be based upon the 'facts made available' to the domestic authorities. Anti-dumping investigations frequently involve both confidential and non-confidential information. 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. Based on the wording of Article 17.5, we can conclude that a panel must examine the facts before it, whether in confidential documents or non-confidential documents."<sup>56</sup>

### 1.7.2.4 Documents created for the purpose of a dispute

40. In deciding whether a document created *post hoc* for the purposes of a dispute could be considered by the Panel, the Panel in *EC – Bed Linen* stated that Article 17.5(ii) "does not require ... that a panel consider those facts exclusively in the format in which they were originally available to the investigating authority. Indeed, the very purpose of the submissions of the parties to the Panel is to marshal the relevant facts in an organized and comprehensible fashion to elucidate the parties' positions and in support of their arguments."<sup>57</sup> The Panel concluded that "the form of the document, (*i.e.*, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation."<sup>58</sup>

### 1.7.2.5 A respondent's reliance on another investigating authority's determination concerning the same product to substantiate its own investigating authority's determination before a WTO panel

41. In *Korea – Stainless Steel Bars*, the Panel reviewed the Korean investigating authority's determination that, upon the expiry of the anti-dumping duties applied to certain Japanese imports, and as a likely result of the subsequent drop in the price of those imports, the volume of such imports would have increased.<sup>59</sup> Korea contended that the reasonableness of its investigating authority's finding that the volume of Japanese imports would have increased was "confirmed by the parallel sunset review by the USITC on SSBs imported from Japan".<sup>60</sup> The Panel declined to take the USITC determination into account because it was not part of the record of investigation, it did not form part of the authority's final determination, and thus, it did not form part of the Panel's relevant "facts" on which to base its assessment under Article 17.5(ii) of the Anti-Dumping Agreement. The Panel reasoned as follows:

"Finally, Korea contends that the reasonableness of the KIA's finding that Japanese imports would increase was 'confirmed by the parallel sunset review by the USITC on SSBs imported from Japan'. We decline to take this USITC determination into account to 'confirm the reasonableness' of the KIA's finding on this point. It post-dates the

<sup>54</sup> Appellate Body Report, *EC – Fasteners (China)* (Article 21.5 – China), para. 5.59.

<sup>55</sup> Panel Report, *EU – Biodiesel (Argentina)*, para. 7.408.

<sup>56</sup> Appellate Body Report, *Thailand – H-Beams*, para. 115.

<sup>57</sup> Panel Report, *EC – Bed Linen*, para. 6.43.

<sup>58</sup> Panel Report, *EC – Bed Linen*, para. 6.43.

<sup>59</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.87.

<sup>60</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.104.

KIA's third sunset review, and therefore was not part of the record of investigation and did not form part of the KIA's finding that the Japanese price drop would lead to an increase in imports. Accordingly, it does not form part of the relevant 'facts' on which we can base our assessment under Article 17.5(ii) of the Anti-Dumping Agreement. To find otherwise could lead the Panel into a *de novo* review on the basis of record evidence that was not before the KIA. We do, however, make some observations regarding this USITC determination ... below."<sup>61</sup>

42. Later in its report, the Panel examined Korea's argument that Japan had initiated the WTO proceedings in bad faith because of the "blatantly unfaithful participation" of the Japanese exporters in the underlying review. In support of this argument, Korea noted that the Japanese exporters had made submissions containing inconsistencies, mistakes, and inaccuracies in their submissions in the underlying review, especially as compared to the USITC's sunset review:

"We make a further observation of relevance to whether Japan's initiation of the present proceedings is in bad faith due to the 'blatantly unfaithful participation' of the Japanese exporters in the underlying review, as evidenced by inconsistencies, mistakes, and inaccuracies in aspects of their submissions. In particular, we recall that Korea relied on the USITC's sunset review of SSBs from Japan and other countries, which post-dates the KIA's sunset review but had a partially-overlapping POR, in support of aspects of its case. Korea also relied on the USITC's sunset review in support of its assertion that the Japanese exporters had engaged in bad faith. As we explained earlier, this exhibit post-dates the KIA's determination and did not form part of the KIA's establishment and evaluation of the facts pursuant to Article 17.5(ii) of the Anti-Dumping Agreement. It would thus be improper for us to consider the USITC's determination in relation to the consistency of the KIA's determination with Article 11.3."<sup>62</sup>

43. The Panel emphasized that Article 17.5(ii) prohibited it from considering the USITC's parallel sunset review in its review of the Korean investigating authority's determination, as the parallel review did not form part of the Korean authority's establishment and evaluation of the facts. The Panel considered that Article 17.5(ii) did not prevent it, however, from taking into account the same sunset review in its consideration of Korea's allegation that Japan had acted in bad faith in the present WTO dispute settlement proceedings:

"However, Article 17.5(ii) does not apply to Korea's allegation that Japan is acting in bad faith in *these* proceedings. Since Korea has referred to the USITC determination in relation to the Japanese exporters' alleged bad faith, and given the Japanese exporters' alleged bad faith forms the basis of Korea's allegation of bad faith against Japan in the present proceedings, we examine the USITC determination for the sole purpose of assessing Korea's allegation against Japan."<sup>63</sup>

### 1.7.3 Relationship with other paragraphs of Article 17

44. In *Thailand – H-Beams*, the Appellate Body discussed the relationship between Articles 17.5 and 17.6. See paragraph 67 below.

## 1.8 Article 17.6

### 1.8.1 Ministerial Decision

45. At the Ministerial Meeting in Marrakesh on 15 April 1994, the Ministers adopted the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994. It states in part:

*Ministers recognize, with respect to dispute settlement pursuant to the Agreement on Implementation of Article VI of GATT 1994 or Part V of the Agreement on Subsidies and*

<sup>61</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.104.

<sup>62</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.170.

<sup>63</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.171.

Countervailing Measures, the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.

46. In *US – Lead and Bismuth II*, the United States argued that, by virtue of the Declaration, the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement is also applicable to reviews of countervailing duty investigations under the SCM Agreement. The Appellate Body disagreed:

"We consider this argument to be without merit. By its own terms, the *Declaration* does not impose an obligation to apply the standard of review contained in Article 17.6 of the *Anti-Dumping Agreement* to disputes involving countervailing duty measures under Part V of the *SCM Agreement*. The *Declaration* is couched in hortatory language; it uses the words 'Ministers recognize'. Furthermore, the *Declaration* merely acknowledges 'the need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures.' It does not specify any specific action to be taken. In particular, it does not prescribe a standard of review to be applied."<sup>64</sup>

47. The Panel in *US – Corrosion-Resistant Steel Sunset Review* considered the issue of "whether prior panel and Appellate Body decisions on countervailing measures can be taken into account by, and provide guidance for, panels dealing with disputes under the *Anti-dumping Agreement* (and *vice versa*)", and stated that it found support in the Declaration "for the application of a similar interpretative analysis by this Panel in addressing analogous issues under the *Anti-dumping Agreement*".<sup>65</sup> Subsequent panels have made similar statements.<sup>66</sup>

48. The Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 further states:

*Ministers decide as follows:*

The standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application.

49. In *EC – Hormones*, the Appellate Body noted that this Decision "evidences that the Ministers were aware that Article 17.6 of the *Anti-Dumping Agreement* was applicable only in respect of that Agreement".<sup>67</sup>

50. In *US – Lead and Bismuth II*, the Appellate Body referred to the Decision in the context of rejecting the argument that the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement is also applicable to reviews of countervailing duty investigations under the SCM Agreement:

"This *Decision* provides for review of the standard of review in Article 17.6 of the *Anti-Dumping Agreement* to determine if it is "capable of general application" to other covered agreements, including the *SCM Agreement*. By implication, this *Decision* supports our conclusion that the Article 17.6 standard applies only to disputes arising under the *Anti-Dumping Agreement*, and not to disputes arising under other covered agreements, such as the *SCM Agreement*. To date, the DSB has not conducted the review contemplated in this *Decision*."<sup>68</sup>

<sup>64</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 49.

<sup>65</sup> Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, footnote 39.

<sup>66</sup> Panel Reports, *US – Softwood Lumber VI*, para. 7.18; *US – Countervailing Duty Investigation on DRAMS*, para. 7.351; *US – Countervailing Measures on Certain EC Products (Article 21.5 – EC)*, para. 7.81; *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, fn 45; and *Japan – DRAMS (Korea)*, para. 7.354.

<sup>67</sup> Appellate Body Report, *EC – Hormones*, fn 79.

<sup>68</sup> Appellate Body Report, *US – Lead and Bismuth II*, para. 50.

### 1.8.2 Relationship with the standard of review in Article 11 of the DSU

51. In *US – Hot Rolled Steel*, the Appellate Body compared the standards of review under Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU when considering to what extent Article 17.6 may conflict with Article 11 of the DSU.<sup>69</sup> The Appellate Body explained that, whilst Article 17.6 lays down rules relating to a panel's examination of "matters" arising under only one of the covered agreement, i.e. the Anti-Dumping Agreement, Article 11 of the DSU rules applies to a panel's examination of "matters" arising under any of the covered agreements.<sup>70</sup> The Appellate Body then focussed on the different structure of both provisions and indicated:

"Article 11 of the DSU imposes upon panels a comprehensive obligation to make an 'objective assessment of the matter', an obligation which embraces all aspects of a panel's examination of the 'matter', both factual and legal. ... Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel's examination of the matter. The first sub-paragraph covers the *panel's 'assessment of the facts of the matter'*, whereas the second covers its '*interpret[ation of] the relevant provisions*'. (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the *Anti-Dumping Agreement*."<sup>71</sup>

52. In the investigation at issue in *US – Softwood Lumber VI*, the US authorities had conducted a single injury determination with regard to anti-dumping and countervailing measures. The Panel stated that it would not be necessary or appropriate in such a case to conduct two different analyses of the same injury determination:

"Under the Article 17.6 standard, with respect to claims involving questions of fact, Panels have concluded that whether the measures at issue are consistent with relevant provisions of the *AD Agreement* depends on whether the investigating authority properly established the facts, and evaluated the facts in an unbiased and objective manner. This latter has been defined as assessing whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached. A panel's task is not to carry out a *de novo* review of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.

Similarly, the Appellate Body has explained that, under Article 11 of the DSU, a panel's role is not to substitute its analysis for that of the investigating authority. The Appellate Body has stated:

'We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, nor to *substitute* their own conclusions for those of the competent authorities, this does *not* mean that panels must simply *accept* the conclusions of the competent authorities'.

In light of Canada's clarification of its position, and based on our understanding of the applicable standards of review under Article 11 of the DSU and Article 17.6 of the *AD Agreement*, we do not consider that it is either necessary or appropriate to conduct separate analyses of the USITC determination under the two Agreements."<sup>72</sup>

53. The Panel in *US – Softwood Lumber VI* found support for its finding in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements:

<sup>69</sup> In this analysis, the Appellate Body applied its conclusions on the relationship between the provisions of the DSU and the special or additional rules and procedures of a covered agreement developed in *Guatemala – Cement II*, paras. 65-67. See paragraph 1 above.

<sup>70</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 53.

<sup>71</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 54.

<sup>72</sup> Panel Report, *US – Softwood Lumber VI*, paras. 7.15-7.17.

"We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty investigations, it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions."<sup>73</sup>

54. The Panel in *Colombia – Frozen Fries* described the standard of review to be applied by a panel reviewing an investigating authority's determination as follows:

"The exact standard of review to be applied by a panel in examining an investigating authority's determination in a given case is a 'function of the substantive provisions of the specific covered agreements that are at issue in the dispute' as well as the 'specific claim(s) put forth by a complainant'".<sup>74</sup>

55. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* reiterated that Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement establish together a standard of review, meaning that, in reviewing the investigating authority's determination, a Panel must:

- "a. examine whether the authority has provided a reasoned and adequate explanation as to:
  - i. how the evidence on the record supported its factual findings; and
  - ii. how those factual findings support the overall determination;
- b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;
- c. limit our examination to the evidence that was before the investigating authority during the investigation;
- d. take into account all such evidence submitted by the parties to the dispute; and
- e. not simply defer to the conclusions of the investigating authority; our examination of those conclusions must be 'in-depth' and 'critical and searching'".<sup>75</sup>

56. As regards the relationship of Article 11 of the DSU with Articles 17.6(i) and 17.6(ii) respectively, see paragraphs 75-76, and 113 below respectively.

### 1.8.3 Article 17.6(i)

#### 1.8.3.1 General

57. In *Guatemala – Cement II*, the Panel defined the standard of review applicable by virtue of Article 17.6(i):

"We consider that it is not our role to perform a *de novo* review of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective. In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities' evaluation of the facts, we will first need to examine evidence considered

<sup>73</sup> Panel Report, *US – Softwood Lumber VI*, para. 7.18.

<sup>74</sup> Panel Report, *Colombia – Frozen Fries*, para. 7.4.

<sup>75</sup> Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.2.

by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating authority. That is, we are not to examine any new evidence that was not part of the record of the investigation."<sup>76</sup>

58. In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body stated clearly that it "will not interfere lightly with [a] panel's exercise of its discretion' under Article 17.6(i) of the *Anti-Dumping Agreement*."<sup>77</sup> In that appeal, it also explained that "[a]n appellant must persuade us, with sufficiently compelling reasons, that we should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts."<sup>78</sup>

59. The Panel in *EU – Footwear (China)* held that Article 17.6(i) only creates obligations on WTO panels, and not on investigating authorities:

"We consider that the text of Article 17.6(i) of the AD Agreement is clear on its face, and only creates obligations on panels and not on investigating authorities of WTO Members in the conduct of anti-dumping investigations ... The ordinary meaning of the text of Article 17.6(i) – 'the panel shall determine' – is clear, and is specifically and exclusively directed at the actions of panels. There is no suggestion in the text of this provision that it also applies to the actions of WTO Members in general, or to specific aspects of the conduct of anti-dumping investigations by their investigating authorities ... It seems clear to us that a provision of the AD Agreement which does not impose obligations on investigating authorities of WTO Members in the conduct of anti-dumping investigations cannot establish an independent legal basis for a claim of violation of the AD Agreement by the investigating authority.

...

Based on the foregoing, we conclude that Article 17.6(i) of the AD Agreement does not impose any obligations on the investigating authorities of WTO Members in anti-dumping investigations that could be the subject of a finding of violation, and we therefore dismiss all of China's claims of violation of Article 17.6(i) of the AD Agreement."<sup>79</sup>

60. The Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* described the nature of an investigating authority's investigative task, as follows:

"We recall that the task of a WTO panel is to examine whether the investigating authority has adequately performed its investigative function, and has adequately explained how the evidence supports its conclusions. It follows from the requirement that the investigating authority provide a 'reasoned and adequate' explanation for its conclusions that the entire rationale for the investigating authority's decision must be set out in its report on the determination. This is not to say that the meaning of a determination cannot be explained or buttressed by referring to evidence on the record. Yet, in all instances, it is the explanation provided in the written report of the investigating authorities (and supporting documents) that is to be assessed in order to determine whether the determination was sufficiently explained and reasoned."<sup>80</sup>

61. The Appellate Body in *US – Anti-Dumping Methodologies (China)* underlined the difference between an allegation that a panel failed to comply with Article 17.6(i) in its assessment of the facts and a claim that the panel erred in its application of a WTO provision:

"Thus, a claim alleging an error of law or incorrect legal interpretation attributed to a panel is different from a claim that the 'assessment of the facts of the matter' by that panel is inconsistent with Article 17.6(i). A claim under Article 17.6(i) must concern

<sup>76</sup> Panel Report, *Guatemala – Cement II*, para. 8.19. See also Panel Reports, *US – Stainless Steel*, para. 6.18; *Argentina – Ceramic Tiles*, paras. 6.2 – 6.3; and *Egypt – Steel Rebar*, paras. 7.8-7.14.

<sup>77</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 169 (quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>78</sup> Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170.

<sup>79</sup> Panel Report, *EU – Footwear (China)*, paras. 7.37 and 7.44.

<sup>80</sup> Appellate Body Report, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.255.

the panel's assessment of the facts of the matter and must involve a showing that the assessment is inconsistent with this provision. For this reason, a claim under Article 17.6(i) should not be made *merely* subsidiary to a claim that the panel erred in its application of a WTO provision. Moreover, the Appellate Body has cautioned that it 'will not interfere lightly with [a] panel's exercise of its discretion' under Article 17.6(i). Accordingly, '[a]n appellant must persuade [the Appellate Body], with sufficiently compelling reasons, that [it] should disturb a panel's assessment of the facts'. For a claim to succeed under Article 17.6(i), it is not sufficient for an appellant simply to disagree with the panel's weighing of the evidence, without substantiating the claim of error by the panel."<sup>81</sup>

### 1.8.3.2 "establishment of the facts was proper"

#### 1.8.3.2.1 Record of the investigating authority

##### 1.8.3.2.1.1 General

62. In *Guatemala – Cement I*, in order to examine the claim that the initiation of an investigation was not consistent with Article 5, the Panel "scrutinized all the information which was on the record before the Ministry at the time of initiation in examining whether an unbiased and objective investigating authority could properly have made the determination that was reached by the Ministry."<sup>82</sup> The panels in *EC – Bed Linen*, *US – Stainless Steel (Korea)*, *Guatemala – Cement II*, and *Thailand – H-Beams* also based their factual review of decisions of the investigating authority on the evidence before the authority at the time of the determination.<sup>83</sup> See also paragraphs 36-40 above dealing with Article 17.5(ii) which orders panels to consider a dispute under the Anti-Dumping Agreement on the basis of the facts made available to the investigating authorities.

63. The Appellate Body in *EU – Fatty Alcohols (Indonesia)* held that "while a panel's review of an investigating authority's determination is limited to the information on the record of the investigation, neither Article 17.6(i) of the Anti-Dumping Agreement nor Article 11 of the DSU bar a panel from examining evidence that was on the investigation record but not expressly reflected in the investigating authority's determination."<sup>84</sup>

##### 1.8.3.2.1.2 Whether a document formed part of the record

64. In *EC – Tube or Pipe Fittings*, the Appellate Body rejected Brazil's claim that the Panel failed to assess whether the establishment of the facts was proper pursuant to Article 17.6(i) of the Anti-Dumping Agreement, when it found that an internal note which contained analysis of certain injury factors and which was not disclosed to the interested parties during the investigation, was part of the record of the underlying anti-dumping investigation. The Appellate Body considered highly relevant that the Panel had not just accepted at face value the assertion of the European Communities that this internal note was contemporaneous to the investigation and formed part of the record of the investigation, but had taken steps to assure itself of the validity of this exhibit and of the fact that it formed part of the contemporaneous written record of the EC investigation.<sup>85</sup>

65. In *Russia – Commercial Vehicles*, the Panel based part of its assessment of the Russian investigating authority's injury determination on the confidential version of the investigation report, which had not been made available to the interested parties during the course of the investigation. The Panel did not engage with the European Union's argument that the Panel should first have taken steps to ensure that the relevant parts of the confidential investigation report were indeed part of the confidential record at the time of the investigation.<sup>86</sup> The Appellate Body

<sup>81</sup> Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.47.

<sup>82</sup> Panel Report, *Guatemala – Cement I*, para. 7.60.

<sup>83</sup> Panel Reports, *EC – Bed Linen*, para. 6.45; *US – Stainless Steel (Korea)*, para. 6.3; *Guatemala – Cement II*, para. 8.19; *Thailand – H-Beams*, para. 7.51; and *Argentina – Ceramic Tiles*, para. 6.27.

<sup>84</sup> Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.92.

<sup>85</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 127.

<sup>86</sup> Panel Report, *Russia – Commercial Vehicles*, paras. 5.125-5.127.



found that, by doing so, the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement:

"We consider that, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record at the time the determination was made, a panel has to take certain steps to assess objectively and assure itself of the report's validity and whether or not it formed part of the contemporaneous written record of the investigation. The panel may do so, for example, by posing specific questions to the respondent party submitting the investigation report about its origin and the point in time when it was incorporated into the record of the investigation. The manner in which a panel can assure itself of whether an investigation report, or parts of it, formed part of the investigation record will depend on the facts of the particular case and may include, in addition to posing questions to the submitting party, examining additional evidence demonstrating that the contested report, or parts of it, formed part of the investigation record.

...

On the basis of the above, we find that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement, on the confidential investigation report without assuring itself of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made."<sup>87</sup>

#### 1.8.3.2.2 Treatment of undisclosed facts

66. In *Thailand – H-Beams*, in discussing whether an injury determination must be based only upon evidence disclosed to the parties to the investigation, the Appellate Body interpreted the term "establishment of the facts was proper", as follows:

"The ordinary meaning of 'establishment' suggests an action to 'place beyond dispute; ascertain, demonstrate, prove'; the ordinary meaning of 'proper' suggests 'accurate' or 'correct'. Based on the ordinary meaning of these words, the proper establishment of the facts appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation prior to the final determination."<sup>88</sup>

67. The Appellate Body in *Thailand- H-Beams* also elaborated on the aim of Article 17.6(i), stating that its function is to "prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective":

"There is a clear connection between Articles 17.6(i) and 17.5(ii). 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). Such facts do not exclude confidential facts made available to the authorities of the importing Member. Rather, Article 6.5 explicitly recognizes 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 recognizes the use, treatment and protection of confidential information by investigating authorities. The 'facts' referred to in Articles 17.5(ii) and 17.6(i) thus 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. Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from 'second-guessing' a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective. Whether evidence or

<sup>87</sup> Appellate Body Report, *Russia – Commercial Vehicles*, paras. 534 and 537.

<sup>88</sup> Appellate Body Report, *Thailand – H-Beams*, para. 116.



reasoning is disclosed or made discernible to interested parties by the final determination is a matter of *procedure* and *due process*. These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement*."<sup>89</sup>

### 1.8.3.3 "the evaluation of facts was unbiased and objective"

68. In *US – Stainless Steel (Korea)*, the Panel examined the determinations of the United States authorities on the issue of whether certain local sales were in dollars or won. The Panel rejected Korea's argument that Article 17.6(i) did not apply to the examination of this issue because the United States decision on this point was not a factual determination. The Panel stated:

"Korea's view appears to be that Article 17.6(i) applies only in respect of the establishment of certain objectively-ascertainable underlying facts, e.g., did the invoices express the sales values in terms of dollars or won, in what currency payment was made, etc. We consider that this interpretation does not however coincide with the language of Article 17.6(i). That Article speaks not only to the establishment of the facts, but also to their evaluation. Therefore, the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation."<sup>90</sup>

69. In *Thailand – H-Beams*, in discussing whether an injury determination must be based only upon evidence disclosed to the parties to the investigation, the Appellate Body touched on the term "unbiased and objective". The Appellate Body stated that "[t]he ordinary meaning of the words 'unbiased' and 'objective' also appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation at the time of the final determination."<sup>91</sup> See also the excerpt from the Appellate Body Report on *Thailand – H-Beams* referenced in paragraph 67 above.

### 1.8.3.4 Relevance of the different roles of panels and investigating authorities

70. In *US – Hot-Rolled Steel*, when defining the task of panels under Article 17.6(i), the Appellate Body recalled the importance "to bear in mind the different roles of panels and investigating authorities".<sup>92</sup> The Appellate Body stated:

"Although the text of Article 17.6(i) is couched in terms of an obligation on *panels* – panels 'shall' make these determinations – the provision, at the same time, in effect defines when *investigating authorities* can be considered to have acted inconsistently with the *Anti-Dumping Agreement* in the course of their 'establishment' and 'evaluation' of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by *panels* in examining the WTO-consistency of the *investigating authorities'* establishment and evaluation of the facts under other provisions of the *Anti-Dumping Agreement*. Thus, panels must assess if the establishment of the facts by the investigating authorities was *proper* and if the evaluation of those facts by those authorities was *unbiased and objective*. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the *Anti-Dumping Agreement*."<sup>93</sup>

71. In *Russia – Commercial Vehicles*, the Appellate Body underlined that, under the standard of review set out in Article 17.6(i) of the Anti-Dumping Agreement, a panel cannot assess the importance of a piece of evidence in order to decide whether that piece of evidence should have been taken into consideration by the investigating authority in the challenged investigation:

<sup>89</sup> Appellate Body Report, *Thailand – H-Beams*, para. 117.

<sup>90</sup> Panel Report, *US – Stainless Steel (Korea)*, para. 6.18.

<sup>91</sup> Appellate Body Report, *Thailand – H-Beams*, para. 116.

<sup>92</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 55.

<sup>93</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 56.

"In addition, in light of the standard of review under the Anti-Dumping Agreement, we recall that it is not for a panel to conduct a *de novo* review of the facts of the case or substitute its judgement for that of the investigating authority. Rather, a panel must examine 'whether, in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate'. In this respect, a panel must ascertain whether the investigating authority has evaluated all of the relevant evidence in an objective and unbiased manner, including by taking sufficient account of conflicting evidence and responding to competing plausible explanations of that evidence. Thus, the Panel in this dispute could not have reached a conclusion about whether the DIMD should have examined certain evidence on the basis of the Panel's own appreciation of this evidence. The fact that the Panel itself undertook the assessment of the evidence on the investigation record does not change the fact that the DIMD failed to make such an assessment. The conclusion of whether the evidence effectively undermines or confirms the investigating authority's price suppression analysis under Article 3.2 of the Anti-Dumping Agreement can only be reached on the basis of the authority's review of the evidence within the particular circumstances of each investigation as reflected in the investigation report."<sup>94</sup>

72. As regards the different roles of investigating authorities and panels in the context of Article 3.7 (threat of serious injury), see the Section on Article 3 of the Anti-Dumping Agreement.

### 1.8.3.5 No *ex post* rationalization

73. It is well established that, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion.<sup>95</sup> The Panel in *Korea – Pneumatic Valves* provided the following summary of WTO dispute settlement practice in this regard:

"A panel must limit its examination to the evidence that was before the investigating authority during the course of the investigation and must take into account all such evidence submitted by the parties to the dispute. A panel's examination in that regard is not necessarily limited to the pieces of evidence *expressly* relied upon by an investigating authority in its establishment and evaluation of the facts in arriving at a particular conclusion. Rather, a panel may also take into consideration other pieces of evidence that were on the record and that are connected to the explanation provided by the investigating authority in its determination. This flows from the principle that investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in the final determination. That notwithstanding, since a panel's review is not *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's conclusion."<sup>96</sup>

74. In *Colombia – Frozen Fries*, the Panel considered Colombia's reference to the investigating authority's explanations provided in the post-investigation revocation decision to be *ex post* rationalization of the decision declining an exporter's cost-related adjustment request in the underlying investigation.<sup>97</sup> See also the Section on Article 2 of the Anti-Dumping Agreement.

### 1.8.3.6 Relationship of Article 17.6(i) with Article 11 of the DSU

75. In *US – Hot-Rolled Steel*, the Appellate Body defined the task of panels under Article 17.6(i) by comparing it to their task under Article 11 of the DSU:

"Under Article 17.6(i), the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts. To that end, Article 17.6(i)

<sup>94</sup> Appellate Body Report, *Russia – Commercial Vehicles*, para. 5.102.

<sup>95</sup> Appellate Body Report, *US – Lamb*, paras. 153-161. See also Appellate Body Reports, *US – Steel Safeguards*, para. 326; *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 97; and Panel Reports, *Argentina – Ceramic Tiles*, para. 6.27; *Argentina – Poultry Anti-Dumping Duties*, para. 7.48; and *Ukraine – Ammonium Nitrate*, paras. 7.117 and 7.121.

<sup>96</sup> Panel Report, *Korea – Pneumatic Valves*, para. 7.10.

<sup>97</sup> Panel Report, *Colombia – Frozen Fries*, paras. 7.268-7.271.

requires panels to make an '*assessment of the facts*'. The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an '*objective assessment of the facts*'. Thus the text of both provisions requires panels to 'assess' the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the *Anti-Dumping Agreement* does not expressly state that panels are obliged to make an assessment of the facts which is '*objective*'. However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an *objective* 'assessment of the facts of the matter'. In this respect, we see no 'conflict' between Article 17.6(i) of the *Anti-Dumping Agreement* and Article 11 of the DSU."<sup>98</sup>

76. In *US – Steel Plate*, India requested the Panel to conduct an "active review" of the facts before the US investigating authorities pursuant to both Article 11 of the DSU and Article 17.6(i). India based its request in the Appellate Body's decisions on the application of Article 11 in *US – Cotton Yarn* and of Article 17.6(i) in *US – Hot-Rolled Steel*.<sup>99</sup> The United States was opposed to such a request since it considered that India was trying to add to the obligations of investigating authorities. The Panel considered that there was no question that it had to apply Article 17.6 to the dispute and recalled the Appellate Body's decision in *US – Hot-Rolled Steel* to the effect that Article 17.6(i) is not in conflict with Article 11 of the DSU<sup>100</sup> and that Article 17.6(ii) supplemented Article 11 of the DSU.<sup>101 102</sup> The Panel found:

"[W]e do not consider that India's reference to Article 11 of the DSU constitutes an argument that we apply some other or different standard of review in considering the factual aspects of this dispute than that set out in Article 17.6 of the *AD Agreement*, which India recognizes is applicable in all anti-dumping disputes. That standard requires us to assess the facts to determine whether the investigating authorities' own establishment of facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves – that is, we may not engage in *de novo* review. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the *AD Agreement* establishes that we are to examine the matter based upon 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member.'<sup>103</sup>

77. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* summarized the standard of review stemming from a cumulative application of Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, as follows:

"Thus, Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement together establish the standard of review that a panel must apply with respect to both the factual and the legal aspects of the present dispute. This means that in reviewing the investigating authority's determination in this dispute, we must:

- a. examine whether the authority has provided a reasoned and adequate explanation as to:
  - i. how the evidence on the record supported its factual findings; and
  - ii. how those factual findings support the overall determination;
- b. not conduct a *de novo* review of the evidence or substitute our judgment for that of the investigating authority;

<sup>98</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 55.

<sup>99</sup> See paragraph 72 of this document.

<sup>100</sup> See paragraph 72 of this document.

<sup>101</sup> See paragraph 101 of this document.

<sup>102</sup> Panel Report, *US – Steel Plate*, paras. 7.1-7.5.

<sup>103</sup> Panel Report, *US – Steel Plate*, para. 7.6.

- c. limit our examination to the evidence that was before the investigating authority during the investigation;
- d. take into account all such evidence submitted by the parties to the dispute; and

not simply defer to the conclusions of the investigating authority; our examination of those conclusions must be 'in-depth' and 'critical and searching'."<sup>104</sup>

78. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the respondent, Morocco, requested the Panel to reject some of the complainant's arguments concerning Morocco's dumping determination because the said arguments had not been raised before the investigating authority. Morocco asserted that the Panel's examination of those arguments would constitute a *de novo* review, which was prohibited under Article 17.6 of the Anti-Dumping Agreement. The Panel stated that it would ensure that the findings requested of it did not lead to a *de novo* review:

"Morocco requests us to reject two of Tunisia's grievances relating to the calculation of normal value and one of its grievances relating to fair comparison, on the grounds that the issues raised before the Panel were not first raised before the investigating authority. Morocco thus requests us to:

[D]eclare as inadmissible all Tunisia's claims concerning arguments that Tunisia or its exporters *could have raised* before the authority, *but did not*.

Morocco considers that, by examining those arguments made by Tunisia, the Panel would be conducting a *de novo* review, prohibited under Article 17.6(i) of the Anti-Dumping Agreement, since 'the authority could not consider and address them'.

Before examining Tunisia's arguments in support of its claims concerning the determination of normal value and fair comparison, we will therefore ensure that the findings requested from us do not lead to a *de novo* review of any evidence or arguments that might not have been submitted to the investigating authority."<sup>105</sup>

79. Before proceeding to analyse Tunisia's arguments concerning the construction of the normal value of the subject product, the Panel revisited the applicable standard of review and rejected Morocco's assertion that the examination of Tunisia's claims would constitute a *de novo* review:

"We recall that Morocco requests, in the first instance, that we do not to examine this argument put forward by Tunisia, on the grounds that it would amount to asking the Panel to conduct a *de novo* review, which is prohibited under Article 17.6(i) of the Anti-Dumping Agreement. In this case, Morocco asserts that the interested parties never raised this matter before the authority and therefore cannot do so for the first time before us.

...

We recall that Article 17.6(i) of the Anti-Dumping Agreement, read together with the provisions of Article 11 of the DSU, sets out the standard to be applied by panels when assessing whether a Member's investigating authorities have 'established' and 'evaluated' the facts consistently with that Member's obligations under the covered agreements. This provision precludes a panel from substituting the investigating authority by engaging in an independent fact-finding exercise. However, if requested to do so by the parties, a panel must determine whether the authority's establishment of the facts was proper and whether its evaluation of those facts was unbiased and objective.

<sup>104</sup> Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.2.

<sup>105</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.6-7.8.

In this case, Tunisia is not asking us to re-evaluate the facts and substitute our evaluation for that of the authority. It is asking us to find, on the basis of the facts contained in the investigating authority's record, that the authority did not apply a reasonable amount for profits, in a manner inconsistent with Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. It is therefore a question of application of the rules of the Anti-Dumping Agreement, which clearly falls within our jurisdiction."<sup>106</sup>

80. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel began by noting that the standard of review is the criterion by which a panel examines the consistency of a challenged measure with a Member's obligations under the WTO covered agreements.<sup>107</sup> The Panel further referred to the importance of Articles 3.2 and 11 of the DSU in outlining a panel's standard of review:

"A panel's function under Article 11 to make an 'objective assessment' embraces both factual and legal aspects of a panel's examination of the 'matter'. We also note the clarification in Article 3.2 of the DSU that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered Agreements'."<sup>108</sup>

81. The Panel subsequently addressed the role of the special standard of review in Article 17.6(i) of the Anti-Dumping Agreement in defining when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement. The Panel also noted that, as both the Anti-Dumping Agreement and the SCM Agreement envisage a review of measures in the form of agency action, panels under both agreements would be accorded a degree of deference in reviewing such actions:

"Although the text of Article 17.6(i) is couched in terms of an obligation upon WTO panels, we consider that 'the provision, at the same time, *in effect* defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their 'establishment' and 'evaluation' of the relevant facts'. Only if an investigating authority's 'establishment of the facts' is 'proper' and its 'evaluation of those facts' is 'unbiased and objective' can it successfully withstand the scrutiny of a WTO panel under Article 17.6(i). These requirements are applicable to all aspects of an investigating authority's conduct and to all stages of an investigation.

While different provisions may apply to the examination of claims under the Anti-Dumping Agreement and the SCM Agreement, we note that both agreements envisage a review of measures in the form of agency action, i.e. determinations made by the competent authorities of WTO Members. In terms of the *degree of deference* to be accorded in reviewing agency determinations, our tasks under the two covered agreements are, therefore, not entirely dissimilar."<sup>109</sup>

82. In the Panel's view, the exact standard of review to be applied by a panel in examining agency determinations is a function of the substantive provisions of the covered agreements invoked in a particular dispute, as well as the specific claims raised by the complainant. The "objective assessment" to be made by a panel reviewing an investigating authority's determination is thus enabled and informed by the explanation provided by the authority:

"The obligation upon panels to make an 'objective assessment' of the 'matter' and to not engage in a *de novo* review has an important corollary. For purposes of review of their WTO-consistency, competent authorities must support their determinations with explanations establishing that they have discharged the specific obligations imposed by the provisions of the covered agreements that are alleged to be infringed. The 'objective assessment' to be made by a panel reviewing an investigating

<sup>106</sup> Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.40 and 7.42-7.43.

<sup>107</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.8.

<sup>108</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.10.

<sup>109</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.13-7.14.

authority's determination is thus enabled and informed by the explanation provided by an authority.

Whether the explanation provided by a competent authority is sufficiently 'reasoned and adequate' for purposes of establishing compliance with the relevant WTO obligations will depend *inevitably* upon the specific facts and circumstances of a given case. Importantly, the exact standard of review to be applied by a panel in examining agency determinations is a 'function of the substantive provisions of the specific covered Agreements that are at issue in the dispute' as well as the 'specific claim(s) put forth by a complainant' in a given case."<sup>110</sup>

### 1.8.3.7 Standard of proof

83. The Panel in *Korea – Stainless Steel Bars* addressed a concern raised by the respondent that the Panel had applied a "double standard of proof" to the parties during the panel proceedings. In the respondent's view, the Panel had asked questions to the complainant that appeared to help the complainant unduly to make its case, and the Panel had asked questions to the respondent that appeared to apply greater scrutiny to its case and to unduly shift the burden to make a *prima facie* case onto the respondent. In response to this concern, the Panel noted that its task was not to debate with the parties as to how it exercised its discretion in accordance with the DSU and the Working Procedures. Nevertheless, the Panel made several observations that were relevant to the respondent's concerns.<sup>111</sup>

84. The Panel noted that, while the complainant and the respondent each have the burden of proving their respective cases in a WTO dispute, a panel is not "frozen into inactivity" during this process. The Panel noted that it can request information from any source and put questions to the parties to inform itself of the relevant facts and the legal considerations in the dispute:

"Our primary task is to help the parties resolve their dispute in a prompt and effective manner. Ordinarily, this involves making findings as to whether a complaining party has presented a *prima facie* case of inconsistency with the applicable obligations of the WTO Agreements and whether, in response, a responding party has effectively rebutted the *prima facie* case of the complaining party. While a panel may develop its own reasoning in arriving at its findings, it is of course not for a panel to make the case for either party.

The fact that it is for the complaining party to discharge its burden of proof by establishing a *prima facie* case at first instance, and then for the responding party to effectively refute that case, does not mean that a panel is frozen into inactivity. The extensive discretionary authority of a panel to request information from any source (including a Member that is a party to the dispute) is not conditional upon a party having established, on a *prima facie* basis, a claim or defence. The same is true for a panel's extensive discretionary authority to put questions to the parties in order to inform itself of the relevant facts of the dispute and the legal considerations applicable. It would thus be erroneous for a party to suggest that we can ask a question of the responding party only upon arriving at an initial determination that the complaining party has established a *prima facie* case. It would further be erroneous for a party to seek to divine from the existence or formulation of a given question that it is reflective of a position already adopted by the Panel, for instance that we had already determined that the complaining party established a *prima facie* case."<sup>112</sup>

85. The Panel recalled that it had explained to the parties that its questions were intended to facilitate its work, were not reflective of a predetermined position, and were without prejudice to its resolution of the parties' claims and arguments. The Panel also noted that, where a determination by an authority of one party is the matter at issue, more questions may be directed toward that party. Such a party would, in the Panel's view, be in the best position to answer certain questions, the "implicit" findings made or uncited record evidence used by that authority:

<sup>110</sup> Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.16-7.17.

<sup>111</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.22-7.23.

<sup>112</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.24-7.25.

"Indeed, in all instances during the proceedings where the Panel posed questions to the parties orally and in writing, we explained that our questions were intended to facilitate our work, and that our questions did not in any way prejudge our findings on the matter before us. For the avoidance of doubt, the purpose of this explanation was to assure the parties that the inclusion of a certain proposition in a question was not reflective of a predetermined position adopted by the Panel regarding that question. While it should be self-evident, we additionally explained that '[a]ll questions are without prejudice to the Panel's resolution of the claims and arguments of the parties, including objections pertaining to the Panel's terms of reference or the admissibility or relevance of certain evidence'.

To reiterate, we explained throughout the proceedings that the Panel's questions were intended to 'facilitate its work'. The 'work' of the Panel is guided at all times by the standard of review prescribed in Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement. It should be unsurprising that where a determination by the authority of one party is the matter at issue, more questions may be directed towards that party. For instance, that party may be in a better position to shed light on the evidence and reasoning underpinning the determination made by its own authority, and what may or may not have been taken into account by its own authority in that regard. That is especially so in circumstances where the responding party relies on 'implicit' findings or uncited record evidence as part of its defence of its authority's determination."<sup>113</sup>

86. The Panel added that, in examining the facts in these proceedings, it focused on how the investigating authority had solicited and had examined the facts in its determination. The Panel noted that this focus merely reflected the obligation of the authority to properly establish the facts and evaluate them in an objective and unbiased manner in the underlying investigation. The Panel considered that an authority may be best placed to explain why it did not address a matter raised by an interested party. For this reason, the Panel noted that it directed questions to a particular party that the opposing party was not precluded from answering:

"Likewise, with respect to our examination of the facts, it should be unsurprising that our focus is on how the *authority* solicited and examined the facts, including whether and where such an examination might be reflected in the authority's determination. Such a focus is not indicative of a 'double standard of proof', but merely reflects that '[t]he *authority* is under an obligation to properly establish the facts and evaluate them in an objective and unbiased manner' in the underlying investigation.

Indeed, the party of the authority may be best placed to explain why it did not address, in its determination (or any other document), a matter that an interested party raised during the underlying investigation, for instance because the matter was unsubstantiated or irrelevant.

Accordingly, for some questions, we chose to direct the question to a particular party, e.g. where it appeared that this party might be better placed to respond. However, the Panel explained that '[t]he fact that a question may be primarily directed towards one party does not preclude a response from the other party'. It would therefore be erroneous for a party to draw any inferences from whether the Panel addressed a question to one party or another."<sup>114</sup>

87. The Panel continued to explain that, of the multiple purposes that a question can serve, none is indicative of a panel having reached a predetermined conclusion on any point or having decided to adopt a particular approach. In the Panel's view, the posing of questions is intended to build a sufficient understanding of the legal arguments and evidence at issue to "facilitate [the Panel's] work". The Panel noted that, because not all responses to questions may be relevant in resolving a dispute or need to be addressed, it would be irrelevant for a party to extrapolate anything from the posing of a given question:

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<sup>113</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.26-7.27.

<sup>114</sup> Panel Report, *Korea – Stainless Steel Bars*, paras. 7.28-7.30.

"We also observe that the posing of questions in panel proceedings can serve multiple purposes. One purpose can be to obtain missing information or fill gaps in the panel record. Another purpose can be to clarify the precise nature and scope of a party's legal claim or defence. A further purpose can be to scrutinize the credibility or reliability of the contested materials before the panel. The way in which a question is framed can depend on the purpose for which it is asked. None of these purposes, however, are indicative of a panel having reached any predetermined conclusions on any point, nor having decided to adopt a particular approach. Indeed, a panel's discretion concerning the form, nature, and content of its questions to parties is unfettered in the DSU. In all instances, the posing of questions is intended to build a sufficient understanding of the legal arguments and evidence at issue to 'facilitate [the Panel's] work'. It may well emerge from the response to a question that it is not a relevant consideration in resolving the dispute; it may also emerge that it is unnecessary for the Panel to address the substance of the response, for instance due to the exercise of judicial economy over the relevant claim, or because the Panel ultimately finds that the other side did not make a *prima facie* case. It would therefore be erroneous for a party to extrapolate anything from the posing of a given question, other than that the Panel seeks a response."<sup>115</sup>

88. The Panel noted, finally, that the parties' respective positions in these proceedings were not prejudiced by the specific formulation of a question. According to the Panel, the parties had had exhaustive opportunities to present their respective cases and rebuttals, and the Panel had taken into account all of the parties' materials during the proceedings:

"Finally, we note that the parties' respective positions in panel proceedings are not prejudiced by the specific formulation of a question posed by a panel when, as in the present case, each party is allowed to comment on responses to the panel's questions received from the other side, to pose its own questions to the other side at multiple junctures during the proceedings, and to comment on the responses received from the other side to its own questions. The parties in the present dispute have had exhaustive opportunities to present their respective cases and rebuttals. As affirmed above, we have taken into account all of the materials submitted by the parties during these proceedings in arriving at a resolution to the dispute that is as effective and prompt as possible."<sup>116</sup>

#### **1.8.3.8 Panels' use of record evidence not explicitly cited by an investigating authority in its determination**

89. The Panel in *Korea – Stainless Steel Bars* considered that there were at least two general ways in which panels may permissibly consider record evidence that was not explicitly cited by an investigating authority in its determination, namely:

"[W]here the complaining party bases its claim on record evidence that was not cited by the authority, and asserts that this uncited record evidence demonstrates that the authority's evaluation was not 'unbiased and objective'; and

where the evidence was not cited by the investigating authority but nonetheless corroborates the inferences, reasoning and conclusions reached by the authority."<sup>117</sup>

90. With respect to the first way indicated above, the Panel noted that a panel may be called upon to respond to a complainant's allegations concerning the significance of record evidence: (a) that the investigating authority allegedly ignored, (b) on which the investigating authority placed insufficient weight, or (c) from which the investigating authority drew incorrect inferences. In such instances, the fact that an investigating authority has not cited every piece of record evidence that negates or substantiates these kinds of allegations does not mean that a panel is prevented from considering such evidence to test the veracity of those allegations:

<sup>115</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.31.

<sup>116</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.32.

<sup>117</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.40.



"Since a panel may not conduct a *de novo* assessment of the case, it must limit its examination to the evidence that was before the authority during the investigation. However, a panel's assessment is not limited to the evidence cited by an authority in its determination, and we understand this to be the position of both parties. Rather, a panel must take into account all record evidence submitted by the parties in the panel proceedings. In that regard, a panel may be called upon to respond to allegations by a complainant concerning the significance of record evidence that the investigating authority allegedly ignored, or on which it placed insufficient weight, or from which it drew incorrect inferences. The fact that an investigating authority has not cited every piece of record evidence that negates or substantiates these kinds of allegations does not mean that a panel is prevented from considering such evidence to test the veracity of those allegations. A panel's review of the record evidence in order to establish the veracity of such allegations, and thus determine whether the complaining party has demonstrated that the authority's conclusions were not reasoned and adequate, does not amount to a *de novo* review of the record evidence. We understand that both parties accept this as a general proposition."<sup>118</sup>

91. With respect to the second way indicated above, the Panel stated that, in examining whether an investigating authority's conclusions were reasoned and adequate, a panel may also take into account evidence on the record that the investigating authority did not expressly rely on in its establishment and evaluation of the facts in arriving at a particular conclusion:

"Equally, a panel's examination of whether an investigating authority's conclusions were reasoned and adequate is not necessarily limited to the pieces of evidence *expressly* relied upon by the authority in its establishment and evaluation of the facts in arriving at a particular conclusion. Rather, a panel may also take into consideration other pieces of evidence that were on the record and that corroborate the explanation provided by the investigating authority in its determination. This is because investigating authorities are not required to cite or discuss *every* piece of supporting record evidence for each fact in their determination. There is no such obligation in the Anti-Dumping Agreement. Thus, Korea is not precluded from now relying on record evidence that was not explicitly cited or discussed by the KIA, but nonetheless substantiates the reasoning of the KIA as reflected in its determination."<sup>119</sup>

92. The Panel cautioned, nevertheless, that since a panel's review cannot be *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation cannot form the basis of a panel's finding that the authority's conclusion was reasoned and adequate. As explained by the Panel, such rationalizations would be *new* and would substitute the Panel's own judgement for that of the investigating authority:

"However, since a panel's review cannot be *de novo*, *ex post* rationalizations unconnected to the investigating authority's explanation – even when founded on record evidence – cannot form the basis of a panel's finding that the authority's conclusion was reasoned and adequate. This is because such rationalizations would be *new* rationalizations. If a panel were to rely on new rationalizations to substantiate an authority's determination, it would effectively be substituting its own judgement for that which was actually made by the authority, and hence engage in a *de novo* assessment."<sup>120</sup>

93. In the light of the above, the Panel agreed with the respondent that a responding party could take into account, *inter alia*, findings, analyses, or considerations that were "implicit" in an investigating authority's determination. These elements could be "implicit", for example, by reference to the nature and implications of the investigating authority's reasoning on a given point or to the procedural circumstances of the review. A respondent could not, however, take into account "implicit" findings, analyses, or considerations to substantiate a new or different rationale

<sup>118</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.38.

<sup>119</sup> (footnote original) We note, however, that if the uncited evidence constitutes an "essential fact" under Article 6.9 of the Anti-Dumping Agreement, the failure to cite that fact (i.e. "disclose" it) could lead to a violation of Article 6.9.

<sup>120</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.41.

to that articulated by the investigating authority in its determination. The Panel stated the following on these matters:

"Thus, we accept Korea's point that it 'is entitled to rely on and refer to evidence on the record to confirm the reasonableness of the authorities' determination so long as it is clear that this was evidence taken into consideration by the authorities'. We also accept Korea's point that certain intermediary findings or considerations may be 'implicit' in an authority's determination. The existence, as a factual matter, of 'implicit' findings, analyses, or considerations by an authority must be demonstrated by the party asserting their existence. This could be shown, for instance, by reference to the nature and implications of the investigating authority's reasoning on a given point or to the procedural circumstances of the review. We would therefore disagree with Japan that a panel can never take into account 'implicit' findings, analyses, or considerations that are not expressed in the text of an authority's determination. However, we accept Japan's point that Korea cannot rely on uncited evidence or 'implicit' analyses to substantiate a new or different rationale to that articulated by the KIA in its determination. In our view, the party asserting the existence of an 'implicit' finding, analysis, or consideration must demonstrate a link to the text of the determination, such that it does not constitute an *ex post* rationalization or lead the Panel to make a *de novo* finding."<sup>121</sup>

#### **1.8.3.9 Whether adverse inferences may be drawn by an investigating authority and by a WTO panel in the light of an allegation that certain interested parties acted in bad faith**

94. In *Korea – Stainless Steel Bars*, Korea alleged that the Japanese exporters, during the underlying sunset review, had "committed mistakes in virtually every submission made to the Korean authorities", which "suggest[ed] that the mistakes were not inadvertent".<sup>122</sup> In Korea's view, the Japanese exporters had participated in bad faith, and Korea asked the Panel to avoid an outcome that would reward such participation:

"According to Korea, this indicates that the Japanese exporters' participation in the sunset review had not been in good faith. Korea requests the Panel to avoid an outcome that would reward the unfaithful participation of interested parties in investigations and reviews, particularly in view of the adverse systemic implications of such an outcome."<sup>123</sup>

95. The Panel considered that, when confronted with evidence that an interested party is acting in bad faith, an investigating authority is not precluded from drawing adverse inferences from those procedural circumstances. The Panel therefore agreed with the premise that, when engaging with the submissions of an interested party, an investigating authority may draw adverse inferences from evidence of that party's "blatantly unfaithful participation" and from bad faith conduct in an investigation:

"As a matter of principle, we consider that, when confronted with evidence that an interested party is acting in bad faith through e.g. manipulating or falsifying data, wilfully mischaracterizing data, or abusively drawing out an investigation, an authority is not precluded from drawing adverse inferences from those procedural circumstances. Such inferences may be drawn in the context of an authority's recourse to the 'facts available'. Such inferences may also be drawn in other contexts when an authority is considering the reliability of certain evidence. We therefore accept Korea's premise that an authority's engagement with, and consideration of, the submissions of an interested party can be attenuated by adverse inferences drawn from evidence of that party's 'blatantly unfaithful participation' and bad faith conduct in an investigation."<sup>124</sup>

<sup>121</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.41.

<sup>122</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.165.

<sup>123</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.165.

<sup>124</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.166.

96. As an example of the instances in which an investigating authority may draw adverse inferences, the Panel noted the role of good faith in understanding the provisions of the Anti-Dumping Agreement, even where the conditions to Article 6.8 are not satisfied:

"There may be circumstances where the conditions for having recourse to Article 6.8 are not satisfied, but where the procedural circumstances of an interested party's conduct clearly calls into question that party's reliability. As the Appellate Body has recognized, the principle of good faith in international law informs the provisions of the Anti-Dumping Agreement."<sup>125</sup>

97. Nevertheless, the Panel considered that it was not for WTO panels to draw adverse inferences from these types of procedural circumstances when weighing the reliability and probative value of the evidence presented in underlying investigations. The Panel noted that it was not the trier of fact in the dispute; rather, pursuant to Article 17.6(i) of the Anti-Dumping Agreement, the authorities' determination is the lens through which panels examine factual matters. The Panel considered that Korea had not pointed to anything in the determination of Korea's investigating authority, nor any contemporaneous record material, indicating that the investigating authority had found the Japanese exporters to have acted in bad faith, which, in turn, would have informed the investigating authority's evaluation of the facts:

"However, it is not for *panels* in WTO dispute settlement to draw adverse inferences from such procedural circumstances as part of a process of weighing the reliability and probative value of the evidence presented in underlying investigations. As Korea explained to the Panel regarding certain evidence, '[t]he Panel is not the trier of fact in this dispute and is not to determine whether it would have given the same weight or have adopted the same reading as the authorities based on these facts'. Instead, pursuant to Article 17.6(i) of the Anti-Dumping Agreement, the authorities' determination is the lens through which panels examine factual matters. Korea has not drawn our attention to anything in the KIA's determination, nor any contemporaneous record material, indicating that the KIA found there to be bad faith conduct on the part of the Japanese exporters which, in turn, informed its evaluation of the facts. We note that the KIA referred to a lack of cooperation by the Japanese exporters in the dumping phase, as well as the submission of '*edited*' data on production capacity' and a failure to provide 'objective and reliable material' supporting their submissions on production capacity. However, these references do not indicate a finding of bad faith or anything analogous. Given the seriousness of such an allegation, we would expect to see clear and unambiguous evidence of a finding of bad faith in the determination or other contemporaneous documents."<sup>126</sup>

#### 1.8.4 Article 17.6(ii)

##### 1.8.4.1 First sentence: customary rules of interpretation

98. In *US – Hot-Rolled Steel*, the Appellate Body looked into the first sentence of Article 17.6(ii) which provides that the Panel "shall" interpret the provisions of the Anti-Dumping Agreement "in accordance with customary rules of interpretation", and considered that it echoed closely Article 3.2 of the DSU (See the Section on Article 3 of the DSU). The Appellate Body stated that such customary rules are embodied in Article 31 and 32 of the Vienna Convention on the Law of the Treaties. On a further note, the Appellate Body indicated that "[c]learly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*".<sup>127</sup>

##### 1.8.4.2 Second sentence: more than one permissible interpretation

99. The Panel in *Korea – Stainless Steel Bars* noted that the second sentence of Article 17.6(ii) deals with the situation where there is more than one permissible interpretation of a provision of

<sup>125</sup> Panel Report, *Korea – Stainless Steel Bars*, fn 508 to para. 7.166 (referring to Appellate Body Report, *US – Hot Rolled Steel*, para. 101).

<sup>126</sup> Panel Report, *Korea – Stainless Steel Bars*, para. 7.167.

<sup>127</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 57. See also Panel Report, *US – Steel Plate*, para. 7.7.

the Anti-Dumping Agreement.<sup>128</sup> In *US – Hot-Rolled Steel*, the Appellate Body defined the term "permissible interpretation" as "one which is found to be appropriate *after* application of the pertinent rules of the Vienna Convention".<sup>129</sup> The Appellate Body considered:

"This second sentence of Article 17.6(ii) *presupposes* that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Anti-Dumping Agreement, which, under that Convention, would both be '*permissible*' interpretations'. In that event, a measure is deemed to be in conformity with the Anti-Dumping Agreement 'if it rests upon one of those permissible interpretations.'

100. It follows that, under Article 17.6(ii) of the Anti-Dumping Agreement, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Anti-Dumping Agreement which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the Vienna Convention."<sup>130</sup>

101. The Appellate Body in *US – Zeroing (Japan)* did not consider "Articles 2.4, 2.4.2, 9.3, 9.5, and 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by the first sentence of Article 17.6(ii), ... [permit] ... another interpretation of these provisions as far as the issue of zeroing before us is concerned."<sup>131</sup> The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* found that "Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the transaction-to-transaction comparison methodology. Therefore, the contrary view is not a permissible interpretation of Article 2.4.2 within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement."<sup>132</sup>

102. The Panel in *US- Stainless Steel (Mexico)* was of the view that it was at least a permissible interpretation of Article 9.3 "that the concept of dumping may be interpreted on an importer-specific basis ... we are precluded from excluding an interpretation which we find permissible, even if there may be other permissible interpretations."<sup>133</sup> The Appellate Body in *US – Stainless Steel (Mexico)* did not agree with the Panel:

"In our analysis, we have been mindful of the standard of review provided in Article 17.6(ii) of the *Anti-Dumping Agreement*. However, we consider that Article VI:2 of the GATT 1994 and Article 9.3 of the *Anti-Dumping Agreement*, when interpreted in accordance with the customary rules of interpretation of public international law as required by the first sentence of Article 17.6(ii) of the *Anti-Dumping Agreement*, do not admit of another interpretation as far as the issue of zeroing raised in this appeal is concerned."<sup>134</sup>

103. In *US – Continued Zeroing*, the Appellate Body analysed Article 17.6(a)(ii) in the context of the law of treaty interpretation. In this context, the Appellate Body underlined the importance of holistic interpretation:

"Article 17.6(ii) consists of two sentences. The first sentence clarifies that panels are charged with the obligation to interpret the provisions of the *Anti-Dumping Agreement* 'in accordance with customary rules of interpretation of public international law'. The

<sup>128</sup> In *EC – Bed Linen*, the EC argued that the Panel had failed to apply the standard of review laid down in Article 17.6(ii) because it had not established that the interpretation of Article 2.4.2 of the Anti-Dumping Agreement was "impermissible". The Appellate Body upheld the Panel's finding and indicated that the Panel had not viewed the interpretation given by the EC of Article 2.4.2 as a "permissible interpretation" within the meaning of Article 17.6(ii). The Appellate Body considered that "the Panel was not faced with a choice of multiple "permissible" interpretations which would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the European Communities was, ..., "impermissible"." Appellate Body Report, *EC – Bed Linen*, paras. 63 – 66.

<sup>129</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 60.

<sup>130</sup> Appellate Body Report, *US – Hot Rolled Steel*, paras. 59-60.

<sup>131</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 189.

<sup>132</sup> Appellate Body, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 123.

<sup>133</sup> Panel Report, *US – Stainless Steel (Mexico)*, para. 7.128.

<sup>134</sup> Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 136..

same language is found in Article 3.2 of the DSU.<sup>135</sup> Panels examining claims under the *Anti-Dumping Agreement* are therefore required to apply the customary rules of treaty interpretation codified in Articles 31 and 32 of the *Vienna Convention*. ... The customary rules of treaty interpretation apply to any treaty, in any field of public international law, and not just to the WTO agreements. As the Appellate Body has said, they 'impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.'<sup>136</sup>

The principles of interpretation that are set out in Articles 31 and 32 are to be followed in a holistic fashion. The interpretative exercise is engaged so as to yield an interpretation that is harmonious and coherent and fits comfortably in the treaty as a whole so as to render the treaty provision legally effective. A word or term may have more than one meaning or shade of meaning, but the identification of such meanings in isolation only commences the process of interpretation, it does not conclude it. Nor do multiple meanings of a word or term automatically constitute 'permissible' interpretations within the meaning of Article 17.6(ii). Instead, a treaty interpreter is required to have recourse to context and object and purpose to elucidate the relevant meaning of the word or term. This logical progression provides a framework for proper interpretative analysis. At the same time, it should be kept in mind that treaty interpretation is an integrated operation, where interpretative rules or principles must be understood and applied as connected and mutually reinforcing components of a holistic exercise."<sup>137</sup>

104. The Appellate Body in *US – Continued Zeroing* then focussed on the second sentence of Article 17.6(ii). In this context, the Appellate Body found that the second sentence may give rise to an interpretative range and that in such cases an interpretation falling within that range will be permissible:

"The Appellate Body has reasoned that the second sentence of Article 17.6(ii) presupposes 'that application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* could give rise to, at least, two interpretations of some provisions of the *Anti-Dumping Agreement*, which, under that Convention, would both be 'permissible interpretations'.' Where that is the case, a measure is deemed to be in conformity with the *Anti-Dumping Agreement* 'if it rests upon one of those permissible interpretations.' As the Appellate Body has said, '[i]t follows that, under Article 17.6(ii) of the *Anti-Dumping Agreement*, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the *Anti-Dumping Agreement* which is *permissible under the rules of treaty interpretation* in Articles 31 and 32 of the *Vienna Convention*.'

The second sentence of Article 17.6(ii) must therefore be read and applied in the light of the first sentence. We wish to make a number of general observations about the second sentence. First, Article 17.6(ii) contemplates a sequential analysis. The first step requires a panel to apply the customary rules of interpretation to the treaty to see what is yielded by a conscientious application of such rules including those codified in the *Vienna Convention*. Only *after* engaging this exercise will a panel be able to determine whether the second sentence of Article 17.6(ii) applies. The structure and logic of Article 17.6(ii) therefore do not permit a panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence.

Secondly, the proper interpretation of the second sentence of Article 17.6(ii) must itself be consistent with the rules and principles set out in the *Vienna Convention*.

<sup>135</sup>(footnote original) Clearly, the first sentence of Article 17.6(ii) involves no "conflict" with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*.

<sup>136</sup>(footnote original) Appellate Body Report, *US – Hot-Rolled Steel*, para. 60. The parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from the rules of interpretation in Articles 31 and 32 of the *Vienna Convention*. (*Ibid.*, footnote 40) But this is not the case here.

<sup>137</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 267-268.

This means that it cannot be interpreted in a way that would render it redundant, or that derogates from the customary rules of interpretation of public international law. However, the second sentence allows for the possibility that the application of the rules of the *Vienna Convention* may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail."<sup>138</sup>

105. However, the Appellate Body in *US – Continued Zeroing* underlined that interpretation should not result in mutually contradictory results, and that the object of the second sentence of Article 17.6(ii) is a WTO covered agreement, not a member's municipal law:

"We further note that the rules and principles of the *Vienna Convention* cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty. The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the *Vienna Convention* if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions. Moreover, a permissible interpretation for purposes of the second sentence of Article 17.6(ii) is not the result of an inquiry that asks whether a provision of domestic law is 'necessarily excluded' by the application of the *Vienna Convention*. Such an approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member's municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty."<sup>139</sup>

106. The Appellate Body then found that "[a] holding that zeroing is also consistent with Article 9.3 would be flatly contradictory. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence."<sup>140</sup>

107. A concurring opinion in *US – Continued Zeroing* emphasized the importance of finality:

"Variability, contradiction, and uncertainty stalk the interpretative enterprise, but they are the hallmarks of its failure, not its success. Just as the interpreter of a treaty strives for coherence, there is an inevitable recognition that a treaty bears the imprint of many hands. And what is left behind is a text, sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructive ambiguity, carrying both the hopes and fears of the parties. Interpretation is an endeavour to discern order, notwithstanding these infirmities, without adding to or diminishing the rights and obligations of the parties."<sup>141</sup>

"There is little point in further rehearsing the fine points of these interpretations. In my view, there is every reason to survey this debate with humility. There are arguments of substance made on both sides; but one issue is unavoidable. In matters of adjudication, there must be an end to every great debate. The Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of 'dumping', it cannot bear a meaning that is

<sup>138</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 270-272.

<sup>139</sup> Appellate Body Report, *US – Continued Zeroing*, para. 273.

<sup>140</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 317.

<sup>141</sup> Appellate Body Report, *US – Continued Zeroing*, para. 306.

both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of Article 17(6)(ii). The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come."<sup>142</sup>

108. In *US – Orange Juice (Brazil)*, the Panel again addressed the possibility of rival interpretations under Article 17.6(ii). The Panel started its analysis by noting that under the Vienna Convention, the interpreter has to give equal weight to conflicting interpretations of a treaty provision:

"It is well established that the purpose of treaty interpretation through the use of the Vienna Convention is the identification of the *common intention* of the parties. It follows that where the common intention of the parties to a treaty explicitly provides for two conflicting interpretations of the same term or treaty provision, the Vienna Convention rules on treaty interpretation must necessarily recognize both positions. In other words, where the very words of a treaty expressly provide for the legality of two rival interpretations, the Vienna Convention will respect both interpretations. The same result must also hold where the examination of a term's ordinary meaning, in the light of its context and the object and purpose of the treaty to which it pertains, establishes a *common intention* of the parties to accept two conflicting interpretations. ... Thus, we see the critical question before us in the present dispute to be the following: does application of the customary rules of interpretation of public international law reflected in the Vienna Convention rules of treaty interpretation lead us to understand the common intention of the Members at the end of the Uruguay Round as allowing for one exclusive ('product as a whole') interpretation of the concept of 'dumping'; or does it accept the possibility that 'dumping' may also have an additional ('transaction-specific') meaning?"<sup>143</sup>

109. Having made this observation, the Panel in *US – Orange Juice (Brazil)* found it appropriate to follow the Appellate Body's earlier interpretation on the issue of zeroing, despite having doubts as to whether this was the only permissible interpretation:

"For the reasons we have tried to explain ... we find it difficult to accept, on the basis of the arguments and jurisprudence we have reviewed, that the AD Agreement entertains only one exclusive definition of 'dumping'. However, there is no doubt in our minds that on the question of 'zeroing', and more particularly, the definition of 'dumping', the string of Appellate Body reports concerning mainly the United States' use of 'zeroing' in anti-dumping proceedings read loud and clear.

...

Given the objective lack of clarity in the current definition of 'dumping' that is set forth in the AD Agreement (a conclusion which we believe is inescapable after almost a decade of unprecedented, and often conflicting, panel and Appellate Body opinions on the matter), we firmly believe that all Members have a strong systemic interest in seeing that a lasting resolution to the 'zeroing' controversy is found sooner rather than later.

With all these considerations in mind, and despite sometimes diverse positions existing even amongst ourselves as to different aspects of this debate, we believe that, on balance, our function under Article 11 of the DSU, and the integrity and effectiveness of the WTO dispute settlement system, are best served in the present instance by following the Appellate Body. Thus, we find that the only permissible interpretation of the definition of 'dumping' contained in Article 2.1 of the AD Agreement, with relevance for the entire AD Agreement, is one that is based on an

<sup>142</sup> Appellate Body Report, *US – Continued Zeroing*, para. 312.

<sup>143</sup> Panel Report, *US – Orange Juice (Brazil)*, para. 7.129.

understanding that 'dumping' can only be determined for the 'product as a whole', and not individual transactions."<sup>144</sup>

110. In *Colombia – Frozen Fries*, the Panel pointed out that whether a particular provision of the Anti-Dumping Agreement admits of more than one permissible interpretation depends on whether more than one such interpretation emerges after applying the rule of interpretation set out in the first sentence of Article 17.6(ii):

"The question of whether a relevant provision admits of more than one 'permissible' interpretation – the situation contemplated under the second sentence – thus depends on whether more than one such interpretation emerges when the Panel examines the provision in accordance with the 'customary rules of interpretation of public international law' – that is, when the Panel applies the first sentence of Article 17.6(ii). As the starting point of our interpretative analysis, we must therefore interpret the term 'dumped imports' in Articles 3.1, 3.2, 3.4, and 3.5 in accordance with the customary rules of interpretation of public international law, as reflected in Articles 31 and 32 of the Vienna Convention."<sup>145</sup>

111. However, in the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator did not agree with the Panel's approach:

"Our approach to the interpretation claims in this appeal differs. We do not begin the interpretative exercise by focusing solely on the first sentence of Article 17.6(ii), as this in our view pays insufficient regard to the immediate context of this sentence, namely Article 17.6(i) and the second sentence of Article 17.6(ii). Each of these provisions must be understood in a manner granting special deference to investigating authorities under the Anti-Dumping Agreement.<sup>146</sup> The second sentence of Article 17.6(ii) mandates panels to defer to and accept an authority's measure as soon as it 'rests upon' a 'permissible' interpretation. As we have noted, Article 17.6(i) prevents a panel from conducting a *de novo* assessment of the facts on record; an authority's establishment and evaluation of facts must be allowed to stand so long as it is 'proper' and 'unbiased and objective', and this is the case 'even though the panel might have reached a different conclusion'."<sup>147</sup>

112. The Arbitrator in the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries* proposed applying the principle laid down in the second sentence of Article 17.6(ii) by drawing a line beyond which an interpretation is no longer permissible:

"Thus, the ultimate question for us when testing a proposed interpretation is to draw a line beyond which an interpretation is no longer 'permissible' under the Vienna Convention method for treaty interpretation. Dictionary meanings support the idea that the search for 'permissible' interpretations differs from an attempt to find one's own – 'final' and 'correct' – interpretation. Rather, the question is whether someone else's interpretation is 'permitted', 'allowable', 'acceptable', or 'admissible' as an outcome resulting from a proper application of the interpretative process called for under the Vienna Convention. Obviously, not just any interpretation put forward by an authority can be accepted as 'permissible'. The interpretative process under the Vienna Convention sets out an outer range beyond which meanings cannot be accepted. Just as permissible interpretations cannot be limited to a single 'final' and 'correct' answer as determined by a given tribunal, not all interpretations have the required degree of solidness or analytical support for them to be given deference as

<sup>144</sup> Panel Report, *US – Orange Juice (Brazil)*, paras. 7.131 and 7.135-7.136.

<sup>145</sup> Panel Report, *Colombia – Frozen Fries*, para. 7.286.

<sup>146</sup> (*footnote original*) To do otherwise would correspond to a standard interpretative exercise applicable to any WTO Agreement and would fail to give effect to the unique character of Article 17.6 as it applies to the Anti-Dumping Agreement. Had the drafters considered that Article 17.6 was simply reflective of a conventional approach to Vienna Convention treaty interpretation, it is hard to see why they would have added the provision and why, in a separate decision, they mandated that the "standard of review in paragraph 6 of Article 17 ... shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application." (Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994)

<sup>147</sup> Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.12.



'permissible' within the bounds of the Vienna Convention method for treaty interpretation."<sup>148</sup>

#### **1.8.4.3 Relationship with standard of review in Article 11 of the DSU**

113. In *US – Hot-Rolled Steel*, the Appellate Body considered the relationship between Article 17.6(ii) and the DSU, in particular Article 11. The Appellate Body stated:

"[A]lthough the second sentence of Article 17.6(ii) of the *Anti-Dumping Agreement* imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an 'objective assessment of the matter' as a whole. Thus, under the DSU, in examining claims, panels must make an 'objective assessment' of the legal provisions at issue, their 'applicability' to the dispute, and the 'conformity' of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the *Anti-Dumping Agreement* suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the *Anti-Dumping Agreement* if it rests upon one permissible interpretation of that Agreement."<sup>149</sup>

114. With respect to the question of the legal interpretation under Article 17.6(ii), the Panel in *US – Softwood Lumber VI* considered that under the Anti-Dumping Agreement, a panel is to follow the same rules of treaty interpretation as in any other dispute:

"Thus, it is clear to us that under the *AD Agreement*, a panel is to follow the same rules of treaty interpretation as in any other dispute. The difference is that if a panel finds more than one permissible interpretation of a provision of the *AD Agreement*, it may uphold a measure that rests on one of those interpretations. It is not clear whether the same result could be reached under Articles 3.2 and 11 of the DSU. However, it seems to us that there might well be cases in which the application of the Vienna Convention principles together with the additional provisions of Article 17.6 of the *AD Agreement* could result in a different conclusion being reached in a dispute under the *AD Agreement* than under the SCM Agreement. In this case, it has not been necessary for us to resolve this question, as we did not find any instances where the question of violation turned on the question whether there was more than one permissible interpretation of the text of the relevant Agreements."<sup>150</sup>

115. The Panel in *EC – Salmon (Norway)* came to the same conclusion:

"Thus, it is clear that under the AD Agreement, we are to follow the same rules of treaty interpretation as a panel in any other dispute. The difference is that if, after following those rules, we find more than one permissible interpretation of a provision of the AD Agreement, we may uphold a measure that rests on one of those interpretations."<sup>151</sup>

#### **1.8.5 Relationship between subparagraphs (i) and (ii) of Article 17.6**

116. In *Mexico – Corn Syrup (Article 21.5 – US)*, the Appellate Body ruled that "the requirements of the standard of review provided for in Article 17.6(i) and 17.6(ii) are cumulative. In other words, a panel must find a determination made by the investigating authorities to be consistent with relevant provisions of the *Anti-Dumping Agreement* if it finds that those investigating authorities have properly established the facts and evaluated those facts in an

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<sup>148</sup> Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.15.

<sup>149</sup> Appellate Body Report, *US – Hot Rolled Steel*, para. 62.

<sup>150</sup> Panel Report, *US – Softwood Lumber VI*, para. 7.22.

<sup>151</sup> Panel Report, *EC – Salmon (Norway)*, para. 7.11.

unbiased and objective manner, *and* that the determination rests upon a "permissible" interpretation of the relevant provisions."<sup>152</sup>

## **1.9 Relationship with other provisions of the Anti-Dumping Agreement**

### **1.9.1 Article 3**

117. In *Thailand – H-Beams*, the Appellate Body addressed the relationship between Articles 3.1 and 17.5 and 17.6. See the Section on Article 3 of the Anti-Dumping Agreement.

### **1.9.2 Article 5**

118. The Panel in *Guatemala – Cement I* addressed the relationship between Articles 5.3 and 17.6. In determining what constitutes "sufficient evidence to justify the initiation of an investigation" under Article 5.3, the Panel in *Guatemala – Cement I* applied the standard of review set out in Article 17.6(i).<sup>153</sup> The Panel also considered that the standard of review for the initiation of an investigation under Article 5 is less strict than that for preliminary or final determination of dumping, injury and causation.<sup>154</sup> However, the Appellate Body found that the dispute was not properly before the Panel and therefore did not reach a conclusion on the interpretation of Article 17.6.

### **1.9.3 Article 7**

119. The relationship between Articles 7.1 and 17.4 was discussed in *Mexico – Corn Syrup*. See paragraph 25 above.

120. Also, the relationship between Articles 7.4 and 17.4 was discussed in *Mexico – Corn Syrup*. See paragraphs 24-25 above.

### **1.9.4 Article 18**

121. Further, the relationship between Articles 17.4, and 18.1 and 18.4 was discussed in *US – 1916 Act*. See paragraph 6 above.

## **1.10 Relationship with other WTO Agreements**

### **1.10.1 GATT 1994**

#### **1.10.1.1 Articles XXII and XXIII**

122. The Appellate Body in *Guatemala – Cement I* noted the following regarding the relationship between Article 17 and Articles XXII and XXIII of the GATT 1994:

"Articles XXII and XXIII of the GATT 1994 are *not* expressly incorporated by reference into the *Anti-Dumping Agreement* as they are into all of the other Annex 1A agreements ... As a result, ... Article XXIII of the GATT 1994 does *not* apply to disputes brought under the *Anti-Dumping Agreement*. On the contrary, Articles 17.3 and 17.4 of the *Anti-Dumping Agreement* are the 'consultation and dispute settlement provisions' pursuant to which disputes may be brought under that covered agreement."<sup>155</sup>

123. The Appellate Body, in *Guatemala – Cement I*, further addressed this issue. See paragraph 18 above. Also, this issue was addressed in *US – 1916 Act*. See paragraphs 3-4 above.

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<sup>152</sup> Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 130.

<sup>153</sup> Panel Report, *Guatemala – Cement I*, para. 7.57.

<sup>154</sup> Panel Report, *Guatemala – Cement I*, para. 7.57.

<sup>155</sup> Appellate Body Report, *Guatemala – Cement I*, fn 43.

## **1.10.2 DSU**

### **1.10.2.1 Article 1**

124. The Appellate Body in *Guatemala – Cement I* considered the concurrent application of Article 17 and the rules and procedures of the DSU. See paragraph 1 above.

### **1.10.2.2 Article 3.8**

125. In *Mexico – Corn Syrup*, the Panel touched on the relationship between Article 17.5 of the Anti-Dumping Agreement and Article 3.8 of the DSU. See paragraph 34 above.

### **1.10.2.3 Article 6.2**

126. The Appellate Body in *Guatemala – Cement I* rejected the Panel's conclusion that Article 17.5 of the Anti-Dumping Agreement prevails over Article 6.2 of the DSU and went on to state that both provisions apply cumulatively:

"The fact that Article 17.5 contains these 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*. In our view, there is no *inconsistency* between Article 17.5 of the *Anti-Dumping Agreement* and the provisions of Article 6.2 of the DSU. On the contrary, they are complementary and should be applied together. 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, 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."<sup>156</sup>

127. The Panel in *Mexico – Corn Syrup* discussed the relationship between Article 17.4 of the Anti-Dumping Agreement, and Article 6.2 of the DSU. See paragraph 29 above.

128. This issue was also discussed by the Appellate Body in *Guatemala – Cement I*. See paragraph 126 above.

### **1.10.2.4 Article 7**

129. The Appellate Body in *Guatemala – Cement I* linked the term "matter" in Article 7 of the DSU, which provides the standard terms of reference for Panels, to the same word in Article 17.4 of the Anti-Dumping Agreement.<sup>157</sup> It specifically stated:

"[T]he word 'matter' has the same meaning in Article 17 of the *Anti-Dumping Agreement* as it has in Article 7 of the DSU. It consists of two elements: the specific 'measure' and the 'claims' relating to it, both of which must be properly identified in a Panel request as required by Article 6.2 of the DSU."<sup>158</sup>

130. The Appellate Body addressed further this issue. See paragraph 28 above.

### **1.10.2.5 Article 11**

131. For the relationship between Article 17.6 and the standard of review provision of the DSU, i.e. Article 11, see paragraphs 51, 75, 113 and 52 above. See also the Section on Article 11 of the DSU.

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<sup>156</sup> Appellate Body Report, *Guatemala – Cement I*, para. 75.

<sup>157</sup> Appellate Body Report, *Guatemala – Cement I*, para. 72.

<sup>158</sup> Appellate Body Report, *Guatemala – Cement I*, para. 76.

### 1.10.2.6 Article 19.1

132. In *Guatemala – Cement I*, it was disputed whether a complaint of non-compliance in an anti-dumping investigation should be examined even if neither a final anti-dumping measure, a provisional measure nor a price undertaking is identified in the request for panel establishment, as referenced in paragraph 19 above. In this regard, the Panel rejected Guatemala's argument that a final or provisional duty or a price undertaking must be identified in a request for panel establishment in order for a panel to be able to issue a recommendation in terms of Article 19.1 of the DSU:

"This [argument] is clearly in conflict with our conclusion regarding the interpretation of the provisions of the ADP Agreement as *not* limited to disputes involving only specific 'measures'. A restrictive reading of Article 19.1 would mean that, while the ADP Agreement provides for consultations and establishment of a Panel to consider a matter without limitation to a specific 'measure', the Panel so established is not empowered to make a recommendation with respect to that matter. This would clearly run counter to the intention of the drafters of the DSU to establish an effective dispute resolution system for the WTO. In addition, it would undermine the special or additional rules for dispute settlement in anti-dumping cases provided for in the ADP Agreement. A broader reading of Article 19.1, on the other hand, *would* give effect to the special or additional dispute settlement provisions of the ADP Agreement, by allowing Panels in anti-dumping disputes to consider the 'matter' referred to them, and issue a recommendation with respect to that matter. As discussed below, the DSU provisions relied on ... do not, in our view, limit Panels to the consideration only of certain types of specified 'measures' in disputes."<sup>159</sup>

133. The Appellate Body in *Guatemala – Cement I* found that the dispute was not properly before the Panel and therefore did not come to any conclusion as to the broad reading of Article 19.1 by the Panel.<sup>160</sup> The Appellate Body concluded that the Panel had not considered whether the complainant, Mexico, had properly identified a relevant anti-dumping measure in its panel request, and that the Panel had therefore erred in finding the dispute properly before it.<sup>161</sup>

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Current as of: December 2024

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<sup>159</sup> Panel Report, *Guatemala – Cement I*, para. 7.21. With respect to the issue of repayment of anti-dumping duties under Article 19.1 of the DSU, see Panel Report, *Guatemala – Cement II*, paras. 9.4-9.7.

<sup>160</sup> Appellate Body Report, *Guatemala – Cement I*, para. 89.

<sup>161</sup> Appellate Body Report, *Guatemala – Cement I*, para. 88.