The Law and Economics of Contingent Protection in the WTO

PETROS C. MAVROIDIS
PATRICK A. MESSERLIN
JASPER M. WAUTERS

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Petros C. Mavroidis

Edwin B. Parker Professor of Law, Columbia Law School, USA and Professor of Law, University of Neuchatel, Switzerland

Patrick A. Messerlin

Professor of Economics, Sciences Po, Paris and Director, Groupe d'Economie Mondiale at Sciences Po (GEM), France

Jasper M. Wauters

Associate, White & Case International Trade (Geneva), Switzerland

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Contents

PART III SAFEGUARDS

Table of cases

EUROPEAN

UNITED STATES

WORLD TRADE ORGANIZATION/GATT

Table of international instruments

AGREEMENTS

ARRANGEMENTS

CODES

CONVENTIONS

DECISIONS

DECLARATIONS

LEGISLATION

Canada

Korea

United States

Uruguay Round Agreements Act

PROTOCOLS

REGULATIONS

REPORTS

TREATIES

PART I

Anti-dumping

1. General introduction

The notions (if not the terms) of 'dumping' and 'anti-dumping' have been part of the bilateral trade treaties and domestic regulations since the progressive market opening of the early 1800s. However, the first time that these terms were used in a trade context similar to the current one was in 1904, by Canada's Liberal government which, although backed by a free trade (in theory) party was facing pressures from domestic manufacturers and farmers to increase import duties in order to protect Canadian industry from foreign dumping (Viner 1923). However, during the 50 years following the end of the First World War, anti-dumping as a trade instrument remained largely a sleeping beauty, mostly because the bulk of protection was ensured by tariffs, quantitative restrictions, subsidies, or a mix of all these instruments. From the early 1900s up to the late 1970s, anti-dumping was thus a relatively minor trade provision allowing Customs to take action in a limited number of cases, despite its introduction in the 1947 GATT text.

Things started to change dramatically during the 1970s. From the 1960s to the early 1970s, the US and the EC were mostly using voluntary export restraints (VERs) or minimum prices (trigger price mechanism) for coping with the increasing relative inefficiency of their labour-intensive activities (textile and clothing, shoes and so on) and of the steel sector. However, all these instruments showed major flaws in their capacity to protect. They tend to attract a lot of public attention. They have to be renewed and tightened frequently because imports from the rest of the world continued to increase, often under the form of upgraded varieties. They offer limited scope for discriminatory measures between efficient and inefficient foreign producers, between foreign competitors and foreign allies, and they have to be paid systematically by giving up rents to the foreign producers.

In all these respects, once it started to be used, the anti-dumping instrument has rapidly shown its ability to offer a 'better' solution (from the import-competing firms' perspective) than VERs and grey measures. As a result, starting from the late 1970s, the total number of anti-dumping investigations and measures has steadily increased.[1] Until the early 1990s, the anti-dumping

[1] Many scholars have studied the proliferation of AD duties and the reasons behind this phenomenon. Prusa (2001 and 2005) offers a very comprehensive look at

Table 1.1 The main anti-dumping users: number of cases, 1995–June 2006

	Number of initiations 1995–2006	Measures in force (July 2006) taken by	
		Number	Share (%)
India	448	323	17.2
United States	366	236	12.6
European Community [c]	345	224	11.9
Argentina	209	149	7.9
South Africa	199	116	6.2
Australia	188	69	3.7
Canada	138	84	4.5
China, P.R.	126	83	4.4
Brazil	125	66	3.5
Turkey	106	97	5.2
Mexico	89	82	4.4
Korea	82	47	2.5
All Top 12 countries	2421	1576	84.1
Developed countries [d]	1119	660	35.2
Developing countries	1302	916	48.9
All other countries	517	299	15.9
Other developed countries [e]	186	136	7.3
Other developing countries	331	163	8.7
All countries	2938	1875	100.0

Notes: [a] Ratios of measures in force in 2006 to initiations over 1995–2006.
[b] Ratio of measures taken by the country to measures taken against the country.
[c] Source for measures in force against the EC: European Commission, November 2006.
[d] US, EC, Australia, Canada, Korea.
[e] Hong Kong, Israel, Japan, Lichtenstein, New Zealand, Norway, Russia, Saudi Arabia, Taiwan.

Source: WTO Secretariat, 2007. Author's calculations.

this issue. Finger and Nogues (2006) have studied anti-dumping practice in seven Latin American countries (Argentina, Brazil, Chile, Colombia, Costa Rica, Mexico and Peru). They confirm that the use of anti-dumping has increased substantially over the years. In their view, however, such use is a necessity, since otherwise the countries

'Productivity' [a] 1995–2006	Measures in force (July 2006) taken against		Case balance [b]	Measures in force in 2006 taken (per USD billion of trade)	
	Number	Share (%)		by	against
72.1	69	3.7	4.68	0.507	0.143
64.5	100	5.3	2.36	0.023	0.021
64.9	103	5.5	2.17	0.027	0.013
71.3	13	0.7	11.46	0.970	0.057
58.3	34	1.8	3.41	0.367	0.121
36.7	8	0.4	8.63	0.103	0.014
60.9	12	0.6	7.00	0.044	0.006
65.9	353	18.8	0.24	0.026	0.099
52.8	69	3.7	0.96	0.147	0.115
91.5	22	1.2	4.41	0.173	0.061
92.1	25	1.3	3.28	0.058	0.019
57.3	132	7.0	0.36	0.033	0.086
65.1	940	50.1	1.68	–	–
59.0	355	18.9	1.86	–	–
70.4	585	31.2	1.57	–	–
57.8	935	49.9	0.32	–	–
73.1	541	28.9	0.25	–	–
49.2	394	21.0	0.41	–	–
63.8	1875	100.0	1.00	–	–

examined would have no way to make adjustments they needed to, in light of the liberalization commitments they undertook since the Uruguay Round. In other words, the countries examined view recourse to anti-dumping more as a safeguard, rather than as a response to an *unfair* practice.

cases were mostly initiated by developed countries. Since then, they have been initiated by developed and developing countries alike. Table 1.1 presents the world anti-dumping activity during the last decade, with details for the top twelve anti-dumping users. The 'productivity' ratios (the measures enforced with respect to the initiations) range from 36 to 92 per cent. These figures are high, all the more because the ratios underestimate the productivity of the anti-dumping proceedings since their denominators are defined over a period of time (11 years) much longer than the legal period of anti-dumping enforcement (generally between three to five years). They strongly suggest a huge bias in the WTO and domestic regulations.[2]

Table 1.1 deserves another important observation. The apparent similar number of cases initiated and enforced by industrial and developing countries is misleading from an economic perspective. In fact, anti-dumping is likely to have a more negative impact on developing economies than on industrial countries, for two reasons. Firstly, there is a marked difference between the number of measures imposed by developing countries and industrial countries, once adjusted for trade size. The average number of measures in force per billion US dollars of goods imported by an anti-dumping user is a better indicator of the potential impact done by anti-dumping to the domestic economy than the absolute number of measures. This indicator is much higher for developing countries than for industrial countries, ranging from 0.05 for Mexico to 1.0 for Argentina and from 0.02 for the European Union to 0.04 for Canada (with an exception, Australia, at 0.1). These differences would be even greater if the number of anti-dumping measures were adjusted for the number of tariff lines concerned since developing countries tend to cover many more tariff items with anti-dumping cases than do industrial countries. Secondly, available information suggests that anti-dumping duties enforced by developing countries are, on average, higher than those imposed by industrial countries – and economic analysis shows that the welfare costs generated by tariffs increase more rapidly than tariffs do.

A final preliminary observation to keep in mind is that, during the last two decades, anti-dumping rules have shown an extraordinary capacity to evolve. Over the past 25 years, the EC and the US have amended their anti-dumping statutes half a dozen times. More importantly, this drift has always been in one direction, making it easier to prove the existence of dumping and injury and of a causal link between dumping and injury, as illustrated by the two following

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[2] There have been huge efforts to provide databases on anti-dumping cases initiated and enforced by WTO Members. Such databases are not simple matters since the anti-dumping procedures are so complicated (especially if one takes into account the reviews). The most complete source is provided by Bown, and it is posted on the following website: http://people.brandeis.edu/~cbown/global_ad.

examples. Imports can now be deemed unfair even if foreign firms charge *higher* prices to their export market than they do at home. The definition of 'less than fair value' was broadened to capture not only price discrimination, but also sales below cost. This chapter presents anti-dumping as related to price discrimination because this was the initial view – and it may be still the most important one although, in the US, cost-based cases account for more than one-half of the lodged anti-dumping cases (Clarida 1996). But the lesson of the past 25 years is that 'losing a case is not a sign that the foreign competition is traded fairly, rather it is simply a sign that the anti-dumping law needs changing' (Bloningen and Prusa 2003). In this context, the WTO dispute settlement mechanism role is essential because the Dispute Settlement Understanding (DSU) appears the only source (so far) of possible counterweights to the general drift towards systematically weakening anti-dumping disciplines.

A DUMPING: AN UNFAIR (?) TRADE PRACTICE

1 Dumping is Price Discrimination

The WTO Agreement on Antidumping (AD Agreement) is probably the single most heavily criticized agreement, predominantly by economists, but increasingly in the legal scholarship as well. Criticism is directed at various aspects of the agreement, but focuses on the very idea to 'punish' price differentiation. For the AD Agreement imposes a legal constraint on WTO Members wishing to impose AD duties but, in principle, accepts the idea that dumping can be 'punished'. And dumping is nothing more than price differentiation, whereby the export price is lower than the price in the home market of the exporter (the normal value). The latter price (the normal value) is very often constructed and it is not an actual price: the domestic investigating authority has the legal right, assuming certain conditions have been met, to neglect an actual market price, and construct a fictitious price which will serve as one of the two benchmarks to decide whether dumping exists.

Dumping is only one of the conditions that must be satisfied for AD duties to be lawfully imposed: it must further cause injury to the domestic industry producing the like product. In a nutshell, if a domestic producer has suffered injury as a result of price differentiation practised by its competitors, it can lobby its government and request protection through the imposition of AD duties.[3]

[3] As will often be repeated in this chapter, the AD Agreement endorses an injury to competitors standard; see on this issue Hoekman and Mavroidis (1996) and Finger (1993). Hoekman and Mavroidis (1996) include their empirical research in the

2 Price Discrimination in Antitrust Statutes

The thrust of criticism has to do with the treatment of price differentiation. In antitrust practice, which is not necessarily by definition the best reflection of cutting-edge economics,[4] but which has been substantially more open to economic analysis, price differentiation is not treated in the way it is treated in the AD Agreement. Of course, there is nothing like a world antitrust statute and hence, *ipso facto*, no harmonized practice either. A look into two quite well-known systems, the EC and the US, is appropriate.

The European Court of Justice (ECJ) had the opportunity to pronounce on this issue in its *Akzo* and *Tetrapak* case-law.[5] In the EC system, price differentiation will be treated as an abuse of (single or collective) dominance. So, for price differentiation to enter the picture of antitrust enforcement, a prior finding on dominance is required. We quote from the last decision (para. 41) which is the most recent one and can be considered the authentic expression of the test for predatory pricing established by the ECJ:

> In AKZO this Court did indeed sanction the existence of two different methods of analysis for determining whether an undertaking has practised predatory pricing. First, prices below average variable costs must always be considered abusive. In such a case, there is no conceivable economic purpose other than the elimination of a competitor, since each item produced and sold entails a loss for the undertaking. Secondly, prices below average total costs but above average variable costs are only to be considered abusive if an intention to eliminate can be shown.

With respect to some of the sales at hand, the ECJ found that the prices charged were between average variable and average total costs. According to its own test hence, it would have to show intent to eliminate the competition. The ECJ in para. 44 ruled as follows on this point:

EC jurisdiction: the European Community has a public interest clause, whereby AD duties will not be imposed unless they meet the statutory requirements of the WTO Agreement, and also meet a statutory requirement mandated by EC law, namely, that the duties eventually imposed serve the public interest. They found that practice of meaningful application of this public interest clause had been extremely scarce. Moreover, although intuitively one would expect that under this clause the (EC) domestic investigating authority would evaluate the implications of imposition of AD duties on EC consumer welfare, this has almost never been the case. Not much has changed since they published their study.

4 See Hovenkamp (2005) pp. 12ff.

5 See *Akzo Chemie BV v Commission, Case C-62/86 [1991], ECR I-3359 (July 3, 1991); Tetrapak International SA v Commission Case T-83/91, [1995], ECR II-762 (CFI) and Case C-333/94P, [1996], ECR I-5951*).

> . . . it would not be appropriate, in the circumstances of the present case, to require in addition proof that Tetra Pak had a realistic chance of recouping its losses. It must be possible to penalize predatory pricing whenever there is a risk that competitors will be eliminated. . . . The aim pursued, which is to maintain undistorted competition, rules out waiting until such a strategy leads to the actual elimination of competitors.

The US Supreme Court also had the opportunity to pronounce on this issue. In the US statute, monopolization plays the same role as abuse of dominance in the EC regime, and it is under its aegis that the Supreme Court discussed this issue. The leading case is *Brooke Group*:[6]

> A plaintiff must prove (1) that the prices complained of are below an appropriate measure of its rival's costs and (2) that the competitor had a reasonable prospect of recouping its investment in below cost prices. . . . The plaintiff must demonstrate that there is a likelihood that the scheme alleged would cause a rise in prices above the competitive level sufficient to compensate for the amounts expended on the predation, included the time value of the money invested in it. Evidence of below cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. The determination requires an estimate of the alleged predation's cost and a close analysis of both the scheme alleged and the relevant market's structure and conditions. Although not easy to establish, these prerequisites are essential components of real market injury. . . . Predatory pricing schemes, in general, are implausible . . . and even more improbable when they require coordinated action among several firms . . . They are least likely to occur where . . . the cooperation among firms is tacit, since effective tacit coordination is difficult to achieve; since there is a high likelihood that any attempt by one oligopolist to discipline a rival by cutting prices will produce an outbreak of competition; and since a predator's present losses fall on it alone, while the latter supracompetitive profits must be shared with every other oligopolist in proportion to its market share, including the intended victim.

Although the evidentiary standard in US law is higher and makes the possibility of successfully challenging predatory schemes quite unlikely, both regimes punish only a sub-set of price discrimination: predatory pricing. Assuming that such a scheme has been successfully implemented, the predator will be in a position to recoup the original investment, having driven the competitors out of the market and having ensured that there is no risk, at least for some time, that they will jump back into the market when it will have raised its prices. In other words, what antitrust statutes punish is behaviour which causes injury to *competition*, as opposed to injury to *competitors*. Rational economic behaviour by governments would suggest that, before imposition of duties, the welfare implications of dumping on the whole of the

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6 *Brooke Group Ltd. v Brown & Williamson Tobacco Corp., 509 US 209, 1993.*

society, and not simply a sub-set of it, that is the injured producers, should have been examined. This is not the case, though. Thus the AD Agreement is a classic device to protect domestic producers.[7]

3 Price Discrimination in Economic Theory: Three Stories

People believe that a firm should charge a price for its product in its home market lower than the price it charges in its foreign market – mostly because they see exporting a product as requiring additional services, such as transportation, marketing adapted to the importing country's consumers, taxes (tariffs) and the rest. Hence, most people consider as abnormal or 'unfair' the cases when the home price of the exporting firm is higher than the price it charges in the importing market. For historical reasons (see above) such pricing is called 'dumping'. By extension, dumping also describes the situation where the costs of the exporting firm in its home market are higher than the price it charges in the importing market. As a result, most people believe that imposing measures counteracting such dumping practices (anti-dumping measures) make sense.

But does anti-dumping make sense from an economic point of view? It is useful to divide the question in two. Does dumping make economic sense; that is, is dumping a quite acceptable pricing behaviour? If not, is the anti-dumping instrument, as designed in the AD Agreement, the appropriate instrument to be used? Economic analysis shows that the most frequent answer to the first question is negative, hence that it is merely another way of protecting import-competing firms. And it shows that, in the few cases where anti-dumping could make some sense, anti-dumping measures are generally not the appropriate instrument to address the issues at stake.

Anti-dumping supporters invoke three reasons which, in their view, present dumping as an unacceptable pricing behaviour, or, at least, as a behaviour to be limited by anti-dumping measures. First, dumping is a predatory pricing strategy with a strong anti-competitive, monopolizing goal. Second, dumping

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[7] Sometimes the argument is voiced that AD should be viewed as some form of safeguard: absent some breathing space for economies that have been opened up too abruptly to foreign competition, governments might be unwilling to make commitments (hence, because of the existence of the AD Agreement, meaningful commitments have been entered) and, more importantly, an important lobby might be losing interest in pushing for trade liberalization. The basic problem with this argument is that it conveniently omits to reveal that another WTO Agreement (the Safeguards Agreement) is designed to play exactly this role (and of course, *per* construction, such is not the function at all of the AD Agreement). So, at best, proponents of this argument would have to explain why the Safeguards Agreement has not fulfilled its original promise for their argument to hold.

is a discriminatory pricing practice which generates distortions among markets. Lastly, dumping reflects asymmetrical conditions in the exporting and importing markets which give an unfair strategic advantage to the foreign exporter(s) over the import-competing firms.

(a) Predation

Complaining firms in anti-dumping cases often argue that the foreign exporters are pricing at a price below their home price, or at a price lower than their cost of production (but generally without specifying whether they are talking about total, fixed or variable costs). And they suggest that such a pricing behaviour is driven by the will of foreign firms to eliminate domestic competitors in their own market in order to increase prices when they will be in a monopoly position in the import-competing market. This line of argument dates from the nineteenth century, more precisely from the nascent US anti-trust law.

Does this argument make sense from an economic point of view? It hardly does because it takes as granted conditions that are far from being met in the real world.

(i) Predation: unlikely

Let us assume the simplest possible world in which all the firms operating in a market have the same supply curve, with the same market price *p* clearing total supply and demand. In this hyper-simple (but very telling) case, all the firms produce, and sell the same quantity on the market.

Let us now assume that one firm, Predator, adopts a predatory pricing strategy in order to eliminate all its competitors, and to become later the monopoly in the market. For achieving this goal, Predator decides to increase massively its supply and to sell a much larger quantity of products than the initial quantity. In other words, Predator decides to 'dump' additional units of the product, hence the term 'dumping'. The immediate consequence of such a policy is to depress the initial market price which falls to an extent which depends on the supply price slope (that is, elasticity).

This new, lower, price has two consequences. The first, and most important, though generally ignored by the anti-dumping supporters, is that Predator is losing money. It sells at a much depressed price many more units. As producing more units imposes sooner or later higher costs (the most general form of a supply curve is to be upward sloping) Predator earns fewer dollars or euros per unit sold, while facing higher costs of production. The more units Predator sells, the more depressed the price is, the more Predator loses money.

The second consequence of the new market price is that Predator's competitors (let us call them Preys) need to adjust to the new (lower) market

price resulting from Predator's dumping. They can do so by reducing their output since, by the same token, they reduce their costs of production. How successful can they be when following this adjustment process to Predators' predatory policy depends on several conditions, in particular the magnitude of the price contraction, their cost constraints, the duration of the price war, and so on. In a nutshell, the longer and the more severe this adjustment has to be, the higher the risk is that Preys have to leave the market.

To sum up this first phase of predation, Predator is losing money while Preys can survive without losses via adjustment. And the fact that Preys may leave the market reflects the fact that Predator may have to depress severely and for a long time the market price, meaning that it has to suffer high losses for a long time. Predation is not easy. It is a war.

Let us assume that Predator succeeds in eliminating all its competitors. The second phase of predation can begin. Predator can start to increase the market price now that it enjoys a monopoly. But, contrary to appearances, this second phase is for Predator as difficult and risky as the first one. This is because competitors old and new alike could re-enter or enter the market as soon as Predators' increased price is high enough to cover their production costs. In sum, Predator's success depends heavily on whether the entry costs of competitors are low or not.

Predator's pricing is thus a strategy in two phases: eliminating competitors which generates costs for Predator, and 'recouping' these costs during the second phase which almost necessarily creates incentives for old competitors to come back or new competitors to enter a market that they ignored before the price war. Predator should follow predatory pricing only if the second phase brings higher profits than the losses generated by the first phase.

The temporal aspect per se makes the price war much less 'easy' than anti-dumping supporters suggest. Let us assume that each of the two phases is spread over several years. Then, losses may easily dominate the actualized value of the predatory strategy (actualized value refers to the value of this war the day before entering the war). This is because losses are concentrated in the first years, hence they are modestly discounted (losses in two or three years from now have almost the same value today as the losses of the first year). In contrast, the benefits expected in the second phase are concentrated in years far from the initial date (in four or five years from now), hence they are more severely discounted (benefits in five years from now have not the same value as today's benefits).

Many complications can be introduced into this illustrative tale. Complications mean risks, hence tending to work against the likelihood of predatory behaviour, contrary to what is often believed at a first glance. For instance, let us assume that Predator is a large firm, and Preys are small firms. Predator's 'large pocket' seems to be a strong card in predatory pricing. This

argument is far from being as convincing as it looks at first glance because size on the supply side of the market is only half of the story – the other half of the market is its demand side. Assuming that Preys are small compared to Predator, they can try to convince the demand side of the market (the consumers) to help them to survive the first phase of Predator's dumping. They have a good argument: it is that, if Predator wins, consumers will pay a monopoly price. In other words, the consumers of the product in question can 'invest' in a competitive market structure (as long as the costs of support during the first phase do not exceed the benefits of a more competitive market during the second phase).

Interestingly, the size argument does not pass the reality check test. Most anti-dumping cases are lodged by large domestic firms against small foreign firms, suggesting that predation would be a pricing strategy followed by small firms against large firms, a case that does not make a lot of sense. A well-known anti-dumping case illustrates this point. In the late 1960s and early 1970s, the US TV producers launched several AD actions against Japanese TV producers. Their argument was that Japanese firms practised predatory behaviour in the US market. One of these anti-dumping cases went to the US Supreme Court (the so-called *Matsushita* case). The debates in the Court established that, if they were following a predatory strategy, the dozen Japanese firms would have needed more than 40 years to recoup their initial losses in the US market, a result illustrating the unlikelihood of dumping as predatory pricing. Indeed, available evidence suggests that only a very small percentage of the anti-dumping cases (less than 5 per cent) deal with cases which may have a predatory dimension (Bourgeois and Messerlin 1998; Shin 1998).

(ii) Merger as an alternative to predation

This unlikelihood is supported by an additional argument. If the goal of predation is monopolization of a market, is there a better – less expansive – way for Predator to achieve this goal? The answer is positive, and it is merger. A much less risky and costly way for Predator to eliminate Preys is to buy them, at a price which would reflect their stock value in the expected monopolistic (not in a competitive) market.

This alternative is limited by the constraints imposed by the existing competition policy. But these constraints are the same whether Predator follows a predatory policy or a merger strategy. And they are the same whether Predator is a foreign firm and Preys are domestic firms. In other words, there is no justification for anti-dumping measures.

(b) Discriminatory pricing

Supporters of the anti-dumping instrument argue that it is 'unfair' that an

exporting firm charges a price in its exporting market lower than its home market price. As said above, their view mirrors the fact that exporting a product requires additional services, compared to selling at home, such as transportation, marketing adapted to the importing country's consumers, taxes (tariffs) and so on. However, this fact is not as robust as it seems at first glance. It is likely to be cheaper for a producer based in Toronto to sell his products in the US East Coast than the Canadian West Coast. More generally and importantly, economic distances are far from mirroring geographic distances. A world map based on transportation costs (not on geographic distances) is very different from a geographic map. In our modern economies, transportation can be low enough to make attractive the production (or assembly) of goods in far away countries.

(i) Discriminatory pricing: frequent . . .

Leaving aside this crucial gap between economic and geographic realities, the above anti-dumping justification relies on a crucial implicit assumption: the competitive structure of the home and export markets are similar, that is, the exporting firm faces the same kind and level of competitive pressures at home and in export markets.

This assumption is far from being granted. Indeed, it seems much more reasonable to assume that a producer is better known in its home market (and that he knows it better) than in its export market. In other words, such a producer may have some 'market power' in its domestic market meaning that the firm in question can influence the price to be paid by the purchasers of its product (that is, it can get a higher price) by restricting the quantity it supplies. By contrast, because the firm in question has no market power in the foreign market, it cannot expect to influence the price paid by the foreign purchasers of its product.

In what follows, 'market power' is a term that channels no a priori views, whether positive or negative. Such a view depends on the source of the market power. A producer can derive its market power from his ability to produce better conceived or designed goods. Such a market power is perfectly respectable, and it plays an important role – indeed, it is part of the competitive process. By contrast, market power may flow from the exporter's capacity to eliminate competitors in its home markets by some illegal means. Or it may flow from the existence of (private or public) import barriers protecting its home market from foreign competition. Such sources of market power are seen as negative by the economic analysis because they impose unnecessary costs on the consumers. The fact that market power has such a different impact, depending on its source, plays a key role in deciding what should eventually be done, and who should act, as shown below.

If the home and foreign markets have different competitive structures, it is easy to show that the home price charged by the producer is necessarily higher than the price it charges in the foreign market; in other words, that dumping is a perfectly justified pricing strategy (if the existing market power flows from a respectable source). For simplicity's sake, let us assume in what follows that the export market price is a price driven by perfect competition. In other words, there are many sellers in this market for the constant price clearing the market. All of them cover their costs, but make no extra profits, meaning that the price in the import-competing market is the lowest possible price of the product in the world.

If the firm charges a price in its home market equal to this foreign price, it does not make use of its market power, hence it sells too many units of its product in its home market. Because the home price of its product is too low, compared to the price it could charge by using its market power, it gives up the possibility of making extra profits at home.

Using its market power at home requires that the firm restrict the quantities it sells at home. How much 'less' is less? For simplicity's sake, let us assume that selling the same unit in the two markets requires the same costs. This assumption means that costs are not part of the answer to the question raised, and thus that the answer depends entirely on the demand side of the markets (the supply side will play a role in the following section). Before selling each unit in a market, the producer should compare how much he will earn by selling it in the home market, and in the export market. The firm will sell its first unit at home since the home consumers are willing to pay for its product a price higher than the foreign consumers (this is the meaning of market power). However, for every additional unit sold at home, the price (marginal revenue) that the producer could get will decline. As a result, sooner or later, the firm would get the same marginal revenue at home and in its export market. This situation signals that it is time for the producer to shift the next units of the product to the export market where he gets the foreign price which is constant and higher than the successive marginal revenues available at home.

In sum, discriminatory pricing generates two prices for the producer, with the home price higher than the export price. Such a situation is sustainable only if there is no way for a trader (or any other operator) to buy units of the product in the export market, and to re-import them in the home market at a lower price than the price charged by the producer. In such a case (called 'arbitrage') the producer is not in a position to make use of its market power at home.

The absence of arbitrage may flow from intrinsic factors out of reach of the exporting firm, such as logistic infrastructures, distribution and so on. However, one might wonder why goods can be shipped from home to the foreign countries and not vice-versa without the help of more visible hands. Limits to arbitrage can thus be trade barriers imposed by the home country of the exporting firm. Other (more subtle) limits can be devices generated by the

exporting firm itself for protecting its home market, such as different technologies in the two markets, as best illustrated by imposing different *cryption* procedures in the DVDs markets. Firms can introduce such designs segmenting markets for more economically sound reasons. For instance, the home country consumers could be much more sensitive to the latest technologies than the foreign country consumers, allowing the firm to sell the no longer fashionable products in the foreign country without serious risks of seeing them shifted back into the home country and sold at a lower price than the ones revealing the firm's market power.

The absence of arbitrage has an important consequence for a key concept in anti-dumping procedure. If generated by economically sound reasons, it strongly suggests that the product sold in the foreign market by the home firm is not 'similar' (a 'like-product' in the WTO legal jargon) to the product sold by the firm in question at home (as in the above example of two technologically different varieties of such a product). In this respect, it is interesting to mention the provision included in the Treaty of Rome (1956) for dealing with *intra-European* dumping. Article 91:2 specifies that all the products exported from one country to another one '*shall, on reimportation, be admitted in the territory of the first-mentioned State free of all customs duties, quantitative measures or measures having equivalent effect*'. This provision (abrogated in the 1997 Amsterdam version of the Treaty) was an attempt to test, via the markets' reaction, whether the product in question was a like product, or not (if it did go back to the country of origin, it could be assumed not to be a similar product).

(ii) . . . but not a reason to intervene for the importing country

Let us assume the absence of arbitrage, so that the exporter's home price can remain higher than his export price for some time. This situation provides no justification to intervene since both prices reflect perfectly the demand and supply conditions in both markets. In particular, the fact that the government of the import-competing country would take anti-dumping measures would hurt the consumers' welfare of the import-competing country. In fact, large economies (such as the US or the EU) offer plenty of cases where producers charge in their home (EU or US Member state) market a price higher than the one they charge in their foreign (the other EU or US Member states) markets without any intervention from the 'home' or 'foreign' Member state, or from the 'federal' government.[8]

[8] The question of providing some 'adjustment' breathing (that is, some time for reacting to rapidly increasing competitive pressures from foreign firms) to the domestic firms of this country is examined in the safeguards section.

Turning to the exporter's home country, there are two alternative conclusions, depending on the source of the exporter's market power. If this market power relies on economically sound reasons (better product conception, design and so on) there is no reason for the exporter's home country to intervene. The higher price that home consumers are ready to pay is their recognition of these economically sound reasons, while the home product is, in some sense, 'unique'. In sharp contrast, if the exporter's market power is generated by his anti-competitive behaviour at home, there is a good reason for the exporter's (not importer's) home country to intervene by using its competition regulations. Similarly, if the home producer enjoys market power because its home country impedes arbitrage by imposing high tariffs or non-tariff barriers, the exporter's government should change its policy and remove these barriers.

But what if the home country does not want to take the appropriate action (be it a competition investigation or a reduction of import barriers in the home exporter's market)? Anti-dumping supporters argue that the adoption of anti-dumping measures by the importing country would induce the foreign government to act. This argument is much weaker than it looks at first glance, simply because the importing country's market is small by the world standard (and that is even true for the US or the EU markets). In such a case, an anti-dumping measure would have no impact on the foreign producer (who will concentrate his sales in the other export markets) while it deteriorates the consumers' welfare in the import-competing country.

(c) Strategic dumping

Discriminatory pricing focuses on pricing differences due to different home and foreign demands (with the home demand being less elastic than the foreign demand). The last type of dumping – strategic dumping – relies on cost conditions. It emerges when an exporting firm benefits from a closed home market where it can charge the full (fixed and variable) costs of production to the home consumers, allowing the sale of the product in the export market at a price including only the variable cost (the import competing is assumed not to be protected). The fact that the exporter's home market is a 'sanctuary' puts the import-competing firms in a difficult situation since they cannot use a pricing strategy mirroring the exporter's approach, but have to charge their full costs to their own consumers. Similar to strategic dumping is dumping associated with sporadic sales, when firms from large countries shift their last discount sales to smaller economies.

There is a condition for strategic dumping to be successful. Import-competing firms should be 'disadvantaged' enough, in terms of the relative size of accessible markets and scale economies, with respect to the exporter operating from the sanctuary market. In particular, strategic dumping is clearly implausible when the exporters' sanctuary market is small relative to the importing market.

As for the other anti-dumping justifications, there is a need for a reality check which suggests that strategic dumping is not a significant case at the current stage of anti-dumping use. The size argument means that the existence of strategic dumping would only justify anti-dumping measures taken by small countries against exporters operating from large economies. In sharp contrast to this conclusion, evidence shows that a vast majority of the anti-dumping measures taken in the world have been adopted by large economies against small countries. As shown by Table 1.1 above, the top twelve anti-dumping users launch and enforce more than 80 per cent of all the cases and measures notified to the WTO, whereas they represent only 65 per cent of the world imports, and 73 per cent of the 2004 world GDP (at purchasing power parity). These top twelve users are the targets of only half of the measures in force, with a wide range of 'case balances' among the top twelve anti-dumping users. In sum, anti-dumping is currently an instrument enforced by a few large countries against the smaller economies of the rest of the world – a situation not at all fitting strategic dumping.

This reality check requires two caveats. First, the size of the economies as a whole is only a proxy of the size of the markets, and what count in anti-dumping matters are the markets of the product in question, not the size of the whole economies. It might be the case that a relatively small economy hosts a relatively large market for a given product, while the relatively large economy hosts a relatively small market for the same product. However, the EU and US anti-dumping cases do not see this first caveat as a common one. Second, the above reality check assumes that developing countries use the anti-dumping instrument in the same way as the large industrial countries. It assumes that developing countries do not use alternative instruments to anti-dumping measures, such as straight minima prices or quantitative restrictions. Evidence suggests that they do, so that more refined data are needed. However, it remains that the current use of anti-dumping does not address the strategic dumping issue.

4 Anti-dumping Enforcement: Lessons from an Economic Perspective

What precedes amply suggests that the main justifications of anti-dumping – in its present form – are weak from an economic perspective. It suggests that anti-dumping, as it is, is a modern form of protection. From this perspective, it is useful to summarize a few economic lessons drawn from past anti-dumping enforcement. The following assessments are mostly derived from the examination of the Australian, Canadian, EC and US cases. But there is no reason to believe that the many cases initiated by the developing countries would lead to different conclusions. These lessons are organized under four headings: the determinants of anti-dumping complaints, the determinants of

anti-dumping investigations, the direct costs of anti-dumping measures, and the magnified costs of anti-dumping protection generated by the anti-competitive nature of a vast majority of the anti-dumping cases.

(a) Determinants of anti-dumping complaints

As should be expected with an instrument of protection, the primary determinants of anti-dumping complaints are import penetration, domestic industry employment and capital stock or intensity of the sector (for more details, see Bloningen and Prusa 2003). In the US, where the procedure for the injury test is harder to predict than for the (almost certain) proof of the existence of dumping, import penetration and domestic employment are particularly crucial since they are the most important variables used by the US authorities in charge of injury determination.

That said, two additional questions related to filing a complaint are interesting. Firstly, to what extent does domestic producers' export activity affect the decision to lodge an anti-dumping complaint? The question is of particular interest in a world with an increasing number of anti-dumping users, that is, where a complainant in one country could easily become a defendant in another large economy: sometimes you're the windscreen, sometimes you're the bug, as the song goes. Economic analysis suggests that larger export exposure should dampen the incentives to lodge complaints. Indeed, Zanardi (2004) shows that, to avoid being the bug, WTO Members strategically avoid hitting with anti-dumping duties their trading partners, who are likely to hit them back, and that anti-dumping activity by a WTO Member is likely to provoke anti-dumping activity against it. (However, the expected relation is not always significant, as shown for US filings with respect to Australia, Canada, EC and New Zealand (Bloningen 2000). In addition to the above explanation based on countries' behaviour, another reason relies on firms' behaviour and the capacity of anti-dumping to be used as a anti-competitive device for segmenting world markets (see below, section (d)).

Secondly, do macroeconomic variables (exchange rate variations, real GDP decline) play an important role in lodging anti-dumping complaints? The answer to the exchange rate impact should take into account two opposite forces. When firms are slow in adjusting prices for taking into account exchange rate variations, the chances of finding dumping and/or the magnitude of dumping margin increase. But, by the same token, the chances of finding injury decrease. For instance, a euro depreciation may rapidly decrease the price of the foreign firms' exports to the European markets (the export price) in terms of the foreign firms' currency (the home market price). Hence, it makes easier the finding of dumping, but it also decreases import penetration, an essential component of the injury test. In a country where the injury test is the crucial one, it is thus the impact of a currency *appreciation* that emerges

as the dominant factor leading to increased anti-dumping activity (Knetter and Prusa 2000). The impact of real GDP decline on lodging anti-dumping cases has been clearly observed in the US, but the evidence is more mixed in the EU.

(b) Determinants of anti-dumping investigations

(i) Determining dumping

During the late 1980s and the early 1990s, there was an increasing recognition of the extent to which dumping determination has been biased. In fact, the focus on injury determination has largely flowed from the realization that dumping determination was an 'exercise in futility' (Palmeter 1991), as best illustrated by the fact that, over the 1990s, the US Department of Commerce issued only three negative less-than-fair value determinations (out of almost 400 determinations) (Bloningen and Prusa 2003).

Not only has dumping been routinely found, but dumping margins have been increasingly high (on average 60 per cent during the 1990s in the US, for instance). Only severe biaises in the procedure can explain such an outcome. A first illustration of these biases is the use of the 'facts available' method in case of no information from foreign firms. In fact, 'facts available' simply mean the facts provided by the domestic complainants. Such a method multiplies by two to three that average dumping margin in the US (Baldwin and Moore 1991; Lindsey 1999) and doubles in the EC (Messerlin 2004). Another severe bias in dumping determination has come from the use of the so-called 'zeroing' method. Under this method, investigators have routinely based their estimates of dumping margins on the average of the positive dumping margins (when prices on the export market are lower than prices on the exporters' home market) while *ignoring* (by giving a zero value, hence the term 'zeroing') the comparisons with negative margins (when prices on the export market are higher than prices on the exporters' home market). Such a biased procedure leads almost inevitably to dumping margins. (For instance, that would be the case if there was only one negative margin, all the other dumping margins being positive.) And it can also easily lead to high dumping margins.

Although the question of how to define like products is critical at the injury as well as the dumping stage, it deserves to be examined at this point, if only because it comes very early in anti-dumping procedures. The usual approach of the investigators is to rely on the tariff nomenclature, that is, to define the like products by a list of tariff lines, generally defined at the six or eight level of the Harmonized Tariff System (HS). In some jurisdictions of developing countries, all tariff lines at the four-digit HS level are sometimes considered as including 'like products'. Of course, this approach does not make any sense

from an economic point of view because it covers a much too wide universe of products, hence it underlines the role of anti-dumping as blatant protectionism.

The like product problem raises the following question: to what extent can a reduced price of a given foreign product have an impact on the quantity produced and on the price of the domestic product? (The fact that this lower price may be unfair or not is totally irrelevant at this stage.) As this question is also crucial in antitrust enforcement, it is useful to look at the antitrust practice. Antitrust authorities examine tests and experiments aiming at revealing prices and quantities interactions, that is, direct and cross-price elasticities. All the products with substantial price interactions are deemed to constitute the 'relevant market' of the product in question. For instance, a pen being sold for 20 euros by a firm is probably sensitive to changes in the prices of pens sold at 22 or 18 euros by competitors. It is probably insensitive to the price of man-made pens (sold at 3000 euros apiece) but it may be sensitive to the price of watches sold at 20 euros if the pens in question and these watches are part of the same relevant market of 'gifts' or souvenirs. This example illustrates how inaccurate the tariff nomeclature approach is since it includes the 3000 euros pens and excludes the 20 euros watches. It also shows that it is hard to say whether the bias introduced by the tariff nomenclature approach overestimates the coverage of the case, or underestimates it. However, what follows provides a likely answer to this question that flows from the high degree of political pressures in anti-dumping (that is, the ability of the complainants to get the best from tariff nomenclature for their own interest).

(ii) Determining injury and causal relation

There is a huge economic literature testing the economic factors that determine injury (Bloningen and Prusa 2003). Its main lesson is as follows. If economic factors (size of import volumes, profit losses) do matter, political pressures are critical. Such pressures take the form of sectors more influential than others (steel and chemicals in particular) and of countries more often targetted than others. This dominant aspect of political pressures reveals biases built into the anti-dumping procedures.

For instance, an apparently innocuous, but crucial, way of channelling such pressures is the mere number of defendants (firms and countries) involved in an anti-dumping investigation. The practice (known as 'cumulation') of aggregating the exports of several countries (firms) leads to a higher probability of finding injury for the *same* market share (the condition of a stable market share is essential to make the observation non-trivial). For instance, US cumulated cases examined between 1980 and 1988 are about 30 per cent more likely to result in duties than non-cumulated cases (Hansen and Prusa 1996). The

reasons for such a bias (known as 'super-additivity') are twofold. A larger number of defendants may reflect higher competitive pressures (lower prices) in the export market than in the case of a smaller number of defendants, hence increasing the probability of finding injury. Alternatively, cumulating defendants is a way to reduce their ability to defend themselves since defence costs have to be shared among a larger number of firms, increasing the risk of free-riding among defendants, hence ultimately their failure (Gupta and Panagariya 2001).

The realization of the importance of political pressures in injury determination has launched a debate on how to improve the methods of assessing injury determination, a debate which echoes the discussions on a similar topic in safeguard enforcement (see the introduction of Chapter 14, on safeguards). What follows presents key aspects of this debate.

Initially, the injury test in anti-dumping has been exclusively based on a 'trend' approach; that is, on descriptive explanations of the evolutions of the key variables in the anti-dumping case, namely the transaction prices for sales of the relevant imports and domestic products and the time series on imports, with a review of the individual transactions in case of alleged lost sales (Morkre and Kruth 1989; Prusa and Sharp 2001). Such trend analyses are necessary and useful, but they have a serious weakness: they are highly sensitive to subjective interpretations.

A first way to improve injury determination relies on modelling the market of a product (CADIC (Boltuck 1991) or COMPAS (Francois and Hall 1993)). Such user-friendly models are based on pre-specified forms of domestic supply, foreign (import) supply and domestic demand. They take the form of spreadsheets requiring analysts to fill up a few cells defining the initial situation (domestic and foreign sales, appropriate (constant) price elasticities and so on) before letting the model run. The main limits of this approach are to be confined to the market of the product in question (it is a partial equilibrium model even if there are more sophisticated versions) and to be heavily dependent on initial data (price elasticities in particular).

An alternative method consists of developing an econometric model of simultaneous relations (equations) of supply and demand. From the demand side, the price of the product under investigation may be stated as a function of several exogeneous variables: for instance, the domestically produced quantity, the price of the imported product from countries under investigation as well as for countries not included in the investigation, the quantities produced of goods derived from the product under investigation (for instance, of autos built from the investigated cold-rolled steel) and so on. From the supply side, the price of the product under investigation may be stated as a function of several exogeneous variables: for instance, the domestically produced quantity (again), the available production capacity, the prices of the

various materials important for producing the product under investigation, and so on. Well oiled econometric techniques allow estimating the coefficients of each of the chosen exogeneous variables, and checking whether the corresponding calculated (predicted) price fits well the observed evolution of the price. If this is the case, the coefficients of each of the exogeneous variables give a sense of their relative impact on the price of the product investigated. In particular, the coefficient of the exogeneous variable 'imports' gives a sense of whether imports have played, or not, a key role in the observed decline of the product price, that is, in the observed injury.

The econometric approach offers a more encompassing analysis than the model approach to the extent that it is based on a wider range of information (it is not just limited to the market if the product is under investigation, but can include a wide range of variables, adapted to each case, from markets of related products).[9] The negative sides of the econometric approach are that the model may be misspecified (for instance, a critical exogeneous variable is not taken into consideration, or not in an appropriate manner) and that it may require a lot of data. Because all the methods have strengths and weaknesses, the best approach is to see these frameworks as complementary, rather than substitutable, and to use the most appropriate one(s) for each case.

(c) The direct costs of anti-dumping measures

Firstly, the average level of anti-dumping measures (or their equivalents) is high (within the 25–35 per cent range) with an increasing trend during the last 15 years. As economic analysis shows that the welfare costs of tariffs increase faster than the tariff increases, there is little doubt that the welfare costs of anti-dumping measures are becoming substantial by this basic standard, as amply documented by many economic estimates (for instance, Murray and Rousslang 1989; Kelly and Morkre 1998; Messerlin 2001) in a partial equilibrium context. However, this conclusion is incomplete.

Secondly, anti-dumping measures are not mere duties. They also consist of quantitative restrictions (quantity undertakings) or minimum prices (price undertakings) decided by the firms in order to avoid paying the anti-dumping duty. In all these cases, anti-dumping measures do not end up in collecting revenues by the government, but in rents captured by private interests. Such anti-dumping measures are frequent because anti-dumping cases often occur in the context of oligopolistic markets. This oligopolistic environment is favoured by the provisions of the 1947 GATT text requiring that the complainants should represent a 'major' proportion of the domestic industry,

[9] It also gives a deeper analysis than the decomposition approach described in the introduction to Chapter 14.

with the 'major' term having often been interpreted as representing more than 50 per cent of the domestic output. Such a provision is a bias favouring complaints by large firms which can achieve this threshold more easily, and at lower costs in terms of coordination of information and lobbying. Moreover, the large size of the data required by complaints and the legal costs of filing complaints introduce additional biases favouring large firms.

The combination of an oligopolistic environment and rent-generating measures (undertakings) means that welfare costs could emerge from changes in the firms' behaviour generated by anti-dumping enforcement. Even if firms behave in a non-coordinated way, they are subjected to incentives to manipulate dumping margin, injury determination and ultimately the new market equilibrium. For instance, efficient and inefficient firms may reduce their exports in order to achieve a lower anti-dumping margin (than in the case where they do not limit their sales). A variant is the case where, in the perspective of a review of the case, foreign firms raise their prices in order to get lower dumping margins, hence indirectly converting tariff revenues into foreign-held rents. A last illustration is the case where the existence of active anti-dumping policies encourage (some) foreign firms to dump in order to trigger anti-dumping cases that will lead to quantity undertakings (VERs) with larger and more stable rents than the initial situation. As a result, the 'dynamic' direct costs of the initial anti-dumping measures can be much larger – ten to 20 times more (Gallaway et al. 1999) – than the initial static direct costs.

All these costs concern the country imposing the anti-dumping measure, but one crucial feature of anti-dumping is to be highly discriminatory at the country and firm level. As a result, a noticeable aspect of anti-dumping costs is the trade *diversion* generated by such measures (fewer exports from the target countries, more from the other exporters). However, available estimates of trade diversion are mixed: significant in the US (Prusa 1997), not in the EU (Vandenbussche, Konings and Springael 1999). Anti-dumping measures could also generate trade *deflection*, that is, the fact that exports to the country imposing an anti-dumping measure are deflected to other countries. For instance, there is evidence that, over the period 1992–2001, roughly one-quarter to one-third of the value of Japanese exports to the US thought to be destroyed by US anti-dumping measures was actually deflected to the EU, with substantially lower Japanese export prices in the EU market (Bown and Crowley 2006).

(d) The magnified costs of anti-dumping protection

So far, non-cooperative behaviour was assumed between foreign and domestic firms, but domestic and/or foreign firms may also behave in a cooperative way, amplifying greatly the direct costs of anti-dumping measures. Contrary to the initial motivation for anti-dumping *rules* (to prevent foreign cartels from

dumping their excess capacity into competitive markets and unfairly harming domestic producers), anti-dumping *measures* can be used as a pro-cartel mechanism for maintaining pre-existing collusion between foreign and domestic firms (Staiger and Wolack 1989; Messerlin 1989, 1990) or for generating tacit collusion between foreign and domestic firms when collusion does not exist in the first place (Prusa 1992). For a given level of protection, the welfare costs of shifting from initially more competitive markets to less competitive markets can increase tremendously, as illustrated (in an admittedly crude way) by the 40 to 50 per cent increases for a selected number of European cases (Messerlin 2001).

Anti-dumping measures may have such a 'pro-cartel' effect at the two stages of the complaint and of the decision. Firstly, exchanging information for lodging a complaint requires a minimum level of cooperation from the complainants. Even if handled through lawyers, complaining firms could draw 'parallel' conclusions from the complaint. Secondly, nascent collusion between complainants can be made 'sustainable' by anti-dumping measures. It is not by accident that at least one-fourth of EU anti-dumping cases of the 1980s were 'twin' anti-dumping and competition cases dealing with similar products and EU firms (Messerlin 1990). A more systematic indication of this pro-cartel dimension flows from the fact that the combined market shares of the plaintiffs and defendants are often extremely high: on average, around 80 to 85 per cent in the US and the EU. Defendants and complainants have a combined market share of less than 90 per cent in only 55 per cent of the US and EC anti-dumping cases examined in the 1980s and mid-1990s. Foreign cartels (that is, outside the country enforcing anti-dumping measures) have been created by anti-dumping cases, as best illustrated by the quasi-official Canadian potash cartel triggered by US anti-dumping.

Ultimately, anti-dumping may be used by a complaining firm for segmenting the world markets, as best illustrated by cycles, hammers or pocket lighters. It remains to be seen whether such 'echoing' anti-dumping cases are frequent.

B THOU SHALL NOT DISCOURAGE DUMPING (OTHER THAN THROUGH DUTIES)

Art. 18.1 of the AD Agreement reads: 'No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.' A footnote to this Article (footnote 24) pertinently adds: 'This is not intended to preclude action under other relevant provisions of GATT 1994, as appropriate.'

It is difficult to speculate what exactly is the *ratio legis* of this provision. In

a sense, this provision adds little if anything to the obligations already assumed under the various provisions of the AD Agreement. The footnote at least is clear: assuming during a safeguard investigation some imports are found to take place at dumped prices, the investigating authority can still go ahead and impose safeguards. What else could be covered was for years a matter for speculation.

This provision has been reproduced verbatim from the *Kennedy round*, to the *Tokyo round*, to the *Uruguay round* AD Agreement virtually without any discussion. The view has been voiced that what the founding fathers probably had in mind, besides what the footnote has made clear, was instruments such as the so-called *anti-circumvention* provisions encountered in some domestic anti-dumping statutes.[10] In the GATT years, for example, the European Community was condemned for using the anti-circumvention provision in its anti-dumping legislation to impose duties on finished items, parts and components of which were allegedly dumped. Such use was deemed necessary by the European Community since, otherwise, it would be left without any weapons to counteract this form of dumping.[11]

The consistency of Art. 13.10 of the then EC anti-dumping regulation (2423/88) with the GATT rules constituted the subject-matter of the litigation. Art. 13.10 read: 'Definitive anti-dumping duties may be imposed, by way of derogation from the second sentence of paragraph 4(a), on products that are introduced into the commerce of the Community after having been assembled or produced in the Community.' During the Panel proceedings that were requested by Japan, the European Community decided not to advance detailed arguments in defence of its law under Art. VI GATT. It did, however, state that, were the Panellists to take the view that its provision was consistent with Art. VI GATT, it would not disagree. We quote from para. 5.11 of the Panel Report on *EEC – Parts and Components*:

> The Panel further noted, that the United States, as an interested third party, had argued that Article VI of the General Agreement provided to a certain extent a legal

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[10] See Horn and Mavroidis (2005a). In their view, this is probably one of the reasons why this provision stayed in place since the enactment of such provisions post-dates the provision as such.

[11] The European Community could not otherwise satisfy the 'likeness' element since a part of a car and a car are not like products. It is interesting to note that the question of alleged circumvention of anti-dumping duties is still on the table. A proposal has been made to recognize in the Agreement two forms of circumvention involving marginal alterations to the product itself, or the above-mentioned minor alterations in the pattern of shipment and assembly. The proposal further suggests that uniform and transparent procedures for conducting anti-circumvention enquiries should be adopted. TN/RL/GEN/29, TN/RL/GEN/106.

> basis for measures to prevent what it considered to be circumvention of anti-dumping duties. At one point in the proceedings the EEC stated that, if the Panel were to find that the anti-circumvention duties were justifiable under Article VI, 'it would not disagree' with such an approach . . . However, the EEC presented no arguments in support of a justification of its measures under Article VI.[12]

In the absence of any specific arguments by the defendant, the Panel made no findings on this issue. The relevance of Art. 18.1 AD Agreement for such instruments remained in limbo. During the Uruguay round negotiations, negotiators adopted a decision whereby they decided that the WTO Anti-dumping Committee should deliberate further on the issue of anti-circumvention provisions and their status under WTO law. No action has been taken on this front since then.[13]

The coverage of Art. 18.1 AD Agreement took a new twist with the litigation concerning the consistency of the so-called *Byrd Amendment* with the multilateral rules. The Panel, in its report on *US – Offset Act (Byrd Amendment)* had the opportunity to clarify its understanding of Art. 18.1 AD Agreement. In its view, a measure is a specific action against dumping if it satisfies a double condition: it acts specifically in response to dumping and it has an adverse bearing on it. Following this analysis, the Panel went on to find that the *Byrd Amendment*, whereby only those US economic operators which supported a petition to impose AD duties were promised monetary compensation, in case of course, the petition led to the imposition of duties, *is a specific action against dumping* (para. 7.18):

> A measure is not a 'specific action against dumping' simply because it 'may be taken *only* when the constituent elements of "dumping" are present', or because it is taken 'in response to' dumping. A measure that may be taken only in situations presenting the constituent elements of dumping is clearly 'specific action' in response to dumping. However, in order for that measure to constitute 'specific action against dumping', something more is needed: the measure must also act 'against' – and therefore have an adverse bearing on – dumping. In other words, a measure will only constitute 'specific action against dumping' if (1) it acts specifically in response to dumping, in the sense that it may be taken only in situations presenting the constituent elements of dumping, and (2) it acts 'against' dumping, in the sense that it has an adverse bearing on dumping.[14] (Emphasis in the original)

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12 GATT Panel Report, *EEC – Parts and Components*, para. 5.11.

13 As we indicated earlier, a proposal to introduce a circumvention provision in the Agreement has been submitted in the course of the negotiations. TN/RL/GEN/29, TN/RL/GEN/106.

14 Panel Report, *US – Offset Act (Byrd Amendment)*, paras. 7.18 and 7.34.

On appeal, the Appellate Body (AB) confirmed the Panel's findings.[15] Recalling its prior pronouncements on this issue (*US – 1916 Act*), the AB held that the Byrd Amendment[16] was inconsistent with Art. 18.1 AD Agreement (paras 255–256 and 265):

> The CDSOA effects a transfer of financial resources from the producers/exporters of dumped or subsidized goods to their domestic competitors. This is demonstrated by the following elements of the CDSOA regime. *First*, the CDSOA offset payments are financed from the anti-dumping or countervailing duties paid by the foreign producers/exporters. *Second*, the CDSOA offset payments are made to an 'affected domestic producer', defined in Section 754(b) of the Tariff Act as 'a petitioner or interested party in support of the petition with respect to which an anti-dumping duty order, a finding under the Anti-dumping Act of 1921, or a countervailing duty order has been entered' and that 'remains in operation'. In response to our questioning at the oral hearing, the United States confirmed that the 'affected domestic producers' which are eligible to receive payments under the CDSOA, are necessarily competitors of the foreign producers/exporters subject to an anti-dumping or countervail order.
>
> Thirdly, under the implementing regulations issued by the United States Commissioner of Customs ('Customs') on 21 September 2001, the 'qualifying expenditures' of the affected domestic producers, for which the CDSOA offset payments are made, 'must be related to the production of the same product that is the subject of the related order or finding, with the exception of expenses incurred by associations which must relate to a specific case.' Fourth, Customs has confirmed that there is no statutory or regulatory requirement as to how a CDSOA offset payment to an affected domestic producer is to be spent, thus indicating that the recipients of CDSOA offset payments are entitled to use this money to bolster their competitive position *vis-à-vis* their competitors, including the foreign competitors subject to anti-dumping or countervailing duties.
>
> All these elements lead us to conclude that the CDSOA has an adverse bearing on the foreign producers/exporters in that the imports into the United States of the dumped or subsidized products (besides being subject to anti-dumping or countervailing duties) result in the financing of United States competitors – producers of like products – through the transfer to the latter of the duties collected on those exports. Thus foreign producers/exporters have an incentive not to engage in the practice of exporting dumped or subsidized products or to terminate such practices. Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades, the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action 'against' dumping or a subsidy, within the meaning of Article 18.1 of the *Anti-Dumping Agreement* and of Article 32.1 of the *SCM Agreement*.

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[15] Bhagwati and Mavroidis (2004) disagree with the AB findings, arguing that there are other, more promising, avenues to attack the *Byrd Amendment*.

[16] Its official acronym is *CDSOA (Continued Dumping and Subsidies Offset Act)*.

> We also stated in that appeal that 'Article VI, and, in particular, Article VI:2, read in conjunction with the *Anti-Dumping Agreement*, limit the permissible responses to dumping to definitive anti-dumping duties, provisional measures and price undertakings.' As CDSOA offset payments are not definitive anti-dumping duties, provisional measures or price undertakings, we conclude, in the light of our finding in *US – 1916 Act*, that the CDSOA is not 'in accordance with the provisions of the GATT 1994, as interpreted by' the *Anti-Dumping Agreement*. It follows that the CDSOA is inconsistent with Article 18.1 of that Agreement.[17] (Emphasis and italics in the original)

This is not an unproblematic decision. Horn and Mavroidis (2005a) point out that it is equally plausible that, as a result of Byrd Amendment payments, exporters continue to dump and possibly, more aggressively so. Consequently, the AB seems to have punished a statute that might (or might not) disincentivize exporters to continue dumping. This decision, consequently, expands considerably the coverage of Art. 18.1 AD. Where one draws the line is a question of future (jurisprudential) experience.

[17] Appellate Body Report, *US – Offset Act*, paras 255–6, and 265.

2. Section I: dumping

A WTO Member is entitled to impose anti-dumping duties in a case where it can be demonstrated through an investigation initiated and conducted in accordance with the provisions of the AD Agreement that dumped imports are causing injury to the domestic industry producing the like product. A demonstration that imports were dumped is thus a first essential and necessary condition for the imposition of any anti-dumping measure.

Both GATT Article VI.1 and the AD Agreement (Article 2.1) define dumping as the introduction of a product into the commerce of another country at less than its normal value. In what follows we will examine the various provisions of the AD Agreement dealing with the establishment of (a) normal value, (b) the subject product's export price and (c) the comparison between the two which allows a WTO Member to determine what, if any, the margin of dumping is.

A NORMAL VALUE (NV)

The normal value of the imported product under examination, generally referred to as the 'subject product' is the *comparable price for the like product sold in the ordinary course of trade, destined for consumption in the exporting country*.[1] When there are (1) no sales of the like product in the exporting country, (2) no sales in the ordinary course of trade or (3) not sufficient volume of sales to allow for a proper comparison,[2] the authorities *are*

[1] Article 2.1 AD Agreement; Article VI.1 (a) GATT 1994. We will come back to these terms 'comparable price' and 'like product' later, when discussing the need to conduct a fair comparison between normal value and export price. The term 'destined for consumption in the exporting country' seems to imply that only domestic sales are to be used as the basis for normal value and not sales made by the investigated exporter domestically but which are subsequently to be exported.

[2] Article 2.2 AD Agreement also requires the authority to disregard actual domestic selling prices if 'the particular market situation' does not permit a proper comparison. WTO case-law has not revealed what constitutes such a particular market situation. A GATT Panel in the *EEC – Cotton Yarn* case found that hyperinflation combined with a fixed exchange rate did not necessarily constitute such a situation.

required to disregard the actual selling price of the like product and have to construct the normal value.[3] Another way of putting it is that authorities are only *permitted* to disregard actual selling prices in one of the three situations described above. As we will explain, disregarding actual sales prices allows for an important discretionary power to the authorities when constructing normal value. It will more likely than not lead to a higher normal value and, therefore, a higher probability of a positive dumping finding. The AD Agreement provides for two alternatives for constructing normal value: (1) the use of a third-country price, or (2) a so-called 'constructed normal value' based on the cost of production in the country of origin, plus a reasonable amount for selling, general and administrative expenses, and for profits.

We will next discuss what the AD Agreement considers to constitute sales made outside the ordinary course of trade and which volume of sales is required at a minimum to allow for a proper comparison.

1 Ordinary Course of Trade

While the AD Agreement does not define the term 'ordinary course of trade', the AB in *US – Hot-Rolled Steel* stated that it was 'content' with the US definition of this term as referring to sales made *under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product.*[4]

What needs to be demonstrated is not so much whether a particular market situation existed per se, but rather whether or not the *sales* concerned would permit a proper comparison, thanks to the particular market situation. The Panel considered that the complainant failed to demonstrate that prices used as a basis of normal value were themselves so affected by the combination of high domestic inflation and a fixed exchange rate such that those sales did not permit a proper comparison. GATT Panel Report, *EEC – Cotton Yarn*, paras 478–9.

[3] As the AB in *US – Hot-Rolled Steel* clearly indicated, 'sales which are *not* made in the ordinary course of trade' must be excluded by the investigating authorities from the calculation of normal value. AB Report, *US – Hot-Rolled Steel*, para. 139. In other words, there is an obligation on the authority to exclude such sales, and the burden for doing so rests with the authority. AB Report, *US – Hot-Rolled Steel*, para. 153:

> In addition, under Article 2.1, it is for the *investigating authorities*, and not exporters, to ensure that the calculation of normal value is based on sales made 'in the ordinary course of trade', as they are responsible for making a determination of dumping. It therefore seems open to serious doubt whether USDOC, under the aberrationally high test, can place on exporters the burden of demonstrating that prices were aberrationally high.

[4] AB Report, *US – Hot-Rolled Steel*, para. 139.

According to the AB, 'Where a sales transaction is concluded on terms and conditions that are incompatible with "normal" commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating "normal" value.'[5]

(a) Sales below cost

The AD Agreement gives one example of such 'abnormal sales'. Article 2.2.1 provides that sales made below per unit (fixed and variable) costs of production plus selling, general and administrative ('SG&A') costs may, under certain circumstances, be considered as not having been made in the ordinary course of trade. Article 2.2.1 provides that this is so only if such sales were made within an extended period of time (normally one year but in no case less than six months), in substantial quantities (if the weighted average selling price of the transactions under consideration is below the weighted average per unit costs or if the volume of sales at a loss represents at least 20 per cent of the volume of transactions), and at prices which do not allow for the recovery of all costs within a reasonable period of time. Sales made at prices which are below per unit costs at the time of sale but above weighted average per unit costs for the period of investigation shall be considered to provide for the recovery of costs within a reasonable period of time.[6]

In the course of the on-going negotiations, it has been argued that the test as currently set forth in Article 2.2.1 and footnotes 4 and 5 of the AD Agreement have some important negative implications for those industries whose product pricing is especially sensitive to shifts in supply and demand and for agricultural and other commodity sectors whose producers are typically 'price takers'. Owing to the price volatility, the result of the current test would be higher normal values reflecting higher price levels that would not normally be sustainable in the market, thus not reflecting market realities. It has been proposed to allow for the exclusion of only those sales as being outside the ordinary course of trade, of which the weighted-average selling price is below the weighted-average total cost, regardless of the quantities of transactions that may have been made individually at prices below cost.[7]

The AD Agreement does not expressly provide whether the exclusion of such below-cost sales can be made on a model-specific basis or whether it has to be examined for the like product as a whole. The current practice is clearly to examine ordinary course of trade considerations on a model-specific basis,

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5 AB Report, *US – Hot-Rolled Steel*, para. 140.

6 See Article 2.2.1 AD Agreements and footnotes 4 and 5.

7 See TN/RL/GEN/95. This would imply the repeal of the current 20 per cent test in footnote 5, as also supported by another proposal (TN/RL/GEN/9).

such that for certain models or types of the like product the normal value will be constructed for reasons of below-cost sales of that model.[8]

A problem which is a consequence of the possibility of excluding sales below cost concerns the need to provide cost data which would allow an authority to determine whether sales were made below cost. Cost information is often very sensitive and confidential business information which producers and exporters alike are not keen to provide to a foreign investigating authority for no good reason. It is however a standard practice of many investigating authorities to require an investigated exporter to present such cost information in addition to the essential price data for domestic and export sales, even in the absence of any indication of below-cost sales. If such cost information is not provided, an authority will most probably come to the conclusion that necessary information was not provided as, without such cost data, it cannot be determined that sales were made in the ordinary course of trade. As a result, facts available will be used and secondary source cost data will be used also to determine whether sales were made below cost. In certain cases, it will even be considered that, since no cost data were provided, the sales may be assumed to have been made outside the ordinary course of trade and the normal value will be constructed on the basis of secondary source cost data. In other words, the domestic price information which had been provided will be disregarded and a normal value will be constructed. We will come back to this issue when discussing the use of 'facts available' under Article 6.8 AD Agreement. It has not been tested in WTO case-law whether an authority would actually be entitled to act in this manner in the absence of any evidence to suggest that a number of sales were made below cost, which would require the authority to request such information to determine the reliability of the price information submitted.[9] In sum, the application of the below-cost test places a heavy

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[8] A proposal has been put on the table to require the below-cost examination to be performed for all sales of the like product as a whole and not on a subgroup of such sales, as it is argued that companies do not determine or manage profitability on a transaction-specific basis but rather on a product-line basis. Hence, the recovery of the full costs is to be measured with respect to sales of the like product as a whole, and not a part of those sales. TN/RL/GEN/9.

[9] However, as we will explain later, the *Korea – Certain Paper* Panel did accept the Korean authority's decision to construct normal value because the downstream reseller did not provide certain financial statements necessary to verify whether the sales data provided were reliable. So the failure to provide information necessary to verify the core data was considered sufficient to disregard the actual information that had been provided. An analogy could be made to the failure to submit cost data which would be necessary to determine whether sales were made in the ordinary course of trade.

burden on the investigated exporters as it requires them to provide in certain cases more and very sensitive information than would actually be necessary.[10]

(b) Sales otherwise outside the ordinary course of trade

It appears that sales below cost as set forth in Article 2.2.1 AD Agreement are only one example of sales not made in the ordinary course of trade. Sales between parties with common ownership were identified by the AB in *US – Hot-Rolled Steel* as another example of such sales outside the ordinary course of trade:

> We can envisage many reasons for which transactions might not be 'in the ordinary course of trade'. For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically *independent*, transacted at market prices, the sale effectively involves a transfer of goods within a *single* economic enterprise. In that situation, there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales price may be *lower* than the 'ordinary course' price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the 'ordinary course' price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise'.[11]

The AB was quick to point out that, even where the parties to a sales transaction are entirely *independent*, a transaction might not be 'in the ordinary course of trade'.[12] The example provided by the AB is that of a liquidation sale by an enterprise to an independent buyer, which may not reflect 'normal' commercial principles. Essential, however, is that any test used to distinguish between normal and abnormal sales must be even-handed and should exclude both abnormally low and abnormally high prices: 'If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-

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[10] For that reason, a proposal has been submitted to limit the possibility of an investigating authority to request such cost data to those cases in which the application already contains some evidence that a substantial portion of the sales were made below cost. TN/RL/GEN/9.

[11] AB Report, *US – Hot-Rolled Steel*, para. 141.

[12] AB Report, *US – Hot-Rolled Steel*, para. 143.

priced sales between affiliates might not be "in the ordinary course of trade."'[13]

The AB thus considered inconsistent the test used by the US which excluded sales transactions between related parties which were marginally low-priced, while including all high-priced sales, except those proved, upon request, to be aberrationally high priced:

> In our view, there is a lack of *even-handedness* in the two tests applied by the United States, in this case, to establish whether sales made to affiliates were 'in the ordinary course of trade'. The combined application of these two rules operated systematically to raise normal value, through the automatic exclusion of marginally low-priced sales, coupled with the automatic inclusion of all high-priced sales, except those proved, upon request, to be aberrationally high priced. The application of the two tests, thereby, disadvantaged exporters. (Footnote omitted)[14]

There is an obvious parallel between this situation of excluding sales to related parties from the normal value calculation and that discussed later with regard to the establishment of the export price. Article 2.3 AD Agreement expressly provides that in a case of association or a compensatory arrangement between the importer and the exporter, the export price may be constructed as it appears that the price agreed upon between the exporter and the importer is unreliable. The fact that no similar provision exists in the normal value context, however, was not seen as an impediment on allowing or even requiring authorities to exclude such sales to related parties when made domestically as well.[15] In the context of establishing the export price an alternative is offered in case the price is found to be unreliable for reasons of a relationship between exporter and importer: the price of the product when sold for the first time to an independent buyer may form the basis for the constructed export price. In *US – Hot-Rolled Steel*, the AB agreed with the US that, in a normal value determination, similar use of such downstream sales may be made for constructing the normal value.

This is rather surprising given the fact that the AD Agreement explicitly provides for two alternatives in case there are either no sales or insufficient sales in the ordinary course of trade. The replacement of the sales outside the ordinary course of trade with downstream sales is not one of those. This had been the view expressed by the Panel in this case. According to the Panel, as long as, after the exclusion of the sales outside the ordinary course of trade,

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13 AB Report, *US – Hot-Rolled Steel*, para. 148.

14 AB Report, *US – Hot-Rolled Steel*, para. 154.

15 It remains to be seen whether an authority would be allowed simply to assume that sales to related parties are unreliable and cannot represent the normal value of the product, as is often the case in the export price calculation.

there still exists a sufficient volume of sales, the normal value determination can and must be made on the basis of the sales made in the ordinary course of trade.[16] The Panel saw no basis on which to conclude that, because Article 2.3 AD Agreement allows for the construction of an export price on the basis of a first resale to an independent buyer, a similar action must be allowed for the determination of normal value. It thus rejected this method which was not provided for in the Agreement.[17] The AB disagreed and stated that, as long as the sales used in calculating normal value were sales at a comparable price of the like product made in the ordinary course of trade, the identity of the seller was not important:

> The text of Article 2.1 is, however, silent as to *who* the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the *Anti-Dumping Agreement* are satisfied, the *identity* of the seller of the 'like product' is not a ground for precluding the use of a downstream sales transaction when calculating normal value. In short, we see no reason to read into Article 2.1 an additional condition that is not expressed.[18]

The AB did consider that, as the use of downstream sales prices to calculate normal value may affect the comparability of normal value and export price because, for instance, the downstream sales may have been made at a different level of trade from the export sales, 'the use of downstream sales prices

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16 Panel Report, *US – Hot-Rolled Steel*, para. 7.118:

> There was no allegation in this case that there were no or insufficient sales in the ordinary course of trade by the investigated companies to allow for the calculation of normal value on the basis of those sales, as required by Article 2.1. Neither party contends that there was a need to calculate normal value according to one of the alternate methods provided for in Article 2.2. Thus, in our view, in order to be consistent with Article 2.1, normal value was to be determined on the basis of the prices of sales made *by the investigated companies themselves*, in the ordinary course of trade. We can see no basis in the AD Agreement for the replacement of certain excluded home market sales by downstream sales of the goods in the calculation of normal value for the investigated respondents in this case. We therefore conclude that the 'replacement' of excluded sales to affiliates with the sales by those affiliates to downstream purchasers in this case was not consistent with Article 2.1 of the AD Agreement.

17 Panel Report, *US – Hot-Rolled Steel*, para. 7.117.

18 AB Report, *US – Hot-Rolled Steel*, para. 166.

may necessitate the provision of appropriate "allowances", under Article 2.4, which take into account any differences demonstrated to affect price comparability'.[19]

It needs to be pointed out that the text of the AD Agreement does not mention the possibility of excluding sales to related parties as outside the ordinary course of trade. It does not say when parties may be considered to be 'related', neither does it set forth any guidelines on how to test for and determine the lack of reliability of such sales. The absence of an agreed definition of what constitutes a 'related' or 'affiliated' party definition is an important problem. As the Panel noted in *US – Hot-Rolled Steel*, in the US, for example, an investigated exporter or foreign producer may own as little as 5 per cent of another company for the sale to be considered as taking place between affiliated parties.[20] Moreover, as to the test to be applied to examine whether the relationship has affected the reliability of the sales data, the Appellate Body stated that any test should be applied in an even-handed manner. So, if related parties' sales are excluded because they are 0.5 per cent lower than other sales, the authorities are required also to exclude sales made to related parties that are priced 0.5 per cent higher than other sales. But can one really say that a 0.5 per cent difference is sufficient to consider those sales as being outside the ordinary course of trade such that they may be excluded or replaced by downstream sales?

Neither is there a textual basis for the replacement of such sales with downstream sales, although such a possibility is explicitly provided for in a different context. Article 2.4 which sets forth the need to make a fair comparison explicitly refers to the problem of the use of downstream sales in calculating the export price, but it is – not surprisingly – silent on the consequences for ensuring a fair comparison in the case where such a method is used in calculating normal value. Moreover, in practice, the result of this replacement will almost inevitably be an increase in the normal value and thus an increased possibility that normal value is higher than export price, and thus that there is dumping. Assume for example that the bike producer sells to three distributors, one of which is related to him. If the price to a related seller is for example consistently 10 USD per unit lower than the price to the two others, sales made to this buyer may be excluded. If the average price without the related sales is 100 USD, the average will undoubtedly go up if you add the buyer's downstream sales prices. In general, such downstream sales can be expected to be higher priced than the original sales and will thus increase the average normal value.

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19 AB Report, *US – Hot-Rolled Steel*, para. 169.

20 Panel Report, *US – Hot-Rolled Steel*, footnote 73.

And what is the AB really saying here? According to the AB, the identity of the seller is not important. What matters is that normal value is based on sales made in the ordinary course of trade, and that such sales are compared to exports sales at the same level of trade. We recall, however, that dumping is a private practice of a company, rather than that of a country, which allows for the imposition of company specific anti-dumping duties upon a proper calculation of an individual margin of dumping for each exporter investigated.[21] The AB seems to be saying that a normal value determination should lead to the establishment of *the* normal value of the product rather than it being a reference to the normal price charged by the exporter. In anti-dumping, because of the individual margin calculation, the identity of the exporter in determining normal value is of course crucially important, as it is *its* pricing practice which is being examined. Because of the requirement to determine an individual margin of dumping for each known exporter, there is not *one* normal value of the product, but as many normal values as there are exporters. It seems therefore that the Panel's approach was more in line with the text of the AD Agreement.

The *Korea – Certain Paper* case revealed another problematic side-effect of allowing the replacement of exporters' sales to related parties by downstream sales by the related party to an independent buyer. The Korean authority considered that it would use, for normal value purposes, the resale data of a third, related, party to which the two Indonesian exporters investigated made an important percentage of their domestic sales. Since this third party, a trading company, did not provide the required financial statements necessary to verify the information provided by this company as well as the two investigated exporters, the investigating authority resorted to facts available to calculate a constructed normal value.

The problem is that, if an authority wants to calculate the normal value on the basis of the price charged by the related party to the first independent buyer, the cooperation of this related party in the country of export is required in providing the necessary information. However, this third party is not an interested party.[22] Moreover, although this third party may well be 'related' to the exporters investigated, this does not necessarily imply that the exporters have sufficient control over this third party to force it to cooperate in providing often very sensitive and confidential information. Nevertheless, the Panel in *Korea – Certain Paper* upheld the Korean authorities' decision to construct

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21 See *inter alia* Article 6.10 AD Agreement.

22 In this respect, the situation in the case of an export price based on the sale by the importer to the first independent buyer is often different as the related importer *is* an interested party in the sense of Article 6.11.

normal value based on facts available because of a failure by the related third party to provide the necessary information. According to the Panel, without this information from the related party, the authority could not possibly determine whether the sales made were 'in the ordinary course of trade'. As a consequence, the authority was entitled to assume that they were not. It was thus allowed to construct normal value on the basis of the facts available. In addition, the constructed normal value did not simply consist of the exporters' cost of production plus the exporters' SG&A expenses and profits, but also included the constructed SG&A expenses for the trading company, since the decision had been made to determine normal value on the basis of the trading company's resale price.[23] It appears that the authority never examined whether the remainder of the exporters' domestic sales which were not made through the related trading company were of sufficient volume to allow for a proper comparison.

In the Round of negotiations currently under way, the question of how to deal with affiliated parties in determining normal value and export price has been the subject of some interesting proposals. The Friends of Anti-Dumping Negotiations (the FANs) have, as a group,[24] as well as individually, in the case of Brazil[25] and Chinese Taipei,[26] submitted elaborated proposals intending to clarify and restrict the meaning of the term 'related' or 'affiliated' party based on the 'control' criterion. Practically, the FANs proposal defines affiliated parties to be similar to those that are consolidated into a consolidated financial statement, into which a responding party also would be consolidated, in accordance with the accounting standards in many countries.[27] In their view, this would avoid many of the problems relating to the provision of information we pointed to earlier. The proposals also suggest changes to the text of the AD Agreement *inter alia* introducing an objective test for determining whether the sales, even when made to related parties, are actually unreliable,

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[23] Panel Report, *Korea – Certain Paper*, para. 7.94. As this case shows, an exporter may soon find himself on a slippery slope, as the construction of the normal value becomes less and less based on the data from the exporter or even the related reseller.

[24] TN/RL/GEN/19. As an aside, we mention the fact that Korea as a 'friend of the anti-dumping negotiations' (a 'FAN') subscribed to this proposal which, given its practice as examined in the *Korea – Certain Paper* case discussed above seems rather contradictory.

[25] TN/RL/GEN/67.

[26] TN/RL/GEN/82.

[27] TN/RL/GEN/19, p. 4. As Brazil point out, the proposal is based on the International Accounting Standard 24 (IAS 24 – reformatted 1994) as regards control and IAS 28 (revised 2000) as regards significant influence. TN/RL/GEN/67, para. 2.

and eliminating the possibility of replacing unreliable sales to related parties with downstream sales.

2 No Sales or Insufficient Volume of Sales

The AD Agreement provides that in a case where there are no sales or not a sufficient volume of sales in the ordinary course of trade of the like product, an authority may resort to one of the two alternative methods identified in the Agreement for determining the normal value. This implies that, for example, where the product is not sold at all on the domestic market because it is a product which is only produced for the export market, a normal value determination can still be made. Maybe the product is too costly for the domestic market, such as may be the case for certain luxury products produced in developing countries. Or maybe consumer tastes are so different that there is no demand for the same product or for one which is like the exported product in the domestic market. A carbon-fibre time-trial bike worth 10 000 USD may be made in Chinese Taipei, but it is not very likely that many, if any, such bikes will be sold in Chinese Taipei.

It is important to note that what is relevant in determining the sufficiency of sales of the like product for determining normal value is the volume of such sales, not their value. Secondly, the volume is expressed in relative terms: determinative is the number of sales made in the domestic market compared with the number of export sales. As footnote 2 AD Agreement indicates, sales shall normally be considered as sufficient in volume if they represent at least 5 per cent of the sales of the subject product to the importing/investigating country. If there is evidence that sales at a lower ratio are still of sufficient magnitude to provide for a proper comparison, a lower number of sales should be acceptable for the purposes of the normal value determination.[28]

The AD Agreement does not specify whether the sufficient volume test relates to all domestic sales by an investigated exporter, or to only those sales by the exporter which are made in the ordinary course of trade. It has been argued that the purpose of the sufficient quantity test is to determine whether the domestic market is sufficiently large to enable domestic sales to serve as a legitimate measure of normal value, and all sales, even those outside the ordinary course of trade, should be taken into account in making this benchmark determination.[29]

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[28] Footnote 2 AD Agreement.

[29] See for example the FANs' proposal to clarify the Agreement to this effect in TN/RL/GEN/9.

In sum, the AD Agreement provides that normal value will have to be constructed if one of the following four conditions exists: (a) there are *no sales* in the exporting country of the like product, (b) there are no sales of the like product in the exporting country in the *ordinary course of trade*; or (c) sales in the exporting country's market do not 'permit a proper comparison' because of '*the particular market situation*';[30] or (d) sales in the exporting country's market do not 'permit a proper comparison' because of their *low volume*.

Assuming that we are in the presence of one of the four conditions described above, the investigating authority can set aside the price in the exporter's home market and pick one of the two alternative bases for the calculation of normal value ('NV') which emerge as per Art. 2.2 AD: (a) *third-country* sales, that is, the investigating authority will use data from sales of the *like* product in an 'appropriate' third country, provided the price is 'representative';[31] or (b) *constructed* price, that is, the investigating authority can calculate *de novo* the NV, which will be the arithmetic addition of the following elements: (i) the *cost of production* in the country of origin; (ii) a *reasonable amount* for SG&A expenses; and (iii) a *reasonable amount* for profits.

The AD Agreement does not allow full discretion to investigating authorities when constructing the normal value. In short, they must (a), with respect to cost of production, follow the disciplines laid down in Art. 2.2.1.1 AD; and (b) with respect to SG&A and profits, follow the disciplines laid down in Art. 2.2.2 AD.

3 Constructing NV

(a) Constructing the cost of production

Article 2.2.1.1 contains three types of obligations relating to an investigating

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[30] As we noted earlier, this third alternative is not discussed here since it is nowhere detailed in the AD Agreement and there is no relevant practice either. A proposal has been tabled during the Doha-round to scrap this possibility altogether. TN/RL/GEN/9.

[31] That is, assuming that, for example, the United States investigates dumping practices by a Korean company, it can use sales by the company at hand to, say, Sweden and use the price obtained in the Swedish market as NV. The letter of the law leaves substantial discretion to investigating authorities as to the choice of third country (provided of course that the price used is representative). Practice is scarce, most investigating authorities preferring to use the other option (constructed price). The United States, for example, which occasionally uses third country sales, will usually select one country and, if there are more candidates, their final choice will be based on considerations such as similarity of the products exported (to the United States and the third country at hand); the country to which the largest volume of sales is directed; and other appropriate factors (see WTO Doc. G/ADP/AHG/W/166 of 26 November 2004).

authority's cost calculations for the purpose of determining whether home market sales are in the ordinary course of trade and for calculating a constructed normal value. Firstly, Art. 2.2.1.1 AD, first sentence, obliges investigating authorities to base their calculations on actual cost data of the examined producer or exporter, provided that (i) such records are in accordance with the generally accepted accounting principles of the exporting country, and (ii) reasonably reflect the costs associated with the production and sale of the product under consideration. Secondly, the second sentence of Article 2.2.1.1 requires that investigating authorities consider all available evidence on the proper allocation of costs including that which is made available by the exporter or producer in the context of an anti-dumping investigation, provided that such allocations have been historically utilized by the exporter or producer. Thirdly, the final sentence then provides for the appropriate adjustment of costs for non-recurring items of cost which benefit future and/or current production or for circumstances in which costs during the period of investigation are affected by start-up operations.

So, in principle, the cost data to be used *as a basis* are those of the exporter or producer in question. The importing Member cannot impose its own domestic industry's cost of production on the exporter. The term *on the basis of*, which is reflected in this provision, arguably leaves some room for discretion. However, the *basis* must be the records kept by the companies under investigation provided that they are kept in accordance with the generally acceptable accounting principles (GAAP).[32] The Panel in *Egypt – Steel Rebar* emphasized that only those costs recorded in the books in accordance with GAAP which 'reasonably reflect the costs *associated with* the production and sale of the product under consideration' are to be included in the cost calculation:

> We note that both of these provisions emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that, second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration. While Egypt argues in the first instance that the IA's decision not to offset interest expense with interest income was based on a permissible interpretation of the relevant provisions, we do not believe that the issue raised by this claim can be resolved on this basis. Rather, here again, we believe that the provision itself makes clear that the calculation of costs in any given investigation must be determined based on the merits, in the light of the particular facts of that investigation. This determination in turn hinges on whether a particular cost element does or does not pertain, in that investigation, to the production and sale of the product in question *in that case*. Thus, in particular, we must consider the details of the evidence of

32 Panel Report, *Egypt – Steel Rebar*, para. 7.393.

> record in order to reach a conclusion as to whether, in the rebar investigation, there was evidence in the record that the short-term interest income was 'reasonably' related to the cost of producing and selling rebar, and that the IA thus should have included it in the cost of production calculation.[33]

The Panel, in its report on *US – Softwood Lumber V*, was of the view that, according to Art. 2.2.1.1 AD, an investigating authority incurs no obligation to base its cost-construction on GAAP, nor that the cost data used must reasonably reflect the costs associated with the production and sale of the product under consideration. This provision merely sets forth the circumstances under which certain positive obligations (that is, to use the cost data as reflected in the exporters' books) do or do not apply:

> In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if ('*provided*') certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP, nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, Article 2.2.1.1 does *not* require that all allocations made by an investigating authority have been historically utilised by the exporter or producer; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *in so far as* such allocations have been historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada's arguments relating to Article 2.2.1.1.[34]

The Panel in *US – Softwood Lumber V* thus applied a very limited reading of the obligation under Article 2.2.1.1. The Agreement contains no further information as to the standard to be employed in case the record at hand does not follow GAAP.[35] Arguably, some 'reasonableness' standard should constitute the outer limit of discretion by investigating authorities in this respect. This

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33 Panel Report, *Egypt – Steel Rebar*, para. 7.393.

34 Panel Report, *US – Softwood Lumber V*, para. 7.237.

35 The Panel on *US – Softwood Lumber V* considered that 'data which are not GAAP-compliant might be found *not* to be reliable and, hence, not be used as the basis for the cost calculation'. Panel Report, *US – Softwood Lumber V*, para. 7.254.

same standard appears to require an authority not to base its construction on costs data which do not reasonably reflect the costs associated with the production and sale of the product under consideration, even in the absence of an explicit obligation in this respect in Article 2.2.1.1. It does, however, leave a large discretionary authority to the investigators, and as the *US – Softwood Lumber V* case clearly demonstrated, it will be difficult to for a complainant to demonstrate a violation in this respect.

Art. 2.2.1.1 AD, second sentence, requires from authorities to consider all available evidence on the proper allocation of costs. Reversing the Panel's findings in this respect, the AB, in its report on *US – Softwood Lumber V*, held for the proposition that occasionally, at least, this sentence would oblige an investigating authority to compare alternative methodologies on cost-allocation and privilege the one that better suits the facts of the case. We quote from paras 138–9 of the report:

> In our view, the parameters of the obligation to 'consider all available evidence' will vary case-by-case. It may well be that, in the light of the facts of a particular case, the requirement to 'consider all available evidence' may be satisfied by the investigating authority without comparing allocation methodologies or aspects thereof. However, in other instances – such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs – the investigating authority may be required to 'reflect on' and 'weigh the merits of' evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to 'consider all available evidence'. Thus, although the second sentence of Article 2.2.1.1 does not, as a general rule, require investigating authorities to compare allocation methodologies to assess their respective advantages and disadvantages in each and every case, there may be particular instances in which the investigating authority may be required to compare them in order to satisfy the explicit requirement of the second sentence of Article 2.2.1.1 to 'consider all available evidence on the proper allocation of costs'.
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> In the light of the foregoing analysis, we disagree with what we understand to be the Panel's interpretation of the phrase 'consider all available evidence', namely, that an investigating authority is *never* required, by virtue of the requirement to 'consider all available evidence', to 'compare various allocation methodologies to assess their advantages and disadvantages'. In our view, that interpretation will not always hold true. We therefore reverse the Panel's finding that 'Article 2.2.1.1 . . . does not require that investigating authorities compare various allocation methodologies to assess their advantages and disadvantages but to "consider" all available evidence on the proper allocation of costs.'[36] (Emphasis in the original)

The question of cost allocations is a particularly important one in many anti-dumping investigations. The fact is that, in an anti-dumping investigation,

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36 Appellate Body Report, *US – Softwood Lumber V*, paras 138–9.

exporters are often asked to allocate costs at a level of detail not required outside the context of an anti-dumping investigations. This may, in addition, raise problems concerning the requirement that the cost allocations of the exporter are to have been historically utilized by the exporter.[37] The large discretionary authority given to authorities in this respect by the AD Agreement and the interpretation given to the relevant provision, Article 2.2.1.1, may lead to the investigating authorities substituting their judgment as to the valuation and allocation of certain costs for that of the investigated exporter or producer.[38]

(b) Constructing SG&A and profits

(i) Actual data of the exporter for the like product

When constructing SG&A and profits, an investigating authority, in accordance with Art. 2.2.2 AD, must base its calculations on the investigated exporter's actual data pertaining to the production and sales in the ordinary course of trade of the like product.[39] In a case that opposed Brazil to the EC on an EC anti-dumping measure on Tube and Pipe Fittings from Brazil, the question arose whether data relating to sales that had been discarded by an investigating authority under Art. 2.2 AD could still be used for the purposes of constructing SG&A and profits in the context of Art. 2.2.2 AD. Specifically, Brazil complained that the EC investigating authority used in its calculations under Art. 2.2.2 AD data relating to sales previously discarded under Art. 2.2 AD for being low volume sales. The AB, upholding the Panel finding in this respect, in its report on *EC – Tube or Pipe Fittings* made it clear that an investigating authority which has discarded the market price for one of the reasons reflected in Art. 2.2 AD, other than for the reason that such sales were made outside the ordinary course of trade, can still use market data for the calculation of SG&A when constructing the normal value. We quote from para. 101:

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[37] This is precisely the reason why one Member is proposing inter alia to scrap this requirement. TN/RL/GEN/95.

[38] It is therefore not surprising that this question has also been raised in the course of the negotiations. See TN/RL/GEN/9; TN/RL/GEN/95.

[39] This implies that, for example, profit data from sales below cost may be excluded. A proposal has been submitted to require the authorities to base the 'reasonable amount for profit' on the aggregate of *all sales of the like product*, including sales below cost. It is argued that business reality is that firms sometimes operate at a loss or no profit. Such sales, which are a reflection of the prevailing market conditions in the country of export, should not be disregarded. In sum, the proposal suggests that, where the aggregate sales value of all sales of the exporter in the exporting country is less than the aggregate costs for the corresponding sales, the profit applied in the constructed value shall be zero. TN/RL/GEN/9.

> We find it significant that Article 2.2.2 specifies the data to be used by an investigating authority when constructing normal value. The text of that provision excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales. The negotiators' express reference to sales outside the ordinary course of trade *and* to low-volume sales in Article 2.2, and the omission of a reference to low-volume sales in the chapeau of Article 2.2.2, confirms our view that low-volume sales are not excluded from the chapeau of Article 2.2.2 for the calculation of SG&A profits. (Emphasis in the original)[40]

The Panel in its report on *EC – Salmon (Norway)* similarly found that actual domestic profit data and actual SG&A data should not be excluded because of the low volume or the low level of profitability of the sales to which they pertain.[41]

As the Panel on *US – Softwood Lumber V* noted, Article 2.2.2 does not define the terms general and administrative costs, nor does it does it state which cost items should be considered to be 'general' or 'administrative' costs.[42] The Panel turned to the ordinary meaning of the terms to define 'general costs' as 'costs affecting all or nearly all products manufactured by a company', while administrative costs were defined as 'costs concerning or relating to the management of the company's affairs'.[43] As such costs can only have a bearing on all the products manufactured by a company, although in varying degrees, the Panel concluded that, 'by their *nature*, G&A costs are costs that will normally affect all products produced or sold by a company'.[44] In constructing normal value, G&A costs have to be based on actual data *pertaining to* production and sales of the like product. The Panel on *US – Softwood Lumber V* was of the view that, since G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation.[45] It thus concluded that 'unless a producer/exporter can demonstrate

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[40] AB Report, *EC – Tube or Pipe Fittings*, para. 101. Horn and Mavroidis (2005b) take issue with this finding. In their view, the AB adopted an overly formalistic reading of the relevant provision which effectively turned the test on its head. As a result, investigating authorities can, whenever it suits them, pick data that they had previously discarded and thus maximize their margin of discretion during the investigation process.

[41] Panel Report, *EC – Salmon (Norway)*, paras 7.309 and 7.318. This Panel dealt with an important member of cost-related and SG&A related claims. See Panel Report, *EC – Salmon (Norway)*, paras 7.463–7.609.

[42] The Agreement does not define the term 'selling costs' either.

[43] Panel Report, *US – Softwood Lumber V*, para. 7.263.

[44] Panel Report, *US – Softwood Lumber V*, para. 7.263.

[45] Panel Report, *US – Softwood Lumber V*, para. 7.265:

> In our view, a meaningful interpretation of the term 'pertain[ing] to' must take into

that the product under investigation did not benefit from a particular G&A cost item, an investigating authority is not precluded from attributing at least a portion of that cost to the product under investigation'.[46] The Panel for example considered that it was not unreasonable of the US investigating authority to allocate part of a large settlement amount relating to claims concerning *hardwood* to the production and sale of *softwood* lumber as this settlement cost was a cost borne by the company as a whole.

Once more, the result of the Panel's finding in *US – Softwood Lumber V*, to allow an authority to include in SG&A any kind of costs borne by the company, even if only very remotely related to the sale of the relevant like product, will increase the SG&A factor and lead to a higher normal value, and thus an increased likelihood of a positive dumping finding.

A proposal has been made in the course of the negotiations to exclude, for the construction of normal value, general and administrative expenses, as such expenses are not related to the sale of the like product and therefore do not affect the pricing decisions for the like product. This, the proponents argue, would bring the provision on constructed normal value in the AD Agreement in line with Article VI.1 (b) (ii) GATT 1994 which only includes, in the constructed value, selling expenses and profit.[47]

(ii) Alternative methods

The Agreement provides for three alternative methods in the case where SG&A and profit data *cannot* be determined on the basis of *actual data pertaining to the production and sales in the ordinary course of trade of the like product*. Paragraphs (i)–(iii) of Article 2.2.2 provide three alternative methods for calculating the SG&A and profit amount, which, in the words of the Panel in *EC – Bed Linen*,

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account the nature of those costs because, as Canada acknowledges, they 'are not directly attributable to the product under investigation or [to] any particular product'. Thus, it would appear to us that, unless a particular G&A cost can be tied to a particular product manufactured by a company, G&A costs – because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods – pertain or relate to all of those goods. Canada's argument that G&A costs 'benefit all products that a company (or division within a company) may produce rather than specific products' supports our view. If G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation.

46 Panel Report, *US – Softwood Lumber V*, para. 7.267.
47 TN/RL/GEN/9.

> are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule.[48]

If one of these methods of Article 2.2.2 is properly applied, the results are by definition 'reasonable',[49] as required by Article 2.2 which provides that, in constructing normal value, a 'reasonable' amount for SG&A and profits shall be added to the cost of production.

As a first alternative methodology, paragraph (i) provides that the amounts can be based on the actual amounts incurred and realized by the investigated exporter *for the same general category of products* (which may include the like product). How broad this same 'general category of products' may be is not defined in the Agreement. The Panel in *Thailand – H-Beams* found that the text of Article 2.2.2 does not provide 'precise guidance as to the required breadth or narrowness of the product category'.[50] It did note, however, that a narrower rather than a broader same category is permitted:

> Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.[51]

Secondly, paragraph (ii) states that SG&A and profit may be based on the weighted average[52] of actual amounts incurred and realized *by other investigated exporters or producers*, rather than by the specific investigated exporter or producer, but for the same like product.[53] The AB clarified that the requirement to use actual data relating to sales in the ordinary course of trade which

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[48] Panel Report, *EC – Bed Linen*, para. 6.60.

[49] Panel Report *EC – Bed Linen*, para. 6.96. Panel Report, *Thailand – H-Beams*, para. 7.122.

[50] Panel Report, *Thailand – H-Beams*, para. 7.111.

[51] Panel Report, *Thailand – H-Beams*, para. 7.113.

[52] In the absence of any guidance from the text of the Agreement, the weighting can be performed on a volume or value basis. See Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.81. The use of the term 'weighted average' in Article 2.2.2 (ii) led the AB to the conclusion that the use of data from *one* other exporter only is not permitted under this methodology, and this method can thus only be used 'if data relating to more than one other producer or exporter is available'. See AB Report, *EC – Bed Linen*, para. 76.

[53] The Panel on *EC – Tube or Pipe Fittings* was of the view that data relating to the like product as a whole could be used in the construction of a specific product type within the like product category. Panel Report, *EC – Tube or Pipe Fittings*, para. 7.150.

appears in the chapeau of Article 2.2.2 does not apply in the context of this alternative methodology. In other words, *all* sales of other exporters or producers of the like product are to be included for determining SG&A and profit data, whether made in the ordinary course of trade or not:

> There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the 'actual amounts incurred or realized'. It follows that, in the calculation of the 'weighted average', *all* of 'the actual amounts incurred and realized' by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the 'weighted average' under Article 2.2.2(ii).[54]

Finally, as a third alternative methodology, paragraph (iii) provides that SG&A and profits may be based on *any other reasonable method*, with the proviso that the amounts shall not exceed the amounts incurred and realized by *other investigated exporters* for the *same general category* of products. The reference to any *other* reasonable method in paragraph (iii), led the Panel in *EC – Bed Linen* to the conclusion that 'in case a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark'.[55]

The Panel on *EC – Bed Linen* considered that the order in which these alternatives are mentioned in Article 2.2.2 is 'without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations'.[56] While, textually speaking, the Panel is right, it does seem that the three options are listed in such a way that one moves further away from the starting point which was the use of actual data from the exporter or producer concerned relating to the like product with each option. It certainly seems, in the greater scheme of things, better to stay with the same investigated exporter and use his data, albeit with respect to a more general category of products, which may even include the like product. Moving to the use of data from other exporters is clearly less accurate and informative of the SG&A and profits of the exporter actually investigated, even if such data relate to the like product. The calculation of a dumping margin is a very individual determination and, by imposing SG&A data of other firms on the investigated producer, the picture can be seriously distorted. The third option, which according to the Panel in *EC – Bed Linen* is thus

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54 AB Report, *EC – Bed Linen*, para. 80.

55 Panel Report, *EC – Bed Linen*, para. 6.98. Also see Panel Report, *Thailand – H-Beams*, para. 7.124.

56 Panel Report, *EC-Bed Linen*, para. 6.66.

equally valid, simply requires the use of 'any other reasonable method' and only caps the amounts by reference to the sales data of other exporters for the same general category of products. An investigating authority would thus be allowed to calculate the SG&A and profits using any other reasonable method, and it could try various methods to see which leads to the highest margin. The discretion allowed by the Panel in respect of determining a company's SG&A and profits may open the door to abuse by the imposition of amounts for SG&A and profit which are not related to the company in question.[57]

The *Korea – Certain Paper* case forms a good, albeit unfortunate, example of the slippery slope an exporter might find himself on, once the authorities have decided to construct normal value. In this case, the authority decided to construct normal value because an important number of sales by two of the investigated Indonesian exporters were made through a related trading company. As this company did not provide the information required to permit the authority to verify whether these sales to that company were made in the ordinary course of trade, it assumed this not to be the case. The authority thus constructed the exporters' normal value, on the basis of the cost of production of the exporter, plus the exporters' SG&A and interest expenses, *plus the SG&A and interest expenses of the trading company*, and finally adding profits.[58] Since the trading company, which was not an interested party, did not provide the necessary data, the authority resorted to facts available to calculate the SG&A and interest expenses of this trading company, and this in spite of repeated claims by Indonesia that this trading company did not incur any financial expenses.[59] The authority then decided not to deduce the expenses of the related trading company from the data provided by the investigated exporters in question but rather relied on SG&A data from two other companies, A and B. The Panel agreed with Indonesia that the authority could have relied on the two investigated exporters' information in deriving the appropriate financial and SG&A expenses for the trading company. However, it did not

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[57] For this reason, a proposal has been submitted to delete sub-paragraphs (ii) and (iii) so as to require the authority to use only data relating to the exporter investigated. This would exclude the possibility of using data that are outside the actual knowledge and control of the exporter under investigation. Even for the data relating to the same general category of products, it has been proposed to clarify that this refers to the narrowest category of products for which data can be obtained, so as to avoid a definition that leads to arbitrary constructed values. TN/RL/GEN/9.

[58] Panel Report, *Korea – Certain Paper*, para. 7.99.

[59] This claim was based on financial statements of this trading company. However, as such statements had not been provided within a reasonable period of time, the Panel considered that the authority was justified in rejecting this claim and assuming the existence of such expenses. Panel Report, *Korea – Certain Paper*, para. 7.101–7.102.

consider that this was the only way for the authority to proceed in this regard, as the authority also had verified information relating to another investigated company which it used to determine the related trading company's costs. Therefore, and given the important discretion given to the investigating authority in this respect in the AD Agreement, the Panel did not find this course of action to be inconsistent with the AD Agreement.[60]

4 Determining the Normal Value in the Case of Imports from Non-market Economies

In the case of imports from a country which is not a market economy, where domestic prices are fixed by the state, a strict comparison with such a country's domestic prices may not always be appropriate, Ad Article VI of GATT 1994 provides. In other words, the domestic prices of products coming from non-market economies do not reflect the normal value of the product and, because of the important government role in determining the prices for inputs, the cost data of such companies cannot be used either. So what do investigating authorities do? They normally use data from third country producers as the basis for the normal value determination. So data relating to Indian producers are often used as a proxy for determining normal value for Chinese products, for example. The AD Agreement contains no provisions dealing with this problem. So, it seems that in general, countries are more or less free to do whatever they want with respect to imports from non-market economy countries.

Not surprisingly, the non-market economy status of China was an important issue in the Chinese accession process. Especially in light of the fact that China is the most targeted country in anti-dumping investigations, it is necessary to have a brief look at China's Accession Protocol[61] (the 'Protocol') to see which commitments were made in this respect.

The Protocol starts from the principle that Members have a choice either to use Chinese prices or costs for the industry (that is, to treat China as any other market economy country) or to use a methodology based on the general rule that it is up to the producers under investigation to 'clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product'. In such a case

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[60] Panel Report, *Korea – Certain Paper*, para. 7.105. The Panel did consider that the authority should have explained better the reason why it decided to use the interest expenses of producing company B, as a proxy rather than those of company A, which, as a trading company, seemed more appropriate as a proxy. Panel Report, *Korea – Certain Paper*, para. 7.111.

[61] WT/L/432, para. 15.

the importing Member is obliged to use Chinese prices. In the opposite case, a methodology that is not based on a strict comparison with domestic prices or costs in China may be used. This methodology has to be notified to the Anti-Dumping Committee. In other words, the producers of a particular product are to be given the opportunity to demonstrate that, at the specific industry level, the industry is operating under normal market conditions.

At the same time, the Protocol provides that, as soon as China is able to establish that it is, as a country as a whole, or with regard to a particular industry, a market economy according to the criteria set forth in the importing Member's national law for market economies, no such choice as described above exists any more, and China or the Chinese industry in question is to be treated as a normal market economy/industry. In order to 'benefit' from this unilateral setting of market economy criteria, such criteria had to exist at the time of China's accession in 2001. It is not entirely clear what happens to these countries which did not have such criteria in place at the time of China's accession. Are they precluded from treating China as a non-market economy? That is certainly one possible interpretation. In any case, the non-market economy status of China will end at the latest 15 years after accession, by 2016.

The Protocol does not set forth which methodology is to be used in case the importing Member does not use Chinese prices and costs. The final report of the Working Party on China's Accession[62] provides further clarification, however: the authority shall normally utilize, to the extent possible, and where cooperation was received, the prices or costs in one or more market economy countries that are significant producers of comparable merchandise and that are either at the level of economic development comparable to that of China or are otherwise an appropriate source for the prices or costs to be utilized in light of the nature of the industry under investigation. Those Members that do not have an established practice in this respect should make best efforts to ensure that their methodology for determining price comparability is along similar lines. In addition, it is provided that due process rights of Chinese exporters be respected also with regard to the methodology used for assessing price comparability.[63]

B EXPORT PRICE

The export price is usually an observed market price. However, as is the case with NV, the export price as well can be constructed, if the conditions enshrined in Art. 2.3 AD have been met:

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62 WT/ACC/CHN/49, para. 151.
63 WT/ACC/CHN/49, para. 151.

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

Consequently, if transactions between the exporter and the importer are not at arm's length, they can be discarded, if there are doubts as to the reliability of the price. The constructed price may then be based on the value of the first arm's-length transaction in the importer's market, or any other reasonable basis.

So, in a normal scenario, the export price of a US bike sold to an importer in Switzerland for 1000 USD is 1000 USD, since the relevant export price of the subject product is based on the price of the product upon importation. However, an authority is not always obliged to accept this price as the correct export value of the product. The Agreement provides that in the case where there is no export price or where it appears to the authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, a different export value may be used. In particular, the Agreement allows for the use of the price of the product when sold for the first time to an independent buyer. In the case where the product is not resold or not resold in the condition as imported, the export price may be determined on another reasonable basis.[64]

It is not unusual for importers to be 'related' to the exporters.[65] A question so far not addressed in WTO case-law is whether, in such a situation, it suffices for an authority simply to point to such a relationship between exporter and importer, or whether an authority is required to demonstrate, in addition, an appearance of unreliability of the price. The latter seems to be more in line with the text of the Agreement and would imply that one cannot disregard the export price simply because of a relationship between the exporter and the importer. In other words, it seems that one should test the reliability of such prices by comparing the prices charged with those charged in transactions with non-related parties.[66] It is common practice to consider that,

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[64] Article 2.3 AD Agreement.

[65] The Agreement actually uses the terms 'association' or 'compensatory arrangement' between importer and exporter.

[66] For sure, the AB was of the view that, in the context of testing whether sales between affiliates were made in the ordinary course of trade, one cannot simply assume that prices of such sales are unreliable, but that this *might* be so. The AB in *US –Hot-Rolled Steel* stated that, '*as between affiliates*, a sales transaction *might* not be "in the

in case of a significant difference in the average price charged to related importers compared with the price charged to other importers, the former price is not reliable and the export price will be constructed for these sales to related importers.

Article 2.4 requires that, in the cases of an export price based on one of these alternatives, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.[67] So, if the bike imported by a related importer is resold to an independent customer at arm's length for 1500 USD, this price will be the *basis for* the comparison. However, it is clear that any costs associated with distribution or further transport and insurance for example still need to be filtered out of this price. In fact, the net export price in our example may be only 1200 USD, for example.

The Panel in *US – Stainless Steel* considered that, as the fourth sentence of Article 2.4 authorizes an authority to make certain specific allowances, allowances *not* within the scope of that authorization may *not* be made.[68] The Panel in *US – Stainless Steel* considered that, as the constructed export price should be a reliable export price, costs incurred between importation and resale can only be deducted if they were foreseen. Only such foreseen costs can be considered to be reflected in the price:

> In this regard, we observe that, while we agree with the United States that as a general principle a related importer may be expected to establish price based on costs plus profit, a price certainly cannot be expected to reflect an amount for costs that were entirely unforeseen at the time the price was set. To deduct costs which

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ordinary course of trade" either because the sales price is higher than the "ordinary course" price, or because it is lower than that price.' AB Report, *US – Hot-Rolled Steel*, para. 143. For a discussion of when parties may be considered as 'related' or 'affiliated', we refer back to our discussion earlier.

[67] As the Panel in *US – Stainless Steel* correctly noted, Article 2.3 specifies that the export price may be constructed *on the basis of* the price at which the imported products are first resold to an independent buyer:

> It is clear from this language that, while the price charged to the first independent buyer is a starting-point for the construction of an export price, it is not *itself* the constructed export price. Nor does Article 2.3 itself contain any guidance regarding the methodology to be employed in order to construct the export price. Rather, the only rules governing the methodology for construction of an export price are set forth in Article 2.4 of the *AD Agreement*, which provides that, '[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made'.

Panel Report, *US – Stainless Steel*, para. 6.91.

[68] Panel Report, *US – Stainless Steel*, para. 6.94.

> not only were incurred after the date of resale but which were entirely unforeseen at that time would not result in a 'reliable' export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis.[69]

Interestingly, the Panel highlighted that there does not exist an obligation to make such adjustments, 'because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin'.[70] In other words, not making allowances would not constitute a disadvantage to the exporter, as it implies a higher export price and thus a lower dumping margin. In sum, when constructing export price on the basis of the first sale to an independent buyer, a *reliable* export price will be calculated in lieu of the actual export price.[71] It is recalled that the export price so determined will not be the price ultimately used in the comparison with the normal value, but will only serve as the basis for the comparison with normal value to be undertaken in accordance with Article 2.4.

C ESTABLISHING THE DUMPING MARGIN

1 The Duty to Perform a Fair Comparison

An investigating authority, irrespective of how it has established the NV and the export price (constructed, or market), and assuming it has respected the prescription of the AD Agreement while establishing them, is under the duty to perform a fair comparison.[72] To this effect, it must ensure price comparability, that is

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69 Panel Report, *US – Stainless Steel*, para. 6.100.

70 Panel Report, *US – Stainless Steel*, para. 6.93.

71 The Panel on *US – Stainless Steel* summed it up as follows:

> Rather, an export price is constructed, and the appropriate allowances made, because it appears to the investigating authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or third party. By working backwards from the price at which the imported products are first resold to an independent buyer, it is possible to remove the unreliability. Thus, we agree with the United States that the purpose of these allowances is to construct a reliable export price to use in lieu of the actual export price or, as expressed by the EC as third party, to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis. (Footnotes omitted)

Panel Report, *US – Stainless Steel*, para. 6.99.

72 Article 2.4 AD Agreement.

(i) the two prices must be at the same level of trade (otherwise they are not comparable), and (ii) due allowance for any differences which affect the price comparability must be made in accordance with the AD Agreement. This means that an investigating authority can make adjustments for factors within the control of the exporter, but also adjustments for exogenous factors.

At the end of the exercise, an investigating authority must show that it compares two prices at the same level of trade (ex factory, wholesale, retail) and that it took due account of any factors that affect price comparability in a fair manner. Viewed as such, the obligation to perform a fair comparison is an obligation of result, and not of specific conduct. The duty to make a fair comparison and the need for adjustments in particular, will form an important part of the investigation. It is *inter alia* through this mechanism of adjustments that domestic producers will try to get the normal value as high as possible and the export price as low as possible, while the exporters and importers will try to argue the opposite.

(a) The obligation to compare prices at the same level of trade

Art. 2.4 AD, which enshrines this obligation, pertinently reads: 'This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.' Although the Agreement thus does not prohibit the use of FOB or CIF prices, it appears that the normal and easiest way to perform a fair comparison at the same level of trade is by comparing prices at the ex-factory level. This implies that an authority will have to work its way back to the ex-factory level to establish the ex-factory normal value and export price. For example, of the 1500 USD a Swiss importer paid for a US bike, the authority will need to deduct the import tariff, the costs of transportation across the ocean, insurance costs, etc. The ex-factory export price which is so calculated may be, for example, only 1300 USD. But on the normal value as well there may be costs of transportation from the factory to the consumer which are reflected in the 'normal value' based on the domestic price. Such domestic transportation and insurance costs will have to be deducted from the normal value side, so as to compare in a fair manner the ex-factory normal value with the ex-factory export price. Ultimately what is important is that prices are compared at the same level of trade. As the Panel in *Argentina – Poultry Anti-Dumping Duties* pointed out, 'it seems to us that under normal circumstances there is an obvious inconsistency with Article 2.4 if an investigating authority compares f.o.b. export prices with "delivered" domestic prices, because such a comparison would not be made at the same level of trade'.[73]

[73] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.235.

(b) Due allowances: an indicative list

Art. 2.4 AD reads:

> Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.[74]

The purpose of this requirement to make due allowance for differences that affect price comparability is 'to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing'.[75] The Panel in *US – Stainless Steel* was therefore of the view that only differences that the exporter could reasonably have anticipated and could have taken into account in his price determination may be the subject of adjustments:

> A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of prices within the meaning of Article 2.4.[76]

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[74] Paragraph 3 to which Art. 2.4 AD refers to explicitly reads:

> In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

[75] Panel Report, *US – Stainless Steel*, para. 6.77

[76] Panel Report, *US – Stainless Steel*, para. 6.77. On that basis the Panel considered that the US was not allowed to treat the non-payment by a customer that went bankrupt as a direct selling expense and a condition or term of sale for which an adjustment may be made. Such unanticipated failure of a customer to pay for certain sales is rather a breach of the conditions and terms of sale. Panel Report, *US – Stainless Steel*, paras 6.75–6.76.

The AD Agreement does not contain an exhaustive list of the kinds of adjustments or allowances that must be made to ensure a fair price comparison. Art. 2.4 AD reflects a mere indicative list, and requires that due allowance shall be made for any not explicitly listed differences which are also demonstrated to affect price comparability.[77] By way of example, we refer to the report of the Panel on *EC – Tube or Pipe Fittings*, in which the Panel accepted that due allowance could be made for packing expenses, an item not explicitly mentioned in Art. 2.4 AD.[78]

In sum, if there is (i) a difference between the exported product and the imported product and (ii) this difference affects the comparability of the price, an adjustment needs to be made. The Panel in *US – Softwood Lumber V* summarized the obligation under Article 2.4 in the following manner:

> An examination of a request for an Article 2.4 adjustment should therefore start with a determination of whether a *difference* between the export price and the normal value exists. That is, a difference between the price at which the like product is sold in the domestic market of the exporting country and that at which the allegedly dumped product is sold in the importing country. Ultimately, this provision requires that differences exist between two markets. If there is no difference affecting the products sold in the markets concerned, for instance, where the packaging of the allegedly dumped product and that of the like product sold in the domestic market of the exporting country is identical, in our view, an adjustment would not be required to be made by that provision.
>
> The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are all black. The difference is obvious; in fact, it is one of those differences listed in Article 2.4 itself – a difference in physical characteristics. However, there might be no variable cost difference among the two cars because the cost of the paint – whether red or black – might be the same. If instead of differences in cost, we were looking at market value differences, we might reach the same conclusion if, either the seller or the purchaser, would be willing to sell or purchase at the same price, regardless whether the car is red or black.[79]

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[77] See AB Report, *US – Hot-Rolled Steel*, para. 177. Also see Panel Report, *Egypt – Steel Rebar*, para. 7.352.

[78] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.184.

[79] In our view, whether a particular factor affects price comparability might be considered from the point of view of the purchaser. The question is whether a purchaser

> It is also important to note that there are no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an *allowance*. In addition, we consider that the obligation on an investigating authority is to examine the merits of each claimed adjustment and to determine whether the difference affects price comparability between the allegedly dumped product and the like product sold on the domestic market of the exporting country.[80]

In other words, Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where (based on the merits of the case) that difference is demonstrated to affect price comparability.[81] For example, the fact that a trading company handles domestic or exports sales of the subject product, does not in and of itself mean that there is a difference that affects price comparability and that an adjustment has to be made, the Panel in *Korea – Certain Paper* found. The Panel rejected the need for an adjustment as it was not convinced that there were sales-related services rendered by the trading company with respect to domestic sales of the exporters' products in the domestic market which were not rendered in the exporters' export sales to the importing country.[82]

(c) Due allowances: a reasonableness standard

The case of *EC – Tube or Pipe Fittings* revealed the limited review authority of a WTO Panel when dealing with adjustments. Since Article 2.4 does not set forth a particular methodology for the calculation of such adjustments, the authority must be presumed to act in a WTO consistent manner if it acts in an unbiased and even-handed manner, and where it does not use its discretion in an arbitrary manner.

The Panel report on *EC – Tube or Pipe Fittings* dealt, *inter alia*, with a claim by Brazil that the European Community had denied due allowances for differences in indirect taxation. The Panel rejected Brazil's argument. In its view, the AD Agreement did not specify a particular manner in which differences in indirect taxation should be accounted for. As a result, any methodology used, to the extent reasonable, should be considered WTO-consistent (para. 7.178):

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would be willing to make a price differentiation between two products. For example, would a purchaser be prepared to pay more for a car painted black than for the very same car when painted red, although the costs for both cars are identical? In other words, if the behaviour of the purchaser would change, depending on the colour of the car, it could be considered that that difference in physical characteristics, that is, the difference in colour, affects price comparability.

80 Panel Report, *US – Softwood Lumber V*, para. 7.356–7.358.

81 Panel Report, *US – Softwood Lumber V*, para. 7.165.

82 Panel Report, *Korea – Certain Paper*, para. 7.147.

> An investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner. This obligation also applies where an investigating authority confronts practical difficulties and time constraints. We do not find, in Article 2.4, or in any other relevant provision in the Agreement, any specific rules governing the methodology to be applied by an investigating authority in calculating adjustments. In the absence of any precise textual guidance in the Agreement concerning how adjustments are to be calculated, and in the absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison, we consider that an unbiased and objective authority could have applied this methodology applied by the European Communities and calculated this adjustment on the basis of the actual data in the record of this investigation. Moreover, Tupy had an opportunity to substantiate its claimed adjustment.[83]

(d) Due allowances: the burden of proof issue

Article 2.4 places the obligation to ensure a fair comparison on the investigating authority.[84] This implies that for those differences which have been identified by the interested parties as requiring an adjustment, the authority is to evaluate those differences to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the AD Agreement, and to adjust where necessary.[85] In the *EC – Tube or Pipe Fittings* case, the parties differed in their view of the nature of the evidence that should be submitted in support of a claim for such an adjustment and whether it is the investigating authority or the exporter that bears the burden of identifying and substantiating the claimed adjustment. According to the Panel, it is for the investigating authority to make due allowances and abide by the disciplines of Art. 2.4 AD. However, the authority retains discretion as to items to be included as well as the manner in which they will be evaluated. To this effect, it could very well be the case that an investigating authority does not accept each and every claim presented under Art. 2.4 AD. It might request clarity from the party making the argument and, if this is the case, the party concerned is under duty to cooperate:

> Thus, while it is incumbent upon the investigating authorities to ensure a fair comparison, so also is it incumbent upon interested parties to substantiate their assertions concerning adjustments as constructively as possible. The duty of an

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83 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178.

84 As the Appellate Body in *US – Hot-Rolled Steel* emphasized, 'under Article 2.4, the obligation to ensure a "fair comparison" lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports'. AB Report, *US – Hot-Rolled Steel*, para. 178.

85 Panel Report, *Argentina – ceramic Tiles*, para. 6.113. Also see Panel Report, *EC – Tube or Pipe Fittings*, para. 7.157 and 7.183.

> investigating authority to ensure a fair comparison cannot, in our view, signify that an investigating authority must accept *any* claimed adjustment. Rather, the investigating authority must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited. On this basis, we examine Brazil's claim under Article 2.4.[86]

The Panel clearly took the view that, if an authority indicates to the parties concerned what information is necessary to ensure a fair comparison and does not impose an unreasonable burden of proof on the interested party, it is not violating the Agreement if it refuses to make an adjustment for certain differences for which no such sufficient evidence has been presented by the party concerned.[87] For example, with respect to a request to make adjustments for differences in packing costs of the product when sold domestically compared to when exported, the Panel considered that no documentary evidence had been supplied by the Brazilian producer in spite of a clear request by the investigating authority to provide such evidence. In such circumstances, the Panel was of the view that there was no obligation on the investigating authority to establish the need for an adjustment through on-site verification, as argued by Brazil.[88]

The Panel on *Egypt – Steel Rebar* considered that the process of determining what kind or types of adjustments need to be made is something of a dialogue between interested parties and the investigating authorities. This Panel also seemed to accept that an investigating authority may be required to make adjustments even when not explicitly requested or identified by the interested parties, in case it is demonstrated 'by the data itself' that a given difference affects price comparability:

> In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case-by-case basis, grounded in factual evidence.[89]

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[86] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158. Also see Panel Report, *US – Softwood Lumber V*, para. 7.167. For a specific application of this rule, see Panel Report, *US – Softwood Lumber V*, paras 7.170–7.184.

[87] See, for example, Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.239.

[88] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.192.

[89] Panel Report, *Egypt – Rebar*, para. 7.352.

This seems a correct approach in light of the overall obligation on investigating authorities to conduct their investigation in a fair and unbiased manner. It would not be consistent with this overall obligation to allow an authority to defer its obligation of making a fair comparison to the interested parties. It thus appears that, even in the absence of a request for adjustments by an interested party, the investigating authority has an independent obligation to make all reasonable adjustments as are necessary to ensure a fair comparison between normal value and export price.

(e) The end result

At the end of the day, prices (NV, export price) have been brought to the same level of trade and due allowances have been made so that their comparability is not affected any more. The investigating authority will have in front of it two prices, or two sets of prices, an adjusted export price and an adjusted normal value. The next step will be to see whether a dumping margin exists. The only issue left is the choice of the method of comparison. We turn to this issue in what immediately follows.

2 Three Alternative Methods for Comparing NV and Export Price

Irrespective of the methodology used, an investigating authority has to come up with a number: if the number is a dumping margin above the statutory *de minimis* level, then one of the three conditions for a lawful imposition of AD duties (dumping) will have been met. The AD Agreement includes three methods that could, theoretically, be used by investigating authorities when establishing a dumping margin. Art. 2.4.2 AD reads:

> . . . the existence of margins of dumping . . . shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis.

Hence the two *normal* methods at the disposal of investigating authorities are (a) weighted average to weighted average (normal value/export price), (b) transaction-to-transaction. Note that the AD Agreement states that, when using the weighted average methodology, the weighted average normal value should be compared to a weighted average of prices of all *comparable* export transactions, and not of all sales. This implies that the use of multiple averages based on, for example different periods of sale, is allowed by the Agreement if this is necessary to avoid a weighted average normal value being compared to a weighted average export price that includes non-comparable export transactions.[90] In

[90] Panel Report, *US – Stainless Steel*, paras 6.111–6.114.

other words, there is no requirement to always compare a single weighted average normal value to a single weighted average export price. The Panel on *US – Stainless Steel*, however, rejected the idea that the mere fact that there existed significant differences in normal value, or export price over the course of an investigation, by itself, is a sufficient basis to conclude that export and home transactions at different points in the POI are not comparable such that the use of multiple averages is permissible under Article 2.4.2. According to the Panel, differences in timing may be considered to give rise to a comparability problem, only in case two elements exist: (i) a change in prices and (ii) differences in the relative weights by volume within the POI of sales in the home market as compared to the export market.[91]

On the other hand, the transaction-to-transaction methodology does not involve an evaluation of all sales either: there could be a discrepancy in the number of sales in the home and the export market. As a result, in such cases, in practice, investigating authorities will look for the domestic sale as close in time as possible to each of the export transactions. In other words, it will compare the two transactions (normal value, export price) which are as close time-wise to each other as possible, and will neglect the remaining transactions.

It is clear that the choice of methodology for calculating the margin may have an important impact on whether dumping is found to exist or not. Assume four domestic transactions taking place on 1 January for 8 USD, 1 March for 10 USD, 1 June for 12 USD and 1 November for 10 USD. The volume is similar each time. The weighted average normal value is 10 USD. Assume three export transactions on 2 January, 2 June and 2 July. All are made for 10 USD, at same weight. So on a weighted average to weighted average basis, there is no dumping. Using a transaction-to-transaction methodology, export transaction 1 for 10 USD will be compared with the domestic transaction of 1 January for 8 USD. A negative margin of –2. Export transaction 2 will be compared with the 1 June domestic transaction for 12 USD, a dumping margin of two. And export transaction 3 will also be compared to domestic transaction of 1 June since this is the closest in time, again finding a margin of dumping of two. On average using this methodology, a positive margin of dumping of 2 USD will have been established. The reverse could of course also happen.

The AB, in its report on *EC – Tube or Pipe Fittings*, made it clear that two methods (weighted average to weighted average and transaction to transaction) are offered alternatively, and WTO Members are free to choose either of them. The issue arose when Brazil argued that, to account for the influences that devaluation might have when calculating the dumping margin, a particular method

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91 Panel Report, *US – Stainless Steel*, para. 6.123.

had to be privileged. The AB rejected all arguments to this effect, arguing that nothing in the AD Agreement gives the nod to choose one over the other methodology when a particular set of facts is present.[92]

A third, exceptional, methodology is provided for. Article 2.4.2 AD allows, in specific circumstances, a comparison between a weighted average normal value and prices of specific export transactions. We quote:

> A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which will differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

This is a third methodology, to be used *exceptionally* when the conditions enshrined in this provision have been met. This provision aims to counteract *targeted dumping*: if, for example, during the POI, an exporter dumps substantial volumes of exports during, say, one month only, then, probably, under this provision, an investigating authority, for the calculation of dumping margins, can legitimately take into account the export prices as reflected in the transactions during this month. The AB, in its report on *EC – Bed Linen*, recognized as much: 'This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of "targeted" dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods.'[93]

The question has arisen whether an investigating authority can still 'fiddle around' with the methodologies embedded in Art. 2.4.2 AD or, conversely, whether they should have a commonly understood, harmonized component. The Panel, in its report on *Argentina – Poultry Antidumping Duties* faced one such question: two Brazilian companies had reported to the Argentine authorities all relevant documents concerning their domestic sales. The Argentine authorities compared the weighted average of a *sample* of these transactions with the weighted average of *all* export prices. The Panel held that this was

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92 Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 76:

> We fail to see how Article VI:2, by stating that the purpose of anti-dumping duties is 'to offset or prevent dumping', imposes upon investigating authorities an obligation to select any particular methodology for comparing normal value and export prices under Article 2.4.2 of the *Anti-Dumping Agreement* when calculating a dumping margin.

93 AB Report, *EC – Bed Linen*, para. 62.

inconsistent with Art. 2.4.2 AD since 'a weighted average normal value' is a weighted average of *all* domestic sales other than those which may be disregarded pursuant to Article 2.2.1 of the AD Agreement.[94] In sum, according to the Panel, the weighted average must be established by using *all* transactions as a benchmark.

D ZEROING AND ITS DISCONTENTS

Although it is now clearly settled that zeroing is not permitted under the AD Agreement, the road to this conclusion has been particularly thorny.[95] In total, six cases[96] and twelve reports so far,[97] have dealt with the issue of zeroing. The zeroing case-law is made up of diverging Panel reports, two dissenting opinions,[98] a Panel overturning itself,[99] the Appellate Body changing its reasoning to deal with the issue on several occasions, and includes even two reports of Panels openly disagreeing with the Appellate Body and refusing to follow its reasoning.[100] The zeroing saga is still

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[94] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.272. The Panel was of the view that 'the strict rules in Article 2 regarding the determination of normal value require that, in the usual case, normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade. There would be no need to stipulate the circumstances in which domestic transactions may be excluded from normal value if there were no general obligation to otherwise include all domestic transactions in normal value'. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.274.

[95] And the debate is far from over it seems, as the US has tabled a proposal to amend the AD Agreement to explicitly allow for the use of zeroing. TN/RL/GEN/147.

[96] *EC – Bed Linen* (Panel and AB Report), *EC – Tube or Pipe Fittings* (Panel Report), *US – Softwood Lumber V* (Panel and AB Report, as well as Article 21.5 Panel and AB Report), *US – Zeroing (EC)* (Panel and AB Report), *US – Zeroing (Japan)* (Panel and AB Report) and *US – Anti-Dumping Measure on Shrimp from Ecuador* (Panel Report).

[97] In the case *US – Corrosion Resistant Steel Sunset Review*, zeroing was one of the aspects of Japan's claims against the USDOC sunset review determinations, but neither the Panel nor the Appellate Body ruled on this aspect of Japan's claim. It is therefore not counted as a 'zeroing case'.

[98] See Panel Report, *US – Softwood Lumber V* and Panel Report, *US – Zeroing (EC)*.

[99] As will be discussed later, the Panel Report on *US – Softwood Lumber V, Article 21.5* reaches a conclusion which is the opposite of that reached by the Panel in the original *US – Softwood Lumber V* case.

[100] Adding spice to the curry was the fact that the chairman of this first Panel to openly refuse to follow the AB was nominated as Appellate Body Member just prior to the release of the Panel's report which defied the position taken by his fellow Appellate

continuing[101] in spite of what is now a clear and comprehensive set of rulings outlawing zeroing.

After a brief technical explanation of what is meant by the term 'zeroing', we will examine the developments in WTO case-law concerning the practice of zeroing and provide some preliminary thoughts concerning the solutions developed by Panels and the Appellate Body to deal with this question.

1 Zeroing – the Practice

Although the practice of zeroing appears in various forms and guises, and no uniform definition of the term exists, in essence zeroing means disallowing negative dumping margins to offset positive dumping margins when calculating an overall margin of dumping for the product alleged to have been dumped into the importing country's market. In other words, in case the export price exceeds the normal value for the product (negative dumping margin) the transaction will either be completely disregarded or will be considered to have taken place at a non-dumped price and a fictitious margin of dumping of zero will be attributed to this transaction. If sufficient export transactions have taken place at a price which is below normal value (positive dumping margin), an overall margin of dumping may be found and the product in question may be burdened with an anti-dumping duty.

The first two cases dealing with the problem of zeroing in the WTO era concerned the EC's practice of zeroing. After the EC changed its practice as a result of a negative finding by two Panels and the Appellate Body, it was the US's zeroing practice which came under attack from Canada and, rather surprisingly, the EC itself.

The EC practice condemned in the case *EC – Bed Linen* consisted of establishing, first, various margins of dumping for different models or types of the product under investigation which at a later stage were then aggregated to calculate an overall margin of dumping for the product as such. In other words, the European Communities first defined the product under investigation as bed linen. It then sub-divided the product under investigation into different subcategories and examined each one of them individually. It then zeroed out all cases of negative margin and kept the cases of positive dumping margin only for the final calculation. It divided the margin found (by the volume of total imports) and applied a duty on all imports of bed linen. In sum, the EC treated any negative margins of dumping (export price exceeds normal value) as zero,

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Body Members, now sitting on the bench with him. The two Panels referred to are *EC – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)*.

[101] There are cases brought by India and Thailand on this issue, and the EC has recently initiated a new case against the US on the matter of zeroing (DS350).

and added up the positive dumping margins and the zeroes to divide this sum by the cumulative total value of all export transactions involving all types and models of the product in order to establish an overall margin of dumping for the product under investigation. In *EC – Bed Linen*, the Appellate Body agreed with the Panel that this EC practice of zeroing was inconsistent with the requirement of the WTO AD Agreement that a margin of dumping be established by comparing a weighted average normal value to a weighted average of *all* comparable export transactions.

At issue in the *US – Softwood Lumber V* case was the US practice of zeroing which is very similar but not identical to the EC practice in this regard.[102] In this case, the USDOC had divided the product under investigation (that is, softwood lumber from Canada) into sub-groups of identical, or broadly similar, product types. For each sub-group, USDOC had calculated a weighted average normal value and a weighted average export price per unit of the product type. It then zeroed the results for the sub-groups in which the weighted average normal value was equal to or less than the weighted average export price. In other words, it considered that there was no 'dumping margin' for those sub-groups. Finally, the result of this aggregation was divided by the value of all export transactions of the product under investigation (including the value of export transactions in the sub-groups that were not included in the aggregation), to calculate the 'overall margin of dumping' for the product under investigation, softwood lumber from Canada. The Appellate Body confirmed the Panel's view that, while multiple averaging (using models) was consistent with the AD Agreement,[103] the United States had been violating its obligations under the AD Agreement (and more specifically, Art. 2.4.2 AD), by practising zeroing as it did.[104]

2 Overview of the Case-Law

The search for the correct legal basis on which to analyse the practice of zeroing is what characterizes the zeroing case-law. It is clear that the Anti-Dumping Agreement does not contain an express prohibition or permission of zeroing. Actually the term is not mentioned in the Anti-Dumping Agreement. This does not necessarily mean that zeroing is permitted under the Agreement, as became clear from the case-law. Still, the problem Panels and the Appellate Body obviously struggled with was finding the right textual hook to hang the analysis on. As we will explain in our commentary

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102 The factual aspects and description of the USDOC zeroing practice at issue in this case can be found in Appellate Body Report, *US – Softwood Lumber V*, para. 64.

103 Appellate Body Report, *US – Softwood Lumber V*, para. 81.

104 Appellate Body Report, *US – Softwood Lumber V*, para. 117.

that follows, in their search for a textual hook, and out of a mistaken adherence to the textual approach, both Panels and the Appellate Body have failed to address the zeroing question in a straightforward and clear manner, thus creating lengthy textual discussions only to further confuse the matter.

The textual basis for much of the Panels and the Appellate Body's analysis was Article 2.4.2 dealing with the methods for comparing normal value and export price in order to establish a margin of dumping, and the general requirement to conduct a fair comparison between normal value and export price of Article 2.4 AD Agreement. It is perhaps useful at this stage to recall once again a couple of basic aspects of an anti-dumping investigation. Under the WTO's Anti-Dumping Agreement, a product is considered dumped if it enters the market of the importing country at a price which is lower than the normal value of the product which, in turn, is defined as the comparable price of the like product when sold in the ordinary course of trade when destined for consumption in the market of the exporting country. Comparing the export price with the normal value of the product is thus the essence of an anti-dumping investigation. Article 2.4 AD Agreement requires that this comparison be fair. Subject to this general requirement of a fair comparison, the Anti-Dumping Agreement, in Article 2.4.2, further provides for two ordinary and one exceptional method for calculating a margin of dumping: either a weighted average of normal value is to be compared with a weighted average of prices of all comparable export transactions, or a comparison is to be made of normal value and export prices on a transaction-to-transaction basis. Exceptionally, and under specific circumstances and conditions, a margin of dumping *may* be established by comparing a normal value established on a weighted average basis to prices of individual export transactions, in the case of so-called 'targeted' dumping (third methodology: weighted average normal value to transaction specific export price). With this in mind, we can turn to the case-law as such.

(i) The original cases: *EC – Bed Linen* and *US – Softwood Lumber V*: establishing the principle

In *EC – Bed Linen*, the Appellate Body agreed with the Panel that the EC's practice of zeroing was inconsistent with the requirement in Article 2.4.2 of the WTO AD Agreement that a margin of dumping be established by comparing a weighted average normal value to a weighted average of *all* comparable export transactions. On appeal the European Communities had argued that, according to Article 2.4.2 AD Agreement, it had to compare the weighted average of the normal value to the weighted average of *comparable* export transactions, and not of *all* export sales. The Appellate Body rejected the EC arguments and emphasized that Article 2.4.2 speaks of *all comparable* export

transactions when requiring that the weighted average normal value be compared with the weighted average of prices of all comparable export transactions. The Appellate Body was of the view that by zeroing the 'negative dumping margins', the European Communities did not take fully into account the entirety of the prices of some export transactions, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found.[105] The Appellate Body considered that all models within the like product are necessarily comparable and the fact that different models are compared is thus not a valid reason for arguing that such transactions are not comparable.[106] In *EC – Tube or Pipe Fittings*, the Panel, in a one paragraph finding in this regard, simply referred to the Appellate Body's ruling in *EC – Bed Linen* to find against the EC's use of zeroing in the establishment of a margin of dumping for tube or pipe fittings from Brazil.[107]

As the Appellate Body's findings were very much linked to the particular type of zeroing practised by the EC, the issue of zeroing came back, in a more sophisticated manner, in *US – Softwood Lumber V*. At issue in this case was the US practice of zeroing which, as we explained above, is very similar but not identical to the EC practice in this regard.[108] The Panel considered it important to clarify what it considered to be the scope of the Appellate Body's ruling in *EC – Bed Linen* with respect to the use of models in establishing a margin of dumping.[109] It thus emphasized that *multiple averaging* whereby the US authority sub-divided the product under investigation into sub-groups and performed a weighted average to weighted average comparison for each sub-group, was not inconsistent with the AD Agreement. It considered that the Appellate Body's ruling in *EC – Bed Linen* prohibited zeroing the results of multiple averaging, but not the practice of multiple averaging as such. Following this clarification, the Panel considered that the US zeroing practice, whereby the US would neglect some of the calculations performed and concentrate on the remainder to establish dumping margin, was at odds with Article 2.4.2 AD.[110] The Appellate Body agreed with the Panel and found that the US practice of zeroing was inconsistent with Article 2.4.2 AD Agreement.

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105 Appellate Body Report, *EC – Bed Linen*, para. 55.

106 Appellate Body Report, *EC – Bed Linen*, para. 58.

107 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.216.

108 The factual aspects and description of the USDOC zeroing practice at issue in this case can be found in AB Report, *US – Softwood Lumber V*, para. 64.

109 This was actually a bit odd since both parties agreed that the Appellate Body ruling in *EC – Bed Linen* could not be read to disallow the use of models or the practice of multiple averaging.

110 Panel Report, *US – Softwood Lumber V*, paras 7.216–7.217. One of the Panellists was of a different view, and expressed his dissenting opinion in section IX of the report.

Importantly, however, the Appellate Body significantly changed its reasoning in support of this finding compared to that developed in *EC – Bed Linen*, where it had focused on the term 'all comparable transactions' which appears only in the sentence dealing with the weighted average to weighted average methodology. In *US – Softwood Lumber V*, the Appellate Body relied crucially on the term 'margin of dumping'. It first noted that, throughout the AD Agreement, it is understood that it is the dumping of the product *as a whole* and not its specific types, models or categories that must be established.[111] The Appellate Body found support in its understanding of the term in various provisions, such as Articles 2.1, 2.4.2, 6.10 and 9.2 AD Agreement. The AB went on to establish that, by the same token, it is the dumping margin of the product *as a whole* that the AD Agreement cares about.[112] The following paragraphs set forth the essence of the Appellate Body's reasoning which still seems to form the basis for its overall view on the question of zeroing. They are therefore quoted in full:

> It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, it is only on the basis of aggregating *all* these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole.
>
> We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the 'results' of the multiple comparisons for all product types. There is no textual basis under Article 2.4.2 that would justify taking into account the 'results' of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other 'results'. If an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of *all* those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2. Thus we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons.
>
> Our view that 'dumping' and 'margins of dumping' can only be established for the product under investigation as a whole is in consonance with the need for consistent treatment of a product in an anti-dumping investigation. Thus, having defined the product under investigation, the investigating authority must treat that *product* as a whole for, *inter alia*, the following purposes: determination of the volume of dumped imports, injury determination, causal link between dumped imports and injury to domestic industry, and calculation of the margin of dumping. Moreover, according to Article VI:2 of the GATT 1994 and Article 9.2 of the *Anti-*

111 Appellate Body Report, *US – Softwood Lumber V*, para. 93.
112 Appellate Body Report, *US – Softwood Lumber V*, para. 96.

> *Dumping Agreement*, an anti-dumping duty can be levied only on a dumped product. For all these purposes, the product under investigation is treated as a whole, and export transactions in the so-called 'non-dumped' sub-groups (that is, those sub-groups in which the weighted average normal value is less than the weighted average export price) are not excluded. We see no basis, under the *Anti-Dumping Agreement*, for treating the very same sub-group transactions as 'non-dumped' for one purpose and 'dumped' for other purposes. Indeed, in the anti-dumping investigation at issue in this dispute, the product as a whole – softwood lumber – has been treated as a 'dumped' product, except at the stage of zeroing.
>
> Moreover, we observe that Article 2.4.2 contains no express language that permits an investigating authority to disregard the results of multiple comparisons at the aggregation stage. Other provisions of the *Anti-Dumping Agreement* are explicit regarding the permissibility of disregarding certain matters. For example, Article 2.2.1 of the *Anti-Dumping Agreement*, which deals with the calculation of normal value, sets forth the *only* circumstances under which sales of the like product may be disregarded.[113] Similarly, Article 9.4 of the *Anti-Dumping Agreement* expressly directs investigating authorities to 'disregard' zero and *de minimis* margins of dumping, under certain circumstances, when calculating the weighted average margin of dumping to be applied to exporters or producers that have not been individually investigated. Thus, when the negotiators sought to permit investigating authorities to disregard certain matters, they did so explicitly.[114] (Italics and emphasis in the original)

The Appellate Body thus ruled against the practice of zeroing for a second time, and it could have been assumed that the WTO had seen the end of the zeroing saga. The opposite proved to be the case. The discussion continued and, surprisingly, three Panels in the cases *US – Zeroing (EC)*, *US – Zeroing (Japan)* and *US – Softwood Lumber V (Article 21.5 – Canada)* justified the use of zeroing in (duty assessment) reviews and in case an authority uses the transaction-to-transaction methodology for establishing the margin of dumping. On each occasion, the Appellate Body overturned the Panel and re-iterated its view that zeroing is a WTO-inconsistent practice.

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[113] Article 2.2.1 of the Anti-Dumping Agreement stipulates that:

> [s]ales of the like product in the domestic market of the exporting country . . . *may be disregarded* in determining normal value *only if* the authorities determine that such sales are made within an extended period of time in substantial quantities and are at prices which do not provide for the recovery of all costs within a reasonable period of time. (Footnotes omitted; emphasis added)

[114] Appellate Body Report, *US – Softwood Lumber V*, paras 97–100. Also see Panel Report, *US – Zeroing (EC)*, paras 7.31–7.32.

(ii) The second generation of cases: *US – Softwood Lumber V, Article 21.5* and *US – Zeroing (EC)*, *US – Zeroing (Japan)*: the Panels' defiant stance

We start our discussion of the second generation of cases with the Panel Reports finding in favour of the practice of zeroing in case a transaction-to-transaction methodology is used for determining the margin of dumping and in the case of reviews rather than original investigations. As will be discussed in what follows, in each case, the Appellate Body overturned the Panel and confirmed its earlier expressed view that zeroing is a WTO-inconsistent practice.

A The Panel Reports: in favour of zeroing

(a) US – Softwood Lumber V, Article 21.5

It is recalled that the Panel on *US – Softwood Lumber V* had ruled against the use of zeroing. In fact, the Panel had even noted that,

> Although we are mindful that we are not called upon to decide whether zeroing is allowed or disallowed under the transaction-to-transaction and weighted-average-normal-value to individual export transaction methodologies, *we are of the view that the use of zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the AD Agreement.*[115] (Emphasis added)

Following the Panel's and the Appellate Body's ruling against the use of zeroing in a weighted-average to weighted-average context, the United States had re-calculated the margin of dumping for softwood lumber, this time using the second methodology allowed for under Article 2.4.2 AD Agreement, comparing normal value and export prices on a transaction-to-transaction basis. Defying the WTO's ruling, the United States again zeroed the negative dumping margins it established when calculating the overall margin of dumping, arguing that the Appellate Body's ruling in *US – Softwood Lumber V* only related to the prohibition of zeroing under the first methodology, the weighted-average to weighted average comparison. Canada challenged what it considered to be a clear case of bad faith implementation of the Dispute Settlement Body's (DSB) ruling and requested the original Panel (which had considered zeroing to be inconsistent with Article 2.4.2 AD Agreement) to examine the implementation dispute. However, the chairman of the original Panel had in the meantime been appointed as Deputy Director-General of the WTO and

115 Panel Report, *US – Softwood Lumber V,* footnote 361.

thus resigned from his position as Chairman of the Panel.[116] We would not mention this so prominently if it were not for the fact that his replacement obviously had an important impact on the outcome of the dispute. Indeed, in this implementation dispute, the Panel, unchanged but for the Chairman, completely changed its approach, and discarded its own above-quoted previous conclusion that zeroing when determining a margin of dumping based on the transaction-to-transaction methodology would not be in conformity with Article 2.4.2 of the AD Agreement.[117] The Panel now found in favour of the United States, considering that zeroing in the context of a transaction-to-transaction methodology is not inconsistent with Article 2.4.2.

Canada had argued that the transaction-to-transaction methodology involves multiple comparisons, and as had been stated by the Appellate Body in the context of a weighted-average to-weighted average comparison, all of these intermediate values must be aggregated in order to arrive at a margin of dumping for the product as a whole. By zeroing the results of certain transactions, the US acted inconsistently with the obligation to take into account all the results for all the multiple comparisons.

At the outset, the Panel clarified that it was of the view that the Appellate Body's ruling in *US – Softwood Lumber V* was limited to the first methodology of establishing a margin of dumping by comparing a weighted average normal value with a weighted average export price and could not automatically be extended to the second methodology (transaction-to-transaction). The Panel refused to read the Appellate Body's discussion on the margin of dumping for the product as a whole outside the context of the reference in the first sentence of Article 2.4.2 to 'all comparable export transactions'.[118] As the latter reference does not appear in the context of the second methodology, it is, according to the Panel, not necessarily so that, outside the context of the weighted average to weighted average comparison methodology, margins of dumping must be established for the product as a whole.[119] The Panel was of the view that the aggregation or summing up of results of comparisons of transaction-specific prices should not be confused with averaging. According to the Panel,

> Although both methodologies might involve aggregation, the W–W methodology is based on an analysis of average price behaviour, while the T–T methodology allows an investigating authority to identify transaction-specific instances of dumping. In

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116 Panel Report, *US – Softwood Lumber V, Article 21.5*, para. 1.5.

117 In fact, it seems that what was once the dissenting opinion of one Panellist became the majority view of the Panel.

118 Panel Report, *US – Softwood Lumber V, Article 21.5*, para. 5.21.

119 Panel Report, *US – Softwood Lumber V, Article 21.5*, para. 5.27.

> these circumstances, we conclude that there is no basis to uphold Canada's claim that Article 2.4.2 required the DOC to establish margins of dumping by aggregating the results of all transaction-to-transaction comparisons, offsetting non-dumped comparisons against dumped comparisons.[120]

The Panel further found confirmation for this reading in a number of broader contextual considerations, the most important being the so-called 'mathematical equivalence' argument put forward by the US.[121] According to the Panel, Canada's argument that Article 2.4.2 requires that the margin of dumping be established with respect to the product as a whole, without zeroing, in any of the methodologies would imply that the third, exceptional methodology (weighted average normal value to be compared to transaction specific export price) leads to a result which is inevitably mathematically equivalent to the result from the application of the first, weighted-average to weighted-average methodology. It thus agreed with the United States that a general prohibition of zeroing based on the Appellate Body's interpretation of the phrase 'margins of dumping' in *US – Softwood Lumber V* would deprive the second sentence of Article 2.4.2 (relating to this third weighted average to transaction methodology) of effect. On the principle of effective treaty interpretation, the Panel refused to accept such a reading of this provision. Overturning its own previous conclusions on this matter, the Panel thus found that zeroing in the context of the second transaction to transaction methodology is not prohibited by the AD Agreement.

The rest of the Panel's analysis logically flows from there. Having concluded that a transaction-to-transaction comparison with zeroing is not inconsistent with Article 2.4.2, it considered that one cannot conclude that failure to use a comparison methodology that would have resulted in lower margins (that is, without zeroing) is 'unfair'. In sum, the Panel held that, since zeroing cannot be prohibited as 'by definition' unfair in the context of

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120 Panel Report, *US – Softwood Lumber V, Article 21.5*, para. 5.30.

121 Other contextual considerations related to the fact that in prospective duty assessments systems, there is no need to offset non-dumped amounts against dumped amounts at the time of assessment; the fact that it was of the view that if the term 'margin of dumping' in Article 2.2 means a single margin of dumping for the product as a whole (and not for a specific model) then this must mean that a single margin of dumping for the product as a whole must be calculated using a constructed normal value for all models, even if the trigger conditions only apply in respect of one model, contrary to what is the generally accepted practice in respect of Article 2.2; and past GATT discussion, and a 1960 report of a Group of Exports in particular which, in the Panel's view, does not support Canada's argument that 'margins of dumping' must always be established for the product as a whole by aggregating all transaction specific results.

Article 2.4.2, Article 2.4 (the general fair comparison requirement) cannot provide for the unqualified, 'by definition' prohibition suggested by Canada either.

(b) US – Zeroing (EC)

A similarly limited reading of Article 2.4 and 2.4.2 as adopted by the Panel in its report on *US – Softwood Lumber V, Article 21.5* and of the Appellate Body's earlier findings was adopted by the Panel in the *US – Zeroing (EC)* case initiated by the EC against the continued use of zeroing by the United States, both in original investigations and in administrative (duty assessment) reviews. The Panel on *US – Zeroing (EC)* considered that, while zeroing may be prohibited in the course of an original investigation, it is *not* prohibited in a review, even if it is only a duty assessment review under Article 9.3. The basic argument of the Panel was that the text of Article 2.4.2 limits its application to the 'investigation phase', a reference, according to the Panel, to the original investigation. As the prohibition of zeroing had been based on the text of this particular provision, the Panel was thus of the view that, in a review, that is, outside the 'investigation phase', the authority is allowed to zero the negative dumping margins:

> We recapitulate the conclusions of our analysis. First, the phrase 'the existence of margins of dumping during the investigation phase' in Article 2.4.2 read in its ordinary meaning in context of the *AD Agreement* as a whole means that Article 2.4.2 applies to the phase of the 'original investigation' i.e. the investigation within the meaning of Article 5 of the *AD Agreement*, as opposed to subsequent phases of duty assessment and review. Second, our interpretation of the meaning of this phrase as limiting the applicability of Article 2.4.2 to investigations within the meaning of Article 5 is also consistent with the distinction made between investigations and subsequent proceedings in various Appellate Body decisions. Third, alternative meanings suggested by the European Communities are implausible at best and deny this phrase any real function, in contradiction with principles of interpretation. Fourth, this interpretation is entirely consistent with the different functions played by 'original investigations' and duty assessments proceedings. Finally, the references made by the European Communities to subsequent practice and preparatory work do not undermine this interpretation.[122]

But the Panel went even one step further in its defence of zeroing, reaching the conclusion that there is nothing inherently unfair about zeroing such that it would violate the general fair comparison obligation expressed in Article 2.4. This is important because, as the Panel recognized, the requirement to conduct

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122 Panel Report, *US – Zeroing (EC)*, para. 7.220.

a fair comparison between normal value and export price set forth in the first sentence of Article 2.4 is certainly *not* limited in any way to the original investigation. According to the Panel, 'to determine whether an approach is unfair there must be a discernible standard of appropriateness or rightness within the four corners of the *AD Agreement* which would provide a basis for reliably judging that there has been an unfair departure from the standard'.[123] It then reached the following conclusion, again based on its interpretation that Article 2.4.2 applies to original investigations only:

> In sum, we consider that while Article 2.4 gives rise to a 'fair comparison' obligation that also applies to the calculation of margins of dumping, to interpret Article 2.4 as prohibiting zeroing and asymmetrical comparisons, zeroing and importer-specific assessment of anti-dumping duties in proceedings other than original investigations cannot be reconciled with the fact that the negotiators of the *AD Agreement* specifically permitted and/or decided not to address these practices in certain circumstances and would undermine the useful effect of Article 2.4.2 and of provisions of Article 9 that permit the collection and assessment of anti-dumping duties on a transaction-specific basis.[124] (Footnote omitted)

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[123] Panel Report, *US – Zeroing (EC)*, para. 7.260.

[124] Panel Report, *US – Zeroing (EC)*, para. 7.275. The essence of the Panel's reasoning can be found in paras 7.263–7.264:

> The fact that Article 2.4.2 expressly permits the use of an asymmetrical, average-to-transaction comparison method of export price and normal value as an exception to the symmetrical comparison methods in the first sentence of Article 2.4.2 and that, as discussed in the previous section of this Report, negotiators did not extend the application of Article 2.4.2 beyond investigations within the meaning of Article 5 of the *AD Agreement* indicates that the negotiators did not treat asymmetry as a practice to be banned in all circumstances. Similarly, while zeroing effectively is prohibited under the average-to-average method in the first sentence of Article 2.4.2, the non-application of Article 2.4.2 outside the 'the investigation phase' shows that zeroing was not treated as a practice to be banned in all circumstances. Conceptually, it is difficult to understand why one provision of the *AD Agreement* specifically dealing with a particular subject would prohibit a practice in certain circumstances and specifically permit or not address the same practice in other circumstances, if another provision of the *AD Agreement* already prohibited that practice as inherently unfair in all circumstances. In fact, the very rationale for the existence of Article 2.4.2 is undermined if asymmetry and zeroing are already proscribed in all circumstances as practices that are inherently unfair by Article 2.4. Therefore, the treatment of asymmetry and zeroing as necessarily unfair is contradicted by the manner in which Article 2.4.2 treats these practices.
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> Similarly, as discussed above, Article 9 of the *AD Agreement* clearly permits the use of an asymmetrical method of comparing normal value and individual export prices in the context of a system of variable anti-dumping duties, which necessarily involves zeroing. The principle that treaty provisions must be presumed not to be in

In a dissenting opinion, one of the Panellists took a different approach, arguing that it would not make sense to consider that the drafters wanted to prohibit zeroing in an original investigation, and not in a review in which the actual amount that the importer will have to pay is determined.[125] In his view, the reference to the 'investigation phase' in Article 2.4.2 was rather a reference to the period of investigation used as the basis for the establishment of a margin of dumping. This dissenting Panellist also strongly disagreed with the Panel's finding that zeroing does not violate the fair comparison requirement:

> With all respect to the Panel and its thorough examination of the dispute, I find this argumentation inconceivable because of the results to which it leads, contradictory because in conflict with the independent nature of the fairness requirement under Article 2.4 of the *AD Agreement* recognized by the Panel and artificial because it seeks interpretation of the basic principle 'informing all of Article 2' in one of its most enigmatic sub-paragraphs. But even more important, the Panel's decision ignores a very important aspect, that Article 2.4.2 is preceded by the 'subject to the provisions governing fair comparison in paragraph 4' requirement. This double security, additional to the independent principle established in the first sentence of Article 2.4, clearly subordinates Article 2.4.2 to the 'fair comparison' rule of Article 2.4 with the consequence that, in case of conflict, the fairness principle prevails.[126] (Footnotes omitted)

(c) US – Zeroing (Japan)

The Panel in *US – Zeroing (Japan)* had to deal with the full range of zeroing issues: model zeroing based on the weighted average to weighted average methodology; simple zeroing based on the transaction to transaction methodology, and zeroing in the context of reviews.

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conflict entails that Article 2.4 cannot be read to ban this methodology in all circumstances by treating it as unfair within the meaning of Article 2.4 of the *AD Agreement*.

[125] Panel Report, *US – Zeroing (EC)*, paras 9.23–9.31. Indeed it seems that allowing zeroing in a duty assessment review but not in the original investigation is putting the cart in front of the horse. What would be the sense of a prohibition on zeroing in an original investigation, if, when the time has come to put the money down, an authority would be allowed to zero, thus raising the margin of dumping and therefore the amount of the anti-dumping duty? The Panel's argument that the original investigation's calculation of a margin of dumping is mainly there to examine whether the margin is more than *de minimis* thus allowing the imposition of a duty is simply unconvincing and nonsensical. As explained by one Member in the course of the negotiations, allowing zeroing in duty assessment reviews would be fundamentally unfair, particularly in a retrospective duty assessment system where the original investigation only determines the deposit rate. See TN/RL/GEN/126, p. 3.

[126] Panel Report, *US – Zeroing (EC)*, para. 9.43.

In respect of model zeroing, the Panel adopted a very 'traditional approach' of referring to past Appellate Body jurisprudence to consider that such model zeroing was prohibited by the AD Agreement:

> Model zeroing, as that term is used by Japan, involves average-to-average comparisons of export price and normal value within individual averaging groups established on the basis of physical characteristics. We note that the panels in *EC – Bed Linen*, *EC – Tube or Pipe Fittings*, *US – Softwood Lumber V* and the Appellate Body in *EC – Bed Linen* and *US – Softwood Lumber V* have found that in circumstances where an authority establishes the existence of margins of dumping during the investigation phase by making multiple, model-by-model comparisons between average export prices and average normal values and by aggregating the results of those comparisons into an overall margin of dumping, Article 2.4.2 of the *AD Agreement* requires that the results of all those comparisons be fully taken into account in the numerator of the overall margin of dumping. In other words, model zeroing, a method under which the numerator of the overall margin of dumping does not include results of comparisons in which average export prices of specific models of a product are above average normal values for those models, has repeatedly been found to be prohibited by Article 2.4.2 of the *AD Agreement* in recent WTO dispute settlement cases when used to establish the existence of margins of dumping during the investigation phase
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> [. . .] We note, in this regard, the reasoning that has led several panels and the Appellate Body to conclude that the text of the first sentence of Article 2.4.2 prohibits the use of model zeroing. We also note that the arguments presented by the United States are similar to arguments of the United States that were rejected by the Appellate Body in *US – Softwood Lumber V*.
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> Thus, we consider that model zeroing in the context of an average-to-average comparison when the existence of margins of dumping is established during the investigation phase is inconsistent with Article 2.4.2 of the *AD Agreement*. (Footnotes omitted)[127]

A completely different approach marked the Panel's discussion of 'simple zeroing' in a transaction to transaction context and in the context of reviews.

When dealing with the question of simple zeroing in a transaction-to-transaction context, the Panel decided to read the Appellate Body ruling outlawing zeroing in a limited manner and sided with the earlier ruling by the Panel in *US – Softwood Lumber V (Article 21.5)* to consider that such zeroing is not prohibited. The Panel took the view that it was 'permissible' to interpret Articles 2.1 and 2.4.2 of the *Anti-Dumping Agreement*, as well as Article VI of the GATT 1994, to mean that 'there is no general requirement to determine dumping and margins of dumping for the product as a whole.[128]

The Panel considered that the Appellate Body Report outlawing zeroing

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127 Panel Report, *US – Zeroing (Japan)*, paras 7.80 and 7.82–7.83.

128 Panel Report, *US – Zeroing (Japan)*, para. 7.142.

under the first weighted average to weighted average method does not prohibit zeroing in a transaction to transaction context.

> In this respect, we note that the Appellate Body Report in *US – Softwood Lumber V* nowhere discusses the issue of whether or not the terms 'dumping' and 'margins of dumping' can apply to transactions. Moreover, the Appellate Body stated several times that it was not addressing the issue of whether zeroing can be used under other methodologies provided for in Article 2.4.2.[129]

After the Panel had issued its interim report, and even after the time for commenting on the interim report had expired, the Appellate Body issued its report on *US – Zeroing (EC)*, in which it clearly took a view opposite to the one adopted by the Panel in both the EC and the Japanese case. At this moment, therefore, the Panel on *US – Zeroing (Japan)* knew that its findings which were similar to those of the *US – Zeroing (EC)* Panel would also be overturned on appeal.

On the one hand, the Panel considered that it could not ignore the fact that the Appellate Body had issued its report dealing with very similar claims by the EC concerning zeroing in reviews in the case of *US – Zeroing (EC).* Therefore, in a remarkable move, the Panel requested the parties at this late stage in the proceedings (after interim review had been completed) to comment on the report of the Appellate Body in *US –Zeroing (EC)*:

> On 20 April 2006, the Panel informed the parties that it had completed its review of the comments made by the parties during the interim review process and was now in a position to issue its final report to the parties. The Panel also indicated that it was aware of the findings of the Appellate Body in its report issued on 18 April 2006 in *US – Zeroing (EC)* and that it recognized that these findings had a direct bearing on the contents of the interim report. The Panel therefore requested the parties to convey their views on whether the Panel should proceed to reconsider the findings in the interim report in light of the Appellate Body Report in *US – Zeroing (EC)* and, if so, how the Panel should adjust its timetable and working procedures in order to provide the parties with an opportunity to express views on any relevant issues of law addressed in that Appellate Body Report. In their responses to this communication of the Panel both parties indicated that they wished to have an opportunity to submit comments on the Appellate Body Report in *US – Zeroing (EC)*. In light of these responses, the Panel on 26 April 2006 invited the parties to submit their written comments on any relevant issues of law addressed in the Appellate Body Report in *US – Zeroing (EC)* by 10 May 2006 and to submit comments on each other's comments by 17 May 2006. Following a request by the United States on 17 May 2006, the Panel decided to hold a meeting with the parties, which took place on 12 June 2006.[130]

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129 Panel Report, *US – Zeroing (Japan)*, para. 7.94.

130 Panel Report, *US – Zeroing (Japan)*, para. 6.2.

While one would have perhaps expected the Panel to have made this move in order to be able to amend its report to bring it in line with the Appellate Body's findings, the opposite proved to be the case.[131]

The Panel acknowledged that the Appellate Body Report on *US – Zeroing (EC)* clearly suggested a broader reading of the Appellate Body's view on zeroing than the one adopted by the Panel:

> We note, however, that in *US – Zeroing (EC)* the Appellate Body used the concept of 'the product as a whole' in a manner that suggests that the relevance of that concept is not limited to the establishment of the existence of margins of dumping under the average-to-average method provided for in the first sentence of Article 2.4.2 of the *AD Agreement*. In that dispute, the Appellate Body found that the United States had acted inconsistently with Articles 9.3 of the *AD Agreement* and Article VI:2 of the GATT 1994 by applying zeroing in the administrative reviews at issue.[132]

In a bold and remarkable departure from the generally accepted position that Panels follow Appellate Body precedent, the Panel decided not to adopt the Appellate Body's approach in this respect:

> We have carefully considered the arguments of Japan in favour of a broader application of the 'product as a whole' concept in a manner consistent with the reasoning of the Appellate Body in *US – Zeroing (EC)*. However, while we recognize the important systemic considerations in favour of following adopted panel and Appellate Body Reports, we have decided not to adopt that approach for the reasons outlined below.[133]

The Panel explained its views on the role of prior precedent in a footnote to this paragraph:

> It is well established that panel and Appellate Body Reports are not binding, except with respect to resolving the particular dispute between the parties to the dispute, but that such reports create 'legitimate expectations' among WTO Members and should therefore be taken into account where they are relevant to any dispute. Appellate Body Report, *US – Softwood Lumber V*, paras 109–112; Appellate Body Report, *Japan Alcoholic Beverages II*, pp. 12–15; Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 109. The Appellate Body has stated that

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131 It is important to recall that at the time the Panel issued its report, the Appellate Body had not yet expressed itself explicitly on the question of such 'simple zeroing'. It did so in its report on *US – Softwood Lumber V (Article 21.5)* which came out shortly after the Panel on *US – Zeroing (Japan)* had sent its final report to the parties.

132 Panel Report, *US – Zeroing (Japan)*, para. 7.95.

133 Panel Report, *US – Zeroing (Japan)*, para. 7.99.

> '. . . following the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same'. Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 188. This notion of an 'expectation' that panels will follow Appellate Body Reports (as well as panel reports) is supported by important systemic considerations, including the objective, referred to in Article 3.2 of the DSU, of providing security and predictability to the multilateral trading system. At the same time, a panel is under an obligation under Article 11 of the DSU to 'make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements . . .' Moreover, Article 3.2 of the DSU requires a panel 'to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law' and provides that '[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in covered agreements'.[134]

The Panel considered that there were 'difficulties in discerning the precise meaning and scope of application of the phrase "multiple comparisons . . . at an intermediate stage" as used in the Appellate Body Report in *US – Zeroing (EC)*'.[135] In addition, it was of the view that the Appellate Body had made a shift in its approach to the issue which it failed to explain in its report on *US – zeroing (EC)*.[136] For that reason as well, the Panel considered it was not required to follow the Appellate Body precedent. A very similar view was expressed by the Panel on *US – Stainless Steel (Mexico)*, paras 7.105–7.106.[137]

For similar reasons relating to the lack of explanation in the Appellate Body Reports dealing with the inconsistency of zeroing with the general fair

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134 Panel Report, *US – Zeroing (Japan)*, footnote 733.

135 Panel Report, *US – Zeroing (Japan)*, para. 7.100.

136 Panel Report, *US – Zeroing (Japan)*, para. 7.101:

> The Appellate Body Report in *US – Zeroing (EC)* provides no explanation of this shift from the use of the 'product as a whole' concept as context to interpret the term 'margins of dumping' in the first sentence of Article 2.4.2 of the *AD Agreement* in connection with multiple averaging, on the one hand, to the use of this concept as an autonomous legal basis for a general prohibition of zeroing, on the other. In this regard, we note, in particular, that the Appellate Body does not discuss why the fact that in the context of multiple averaging the terms 'dumping' and 'margins of dumping' cannot apply to a *sub-group* of a product logically leads to the broader conclusion that Members may not distinguish between *transactions* in which export prices are less than normal value and *transactions* in which export prices exceed normal value.

137 Panel Report, *US – Stainless Steel (Mexico)*, paras 7.105–7.106.

comparison requirement, the Panel refused to conclude that there was anything inherently unfair about zeroing:

> We also note, however, that to date the Appellate Body has never actually made a *legal finding* in a specific case that the use of zeroing is inconsistent with Article 2.4 of the *AD Agreement* on its own (i.e. as an independent legal obligation). We do not consider, in this regard, that the Appellate Body Reports in *EC – Bed Linen* and *US – Corrosion-Resistant Steel Sunset Review* provide a sufficiently detailed legal analysis of the 'fair comparison' requirement in general and its applicability to the issue of zeroing in particular, to warrant the conclusion that this requirement must be interpreted to mean that zeroing is prohibited in all circumstances. We find it highly significant in this regard that, as discussed above, in *US – Softwood Lumber V* the Appellate Body declined to answer the question of whether zeroing is permitted under the transaction-to-transaction and the average-to-transaction comparison methods.[138]

The Panel applied the same line of reasoning in rejecting Japan's claims relating to zeroing in the context of periodic reviews and new shipper reviews, and refused to follow the Appellate Body Report on *US – Zeroing (EC)* in respect of zeroing in the context of reviews. It again referred to its difficulties with the Appellate Body Report in question and to the lack of explanation offered by the Appellate Body:

> Moreover, while we note that Japan finds support for its claims with respect to simple zeroing in periodic reviews and new shipper reviews in the findings and reasoning of the Appellate Body in *US – Zeroing (EC)*, we recall in that regard that we have pointed to the difficulties of interpretation of the meaning and scope of application of the phrase 'multiple comparisons . . . at an intermediate stage' as used in the Appellate Body Report in *US – Zeroing (EC)* and to the limited explanation in that Appellate Body Report as to why the 'product as a whole' concept is applicable more broadly than in the specific context of 'multiple averaging' in which it is used in the Appellate Body Report in *US – Softwood Lumber V*.[139]

B The Appellate Body Reports: The Appellate Body sets the record straight

From the above it becomes clear that both Panels in *US – Zeroing (EC)* and *US – Softwood Lumber V, Article 21.5* developed a very textual argument and tried to show that the Appellate Body's earlier rulings in *EC – Bed Linen*, and more importantly in *US – Softwood Lumber V* had to be read in a narrow manner as being applicable only to the first (weighted average to weighted average) methodology and only when establishing margins of dumping in the course of the original investigation. The Appellate Body in its report on *US –*

138 Panel Report, *US – Zeroing (Japan)*, para. 7.157.
139 Panel Report, *US – Zeroing (Japan)*, paras 7.195.

Zeroing (EC) and US – Softwood Lumber V, Article 21.5 set aside their efforts to narrow its earlier ruling and confirmed in an unequivocal manner its prohibition of zeroing.

(a) US – Zeroing (EC)

In essence the Appellate Body reiterated its view that, under the AD Agreement and Article VI GATT 1994, 'dumping' and 'margins of dumping' must be established for the product as a whole, and emphasized that this finding was based not only on Article 2.4.2, first sentence, but also on Article VI.2 GATT 1994 and the context found in *inter alia* Article 2.1 AD Agreement. Hence an investigating authority is not allowed to take into account the results of only some multiple comparisons, while disregarding others. This is true in the context of original investigations as well as in the context of reviews. The Appellate Body considered that, under Article 9.3 AD Agreement (relating to duty assessment reviews) and Article VI.2 GATT 1994, margins of dumping are established for the foreign producer or exporter. This margin of dumping operates as a ceiling for the total amount of anti-dumping duties that can be levied on the entries of the subject product (from that exporter) covered by the duty assessment proceeding. According to the Appellate Body, the establishment of margins of dumping is independent from the methodology to be used for assessing the duties, and anti-dumping liability may well be assessed on a transaction-or importer-specific basis. In its report on *US – Zeroing (EC)*, the Appellate Body reached the following conclusion:

> . . . in the administrative reviews at issue, the USDOC assessed the anti-dumping duties according to a methodology in which, for each individual importer, comparisons were carried out between the export price of each individual transaction made by the importer and a contemporaneous average normal value. The results of these multiple comparisons were then aggregated to calculate the anti-dumping duties owed by each individual importer. If, for a given individual transaction, the export price exceeded the contemporaneous average normal value, the USDOC, at the aggregation stage, disregarded the result of this individual comparison. Because results of this type were systematically disregarded, the methodology applied by the USDOC in the administrative reviews at issue resulted in amounts of assessed anti-dumping duties that exceeded the foreign producers' or exporters' margins of dumping with which the anti-dumping duties had to be compared under Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994. Accordingly, the zeroing methodology, as applied by the USDOC in the administrative reviews at issue, is inconsistent with Article 9.3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994.[140]

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140 Appellate Body Report, *US – Zeroing (EC)*, para. 133.

The Appellate Body thus reversed the Panel's finding that zeroing was permitted in the context of a duty assessment review. In its report on *US – Zeroing (EC)*, the Appellate Body did not consider it 'necessary for resolving the dispute' to address the additional findings of the Panel that zeroing is not inconsistent with the general fair comparison requirement of Article 2.4 AD Agreement. It did note that the Panel's reasoning in support of this finding depended to a large extent on its finding of Article 2.4.2 and Article 9.3, which it reversed, and therefore declared 'moot, and of no legal effect' the finding of the Panel in respect of Article 2.4.[141] Finally, the Appellate Body recognized that the issue of the applicability of Article 2.4.2 to administrative reviews was hotly debated before the Panel (the 'during the investigation phase' argument), but emphasized that it did not find it necessary to resolve the issue of zeroing in the administrative reviews at issue in this case through an examination of Article 2.4.2. The Appellate Body even added that it was 'not expressing any view in this appeal as to whether Article 2.4.2 is applicable or not to administrative reviews under Article 9.3'. This is surprising because it had just ruled that zeroing in an administrative review context was prohibited by the AD Agreement, and it had in the past consistently based the prohibition of zeroing on Article 2.4.2 AD Agreement.

(b) US – Softwood Lumber V, Article 21.5

In its report on *US – Softwood Lumber V, Article 21.5* the Appellate Body referred to the reasoning developed in the original *US – Softwood Lumber V* case concerning the term margins of dumping (quoted above) to conclude that 'zeroing in the transaction-to-transaction methodology does not conform to the requirement of Article 2.4.2 in that it results in the real values of certain export transactions being altered or disregarded'.[142] The Appellate Body further pointed to the fact that the two methodologies are offered as two alternatives in Article 2.4.2 both fulfilling the same function of establishing the margin of dumping and that it would therefore be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.[143] In sum, according to the Appellate Body, Article 2.4.2 does not permit an investigating authority, when aggregating the results of transaction-specific comparisons, to disregard transactions in which export price exceeds normal value.[144]

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141 Appellate Body Report, *US – Zeroing (EC)*, para. 147.
142 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, paras 88–9.
143 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 93.
144 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 94.

Interestingly, the Appellate Body also dealt in a convincing manner with the so-called 'mathematical equivalence' argument, considering the Panel's approach as 'misguided'. The Appellate Body pointed out that the third exceptional methodology had never been applied by the US or any of the other parties to the dispute. More importantly, being an exception to the two normal methodologies set forth in the first sentence of Article 2.4.2, the Appellate Body was of the view that this comparison methodology alone cannot determine the interpretation of the two 'normal' methodologies.[145] The Appellate Body also rightly criticizes the Panel for accepting the US assumption that zeroing is prohibited under this exceptional methodology, something which is quite uncertain.[146] Finally, even assuming that there may exist mathematical equivalence between the two methodologies under certain circumstances does not necessarily imply that outlawing zeroing under the first and second methodology would render the third exceptional methodology useless.[147] The Appellate Body thus concluded that

> zeroing is not permitted under the transaction-to-transaction methodology set out in the first sentence of that provision. The 'margins of dumping' established under this methodology are the results of the aggregation of the transaction-specific comparisons of export prices and normal value. In aggregating these results, an investigating authority must consider the results of all of the comparisons and may not disregard the results of comparisons in which export prices are above normal value.[148]

This time, the Appellate Body went all the way and decided also to address the basic argument that zeroing is inconsistent with the requirement under Article 2.4 AD Agreement of a fair comparison. It came to the conclusion that 'the use of zeroing under the transaction-to-transaction comparison methodology is difficult to reconcile with the notions of impartiality, even-handedness, and

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145 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 97.

146 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 98.

147 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 99:

> In other words, the fact that, under the specific assumptions of the hypothetical scenario provided by the United States, the weighted average-to-transaction comparison methodology could produce results that are equivalent to those obtained from the application of the weighted average-to-weighted average methodology is insufficient to conclude that the second sentence of Article 2.4.2 is thereby rendered ineffective. It has not been proven that in all cases, or at least in most of them, the two methodologies would produce the same results.

148 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 122.

lack of bias reflected in the "fair comparison" requirement in Article 2.4'.[149] Zeroing distorts the prices of certain export transactions because export transactions made at prices above normal value are not considered at their real value. As the AB rightly concludes, the use of zeroing 'artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased.'[150]

In sum, this report by the Appellate Body on the question of zeroing put an end to the zeroing saga concluding that zeroing is inconsistent with the specific requirement of Article 2.4.2 first sentence as well as with the general requirement of conducting a fair comparison under Article 2.4 AD Agreement, thus closing the door to the use of zeroing in AD investigations.

(c) US – Zeroing (Japan)

The Appellate Body Report in *US – Zeroing (Japan)* was the one too many. In its report, the Appellate Body simply summarized its earlier case-law, and rejected all of the findings to the contrary that the Panel had made. The Appellate Body went through the motions of explaining all of its arguments once again and made numerous references to its earlier reports, and the report on *US – Softwood Lumber V (Article 21.5)* in particular. The Appellate Body considered it saw 'no reason to depart from the Appellate Body's reasoning in *US – Softwood Lumber V (Article 21.5 – Canada)*, which is in consonance with the Appellate Body's approach in the earlier case of *US – Softwood Lumber V* and is consistent with the fundamental disciplines that apply under the *Anti-Dumping Agreement* and Articles VI:1 and VI:2 of the GATT 1994, as highlighted above'.[151] Remarkably, the Appellate Body did not address the obvious fact that the Panel had deliberately failed to follow earlier AB jurisprudence. A moment of remarkable restraint, of course right when it was not due.

3 Conclusion

It is by now clearly established that zeroing is prohibited in case an investigating authority decides to establish the margin of dumping on the basis of a weighted-average to weighted-average comparison (first methodology under Article 2.4.2). This is true independent of whether the margins are established

149 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 138.
150 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, para. 142.
151 AB Report, *US – Zeroing (Japan)*, para. 121.

in the course of the original investigation or in a duty assessment review. This much is clear from the Appellate Body Reports on *US – Softwood Lumber V* and *US – Zeroing (EC)*.

Following two defiant Panel Reports, the Appellate Body was forced to explain that zeroing is outlawed irrespective of the methodology used, whether in an original investigation or in the course of any type of review. The Appellate Body's reliance on the terms 'margins of dumping' and the emphasis on the need to establish a margin of dumping 'for the product as a whole' formed the basis for the Appellate Body's conclusion that there is no place for zeroing in the AD Agreement. More generally, the Appellate Body clarified that calculating margins of dumping using zeroing cannot be described as impartial, even-handed, or unbiased and is thus inconsistent with the need to conduct a fair comparison.

That the discussion would end this way was actually quite predictable. What has been surprising about this set of zeroing cases had been the defiant stance taken by a number of Panels that refused to accept the inconsistent nature of the zeroing practice. Indeed, already in the Appellate Body Report on *US – Softwood Lumber V*, the AB had based its finding on the term 'margin of dumping' which appears *inter alia* at the beginning of Article 2.4.2, and clearly relates to both the weighted-average to weighted average and the transaction-to-transaction methodology for calculating a dumping margin. This term also appears elsewhere in a number of provisions which are central to the AD Agreement, such as Articles 6.10 and 9.3 AD Agreement, which apply irrespective of the specific methodology used under Article 2.4.2. It could thus be argued with force that, by relying on the notion of 'margins of dumping', the Appellate Body since the original *US – Softwood Lumber V* case had clarified that, whatever the methodology used, zeroing is prohibited. Four Panels refused to accept this conclusion, though, and some openly challenged the Appellate Body, which is extremely rare in the WTO.

4 Commentary

The basic problem and the reason for the fact that the zeroing discussion dragged on for so long was that for too long the Appellate Body failed to call the thing by its name. It is clear that the practice of zeroing is at odds with the requirement to conduct an objective and unbiased investigation into the existence of dumping.[152] The requirement of even-handedness is crucial in

[152] The Appellate Body finally realized the need to emphasize this basic point in its report on *US – Softwood Lumber V, Article 21.5*, as discussed above. In the course of the negotiations, proposals have been made to clearly prohibit zeroing whatever the method used and whether in an original investigation or in case of a review in the sense of Article 9 and 11. See e.g. TN/RL/GEN/8, TN/RL/GEN/44, TN/RL/GEN/126.

conducting an objective examination and, as the Appellate Body has made clear on numerous occasions, the use of a methodology which makes it more likely that the investigating authority will determine that there is dumping, as is the case with zeroing, is at odds with this obligation.[153]

In an anti-dumping investigation, there will always be many transactions that will need to be compared, sometimes for different models. So, under any method, the investigating authority will need to calculate an average in the end, whether it is the average of the results of all comparisons of export transactions with domestic transactions, or the average of the results of weighted-average to weighted-average comparisons for different models. Averaging precisely implies that positive results will be offsetting negative results. By zeroing, the investigating authority tinkers with the results by disallowing the positive results to fully offset the negative results, thus making it more likely, if not almost inevitable, that a dumping margin will be found. Given this basic problem with zeroing, it is clear that, in the absence of an explicit authorization in the text of the AD Agreement that would allow for this type of distorted examination, zeroing has to be considered as prohibited under the AD Agreement. The argument that an explicit prohibition was discussed, but no agreement was reached during the Uruguay Round for the inclusion of such a prohibition, does not convince.[154] Actually, the fact that zeroing was discussed, and *no explicit authorization* of this obviously biased practice was included in the AD Agreement, only confirms its illegitimate status.

The problem was that the Appellate Body, prior to its report on *US – Softwood Lumber V, Article 21.5* had, with one notable exception, shied away from making this basic point which would have ended all further discussion on this matter. Indeed, on one occasion, in its report on *US – Corrosion-Resistant Steel Sunset Review*, a dispute which only indirectly related to the question of zeroing, the Appellate Body stated in a very straightforward manner that zeroing is inherently unfair and therefore inconsistent with the AD Agreement, irrespective of whether it is applied in original investigations or in reviews:

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153 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para.132. Appellate Body Report, *US – Hot-Rolled Steel*, para. 196. While the Appellate Body was discussing the need for an 'objective examination' in the context of an injury determination, it is clear that there exists a similar obligation to conduct an objective examination into dumping, and the statements referred to are thus equally applicable.

154 In fact, it seems that the discussion at the time of the Uruguay round focused more on the question of symmetry in the comparison methodology than on the issue of zeroing as such. In any case, the Appellate Body correctly set aside all argument based on the negotiating history of historical documents such as a 1960 Group of Experts report relied upon by the pro-zeroing camp. See AB Report, *US – Softwood Lumber V, Article 21.5*, para. 121.

> In *EC – Bed Linen*, we upheld the finding of the panel that the European Communities acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* by using a 'zeroing' methodology in the anti-dumping investigation at issue in that case. We held that the European Communities' use of this methodology 'inflated the result from the calculation of the margin of dumping.' We also emphasized that a comparison such as that undertaken by the European Communities in that case is not a 'fair comparison' between export price and normal value as required by Articles 2.4 and 2.4.2.
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> When investigating authorities use a zeroing methodology such as that examined in *EC – Bed Linen* to calculate a dumping margin, *whether in an original investigation or otherwise*, that methodology will tend to inflate the margins calculated. Apart from inflating the margins, such a methodology could, in some instances, turn a negative margin of dumping into a positive margin of dumping. As the Panel itself recognized in the present dispute, 'zeroing . . . may lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing'. Thus, the inherent bias in a zeroing methodology of this kind may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[155] (Footnotes omitted, emphasis added)

In all of the zeroing cases discussed above, the Appellate Body was looking for a textual hook to prohibit zeroing and failed to outlaw zeroing for what is was, biased and unfair. The textual arguments of the Appellate Body proved to be problematic and became a source of as much discussion if not more than the actual text of the AD Agreement. A number of Panels, and dissenting Panellists, they all pointed to a couple of technical and textual shortcomings of the Appellate Body's arguments. As we stated earlier, the Appellate Body had to move away from the 'all comparable transactions' language relied on in *EC – Bed Linen* to avoid being trapped in a prohibition which related exclusively to the first methodology of Article 2.4.2 AD Agreement. In *US – Softwood Lumber V*, it thus relied on the term 'margin of dumping' as it appeared at the beginning of the opening sentence of Article 2.4.2 AD Agreement. However, its reasoning was still very much linked to Article 2.4.2 AD Agreement. The Panel in *US – Zeroing (EC)* pointed to the fact that Article 2.4.2 limits its application to the 'investigation phase', and on that basis followed the US in its argument that zeroing was not prohibited in the context of administrative reviews. Rather than dealing with this textual, albeit unconvincing, argument

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[155] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 134–5. However, given the lack of factual findings by the Panel regarding the methodology used by USDOC in the administrative reviews, the Appellate Body considered that it did not have a sufficient factual basis to complete the analysis of Japan's claim on this issue. It thus considered that it was unable to rule on whether the United States acted inconsistently with Article 2.4 or Article 11.3 of the Anti-Dumping Agreement by relying on the zeroed dumping margins from the administrative reviews in making its likelihood determination in the sunset review.

by the Panel, the Appellate Body again changed the basis for its finding against zeroing, this time relying exclusively on Article 9.3 AD Agreement. In its report on *US – Zeroing (EC)* the Appellate Body avoided having to explain some of the problems of its earlier reliance on Article 2.4.2 AD Agreement by applying judicial economy in respect of the Article 2.4 claims of the EC.[156]

Some of the challenges the Appellate Body encountered were clearly of its own making, not only because of the textual nature of its analysis but also because of some of the statements that accompanied the analysis. On a number of occasions, the Appellate Body explicitly stated that its rulings should be seen as limited to the weighted average to weighted average methodology before it. This in spite of the fact that the terms it was relying on and the reasoning used to support its findings against the use of zeroing clearly also applied to the second (transaction-to-transaction) methodology. This, as well, fuelled 'hopes' in the pro-zeroing camp and the Panel in *US – Softwood Lumber V, Article 21.5* openly relied on such statements in support of its view that the Appellate Body did not wish to outlaw zeroing, irrespective of the methodology used, as had been argued by Canada.[157]

The Appellate Body prides itself on restricting its findings to the case before it in an attempt to avoid accusations of its acting like a law-making body. The result however, in this case, as on other occasions, is an absence of certainty and predictability. Continuous litigation over a rather technical and straightforward issue has wasted a lot of the WTO's resources as a consequence.

This criticism of the Appellate Body's approach in this matter should not be read to imply that the Panels which found in favour of zeroing were right. They were not, for the reasons briefly discussed earlier. The Panels did have a couple of technical remarks which it would have been good for the Appellate Body to address. This is not the place to make the case for the Appellate Body and refute all of the Panels' arguments in favour of zeroing. Nevertheless, it seems that one important common aspect of these Panels' reasoning deserves our further attention. It concerns the principle of effective treaty interpretation and the role of the third exceptional methodology for establishing margins of dumping under Article 2.4.2 AD Agreement, which, in the argument of the Panels, necessarily requires an authority to zero.

In short, the Panels on *US – Zeroing (EC)* and *US – Softwood Lumber V, Article 21.5* both argued that the third methodology necessarily permits the use

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156 In a bizarre move, the Appellate Body nevertheless declared the Panel's findings with respect to Article 2.4 to be moot and without legal effect. Appellate Body Report, *US – Zeroing (EC)*, para. 147.

157 Panel Report, *US – Softwood Lumber V*, Article 21.5, para. 5.20.

of zeroing as only through zeroing non-dumped export transaction would the result of this third methodology differ from the results reached by applying the first (weighted average to weighted average) methodology. This is what the Panels referred to as the 'mathematical equivalence' argument. If this is so, the Panels argued, then the Appellate Body's findings, even though based on terms which could relate to all three methodologies, must be limited to the first methodology, because extending the prohibition of zeroing to the second and third methodology would deprive of all meaning the third methodology. Effective treaty interpretation would argue against such a conclusion, and it cannot be assumed that the Appellate Body wanted to reduce to a nullity a provision of the Agreement. Moreover, according to both Panels, if zeroing is permitted under the third methodology, it cannot be considered to be unfair per se, or inconsistent with the general fair comparison requirement of Article 2.4 AD Agreement. We recall that we have explained earlier the manner in which the Appellate Body rejected this mathematical equivalence argument in its report on *US – Softwood Lumber V, Article 21.5*.[158] In what follows, we add a couple of personal remarks.

Before we have a closer look at what both Panels called the 'mathematical equivalence' argument, it is worth noting, as did the Appellate Body in *US – Softwood Lumber V, Article 21.5* (see above), that both Panels showed a great willingness to conclude a lot from very little. Indeed, it is very doubtful whether it makes sense to conclude that zeroing must be permitted under the second methodology or is not unfair in general, simply because zeroing may be permitted under a particular methodology which may only be used under exceptional and well-defined circumstances and if properly explained and justified. In other words, even if the Panels were correct in finding that the third methodology permits zeroing, it does not make much sense to elevate this exceptional situation to the general rule. The opposite is actually true: the exception confirms the rule that zeroing is, in general, prohibited.

We will first address the mathematical equivalence argument and then discuss to what extent zeroing, if at all permitted under the third methodology, can be used as an argument in the different context of the first or second methodology.

The Panels appeared determined to demonstrate that, in the absence of zeroing, the results from the application of the third methodology would be mathematically equivalent to those obtained by applying the first (weighted-average to weighted-average) methodology. Reading the report of the Panel on *US – Softwood Lumber V, Article 21.5* creates the impression that zeroing is the 'raison d'être' of the third methodology. Answering various questions and

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158 AB Report, *US – Softwood Lumber V, Article 21.5 (Canada)*, paras 97–100.

addressing a number of hypothetical situations, Canada convincingly argued that the third methodology can be applied in a meaningful manner without zeroing. The Panel, however, considered that, in so doing, Canada on each occasion changed the parameters of the analysis from those that would apply in a weighted average to weighted average (W–W) analysis: 'Thus, Canada's arguments do not address the question of how a targeted dumping analysis based on W–T comparison without zeroing could yield a result different from a W–W comparison, in a situation holding everything except the comparison methodology equal.'

This explains the basic problem of the Panel's approach which is, in essence, circular. What the Panel wanted Canada to do is to weight-average all the results from all transactions. It goes without saying that, in such a situation, the results of a weighted average normal value comparison to transaction specific export prices will be mathematically equivalent to those of a weighted average normal value to weighted average export price: it is a comparison of weighted averages in the end. But this is completely circular, and begs the question whether weight averaging all export transactions is required under the third methodology. The text of Article 2.4.2 does not support such a conclusion, as it does not require the weight averaging of the results of the third methodology. Moreover, what is the Panel actually saying? That there are only two methodologies, weighted average normal value to weighted average export price (method 1) and transaction to transaction (method 2). The third methodology is actually the first methodology, but for the fact that it permits zeroing. This is clearly a conclusion which is not supported by the text of the AD Agreement, nor by its history. Canada was right in pointing to the various ways in which this third methodology can be used to deal with the problem of 'targeted' dumping leading to results different from those obtained on the basis of the first methodology. The Agreement provides for two symmetrical and one asymmetrical methodology for establishing margins of dumping.

Second, it seems that, while zeroing is not necessary to give meaning to the third methodology, the argument could be made that zeroing may be permitted under this third methodology as it plays a different role and has a completely different effect compared to the effect of zeroing in the context of the first or second methodology.

The Panel in *US – Zeroing (EC)* considered that Article 2.4.2, by allowing for a third and asymmetrical method for establishing a margin of dumping, necessarily permits zeroing. So, the Panel concluded, zeroing cannot be considered to be unfair under all circumstances per se, and the Article 2.4 requirement to make a fair comparison does not therefore prohibit zeroing.[159]

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159 Panel Report, *US – Zeroing (EC)*, para. 7.266.

This is a particularly interesting remark, because, if this third methodology indeed permits zeroing, it seems that the zeroing in question is actually used to soften the blow for the exporter and will lead to a lower dumping margin than would otherwise have been the case. Let us explain.

The first two (ordinary) comparison methodologies of Article 2.4.2 are symmetrical in nature, but will not necessarily lead to the same result. In the first (weighted average to weighted average) comparison, all the normal value transactions are averaged, and all the export sales are averaged to compare a weighted average normal value to a weighted average export price. In the second, the transaction to transaction methodology, the export sales are compared to domestic transactions which are closest in time to these export sales. The margins of dumping so found are then to be averaged to calculate the product's dumping margin. As a consequence, it may well be that not all domestic sales transactions have been taken into account, and the dumping margin is thus based on a sub-set of all sales. However, once all relevant sales transactions have been determined, all such transactions are to be included in the calculation of a margin. Under the third (exceptional) asymmetrical methodology, a weighted average normal value may be compared to prices of individual export transactions, if certain conditions are met and if properly explained. What this provision deals with is so-called 'targeted' dumping, that is, dumping during a particular period of time, to a particular importer or a particular region. A plain reading of this provision leads to the conclusion that, under these exceptional circumstances, an authority is entitled to focus on only these export sales made to that particular customer or region, or during that particular period. For example, if a pattern of dumping is found during the month of August, it would seem possible under this provision to take the export prices of the August transactions, which are then compared to the weighted average of normal value during a similar period of time. There is no need for zeroing. But by focusing on only a certain and limited number of sales, for example during a particular period of time, and by comparing individual export prices to an average, it seems that dumping margins may well be established which would not have been found to exist if all transactions for the whole year had to be taken into account. Rather than limit the exports transactions in this manner, some investigating authorities include all export transactions in the calculation. Assuming that the situation is one of targeted dumping, this will most likely lead to a high number of export transactions being included which are priced above normal value. However, these export transactions are then being zeroed, as otherwise these high priced export sales would mask the existence of targeted dumping. Compared to what the third methodology of Article 2.4.2 actually allows for, it is clear that this type of zeroing is in the exporter's interest as the dumped sales are placed against the background of a possible high number of other export sales which were not

dumped. In more technical terms, all export transactions are included, and even if zeroed, the weighted average dumping margin will still be lower than if those export transactions had been completely excluded from the calculation, as Article 2.4.2 seems to permit. Zeroing is thus not necessary to make the third methodology of Article 2.4.2 work, but it may be permitted for an obvious reason: it is beneficial to the exporter's interests. That precisely this implicit permission to zero in this particular context is used as an argument in favour of a conclusion that zeroing is not unfair per se, is surprising to say the least.

Zeroing in the context of a weighted average to weighted average comparison or in a transaction to transaction comparison implies that certain transactions which are included in the set of relevant transactions are subsequently, when averaging the results of all these comparisons, adjusted so that, inevitably, a higher margin of dumping will be found to exist than if the authority had not been zeroing. As the Appellate Body correctly pointed out in an often forgotten statement in *US – Corrosion Resistant Steel Sunset Review*, and repeated in its report on *US – Softwood Lumber V, Article 21.5*, whether in an original investigation or in a review in which dumping margins are established, such as is the case in the US retrospective duty assessment system, zeroing is inherently unfair because it inflates the margin of dumping. In the third methodology, it could be argued, an authority may zero for one simple reason: it benefits the exporter. And that is a very relevant remark. The Panel in *US – Zeroing (EC)* may have been correct in pointing out that one method is not more fair than the other simply because one leads to a lower margin than the other. What is important, though, is that this AD Agreement imposes disciplines on the investigating authority when conducting AD investigations and calculating AD margins. If the authority wants to be more forgiving to the exporter than what the AD Agreement allows for, there is no inconsistency in light of the AD Agreement's overall object and purpose.[160]

[160] The old French maxim, 'Qui peut le plus, peut le moins' seems to capture such behaviour.

3. Section II: injury and causality analysis

A GENERAL INTRODUCTION

A finding of dumping alone does not suffice for the imposition of an anti-dumping measure. Only in the case where the dumping is causing injury to the domestic industry is a WTO Member entitled to impose anti-dumping duties. So, assuming dumping has been proven, an investigating authority will also have to demonstrate that, as a result of dumped imports, injury to its domestic industry producing the like product has been caused.

The AD Agreement does not condition the initiation of an injury analysis on a prior finding of dumping. In practice the two 'legs' of the analysis, that is, the investigation regarding dumping margins and the investigation regarding the resulting injury, take place in parallel. An investigating authority has to demonstrate, by looking at indicators specifically reflected in the AD Agreement that the domestic industry producing the like (to the allegedly dumped) product has been injured (Art. 3.2 and 3.4 AD) as a result of the dumped imports (Art. 3.5 AD). To do that, the investigating authority must abide by the same standards of objective examination, as reflected below.

The term 'injury' is used in the AD Agreement to refer to a situation of current material injury, threat of future injury and the material retardation in the establishment of an industry. The latter concept should not be confused with the infant industry situation. Rather, what the Agreement is referring to is a situation where an industry was about to be established, but its establishment was materially retarded because of the dumped imports. Once the industry is established, the domestic producers forming part of this new industry cannot rely on this meaning of the term 'injury' anymore.[1]

The AD Agreement does not contain a real definition of the term 'injury', unlike the Safeguards Agreement for example, which defines 'serious injury'

[1] It has been proposed to clarify the meaning of the concept of 'material retardation' by providing a clear definition of the terms 'establishment of an industry' and by defining factors for the assessment of material retardation. TN/RL/GEN/122.

as a 'significant overall impairment in the position of a domestic industry'.[2] In general, the AD Agreement provides that a finding of injury is to involve an objective examination of the volume and price effects of dumped imports as set forth in Article 3.2 AD Agreement, as well as the consequent impact of these dumped imports on domestic producers of like products, as specified in Article 3.4 AD Agreement. A determination of threat of injury will require a similar examination of the impact of the dumped imports, but supplemented by a 'threat' specific analysis, as set forth in Article 3.7 AD Agreement.[3] We

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[2] Article 4.1 (a) Safeguards Agreement. A proposal has been made in the course of the negotiations to introduce a similar definition which would focus on an overall, measurable and important deterioration of the industry's operating performance. By using the term 'deterioration', the proponents want to emphasize that there can only be 'injury' if the state of the domestic industry (its operating performance) in the most recent year is worse when compared to the previous years. In so doing they want to exclude the possibility of an injury finding in the case of a chronically bad performing industry or an industry which could have performed even better absent the dumped imports. TN/RL/GEN/28, TN/RL/GEN/38.

[3] Panel Report, *Mexico – Corn Syrup*, para. 7.126:

> While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the 'consequent impact' of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the 'consequent impact' of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.

The Panel thus concluded that an authority is to examine all the relevant factors as required by Article 3.4 in order to be able to make a finding of threat of injury:

> In sum, we consider that Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

Panel Report, *Mexico – Corn Syrup*, para. 7.131.

will come back to the threat-specific requirements after having discussed the basic requirements for a proper injury and causation analysis.

B FINDINGS OF INJURY MUST BE BASED ON POSITIVE EVIDENCE AND INVOLVE AN OBJECTIVE EXAMINATION

1 Positive Evidence

Art. 3.1 AD requests WTO Members to base their findings, with respect to injury, on *positive evidence*. The Appellate Body in its report on *US – Hot-Rolled Steel* considered that the requirement of positive evidence implies that the evidence must be 'objective and verifiable'.[4] In the words of the Appellate Body, 'The term "positive evidence" relates, in our view, to the quality of the evidence that authorities may rely upon in making a determination. The word "positive" means, to us, that the evidence must be of an affirmative, objective and verifiable character, and that it must be credible.'[5]

According to the Panel in *Mexico – Anti-Dumping Measures on Rice*, 'positive evidence is in the first place evidence which is material to the case at hand, in other words it is to be relevant and pertinent with respect to the issue to be decided. It is positive which make it 'evidence' as opposed to unrelated facts. In addition, it must have the characteristics of being inherently reliable and creditworthy'.[6] In certain circumstances, an authority might have to rely on certain assumptions or draw certain inferences. But, as the Appellate Body pointed out in *Mexico – Anti-Dumping Measures on Rice*, 'these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified'.[7]

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[4] Although positive evidence is thus evidence that is *verifiable*, it does not imply, according to the Appellate Body in *Thailand – H-Beams*, that only evidence disclosed to or discernible by the parties to the investigation can be considered to constitute 'positive' evidence. Appellate Body Report, *Thailand – H-Beams*, para. 107.

[5] Appellate Body Report, *US – Hot-Rolled Steel*, para. 192. This view has since been repeated on numerous occasions by Panels dealing with claims under Article 3.1. See, for example, Panel Report, *EC – Tube or Pipe Fittings*, para. 7.226.

[6] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.55.

[7] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 204. The Appellate Body thus upheld the Panel's finding of a violation:

> In this case, the Panel found violations of Articles 3.1 and 3.2 of the *Anti-Dumping Agreement* because important assumptions on which *Economía* was relying in its methodology were 'unsubstantiated'. An investigating authority that uses a method-

In other words, the absence of hard data is not a justification for using *unsubstantiated* assumptions.[8]

Thus, when, in an investigating authority's methodology, a determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified.

2 Objective Examination

Article 3.1 also requires that an injury determination involves an *objective examination*, which according to the Appellate Body in *US – Hot-Rolled Steel* requires that the effects of the dumped imports be investigated in an objective manner, without favouring the interests of any interested party in the investigation:

> While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objec-

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> ology premised on unsubstantiated assumptions does not conduct an examination based on positive evidence. An assumption is not properly substantiated when the investigating authority does not explain why it would be appropriate to use it in the analysis. The assumptions on which *Economía* relied in its methodology played an important role in its reasoning. In the Final Determination, *Economía* did not explain why these assumptions were appropriate and credible in the analysis of the volume and price effects of the dumped imports, or how they would contribute to providing an accurate picture of the volume and price effects of the dumped imports. We therefore agree with the Panel that the assumptions on which *Economía* was relying in its methodology were not properly substantiated.

Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 205.

[8] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, footnote 228: 'The justification provided by *Economía* for resorting to assumptions was the lack of hard data. This is not a sufficient explanation because, by definition, assumptions are used in the absence of hard evidence, as surrogates for such data. Instead, we would expect an investigating authority to substantiate the reasonableness and credibility of particular assumptions.'

> tive examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. (Footnotes omitted)[9]

One may actually wonder what the value added of this requirement in Article 3.1 of an objective examination based on positive evidence really is, as it seems difficult to argue that in a *dumping* determination, where there is no provision parallel to Article 3.1, the investigating authority would not be required to conduct an objective examination based on positive evidence. As Article 17.6 (i) AD Agreement clearly provides, a Panel will review the determination of the authority to assess whether an objective and unbiased investigating authority could have reasonably drawn the conclusions it did from the facts properly established by the authority. The obligation for an investigating authority to conduct an objective and unbiased examination is thus one which is not particular to the injury determination.

C SUBSTANCE OF AN INJURY DETERMINATION

Article 3.1 AD Agreement sets forth the 'overarching obligation'[10] that the injury determination involves an objective examination based on positive evidence of (i) the volume of dumped imports, (ii) the price effects of dumped imports and (iii) the consequent impact of dumped imports on domestic producers of the like product. This obligation is further detailed in Articles 3.2, relating to the volume of dumped imports and their price effects and 3.4 concerning the overall impact on the state of the domestic industry.

In fact, it seems that the first two aspects of the injury analysis as required by Article 3.1 are not really informative of whether there is injury to the

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[9] Appellate Body Report, *US – Hot-Rolled Steel*, para. 193. Also, Panel Report, *EC – Tube or Pipe Fittings*, para. 7.226.

[10] In *Thailand – H-Beams*, the Appellate Body stated that it considered Article 3.1 as an 'overarching provision' that informs the more detailed obligations in the succeeding paragraphs of Article 3:

> Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2) . . . The focus of Article 3 is thus on substantive obligations that a Member must fulfil in making an injury determination.

Appellate Body Report, *Thailand – H-Beams*, para. 106, as further referred to by the Appellate Body in *EC – Bed Linen (Article 21.5 – India)*, para. 110.

domestic industry. An examination of the volume of dumped imports and their price effects relate rather to the question of causation. Article 3.4 and the requirement to evaluate all relevant factors and indices having a bearing on the state of the domestic industry, on the other hand, is the essence of the injury analysis.[11]

1 Volume of Dumped Imports

Article 3.2 requires that an authority consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member. It thus requests from an investigating authority to consider whether a change in the volume of dumped imports has occurred, which justifies the imposition of AD duties.

(a) No increased dumped imports, no injury?

An initial question seems to be whether such a finding should be regarded as an additional requirement for the lawful imposition of AD duties: in other words, should an investigating authority be requested to prove, beyond dumping, injury and causality, a (relative or absolute) increase in dumped imports as well? Panels and the AB have not gone so far. To be sure, they have not reduced Art. 3.2 AD to a mere procedural requirement altogether. But they definitely have accepted the view that an investigating authority can still lawfully impose AD duties, even if there has been no absolute or relative

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[11] This seemed to have been the view of the Panel on *Mexico – Corn Syrup* as well. The Panel considered that in a threat of injury analysis the authority cannot simply examine the 3.7 threat factors but must also examine the impact of the dumped imports on the industry as set forth in Article 3.4 in order to assess whether material injury is imminent. The Panel did not require an additional examination of the Article 3.2 volume and price effects of the dumped imports:

> In sum, we consider that Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

Panel Report, *Mexico – Corn Syrup*, para. 7.131.

increase in dumped imports.[12] The Panel Report on *EC – Countervailing Measures on DRAM Chips* seems to subscribe to this point of view when dealing with the identical provision in the SCM Agreement in a countervailing duty context.[13] Similarly, the Panel in *Thailand – H-Beams* was of the view that Article 3.2 required an authority to 'consider' whether there had been a significant increase, rather than requiring it to make an explicit finding or determination as to whether the increase was 'significant'.[14] Critically, the AB in its report on *EC – Tube or Pipe Fittings* accepted this approach in explicit manner:

> Brazil's thesis is further predicated on the assumption that if no significant increase in dumped imports (either in absolute terms or relative to production and consumption in the importing Member) were found originating from a specific country under Article 3.2, then those imports would have to be excluded from cumulative assessment under Article 3.3. (Brazil's response to questioning at the oral hearing.) However, we find no support for this argument in the text of Article 3.2 itself: significant increases in imports have to be 'consider[ed]' by investigating authorities under Article 3.2, but the text does not indicate that in the absence of such a significant increase, these imports could not be found to be causing injury.[15]

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[12] Of course, since Art. 3.2 AD does not request of investigating authorities to explain why an increase has taken place, this requirement, especially if we are talking *relative* increase, will be met in a large number of cases.

[13] The Panel considered that 'the consideration of the volume of subsidized imports under Article 15.2 is not alone determinative in an injury determination. Rather, it forms part of the overall assessment of injury to the domestic industry and is conducted so as to provide guidance to the investigating authority in the context of this assessment of injury and causation'. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.290. For a similar view in respect of the price undercutting analysis, see Panel Report, *EC – Tube or Pipe Fittings*, para. 7.278:

> In this respect, we observe that whereas the dumping margin is alone determinative in a dumping determination, price undercutting is not alone determinative in an injury determination; rather, it forms part of the overall assessment of injury to the domestic industry and is conducted so as to provide guidance to the investigating authorities in the context of this assessment of injury and causation. While this certainly gives no basis or justification for an arbitrary or non-even-handed examination, particularly in light of the fact that the Agreement contains no specific conditions or criteria or methodology, it permits an investigating authority a degree of discretion in carrying out the price undercutting assessment.

[14] Panel Report, *Thailand – H-Beams*, para. 7.161. The Panel noted that 'The *Concise Oxford Dictionary* defines "consider" as, *inter alia*: "contemplate mentally, especially in order to reach a conclusion"; "give attention to"; and "reckon with; take into account".' We therefore do not read the textual term 'consider' in Article 3.2 to require an explicit 'finding' or 'determination' by the investigating authorities as to whether the increase in dumped imports is 'significant'.

[15] Appellate Body Report, *EC – Tube or Pipe Fittings*, footnote 114.

One would expect that, although in principle possible, a lawful imposition of AD duties in the case of no absolute or relative increase in dumped imports would be more difficult, precisely because of this absence. Indeed, it seems that an increase in imports will be one of the first and most obvious consequences of the dumping practice which makes the imported products more appealing to consumers in the importing country. If the dumping has not even had the effect of increasing imports, it will be highly unlikely that any other significant effect of the dumping will be found.

(b) An increase in 'dumped imports'

In order to comply with Article 3.2, an authority is to consider whether there has been a significant increase in *dumped* imports. In other words, the authority is not to examine whether imports in general have increased in any way, but rather whether *dumped* imports have increased significantly in absolute terms or relative to production or consumption.[16]

Dumped imports are imports from those sources which were found to have been dumping above *de minimis* level.[17] All imports from these companies may be included in examining whether imports from these sources have increased.[18] Imports from sources not found to have been dumping are not to

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[16] The Agreement does not define the term 'significant'. In the view of the Panel in *EC – Countervailing Measures on DRAM Chips*, interpreting the identical requirement in Article 15.2 SCM Agreement, 'the ordinary meaning of "significant" encompasses "important", "notable", "major", as well as "consequential", which all suggest something that is more than just a nominal or marginal movement'. Panel Report, *EC – Countervailing Measures on DRAM Chips* para. 7.307.

[17] For an explanation of this term 'de minimis' see below.

[18] In *EC – Bed Linen*, the Panel rejected the argument that 'dumped imports' refers to only those transactions for which the export price was lower than the margin of dumping. The Panel was of the view that the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters, and that all imports from those producers/exporters found to have been dumping could be considered as 'dumped imports' for the purpose of an injury analysis:

> That is, the determination of dumping is made on the basis of consideration of transactions involving a particular product from particular producers/exporters. If the result of that consideration is a conclusion that the product in question from particular producers/exporters is dumped, we are of the view that the conclusion applies to all imports of that product from such source(s), at least over the period for which dumping was considered. Thus, we consider that the investigating authority is entitled to consider all such imports in its analysis of 'dumped imports' under Articles 3.1, 3.4, and 3.5 of the AD Agreement.

Panel Report, *EC – Bed Linen*, para. 6.136. This view was endorsed by the Appellate

be included.[19] So, if three companies (A, B and C) have been examined and A and B were found to have been dumping above *de minimis*, the authority will examine whether imports from A and B increased significantly. Imports from C are not relevant and should not be included in the calculation. This implies that it needs to be established first which companies were dumping. So, in effect, while the Agreement states that the dumping and injury analysis should take place simultaneously, parts of the injury analysis, such as this one, require a prior determination of dumping.

A problem arose in the context of an investigation that was based on only a sample of exporters. The practice of sampling is explicitly allowed by Article 6.10 AD Agreement, and it implies that not all exporters will be investigated. When using a sample, an authority will examine only the exports from these sampled companies and it will determine a dumping margin for these sampled companies only. Still, a duty may be imposed on both sampled and non-sampled exporters. Article 9.4 limits the maximum amount of the duty that can be imposed on non-sampled exporters to the weighted average of the dumping margins of the sampled exporters, excluding zero and *de minimis* margins, as well as margins established on the basis of facts available. How to deal with imports from these non-sampled and therefore non-investigated exporters in an injury analysis when examining whether the volume of *dumped* imports increased significantly? Can such imports be considered to have been dumped because a duty may be imposed on such imports by virtue of Article 9.4? In *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body reversed a finding of the Panel which had accepted the EC argument that non-sampled imports may be assumed to have been dumped as an anti-dumping duty may be imposed on such imports. According to the Appellate Body, the requirement to conduct an objective examination of the volume of dumped imports does not permit an authority to assume that all imports from non-examined producers are dumped, because 'this approach makes it "more likely [that the investigating authorities] will determine that the domestic industry is injured" ',[20] and,

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Body in *EC – Bed Linen (Article 21.5 – India)* which stated that 'if a producer or exporter is found to be dumping, all imports from that producer or exporter may be *included* in the volume of dumped imports, but, if a producer or exporter is found *not* to be dumping, all imports from that producer or exporter must be *excluded* from the volume of dumped imports'. Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 115. Also see Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.303.

[19] Appellate Body Report, *EC – Bed Linen (Article 21.5 – India*), para. 115. A proposal has been submitted to clarify Article 3's reference to dumped imports by codifying the case-law referred to above. TN/RL/GEN/65, TN/RL/GEN/65/Rev.1.

[20] Appellate Body Report, *US – Hot-Rolled Steel*, para. 196.

therefore, it cannot be 'objective'.[21] In the view of the Appellate Body, Article 9.4 does not provide justification for considering *all* imports from *non*-examined producers as *dumped* for purposes of Article 3.[22] According to the Appellate Body, 'the right to impose a certain maximum amount of anti-dumping *duties* on imports attributable to *non*-examined producers under Article 9.4 cannot be read as permitting a derogation from the express and unambiguous requirements of paragraphs 1 and 2 of Article 3 to determine the *volume* of dumped imports – including dumped import volumes attributable to *non*-examined producers – on the basis of 'positive evidence' and an 'objective examination'.[23] The Appellate Body recognized that there is a right to conduct a limited examination in the circumstances described in the second sentence of Article 6.10, and that paragraphs 1 and 2 of Article 3 must, accordingly, be interpreted in a way that permits investigating authorities to satisfy the requirements of 'positive evidence' and an 'objective examination' without having to investigate each producer or exporter individually.[24] The Appellate Body did not explicitly state how to determine the volume of dumped imports in the case of a sample, but indicated that it was difficult to perceive of any other way than to do this on the basis of some extrapolation of the evidence relating to the investigated producers/exporters.[25]

2 Price Effect of Dumped Imports

Apart from a volume analysis, the Agreement also requires an authority to examine the effect that dumped imports have had on prices. In particular, Article 3.2 provides that an authority shall 'consider'[26] whether there has been a significant price undercutting by the dumped imports as compared with the price of the like product in the importing Member, or whether the effect of dumped imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. In sum, it needs to be examined whether dumped imports were undercutting prices, or whether such imports had the effect of depressing or suppressing prices for the like product.

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21 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 132.
22 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 127.
23 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 124.
24 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 117.
25 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 137.
26 Similar to the views held by Panels in respect of the volume analysis under Article 3.2 AD Agreement, the Panel in *Korea – Certain Paper* considered that Article 3.2 required an authority to 'consider' whether there had been a significant price effect, rather than requiring it to make an explicit finding of such effects or as to whether the effect was 'significant'. Panel Report, *Korea – Certain Paper*, paras 7.242 and 7.253.

This requirement actually relates to the price of the dumped imports on the one hand, and the evolution in prices for domestic like products on the other. It appears that Article 3.2 requires an authority to examine not only whether prices were depressed or suppressed during the period of investigation, but also whether it was the dumped imports which were causing this effect. However, the Panel in *EC – Countervailing Measures on DRAM Chips* refused to read a causation analysis requirement into Article 15.2 which is the countervail equivalent of Article 3.2:

> In our view, Article 15.2 of the *SCM Agreement* requires an investigating authority to consider whether there has been any significant price undercutting by the subsidized imports. Article 15.2 does not require an investigating authority to establish what caused the price undercutting.[27,28]

Article 3.2 does not set forth any particular methodology for conducting a price analysis. Panels have thus rejected arguments that the 3.2 analysis is to take place at a particular level of trade,[29] on a quarterly basis,[30] or over a particular period of time.[31]

More specifically with regard to the price effect analysis, the Panel in *EC – Tube or Pipe Fittings* rejected the suggestion that an investigating authority must base its price undercutting analysis on a methodology that offset undercutting prices with 'overcutting' prices and calculate one single margin of undercutting based on an examination of every transaction involving the product concerned and the like product. According to the Panel, to do so would have the result of requiring the investigating authority to conclude that no price undercutting existed when, in fact, there might be a considerable number

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[27] This does not mean that the considerations raised by Korea can be disregarded by the investigating authority. In our view, if there are other producers/exporters which are selling at prices lower than Hynix's, because of the way the market operates, their cost structures, or any other reason, then the injurious effects of these factors should not be attributed to the subsidized imports from Hynix. Thus, this information is highly relevant to a proper causality assessment under Article 15.5 of the *SCM Agreement*.

[28] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.328. This seems to be in contradiction to the views expressed by Panels in the context of a similar examination of price effects in the framework of an investigation into the adverse effects of subsidies. For a more detailed explanation, we refer to our section on the Subsidies and Countervailing Measures Agreement.

[29] Panel Report, *Egypt – Steel Rebar*, para. 7.73. Turkey had argued that a price undercutting analysis must be made on a delivered-to-the-customer basis, as it is only at that level that any such undercutting can influence customers' purchasing decisions. Panel Report, *Egypt – Steel Rebar*, para. 7.70.

[30] Panel Report, *Thailand – H-Beams*, para. 7.168.

[31] Panel Report, *Guatemala – Cement II*, para. 8.266.

of sales at undercutting prices which might have had an adverse effect on the domestic industry.[32] This would not be in line with the purpose of the price undercutting analysis:

> One purpose of a price undercutting analysis is to assist an investigating authority in determining whether dumped imports have, through the effects of dumping, caused material injury to a domestic industry. In this part of an anti-dumping investigation, an investigating authority is trying to discern whether the prices of dumped imports have had an impact on the domestic industry. The interaction of two variables would essentially determine the extent of impact of price undercutting on the domestic industry: the quantity of sales at undercutting prices; and the margin of undercutting of such sales. Sales at undercutting prices could have an impact on the domestic industry (for example, in terms of lost sales) irrespective of whether other sales might be made at prices above those charged by the domestic industry. The fact that certain sales may have occurred at 'non-underselling prices' does not eradicate the effects in the importing market of sales that *were* made at underselling prices.[33]

3 Factors Evidencing the Impact of the Dumped Imports (Injury Indicators)

(a) All factors reflected in Art. 3.4 AD must be examined

Art. 3.4 AD reads as follows:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

A number of Panels[34] and the Appellate Body[35] held that Article 3.4 contains

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[32] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.276. The Panel was of the view that there existed no 'specific provision concerning time periods in the Agreement; an importing Member may investigate price effects of imports in an injury investigation period which may be different from the IP for dumping. These considerations do not, of course, diminish the obligation of an investigating authority to conduct an unbiased and even-handed price undercutting analysis'.

[33] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.277.

[34] *See* e.g., Panel Report, *Egypt – Steel Rebar*, para. 7.36; Panel Report, *EC – Bed Linen*, para. 6.159; Panel Report, *Mexico – Corn Syrup*, para. 7.128; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.304.

[35] *See* e.g., Appellate Body Report, *Thailand – H-Beams*, para. 125.

a mandatory (rather than merely an illustrative) list of factors and have considered that all of the factors explicitly listed in Article 3.4 must be addressed in every investigation. That is, although the list reflected in Art. 3.4 AD is indicative,[36] an investigating authority, before deciding whether injury has occurred, must have examined at least all factors included in the body of this provision. In the words of the AB in its report on *Thailand – H-Beams*:

> The Panel concluded its comprehensive analysis by stating that 'each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities . . .'. We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the Anti-Dumping Agreement.[37]

The AB, in its report on *EC – Tube or Pipe Fittings*, held the view that Art. 3.4 AD did not impose an obligation as to the manner in which the mentioned factors should be examined. As a result, even though, in its decision to impose duties, the European Communities did not explicitly refer to one of the factors of Article 3.4, it sufficed for the purposes of consistency with Art. 3.4 AD that it had *implicitly* examined it.[38] In the case at hand, the European Communities had not reflected in its order a separate examination of 'growth', a factor listed in Art. 3.4 AD. It stemmed, however, from the record, that the investigating authority had taken into account the said factor:

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[36] The explicit wording in the last sentence of Art. 3.4 AD leaves no room for any other interpretation.

[37] Appellate Body Report, *Thailand – H-Beams*, para. 125.

[38] In previous cases, Panels had expressed the view that the consideration of the factors in Article 3.4 must be apparent in the determination so the Panel may assess whether the authority acted in accordance with Article 3.4 at the time of the investigation. See Panel Report, *Guatemala – Cement II*, para. 8.283. Also see Panel Report, *EC – Bed Linen*, para. 6.162. In *Egypt – Steel Rebar*, the Panel emphasized the important role of the written record:

> If there is no such written record – whether in the disclosure documents, in the published determination, or in other internal documents – of how certain factors have been interpreted or appreciated by an investigating authority during the course of the investigation, there is no basis on which a Member can rebut a *prima facie* case that its 'evaluation' under Article 3.4 was inadequate or did not take place at all. In particular, without a written record of the analytical process undertaken by the investigating authority, a panel would be forced to embark on a *post hoc* speculation about the thought process by which an investigating authority arrived at its ultimate conclusions as to the impact of the dumped imports on the domestic industry. A speculative exercise by a panel is something that the special standard of review in Article 17.6 is intended to prevent.

Panel Report, *Egypt – Steel Rebar*, para. 7.49.

> Accordingly, because Articles 3.1 and 3.4 do not regulate the *manner* in which the results of the analysis of each injury factor are to be set out in the published documents, we share the Panel's conclusion that it is not required that in every anti-dumping investigation a separate record be made of the evaluation of each of the injury factors listed in Article 3.4. Whether a panel conducting an assessment of an anti-dumping measure is able to find in the record sufficient and credible evidence to satisfy itself that a factor has been evaluated, even though a separate record of the evaluation of that factor has not been made, will depend on the particular facts of each case. Having said this, we believe that, under the particular facts of this case, it was reasonable for the Panel to have concluded that the European Commission addressed and evaluated the factor 'growth'.
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> Having regard to the nature of the factor 'growth', we believe that an evaluation of that factor necessarily entails an analysis of certain other factors listed in Article 3.4. Consequently, the evaluation of those factors could cover also the evaluation of the factor 'growth'. This relationship was recognized by Brazil during the oral hearing, when we inquired about the nature of the factor 'growth' and whether it may be reflected in the performance of certain other factors listed in Article 3.4. (Footnote omitted)[39]

We should not, however, understand the previous passage as suggesting that the quality of review can be superficial. Although Art. 3.4 AD does not specify the manner in which the factors mentioned will be examined, as the Panel in its report on *EC – Tube or Pipe Fittings* makes clear, a formalistic 'check' of all Art. 3.4 AD factors does not suffice:

> The Agreement requires that each listed Article 3.4 factor be addressed. As to the manner in which each factor must be addressed, it is clear that a formalistic 'checklist' approach – which would require that each factor be explicitly and independently addressed in each determination on the basis of the precise terms used in the relevant provision – would be highly desirable in that it would increase an investigating authority's (and a panel's) confidence that all factors were considered. However, we find no such obligation in the text of the provision and consequently do not believe that this is a required approach to analysis under Article 3.4. The provision requires substantive, rather than purely formal, compliance. The requirements of this provision will be satisfied where it is at least apparent that a factor has been addressed, if only implicitly. No separate record was made of the 'evaluation of actual and potential negative effects on . . . growth'. The European Communities itself does not contest this. However, the European Communities did address, in the course of the investigation, certain other listed factors, including sales, profits, output, market share, productivity, return on investment and capacity utilisation. For each of these factors, the European Communities traced developments from 1995 through to the end of the IP. This examination touched upon the performance and relative diminution or expansion of the domestic industry. For example, the Provisional Regulation (recital 150) indicates that there was a decrease in EC production in 1995 and 1996, and an increase between 1996 and the IP, while EC

[39] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras 161–2.

> production capacity, sales volume, profitability and market share decreased. The facts on the record of the investigation and taken into account in the EC injury analysis indicate to us that, in its examination of other injury factors – in particular, sales, profits, output, market share, productivity and capacity utilisation – satisfy us that, in addressing developments in relation to these other factors in the manner that it did in this particular investigation, the European Communities implicitly addressed the factor of 'growth'.[40]

(b) The need *to evaluate* all relevant factors

In the same *EC – Tube or Pipe Fittings* report, the Panel had the opportunity to further clarify this point by explaining how it understands the term 'evaluate' which appears in Art. 3.4 AD:

> The term 'evaluate' is defined as: 'To work out the value of . . .; To reckon up, ascertain the amount of; to express in terms of the known;' 'To determine or fix the value of; To determine the significance, worth of condition of usually by careful appraisal or study.' These definitions reveal that an 'evaluation' is a process of analysis and assessment requiring the exercise of judgment on the part of the investigating authority. It is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere checklist. As the relative weight or significance of a given factor may naturally vary from investigation to investigation, the investigating authority must therefore assess the role, relevance and relative weight of each factor in the particular investigation. Where the authority determines that certain factors are not relevant or do not weigh significantly in the determination, the authority may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors. The assessment of the relevance or materiality of certain factors, including those factors that are judged to be not central to the decision, must therefore be at least implicitly apparent from the determination. Silence on the relevance or irrelevance of a given factor would not suffice. Moreover, an evaluation of a factor, in our view, is not limited to a mere characterisation of its relevance or irrelevance. Rather, we believe that an 'evaluation' also implies the analysis of data through placing it in context in terms of the particular evolution of the data pertaining to each factor individually, as well as in relation to other factors examined.[41]

In sum, Article 3.4 requires the investigating authority to carry out a reasoned analysis and a thorough evaluation of the state of the industry. The obligation to analyse the mandatory list of 15 factors under Article 3.4 is thus not a mere

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[40] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.310.

[41] Panel Report, *EC – Tube or Pipe Fittings*, para. 7. 314. Also see Panel Report, *Thailand – H-Beams*, para. 7.236; Panel Report, *Korea – Certain Paper*, para. 7.272. The Panel in *Egypt – Steel Rebar* considered that it does not suffice to simply gather data for all factors listed in 3.4, an authority must also 'analyze and interpret those data'. Panel Report, *Egypt – Steel Rebar*, para. 7.44.

'checklist obligation' consisting of a mechanical exercise to make sure that each listed factor has somehow been addressed by the authority. It is important in this respect that an explanation of why factors which would seem to lead in the opposite direction (that is, no material injury) do not, overall, undermine the conclusion of material injury.[42]

The last sentence of Art. 3.4 AD makes it clear that the list is not exhaustive,[43] and that it is not necessarily the case that one or several of the factors included in this provision give guidance as to the injury caused. In other words, not each and every injury factor must be indicative of injury and it is thus not necessary that all factors show negative trends.[44] As the Panel in *EC*

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[42] The views expressed by the Appellate Body in the context of the similar obligation contained in Article 4.2 (a) of the Safeguards Agreement in *US – Lamb* are obviously relevant in this respect:

> Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.

Appellate Body Report, *US – Lamb*, para. 106.

[43] In the words of the Appellate Body in *US – Hot-Rolled Steel*:

> Article 3.4 lists certain factors which are deemed to be relevant in every investigation and which must always be evaluated by the investigating authorities. However, the obligation of evaluation imposed on investigating authorities, by Article 3.4, is not confined to the listed factors, but extends to 'all relevant economic factors'. (Footnote omitted)

Appellate Body Report, *US – Hot-Rolled Steel*, para. 194.

[44] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.213. A proposal has been tabled in the course of the negotiations to add an illustrative list of benchmarks for determinations of material injury. It is proposed to introduce a rebuttable presumption that there is no material injury if the domestic industry's operating profits have increased and the market share has been maintained or increased during the period of investigation. In such circumstances, it is suggested, the authorities shall not find material injury unless there is sufficient justification to overcome the presumption. TN/RL/GEN/42. More in general, it has been proposed that the focus of the injury analysis should be on operating performance. The proponents suggest that it be clarified that injury has to be assessed by analysing production/sale-related aspects of an industry's condition, as import competition affects the production, sale volume and prices of the domestic industry. Financial performance, it is suggested, should not be seen as an indicator in determining the existence of injury as it is not necessarily a result of production and sales of the like product alone. TN/RL/GEN/38.

– *Bed Linen (Article 21.5 – India)* found, 'the analysis and conclusions must consider each factor, determine the relevance of each factor, or lack thereof, to the analysis, and consider the relevant factors together, in the context of the particular industry at issue, to make a reasoned conclusion as to the state of the domestic industry'.[45]

(c) No need for a causation analysis under Article 3.4

The list of 'factors' in Article 3.4 seems to combine both indicators of the state of the domestic industry (such as sales, profits, output, market share, productivity, return on investments and capacity utilization) and factors which may be relevant in resolving the causation question (such as 'factors affecting domestic prices' or the 'magnitude of the margin of dumping'). The Panel in *Egypt – Steel Rebar* considered that Article 3.4 does not require a full causation analysis, which is provided for in Article 3.5, and stated that, 'as a whole, these factors are more in the nature of effects than causes'.[46] The Panel in *EC – Tube or Pipe Fittings* took a similar view and thus rejected a number of Brazilian arguments relating to the 'factors affecting domestic prices' under Article 3.4 as being more part of a causation analysis under Article 3.5:

> Article 3.4 requires an evaluation of 'factors affecting domestic prices' (not 'all' factors affecting domestic prices). We consider that this requirement is inextricably linked to the requirements of Articles 3.1 and 3.2 to conduct an objective examination of the effects of dumped imports on prices in the domestic market for like products, which must involve a consideration of whether there has been significant price undercutting or price depression or suppression. We derive from this that an investigating authority must conduct a price analysis as required by Articles 3.1 and 3.2 (which contains no explicit requirement for an analysis of terms of sale, patterns of trade or cost structures). We see no basis in the text of the Agreement for Brazil's argument that would require an analysis of factors affecting domestic prices beyond an Article 3.2 price analysis, and observe that certain of the factors potentially affecting price may be more in the way of causal factors to be analysed under Article 3.5, rather than under 3.4. In our view, Article 3.4 focuses on factors *indicative* of the state of the industry, or of the *effects* on the industry, rather than factors *having an effect* thereon. Thus, whether or not an evaluation of causal factors is adequate is matter to be examined under Article 3.5. (Footnote omitted)[47]

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45 Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.213. Also see Panel Report, *Thailand – H-Beams*, para. 7.236 requiring the authority to provide a 'persuasive explanation as to how the evaluation of relevant factors led to the determination of injury'.

46 Panel Report, *Egypt – Steel Rebar*, para. 7.62.

47 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.335.

If upon consideration of the injury factors an authority comes to the conclusion that the domestic industry is not suffering current material injury, it may continue to examine whether there is nevertheless a threat of such injury occurring in the near future.

4 Threat of Injury

As we stated earlier, the term 'injury' in the AD Agreement refers to both material injury to a domestic industry and threat of material injury to a domestic industry. In other words, not only actual material injury, but also, threat of injury can be addressed through AD duties. Article 3.7 AD sets forth the requirements an authority has to comply with in the case of a threat of injury examination. Article 3.7 contains three obligations of different nature.

First, a determination of threat of injury must be based on facts and not merely on allegations, conjecture or a remote possibility. Second, the expected injury must be imminent and clearly foreseen.[48] Third, Article 3.7 requires that *inter alia* a certain number of factors be considered by the authority concerning (i) whether dumped imports have been increasing at a significant rate which indicates the likelihood of substantially increased importation; (ii) whether there is sufficiently freely disposable or an imminent substantial increase in the capacity of the exporter indicating a likelihood of substantially increased dumped exports; (iii) whether the prices of the dumped imports are such that they have a significant price depressing or suppressing effect on domestic prices and would therefore likely increase demand for further imports; and (iv) the state of the inventories of the subject product.[49]

The factors listed in Article 3.7 all have in common that they are informative of the further increase in dumped imports that can be anticipated to occur. According to the Panel on *US – Softwood Lumber VI*, an authority is required

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[48] According to the Panel in *US – Softwood Lumber VI*, the change in circumstances that would give rise to a situation in which injury would occur encompasses a single event, or a series of events, or developments in the situation of the industry, and/or concerning the dumped or subsidized imports, which lead to the conclusion that injury which has not yet occurred can be predicted to occur imminently. Panel Report, *US – Softwood Lumber VI*, para. 7.57.

[49] Because the AD Agreement uses the term 'should' in the context of the factors listed in Article 3.7, the Panel on *US – Softwood Lumber VI* was of the view that, unlike the situation under Article 3.4 of the AD Agreement, consideration of each of the factors listed in Articles 3.7 and 15.7 is not mandatory. According to the Panel, whether a violation of Article 3.7 exists would depend on the particular facts of the case, in light of the totality of the factors considered and the explanations given. Panel Report, *US – Softwood Lumber VI*, para. 7.68.

to 'consider' these factors, in the same way as it is required to 'consider' the volume and price effects of dumped imports in Article 3.2:

> Thus, we are of the view that, in order to conclude that the investigating authorities have 'considered' the factors set out in Articles 3.7 and 15.7, it must be apparent from the determination before us that the investigating authorities have given attention to and taken into account those factors. That consideration must go beyond a mere recitation of the facts in question, and put them into context. However, the investigating authorities are not required by Articles 3.7 and 15.7 to make an explicit 'finding' or 'determination' with respect to the factors considered. (Footnotes omitted)[50]

In sum, the totality of these factors must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury would occur.

The Panel in *Mexico – Corn Syrup* correctly pointed out that the factors listed in Article 3.7 relate specifically to the question of the likelihood of increased imports, and do not relate to the consequent impact of the dumped imports on the domestic industry. An examination of only those factors listed in Article 3.7 therefore does not suffice to reach a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4:

> While an examination of the Article 3.7 factors is required in a threat of injury case, that analysis alone is not a sufficient basis for a determination of threat of injury, because the Article 3.7 factors do not relate to the consideration of the impact of the dumped imports on the domestic industry. The Article 3.7 factors relate specifically to the questions of the likelihood of increased imports (based on the rate of increase of imports, the capacity of exporters to increase exports, and the availability of other export markets), the effects of imports on future prices and likely future demand for imports, and inventories. They are not, in themselves, relevant to a decision concerning what the 'consequent impact' of continued dumped imports on the domestic industry is likely to be. However, it is precisely this latter question – whether the 'consequent impact' of continued dumped imports is likely to be material injury to the domestic industry – which must be answered in a threat of material injury analysis. Thus, we conclude that an analysis of the consequent impact of imports is required in a threat of material injury determination.[51]

The Panel was of the view that with respect to the question of threat of material injury,

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[50] Panel Report, *US – Softwood Lumber VI*, para. 7.67.

[51] Panel Report, *Mexico – Corn Syrup*, para. 7.126. It has been proposed to amend Article 3.7 to refer explicitly to the factors of Article 3.4. TN/RL/GEN/121.

> an investigating authority cannot come to a reasoned conclusion, based on an unbiased and objective evaluation of the facts, without taking into account the Article 3.4 factors relating to the impact of imports on the domestic industry. These factors all relate to an evaluation of the general condition and operations of the domestic industry – sales, profits, output, market share, productivity, return on investments, utilization of capacity, factors affecting domestic prices, cash flow, inventories, employment, wages, growth, ability to raise capital. Consideration of these factors is, in our view, necessary in order to establish a background against which the investigating authority can evaluate whether imminent further dumped imports will affect the industry's condition in such a manner that material injury would occur in the absence of protective action, as required by Article 3.7.[52]

The Panel in *US – Softwood Lumber VI* agreed with this view but did not consider that an authority, once it had examined and evaluated the 3.4 factors was required to make projections as to the likely impact of future dumped imports on each of the 3.4 factors.[53] Neither would it be necessary, according

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[52] Panel Report, *Mexico – Corn Syrup*, para. 7.132. The Panel summarized its view of the inter-relationship between Articles 3.1, 3.4 and 3.7 in the following manner:

> In sum, we consider that Article 3.7 requires a determination whether material injury would occur, Article 3.1 requires that a determination of injury, including threat of injury, involve an examination of the impact of imports, and Article 3.4 sets out the factors that must be considered, among other relevant factors, in the examination of the impact of imports on the domestic industry. Thus, in our view, the text of the AD Agreement requires consideration of the Article 3.4 factors in a threat determination. Article 3.7 sets out additional factors that must be considered in a threat case, but does not eliminate the obligation to consider the impact of dumped imports on the domestic industry in accordance with the requirements of Article 3.4.

Panel Report, *Mexico – Corn Syrup*, para. 7.131.

[53] Panel Report, *US – Softwood Lumber VI*, para. 7.105:

> It seems clear to us that, as the Panel found in *Mexico – Corn Syrup*, there must, in every case in which threat of material injury is found, be an evaluation of the condition of the industry in light of the Article 3.4/15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of specific threat factors. However, once such an analysis has been carried out, we do not read the relevant provisions of the Agreements to require an assessment of the likely impact of future imports by reference to a consideration of projections regarding each of the Article 3.4/15.4 factors. There is certainly nothing in the text of either Article 3.7 of the AD Agreement and Article 15. 7 of the SCM Agreement, or Article 3.4 of the AD Agreement and Article 15.4 of the SCM Agreement, setting out an obligation to conduct a second analysis of the injury factors in cases involving threat of material injury. Of course, such an

to the Panel, for an authority to re-examine the 3.2 factors concerning volume and price effect of dumped imports in a predictive context in making a threat of material injury determination.[54] In sum, in a threat of material injury examination, it suffices for an authority to conduct an injury examination on the basis of Articles 3.2 and 3.4, and consider in addition some or all of the factors mentioned in Article 3.7 in order to be able to conclude that further dumped imports are imminent and that, unless protective action is taken, material injury would occur.

The term 'threat of injury' by definition suggests future, as opposed to actual, occurrence of an event. As with all future events, some degree of uncertainty is a necessary ingredient. Art. 3.7 AD makes it clear that a determination of threat of injury should not be based on pure conjecture or remote possibility; it should be based on facts. However, it is difficult to qualify future action as facts. So, inevitably, some uncertainty will be tolerated. Case-law has contributed some clarifications on this score.

The AB, in its report on *Mexico – Corn Syrup (Article 21.5 – US)*, provided its understanding as to the applicable standard of review:

> In our view, the 'establishment' of facts by investigating authorities includes both affirmative findings of events that took place during the period of investigation as well as assumptions relating to such events made by those authorities in the course of their analyses. In determining the existence of a *threat* of material injury, the investigating authorities will necessarily have to make assumptions relating to 'the "occurrence of future events" since such *future* events "can never be definitively proven by facts"'.[55] Notwithstanding this intrinsic uncertainty, a 'proper establishment' of facts in a determination of threat of material injury must be based on events that, although they have not yet occurred, must be 'clearly foreseen and imminent', in accordance with Article 3.7 of the *Anti-Dumping Agreement*.[56] (Italics in the original)

Consequently, the AB essentially requests that an investigating authority have recourse to threat of injury in order to justify imposition of AD duties, only if

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> assessment could be undertaken, to the extent available information permitted, and might be useful. However, in many instances, it seems likely that the necessary information would not be available, for instance projected productivity, return on investment, projected cash flow, etc. Even if projections are made on the basis of the information gathered in the investigation, this might result in a degree of speculation in the decision–making process, which is not consistent with the requirements of the Agreements.

[54] Panel Report, *Mexico – Corn Syrup*, para. 7.111.

[55] Appellate Body Report, *United States – Lamb Safeguard*, WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 136.

[56] As we noted in *United States – Hot-Rolled Steel*:

the injury is imminent in the short-run and not an event which could, speculatively, occur in the distant future.[57]

The Appellate Body in *US – Softwood Lumber VI (Article 21.5 – Canada)* disagreed with the conclusion of the Panel in that case that a threat determination involving predictions based on facts 'may be less susceptible to being found, on review by a Panel, to be outside the range of conclusions that might be reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given'.[58] According to the Appellate Body, any implication that there could exist a greater likelihood of Panels upholding a threat of injury determination, as compared to a determination of current material injury, when those determinations rest on the same level of evidence, 'would be erroneous'.[59] It concluded that a Panel when reviewing the factual basis for a threat of injury determination must determine

> whether the investigating authority has provided 'a reasoned and adequate explanation' of:
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> a) how individual pieces of evidence can be reasonably relied on in support of particular inferences, and how the evidence in the record supports its factual findings;
> b) how the facts in the record, rather than allegation, conjecture, or remote possibility, support and provide a basis for the overall threat of injury determination;
> c) how its projections and assumptions show a high degree of likelihood that the anticipated injury will materialize in the near future; and
> d) how it examined alternative explanations and interpretations of the evidence and why it chose to reject or discount such alternatives in coming to its conclusions.'[60]

Article 3.8 AD Agreement provides that, in a case of threat of injury, the application of anti-dumping measures shall be considered and decided with special care, without explaining what this implies in practice. However, according to

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> Article 17.6(i) . . . 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*. (Original emphasis)

Appellate Body Report, *United States – Hot Rolled Steel*, para. 56.

[57] In general, the validity of a forecast is more powerful for imminent events.

[58] Panel Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 7.13.

[59] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 110.

[60] Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 98.

the Panel in *US – Softwood Lumber VI*, this implies that 'a degree of attention over and above that required of investigating authorities in all anti-dumping and countervailing duty injury cases is required in the context of cases involving threat of material injury'.[61] The 'special care' obligation applies during the process of investigation, in the establishment of whether the prerequisites for application of a measure exist, and not merely afterward when final decisions whether to apply a measure are taken.[62]

5 Cumulation

The AD Agreement allows an authority to examine the injurious effect of dumped imports from various countries at the same time. Article 3.3 AD Agreement imposes certain disciplines on an investigating authority that wants to conduct such a cumulative injury analysis. It provides that an authority may only cumulate the effects of imports simultaneously subject to anti-dumping investigations if it determines that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* and the volume of imports from each country is not negligible; and (b) such a cumu-

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61 Panel Report, *US – Softwood Lumber VI*, para. 7.33.

62 Panel Report, *US – Softwood Lumber VI*, para. 7.33. As it was 'not clear to us [the Panel] what the parameters of such "special care" in the context of an objective evaluation based on positive evidence would be', the Panel considered it appropriate to consider alleged violations of Articles 3.8 and 15.8 only after consideration of the alleged violations of specific provisions. Panel Report, *US – Softwood Lumber VI*, para. 7.34. In the case at hand, the Panel was of the view that Canada had not made any independent arguments with respect to Article 3.8. It thus came to the following conclusions:

> In light of the foregoing, in the circumstances of this case we can see no basis for a finding of violation of the special care requirement with respect to any aspect of the determination which is otherwise found to be *consistent* with the other provisions of Articles 3 and 15 asserted by Canada. On the other hand, with respect to any aspect of the determination that is found to be *inconsistent* with any other provision of Articles 3 and 15 the Agreements asserted by Canada, we can see no reason to conclude, in addition, that it also violates the special care requirement. Clearly, whatever the precise parameters of 'special care' in the context of a threat determination may be, an aspect of the determination which does not satisfy the other, more specific obligations of Articles 3 and 15 cannot satisfy the special care obligation. However, to say so does not in any respect clarify the obligation set out in Articles 3.8 of the AD Agreement and 15.8 of the SCM Agreement. Nor would it provide any guidance in the context of implementation of any recommendation of the DSB. Therefore, we will make no findings with respect to this claim.
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> Panel Report, *US – Softwood Lumber VI*, para. 7.36.

lative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products from the various countries examined and the conditions of competition between the imported products and the like domestic product.

The *de minimis* threshold could be read to imply the need to calculate a country-wide margin of dumping. The fact that the term 'margin of dumping' is used in the AD Agreement to refer to company–specific margins of dumping seems to suggest a slightly different reading. An authority would be required to first gather all the companies from a particular country whose dumping margins are above *de minimis*. A second step is to isolate the volume of these companies with above *de minimis* margins to examine whether the volume of imports from these remaining producers is not negligible.

How to assess whether cumulation is appropriate in light of the conditions of competition formed the subject of many discussions in the Working Group on Implementation of the Anti-Dumping Committee with a view to issuing a Recommendation in this respect. A draft Recommendation discussed in this Working Group referred *inter alia* to factors such as physical characteristics, end-use, channels of distribution, degree of interchangeability or substitutability.[63] No agreement on the draft Recommendation could be reached, however, and the matter seems to have been put aside for an indefinite period of time.[64]

The AB, in its report on *EC – Tube or Pipe Fittings* upheld the Panel's finding that cumulation is only possible after a prior country-specific analysis of volume and price effects of dumped imports. In other words, the determination of a significant increase in dumped imports and significant price effects may be based on an examination of the volume and price of dumped imports from all cumulated countries together. The Appellate Body justified its approach by looking at the rationale for cumulation:

> The apparent rationale behind the practice of cumulation confirms our interpretation that both volume and prices qualify as 'effects' that may be cumulatively assessed under Article 3.3. A cumulative analysis logically is premised on a recognition that the domestic industry faces the impact of the 'dumped imports' as a

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[63] G/ADP/AHG/W/121/Rev.4. A proposal has been tabled to include a list of such factors of importance in assessing the conditions of competition which is based on this draft Recommendation. This proposal further suggests that Article 3 be clarified to allow cumulation only in case the imports in question are subject to anti-dumping investigations referring to the same or largely overlapping period of investigation. TN/RL/GEN/51.

[64] See G/ADP/M/26, p.10, para. 72. A table providing an overview of the most commonly used criteria in assessing whether the conditions of competition support cumulation is provided in Czako et al. (2003), *A Handbook on Anti-Dumping Investigations*, Cambridge: Cambridge University Press, p. 260, table III.1.4.

whole and that it may be injured by the total impact of the dumped imports, even though those imports originate from various countries. If, for example, the dumped imports from some countries are low in volume or are declining, an exclusively country-specific analysis may not identify the causal relationship between the dumped imports from those countries and the injury suffered by the domestic industry. The outcome may then be that, because imports from such countries could not *individually* be identified as causing injury, the dumped imports from these countries would not be subject to anti-dumping duties, even though they are in fact causing injury. In our view, therefore, by expressly providing for cumulation in Article 3.3 of the *Anti-Dumping Agreement*, the negotiators appear to have recognized that a domestic industry confronted with dumped imports originating from several countries may be injured by the cumulated effects of those imports, and that those effects may not be adequately taken into account in a country-specific analysis of the injurious effects of dumped imports. Consistent with the rationale behind cumulation, we consider that changes in import volumes from individual countries, and the effect of those country-specific volumes on prices in the importing country's market, are of little significance in determining whether injury is being caused to the domestic industry by the dumped imports as a whole.

By seeking to place additional obligations on investigating authorities beyond those specified in Article 3.3, namely, that investigating authorities first determine *on a country-specific basis* the existence of significant increases in dumped imports, and their potential for causing injury to the domestic industry, Brazil ignores the role of cumulation in ensuring that each of the multiple sources of 'dumped imports' that cumulatively contribute to a domestic industry's material injury be subject to anti-dumping duties. We therefore agree with the Panel that Brazil's interpretation of the relationship between Articles 3.2 and 3.3 'would undermine the very concept of a cumulative analysis.'[65] (Footnotes omitted)

D THE CAUSATION REQUIREMENT

1 Causation and Non-attribution

Art. 3.5 AD reads:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive

65 Appellate Body Report, *EC – Tube or Pipe Fittings*, paras 116–17.

> practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

The law, hence, imposes a dual obligation on WTO Members: their investigating authorities must ensure that (a) injury is attributed to dumped imports, and (b) injury is not attributed to factors other than dumped imports. The requirement under (b) is often referred to as 'non-attribution'. Under this requirement, an investigating authority will be required first to examine all known factors other than dumped imports which are causing injury to the domestic industry at the same time as dumped imports; and second, investigating authorities must ensure that injuries which are caused by known factors other than dumped imports are not attributed to the dumped imports.[66] According to the AB in *US – Hot-rolled Steel*, the latter implies that an authority is required to *separate and distinguish* the effects of dumped imports, from the effects of any other factor, on the domestic industry producing the like product.[67] This implies that the nature and extent of the injurious effects of the other known factors needs to be identified.[68] The AB agreed, however, that the discipline imposed is quite demanding for any bureaucracy:

> . . . we agree . . . that the different causal factors operating on a domestic industry may interact, and their effects may well be inter-related, such that they produce a *combined* effect on the domestic industry. We recognize, therefore, that it may not be easy, as a practical matter, to separate and distinguish the injurious effects of different causal factors. However, although this process may not be easy, this is precisely what is envisaged by the non-attribution language. If the injurious effects of the dumped imports and the other known factors remained lumped together and indistinguishable, there is simply no means of knowing whether injury ascribed to dumped imports was, in reality, caused by other factors. Article 3.5, therefore, requires investigating authorities to undertake the process of assessing appropriately, and separating and distinguishing, the injurious effects of dumped imports from those of other known causal factors. (Italics in the original)[69]

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66 Appellate Body Report, *US – Hot-Rolled Steel*, para. 222. A proposal exists to introduce a requirement in Article 3.5 that in each case the impact of the sales volume and prices of domestic producers be examined in order to ensure that the effect of the price set by price leader domestic producers on domestic prices as a whole are analysed and that the effects of such price settings are not attributed to dumped imports. TN/RL/GEN/28.

67 Appellate Body Report, *US – Hot-Rolled Steel*, para. 223.

68 Appellate Body Report, *US – Hot-Rolled Steel*, para. 227.

69 Appellate Body Report, *US – Hot-Rolled Steel*, para. 228. It has been suggested that one way of facilitating the work of an authority and increasing predictability at the same time, would be the introduction of certain rebuttable presumptions. In particular, it has been proposed that a presumption of no causal link

Next, comes the question of the methodology to use in order to separate and distinguish the effects from various factors. An investigating authority is facing a situation where more than one factor is simultaneously (potentially) influencing one outcome.[70] Economists use multivariate analysis to show correlation between two variables.[71] A correlation between two variables simply indicates that these variables tend to move together. It does not say anything about whether one variable causes the other. Indeed, the fact that they move together may be the result of the fact that a change in the first variable led to a change in the second variable and vice-versa. In addition, the fact that they move together may be the result of a third factor. The objective of a multivariate analysis is precisely to control for such third factor, that is, to see whether the variables still move together when the influence of other variables has been removed. Causality cannot be inferred from observations. What economists usually do is formulate a hypothesis on the basis of abstract (theoretical) reasoning and check whether observations are consistent with the hypothesis.[72]

Although one would expect that this method should be given some prominence in the WTO, the Appellate Body was of the view that 'the particular methods and approaches by which WTO Members choose to carry out the process of separating and distinguishing the injurious effects of dumped imports from the injurious effects of the other known causal factors are not prescribed by the Anti-Dumping Agreement'.[73] Therefore (so the Panel on *EC – Tube or Pipe Fittings* concluded) 'WTO Members may apply any causation methodology, provided that it appropriately separates and distinguishes the

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be introduced for two situations: (i) where the volume of increase of non-dumped imports has significantly exceeded the volume of dumped imports and (ii) in the case where prices of dumped imports have increased while there has been no price undercutting and market share of dumped imports has been declining. TN/RL/GEN/42.

[70] This is a rather common story in many situations.

[71] A proposal has been made to encourage the use of such correlation analysis and to ensure that it is applied in a uniform manner. It has been proposed to introduce a presumption that in case there is neither a strong correlation between a significant increase in dumped imports and injury nor a significant price effect of dumped imports and injury, no causal link may be found to exist unless compelling evidence to the contrary. Similarly, in case of a strong correlation between other factors and injury, the introduction of a presumption of no causal link between dumped imports and injury is proposed. The proposal does not intend to prescribe any specific methodology that the authorities have to use in order to show a 'strong correlation'. TN/RL/GEN/28; TN/RL/GEN/38.

[72] See Greene (1993 pp. 486–507) and for a practical application, see Grossman (1986).

[73] Appellate Body Report, *US – Hot-Rolled Steel*, para. 224.

injurious effects of dumped imports from the injurious effects of the other known causal factors and therefore satisfies the obligations in Article 3.'[74] In other words, the non-attribution requirement of Article 3.5 does not prescribe a particular methodology that all investigating authorities must use to this effect. In light of the Appellate Body case-law relating to the causation and non-attribution requirement in the Safeguards Agreement,[75] it seems that the non-attribution requirement does not require an authority to demonstrate that the dumped imports, alone, in isolation, have caused injury. In other words, while there is an obligation to separate and distinguish the nature and extent of the injury caused by other factors, it appears that the AB holds the view that there is no need to somehow quantify and deduct the injury caused by other factors from the injury caused by the dumped imports to determine whether the dumped imports alone were sufficient to cause material injury.[76] What the goal of separating and distinguishing these other factors' effects then is, remains an open question.

Next, comes the question whether the impact of factors other than dumped imports, should be examined both individually and collectively. The AB addressed this issue in its report on *EC – Tube or Pipe Fittings*. In the Appellate Body's view, an affirmative response to this question would depend on the circumstances. In other words, an assessment of the collective effects of other causal factors is not necessarily required in every case:

> In contrast, we do not find that an examination of collective effects is necessarily required by the non-attribution language of the Anti-Dumping Agreement. In particular, we are of the view that Article 3.5 does not compel, in every case, an assessment of the collective effects of other causal factors, because such an assessment is not always necessary to conclude that injuries ascribed to dumped imports are actually caused by those imports and not by other factors.

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74 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.366

75 The Appellate Body explicitly recognized the parallel between the obligations under Article 3.5 AD Agreement and Article 4.2 Safeguards Agreement. See e.g. Appellate Body Report, *US – Hot-Rolled Steel*, para. 230.

76 See discussion in Safeguards section. A proposal has been tabled to clarify Article 3.5 AD Agreement to require that it be demonstrated that dumped imports *in and of themselves* were responsible for injury. The dumped imports should be a sufficient cause of injury, while not necessarily the sole cause. TN/RL/GEN/28; TN/RL/GEN/38. A similar standard had been adopted by Panels in the Safeguards context, in particular in *US – Wheat Gluten* and *US-Lamb*, but was rejected by the Appellate Body in both cases. Another proposal going in the opposite direction is to clarify in Article 3.5 that 'the authorities need not isolate or quantify the effects of either the dumped imports or the other known factors, either individually or collectively'. TN/RL/GEN/128.

> We believe that, depending on the facts at issue, an investigating authority could reasonably conclude, without further inquiry into collective effects, that 'the injury . . . ascribe[d] to dumped imports is actually caused by those imports, rather than by the other factors'. At the same time, we recognize that there may be cases where, because of the specific factual circumstances therein, the failure to undertake an examination of the collective impact of other causal factors would result in the investigating authority improperly attributing the effects of other causal factors to dumped imports. We are therefore of the view that an investigating authority is not required to examine the *collective* impact of other causal factors, provided that, under the specific factual circumstances of the case, it fulfils its obligation not to attribute to dumped imports the injuries caused by other causal factors.[77] (Italics and emphasis in the original)

What stems from the above is that the causality requirement has been read in a proceduralist manner, that is, as requiring that the analysis by the domestic investigating authority must separate out the various factors causing injury and must not attribute wrongly to dumping what is attributable to other facts. Importantly, once injury has been shown to have been caused, at least partially, by dumped imports, the whole injury analysis becomes moot for the remaining part of the process: AD duties, as will be shown *infra*, will be imposed to counteract the dumping margin and not the resulting injury for the domestic industry producing the like product. That is, demonstrating that injury has been caused by dumped imports is a mere procedural obligation and nothing beyond that. Assume, for example, that the dumping margin established through investigation is 20 per cent. Assume further that the resulting injury for domestic producers is USD10 million. Assume that AD duties of 5 per cent suffice for the domestic industry to be compensated (since they guarantee the lost market share). A WTO Member can lawfully impose the 20 per cent mark-up, the lesser (in this case 5 per cent) duty rule, according to which a WTO Member should impose lower than the established margins duties if such lower duties suffice to counteract the injury caused, being an option, but not an obligation.[78]

2 Other Known Factors must be Examined as well

Any investigating authorities must control for the effect that factors, other than those mentioned in Article 3.4 AD, have had on the 'health' of the domestic industry producing the like (to the dumped) product. This much is provided for

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[77] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras 191–2.

[78] As will be discussed in the context of the Safeguards Agreement, the Appellate Body in its report on *US – Line Pipe* has taken a dramatically different approach when discussing the application of a safeguard measure, limiting such application to that part of the injury caused by the increased imports alone.

in Article 3.5 AD. The term other 'known' factors, appearing in Article 3.5 AD, is not self-interpreting. The AB, in its report on *EC – Tube or Pipe Fittings*, recognized this point in an obiter dictum:

> We are mindful that the Anti-Dumping Agreement does not expressly state how such factors should become 'known' to the investigating authority, or if and in what manner they must be raised by interested parties, in order to qualify as 'known'. We also recognize that the Anti-Dumping Agreement does not expressly state to what degree a factor must be unrelated to the dumped imports, or whether it must be extrinsic to the exporter and the dumped product, in order to constitute a factor 'other than the dumped imports'.[79]

A number of questions emerge, as a result of this statement:

(a) Should only factors raised by interested parties qualify as known factors under Art. 3.5 AD, or, does the investigating authority itself have a duty to look for such other factors?[80] If the latter, what is the extent of such duty?
(b) In what form should factors be raised by interested parties?
(c) Should factors completely unrelated to dumped imports come under the purview of Art. 3.5 AD?

This inventory is far from being exhaustive, of course. Moreover, some of the questions above are inter-related anyway. For example, assuming the response to question (c) above is affirmative, then one probably should assign some duty to investigate to the investigating authority: if for example, a factor that has caused injury to the domestic industry is the fact that the domestic industry has not invested in new technologies, then it seems natural that questions to this effect should find their place in the questionnaire by the investigating authority addressed to interested parties.[81]

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79 Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 176.

80 The Panel in *Thailand – H-Beams* was of the view that an investigating authority is not required to seek out in each case on its own initiative the effects of all other factors. According to the Panel, this was in line with the view expressed by the GATT Panel in *US – Norwegian Salmon AD*. Panel Report, *Thailand – H-Beams*, para. 7.273. The Appellate Body's statements regarding the meaning of the term 'known exporters' in *US – Anti-Dumping Measures on Rice*, discussed elsewhere in this section, seems to support the Panel's limited view of what constitutes such other 'known' factors.

81 This question is, of course, part of the more general question of how proactive an investigating authority should be. The AD Agreement is not very explicit on this issue. Recent case-law seems to lean towards a rather active role, the specifications of which, however, have yet to be nailed down.

Case-law has provided some responses to the questions mentioned above. It is by now clear that factors raised by an interested party qualify as 'known' factors under Art. 3.5 AD. We quote from the Panel Report on *EC – Tube or Pipe Fittings*:

> The obligation imposed by Article 3.5 is therefore to examine any other *known* factors which at the same time are injuring the domestic industry. This provision makes clear that it is mandatory to consider 'known' factors other than the dumped imports which at the same time are injuring the domestic industry and to ensure that any such injury is not attributed to those imports. The phrase 'factors which *may* be relevant in this respect *include, inter alia* . . .' (emphasis added) further makes it clear that the list contained in the provision is indicative. We understand that 'known' factors under Article 3.5 include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an anti-dumping investigation.[82]

Moreover, the AB, in its report on *EC – Tube or Pipe Fittings* clarified that it is irrelevant if an interested party has raised a factor at one stage of the investigation only and not *consistently* throughout the investigation. What matters is whether a factor was raised or not. At the instant case, Brazil had raised cost efficiency as a factor affecting injury of the EC industry when dumping and when injury was discussed but not when causality was being discussed. The EC considered that the authority was allowed to dismiss the factor since it was not raised at the appropriate stage of the investigation, that is, when discussing causality. The AB disagreed with the approach followed by the European Community (which had been previously upheld by the Panel) stating:

> We understand the Panel, in rejecting this aspect of Brazil's claim under Article 3.5, to have stated that the alleged causal factor *was* 'known' to the European Commission in the context of its dumping and injury analyses, but that the factor was nevertheless *not* 'known' in the context of its causality analysis. In our view, a factor is either 'known' to the investigating authority, or it is not 'known'; it cannot be 'known' in one stage of the investigation and unknown in a subsequent stage.[83] (Emphasis in the original)

This is all that case-law has clarified so far. The questions mentioned above remain, from a positive law-perspective, still open questions. What is required from the authority is that it provide an adequate and reasoned explanation of how the facts support the determination made, which includes the effective refutation of possible alternative explanations.[84]

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82 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.359.

83 Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 178.

84 See our discussion on the standard of review below.

E THE DOMESTIC INDUSTRY PRODUCING THE LIKE PRODUCT

It is probably warranted to identify the object of injury: the domestic industry producing the like product. The term *like product* appears in various parts of the WTO Agreement and it does not necessarily have the same meaning across provisions and across covered agreements.[85]

Art. 4.1 AD defines the industry producing the like product as follows:

> For the purposes of this Agreement, the term 'domestic industry' shall be interpreted as referring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products.[86]

The term *like product* is in turn defined in Art. 2.6 AD as follows:

> Throughout this Agreement the term 'like product' ('produit similaire') shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

It seems, hence, reasonable to conclude that, in principle, the like product definition in the AD Agreement is a much narrower definition than, for example, the like product definition in Art. III GATT. [87] We will come back to the 'like product' question when discussing the scope of the investigation below.

The domestic industry thus consists of *all* of the domestic producers ('domestic producers as a whole') or of those producers who together represent 'a major proportion' of total domestic output of the like product. It is the impact that dumped imports have on these producers that will be examined in the injury determination. This seems to imply that if, in a country with for

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[85] Actually, such an outcome is very much in line with the Vienna Convention on the Law of Treaties (VCLT), which the AB has consistently invoked since its first decision (*US – Gasoline*).

[86] Article 4.1 (i) further adds: 'except that: (i) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers.'

[87] The Panel in its report on *EC – Tube or Pipe Fittings* dealt with a case where no data for the like product existed. It found that, in the absence of specific data for the like product, recourse to annual audits of companies on the basis of turnover was not inconsistent with the AD Agreement. Panel Report, *EC – Tube or Pipe Fittings*, para. 7.328.

example ten producers of the like product, you have three producers which together represent a major proportion of total domestic production, an authority is entitled to ignore completely the remaining seven producers. The authority's 'injury-to-the-industry' determination may then in fact be no more than a determination of injury to a major proportion of the industry. The flexibility allowed by Article 4.1 may thus lead an authority to select a smaller group of companies which it will consider as the domestic industry, thus making a positive injury finding more likely.[88] The Panel in its report on *Mexico – Steel Pipes and Tubes* confirmed this flexibility and considered that the text of Article 4.1 does not indicate a hierarchy between these two options. The Panel added that this did not imply that an authority would be allowed to switch back and forth between these two possibilities in the course of a single injury analysis, or to oscillate back and forth between various allegedly major proportions of the domestic industry in the course of the same injury analysis. Once an investigating authority has identified the framework for its analysis it must use this identified framework consistently and coherently throughout an investigation.[89] Importantly, as the Panel in *EC – Salmon (Norway)* found, 'any enterprise that produced any form of the like product should be considered, at least in the first instance, a "producer" of the like product, and as such, part of the domestic industry'.[90]

The Agreement provides that, in addition, it is possible to exclude from the definition of the domestic industry those producers who are 'related' to the exporters or importers[91] or are themselves importers of the allegedly dumped product.[92] The rationale for this is of course that these producers may be less

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[88] It has been proposed to clarify Article 4.1 to allow an authority to base its injury determination on data for less than the total of domestic producers only exceptionally and only after best efforts have been made to obtain all relevant evidence concerning *all* domestic producers. TN/RL/GEN/27.

[89] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.322. In this case, the Panel found that Mexico had failed to comply with this requirement as it had analysed a number of economic injury factors with respect to three firms representing 88 per cent of the national production, while its analysis of financial injury factors was based on only one firm constituting 53 per cent of national production only.

[90] Panel Report, *EC – Salmon (Norway)*, para. 7.115.

[91] The term 'related' is defined in the Agreement, footnote 11, in terms of control. One shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter. The fact that a producer is controlled by or itself controls an exporter or an importer does not suffice, as it is also required that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer to behave differently from non-related producers.

[92] The Agreement does not provide for a certain minimum amount of imports that needs to be made by a domestic producer so as to allow the authority to exclude

representative of the interests of the domestic industry, as they may be benefiting from the success of the dumped imports themselves. Excluding these domestic producers may have an important impact on the determination.

In the end, though, the domestic producers examined must represent 'a major proportion of domestic production of the like product'. The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected the argument that the term 'a major proportion' implies that such producers must be responsible for at least 50 per cent of total domestic production.[93] It suffices that the domestic producers that constitute the 'domestic industry' for purposes of the AD investigation represent 'an important, serious or significant proportion of total domestic production'.[94] As we explain later, for a request for initiation to be acceptable, it must be made by or on behalf of the domestic industry requiring that the domestic producers supporting the application must represent at least 25 per cent of total domestic production. It thus seems that the domestic industry examined should represent at least 25 per cent of total domestic production.[95] That is a lot less than 'the domestic producers as a whole'.

The AB, in its report on *US – Hot-Rolled Steel* faced, *inter alia*, the question, to what extent investigating authorities should examine the totality of the domestic industry affected by allegedly dumped imports, or to what extent they could primarily focus on the part of the industry that does not embrace the so-called *captive industry*, that is, the part of the industry that is self-consumed and for this reason may be unaffected by dumped imports. The AB held that an examination of parts of the industry only could be misleading. In its view, an investigating authority must examine the effects of dumped imports on the whole of the industry producing the like product. The AB considered that it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment. However, where

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this producer from the investigation. A proposal has been put forward to provide further clarification in this regard and limit the discretion of the investigating authority in excluding domestic producers from the injury determination for reason of imports made by this producer. It has been proposed to prohibit such exclusion in case the total import value made by the producer is relatively low compared to its sales or in case the imports in question relate to a few models of the like product and were made to fill the gaps in its range of products. TN/RL/GEN/62.

93 It has been proposed in the course of the negotiations to change this language to refer to 'the' major proportion, i.e. requiring that the domestic producers in question represent more than 50 per cent of total domestic output. TN/RL/GEN/27; TN/RL/GEN/62.

94 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

95 The Panel in *Argentina – Poultry Anti-Dumping Duties* rejected the parallel with the standing requirement of Article 5.4, but its explanation is difficult to follow. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341, footnote 221.

investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examining the industry as a whole. If not, the state of the domestic industry is not examined in an objective manner, as required by Article 3.1:

> Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry. We note that the reverse may also be true – to examine only the parts of an industry which are performing well may lead to overlooking the significance of deteriorating performance in other parts of the industry.[96]

It seems that an authority is not entitled to examine various injury factors from different domestic producers ensuring each time that the data used come from domestic producers which represent a major proportion of domestic output. The Panel Report in *Mexico – Steel Pipes and Tubes*, stands for the proposition that, once a determination has been made as to which producers constitute the domestic industry for purposes of the investigation, it is the data from all of these producers that must be used to assess the impact of the dumped imports on the domestic industry. Importantly, the Panel in *EC – Salmon (Norway)* found that sampling in an injury analysis is permitted by the AD Agreement.[97]

There are currently no special rules dealing with a domestic industry producing perishable, seasonal agricultural products.[98]

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[96] Appellate Body Report, *US – Hot-Rolled Steel*, para. 204. Note that the AB simply ruled that the US legislation at hand which requested investigating authorities to *focus* on the segment of the industry which is not captive industry did not *exclude* from the review the segment of the industry which is captive industry. This approach is consistent with the view that the AB held in the context of a safeguards litigation where the same issue arose. AB Report, *US – Cotton Yarn*, paras 100–101.

[97] Panel Report, *EC – Salmon (Norway)*, para. 7.129.

[98] A detailed proposal has been made to provide for a possibility of defining the domestic industry in the context of particular seasonal markets under certain circumstances. TN/RL/GEN/129.

4. Section III: procedural obligations – the tasks of the domestic investigating authority

The Anti-dumping Agreement is as much about procedures as it is about substance. Procedural discipline and ensuring transparency and due process are currently the most important safeguards against abuse of the anti-dumping regime for protectionist purposes. The Agreement governs the investigatory process and imposes obligations on the investigating authority at various stages of the investigation. The Agreement, in Article 5, provides for a number of obligations dealing with the initiation and termination of an investigation. Article 6 of the Agreement sets forth a number of rules dealing with evidence gathering during the investigation, once initiated. These rules require that the investigating process of information gathering and information sharing is conducted in a transparent manner with respect for all interested parties' due process rights. The type of measures an authority can impose, as well as their scope and lifespan are regulated by Articles 8 and 9 of the Agreement. All of these rules will be discussed in the present chapter.

The obligations referred to above relate to the way the authority conducts the investigation vis-à-vis the *interested parties*[1] participating in the investigation. Article 12 of the Agreement lists a number of very specific obligations incumbent upon an investigating authority in ensuring that the public at large is kept informed at various stages in the investigation, from initiation to the imposition of final measures. These public notice requirements are different from the due process requirements to be complied with in the authority's dealings with the interested parties.

[1] The 'interested parties' are defined in Article 6.11 AD Agreement.

A THE OVERARCHING OBLIGATION: AN OBJECTIVE AND UNBIASED INVESTIGATION WITH RESPECT FOR DUE PROCESS

1 The Need to Conduct an Objective and Active Investigation

WTO Members wishing to impose anti-dumping duties have to investigate whether the three elements mentioned above (dumping, injury, causality) are present. All substantive requirements in the AD Agreement are linked to specific procedural steps that WTO Members wishing to avail themselves of this possibility must observe. At the heart of the AD Agreement is the manner in which an investigation by a domestic authority will be conducted.

The Panel in *Mexico – Anti-Dumping Measures on Rice* emphasized the active and objective role an investigating authority is to play in an anti-dumping investigation:

> This context is formed by the overarching obligation to conduct *an investigation* and by the specific obligations on the authority to ensure that all interested parties are informed of the information required of them and are given the opportunity to present all evidence to support their case.
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> The first important obligation is the requirement expressed in Article 1 of the AD Agreement that an anti-dumping measure shall only be applied pursuant to *investigations* initiated and conducted in accordance with the provisions of the AD Agreement. Among others, Article 5 of the AD Agreement entitled 'Initiation and Subsequent Investigation' and Article 6 of the AD Agreement further elaborate on the specific requirements that an investigating authority has to comply with when conducting this investigation. The term 'to investigate' means 'to search or inquire into; examine a matter systematically or in detail; make an (official) inquiry into'[2] and an 'investigator' is not surprisingly defined as 'a researcher'.[3] In our view, an investigating authority required to conduct an investigation in an objective and unbiased manner has to play an active role in the search of the information it requires in order to make its determination. We thus concur with the view expressed by the Appellate Body, albeit in a different context, in the *US – Wheat Gluten* case that:
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> > '[T]he ordinary meaning of the word "investigation" suggests that the competent authorities should carry out a "systematic inquiry" or a "careful study" into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an "investigation" – must actively seek out pertinent information.'[4]

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2 *New Shorter Oxford Dictionary*, p. 1410.
3 *New Shorter Oxford Dictionary*, p. 1410.
4 Appellate Body Report, *US – Wheat Gluten*, para. 53.

> While it is clear that the interested parties, including the applicants, play a very important role in the fact gathering process, the obligation of conducting an investigation and making a determination remains that of the investigating authority, and not that of the interested parties.[5]

Summing up its prior case-law on the issue, the AB provided in its report on *EC – Bed Linen (Article 21.5 – India)* its understanding that the duty to perform an objective examination entails a duty of even-handedness (para. 114):

> In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. (Emphasis in the original)

Technically speaking it is certainly true that the AB was in this quotation discussing the explicit obligation set forth in Article 3.1 to conduct an injury determination in an objective manner and based on positive evidence. However, it seems hard to argue, in light of the Panel's review authority and the general requirement to conduct an investigation before imposing AD measures, that such an obligation of even-handedness does not permeate all of the investigating authority's obligations.

2 Respect for Due Process

Throughout the investigation, WTO Members must respect certain *due process* clauses. They must, in a nutshell, ensure that interested parties (a) are essentially given a chance to adequately present their views (right of defence) and (b) have access to all information having a bearing on the case (right to access all relevant information).

The term *interested parties* is defined in Art. 6.11 AD as follows:

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[5] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras 7.184–7.186. A similar view to clarify Article 6 to require authorities to seek actively and in an objective and unbiased manner the accurate, relevant and representative data and information necessary for the investigation has been expressed in the course of the negotiations. This would include a requirement for authorities to make 'best efforts' to identify exporters and/or producers concerned, including through, *inter alia*, checking customs declarations, through requests to industry associations in the exporting Member, through industry publications in the exporting Member and any other means reasonably available to them. TN/RL/GEN/49 and TN/RL/GEN/49/Add. 1.

> For the purposes of this Agreement, 'interested parties' shall include:
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> (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
> (ii) the government of the exporting Member; and
> (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.
>
> This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.[6]

Transparency, even-handedness, the right to information, in one word, the need for due process is reflected in a large number of provisions of the AD Agreement, such as Art. 6.1 AD (right to be informed of information required and provided, opportunity to present in writing all evidence); Art. 6.2 AD (right of defence throughout the anti-dumping investigation); Art. 6.4 AD (right to see all non-confidential relevant information); Art. 6.5 AD (treatment of confidential information); Art. 6.8 AD (conditional only recourse to best information available); Art. 6.9 AD (right to be informed of the essential facts forming the basis for the final determination before it is made public); Art. 6.13 AD (obligation of authorities to account for difficulties in providing information).

Of these obligations, Article 6.2, dealing with the right of defence in a more general manner, together with the more specific obligations of Article 6.4 and 6.9, seem to form the backbone of the due process requirements any investigation has to comply with.

Article 6.2 AD, on the *right of defence*, stands out as an obligation of a rather general nature. The Panel in its report on *Argentina – Poultry Antidumping Duties* underscored this point. Hence, if a finding under a more specific provision has been made, there is no need to make another finding concerning (in)consistency with Art. 6.2 AD.[7] By the same token, the AB in its report on *EC – Tube or Pipe Fittings* reaffirmed that violation of the specific obligation to provide timely access to all information relevant to the

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[6] This last sentence is the legal basis for public interest clauses, whereby, for example, consumers are being invited to present their views on an imminent AD imposition. A proposal has been tabled in the negotiations to allow the general public, including for example consumer associations, academics, and the authorities of other Members access to the non-confidential version of the file through the establishment of a sort of public reading room. Such access for transparency purposes is different from any public interest examination. See TN/RL/GEN/90.

[7] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.160.

presentation of the interested parties' case in Art. 6.4 AD amounted ipso facto to violation of the right of defence of Art. 6.2 AD.[8]

In other words, the right to access all relevant information is crucial for an effective use of the right of defence. The AB in its report on *EC – Tube or Pipe Fittings* made it clear that the opportunity to see all information should be understood as an obligation imposed on investigating authorities to disclose information deemed relevant *by an interested party*. An investigating authority is to provide an opportunity to see the information that the requesting party considers relevant. Put differently, the authorities cannot keep information from the interested parties simply because *they* do not consider it relevant. It thus rejected the Panel's opinion that an interested party is only entitled to see what an investigating authority considers to be relevant to that party's case:

> We turn first to the requirement that the information be 'relevant'. From the Panel's reasoning, it is apparent that it read this requirement to mean 'relevant' from the perspective of the *investigating authority*. We disagree. Article 6.4 refers to 'provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their* cases' (emphasis added). The possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'. The investigating authorities are not mentioned in Article 6.4 until later in the sentence, when the provision refers to the additional requirement that the information be 'used by the authorities'. Thus, whether or not the investigating authorities regarded the information in Exhibit EC-12 to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4. (Emphasis in the original)[9]

We will come back to the specific obligations of the investigating authorities when conducting an investigation, after having discussed the preliminary stage of initiation of an investigation.

B INITIATING THE INVESTIGATION PROCESS

1 Two Tracks: *Ex Officio*, upon Request

An investigation can be launched following either an application or petition by the domestic industry or, exceptionally, *ex officio*. Art. 5.1 AD states: 'Except as provided for in paragraph 6, an investigation to determine the existence,

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[8] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 149.

[9] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145. According to the Appellate Body, information concerning Article 3.4 factors is in any case relevant for the purposes of Article 6.4. Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 146.

degree and effect of any alleged dumping shall be initiated upon a written application by or on behalf of the domestic industry.'

Art. 5.6 AD adds:

> If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify the initiation of an investigation.

In the remaining part of this chapter, we will focus on an investigation upon request, and will revert to the *ex officio* procedure only when necessary.

An investigation may only be initiated if two sets of requirements are met. The first set deals with the application by the domestic industry, which needs to contain evidence on dumping, injury and the causal link. The second set of requirements go beyond the application as such and require the authority to examine whether there is sufficient support from the domestic industry for such an initiation and whether there is sufficient evidence to justify initiating an investigation. We will deal with these two sets of requirements in turn.

2 A Proper Application for Initiation

Art. 5.2 AD reflects the elements that an application must contain:

> An application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and *(c)* a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.

Article 5.2 AD further specifies that 'the application shall contain such information as is reasonably available to the applicant' concerning the domestic industry, the allegedly dumped product and the alleged dumpers, the normal value and export price, the volume and price effect of the imports, and their consequent impact on the domestic industry.[10]

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[10] It has been proposed that the applicants should also be required to submit a list of all known domestic producers who support the application and the volume and value of each producer's domestic production of the like product, so as to facilitate the work of the investigating authority in examining standing. TN/RL/GEN/23. Another proposal which may impact the standing determination concerns the need to identify all domestic producers in order to ensure that the assessment of injury to the industry is as complete as possible. See TN/RL/GEN/89.

In other words, Article 5.2 contains two preliminary obligations for an application to be acceptable to the authority. It requires the applicant to substantiate the application by *providing relevant evidence*, beyond a simple assertion. Secondly, it specifies the issues on which information is to be provided and attenuates the obligation of providing information by only requiring an applicant to provide such information *as is reasonably available* to the applicant.

The term *simple assertions* has not been interpreted in any meaningful way, but it is clear that less than full proof, to the extent that it passes the *simple assertion* threshold, is all that is required at this stage. It goes without saying that the quantity and quality of the information provided by the applicant need not be such as would be required in order to make a preliminary or final determination. Neither does it appear to be the case that the application needs to contain information on, for example, *all* of the injury related factors listed in Article 3.4.[11] The term 'evidence' refers to information, raw numerical data, rather than any analysis of such data.[12] According to the Panel in *Mexico – Corn Syrup*,

> . . . Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself.[13]

The Panel on *US – Softwood Lumber V* rejected the argument that the 'reasonably available' language is there to toughen the obligation to provide evidence in the application. Quite the opposite is the case, according to the Panel:

> It seems to us that the 'reasonably available' language was intended to avoid putting an undue burden on the applicant to submit information which is not reasonably available to it. It is not, in our view, intended to require an applicant to submit *all* information that is reasonably available to it. Looking at the purpose of the application, we are of the view that an application need only include such reasonably available information on the relevant matters as the applicant deems necessary to substantiate its allegations of dumping, injury and causality. As the purpose of the application is to provide an evidentiary basis for the initiation of the investigative process, it would seem to us unnecessary to require an applicant to submit *all* infor-

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[11] Panel Report, *Mexico – Corn Syrup*, para. 7.73.

[12] The Panel on *Thailand – H-Beams* was of the view that 'raw numerical data would constitute 'relevant evidence' rather than merely a "simple assertion" within the meaning of this provision'. Panel Report, *Thailand – H-Beams*, para. 7.77.

[13] Panel Report, *Mexico – Corn Syrup*, para. 7.76. The Panel on *Thailand – H-Beams* agreed with this view. Panel Report, *Thailand – H-Beams*, para. 7.75–7.76.

> mation reasonably available to it to substantiate its allegations.[14] This is particularly true where such information might be redundant or less reliable than information contained in the application. Of course, this does not mean that such information will necessarily be sufficient to justify initiation under Article 5.3.[15]

In other words, an application which is not supported by evidence on dumping, injury and the causal link, because no such evidence was reasonably available to the applicant, may nevertheless be Article 5.2 compliant.[16]

An application which is Article 5.2 compliant is a preliminary necessary condition for the initiation of an investigation, but it is not sufficient. Put differently, whether an application complies with Article 5.2 does not answer the question whether the authorities are justified in initiating an investigation. Two additional requirements need to be fulfilled: there needs to be sufficient support from the domestic industry for the initiation of an investigation (the question of 'standing'), and the application needs to contain *sufficient* evidence *to justify the initiation* of an investigation. Where, under Article 5.2, an application was required to be supported by evidence beyond simple assertions, the question under Article 5.3 is whether the evidence provided in accordance with Article 5.2 is objectively *sufficient to justify the initiation* of an investigation under Article 5.3.[17] We will next deal with these two additional requirements.

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[14] If the requirement were to be that all information reasonably available to the applicant must be submitted in the application, it could lead to absurd results in that the applicant might be required to submit a large volume of information for purposes of the initiation of the investigation.

[15] Panel Report, *US – Softwood Lumber V*, para. 7.54.

[16] As the Panel on *US – Softwood Lumber V* noted, 'the words "reasonably available" mean that the specified information must be submitted *to the extent* reasonably available to the applicant. It is therefore a modulation of the requirement to provide such information in light of its availability, so as to make the application compliant with Article 5.2 even if it does not include all the specified information if such information was simply not reasonably available to the applicant'. Panel Report, *US – Softwood Lumber V*, para. 7. 55.

[17] The Panel in *US – Softwood Lumber V* quoted from the *Guatemala – Cement I* case what it considers to be the essential difference between the obligations of Article 5.2 and 5.3: 'Thus, the decision to initiate is made by reference to the objective sufficiency of the evidence in the application, and not by reference to whether the evidence and information provided in the application is all that is reasonably available to the applicant.' Panel Report, *Guatemala – Cement I*, para. 7.50, quoted with approval in Panel Report, *US – Softwood Lumber V*, para. 7.74. Also see Panel Report, *Mexico–Steel Pipes and Tubes*, para. 7.23.

3 Standing Requirements

Art. 5.4 AD lays down the standing requirements for the domestic industry filing an application. It prevents WTO Members from initiating an investigation unless a certain statutory percentage of the domestic industry producing the like product supports the application, such that the application can be considered to have been made 'by or on behalf of the domestic industry'. There are two thresholds to be met simultaneously, a 50 per cent and a 25 per cent support threshold. First, the application needs to be supported by those producers[18] whose collective output is more than 50 per cent of the total production of that portion of the domestic producers expressing an opinion in favour or against the initiation. So assume that A, B, C and D are the only companies in a relevant market in the US and they are producing 10 tonnes, 20 tonnes, 50 tonnes and 20 tonnes, respectively. A and B support the initiation, C is opposed to initiation and D remains idle. The joint production of A and B is 30 tonnes, which is less than 50 per cent of the total production of the producers expressing an opinion (A, B and C which together produce 80 tonnes). If C had remained idle and it had been D who had voiced opposition to the idea of an initiation, A and B would have met the first threshold, as together they produce 30 tonnes, which is more than 50 per cent of the 50 tonnes which is produced by A, B and D.

Second, the producers expressly supporting the initiation need to represent at least 25 per cent of total production, that is, not less than 25 per cent of the production of all domestic producers whether expressing an opinion on the initiation or not. In the above example, A and B together produce 30 tonnes which is more than 25 per cent of the total production of the domestic industry (A, B, C and D) which amounts to 100 tonnes.[19]

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[18] The Agreement does not explicitly require individual producers' support and appears to allow the authority to consider as sufficient the support expressed by a producers' association on behalf of its members. A practice exists to consider the support expressed by the association as equivalent to the support expressed by *all* of the producers represented by this association, even though the association perhaps only supported the application following a small majority vote within the association. It has therefore been suggested to clarify the Agreement to require that the standing determination be based on the positions expressed by individual domestic producers, and that representation by trade associations should not be counted collectively when such determinations are made. TN/RL/GEN/23; TN/RL/GEN/69.

[19] Certain Members consider that these thresholds are too low and still allow investigations to be initiated at the request of a small portion of the domestic industry. They propose to raise the threshold to require support for the application by domestic producers representing more than 50 per cent of total domestic production. This would also imply that there would be no need for a two-pronged test anymore. In their view,

The Panel on *US – Offset Act (Byrd Amendment)* faced the following situation: as already stated briefly above, the US were promising all US companies, that would actively back a petition to impose AD duties, a re-distribution of proceeds from (the eventually imposed) AD duties. The Panel found this measure to be inconsistent with the terms of Art. 5.4 AD since, in its view, it violated the principle of good faith (*bona fides*): by providing operators with an incentive to support an application, the US authority was not acting in good faith since it was reducing a statutory requirement (Art. 5.4 AD) to redundancy.[20] On appeal, the AB reversed the Panel's conclusions in this respect:

> A textual examination of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* reveals that those provisions contain no requirement that an investigating authority examine the motives of domestic producers that elect to support an investigation. Nor do they contain any explicit requirement that support be based on certain motives, rather than on others. The use of the terms 'expressing support' and 'expressly supporting' clarify that Articles 5.4 and 11.4 require only that authorities 'determine' that support has been 'expressed' by a sufficient number of domestic producers. Thus, in our view, an 'examination' of the 'degree' of support, and not the 'nature' of support is required. In other words, it is the 'quantity', rather than the 'quality', of support that is the issue.
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> . . .
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> We conclude, therefore, that the texts of Article 5.4 of the *Anti-Dumping Agreement* and Article 11.4 of the *SCM Agreement* do not support the reasoning of the Panel. By their terms, those provisions require no more than a formal examination of whether a sufficient number of domestic producers have expressed support for an application.
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> . . .
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> The Panel found that the CDSOA 'will result' in more applications having the required level of support from domestic industry than would have been the case without the CDSOA and stated that 'given the low costs of supporting a petition, and the strong likelihood that all producers will feel obliged to keep open their

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requiring a higher degree of support for the application ensures a genuine industry interest and thus more complete data on which the injury determination may be based. TN/RL/GEN/23, TN/RL/GEN/69.

[20] Panel Report, *US – Offset Act (Byrd Amendment)*, paras 7.59–7.65. The Panel noted that 'those two provisions [AD Article 5.4 and SCM Article 11.4] were introduced in response to the controversial practice of the United States authorities of presuming that an application was made by or on behalf of the domestic industry unless a major proportion of the domestic industry expressed active opposition to the petition'. It considered that the Offset Act undermined the value of the standing requirement and recreates 'the spectre of an investigation being pursued where only a few domestic producers have been affected by the alleged dumping, but industry support is forthcoming because of the prospect of offset payments being distributed if dumping is found in consequence of the investigation and anti-dumping duties imposed'. Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.63.

> eligibility for offset payments for reasons of competitive parity', it 'could conclude that the *majority of petitions will achieve the levels of support required* under AD Article 5.4/SCM Article 11.4'. The evidence contained in the Panel record, however, does not support the overreaching conclusion that 'the majority of petitions will achieve the levels of support required' under Articles 5.4 and 11.4 as a *result* of the CDSOA. Indeed, we note that, in its first written submission to the Panel, the United States explained that 'it is rare for domestic producers in the United States not to have sufficient industry support in filing antidumping or countervailing duty petitions.' In support of its statement, the United States submitted to the Panel a survey that shows, for example, that during the year prior to the enactment of the CDSOA, *all* of the applications that were filed met the legal thresholds for support.
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> We also believe that the Panel had no basis for stating that the CDSOA as such 'in effect *mandates* domestic producers to support the application'. Even assuming that the CDSOA may create a financial incentive for domestic producers to file or to support an application, it would not be correct to say that the CDSOA as such 'mandates' or 'obliges' producers to do so. The fact that a measure provides an 'incentive' to act in a certain way, does not mean that it 'in effect mandates' or 'requires' a certain form of action. Indeed, we are not considering here a measure that would 'coerce' or 'require' domestic producers to support an application. Such a measure might well be found to be WTO-inconsistent. It could be considered, *inter alia*, to circumvent the obligations contained in Article 5.6 of the *Anti-Dumping Agreement* and Article 11.6 of the *SCM Agreement* not to initiate an investigation without a written application 'by or on behalf of the domestic industry' except when the conditions set out in those provisions have been met. However, the CDSOA is not such a measure.[21] (Italics in the original)

Consequently, in the AB's view, Art. 5.4 AD imposes a mere formal requirement to ensure that a certain percentage of the domestic industry is backing an application and reflects no bona fides obligation to abstain from influencing the outcome, as envisaged by the Panel.[22]

The AD Agreement is often said to be as much about procedures as it is about substance. However, an important point to note is that, sometimes, procedures heavily determine substance. The best, probably, illustration of this crucial point is offered by the two conditions – apparently innocuous and of common sense – for launching an AD investigation, discussed in this context: complaining firms should (i) represent a 'major proportion' of the domestic industry, and (ii) be 'domestic' firms.

At first glance, the 'major proportion' condition makes a lot of sense. It would have been dangerous for the multilateral trading system to allow small

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[21] Appellate Body Report, *US – Offset Act (Byrd Amendment)*, paras 283, 286, 292–3.

[22] Horn and Mavroidis (2005a) expressed a sympathetic view to the Panel's findings. In their view, if at all, claims under Art. 5.4 AD looked more promising than claims under Art. 18.1 AD.

individual firms to table anti-dumping complaints. Too many complaints would have been produced, eliminating quickly any progress towards freer market access. However, this condition of apparently elementary common sense has two major flaws. Firstly, it does not exclude small firms as strictly as it appears at first glance. Small firms could successfully table complaints if the product in question is defined narrowly enough, as best illustrated by several cases in the electronic industry (chips) where small producers of outdated chips (no longer produced by the large chip producers) have been able to table complaints successfully by using an appropriately narrow definition of the 'like-product'. Secondly, and more crucially, the major proportion condition has an implicit huge bias in favour of large firms, hence of oligopolistic industries. Such a condition can be met de facto only by a few large firms, since a myriad of small firms would find it hard to act together (coalitions are costly to generate). In the EU and US cases, the market share of the plaintiffs alone are often very high. On average, they amount to 60–70 per cent of the domestic market of the product under investigation. By any standard of competition policy, such large shares raise the question of a potentially dominant or monopolizing (joint) position when they involve two or three firms. Moreover, 7–8 per cent of the US and EC anti-dumping cases have been lodged by plaintiffs which are the 'sole' producer of the good in question in the importing country. Sole producers become full monopolies as soon as (even minor) anti-dumping quantitative restrictions are taken, and as soon as high anti-dumping tariffs are imposed.

In this legal context, it is not surprising that anti-dumping cases have been heavily concentrated in oligopolistic industries. Metals, chemicals, plastics, electrical equipment, textiles and clothing account for 75 per cent of anti-dumping measures, even though these sectors account for less than half of world trade. Metals, chemicals, plastics, electrical equipment and textiles have a high proportion of relatively standard products and their market structures are often oligopolistic. Clothing does not show this pattern. But it is increasingly dominated by a few firms (producers and distributors) which compete via product differentiation and varieties; that is, imperfect competition based on trademarks, goodwill, distribution channels, and the like – all features that have an oligopolistic content.

The second condition – that is, that complaining firms should be 'domestic' – may have made sense when Article VI of the GATT was drafted in 1947. But this condition had lost any meaning in the 1980s when large and multinational complaining firms were facing defendants that they own, when large and multinational defending firms were running plants in the import-competing country, or when large and multinational complainants and defendants were closely related by joint patents for the product under investigation.

The impact of these two apparently innocuous conditions has been enormous for the vast success of the anti-dumping instrument. It is unlikely that coalitions of small firms would have been able to attract the same range of skills in legal matters and lobbying as the big plaintiffs and defendants during the last 25 years – hence would have been able to distort and expand the AD Agreement as much as has been the case during these two decades. Clearly, these two provisions have been the key instrument for the 'privatization' of trade policy by firms having enough initial market power to use the 'pro-collusion' bias embedded in anti-dumping regulations

4 Sufficient Accurate and Adequate Evidence to Justify Initiation

When presented with a petition, investigating authorities are not obliged to initiate an investigation. They retain discretion to this effect. More importantly, Article 5.3 AD Agreement provides that even in the case where the application contains evidence on dumping, injury and the casual link as required by Article 5.2 AD Agreement, no investigation may be initiated unless the investigating authority has examined the accuracy and adequacy to determine whether there is sufficient evidence to justify the initiation of an investigation. When the authority is persuaded as to the accuracy of the information provided and the well-founded nature of the allegations, it may decide to launch a formal investigation.[23]

In its report on *US – Softwood Lumber V*, the Panel held the view that Art. 5.3 AD is a step additional to that undertaken under Art. 5.2 AD, in that it requests investigating authorities actively to check the accuracy and adequacy of the submitted information. Summing up prior case-law on this issue, the Panel went on to state (para. 7.74):

> We note that a number of panels have addressed the different obligations contained in and the functions of Article 5.2 and Article 5.3 of the *AD Agreement*. Article 5.2 provides that the written application shall contain certain evidence of dumping, injury and causality in the form of specified information to be submitted to the extent such evidence is reasonably available to the applicant. At this stage, the only requirement is that information described in the subparagraphs of Article 5.2 has been included in the application. This does not mean that the investigation can be initiated on the basis of compliance with Article 5.2 only, as Article 5.3 makes it clear that a further step is required, that is, that the investigating authority has to examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of the investigation. It is therefore clear that an application might satisfy the requirements of

[23] A petitioner whose request has been rejected cannot complain before a WTO Panel. If at all, it might have a course of action before its domestic jurisdiction.

> Article 5.2, but *not* necessarily those of Article 5.3 as the evidence contained in the application might be judged by the investigating authority not to be sufficient to form the basis for initiating the investigation. Although we recognize that, because the Appellate Body reversed the panel's conclusions in *Guatemala – Cement I* on the issue of whether the dispute was properly before it, that panel's conclusions in this regard have no legal status, we find its statements on this issue instructive and we agree with it when it states:
>
> > . . . the fact that the applicant has provided, in the application, all the information that is 'reasonably available' to it on the factors set forth in Article 5.2(i)–(iv) is not determinative of whether there is sufficient evidence to justify initiation. Rather, Article 5.3 establishes an obligation that extends beyond a determination that the requirements of Article 5.2 are satisfied.

Now what does this duty specifically entail? The Panel on *Guatemala – Cement II* as well as the Panel on *Argentina – Poultry Antidumping Duties* were of the view that, while the accuracy and adequacy of the evidence are relevant to the authorities' determination whether there is sufficient evidence to justify initiation, 'it is however the sufficiency of the evidence, and not its adequacy and accuracy per se, which represents the legal standard to be applied in the case of a determination whether to initiate an investigation'.[24] In sum, the investigating authority should satisfy itself as to the *sufficiency of evidence* to initiate an investigation before it.

(a) Sufficient evidence of what?

Article 5.3 AD Agreement does not expressly provide that the evidence in question should relate to the questions of dumping, injury and the casual link but, when read in the context of Article 5.2, Panels have consistently held that such is the kind of evidence required to justify initiation.[25] In this respect,

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[24] Panel Report, *Guatemala – Cement II*, para. 8.31. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.60; Panel Report, *US – Softwood Lumber V*, para. 7.79. An application alleging threat of injury does not for example need to contain information on all of the Article 3.7 factors, but a consideration of those factors is certainly pertinent to an evaluation of whether there was sufficient evidence of threat of injury to justify the initiation of an investigation. Therefore, absence of information concerning any of the four threat factors of Article 3.7 cannot be considered to constitute sufficient evidence to justify initiation. Panel Report, *Guatemala – Cement II*, para. 8.52.

[25] Panel Report, *Guatemala – Cement II*, para. 8.35; Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.61; Panel Report, *US – Softwood Lumber V*, para. 7.77:

> Before addressing the issue of what constitutes sufficient evidence, we first need to address the question of 'sufficient evidence' of what? In this regard, we find the first

Articles 2 and 3 AD Agreement on 'dumping' and 'injury' are considered to provide guidance to the authority regarding the meaning of that term for the purpose of the AD Agreement. In order to determine whether there is sufficient evidence of dumping and injury, an investigating authority cannot entirely disregard the elements that configure the existence of that practice as outlined in Articles 2 and 3.[26] In other words, even though, for example, the various provisions relating to normal value and export price of Article 2 do not apply as such to the initiation determination, they are certainly relevant to the authorities' determination of the sufficiency of evidence.[27] According to the Panel in *US – Softwood Lumber V*,

> this does not, of course, mean that an investigating authority must perform a full-blown determination of dumping in order to initiate an investigation. Rather, it means simply that an investigating authority should take into account the general parameters as to what dumping is when inquiring about the sufficiency of the evidence. The requirement is that the evidence must be such that an unbiased and objective investigating authority could determine that there was sufficient evidence of dumping within the meaning of Article 2 to justify initiation of an investigation.[28]

In the case of *Argentina – Poultry Anti-Dumping Duties*, for example, the Panel considered that an initiation based on a weighted average export price that was calculated using only those transactions with a price lower than normal value was not based on the totality of comparable export transactions as required by Article 2.4.2, and thus did not allow an objective and unbiased investigating authority properly to conclude that there was sufficient evidence of dumping to justify the initiation of an investigation. The Panel recalled that, in accordance with Article 2, a determination of dumping should be made in

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> part of Article 5.3 instructive, where it states that '[t]he authorities shall examine the accuracy and adequacy of the evidence provided in the application', as well as the chapeau of Article 5.2 which states that '[a]n application under paragraph 1 shall include evidence of *(a)* dumping, *(b)* injury . . . and *(c)* a causal link between the dumped imports and the alleged injury'. We are therefore of the view that, although Article 5.3 contains no express reference to evidence of dumping, evidence on the three elements necessary for the imposition of an anti-dumping measure may be inferred into Article 5.3 by way of Article 5.2. Article 5.2 makes it clear that the application has to contain evidence on dumping, injury and causation, while Article 5.3 requires the investigating authority to satisfy itself as to the accuracy and adequacy of the evidence to determine that is sufficient to justify the initiation of the investigation. Reading Article 5.3, in the context of Article 5.2, the evidence mentioned in Article 5.3 can only mean evidence of dumping, injury and causation.

[26] Panel Report, *Guatemala – Cement II*, para. 8.35. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.62, Panel Report, *US – Softwood Lumber V*, para. 7.80.

[27] Panel Report, *Guatemala – Cement II*, para. 8.36.

[28] Panel Report, *US – Softwood Lumber V*, para. 7.80.

respect of the product as a whole, for a given period, and not for individual transactions concerning that product.[29] Neither would, according to the same Panel, a comparison between normal value data relating to one day and export price for a period of several months constitute a proper basis for determining whether there is sufficient evidence of dumping to justify an initiation in light of the requirement in Article 2.4 to make a fair comparison between normal value and export price.[30]

(b) What is sufficient as evidence?

What *quantum of proof* (*burden of persuasion*) is necessary for an investigation to be launched is not clear. It should be pointed out here that an investigating authority receiving a petition knows that its eventual decision is justiciable, in the sense that, eventually, a complaint against its decision might be introduced before the WTO. The clear position taken by Panels on the issue of sufficiency of evidence is that the *quantity* and *quality* of the evidence required to meet the threshold of sufficiency of the evidence is of a different standard for purposes of initiation of an investigation compared to that required for a preliminary or final determination of dumping.[31] The Panel, in its report on *Argentina – Poultry Antidumping Duties*, stated that it is through the investigation itself that an authority should satisfy itself that all three elements are simultaneously present. It suffices that the authority has before it enough material to warrant an initiation of the investigation. The Panel quoted with approval the following statement of the Panel in *Guatemala – Cement II*:

> We do not of course mean to suggest that the investigating authority must have before it at the time it initiates an investigation evidence of dumping within the meaning of Article 2 of the quantity and quality that would be necessary to support a preliminary or final determination. An anti-dumping investigation is a process where certainty on the existence of all the elements necessary in order to adopt a measure is reached gradually as the investigation moves forward.[32]

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[29] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.80.

[30] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.84.

[31] Panel Report, *Guatemala – Cement I*, para. 7.64; Panel Report, *Guatemala – Cement II*, para. 8.35. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.62; Panel Report, *US – Softwood Lumber V*, para. 7.84. For example, in its report on *Argentina – Poultry Anti-Dumping Duties*, the Panel was of the view that evidence relating to sales in a major market of the exporting country, even when relating to sales in one city only, rather than the entire country was sufficient for initiation; and that evidence at initiation need not be of the same quantity or quality as would be necessary to support preliminary or final determination. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.67.

[32] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.61, quoting Panel Report, *Guatemala – Cement II*, para. 8.35.

This statement is of course, not very informative: less than full proof, but how much less? As usual, the issue whether the information submitted was sufficient will be discussed on a case-by-case basis. In *Guatemala – Cement II*, the Panel considered that the authority was not justified in initiating an investigation based on an application which presented data for normal value and export price at different levels of trade and with important differences in the sales quantities, without examining the possible effects of such differences on price comparability.[33] Similarly, the Panel in *Mexico – Steel Pipes and Tubes* considered that the information contained in a request for initiation was not sufficient where the normal value information presented consisted of one invoice and one price quote which did not even pertain to the known exporter but to a distributor, related only to a small sub-set of the product under investigation, and concerned one single day. By contrast, the export price information reflected the full spectrum of products imported by Mexico from Guatemala, over the entire period of investigation, at the level of the Guatemalan producer or exporter. The Panel rightly found that differences of this kind typically lead to a distortion of the normal value *vis-à-vis* the export price, and thus if not adjusted for could give rise to apparent margins of dumping where no dumping in fact exists.[34] In contrast, and to cite a concrete example of information which was considered sufficient to initiate, the Panel in its report on *US – Softwood Lumber V* held that the following information was sufficient:

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[33] Panel Report, *Guatemala – Cement II*, para. 8.39. The differences were quite conspicuous in this case:

> Turning to the case at hand, the evidence on normal value relied on by the Ministry for initiation consisted of two invoices from Mexican retailers for one sack of cement each, while the evidence of the export price consisted of two import certificates for 7035 and 4221 bags of cement. In our opinion, the evidence on normal value and export prices presents obvious differences with regard to the quantities for the involved transactions and the level of trade of the sales. It is clear on the face of these documents that the invoices reflecting prices in Mexico are for sales occurring at the very end of the commercialization chain and the import certificates reflect prices at the point of importation which is the beginning of the commercialization chain for Mexican cement in Guatemala. The existence of these stark differences in quantity and in level of trade, differences of the kind that Article 2.4 of the AD Agreement recognizes may affect price comparability, should have triggered at a minimum some reflection on the part of the investigating authorities as to the possible non-comparability of the sales in question. Panel Report, *Guatemala – Cement II*, para. 8.37.

[34] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.42.

(a) Cost-related evidence from smaller surrogate domestic producers (as a proxy for cost data from the exporters/producers allegedly dumping) satisfies the requirements of Art. 5.3 AD (para. 7.95);
(b) Cost-allocation to specific products can legitimately not take place at this stage, and hence absence of evidence concerning such cost-allocation is not at odds with the requirements of Art. 5.3 AD (para. 7.97);
(c) If cost data from various surrogate companies cover the whole year and costs data of one company covers the whole period, Art. 5.3 AD has not been violated (para. 7.99);
(d) The fact that evidence of dumping is found only with respect to some categories of the product among those for which an initiation of investigation has been requested is not at odds with the requirements of Art. 5.3 AD (para. 7.101);
(e) Prices for domestic sales (home market) can legitimately be taken from a specialized magazine, even though it reflects a number of sales and is not related to a specific sale (para. 7.105);
(f) An affidavit which reflects deleted (confidential) information can legitimately be taken into account (para. 7.120);
(g) Price information on only two out of seven categories of lumber products under investigation suffices to meet the requirements of Art. 5.3 AD, as long as the evidence concerns more than an insignificant sub-set of the imported product (para. 7.123);
(h) Freight cost information which related to truck freight only does not violate Article 5.3 as nothing before the authority indicated that only rail was used to transport lumber or even that rail was mostly used (para. 7.126).

It is noteworthy that the Panel in *US – Softwood Lumber V* seems to be of the view that the complexity of the case lowers the evidentiary threshold for initiation.[35] So it appears that the Panel considers that an authority is allowed the benefit of the doubt in complex cases. This is surprising given the chilling trade effect that the mere initiation of an anti-dumping investigation may have on trade. It is worth pointing out that the complex nature of the case in *US – Softwood Lumber V* was to a certain extent self-imposed by the applicants which were arguing their case of dumping on the basis of a constructed normal value for which cost data are of course required. In the absence of cost data

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[35] See for example Panel Report, *US – Softwood Lumber V*, para. 7.95:

> In light of the nature of the lumber industry in both the United States and Canada, and the dynamic interrelationship of the different cost elements, we are of the view that it would almost be impossible for an applicant to be able to submit information to address all these variables for purposes of the initiation of an investigation.

from the Canadian exporters, the applicant had to use cost data from US lumber mills as a proxy, the logical consequence of which was a number of problems relating to the relevance and comparability of such US cost data to the case at hand.

In any case, there seems to exist some tension between the deferential approach of the Panel in this *US – Softwood Lumber V* case compared to the demanding approach of Panels in other cases such as *Argentina – Poultry Anti-Dumping Duties* or *Guatemala – Cement II*. In *Argentina – Poultry Anti-Dumping Duties* the authority was considered not justified in initiating an investigation even though the application contained evidence on at least a number of transaction that were dumped. Because not all comparable export transactions had been included in the preliminary dumping analysis, the Panel considered that there was not sufficient evidence for initiation. Similarly, in *Guatemala – Cement II*, an authority was faulted for initiating an investigation involving a claim of threat of injury which contained information on dumping, injury and the causal link, but did not provide information on the additional threat factors of Article 3.7. Yet, in this case, it seems that, if the authority had initiated the investigation on the basis of 'material injury' later to change its determination to one of a 'threat of injury' only, it probably would have been allowed to initiate the investigation on the basis of the application before it. The Panel in *Mexico – Steel Pipes and Tubes* was similarly demanding when it considered that the Mexican investigating authority could not have initiated an investigation on the basis of volume of import data at the tariff line level, without any break-up of such data at the specific product level. Interestingly, the Mexican authority had acknowledged this problem and stated at the time of initiation that this was one of the issues it was going to investigate in the course of the investigation in order to determine the exact trend in the volume of imports of the subject product as part of its injury analysis. Actually, the investigation confirmed that the subject product constituted a substantial portion of the imports under this more general tariff line, thus confirming the reliability of the data. The Panel did not consider any of this to be relevant in its assessment of whether, at the time of initiation, the Mexican authority was in possession of information sufficient to justify the investigation.[36] This relatively exacting approach was not followed by the Panel on *US – Softwood Lumber V* which shied away from requiring the authority to examine more closely the construction of the normal value which formed the basis for the dumping analysis.

Interestingly, an investigating authority which is not persuaded by the record before it can go ahead and complete it, and, using the additional infor-

[36] Panel Report, *Mexico – Steel Pipes and Tubes*, paras 7.58–7.60.

mation it has gathered, initiate an investigation, although it has no obligation to do so.[37] According to the Panel in *Guatemala – Cement II*, this is one of the consequences of the difference between the Article 5.2 reasonably available standard that refers to the applicant and the Article 5.3 sufficiency of evidence standard which is applicable to the investigating authority:

> We have expressed the view that Articles 5.2 and 5.3 contain different obligations. One of the consequences of this difference in obligations is that investigating authorities need not content themselves with the information provided in the application but may gather information on their own in order to meet the standard of sufficient evidence for initiation in Article 5.3.[38]

Consequently, the decision whether to initiate an investigation can be taken on the basis of information submitted by the applicants *and* completed *ex officio*. This implies that it could actually be required that the authority in complex cases such as those involving an application based on constructed normal value, conduct some sort of pre-investigation to examine the accuracy of the information provided in the application. Seen in this light, there seems to be even less reason to consider the complexity of the case as an excuse to let a deficient application be the basis for an anti-dumping investigation.

It is important to point out that the exporters or producers alleged to have been dumping the product are not involved at all in this pre-initiation phase. Article 5.5 AD Agreement even expressly provides that the authorities shall avoid any publicizing of the application for initiation of an investigation, unless a decision has been made to initiate an investigation. The only obligation that exists is to notify the government of the exporting country of the receipt of a properly documented application and this prior to initiation of the investigation. The reason for this is clearly to avoid the chilling effect on trade which even the submission of an application may have, given the likelihood that it may lead to the initiation of an investigation. However, the initiation decision has very important effects on the foreign exporters and producers who will have to respond to questionnaires, be involved in burdensome procedures and ultimately may see duties imposed on their products. It is for this reason that it has been argued that exporters should be allowed to comment on the application prior to initiation such as to better inform the investigating authorities of the available evidence, thereby avoiding frivolous initiations.[39]

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37 Panel Report, *US – Softwood Lumber V*, para. 7.75.

38 Panel Report, *Guatemala – Cement II*, para. 8.62.

39 TN/RL/GEN/23; TN/RL/GEN/69; TN/RL/GEN/123. As the Appellate Body in *Guatemala – Cement I* indicated, the decision to initiate an investigation is not a 'specific measure' in the sense of Article 17.4 AD Agreement which can be challenged

What an investigating authority must at any rate do, to comply with Article 5.7, is to ensure that evidence of dumping and injury is *simultaneously* considered by the competent authority in its decision to initiate an investigation. It is recalled that the relevant investigating authority which Article 5.7 is referring to is the domestic authority responsible for taking the decision to initiate, rather than the subordinate examining bodies reporting to the authority taking the decision.[40] It is noteworthy that the few cases in which Panels have called for revocation of the anti-dumping measures following a successful challenge of such measures before the WTO have all involved disputes in which, *inter alia*, the determination of initiation under Article 5.3 was considered flawed.[41] It appears that Panels are of the view that in case of a flawed initiation, there can be no justification for maintaining an anti-dumping measure that was based on an investigation that should not even have taken place. This has certainly added to the bite of Article 5.

Assuming that the decision is taken to initiate an investigation, the investigating authority will have to issue a public notice to this effect. When issuing this notice, the investigating authority concerned will have to observe the requirements reflected in Art. 12.1.1 AD. Following the issuance of this notice the investigation is formally launched.

C THE INVESTIGATION – CHOOSING THE PERIOD OF INVESTIGATION (POI)

1 General

One of the critical aspects on an anti-dumping investigation is the choice of the period of investigation.[42] To be clear, with the period of investigation (the

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before a WTO Panel. AB Report, *Guatemala – Cement I*, paras 79–80. In other words, an exporter would be forced to wait until provisional measures have been taken before taking any action before the WTO. This is another reason why certain members are advocating an involvement of the exporters even at the pre-initiation stage. The establishment of an independent group of experts which would review initiation decisions upon request and issue non-binding opinions has been proposed as an alternative means of ensuring a rapid review of the initiation decision. TN/RL/GEN/109.

[40] These bodies may, therefore, be examining dumping and injury at different times. See Panel Report, *Argentina – Poultry Antidumping Duties*, para. 7.122.

[41] Panel Report, *Guatemala – Cement II*, para. 9.6; Panel Report, *Argentina – Poultry*, para. 8.6–8.7; Panel Report, *Mexico – Steel Pipes and Tubes*, para. 8.9–8.13.

[42] As was recognized by the Panel on *Mexico – Anti-Dumping Measures on Rice*, para. 7.56: 'The choice of the period of investigation is obviously crucial in this investigative process as it determines the data that will form the basis for the assess-

'POI') we refer to the period for which dumping and injury related data are collected and analysed. This POI normally precedes the initiation of the investigation. The investigation itself runs for a period of, normally, 12 to a maximum 18 months (Article 5.10)[43] during which information is gathered and analysed. In sum, the POI is the reference period that will be used to assess whether dumping is causing injury to the domestic industry.[44]

Strangely enough, the AD Agreement does not expressly discuss the period of investigation (POI) for which the data with respect to dumping and injury should be collected. There exists, however, a generally accepted practice, which led the WTO Antidumping Committee (ADP Committee) to adopt a *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations* (the 'Recommendation') which regulates the period of the POI.[45] The Recommendation[46] distinguishes between a period of data collection for the dumping investigation and a period of data collection for the injury investigations and provides, *inter alia*:

(a) that the period of data collection for *dumping* investigations normally should be twelve months, and in any case no less than six months;
(b) that this period should end as close to the date of initiation as is practicable;
(c) that the period of data collection for *injury* investigations should normally be at least three years, unless a party from whom data is being gathered has existed for a lesser period; and
(d) that the period of data collection for injury investigations should include the entirety of the period of data collection for the dumping investigation.

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ment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.'

[43] Art. 5.10 AD regulates the total duration of an investigation: 'Investigations shall, except in special circumstances, be concluded within one year, and in no case more than 18 months, after their initiation.'

[44] As the Panel in *EC – Tube or Pipe Fittings* noted, 'The concept of a set period of investigation to examine the existence of dumping has been present in the GATT system for over 40 years. Indeed, a 1960 Report by a Group of Experts concerning anti-dumping and countervailing duties considered the use of a "pre-selection system".' See Group of Experts, *Second Report on Anti-dumping and Countervailing Duties*, adopted on 27 May 1960 (L/1141) BISD 9S, 194. Panel Report, *EC – Tube or Pipe Fittings*, footnote 116.

[45] See Panel Report, *Guatemala – Cement II*, para. 8.266: 'This recommendation reflects the common practice of Members'.

[46] See WTO Doc. G/ADP/6 (adopted by the Committee on 5 May 2000), and entitled *Recommendation Concerning the Periods of Data Collection for Anti-Dumping Investigations.*

In sum, the POI for dumping purposes will normally be one year and in no case less than six months, while the POI for the assessment of injury normally covers a three year period and should include the period for which dumping information is gathered and analysed. The Committee stated in its Recommendation that its guidelines do not preclude investigating authorities from taking account of the particular circumstances of a given investigation in setting the periods of data collection for both dumping and injury, to ensure that they are appropriate in each case. It did require that, in such cases, investigating authorities should include in public notices or in the separate reports an explanation of the reason for the selection of a particular period for data collection if it differs from that provided for in, *inter alia*, the Recommendation. It is clear that the choice of the POI may be something the applicants express a view on. After all, the application will be based on information relating to a particular period. However, the authority is by no means obliged to accept this period as the POI for the investigation.

The Panel Report on *EC – Tube or Pipe Fittings* explained in pertinent terms the *rationale* for using a period which ends before the POI and which aims at collecting data as close as possible to the initiation of the investigation:

> There are practical reasons for using an investigation period, the termination date of which precedes the date of initiation of the investigation. This ensures that the data that will form the basis for the eventual determination are not affected in any way by the initiation of the investigation and any subsequent actions of exporters/importers. The rationale is thus to acquire a finite data set unaffected by the process of the investigation. This can form the basis for an objective and unbiased determination by the investigating authority. The period of investigation terminates as close as possible to the date of initiation of the investigation in order to ensure that the data pertaining to the investigation period, while historical, nevertheless refers to the recent past. The use of a sufficiently long period of investigation is critical in order to ensure that any dumping identified is sustained rather than sporadic.[47]

The legal status of Committee recommendations is not very clear in WTO law. The WTO Agreement does not even recognize the term *secondary law*, and case-law has been quite erratic on this issue: the Panel, in its report on *US – Hot-Rolled Steel*, took the view, based on discussions in the ADP Committee itself concerning the nature of Committee recommendations, that the ADP Recommendation on the length of the POI on injury is a *non-binding* instrument. Accordingly, in the Panel's view, all obligations of investigating authorities with respect to the length of the POI have to be found in the AD Agreement itself. We quote footnote 152 of the report:

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47 Panel Report, *EC – Tube or Pipe Fittings,* para. 7.101.

> We note that the Committee on Anti-Dumping Practices recently adopted a recommendation which provides that 'the period of data collection for injury investigation normally should be at least three years' (Committee on Anti-Dumping Practices, Recommendation concerning the Periods of Data Collection for Anti-Dumping Investigations, adopted by the Committee on 5 May 2000, G/ADP/6). We note, however, that this recommendation was adopted after the investigation at issue in this dispute had been completed. Moreover, the recommendation is a non-binding guide to the common understanding of Members on appropriate implementation of the AD Agreement. It does not, however, add new obligations, nor does it detract from the existing obligations of Members under the Agreement. See G/ADP/M/7 at para. 40, G/ADP/AHG/R/7 at para. 2. Thus, any obligations as to the length of the period of investigation must, if they exist, be found in the Agreement itself.[48]

Subsequent Panels have distanced themselves from such views. In its report on *Argentina – Poultry Antidumping Duties*, the Panel shows considerable deference towards the ADP Recommendation on the length of the POI when evaluating the injury:

> Furthermore, we note that the issue of periods of review has been examined by the Anti-Dumping Committee. It has issued a recommendation to the effect that, as a general rule, 'the period of data collection for injury investigations normally should be at least three years, unless a party from whom data is being gathered has existed for a lesser period, *and should include the entirety of the period of data collection for the dumping investigation*'. It would appear, therefore, that the period of review for injury need only 'include' the entirety of the period of review for dumping. There is nothing in the Anti-Dumping Committee's recommendation to suggest that it should not exceed (in the sense of including more recent data) the period of review for dumping. (Emphasis added)[49]

The Panel in *Mexico – Anti-Dumping Measures on Rice* took the third way by recognizing on the one hand the non-binding nature of the Recommendation, while on the other hand finding support in the Recommendation for its position.[50] An approach upheld by the Appellate Body.[51] Although the issue is far

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[48] Panel Report, *US – Hot-Rolled Steel*, footnote 152. A similar view had been expressed by the Panel on *Guatemala – Cement II*, para. 8.266, footnote 868: 'We note that this recommendation is a relevant, but non-binding, indication of the understanding of Members as to appropriate implementation practice regarding the period of data collection for an anti-dumping investigation.'

[49] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.287. Also see Panel Report, *Guatemala – Cement II*, para. 8.266.

[50] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.62. For a similar approach, Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.229.

[51] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para.169: 'It appears to us that the Panel referred to the Recommendation, not as a legal basis for its findings, but simply to show that the Recommendation's content was not inconsistent with its own reasoning. Doing so does not constitute an error of law.'

from being settled, it seems that de facto Panels are likelier to follow the latter view: it would seem odd to do otherwise; as said, the Recommendation reflects the common agreement of WTO Members based on their practice as to the POI.

2 POI-related Questions

As stated earlier, the selection by an investigating authority of the period of investigation is clearly a critical element in the anti-dumping investigative process since it determines the data that will form the basis for the assessment of dumping, injury and the causal relationship between dumped imports and the injury to the domestic industry.[52] Importantly, as clearly stated by the Panel in its report on *Mexico Steel Pipes and Tubes*, as the selection of the POI is linked to its obligation to under Article 3.1 to conduct an objective assessment of positive evidence and an IA is bound to satisfy its obligations in this respect whether or not it is raised by an interested party in the course of an investigation.[53] In other words, the fact that an interested party does not take issue with the choice of the POI in the course of the investigation does not preclude a Member from raising this issue before the Panel.

Several questions have arisen in WTO case-law involving the choice of the period of investigation by the authorities. First, does an authority always need to gather three years' worth of information in an injury analysis? Second, is there a need for the POI to end as closely as possible to the start of the investigation or should it even continue following initiation of the investigation?

A preliminary problem arises in respect of any claims relating to the POI: in the absence of any specific provisions in the Agreement dealing with the POI, on which basis can a complaining party claim a violation of the Agreement? Thus far, whether by accident or not,[54] most POI-related claims have been related to the injury determination, and have been based on the obligation under Article 3.1 to determine injury based on positive evidence

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[52] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.224. The Panel Report in *Mexico – Steel Pipes and Tubes* discusses many of the same questions dealt with by the Panel and Appellate Body in respect of another anti-dumping measure of Mexico in the case of *Mexico – Anti-Dumping Measures on Rice*. Panel Report, *Mexico – Steel Pipes and Tubes*, paras 7.222–7.261.

[53] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.237 and 7.259.

[54] As we point out, the basis for a claimed violation has been the explicit obligation in Article 3.1 of an objective examination based on positive evidence, which is not mirrored in Article 2 relating to dumping. While it seems hard to argue that the dumping determination can be made on any other basis than positive evidence and should not involve an objective examination, the absence of any such explicit requirement may make POI-related claims concerning the POI for dumping less obvious.

and involving an objective examination. The one dumping-related POI claim was raised in the *EC – Tube or Pipe Fittings* case and was based on the general introductory Article 1, and the similarly general Article VI.2 GATT 1994.

In general, it appears from more recent case-law that, in case the POI provides only a partial or distorted picture of the state of the domestic industry, a POI-related claim could be entertained by a Panel even in the absence of any explicit provisions concerning the choice of the POI in the AD Agreement. In *Mexico – Anti-Dumping Measures on Rice*, for example, the US introduced a number of POI-related claims arguing that the Mexican authority had used a POI for injury which ended more than 15 months prior to the initiation of the investigation and analysed only part of the POI for which data had been gathered. The US contended that this was in violation of the obligation of Article 3.1 to conduct an objective examination based on positive evidence to determine injury, and thus also constituted violations of Articles 3.2, 3.4 and 3.5. The Panel followed the US in its reasoning.

(a) The need for an accurate and unbiased picture

Case-law reveals two things: one, the mere fact that the injury POI does not cover a three-year period is not alone sufficient to conclude that the authorities failed to examine injury in an objective manner and based on positive evidence; two, what is important, however, is that the data from the POI allow the authorities to have an accurate and unbiased picture of the state of the domestic industry, while the former aspect has been underlined in early case-law and formed part of a more deferential approach by Panels. The starting point of such Panels as *US – Hot-Rolled Steel* or *Guatemala – Cement II* was clearly that a Panel will not lightly interfere with the POI decision of the investigating authority, given the absence of any express provisions in this respect in the AD Agreement. The latter aspect on the other hand has been emphasized in more recent case-law and allows closer scrutiny of the investigating authorities' choice of a POI.

In *US – Hot-Rolled* Steel the Panel considered whether an injury analysis which revolved around an evaluation of two years of data would be inconsistent with the requirement to conduct an objective examination based on positive evidence. The US had gathered data for a three-year period and acknowledged that such was required for injury purposes. The US argued, however, that the reason the authority did not compare data for 1996 with those for 1998 was that 'changes created a new economic context for the performance of the industry'. The US did not explain why it considered those data no longer relevant in light of the changed economic circumstances. Nevertheless, the Panel did not consider it inappropriate of the authority to examine only data from two years as these data related to the most recent period and included the period of alleged dumped imports:

> We are of the view that in this case it was not improper of USITC to focus on the sudden and dramatic decline in industry performance from 1997 to 1998, at a time when demand was still increasing. The period USITC considered explicitly (1997–1998) is the most recent period, and is the period that coincides with the period of the alleged dumped imports. In our view, to the extent that Japan is suggesting that USITC should have made a static end-point-to-end point comparison, comparing 1996 levels to 1998 levels, we note that such a comparison, by ignoring intervening changes in circumstances and conditions in which the industry is operating, would present a less complete picture of the impact of dumped imports. In our view, a proper evaluation of the impact of dumped imports on the domestic industry is dynamic in nature and takes account of changes in the market that determine the current state of the industry. USITC gathered the information and discussed in some detail developments in the performance of the domestic industry over the entire period of investigation. Against this background, it discussed the impact of imports both over the period of investigation, and with specific reference to the period 1997–1998, a period when demand continued to increase, but the performance of the domestic industry worsened. We believe USITC thus performed a dynamic analysis for all relevant factors. Merely that it did not explicitly address production, sales and financial performance during 1996 does not, in our view, undermine the adequacy of the USITC's evaluation of the relevant economic factors, in light of its analysis and explanations, so as to render its examination of the impact of dumped imports on the domestic industry inconsistent with the AD Agreement.[55]

The Panel thus emphasized that no end-point-to-end-point comparison was required and that in certain circumstances it would be reasonable of an authority to examine only part of the data covering only a two-year period, for example. As long as three years of data are gathered and such three-year data have at least in part been used, the authority would seem to be able to get away with not analysing part of the data for certain of the 3.4 factors. Given Japan's claim that the year which the US used as the base year for the two-year comparison was the best year for the industry in a decade, the Panel's analysis was thus very lenient on the investigating authority. It could as well have said that, while an end-point-to-end point is not always required or necessarily decisive, it does form part of the overall analysis of data on the basis of which an injury determination is made. It seems difficult to conduct a proper injury analysis 'which is dynamic in nature' by only looking at two years of data and which does not put the base year in the right perspective.

In *Guatemala – Cement II*, the Panel rejected the idea that the use of a one-year period of data collection would be a priori inconsistent with the requirement of Article 3.2 AD Agreement to consider whether there has been a significant increase in the volume of dumped imports in the circumstances of a particular case. We recall that the examination of a significant increase is part

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55 Panel Report, *US – Hot-Rolled Steel*, para. 7.234.

of the injury analysis for which the ADP Committee Recommendation considered that a three-year period of data collection was the norm. The Panel considered that there is no provision in the Agreement which specifies the precise duration of the period of data collection. In this case, Guatemala argued that the reason for the short period of data collection was that exports by the Mexican producer, Cruz Azul, did not become significant until the year of data collection, a conclusion supported by the record of the investigation. Under these circumstances, while the Panel was of the view that a longer data collection period might have been preferable, it was unable to find that the use by Guatemala of a one-year data collection period was inconsistent with Guatemala's obligation under Article 3.2 to consider whether there was a significant increase in dumped imports.[56]

In *Mexico – Anti-Dumping Measures on Rice*, the US claimed the AD Agreement had been violated because the Mexican authority had analysed only six months' worth of data for each of the three years of data collection. Mexico asserted that it was necessary to examine these particular six months of every year instead of the full year in order to ensure that the period of the injury analysis paralleled the six-month period chosen for the analysis of dumping, so as to avoid any distortions. The Panel saw no *a priori* reason why a period of investigation on the injury analysis should be chosen to fit the period of investigation for the dumping analysis in case the latter period of investigation covers a period of less than 12 months, as there is nothing in the AD Agreement that would require such an approach, quite to the contrary.[57]

The Panel considered that the choice of the period of investigation is crucial as it determines the data that will form the basis for the assessment of the impact of dumping and that an examination or investigation can only be 'objective' if it is based on data which provide an accurate and unbiased picture of what it is that one is examining.[58] The Panel thus reached the following conclusion:

> In sum, we find that the injury analysis of the Mexican investigating authority in the rice investigation, which was based on data covering only six months of each of the three years examined, is inconsistent with Article 3.1 of the AD Agreement as it is not based on positive evidence and does not allow for an objective examination, as it necessarily, and without any proper justification, provides only a part of the picture of the situation. In addition, we find that the particular choice of the limited

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56 Panel Report, *Guatemala – Cement II*, para. 8.266.

57 Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.82.

58 Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.79. The Panel added however that its ruling should not be read as to imply that there could never be any convincing and valid reasons for examining only parts of years. Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.82.

> period of investigation in this case was not that of an unbiased and objective investigating authority as the authority was aware of, and accepted, the fact that the period chosen reflected the highest import penetration, thus ignoring data from a period in which it can be expected that the domestic industry was faring better.[59]

Similarly, the Panel in *EC – Tube or Pipe Fittings* was of the view that an investigating authority is precluded from limiting its dumping analysis to a selective sub-set of data from only a temporal sub-segment of the POI. The Panel relied as the basis for this conclusion on the requirement of Article 2.4.2 which generally calls for 'a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-by-transaction basis'. According to the Panel, either of these methodologies would seem to require, in general, that data *throughout* the entire investigation period would necessarily consistently be taken into account.

In *Argentina – Poultry Anti-Dumping Duties*, the use of different periods for different injury factors was found to be inconsistent with the requirement to conduct an objective examination.[60] To examine only a part or a segment of the domestic industry was also considered to be inconsistent with the requirement to conduct an objective examination. As the Appellate Body in *US – Hot-Rolled Steel* stated, where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole. It was clearly the fact that such a partial examination of the domestic industry could make it easier to find injury which led the

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[59] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.86. The Appellate Body agreed that these two factors (the selective use of the information gathered and the fact that the authority accepted the POI proposed by the petitioner, knowing that the petitioner proposed that period because it allegedly represented the period of highest import penetration) were sufficient to conclude that the data used by the Mexican authority did not provide an accurate and unbiased picture. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 181. For a similar approach see Panel Report, *Mexico – Steel Pipes and Tubes*, paras 7.252–7.261.

[60] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para.7.283:

> In our view, there is a *prima facie* case that an investigating authority fails to conduct an 'objective' examination if it examines different injury factors using different periods. Such a *prima facie* case may be rebutted if the investigating authority demonstrates that the use of different periods is justifiable on the basis of objective grounds (because, for example, data for more recent periods was not available for certain injury factors). Since the CNCE only examined 1999 data for certain injury factors, we find *prima facie* that the CNCE failed to conduct an objective examination of injury.

Appellate Body to the conclusion that such a practice was inconsistent with the objective examination obligation of the AD Agreement:

> Different parts of an industry may exhibit quite different economic performance during any given period. Some parts may be performing well, while others are performing poorly. To examine only the poorly performing parts of an industry, even if coupled with an examination of the whole industry, may give a misleading impression of the data relating to the industry as a whole, and may overlook positive developments in other parts of the industry. Such an examination may result in highlighting the negative data in the poorly performing part, without drawing attention to the positive data in other parts of the industry.[61]

(b) The end of the POI – the recent past?

The requirement that the POI for injury purposes at least *include* the POI for dumping purposes formed the basis for the Panel in *Argentina – Poultry Anti-Dumping Duties* to reject the argument that the POI for dumping and the POI for injury should also end at the same time. Brazil had argued that such an identity was required in order to be able to establish a causal link between dumped imports and injury to the domestic industry as required by Article 3.5. According to the Panel, there is nothing in the Anti-Dumping Committee's recommendation to suggest that the POI for injury should not exceed (in the sense of including more recent data) the period of review for dumping. The Panel added that there may be a time-lag between the entry of dumped imports and the injury caused by them, and that it may therefore not be appropriate to use identical periods of review for the dumping and injury analyses in all cases.[62]

In *Mexico – Anti-Dumping Measures on Rice*, the US introduced a number of POI-related claims arguing that the Mexican authority had used a POI for injury which ended more than 15 months prior to the initiation of the investigation. The Panel considered that, while the AD Agreement does not contain any specific and express rules concerning the period to be used for data collection in an anti-dumping investigation, this does not mean that the authorities' discretion in using a certain period of investigation is boundless.[63] The Panel was of the view that there is necessarily an inherent real-time link between the investigation leading to the imposition of measures and the data on which the investigation is based. In spite of the fact that an anti-dumping investigation out of necessity relies on historical data gathered during a past POI, such information should be the most recent information reasonably available:

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61 Appellate Body Report, *US – Hot-Rolled Steel*, para. 204.
62 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.287.
63 Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.57.

> Of course, it is well established that the data on the basis of which this determination is made may be based on a past period, known as the period of investigation. Nevertheless, because this 'historical' data is being used to draw conclusions about the current situation, it follows that the more recent data is likely to be inherently more relevant and thus especially important to the investigation. This, as a consequence, implies that the data considered concerning dumping, injury and the causal link should include, to the extent possible, the most recent information, taking into account the inevitable delay caused by the need for an investigation, as well as any practical problems of data collection in any particular case.[64]

This led the Panel to the following conclusion:

> The requirement of a time-consuming and sometimes complicated investigation to demonstrate the existence of dumping and the ensuing injury poses a practical impediment to a complete identity in time between the imposition of the measure and the conditions for such imposition, i.e. dumping causing injury. Although this practical problem may lead to the situation in which any determination of dumping causing injury has by the time of the imposition of the measure become more of a proxy than a real time assessment of the current situation, it would, in our view, not be correct to be led by the practical necessity to examine the past to assess the present to accept that an investigating authority could justifiably base itself on old data to the exclusion of more recent data which was available and usable. To the contrary, the fact that an investigation of up to 12 months may have to be conducted to determine dumping, injury and the causal link magnifies the importance of having a period of data collection which ends as closely as possible to the date of initiation, as by the time of the possible imposition of the measure another 12 months may have passed.[65]

The Panel thus considered that a 15-month gap between the end of the period of investigation and the initiation of the investigation is sufficiently long as to impugn the reliability of the period of investigation to deliver, for the purposes of a determination, evidence that has the requisite pertinence or relevance, thereby failing to meet the criterion of 'positive evidence' pursuant to Article 3.1 of the AD Agreement.[66] The Appellate Body fully upheld the reasoning of the Panel.[67] It emphasized the fact that the determination of whether injury exists should be based on data that provide indications of the situation prevailing when the investigation takes place, because the conditions to impose an

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[64] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.58. For a slightly different view showing greater deference to the investigating authority and accepting practical problems as an excuse, see Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.234–7.239.

[65] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.63.

[66] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.64.

[67] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras 163–72.

anti-dumping duty are to be assessed with respect to the current situation.[68] Interestingly, the Panel in *Mexico – Steel Pipes and Tubes* agreed with the statements of the Panel and Appellate Body in the *Mexico – Anti-Dumping Measures on Rice* concerning the real-time link between the POI and the imposition of measures, but considered that an eight-month gap between the end of the POI and the initiation of the investigation was reasonable. It acknowledged that this 8-month gap implied that the authority did not have 'the *most* pertinent, credible and reliable information' (italics in original), but considered that 'practical time constraints inherent in the production of data that must then be collected and analysed by the applicant (in order to be relied upon and submitted in the application), and then analysed by the investigating authority', and the fact that 'the investigation occurred within the overall time constraints envisaged by the Agreement', were sufficient reasons to conclude that the temporal gap did not preclude the authority from making a determination of injury based on positive evidence and which involved an objective examination.[69]

The Panel in *EC – Tube or Pipe Fittings* rejected the argument that the POI would need to be adjusted in the case of important developments, such as *in casu* a devaluation, occurring towards the end of the POI. In other words, the Panel was of the view that, once an appropriate POI was chosen, i.e. a POI which relates to the recent past,[70] there is no need to re-examine the issue. In other words, an investigating authority is not required to re-assess its own determination made on the basis of an examination of data pertaining to the POI prior to the imposition of an anti-dumping measure in the light of an event which occurred during the POI.[71] The Panel thus found that Brazil had not established that the European Communities violated its obligations under Article 1 of the *Anti-Dumping Agreement* or under Article VI:2 of the *GATT 1994* in imposing an anti-dumping measure in this case following the devaluation of the Brazilian currency at the beginning of the fourth quarter of the POI.

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68 Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 165.

69 Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.239.

70 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.102:

> We agree with Brazil that, like Article VI of the *GATT 1994*, both of these provisions are in the present tense, and that the point is to offset present dumping. The issue is, however, how best to follow a consistent and reasonable methodology for determining present dumping. Read in the context of the provisions we have already cited, and on the basis of the necessity to follow a consistent and reasonable methodology, we are of the view that a finding that dumping exists during a recent past IP is a finding of 'present' dumping for the purposes of the Agreement.

71 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.106.

The Panel in this case thus took a very formalistic view on the role of the POI. The Panel seemed to agree with Brazil that 'it is in the very nature of anti-dumping investigations to assess a practice which has taken place in the past in order to determine whether to remedy the consequences of that past practice in the future'. But according to the Panel this did not imply that the POI would have to be adjusted or re-determined in the case where there are major changes occurring towards the end of the POI, even though it is clear that the results based on the earlier part of the POI are uninformative of the situation at the time of imposition of the measure. That is a problem that can be dealt with through reviews, according to the Panel.[72]

D THE INVESTIGATION: DEFINING THE SUBJECT PRODUCT AND THE LIKE PRODUCT

At initiation, the investigating authority will define the product that it will be investigating as the allegedly dumped product causing injury.[73] The Agreement does not contain any rules concerning the definition of this product under investigation, also referred to as the 'subject product'. Yet it is of crucial importance to the success of the investigation. If the product is defined in very broad terms, a wide range of product types will be covered under the definition. If dumping is found to exist, duties may be imposed on imports of all these product types. Avoiding circumvention is another reason why a wide product scope may be interesting from the domestic producers' and the authorities' point of view. On the other hand, since dumping has to be found with respect to the product as a whole, it will often be more difficult to find dumping, as the margin of dumping for the product will consist of an average of all the various dumping margins per product type. Also, a wide product scope complicates the investigation as the requirement of making a fair comparison between normal value and export price becomes increasingly difficult.

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72 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.106.

73 It should be noted that the Panel in *Mexico – Steel Pipes and Tubes* clearly accepted that an authority may modify its product scope in the course of an investigation, as long as it gathers the evidence required to support its findings in respect of this modified product scope. Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.105. It is not clear how such a modification of the product scope affects the requirements under Article 5.2–5.3 in terms of the sufficiency of the request for initiation. The Panel in *Mexico – Steel Pipes and Tubes* considered that an amendment to the product scope did not require an authority to re-examine the standing requirement under Article 5.4 AD Agreement, as long as no 'radical change' in the product scope was involved. Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.347.

Most importantly, the definition of the subject product has important consequences for the definition of the 'like product'. While the AD Agreement does not contain any rules concerning the subject product, it does define the concept of 'like product' which is important both in the dumping and in the injury part of the investigation. Article 2.6 provides that the 'like product' is a product which is identical, that is, alike in all respects to the product under consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration. In an investigation, there will be two 'like products', one of relevance to the dumping investigation, and another one relevant to the injury determination. The product under consideration is the product as imported into the country that is conducting the investigation. Its export price will need to be compared with the normal value for the like product, that is, the like product's domestic price. To examine whether the imports of the subject product at dumped prices are causing injury, the state of the domestic industry producing the like product needs to be examined. It is clear that the like product for dumping purposes may be different from the like product for injury purposes. The two like products do not even have to be like each other.

While the Agreement thus defines the like product it does not provide more specific guidance concerning the criteria on which to base an assessment of likeness between two products. Article 2.6 simply refers to *closely resembling characteristics*. While this has in general been read to imply a focus on the physical characteristics of the product,[74] (such as the inputs that went into making the product, the physical appearance and so on), other aspects such as the quality of the product, its use, or the customs classification have also been used as criteria in determining on a case-by-case basis whether one product is like another.

In any case, the point of reference for the like product is the product under consideration, and the way that is defined will thus be determinative for the like products that will be examined.[75] By way of example, we refer to the definition of the product subject to the investigation in the US anti-dumping investigation on softwood lumber: The final scope of the anti-dumping duty order was determined by the US Department of Commerce (DOC) to be as follows:

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[74] The Panel in *Korea – Certain Paper* even mistakenly paraphrased Article 2.6 as stipulating that the like product is the product that is identical to the product under consideration, 'or one that has *physical* characteristics that closely resemble those of the product under consideration'. Panel Report, *Korea – Certain Paper*, para. 7.219.

[75] In the course of the negotiations, it has been argued that because of the reference to 'closely resembling characteristics' in Article 2.6 concerning the like product, the subject product itself cannot be a group of products which do not share the same characteristics. See e.g. TN/RL/GEN/50; TN/RL/GEN/78.

> [t]he products covered by this order are softwood lumber, flooring and siding (softwood lumber products). Softwood lumber products include all products classified under headings 4407.1000, 4409.1010, 4409.1090 and 4409.1020, respectively, of the Harmonized Tariff Schedule of the United States (HTSUS), and any softwood lumber, flooring and siding described below. These softwood lumber products include:
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> (1) coniferous wood, sawn or chipped lengthwise, slice or peeled, whether or not planed, sanded or finger-jointed, of a thickness exceeding six millimetres;
> (2) coniferous wood siding (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed;
> (3) other coniferous wood (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces (other than wood mouldings and wood dowel rods) whether or not planed, sanded or finger-jointed; and
> (4) coniferous wood flooring (including strips and friezes for parquet flooring, not assembled) continuously shaped (tongued, grooved, rabbeted, chamfered, v-jointed, beaded, molded, rounded or the like) along any of its edges or faces, whether or not planed, sanded or finger-jointed.[76]

Canada argued before the Panel that the range of products included in the scope of the investigation, being the product under consideration, was so broad that all the individual products, constituting collectively the 'like product', were not alike to each and every of the products collectively forming the product under consideration as they did not have characteristics closely resembling those of each and every one of the individual products constituting collectively the product under consideration.[77]

The Panel could find no explicit guidance in the AD Agreement as to how the investigating authority should define the product under consideration.[78] The Panel considered that the US did not define the like product differently than it had defined the product under consideration, certain softwood lumber, on the basis of a technical definition involving narrative description and tariff classification. The Panel rejected the argument that all product types of the like product must be identical to the various product types that together constitute the product under consideration:

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[76] Panel Report, *US – Softwood Lumber V*, para. 7.139.

[77] Panel Report, *US – Softwood Lumber V*, para. 7.155.

[78] Panel Report, *US – Softwood Lumber V*, paras 7.153; 7.156. The Panel in *Korea – Certain Paper* also found that no provision in Article 2.6, or any other article in the Agreement contains a definition of 'the product under consideration'. See Panel Report, *Korea – Certain Paper*, paras 7.219–7.221.

> This in effect means that there must be 'likeness' within both the product under consideration and within the like product. As Canada itself has stated, '[t]he terms "product under consideration" and "like product" must be limited to a single group of products sharing characteristics'. Once again, however, we see no basis to imply such a condition into the *AD Agreement.* While there might be room for discussion as to whether such an approach might be an appropriate one from a policy perspective, whether to require such an approach is a matter for the Members to address through negotiations. It is not our role as a panel to create obligations which cannot clearly be found in the *AD Agreement* itself. (Footnote omitted)[79]

It is clear that the absence of a definition of what may constitute the product under consideration in the AD Agreement allows for the possibility of a disjoint in the types of products included in the scope of the like product and those included in the product under consideration. If two types of products of a product generally defined as A (Bicycles) are exported, A1 (mountain bikes) and A2 (racing bikes), while four types of this product are sold domestically, types A1 (mountain bikes), A2 (racing bikes), A3 (citybikes/touring bicycles) and A4 (children's bicycles), these four types will all be considered as like products even though it could well be argued that a children's bike is not at all 'like' a race bike from the consumer's point of view.[80] By defining the subject product very broadly, the authority will be able to use the data from all four product types sold domestically in the country of exportation for comparison purposes, which may obviously lead to a distorted picture. It may also allow the authority to provide protection to the domestic industry producing mainly citybikes, for example. As a bicycle, a children's bicycle is like the product under consideration broadly defined as 'bicycles'. However, from a market definition point of view, it does not make sense to put children's bicycles in the same market as mountain bikes or racing bikes which serve different types

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79 Panel Report, *US – Softwood Lumber V*, para. 7.157.

80 The European Commission nevertheless did consider that all such bicycles could be considered as 'like products' in the *Bicycles from China* case. According to the European Commission, there is a high degree of interchangeability and consequently of competition between models classified in different categories. In its view, end users will regularly put a bicycle in a particular category to a variety of uses and applications, and there is therefore no clear dividing line based on end-users' application and consumers' perception of different categories. See Council Regulation 2474/93 of 8 September 1993 imposing a definitive anti-dumping duty on imports into the Community of bicycles originating in the People's Republic of China (OJ 1993 L 228, 1). This decision was upheld by the European Court of First Instance (judgment of 25 September 1997, case T-170/94, *Shangahi Bicycle Corporation. Council of the European Union*, 1997 ECR II-1383. A similar approach of grouping all types of bicycles as like products has been adopted since by the European Commission. See for example the case of *Bicycles from Indonesia, Malaysia and Thailand*, Council Regulation 648/96 of 28 March 1996, OJ 1996 L 91.

of customer. However, according to the approach taken by the Panel, once the subject product has been defined, and irrespective as to how broad or narrow this definition has been, it suffices for a product to be like the subject product. In the injury analysis, for example, the fact that a citybike is really a different type of bicycle will thus not be considered relevant any longer as it is considered like the subject product. The discretion that is given to the investigating authorities in defining the subject product, and thus the like product to be used for dumping and injury purposes, is one of those issues that, so it seems, should be addressed if one wants to improve the disciplines of the AD Agreement.[81]

E THE INVESTIGATION: INFORMATION GATHERING AND DUE PROCESS

Once the period of investigation and the product under consideration have been defined, the investigation may be initiated, and the information gathering process may start.

(a) The Information Gathering Process

Investigating authorities are under the basic obligation to give notice to all interested parties of the information which they require, and ample opportunity is to be given to present in writing all evidence which the interested parties consider relevant in respect of the investigation.[82] Following the issuance of the notice announcing the initiation of investigation, an investigating authority will transmit questionnaires to the interested parties. The known exporters will receive a questionnaire (in practice, requesting information necessary to establish the normal value) to which they are requested to respond. The deadline cannot be less than 30 days and upon cause shown,

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[81] Not surprisingly, therefore, a proposal has been made to introduce a provision in the Agreement concerning the scope of the product under consideration, requiring that each investigation should encompass only products that are under the same conditions of competition. TN/RL/GEN/50. A similar proposal would require the authority to have separate investigations in case there is more than one distinct product under consideration. Physical characteristics, technical specifications and quality, market characteristics, including end-uses, substitutability, pricing levels and distribution channels are some elements listed as relevant in determining whether there is more than one product under consideration. TN/RL/GEN/73. In a similar vein, also see TN/RL/GEN/78.

[82] Article 6.1 AD Agreement.

extensions should be granted, if practicable (Art. 6.1.1 AD).[83] Importers and the domestic industry will also receive a questionnaire which in practice very often relates (but is not always limited) to information necessary to establish the export price and the state of the domestic industry.

At this juncture, and as soon as the investigation has been initiated,[84] the authorities are to provide[85] the full text of the application to the known exporters and to the authorities of the exporting Member and make this text available upon request to other interested parties (Art. 6.1.3). Upon reading the text of the application, the exporters will become aware of the information provided by the applicants against them, which will allow the exporters to better understand the basis for some of the allegations. This, in turn, may assist the exporters in defending their interests and in replying to the questionnaires in the most useful manner.

The Panel in *Mexico – Anti-Dumping Measures on Rice* was of the view that, in order to comply with the requirement to ensure that all interested parties be given notice of the information required of them, the investigating authority, when conducting an investigation, cannot remain 'entirely passive' in the identification of the interested parties, and must inform those interested parties of which it can reasonably obtain knowledge.[86] It thus considered that the 'known' exporters to which the full text of the application is to be sent and for which ultimately, in accordance with Article 6.10, an individual margin of dumping is to be calculated relates to all exporters that were known to the authority or of which the authority could reasonably have been expected to obtain knowledge of.[87] It considered that the Mexican

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[83] Footnote 15 to Article 6.1.1 AD Agreement provides that the questionnaire shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member. According to the Appellate Body, no obligation can be deduced from footnote 15 to Article 6.1.1 for diplomatic authorities of the exporting Member to make their exporters or producers aware of the investigation. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 263.

[84] On the basis of this timing requirement, the Panel in *Guatemala – Cement II* was of the view that sending an application to interested parties 18 days following investigation complies with this requirement. Panel Report, *Guatemala – Cement II*, para. 8.101.

[85] This is more than simply allowing access to this document. See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.170.

[86] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.192. A proposal has been submitted to include an explicit requirement to this effect in Article 6.1 AD Agreement. TN/RL/GEN/49 and TN/RLGEN/49/Add.1; TN/RL/GEN/89.

[87] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras 7.187–7.188.

In sum, we are of the view that the term 'known exporter or producer' in Article

authority should have made more of an effort to obtain knowledge of other US exporters.

While the Panel emphasized the active role of the investigating authority, the Appellate Body, in turn, applied a very strict textual reading of the term 'known' exporters. It overturned the Panel's finding and found that 'a known exporter or producer is an exporter or producer known to the investigating authority, not an exporter or producer of which it does not know, but should have known'.[88] According to the Appellate Body there is no duty on the investigating authority to actively identify the exporters, and therefore no obligation to give notice of the required information to exporters of which the authority did not know, but of which it could have obtained knowledge.[89] The exporters that shall be given notice of the required information under Article 6.1 are the exporters known to the investigating authority:

> These exporters include not only those referred to in the application, but also the exporters who might have made themselves known to the investigating authority following the issuance of the public notice required by Article 12.1 of the *Anti-Dumping Agreement*, and those that otherwise might have become known to it subsequent to the notice of initiation.[90]

6.10 of the AD Agreement refers to the exporters or producers that an unbiased and objective investigating authority properly establishing the facts would be reasonably expected to have become conversant with. Article 6.10 of the AD Agreement is a general requirement that the authority has to comply with, at the latest, at the end of the investigation when making the determinations. This implies that the exporters that are known to the authorities at that point are those that an objective and unbiased investigating authority properly establishing the facts and conducting an active investigation could have and should have reasonably been considered to have knowledge of.

Clearly, the exporters that would be 'known' to an investigating authority which makes little or no effort to inform itself will be far less than those 'known' to an authority that has been reasonably active. Interpreted in its context, the term 'known' cannot be construed in such an artificially contrived and solipsistic manner as to become a warrant for a passive investigative approach. To do so would be to effectively read out of the AD Agreement an important aspect of the obligation of an investigating authority regarding the conduct of an investigation.

[88] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 255.
[89] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 254.
[90] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 250. However, as we discuss in our section dealing with the use of facts available, the Appellate Body was of the view that the price to be paid for this passive approach was that no duty based on the facts available is to be imposed on such unidentified exporters. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

The information received from questionnaire replies shall be made available promptly to other interested parties participating in the investigation,[91] subject, of course to the requirement to protect confidential information. (Art. 6.1.2)

The Agreement requires the authorities to provide all interested parties with a full opportunity for the defence of their interests, including the organization of oral hearings and confrontations with parties with adverse interests, upon request (Article 6.2). This does not exclude the possibility of imposing deadlines for responses.[92] As the Panel in *Guatemala – Cement II* pointed out, Article 6.2 is a 'fundamental due process provision'.[93]

The Appellate Body balanced these rights of interested parties against the right of the investigating authority to conclude its investigation expeditiously and within the deadline of 12 months:

> Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be 'ample' and 'full', respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests. Nevertheless, we agree with the United States that Articles 6.1 and 6.2 do not provide for 'indefinite' rights, so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose. Such an approach would 'prevent the authorities of a Member from proceeding expeditiously'[94] in their reviews, contrary to Article 6.14. It would also affect the rights of other interested parties. In this regard, we recall that the Appellate Body has previously recognized the importance for investigating authorities of establishing deadlines and controlling the conduct of their investigations.[95,96]

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91 According to the Panel in *Argentina – Poultry Anti-Dumping Duties*, there is therefore no obligation to make such evidence available to interested parties that were not participating in the investigation. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.153.

92 Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 252.

93 Panel Report, *Guatemala – Cement II*, para. 8.179. According to the Panel this implies that for an interested party to be able to defend its interest, it should be allowed to comment on requests or statements from other interested parties defending their interests. But it does not go as far as to require the authority to allow interested parties an opportunity to comment on a change in the legal determination made by an authority, for example in case of a change in determination from threat to current material injury between a preliminary and final determination.

94 *Anti-Dumping Agreement*, Article 6.14.

95 In *US – Hot-Rolled Steel*, the Appellate Body stated:

> Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede

All interested parties are to be given timely opportunities to see all information that (i) is relevant to the presentation of their cases, (ii) is not confidential,[97] and (iii) is used by the investigating authorities. Interested parties must be allowed to prepare presentations on the basis of this information (Article 6.4). For example, in the case of a constructed normal value, the actual figures for cost of manufacture, SG&A expenses or profits used in the calculation of this constructed normal value are to be disclosed to the interested party requesting to see such information.[98] This provision thus relates to information submitted by other interested parties as well as information from other sources or documents prepared by the authorities. It is sometimes referred to as the 'access to file' obligation, although an authority can ensure compliance with Article 6.4 through other means than by providing access to the file as well.[99] It is, in short, a requirement on the authorities to keep a public record of the investigation.[100]

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control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the Anti-Dumping Agreement. . . . We, therefore, agree with the Panel that 'in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines'.

(Appellate Body Report, *US – Hot-Rolled Steel*, para. 73 (quoting Panel Report, *US – Hot-Rolled Steel*, para. 7.54)) (emphasis added by the Appellate Body)

96 Appellate Body Report, US – *Oil Country Tubular Goods Sunset Reviews*, para. 241. Also see Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282.

97 As the Panel in *Korea – Certain Paper* correctly noted however, Article 6.4 cannot be interpreted to deny an interested party access to its *own* confidential information used for example in the calculation of a constructed normal value. Panel Report, *Korea – Certain Paper*, para. 7.201. In this sense the Article 6.4 disclosure differs clearly from the public notice requirements under Article 12 which do not allow the disclosure of any confidential information. Panel Report, *Korea – Certain Paper*, para. 7.208.

98 See Panel Report, *Korea – Certain Paper*, para. 7.199.

99 See Panel Report, *Guatemala – Cement II*, para. 8. 133.

100 There is a proposal on the table to clarify Article 6.4 in order to avoid authorities denying prompt access to non-confidential information on the basis of an alleged misreading of the conditions currently set forth in Article 6.4: i.e. that such access to non-confidential information is only to be provided 'when practicable', if the information is 'relevant' and if it is 'used by the investigating authority'. It is suggested that Article 6.4 should be re-worded to require an authority to establish a central location where interested parties and the public alike can review and make photocopies of *all* non-confidential information submitted to or gathered by the investigating authority. TN/RL/GEN13. In similar vein, and arguing the need to include the requirement to provide access to an index which contains all documents gathered by the authority, see TN/RL/GEN/49 and TN/RL/GEN/49/Add.1; TN/RL/GEN/84.

During anti-dumping investigations, a substantial amount of information requested (and often submitted) is of a confidential nature. To provide interested parties with the incentives to submit, the AD Agreement guarantees that such information will be disclosed only with the permission of the party submitting it (Art. 6.5 AD). According to the Agreement, there are two types of confidential information: information which is confidential by nature, and information which is confidential because such confidential treatment has been requested by the party supplying the information.[101] Panels in the case of *Guatemala – Cement II* and *Korea – Certain Paper* expressed the view that, in both cases, good cause must be shown for confidential treatment to be granted by the authority. As said, certain information is by nature confidential, for example because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information. While it would appear that no good cause requirement exists with respect to this type of obviously confidential information, the Panels in *Guatemala – Cement II* and *Korea – Certain Paper* were of the opposite view and found that good cause must be shown by the interested party submitting the confidential information at issue, and not by the investigating authority itself.[102]

When confidential information has been submitted, a non-confidential summary[103] will be requested and, in principle, disclosed; if however, in

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[101] A proposal has been made to specify the types of information which may be considered as confidential information and to further distinguish between confidential information, to which access should be provided under some sort of APO system, and restricted information which would only be available to the authorities. TN/RL/GEN/84.

[102] Panel Report, *Guatemala – Cement II*, para. 8.219–8.220; Panel Report, *Korea – Certain Paper*, para. 7.335. The *Korea – Certain Paper* Panel did add that in its view, while some showing of good cause is necessary for both categories of confidential information, the degree of that requirement may, however, depend on the type of information concerned. Panel Report, *Korea – Certain Paper*, para. 7.335. The Panel in *Mexico – Steel Pipes and Tubes* agreed with such conclusions and added that in its view:

> a showing of 'good cause' for information that is 'by nature confidential' may consist of establishing that the information fits into the Article 6.5 (chapeau) description of such information: 'for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information'.

Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.378.

[103] The summary should be in sufficient detail to permit a reasonable under-

exceptional circumstances, parties indicate that the information provided cannot be summarized, they will be requested to motivate their opinion (Art. 6.5.1 AD).[104] Investigating authorities retain discretion and they can refuse to adhere to a request to treat some information as confidential. In such cases, they can disregard the information unless it has been demonstrated that it is correct (Art. 6.5.2 AD). Interestingly, the Panel in its report on *Mexico – Steel Pipes and Tubes* found that an authority is complying with Article 6.5 in case it accepts without any explanation or analysis a request for confidentiality which is accompanied by a statement that a non-confidential summary is not possible for certain reasons. The Panel based its view on the fact that Article 6.5 does not set for exactly how an investigating authority should or must evaluate a request for confidential treatment; how an investigating authority should or must indicate (explicitly or otherwise in the record of the investigation) how, and the extent to which, it assessed an applicant's assertion to conclude that 'good cause' existed for the information to be treated as confidential within the meaning of Article 6.5, or how, and the extent to which, it assessed an assertion that summarization was not possible within the meaning of Article 6.5.1.[105] In other words, in case an authority accepts a request for confidentiality there is nothing it needs to do in terms of justification under Article 6.5. It is not clear how this deferential approach of the Panel can be squared with its important acknowledgement about the role of Article 6.5.1:

> We see that that Article 6.5.1 strikes a balance between the interests of the interested parties submitting confidential information to have that confidentiality maintained during the investigation and the interests of the rest of the interested parties to be reasonably informed about the substance of that information in order to be able to defend their interests.[106] We are aware that the designation of information as 'confidential' might affect the ability of interested parties to have full access to that information, and therefore might affect their ability to defend their interests in the course of an anti-dumping investigation. We are further aware of the potential for abuse of the possibility to designate information as confidential so as to consciously place other interested parties at a disadvantage in the investigation. We consider that the

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standing of the substance of the information submitted in confidence. The Panel in *Argentina – Ceramic Tiles* pointed out that the purpose of such non-confidential summaries was to inform interested parties so as to enable them to defend their interests, and the authorities are therefore not allowed to reject an exporters' response, simply because the summary was not sufficiently informative to allow the calculation of normal value, export price and the margin of dumping. Panel Report, *Argentina – Ceramic Tiles*, para. 6.39.

104 According to the Panel in *Guatemala – Cement II*, the authorities are *required to request* interested parties to provide a statement of the reasons why summarization is not possible. Panel Report, *Guatemala – Cement II*, para. 8.213.

105 Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.393.

106 See, for example, Panel Report, *Argentina – Ceramic Tiles*, paras 6.38–6.39.

> conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation. For precisely this reason, we consider it paramount for an investigating authority to ensure that the conditions in these provisions are fulfilled. We consider it equally important for a WTO Panel called upon to review an investigating authority's treatment of confidential information strictly to enforce these conditions, while remaining cognizant of the applicable standard of review.[107]

It appears that the Panel ultimately favoured a deferential standard of review accepting complete silence on the part of the investigating authority which had accepted important aspects of the information submitted by the domestic industry as confidential information, without examining whether good cause existed or whether it was indeed not possible to provide a non-confidential summary as alleged by the applicant. It is difficult to see much balance in this pro-investigating authority approach on such an important issue.

The authorities shall during the course of the investigation satisfy themselves as to the accuracy of the supplied information upon which their findings will be based. (Article 6.6) This may imply an on-the-spot verification of the information, although there certainly does not appear to exist any obligation on the authorities to conduct such a costly verification.[108] The Panel in its report on *EC – Tube or Pipe Fittings* even seemed to consider an on-site verification as the exception rather than the rule. According to the Panel, verification is an essentially documentary exercise:

> Rather, we view verification as an essentially 'documentary' exercise that may be supplemented by an actual on-site visit. On-site verification is provided for, but not mandated by, the Agreement. Thus, it would seem incongruous to *require* the European Communities to use a methodology that would have *necessitated* substantiation through on-site verification.
>
> An essentially documentary approach to verification – which focuses upon documented support for claims for adjustment – seems to us to be entirely consistent with the nature of an anti-dumping investigation and is, indeed, critical for the purposes of dispute settlement and meaningful Panel review under the *DSU* and the *Anti-Dumping Agreement*. (Footnote omitted)[109]

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[107] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.

[108] In the view of the Panel in *US – DRAMS*, authorities 'could "satisfy themselves as to the accuracy of the information" in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information'. Panel Report, *US – DRAMS*, para. 6.78. Also see, Panel Report, *Argentina – Ceramic Tiles*, fn. 65; Panel Report, *Egypt – Steel Rebar*, paras 7.326–327.

[109] Panel Report, *EC – Tube or Pipe Fittings*, paras 7.191–7.192.

In any case, what is important is that the authorities inform the exporters/foreign producers of the information required for verification purposes.[110] Verification is not limited to information submitted prior to the verification visit, but may also include information to be provided during the course of verification.[111] Importantly, the Panel on *EC – Salmon (Norway)* considered that it was not because information as not provided at the time of the on-the-spot verification that such information was not verifiable, such that facts available could be used.[112] On-the-spot verification may only take place in the case where the firms to be verified agree to such a verification, and the authorities of the exporting Member have been notified and do not object (Article 6.7). Annex I of the Agreement contains further details relating to on-the-spot verifications. The Agreement does not state what to do in case of objection by the firm or the government in question. While, in the case of a company objecting to verification, it appears Article 6.8 best information available will be used, it is not clear how to treat a government objection, and whether the firm investigated could be considered to have impeded the investigation so that Article 6.8 may apply. We will come back to Article 6.8 later.

The results of these verifications must be made available to the verified firms as well as to the applicants.[113] As Article 6.7 relates to foreign exporter-related verification, it is not clear whether a similar obligation of making the results of verification available to the exporters can be deduced from this in case verification takes place of the domestic industry's questionnaire responses. The obligation to disclose the results of the verification is intended to ensure that exporters can structure their cases for the rest of the investigation in light of those results. The Panel in *Korea – Certain Paper* was thus of the view that such disclosure is to contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully, as both could be relevant to the presentation of the interested parties' case.[114]

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110 Panel Report, *Argentina – Ceramic Tiles*, para. 6.57. It has been argued in the course of the on-going negotiations that Article 6.6 should be clarified to require authorities to set out in writing any requests for clarifications or additional information within a reasonable period after the receipt of the questionnaires. TN/RL/GEN/49.

111 Panel Report, *Guatemala – Cement II*, para. 8.203. Thus, according to the Panel, an authority may seek new information during the course of verification. Panel Report, *Guatemala – Cement II*, para. 8.205.

112 Panel Report, *EC – Salmon (Norway)*, para. 7.360.

113 The Panel in *Korea – Certain Paper* was of the view that this disclosure does not necessarily have to be made in writing, although an oral disclosure would of course lead to obvious evidentiary problems in the case of a WTO challenge. Panel Report, *Korea – Certain Paper*, para. 7.188.

114 Panel Report, *Korea – Certain Paper*, para. 7.192.

Before making a final determination,[115] the authorities are to inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests (Article 6.9).[116] Case-law reveals that this does not imply that the authorities are required to inform the parties of their legal determinations during the course of an investigation, or of the reasons for accepting or rejecting certain arguments.[117] The disclosure obligation under Article 6.9, as under Article 6.1 and 6.2 for that matter, relates only to factual information.[118] Moreover, it only relates to factual information that the authority is going to rely on in the final determination. So, for example, the fact that certain export price and normal value data which had been supplied by one of the parties are not going to be used is not an essential fact that must be disclosed.[119] Different from the 'access to file' obligation of Article 6.4, the disclosure obligation in Article 6.9 requires the authority to identify the facts that *it* considers essential.[120] The

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115 A proposal has been submitted to have a similar disclosure obligation prior to the imposition of provisional measures which are considered as disruptive by the proponent as final measures. TN/RL/GEN/87.

116 There exist proposals to include a requirement to give interested parties an opportunity to comment within 15 days (TN/RL/GEN/63) or 20 days (TN/RL/GEN/87).

117 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.225. A proposal has been submitted to strengthen the disclosure obligations to require authorities to inform interested parties of the assessment by the authorities of the essential facts, the methodologies the authorities will apply and the legal interpretations the authorities will base themselves on. In the view of the proponents, not just the essential facts but also a reasoned and adequate explanation of how the facts support the determination made and how alternative data do not detract from the findings would need to be disclosed. TN/RL/GEN/49;TN/RL/GEN/87. For a similar proposal, see TN/RL/GEN/63.

118 Panel Report, *Guatemala – Cement II*, para. 8.238. Thus the Panel rejected Mexico's claim that the Ministry violated *inter alia* Article 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing Cruz Azul, the Mexican producer, of that change. Panel Report, *Guatemala – Cement II*, para. 8.239.

119 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.224. On the other hand, the Panel in its report on *Argentina – Ceramic Tiles* seemed to have been of the view that the exporters should have been informed of the fact that their information, as submitted was not going to be used for the final determination. Panel Report, *Argentina – Ceramic Tiles*, para. 6.129.

120 Panel Report, *Guatemala – Cement II*, paras 8.229–8.230. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.220. In *Argentina – Ceramic Tiles* the Panel concluded that by merely providing access to the file, the Argentine author-

manner in which the disclosure obligation of Article 6.9 is to be met is not prescribed in the Agreement.[121] The aim of disclosure is to allow interested parties to defend their interests, and it is in light of this aim that the means of disclosure may be examined.

Throughout the investigation, the authorities shall take due account of the difficulties experienced by interested parties, in particular small companies in supplying the information requested, and shall provide any assistance practicable (Article 6.13).[122]

(b) Publication and Notification Requirements

Art.12.2 AD requests investigating authorities to make public any preliminary or final determination or acceptance of price undertakings. Art. 12.2.1–3 AD reflects the elements that should figure in the public notice. It has been suggested that the ability of an interested party to defend its interests throughout an anti-dumping investigation depends largely on the sufficiency of the explanations issued by the investigating authority in respect of the legal and factual determinations and decisions made at each stage of the investigation. For that reason, a proposal has been made in the course of the negotiations to further elaborate on these provisions by expressly requiring the authorities to provide information in the public notices on questions such as, *inter alia*, the

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ity failed to inform the exporters that most of the information they had submitted was rejected and secondary source information was used instead:

> In light of the state of the record, we find that the exporters could not be aware in this case, simply by reviewing the complete record of the investigation, that evidence submitted by petitioners and derived from secondary sources, rather than facts submitted by the exporters, would, despite the responses of the exporters to the DCD's information requests as summarized above, form the primary basis for the determination of the existence and extent of dumping. The DCD thus failed to put the exporters on notice of an essential fact under consideration. As a result, the exporters were unable to defend their interests within the meaning of Article 6.9, for example, by giving reasons why their responses should not be rejected and by suggesting alternative sources for facts available if their responses were nonetheless disregarded. Under these circumstances, we find that the DCD did not, by referring the exporters to the complete file of the investigation, fulfil its obligation under Article 6.9 to inform the exporters of the 'essential facts under consideration which form the basis for the decision whether to apply definitive measures.' (Footnote omitted)

Panel Report, *Argentina – Ceramic Tiles*, para. 6.129.

121 Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.

122 It has been proposed to make this obligation more operational and concrete by including certain specific obligations. See TN/RL/GEN/49.

use of constructed values, the use of facts available, or the choice of the period of data collection.[123] Another proposal is to include a requirement that Members maintain a public register of all anti-dumping measures in force setting out relevant details of the measure in question.[124]

(c) Specific Aspects of the Investigation: Recourse to Best Information Available (BIA)

As already stated, all parties requested to provide information are de facto under a duty to cooperate. Actually, it is probably in their best interests[125] to do so, in light of the possibility granted to investigating authorities under Art. 6.8 AD,[126] when facing un-cooperative behaviour, to base their findings on the *facts available*, also referred to as the *best information available*.

The Panel, in its report on *US – Softwood Lumber V*, explained that interested parties are not simply under a duty to cooperate (in the sense of responding to the questionnaire), but they also carry the obligation to explain to an investigating authority how data that they submitted should be read and evaluated, in case their submitted data could be read in different ways (para. 7.183). This is true if they want their arguments to prevail.

> In sum, we do not consider that the above-examined communications show that it was demonstrated in the investigation that the remaining differences in dimension which were not resolved by product matching affected price comparability. In our view, exporters could have been more forthcoming in suggesting ways in which DOC should have marshalled the data before it. Had the respondents argued that DOC should have examined data in a particular way, in light of the specific facts of the case, and had DOC analysed that data in an unreasonable manner, thus determining that differences in dimension were not demonstrated to have affected price comparability, we might have found that the United States acted inconsistently with Article 2.4. This, however, we do not find to be the case.

From the above it is clear that investigating authorities depend to a large degree on the interested parties to submit the necessary information for the

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123 TN/RL/GEN/21. Another proposal is to make explicit the requirement established in case-law for reasoned and adequate explanations for all determinations to be set out in all notices under Article 12. TN/RL/GEN/49.

124 TN/RL/GEN/83.

125 We should add a caveat here. It all depends on how exporters see their chances to prevail in a litigation where Art. 6.8 AD will be at the centre of discussion. Although, however, case-law has imposed some limits on the investigating authority's discretion under Art. 6.8 AD, in principle, its hands are freer when conducting an investigation under Art. 6.8 AD than otherwise.

126 See *infra*.

determination of dumping, injury and the causal link. But what if an interested party does not provide the information, or fails to provide supporting evidence, or does not allow an authority to verify the information that was provided? Article 6.8 deals with such situations and enables the authority to continue with the investigation in spite of the lack of cooperation one way or another from an interested party. It provides that in cases in which any interested party refuses access to, or otherwise does not provide necessary information within a reasonable period of time or significantly impedes the investigation, determinations, preliminary and final, affirmative or negative, may be made on the basis of the facts available. When resorting to facts available under Article 6.8, the authorities shall observe the provisions of Annex II entitled Best Information Available in terms of Paragraph 8 of Article 6.

Resorting to facts available implies relying on information from sources other than the primary source which are the interested parties themselves. There is an obvious risk that the discretion that is given to an investigating authority once it is allowed to rely on information other than that coming from the affected interested party may be abused. The Agreement, and Annex II in particular, appear to be aimed at ensuring that the use of information from unreliable sources is avoided.[127] Therefore, two important questions that need to be addressed are: (1) what are the conditions for resorting to 'facts available' and (2) which information is to be used when resorting to facts available?

(i) The conditions for recourse to best information available ('BIA')

What we described above is the process when parties agree to cooperate with the investigating authority and respond to the questionnaires they have received. It could, however, be the case that parties are less forthcoming and the authorities do not receive the necessary information. The AD Agreement moves the process out of the deadlock by introducing the recourse to facts available (Best Information Available) ('BIA') as an institutional possibility to conduct an investigation. It allows the investigating authority to move on and complete the record on the basis of BIA, provided that the conditions of Art. 6.8 AD and Annex II AD have been met.

The Agreement in Article 6.8 provides for three situations in which the authority is allowed to make determinations on the basis of facts available. In addition, Annex II sets forth a number of obligations that must be met in any of these three situations before an authority can lawfully resort to facts available. The provisions of Annex II form an integral part of Article 6.8 and are of

127 See Panel Report, *Egypt – Steel Rebar*, para. 7.154.

a mandatory nature.[128] The Appellate Body in its report on *US – Hot-Rolled Steel* thus referred to the 'collective requirements' of Article 6.8 and certain provisions of Annex II.[129]

These three situations are (1) the interested party refuses access to necessary information; (2) the interested party fails to provide necessary information within a reasonable period of time; and (3) the interested party significantly impedes the investigation. With respect to the latter criterion, the Panel in *Guatemala – Cement II* considered that a failure to cooperate with a verification visit owing to a disagreement concerning the composition of the verification team and the presence of non-governmental experts with a possible conflict of interest does not necessarily constitute a significant impediment of the investigation. According to the Panel, the Agreement 'does not require cooperation by interested parties at any cost':

> In light of these considerations, we do not consider that an objective and impartial investigating authority could properly have found that Cruz Azul significantly impeded its investigation by objecting to the inclusion of non-governmental experts with a conflict of interest in its verification team. We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the AD Agreement does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner. In light of the facts of this case, we find that the Ministry did not act in such a manner.[130]

Annex II further stipulates that, in any of the three situations, resort to best information available may only be had in case (1) the interested party has been informed in a proper and timely manner of the information it is required to submit;[131] (2) the interested party has been informed of the consequences of

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128 See e.g. Appellate Body, *US – Hot-Rolled Steel*, para. 75; Panel Report, *Egypt – Steel Rebar*, para. 7.152.; Panel Report, *Argentina – Ceramic – Tiles*, e.g. paras 6.50, 6.67; Panel Report, *US – Steel Plate*, para. 7.56.

129 Appellate Body Report, *US – Hot-Rolled Steel*, para. 82.

130 Panel Report, *Guatemala – Cement II*, para. 8.251. A proposal has now been made to replace the concept of 'significant impediment' in Article 6.8 with 'unreasonable refusal of verification'. TN/RL/GEN/64. Also see TN/RL/GEN/20.

131 Annex II, para. 1, Article 6.1 AD Agreement – the parties should be informed of the information required 'as soon as possible after the initiation'. Also see Panel Report, *Egypt– Steel Rebar*, para. 7.155. It has been proposed that paragraph 1 of Annex II should be clarified to state that authorities shall not require the submission of information which is not reasonably needed for the purposes of the investigation. TN/RL/GEN/64. Also see TN/RL/GEN/20.

not providing such information (i.e. use of BIA);[132] (3) the interested party has been informed of the fact that the information submitted was rejected and has been given an opportunity to respond to the reason for rejection.[133]

The requirement that interested parties be informed of the information required as a precondition for applying facts available has serious consequences for the use of facts available in the calculation of a residual rate to be applied to unidentified exporters and new shippers. In *Mexico – Anti-Dumping Measures on Rice*, the Panel considered that an authority which does not take an active role in identifying the exporters in question cannot apply facts available to such exporters that were never informed of the information that was required:

> For the reason set out above, we find that the investigating authority failed to comply with Articles 6.1 and 12.1 of the AD Agreement as it failed to notify all interested parties known to have an interest in the investigation of the initiation of the investigation and of the information required of them. We are of the view that these violations are not to be viewed as some kind of minor or inconsequential procedural infringement as they have important implication(s) with regard to the use of facts available under Article 6.8 of the AD Agreement. As we stated earlier, in case the authorities do not properly notify and inform the interested parties, it is not permitted to apply the facts available to make determinations with regard to these interested parties. We thus conclude that, by applying the facts available in the calculation of a margin of dumping for the US exporters or producers that were known or could reasonably have been known to the authority, Mexico acted in a manner which is inconsistent with Article 6.8 and paragraph 1 of Annex II of the AD Agreement.[134]

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[132] Annex II, para.1.

[133] Annex II, para. 6. According to the Panel in *Korea – Certain Paper*, paragraph 6 does not, however, give the interested party a second chance to submit information:

> In our view, what paragraph 6 requires is that the IA has to give the interested party whose information is rejected the opportunity to explain to the IA why the information has to be taken into consideration. This, in turn, would give the IA a second chance to review its decision to reject that information. Paragraph 6 does not, however, give the interested party a second chance to submit information. If paragraph 6 is interpreted to mean that each time there is a defect in the submitted information the interested party concerned has the right to submit further information, the investigation might carry on indefinitely.

Panel Report, *Korea – Certain Paper*, para. 7.85.

[134] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.200. This finding was upheld by the Appellate Body. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 261.

Although the Appellate Body overturned the Panel's finding with respect to the need actively to identify exporters, it upheld the Panel's finding that no facts available margin may be imposed on exporters which were not given the opportunity to provide the information required by the authority:

> The last sentence of Article 6.8 provides that the provisions of Annex II shall be observed in the application of that paragraph. In particular, under the second sentence of paragraph 1 of Annex II, the investigating authorities should 'ensure' that an interested party is 'aware' that, if the required information is not supplied within a reasonable time, 'the authorities will be free to make determinations on the basis of facts available, *including those contained in the application for the initiation of the investigation by the domestic industry*' (emphasis added). The second sentence of paragraph 1 of Annex II conditions the use of facts from the petitioner's application on making the interested party 'aware' that, if the information is not supplied by it within a reasonable time, the investigating authority will be free to resort to these facts available. In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority – and, therefore, is not notified of the information required to be submitted to the investigating authority – is denied such an opportunity. Accordingly, an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement.[135] (Footnote omitted)

While the Appellate Body was in this case addressing a situation in which the use of facts available was particularly 'adverse', the basis for its analysis, that is, the obligation under paragraph 1 of Annex II to inform interested parties of the information required prior to the application of facts available, applies irrespective of whether the facts available used consist of data provided by the petitioner or not. The Panel in *EC – Salmon (Norway)* also concluded that in case the authority has not made sufficient efforts to inform possible unidentified exporters, it may not apply facts available to such unidentified exporters.[136]

Finally, in accordance with paragraph 3 of Annex II, the authority is in any case required to take into account information which is verifiable,[137]

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135 Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 259.

136 *Panel Report, EC – Salmon (Norway)*, paras 7.461–7.462.

137 The fact that it was not actually verified is irrelevant in this respect. See Panel report, *Guatemala – Cement II*, para. 8.252. According to the Panel in *US – Steel Plate*, information is verifiable if the 'accuracy and reliability of the information can be assessed by an objective process of examination'. Panel Report, *US – Steel Plate*, para.

appropriately submitted[138] so that it can be used without undue difficulty.[139] which is supplied in a timely fashion and in the medium requested by the authorities.[140] Even though the information may not be ideal in all respects, paragraph 5 of Annex II provides that an authority is not justified in disregarding this information and resorting to facts available in the case where the interested party has acted to the best of its ability.[141] The latter does not imply that information which was not verifiable or not appropriately submitted should nevertheless be taken into consideration if the party submitting it acted to the best of its abilities.[142]

7.71. Merely because information was not provided at the time of the on-the-spot verification does not imply that such information is not 'verifiable'. See Panel Report, *EC – Salmon (Norway)*, para. 7.360.

[138] Information which is not submitted in accordance with a Member's domestic laws is not appropriately submitted. See Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.191. The Panel thus considered that the information submitted by Brazilian exporters without respecting the Argentine *accreditation* requirements was not appropriately submitted.

[139] As the Panel in *US – Steel Plate* correctly pointed out, it is not possible to determine in the abstract what 'undue difficulties' might attach to an effort to use information submitted:

> We consider the question of whether information submitted can be used in the investigation 'without undue difficulties' is a highly fact-specific issue. Thus, we consider that it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties.

Panel Report, *US – Steel Plate*, para. 7.74.

[140] According to the Panel in *US – Steel Plate*, an authority is only required to take into account information which satisfies all of the applicable criteria of paragraph 3 of Annex II. Panel Report, *US – Steel Plate*, para. 7.57. A proposal has been submitted in the course of the negotiations to allow an authority to refuse to use submitted information if it is linked to other information that was *not* provided. According to this proposal the authority would be allowed to conclude that the use of such submitted information would be 'unduly difficult'. TN/RL/GEN/105.

[141] See Appellate Body Report, *US – Hot-Rolled Steel*, para. 81, Panel Report, *US – Steel Plate*, para. 7.55; Panel Report, *Egypt – Steel Rebar*, para. 7.159. The Panel in *Korea – Certain Paper* considered that, in case of a significant degree of commonality in ownership, an interested party may be expected to provide information under the control of a third, related company. It thus rejected Indonesia's claim that the exporters examined had acted to the best of their abilities but could not be considered to have failed to provide necessary information which was not under their control. Panel Report, *Korea – Certain Paper*, para. 7.51. The Panel Report in *Mexico – Steel Pipes and Tubes* provides a clear example of how Panels apply such requirements of Annex II to the facts of a particular case. Panel Report, *Mexico – Steel Pipes and Tubes*, paras 7.161–7.184.

[142] Panel Report, *US – Steel Plate*, para. 7.64. As the Panel in *Egypt – Steel Rebar*

Some of the key terms mentioned above have been further interpreted in case-law. We turn to these interpretations in what immediately follows.

(ii) Necessary information

In the first two situations set forth in Article 6.8, it is only in the case where information that is not provided within a reasonable period of time, or to which access is refused is 'necessary' that resort to facts available is allowed for. The Agreement does not specify what is meant by 'necessary' information. In any case, it is clear that, if the authorities did not clearly request certain information, the failure to submit such information cannot be considered as a failure to provide necessary information. As the Panel in *Argentina – Ceramic Tiles* clearly stated:

> Thus, the first sentence of paragraph 1 [of Annex II] requires the investigating authority to 'specify in detail the information required', while the second sentence requires it to inform interested parties that, if information is not supplied within a reasonable time, the authorities may make determinations on the basis of the facts available. In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.[143]

But does the mere fact that information was requested or required by the authorities suffice to label such information as *necessary*? This certainly seems to have been the view of the Panel in *Egypt – Steel Rebar*:

> On the question of the 'necessary' information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis and so on), as the authority is charged by paragraph 1 to 'specify . . . the information required from any interested party'. This paragraph also sets forth rules to be followed by the authority, in particular that it must specify the required information 'in detail', 'as soon as possible after the initiation of the investigation', and that it also must specify 'the manner in which that information should be structured by the interested party in its response'. Thus, there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party.[144]

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noted, 'an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive quality of the information submitted' and thus the fact of acting to the best of one's ability by itself does not preclude the investigating authority from resorting to facts available in respect of the requested information. Panel Report, *Egypt – Steel Rebar*, para. 7.242.

143 Panel Report, *Argentina – Ceramic Tiles*, para. 6.55.

144 Panel Report, *Egypt – Steel Rebar*, para. 7.155.

A similar view was held by the Panel in *Korea – Certain Paper*. Because a certain percentage of the domestic sales of two exporters was made through a related company, CMI, the authority considered it needed the financial statements of CMI for purposes of verifying the completeness of the normal value data submitted. In spite of the fact that both the two companies and CMI submitted all of their domestic sales data, the authority considered that the failure to provide CMI's financial statements implied that necessary information had not been provided.[145] The authority therefore decided to reject all of the domestic sales data submitted. The Panel upheld this approach showing a lot of deference to the investigating authority when it comes to determining what constitutes 'necessary information'. In this particular case, it is the authority's decision to base its normal value determination of the prices charged by the related company CMI to independent buyers which gave prominence to the financial statements of this related company CMI. Moreover, in so doing, the Panel expressed the view that 'necessary' information includes information which is important in *verifying* information actually submitted, and is not limited to the actual data needed to calculate normal value and export price:

> Article 6.8 of the Agreement stipulates that failure to provide *necessary* information within a reasonable period may allow the IA to resort to facts available. In our view, the decision as to whether or not a given piece of information constitutes 'necessary information' within the meaning of Article 6.8 has to be made in light of the specific circumstances of each investigation, not in the abstract. A particular piece of information that may play a critical role in an investigation may not be equally relevant in another one. We shall therefore determine whether or not CMI's financial statements and accounting records constituted necessary information in the circumstances of the investigation at issue.
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> We note that, in this investigation, the KTC based its normal value determinations on CMI's sales of the subject product to independent buyers, rather than Indah Kiat's and Pindo Deli's sales to CMI. Therefore, information pertaining to CMI's sales played a critical role with respect to the KTC's normal value determinations. This applies, in particular, to quantities and all aspects of prices of CMI's sales to independent buyers, as well as information relevant to whether those sales were in the ordinary course of trade. It follows that the KTC could legitimately consider as necessary information about CMI's selling activities, including its costs associated with the domestic sales of the subject product. Therefore, the accuracy of Indah Kiat's and Pindo Deli's domestic sales information being central to the KTC's normal value determinations leads, in our view, to the conclusion that CMI's finan-

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145 It is noteworthy that CMI was not an exporter or one of the interested parties, although related to the two exporters examined. The argument that the two exporters did not control CMI to force it to provide this highly confidential information was rejected by the authority without much consideration of this argument so it seems. The Panel upheld the authority's approach because of the 'significant degree of commonality of ownership'. Panel Report, *Korea – Certain Paper*, para. 7.51.

> cial statements and accounting records constituted 'necessary information' for purposes of the investigation at issue.[146]

To allow the authority to determine what is necessary is a recipe for abuse of the facts available, however. It implies that the authorities can ask any kind of information which perhaps could be used in the investigation and when it is not provided, hit the exporters with facts available. For example, in case there are no allegations of below cost sales, is an authority that requests detailed and often confidential cost data entitled to resort to facts available if such data are not provided? Or can information be rejected and facts available be used in the case where an authority requests the producer to provide documentary evidence (invoices and so on) of all the sales data it provided, and the exporter refuses for practical reasons to submit all such documents, inviting the authority to come and verify the data at the company's premises?[147]

Surely, necessary information must relate to the essential elements of a dumping and injury determination and thus relate to data necessary to calculate normal value or export price, for example. The fact that cost data are not submitted should not automatically allow an authority to resort to facts available, as such information may not be necessary in all cases. Moreover, a justified question can be raised as to whether supporting evidence actually constitutes necessary information, and hence whether facts available may be used simply because no, or no sufficient supporting documents had been provided, when requested. The Panel in *Argentina – Ceramic Tiles* was able to escape this thorny question by focusing on the lack of precision in the authority's request:

> In light of the ambiguity of the questionnaire regarding documentary evidence and given that the verification methodology to be used was not clearly indicated, some precision by the DCD as to what supporting documentation was expected from the

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[146] Panel Report, *Korea – Certain Paper*, paras. 7.43–7.44. It is interesting to note that other ways of verifying the information were offered, such as the verification of a number of sample transactions, which the Panel recognized to be one of the tools to satisfy the investigators about the completeness and accuracy of domestic sales transactions. See Panel Report, *Korea – Certain Paper*, para. 7.71.

[147] One of the proposals that has been made in the course of the negotiations relates to the above-highlighted problems. It has been proposed to insert a sentence in Article 6.8 stating that facts available may be used 'only to the extent necessary to substitute missing or rejected information'. A further suggestion is that paragraph 3 of Annex II would have to be clarified to require the authorities to use information actually verified, on the one hand, and to allow the authorities to reject information which was not verified only if the results of a sampling verification indicate that the unverified information is highly likely to be inaccurate, on the other. TN/RL/GEN/64. Also see TN/RL/GEN/20.

> exporters was necessary. We are of the view that the very general references to the need to provide supporting documentation in the introductory section of the questionnaire did not meet this requirement. Neither do we consider the one general reference in the letter of 30 April 1999 to the need for new probative elements expressed in the context of a request to declassify certain information or provide more detailed public summaries thereof to be a sufficient notice to the exporters to provide documentary evidence. Therefore, and especially in light of the complex nature of the kind of information that might be needed to demonstrate the accuracy of certain information, we do not consider that any clear request for supporting documentation was made to the exporters. We further do not believe that, independent of any clear request, an interested party is required to provide any particular number of documents to support the information supplied. At the meeting of 11 May 1999, the case-handlers requested at least some exporters to provide certain supporting documentation. The exporters concerned supplied the requested documentation and were never informed by the DCD that the documentation provided was insufficient or that their understanding of the DCD's request was incorrect. We are unable therefore to accept Argentina's argument that the exporters significantly impeded the investigation or refused access to necessary information by not providing more supporting documentation. We find that the DCD was not justified in disregarding in large part the information supplied by the exporters for this reason.[148]

(iii) Submitted within a reasonable period of time

The Panel Report on *US – Hot-Rolled Steel* dealt with a challenge by Japan against a US decision to reject submitted information. The US authority (USDOC)[149] had requested information by NSC (a Japanese company) by a date that it had fixed unilaterally. NSC did not respect the deadline, but still sent its responses to the USDOC in sufficient time before the initiation of the verification process. In the Panel's view, what matters is not the respecting of unilateral deadlines, but rather whether the process had suffered as a result of NSC's behaviour. In its view this was not the case, since there was ample time to verify the submitted information (para. 7.57):

> It is thus clear to us that in the case of NSC the USDOC rejected information that was actually submitted to it, albeit not by the deadline specified, despite the fact that the information was available in sufficient time to allow its verification and use in the calculation of NSC's dumping margin. In our view, based on the evidence before the USDOC at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that NSC had failed to provide necessary information within a reasonable period. Thus, we conclude that USDOC acted inconsistently with Article 6.8 in applying facts available in making its determination of NSC's dumping margin.

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148 Panel Report, *Argentina – Ceramic Tiles*, para. 6.66.

149 United States Department of Commerce.

On appeal the AB confirmed the Panel's finding and added its view as to the parameters of interpretation of the term *reasonable period* (Art. 6.8 AD) during which information must be submitted (paras 84–6):

> Our interpretation of these provisions raises a further interpretive question, namely the meaning of a 'reasonable period' under Article 6.8 of the *Anti-Dumping Agreement* and a 'reasonable time' under paragraph 1 of Annex II. The word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.
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> In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit.
>
> In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a licence for interested parties simply to disregard the time-limits fixed by investigating authorities. Instead, Articles 6.1.1 and 6.8, and Annex II of the *Anti-Dumping Agreement*, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.[150]

The *Korea – Certain Paper* Panel followed a similar approach. The Panel first examined whether information was provided within the deadline set by the authority. It took the rather formalistic view that previously requested information submitted within a time period provided for comments on the calculation methodology was not submitted within the deadline as this time period did not provide for the possibility of submitting new data. It then examined whether such information was nevertheless submitted within a reasonable

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150 Appellate Body Report, *US – Hot Rolled Steel*, paras 84–6.

period by applying the five criteria set forth by the Appellate Body in the above quoted *US – Hot-Rolled Steel* case.[151]

In sum, and quite remarkably, whether information was provided within a reasonable period of time is not decided by using the time of request for such information as the reference point, but rather the moment that this information is to be used by the authority. In other words, whether information was submitted within a 'reasonable period of time' depends on whether this information was submitted in time for it to be used by the authority without too much difficulty. Important in this assessment is whether the information was submitted in time for verification for example. This implies that the timing of the verification becomes an important matter. A bad faith argument could be to advise an authority to organize the verification as soon as possible in the process so that any information later submitted could be rejected, based on the argument that it would require a new verification which would delay the whole process. The Panel in *Korea – Certain Paper* considered that the verifiability of the information and thus the timing of the verification were crucial in determining whether information had been submitted within a reasonable period:

> Verification is a critical stage in an anti-dumping investigation where the IA's main objective is to satisfy itself about the completeness and accuracy of the information on which it will later base its determinations. Thus, it would, in our view, be unfair to take the view that in a case such as this one, the KTC had to carry out a second verification visit to verify the belatedly submitted information.
> . . .
> With respect to the KTC's ability to *conduct the investigation expeditiously* and the *number of days* by which the Indonesian companies missed the deadline, we note that CMI's financial statements were submitted two weeks before the KTC's preliminary determination and over five months before its final determination. We further note, however, that the information was originally requested in the initial questionnaires sent to the exporters and again in the verification plan sent before the verification. Thus, the delay in receipt of the information was substantial and, had the KTC been required to conduct a second verification, the investigation could have been delayed substantially.[152]

Interesting to note is that, in the *Korea – Certain Paper* case, the 'necessary' information which was not submitted within a reasonable period did not consist of normal value data as such, but concerned financial statements which the authority considered 'necessary' to verify the completeness of the data submitted. In other words, it related to supporting documents only, which in any case were submitted two weeks prior to the preliminary determination and

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151 Panel Report, *Korea – Certain Paper*, paras 7.48–7.55.
152 Panel Report, *Korea – Certain Paper*, paras 7.52 and 7.54.

five months prior to the final determination. Because the information was submitted after the verification, the authority was entitled to reject this information and as a consequence all of the normal value data submitted as such data could allegedly not be properly verified without these financial statements.

(iv) Which information to use as best information available

Even in the case where the authority is entitled or forced to make determinations on the basis of the facts available because necessary information was not provided, it is not entirely free to make its determinations on whatever basis it chooses. First, the determination should still be made on the basis of facts, not merely on assumptions or conjecture. Second, as we stated earlier, an authority is not to disregard information which was appropriately submitted, supplied in a timely fashion and in the medium requested by the authorities. In addition, information, even if not ideal in all respects, is supplied by an interested party acting to the best of its abilities, it should not be disregarded. In essence what these requirements which are set forth in paragraphs 3 and 5 of Annex II require is for an authority to use as much as possible the information submitted by the interested parties. An authority is thus not allowed to disregard all of the data submitted by an exporter simply because this exporter is not forthcoming in providing information with respect to one of the items on which information was requested in the questionnaire. Nevertheless, as acknowledged by the Panel in *US – Steel Plate*, for certain parts of the information requested the failure to provide such information may have ramifications beyond that particular item. For example, in the absence of cost of production data, the authority will not be able to determine whether sales were made in the ordinary course of trade:

> Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. Moreover, without considering any particular 'categories' of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II. However, to accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any 'essential' element of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination exclusively on facts available. To conclude otherwise would fly in the face of one of the fundamental goals of the AD Agreement as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.[153]

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[153] Panel Report, *US – Steel Plate*, para. 7.60. For a similar approach, see Panel Report, *Korea – Certain Paper*, para. 7.72 and 7.94.

The information to be used when the interested party is not providing such information will be information from secondary sources, such as other interested parties. Paragraph 7 of Annex II requires the authority to use 'special circumspection' in basing its determination on secondary source information, checking the information from independent sources at their disposal (such as published price lists, official import statistics and customs returns) and from the information obtained from other interested parties. Although an authority is entitled to use information provided by the applicant when resorting to facts available, it is still obliged to compare this information with information from other independent sources.[154] It is not because an authority has already verified the accuracy and adequacy of the information contained in the application at the time of initiation that it no longer needs to comply with this obligation to corroborate under paragraph 7 of Annex II.[155]

However, as the latter part of paragraph 7 of Annex II states, it is clear that, if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if it did cooperate. This sentence has created a lot of debate about the possibility of drawing adverse inferences from a failure to cooperate with the authorities. It appears that some Members are of the view that there are two categories of situations in which 'facts available' may be used for two different responses. The first is a situation where an interested party does not provide certain necessary information for reasons other than bad faith. For example, it could be that the information requested is actually

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[154] It goes without saying that if the authorities use information supplied by the petitioner 'as is' without verification of the accuracy of such information, the investigating authority is not complying with this obligation. Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.193.

[155] Panel Report, *Korea – Certain Paper*, para. 7.124:

> The standard under Article 5.3 is that evidence be 'adequate and accurate' so as to justify initiation whereas paragraph 7 of Annex II requires that information from secondary sources be compared against that from other independent sources. We therefore do not agree with the view that the fulfilment of the obligation under Article 5.3 of the Agreement may in some cases also satisfy the requirements of paragraph 7 of Annex II. It may be the case that the obligation to corroborate under paragraph 7 may entail little substantive analysis in addition to the analysis carried out under Article 5.3 at the initiation stage. However, that does not make these two obligations the same from a procedural and substantive point of view. They are two distinct obligations that have to be observed by the IA at different stages of an investigation. We therefore disagree with Korea's contention that, in certain cases, the fulfilment of the obligation under Article 5.3 may also suffice to meet the requirements of paragraph 7 of Annex II.

not held by the company in question[156] but by an affiliated party over which it does not have sufficient control to require it to provide the information requested. From the authority's point of view, the problem is that, in spite of the interested party's good will, the information which it considered necessary to make determinations is not provided. It will resort to the use of facts available using secondary source information. A second situation is that of a lack of cooperation.[157] In case the information is not provided because the interested party simply refuses to provide it, an authority would be entitled to assume that the reason for not providing such information is that the interested party has something to hide. The authority would therefore, when faced with such non-cooperation, be allowed to draw an adverse inference from this failure to cooperate and may choose among the information from secondary sources the information which is most adverse to the interests of the non-cooperating party. This threat of adverse inferences would, in addition, work as one of the only means available to the investigating authority of forcing parties to cooperate. The question of course is whether such an approach is supported by the text of the Agreement.

The Panel and the Appellate Body in *US – Hot-Rolled Steel* were able to avoid deciding the issue by finding that a party which tried to, but could not, obtain the information held by a subsidiary and thus had not provided the information could not reasonably be considered to have failed to cooperate with the authorities.

The Appellate Body thus considered that in this appeal, it was not necessary to address the issue of whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for investigating authorities *consciously* to choose facts available that are *adverse* to the interests of the party concerned.[158] However, the Appellate Body did, albeit implicitly, seem to accept the idea of applying two types of facts available, a neutral one in the case of cooperation which was unsuccessful, and a possibly adverse one in case of non-cooperation:

> Paragraph 7 of Annex II indicates that a lack of 'cooperation' by an interested party may, by virtue of the use made of facts available, lead to a result that is 'less favourable' to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of 'cooperate': to 'work together for the same purpose or in the same task'. This meaning

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156 For example, in case of the use of downstream sales information to calculate normal value or export price.

157 Such was the case, for example, of one of the investigated exporters in the *Korea – Certain Paper* case. See Panel Report, *Korea – Certain Paper*, paras 7.119–7.127.

158 Appellate Body Report, *US – Hot-Rolled Steel*, footnote 45.

> suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*.
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> Paragraph 7 of Annex II does not indicate what *degree* of 'cooperation' investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a 'less favourable' outcome.[159] (Footnote omitted)

The Appellate Body thus seemed to reason that an authority is precluded from reaching a less favourable result in the case where there has been cooperation, and thus, *arguendo*, accepted the principle that in the absence of cooperation the result may be less favourable. In other words, an authority may intentionally use such facts which would be least favourable to the interests of a non-cooperative interested party. The only hurdle that the Appellate Body put up for investigating authorities consisted of its interpretation of the term 'cooperation'. According to the Appellate Body, 'cooperation' is, 'a two-way process involving joint effort'.[160] This implies that the authorities are to make certain allowances for, or take action to assist, interested parties in supplying information. Therefore, 'if the investigating authorities fail to "take due account" of genuine "difficulties" experienced by interested parties, and made known to the investigating authorities, they cannot . . . fault the interested parties concerned for a lack of cooperation.'[161]

This distinction between facts available in a situation of cooperation and facts available in a situation of non-cooperation is somewhat surprising given the fact that Article 6.8 AD Agreement by no means makes such a distinction. Article 6.8 seems to be more neutral in wording and allows the investigating authorities to break the deadlock caused by the non-provision of certain necessary information. Neither is it really clear from paragraph 7 of Annex II that it intended to introduce such a bifurcated facts available provision. It appears that paragraph 7 simply states the obvious, which is that, if secondary source information will have to be used, this 'could lead to a result which is less favourable to the party than if the party did cooperate'. A party's own information is obviously the most correct information, and other information may be less accurate and less complete than such first-hand information. So an interested party that does not cooperate and does not provide the information

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159 Appellate Body Report, *US – Hot-Rolled Steel*, paras 99–100.
160 Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.
161 Appellate Body Report, *US – Hot-Rolled Steel*, para. 104.

that was required should not later complain about the fact that information from secondary sources was used which led to a higher dumping margin than would have been the case if the authorities had based their determination on the party's own data.

The Panel in *Mexico – Anti-Dumping Measures on Rice* was clearly of this view and thus faulted Mexico for having legislation in place which required the authority to apply the highest facts available margin:

> We recall that Article 6.8 of the AD Agreement provides that in certain situations in which access to necessary information is refused, such information is otherwise not provided within a reasonable period, or the investigation is significantly impeded, the authorities may make their determinations on the basis of the facts available. The fact gathering and evidentiary context in which Article 6.8 of the AD Agreement provides for this possibility clearly shows that Article 6.8 of the AD Agreement is there to allow authorities to continue with the investigation and make a determination, positive or negative, on the basis of the facts that are available. The Agreement expresses a clear preference for first-hand information, but does not allow any party to hold the authority hostage by not providing the necessary information, and thus provides that second-best information from secondary sources may be used in certain well-defined circumstances. The use of facts available under Article 6.8 of the AD Agreement is not however intended to operate as a punishment for those parties that do not provide such information. In fact, as paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement entitled 'Best Information Available in Terms of Paragraph 8 of Article 6' clearly show, all the information provided by the parties, even if not ideal in all respects, should to the extent possible be used by the authorities, and in case secondary source information is to be used, the authorities should do so with special circumspection. The final sentence of paragraph 7 of Annex II, in our view, only states the obvious, that in case of non-co-operation, the result of such use of secondary source information could be less favourable to the party than if the party did cooperate. By making it a requirement always to use the highest margin based on the facts available, Article 64 of the Act prohibits the authority from taking into account the specific circumstances of each individual case of non-provision of information. This effectively prevents the authority from being able to undertake the inherently comparative evaluation of this evidence available in a case at hand that is needed to meet the requirement that the facts available to be used are the 'best' information that is available. This, in our view, requires the authority to use those data which are most appropriate and best suited to replace the missing data. Since Article 64 of the Act effectively prevents the authorities from using the best information to replace the missing data, we find that Article 64 of the Act is inconsistent with Article 6.8 and paragraphs 1, 3, 5 and 7 of Annex II of the AD Agreement. (Footnotes omitted)[162]

Important in the Panel's reasoning was its understanding of the meaning of the term '*best* information available' as used in the title of Annex II ('Best

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162 Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.238.

Information Available in Terms of Paragraph 8 of Article 6').[163] The Appellate Body agreed with the following explanation of the Panel concerning the term 'best information available' as requiring an evaluative, comparative assessment necessary in order to determine which facts are 'best' to fill in the missing information:

> The use of the term '*best* information' means that information has to be not simply correct or useful per se, but the most fitting or 'most appropriate'[164] information available in the case at hand. Determining that something is 'best' inevitably requires, in our view, an evaluative, comparative assessment as the term 'best' can only be properly applied where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgment correctly if it has made an inherently comparative evaluation of the 'evidence available'.[165]

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[163] It has therefore been proposed that paragraph 7 of Annex II be clarified to provide that even in case of non-cooperation the facts available used must be those which most closely represent the prevailing state of the relevant industry and market to which the missing or rejected information relates. TN/RL/GEN/64. More in general it has been proposed to close the gap in treatment between cooperative and so-called uncooperative parties. TN/RL/GEN/20.

[164] *New Shorter Oxford Dictionary*, p. 218.

[165] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.166, as quoted in Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289. Like the Panel, the Appellate Body thus considered inconsistent with the AD and SCM Agreement Mexican legislation requiring, in certain circumstances, the use of the highest margin based on facts available:

> Article 64 also does not on its face permit the agency to use *any* information that might be provided by a foreign producer or exporter, even if incomplete, where the use of such information would result in a margin lower than the highest facts available margin. Nor does it allow the agency to engage in the 'evaluative, comparative assessment' necessary in order to determine which facts are 'best' to fill in the missing information. Furthermore, Article 64 requires *Economía* to use those facts necessary to arrive at the highest margin that can be calculated, even if those facts, although 'substantiated', might be deemed unreliable by the agency after exercising 'special circumspection'. Thus, in all situations of incomplete information, including those of producers not appearing in the investigation and producers not exporting the subject merchandise during the period of investigation, we read Article 64 as preventing *Economía* from engaging in the reasoned and selective use of the facts available directed by Article 6.8 of the *Anti-Dumping Agreement*, Annex II thereto, and Article 12.7 of the *SCM Agreement*.
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> Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 297.

The Appellate Body further considered that an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection'. An authority is not to use data from secondary sources without ascertaining for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties.[166]

The above quoted views that the use of facts available under Article 6.8 of the AD Agreement is not intended to operate as a punishment for those parties that do not provide such information seems to be contrary to the position that interested parties are somehow under a duty to cooperate with the authorities. It appears that, only when such a duty to participate and cooperate exists, an authority would be allowed to use the lack of cooperation as an excuse for intentionally choosing from among the facts available those which are adverse to the interests of the non-cooperative party.

The Agreement does not set forth such a duty to cooperate. Paragraph 7 of Annex II is all there is. Yet it seems the Appellate Body is of the view that such a duty exists, stating that investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters:

> We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.[167]

However, even if such a duty to cooperate would exist, as the Panel in *EC – Countervailing Measures on DRAM Chips* discussed below suggests, the question still remains to what extent an authority is entitled to resort to facts available in case the information is not held by the interested party in question.

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[166] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289. According to the Appellate Body, the absence of an Annex to the SCM Agreement similar to Annex II AD Agreement does not mean that there are no similar limitations on an investigating authority's use of 'facts available' in countervailing duty investigations. The Appellate Body was of the view that it would be anomalous if Article 12.7 of the SCM Agreement were to permit the use of 'facts available' in countervailing duty investigations in a manner markedly different from that in anti-dumping investigations. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

[167] Appellate Body Report, *US – Hot-Rolled Steel*, para. 102.

As the Appellate Body in *US – Hot-Rolled Steel* noted, paragraph 5 of Annex II AD Agreement requires the interested parties to act to the best of their abilities. It is thus doubtful whether resort may be had to facts available if the 'necessary' information which is not provided is not within the control of the interested party in question. The Panel in *Korea – Certain Paper* rejected the argument by Indonesia that the authority had not been justified in rejecting the information provided by two Indonesian exporters examined because of the failure of a third, related company, CMI, to provide financial statements. This third company was not an exporter or one of the interested parties, but a related reseller. The argument that the two exporters did not control CMI to force it to provide this highly confidential information was rejected by the authority without much consideration of this argument, so it seems. The Panel upheld the authority's approach because of the 'significant degree of commonality of ownership'.[168] The Panel thus clearly decided to err on the side of the investigating authority's need to be able to verify the information provided, rather than taking into account the difficulties of parties forcing related but independent parties to cooperate in an investigation in which they are not immediately interested. It seems that in such a situation it becomes even more important that the 'facts available' used are truly the 'best information available' in order to maintain this careful balance between the interests of investigating authorities and those of exporters.[169]

The Panel in *EC – Countervailing Measures On DRAM Chips*, a countervailing duty case dealing with the application of facts available under Article 12.7 of the SCM Agreement considered that the above quoted statement of the Appellate Body supported its view that a duty to cooperate exists. The Panel thus considered that the facts available provision allowed an authority to draw certain 'inferences, which may be adverse' from the failure to cooperate:

> In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was

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168 Panel Report, *Korea – Certain Paper*, para. 7.51.

169 A number of proposals have been introduced in the course of the negotiations to deal with this thorny question of the submission of information held by affiliated parties. The proposals argue that it would be unreasonable and unjust to punish the respondent with adverse facts available when there is no 'control' relationship between the respondent in an investigation and an affiliated party as it would mean that the collection of the data is beyond the respondent's means. These proposals also clarify what is meant by the term 'control' in this context. TN/RL/GEN/72; TN/RL/GEN/125.

withheld from the authority may be the element that tilts the balance in a certain direction. Depending on the circumstances of the cases, we consider that an authority may be justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. We consider relevant, in this respect, the following statement of the Appellate Body in the *US – Hot-Rolled Steel* case concerning the facts available provision of Article 6.8 of the *AD Agreement*, which is very similar both textually and contextually to Article 12.7 of the *SCM Agreement*:

> [i]n order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.[170] (Emphasis in original)

While we acknowledge that this statement was, at least in part, based on several paragraphs of Annex II to the *AD Agreement*, we consider that a similar significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation.[171] The fact that the *SCM Agreement* does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same. Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority. If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile. We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.[172]

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[170] Appellate Body Report, *United States – Hot-Rolled Steel*, para. 102.

[171] In that respect, we see an important similarity between the power of an investigating authority to draw inferences from the failure to cooperate with the authority and the discretionary power of Panels in the WTO dispute settlement context, as well as international tribunals of various kinds in public international law, to draw such inferences, as recognized by the Appellate Body in the *Canada – Aircraft* case. (Appellate Body Report, *Canada – Aircraft*, para. 202).

[172] Panel Report, *EC – Countervailing Measures On DRAM Chips*, para. 7.60–7.61.

It should be noted that the Panel in *EC – Countervailing Measures On DRAM Chips* was not dealing with a situation where certain information was rejected or not provided which had to be replaced with information from other sources. Rather, the question before the Panel was whether an authority when weighing the evidence before it could take into consideration the non-cooperation by an interested party. It would seem odd to say that an authority could not. The Panel thus did not conclude that it would be possible to replace information which was rejected or not provided with information which it knew would lead to a less favourable result. But it is clear that this Panel by emphasizing the absence of subpoena or other evidence gathering powers of an authority seemed favourable to a reading of the facts available provision allowing for the use of adverse facts available under certain circumstances. What is interesting is that the Panel in *EC – Countervailing Measures On DRAM Chips* did not consider relevant the fact that the SCM Agreement does not contain an annex similar to Annex II AD Agreement.[173] Yet, in the AD context, Panels and the Appellate Body have built their bifurcated approach (cooperative facts available v. non-cooperative facts available) completely on paragraph 7 of Annex II, a provision absent from the SCM Agreement. The Panel in *EC – Countervailing Measures On DRAM Chips* did not need such a paragraph 7 to conclude that an authority may be influenced in the weighing process by the lack of cooperation. Perhaps this approach again indicates that the Panel in *EC – Countervailing Measures On DRAM Chips* was actually talking about something different, that is, weighting of evidence rather than the use of secondary source information to replace the missing data in a normal value or export price calculation.

(d) The Need for a Company-specific Margin Calculation – and the Sampling Exception

In principle, an authority is to calculate a dumping margin for each individual exporter/producer, that is, for each known exporter or producer concerned (Article 6.10 AD Agreement). The Panel in *EC – Salmon (Norway)* considered that it was legitimate for an authority to exclude non-producing exporters.[174] However, the Agreement provides that an investigating authority can limit its

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[173] As we noted earlier, in *Mexico – Anti-Dumping Measures on Rice*, the Appellate Body was of the same view, as it considered that the absence of an Annex to the SCM Agreement similar to Annex II AD Agreement does not mean that there are no similar limitations on an investigating authority's use of 'facts available' in countervailing duty investigations. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 295.

[174] Panel Report, *EC – Salmon (Norway)*, para. 7.167.

investigation to a *sample* of all such known exporters, when the number of exporters, producers, importers or types of products involved is so large as to make a determination impracticable.

(i) An individual margin of dumping – collapsing

The Panel in *Korea – Certain Paper* addressed the question whether the practice of collapsing is consistent with the clear obligation in Article 6.10 AD Agreement to calculate an individual margin of dumping for each known exporter or producer concerned. In this case, Korea had calculated a single margin of dumping for three legally independent Indonesian companies which it considered to constitute one entity for purposes of the anti-dumping investigation. This practice of collapsing is intended to ensure the efficiency of the anti-dumping measure. The fear is that, if separate companies are sufficiently closely linked, they may be able to start selling through the company for which the lowest duty has been calculated once the duty has been put in place. In other words, it functions as a sort of pre-emptive anti-circumvention action. The Panel was of the view that Article 6.10 does not define the term 'exporter' or 'producer', but that, when read in context, Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations.[175] However, the Panel added, 'in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment'.[176]

In other words, according to the Panel, only when the 'structural and commercial relationship between the companies in question is sufficiently close to be considered as a single exporter or producer'[177] would collapsing be permissible. No evidence indicating actual coordination in the sales of the companies in question is necessarily required. In the case at hand, the Panel accepted Korea's decision to treat as a single exporter and calculate a single margin of dumping for three independent Indonesian exporters based on the

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175 Panel Report, *Korea – Certain Paper*, para. 7.161. In particular, the Panel considered that Article 9.5 as context strongly suggests that the term 'exporter' in Article 6.10 should not be read in a way to require an individual margin of dumping for each independent legal entity under all circumstances. According to the Panel, Article 9.5 reveals that in the context of new shipper reviews, the mere existence of a relationship to an exporter or producer already subject to anti-dumping duties is sufficient to disqualify an entity from entitlement to an individual margin of dumping. Panel Report, *Korea – Certain Paper*, para. 7.159.

176 Panel Report, *Korea – Certain Paper*, para. 7.161.

177 Panel Report, *Korea – Certain Paper*, para. 7.162.

commonality of management and shareholding, the use of the same trading company by all three exporters, and the existence of cross-sales of the subject product among the three companies, which, according to the Panel, showed 'the ability and willingness of the three companies to shift products among themselves'.[178]

(ii) The exception to the rule – sampling

The Agreement allows the use of samples, as an alternative to the individual margin calculation for each exporter.[179] When choosing the sample, an investigating authority must, in accordance with the second sentence of Art. 6.10 AD: (a) *either* choose a sample which is *statistically valid*, *or* (b) investigate the *largest percentage of the volume of exports* from the country in question which can be *reasonably* investigated.[180] Notice the *or*: the two methods are substitutes. Recourse to basic econometrics seems warranted in order to define what is a statistically valid sample; however, the other method seems to leave more discretion to an investigating authority: the reasonableness test enshrined in there suggests that a number of factors might be relevant to justify the authority's course of action.[181]

The selection of the sample shall preferably be chosen in consultation with and with the consent of exporters, producers or importers concerned.[182] Any exporter or producer not selected who submits the necessary information in time for that information to be considered during the investigation shall receive an individual margin of dumping, unless the number of exporters or producers is so large that individual examination would be unduly burdensome and prevent the timely completion of the investigation.[183] Article 9.4 provides that the maximum of duties that may be imposed on the non-sampled exporters is the weighted average margin of dumping for the investigated

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178 Panel Report, *Korea – Certain Paper*, paras 7.165 and 7.168.

179 It has been proposed to limit the discretion of the authority in reverting to the use of a sample by requiring *inter alia* an adequate and reasoned explanation why the authority had to limit the examination. The proponents emphasize that sampling should be truly exceptional. TN/RL/GEN/46. In a similar vein, claiming the right to the calculation of an individual margin of dumping, see TN/RL/GEN/77.

180 This requires an active inquiry by the investigating authority in case it had knowledge of the importance of a particular exporter. Panel Report, *EC – Salmon (Norway)*, para. 7.203.

181 In order to ensure that the sample is representative of all exporters and producers, it has been argued in the course of the negotiations that Article 6.10 should be amended to provide, as a guideline, that the sample must include respondents representing no less than two-thirds of the total imports from the exporting country under investigation. TN/RL/GEN/46.

182 Article 6.10.1 AD Agreement.

183 Article 6.10.2 AD Agreement.

exporters, excluding *de minimis* and zero margins as well as margins established on the basis of facts available. We will come back to Article 9.4 when discussing the amount of the duty.

The AB, in its report on *EC – Bed Linen (Article 21.5 – India)* provided some important clarifications as to whether, in a sampling situation, it suffices to examine the sampled exporters in order to be able to reach conclusions on injury and ultimately impose duties on all exporters or producers within the limits of Article 9.4.

The European Communities sampled Indian exporters. Of the five sampled, three were found to be dumping. The European Community did not impose duties on the two exporters found not be dumping; it did impose the weighted average (of the duties imposed on the three 'dumpers') on the non-sampled Indian exporters. India protested. It stated that, during the investigation of Indian exporters of bed linen, 53 per cent of imports to the EC market were found not to be dumping. India did not call into question the methodology used by the European Community for sampling and did not attack the EC practice under Art. 6.10 or 9.4 AD either. In India's view, it was the injury analysis of the European Communities that was questionable: since Art. 3.2 AD requires investigating authorities to focus on the effects of dumped imports only, the European Community should have kept as a working hypothesis at this stage that 53 per cent of total Indian imports are not dumped, and, hence, should not be taken into account for the purpose of the injury analysis.

The European Community disagreed. In its view, the working hypothesis of Arts 6.10 and 9.4 AD is that there is no need to make a separate injury analysis for non-sampled known exporters: the very fact that Art. 6.10 AD allows sampling and Art. 9.4 AD allows the imposition of the weighted average on non-sampled known exporters, amounted, in the EC point of view, to a presumption that injury has been caused by such exporters.

Two arguments, at least, come in support of the EC view:

(a) if the EC point of view is not accepted, then the AD Agreement, through Arts 6.10 and 9.4 AD, allows the imposition of duties on imports which do not satisfy two of the three conditions mentioned in the Agreement as pre-requisites for an imposition of duties: injury and causal link;
(b) it is not at all the case that non-sampled known exporters are defenceless. They can announce themselves to the investigating authority and request that they be investigated: under Art. 6.10.2 AD, in such a case, absent truly exceptional circumstances, the EC investigating authority is obliged to determine an individual dumping margin for each one of them.

The AB however, rejected all EC arguments and held, in paras 132–3:

> Under the approach used by the European Communities, whenever the investigating authorities decide to *limit* the examination to some, but not all, producers – as they are entitled to do under Article 6.10 – *all* imports from *all non*-examined producers will *necessarily always be included* in the volume of dumped imports under Article 3, as long as any of the producers examined individually were found to be dumping. . . . In other words, under the European Communities' approach, imports attributable to *non*-examined producers are simply *presumed*, in all circumstances, to be *dumped*, for purposes of Article 3, solely because they are subject to the imposition of anti-dumping duties under Article 9.4. This approach makes it 'more likely [that the investigating authorities] will determine that the domestic industry is injured', and, therefore, it cannot be 'objective'. Moreover, such an approach tends to favour methodologies where *small numbers* of producers are examined individually. This is because the *smaller* the number of individually-examined producers, the *larger* the amount of imports attributable to *non*-examined producers, and, therefore, the larger the amount of imports *presumed* to be *dumped*. Given that the *Anti-Dumping* Agreement generally requires examination of *all* producers, and only exceptionally permits examination of only *some* of them, it seems to us that the interpretation proposed by the European Communities cannot have been intended by the drafters of the Agreement.
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> For these reasons, we conclude that the European Communities' determination that imports attributable to *non*-examined producers were dumped – even though the evidence from examined producers showed that producers accounting for 53 per cent of imports attributed to examined producers were *not* dumping – did not lead to a result that was *unbiased*, *even-handed* and *fair*. Therefore, the European Communities did not satisfy the requirements of paragraphs 1 and 2 of Article 3 to determine the volume of dumped imports on the basis of an examination that is 'objective'.[184] (Emphasis in the original)

Following this ruling, it is unclear how sampling can lawfully take place in future practice. While the Appellate Body refused to rule in favour of India in this respect, it appears that the only practical solution would be, as proposed by India in this dispute, to use the examined producers and exporters as a proxy and assume that the volume of dumped imports for the non-sampled exporters or producers is similar to the volume of dumped imports from the examined producers. The only other alternative, it appears, is to examine all exporters or producers to see whether imports from these exporters were dumped so that their volume can be included in the 'volume of *dumped imports*' under Article 3.2.

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184 Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras 132–3.

F THE INVESTIGATION – THE END

1 Termination for Reason of *De Minimis* Margin or Negligible Volume of Dumped Imports

An investigation normally may run for 12 months and up to a maximum of 18 months.[185] However, according to Article 5.8 AD Agreement, an investigation is to be terminated *immediately* in the case where the authorities determine that the margin of dumping is *de mimimis*, or that the volume of dumped imports, or the injury, is negligible.[186] Article 5.8 further clarifies that the *de minimis* level of dumping is a margin of dumping of less than 2 per cent. If the volume of dumped imports from a particular country is less than 3 per cent of imports of the like product in the importing Member, it will be considered negligible.[187] The Agreement does not stipulate what it considers to be a negligible level of injury, which is also listed as one of the three reasons for immediate termination of the investigation.

The term 'margin of dumping' in the AD Agreement refers to individual and *company*-specific margins of dumping.[188] The required termination of the investigation on the basis of a *de minimis* margin of dumping is therefore the investigation with respect to a particular company and would not entail the termination of the investigation overall. As the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* concluded, 'the second sentence of Article 5.8 requires the immediate termination of the investigation in respect of exporters for which an *individual* margin of dumping of zero or *de minimis* is determined'.[189]

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185 A proposal has been submitted to limit this period of investigation which is a period of uncertainty for the exporters and importers to 12 months, unless exceptional circumstances require a (limited) extension of the investigation. The same proposal also suggests introducing a one year grace period following the termination of an investigation to avoid back-to-back investigation on the same product. TN/RL/GEN/23.

186 Article 5.8 AD Agreement. A number of proposals have been tabled increasing the *de minimis* level and clarifying the negligibility concept. See TN/RL/GEN/30/Rev.1; TN/RL/GEN/31; TN/TL/GEN/60; TN/RL/GEN/68; TN/RL/GEN/75.

187 Unless countries which individually account for less than 3 per cent of the imports of the like product collectively account for more than 7 per cent of imports of the like product in the importing Member.

188 Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 216; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, paras 7.137–7. 142. According to the Panel, 'whenever the Agreement refers to the determination of a margin of dumping, it refers to the margin of dumping determined for the individual exporter'. Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.140. Also see Panel Report, *US – DRAMS*, para. 6.90.

189 Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 217.

The situation is different in the case of a termination based on a negligible volume of dumped imports, which is something that is determined on a *country*-specific basis. If the volume of dumped imports from a country is negligible, the investigation has to be terminated with respect to all imports from that country. A possible negligible injury finding would similarly lead to the termination of the investigation on products from a particular country as a whole.

A practice exists in certain countries to only terminate the investigation if the average margin of dumping for the country as a whole is *de minimis*, or in case there is no margin of dumping for any producer or exporter which is above *de minimis*. In all other cases, the investigation would continue and an anti-dumping order may be issued with respect to all exporters including the exporter for which a margin of dumping of below *de minimis* would have been found. While this exporter would be included in the order, he would receive a zero per cent duty rate.[190] Both the Panel and the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* clearly rejected this approach. Exporters for which a *de minimis* margin of dumping has been determined should be excluded from the AD order.[191] The Panel emphasized the importance of excluding from the order all exporters for which a *de minimis* margin of dumping was found:

> We are of the view that in this context Article 5.8 of the AD Agreement requires the termination of the investigation, and thus the exclusion from the anti-dumping order of any exporter or producer with a below *de minimis* margin of dumping. This, in our opinion, is the essential difference between Article 5.8 of the AD Agreement and Article 9.3 of the AD Agreement which deals with the amount of the duty to be imposed and collected, after it has been established that a duty may be applied to the exporter or producer in question. To accept Mexico's argument that the application of a zero per cent duty does not really constitute the imposition of a measure as it complies with Article 9.3 of the AD Agreement would moreover render Article 5.8 of the AD Agreement meaningless. Indeed, it would not be a violation of Article 9.3 of the AD Agreement to impose a duty at 0.5 per cent if that was the margin of dumping for the exporter concerned, but doing so would clearly be inconsistent with the requirement of Article 5.8 of the AD Agreement to terminate the investigation in case of a *de minimis* dumping margin. As convincingly explained by the Panel in the *US – DRAMS* case, both provisions serve a different purpose and

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The Appellate Body agreed with the reasons provided by the Panel in support of this position in paragraphs 7.137–7.142 of its report.

[190] Since the exporter would be included in the order, this exporter's duty could be subject to administrative and changed circumstances reviews later. This, the Panel in *Mexico – Anti-Dumping Measures on Rice* pointed out, reveals the important difference between applying a zero per cent duty and excluding an exporter from the order. Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.251.

[191] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 221; Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.145.

compliance with Article 9.3 of the AD Agreement does not equal compliance with Article 5.8 of the AD Agreement.[192,193]

2 Price Undertakings

WTO Members can instead of imposing AD duties, request or accept *price undertakings* from willing exporters (Art. 8 AD). Through a price undertaking, an exporter agrees to raise prices up to the level that no injury results for the domestic industry of the like product. The maximum price rise is up to the level of the dumping margin, a lesser duty-rule being an option.[194]

Such price undertakings may not be offered to exporters until after a preliminary affirmative determination of dumping, injury and the causal link has been made. There is no obligation to offer price undertakings, neither is there an obligation to accept such undertakings when offered by exporters, if the authorities consider their acceptance impractical, or for other reasons including reasons of general policy.[195] The Panel in its report on *US – Offset Act (Byrd Amendment)* emphasized the freedom of the authority in accepting

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[192] The EC, as a third party, argued that requiring an authority to terminate an investigation against those exporters found not to be dumping above *de minimis* levels and excluding them from the measure could lead to the need to have a parallel investigation against the same product from the same country soon after the application of the measure, as the excluded exporters could use the imposition of the duty to start dumping into the market of the investigating country. This would be so because no administrative or changed circumstances reviews would apply to such exporters, once they had been excluded from the application of the measure. We do not find this scenario to be very likely. If the exporters were able to compete in the market during the period of investigation without dumping, and this while others were engaging in dumping practices, we do not consider that it would be necessarily so that such exporters would start dumping their products, once an anti-dumping duty is in place, as this anti-dumping duty has indirectly also increased their competitive position. It thus seems that it could be argued that there is actually even less reason for them to engage in dumping than before the duty was in place. Be all that as it may, expressing concerns about practical consequences, whether plausible or otherwise, does not in any event constitute a basis to go against the plain meaning of the text. An exporter whose dumping margin is found to be *de minimis* is, under the Agreement, effectively returned to precisely the same position as an exporter which is not dumping. The Agreement, otherwise drafted, could have provided for some differentiation of treatment as between these cases. But it does not in fact do so. It is not our place to read into the text provisions which invent distinctions that are not in fact there.

[193] Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.144.

[194] Vermulst and Waer (1997) show that this practice is actively pursued by the EC authority. In practice, this works like a voluntary export restraint.

[195] Proposals have been tabled that would considerably limit the discretion of the authorities in accepting or rejecting price undertakings. TN/RL/GEN/2; TN/RL/GEN/76.

or rejecting any price undertakings. While it did not explicitly pronounce itself on the question whether an authority may refuse to accept undertakings as a matter of general policy or for non-pertinent reasons, it did make the bold statement that an authority is not required to examine a proposed price undertaking in an objective manner:

> In addition we note that the text of AD Article 8.3 and SCM Article 18.3 does not require the authority to examine objectively any undertaking offered. Rather, it stresses that undertakings offered need not be accepted and that the reasons for rejecting an undertaking may be manifold and include reasons of general policy. In our view, the CDSOA cannot be found to impede the objective examination of the appropriateness of accepting an undertaking, in the absence of any such obligation under AD Article 8 and SCM 18.[196]

Normally speaking, the acceptance of a price undertaking puts an end to the investigation with respect to the exporter concerned, unless this exporter desires the authorities to continue with the investigation. In case such a continued investigation ultimately leads to a negative finding of dumping or injury, the undertaking shall automatically lapse.[197]

Article 8.6 provides for a monitoring device and allows authorities to request exporters to provide periodically information relevant to the fulfilment of the undertaking thus permitting verification. In case of violation of the agreed undertaking, the authorities are entitled to take expeditious actions, which may include the immediate application of provisional measures using best information available. Definitive duties may be levied retroactively up to

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196 Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.81. The Panel thus rejected the argument that the incentive of the Offset Act combined with the important role given to the US domestic industry in accepting an undertaking from exporters somehow violated Article 8:

> The decision to accept an undertaking or not under the Agreements is one the investigating authority is to take, and it may reject an undertaking for various reasons, including reasons of general policy. The fact that domestic producers may or may not be influenced by the CDSOA to suggest to the authority not to accept the undertaking, does not affect the possibility for interested parties concerned to offer an undertaking or for that undertaking to be accepted, in light of the non-decisive role of the domestic industry in this process.

Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.80. It thus seems that both authorities and the exporters/producers concerned are completely free to propose, accept or reject such undertakings. See Article 8.3 and 8.5 AD Agreement.

197 Except in cases where a negative determination is in large part due to the price undertaking, in which case the undertaking may be maintained for a reasonable period of time.

90 days before the application of such provisional measures. No duties may be levied on imports pre-dating the violation.

3 Imposing and Monitoring AD Duties

(a) Imposing duties is a right, not an obligation

If at the end of an investigation, an investigating authority has demonstrated that dumped imports have caused injury to its domestic industry producing the like product, it has the right to impose AD duties.[198] Art. 9.1 AD reads:

> The decision whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the anti-dumping duty to be imposed shall be the full margin of dumping or less, are decisions to be made by the authorities of the importing Member.

The decision to impose duties, or not, thus requires the authorities to balance the interest of the domestic industry against those of consumers and downstream producers. Dumped imports will often, although not necessarily, mean cheap products, and lower prices are of course of interest to consumers. This is especially so if the product under consideration is, for example, wheat flour that will be used to make bread. In the case where there is one wheat flour producer in the country and it is seeking anti-dumping protection from cheap dumped imports of wheat flour, it will be a political decision for the government to impose duties or not. By providing anti-dumping protection, it may save jobs for people working for the wheat flour producer, but it will go at the expense of the purchasing power of consumers who will have to pay more for their daily bread. For some, the price increase may be too much to bear.

Some countries, and the EC and Canada in particular, have imposed an additional requirement on themselves to examine whether the imposition of duties would not be against the public interest. The public interest test, or the

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198 Article VI.5 GATT 1994 does not allow duties to be imposed simultaneously to offset the same problem set, i.e. dumping or export subsidization. The implications of this prohibition as stated in Article VI.5 GATT 1994 are twofold. First, Article VI.5 does not prohibit conducting two parallel investigations on dumping and subsidies simultaneously. Article VI.5 prohibits only the joint imposition of duties. Second, Article VI.5 prohibits the imposition of AD duties and countervailing (CV) duties to compensate for the same situation of dumping or export subsidization. Arguably, this implies that such joint imposition of duties is only prohibited in case of export subsidization. It is not clear however whether the term export subsidization is identical to the concept used in Article 3 of the SCM Agreement. In any case, the imposition of AD and CVD measures at the same time and on the same product is quite common in practice, although that does not mean it is GATT/WTO consistent of course. This issue has not yet been addressed in case law.

Community interest test as it is called in the EC, will require the authority to examine whether the negative effects of an anti-dumping duty on consumers would not be disproportionate compared to the advantage of the protection offered to the domestic industry. The AD Agreement does not contain a similar obligation.[199] The public interest test is thus not to be confused with the requirement in Article 6.12 that authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is sold at the retail level to provide information which is relevant to the investigation regarding dumping, injury and causality. The kind of information that industrial users are to provide thus relates to dumping, injury and the causal link only, and does not relate to the possible negative effect of the imposition of a duty for downstream users of the product or for consumers in general.

(b) Non-discrimination

Art. 9.2 AD states that, once imposed, AD duties shall be collected on a non-discriminatory basis on imports from all sources found to be dumped and causing injury, unless, of course, price undertakings[200] have been accepted. In other words, a Member cannot exclude imports from a particular exporter or a particular country that were found to have been dumped and causing injury because for example the type of products or the quality of these products from this particular producer or country are needed by the domestic producers, or certain consumers. So, while the imposition of an anti-dumping duty is to a certain extent an exception from the MFN principle as imports from certain countries are singled out and receive less favourable treatment, no further discrimination within this group is allowed. This duty, however, is limited to the imposition stage.[201]

(c) *Ad valorem*, fixed or variable duties

In case of an affirmative determination, a Member may either offer or accept

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199 A proposal to include such a public interest test has been made in the course of the negotiations. TN/RL/GEN/85; TN/RL/GEN/53. At a minimum, each Member should provide for a mechanism to allow for the authority to take due account of representations by adversely affected domestic interested parties (such as consumers and industrial users of the subject product). TN/RL/GEN/111.

200 See *infra.*

201 Arguably, even the initiation of an investigation is covered by the MFN clause which states that *any* advantage comes under its purview. It will be an insurmountable evidentiary task, however, to demonstrate that, in presence of information that companies from two different countries were dumping in a third market, the latter chose to attack only one of them. A number of distinguishing factors, on the other hand, could cast doubt on a discrimination-based legal challenge.

a price undertaking or impose anti-dumping duties. Anti-dumping duties can take various forms. In the case of a fixed duty, the imports will be subject to an additional duty of for example, 2 USD per kilogramme. An *ad valorem* duty will be expressed in percentage terms of the value, such as a duty of 10 per cent. In the case of a variable duty, a minimum export price or reference normal value will be determined and a duty will be imposed, based on a comparison between the actual export price and this reference price.

The Panel Report on *Argentina – Poultry Antidumping Duties* confirmed that duties can be *ad valorem*, fixed or variable, using a minimum export price or reference normal value which will be compared to the actual export price.[202] The Panel noted that nothing in the AD Agreement explicitly identifies the form that anti-dumping duties must take, and that certainly nothing in the AD Agreement explicitly prohibits the use of variable anti-dumping duties.[203] The question of the legitimacy of variable anti-dumping duties is intrinsically linked with the amount of the anti-dumping duty which is limited by the margin of dumping as established under Article 2. We will come back to this question shortly.

(d) The level of the duty

Before discussing the level of the duty, it seems appropriate, first, to briefly summarize the different 'categories' of exporters for which the Agreement provides ways of calculating the duty. The Agreement requires the calculation of an individual margin for each known exporter (category 1: 'known exporters'). This is so unless the investigation is based on only a sample of exporters. In such a situation, a margin is to be calculated for each of the investigated exporters as well as for each exporter that provides the necessary information although not initially included in the sample (category 2: 'sampled exporters'). For exporters not included in the sample, Article 9.4 AD Agreement provides what the maximum duty is that may be imposed on these non-sampled exporters (category 3: 'non-sampled exporters'). Article 9.5 allows exporters which did not actually export any products during the period of investigation to request the authority to calculate an individual margin of dumping in order to determine their duty rate (category 4: 'new shippers'). These are the four categories of exporters for which the Agreement gives precise guidance. The practice however reveals the existence of another category of exporters for which a so-called 'residual rate' is calculated: the

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202 The Panel found that 'the variable anti-dumping duties at issue are not inconsistent with Article 9.3 simply because they are collected by reference to a margin of dumping established at the time of collection (i.e., the difference between a "minimum export price", or reference normal value, and actual export price)'. Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.364.

203 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.355.

exporters that were not identified as such by the authorities at the time of the investigation, because they were not mentioned by the applicants, were not identified by the authorities themselves or by any of the other interested parties and which did not out of their own initiative make themselves known in order to be able to participate in the investigation (category 5: 'unknown exporters'). There is nothing in the Agreement expressly dealing with this situation. A similar silence concerns the duty to be paid by new shippers prior to their request for an individual margin calculation. The Agreement is silent on which duty rate applies to their shipments.

In what follows, we will try to provide an overview of the issues that have arisen with respect to the duty to be applied to these different categories of exporters. We will first examine the standard situation of a duty applied following an individual margin calculation for an investigated exporter (categories 1 and 2 exporters). We will then examine the provisions relating to the sampling situation, and discuss in particular the rate to be applied to non-sampled exporters (category 3 exporters). We will finally deal with the question of which, if any, duty rate to be applied to the unknown exporters and the new shippers prior to shipping (category 5 exporters).

(i) Individual duty: the margin of dumping as the ceiling for AD duties

Art. 9.3 AD is quite straightforward, so it seems. It provides that investigating authorities cannot impose AD duties higher than the level of the dumping margin as established under Article 2. In other words, the margin of dumping as established during the investigation process thus ipso facto determines the maximum amount of AD duties permissible under the AD Agreement. At least so it seemed. But the Panel in its report on *Argentina – Poultry Anti-Dumping Duties* came to a different conclusion. According to the Panel, a higher duty may be imposed as long as this duty is based on a margin of dumping calculated under the conditions of Article 2.

The Panel in this case addressed an argument by Brazil that a variable duty is inconsistent with the ceiling requirement of Article 9.3 as it allows for duties to be collected above the dumping margin as the duties are imposed on the basis of a fixed reference export price. The duty to be paid is the difference between the actual export price at the time of collection of the duty and this reference price. In case of a low export price at the time of collection of the duty, the duties imposed may thus be higher than the margin of dumping as established during the investigation based on data from the POI. The Panel approved of the use of variable duties, even if they may have this effect.

The Panel thus rejected Brazil's argument that, from the moment the anti-dumping duty is imposed, until a review of the imposition of that duty is made, the only margin of dumping available, calculated pursuant to Article 2, is the

margin assessed in the investigation, found in the final determination, and made known to all interested parties through a public notice. The Panel acknowledged that Article 9.3 provides that a duty may not be collected in excess of the margin of dumping as established under Article 2. In the view of the Panel, this means simply that, when ensuring that the amount of the duty does not exceed the margin of dumping, a Member should have reference to the methodology set out in Article 2.[204] The Panel found contextual support for its interpretation in Article 9.3 of the AD Agreement and the refund mechanism of 9.3.1 and 9.3.2 in particular. We quote in full from the report:

> Accordingly, we understand that the Article 9.3.2 refund mechanism would include refunds of anti-dumping duties paid in excess of the margin of dumping prevailing at the time the duty is collected. This therefore further undermines Brazil's argument that the only margin of dumping relevant until such time that there is an Article 11.2 review is the margin established during the investigation. If the basis for duty *refund* is the margin of dumping prevailing at the time of duty collection, we see no reason why a Member should not use the same basis for duty *collection*. Brazil has noted that refunds do not imply modification of the duty, and are only available if requested by the importer. While these points may be correct, they do not change the fact that the refund mechanism operates by reference to the margin of dumping prevailing at the time of duty collection. It is this aspect of the refund mechanism that renders it contextually relevant to the issue before us. Accordingly, we see no reason why it is not permissible for a Member to levy anti-dumping duties on the basis of the actual margin of dumping prevailing at the time of duty collection. (Footnotes omitted)[205]

The Panel then had to address the logical question raised by Brazil: if the margin of dumping does not limit the amount of the duty that can be imposed, what purpose does it serve? The Panel came up with a very unsatisfactory answer: a margin of dumping is to be calculated to comply with the *de minimis* standard of Article 5.8:

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[204] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.357. The Panel added that 'it would not be possible to establish a margin of dumping without reference to the various elements of Article 2. For example, it would not be possible to establish a margin of dumping without determining normal value, as provided in Article 2.2, or without making relevant adjustments to ensure a fair comparison, as provided in Article 2.4. Thus, the fact that Article 2.4.2, uniquely among the provisions of Article 2, relates to the establishment of the margin of dumping "during the investigation phase" is not determinative of the issue before us, since other provisions of Article 2 do not contain that limitation'.

[205] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.361. The Panel in *EC – Salmon (Norway)* reached a very similar conclusion, upholding the EC's mechanism of Minimum Import Prices, even when this led to the imposition of duties in excess of the margin as established in the original investigation. Panel Report, *EC – Salmon (Norway)*, para. 7.749.

> Finally, in support of its argument that the margin of dumping referred to in Article 9.3 is that established during the period of investigation, Brazil asked what would be the purpose of establishing a margin of dumping in the initial investigation if that margin did not circumscribe the amount of duties that could subsequently be collected. Without intending to provide a comprehensive response to this question, we note that, in accordance with Article 5.8 of the *AD Agreement*, there shall be immediate termination of an investigation if the margin of dumping is *de minimis*. Accordingly, one of the principal reasons for establishing a margin of dumping in the investigation is to ensure compliance with Article 5.8. (Footnote omitted)[206]

It is, to say the least, a bit odd that an authority would be required to go through all the pain of calculating a margin of dumping for each individual exporter simply to pass the *de minimis* threshold of Article 5.8. The Panel when developing its reasoning also conveniently seems to forget that the ceiling of Article 9.3 is actually simply repeating what is already in Article VI.2 of GATT 1994, which does not set forth any *de minimis* requirement. Rather, it seems, that Article 9 which deals with the Imposition and Collection of Anti-Dumping Duties relates to the final phase of the investigation: the decision whether or not to impose an anti-dumping duty, at which level, how to collect it, and how to impose duties on non-sampled exporters and new shippers. Article 9.1 talks about the decision whether the amount of the duties to be imposed shall be the full margin of dumping or less, stating that it would be desirable that the duty be less than the margin of dumping if such lesser duty would be adequate to remove the injury. Article 9.3 follows up on that and provides that the amount of the duty shall not exceed the margin of dumping as established under Article 2, which in this context can only be read as a reference to the margin found during the investigation phase. Article 9.3 thus caps the amount of the duty, and its sub-paragraphs 9.3.1 and 9.3.2 deal with required reimbursements in case of a duty paid in excess of the actual margin of dumping. In other words, exporters should be allowed to get a refund if the actual margin is lower than the margin as calculated on the basis of data from the POI. Nothing in Article 9.3.1 and 9.3.2 allows an authority to increase the duty. At least not in our view. But maybe the answers to the Panel's bizarre reasoning is to be found in this context. The US retrospective system of duty assessment does allow the authority to calculate a new margin of dumping at the end of each year of the order, which may (or may not) be higher than the original margin of dumping, and impose a duty accordingly. And the EC's system of Minimum Import Prices combined with fixed duties may also lead to such results.[207] Perhaps the Panel wanted to make sure that this system

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206 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.363.

207 See Panel Report, *EC – Salmon (Norway)*, para. 7.749 and 7.755.

could be safeguarded and did not see any other way than to axe the obligation in Article 9.3.

As was mentioned earlier, Art. 9.1 AD provides for a hortatory lesser duty rule. This provision reads in relevant part: 'It is *desirable* that the imposition be permissive in the territory of all Members, and that the duty be less than the margin if such lesser duty would be adequate to remove the injury to the domestic industry' (emphasis added). The decision to impose a lesser than the dumping margin duty, depends solely on the investigating authority.[208] Art. 9.1 AD expresses a wish that this be the case but imposes no such obligation. In practice, some national authorities always observe this rule (the European Community is a good example),[209] whereas others (such as the US), do not.

The lesser duty rule implies that a duty will be imposed which sufficiently raises the price to provide the protection the domestic industry needs to stop suffering injury, but without providing additional protection. For example a price increase by 5 per cent may be sufficient to eliminate the price advantage gained by the exporters through dumping. Imposing a duty of 5 per cent rather than a duty based on the margin of dumping of, for example, 20 per cent avoids the anti-dumping duty having more negative effects for consumers than necessary and prevents the domestic producers from benefiting from protectionist rents. It attenuates the trade distorting effect of the anti-dumping measure.

(ii) Special case of a sample: maximum amount of duty for non-sampled exporters or producers

Article 9.4 AD explains the maximum permissible AD duty that an investigating authority can apply to non-sampled exporters or producers when it has sampled in accordance with the second sentence of Art. 6.10 AD:

> When the authorities have limited their examination in accordance with the second sentence of paragraph 10 of Article 6, any anti-dumping duty applied to imports from exporters or producers not included in the examination shall not exceed:
>
> (i) the weighted average margin of dumping established with respect to the selected exporters or producers or,
> (ii) where the liability for payment of anti-dumping duties is calculated on the basis of a prospective normal value, the difference between the weighted

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[208] A number of proposals argue in favour of a mandatory lesser duty rule and provide methodologies for calculating such a lesser duty. See, e.g., TN/RL/GEN/32; TN/RL/GEN/43; TN/RL/GEN/76, TN/RL/GEN/99. The US commented negatively on such proposals, TN/RL/GEN/58.

[209] See Vermulst and Waer (1997).

> average normal value of the selected exporters or producers and the export prices of exporters or producers not individually examined,
>
> provided that the authorities shall disregard for the purpose of this paragraph any zero and *de minimis* margins and margins established under the circumstances referred to in paragraph 8 of Article 6. The authorities shall apply individual duties or normal values to imports from any exporter or producer not included in the examination who has provided the necessary information during the course of the investigation, as provided for in subparagraph 10.2 of Article 6.

Consequently, an investigating authority will calculate individual dumping margins for all exporters that have been sampled, and will apply at maximum the weighted average to all other known exporters.[210] We recall that, under Article 6.10.2 AD Agreement, assuming an individual exporter which has not been included in the investigation submits evidence to this effect, an investigating authority will apply an individually calculated duty, if practicable. Importantly, when calculating the maximum duty for non-sampled producers or exporters, an investigating authority must disregard *de minimis* and zero dumping margins (at which it has arrived through the normal procedure, for example not through recourse to best information available), and cannot base itself on margins established through recourse to the facts available provision of Article 6.8 AD. This way, the Article 9.4 all others rate excludes from the average the lowest margins (zero or *de minimis* margins) as well as the assumingly highest margins (those based on the facts available, the use of which may lead to a result less favourable than if the party had cooperated).

The extent of this latter requirement, to exclude facts available margins, led to disagreements as to the exact scope of the obligation assumed. The AB in its report on *US – Hot-Rolled Steel* faced an argument by the US, as to the extent to which it was permissible for an investigating authority to rely on a margin partly based on information collected through the procedure established in Art. 6.8 AD, when duties are imposed under Art. 9.4 AD. The AB rejected the argument advanced, holding that whenever recourse is being made to Art. 9.4 AD, an investigating authority cannot include in the average the results of a margin based, even in part, on facts available, that is, through recourse to Art. 6.8 AD:

> We have noted that Article 9.4 establishes a prohibition, in calculating the ceiling for the all others rate, on using 'margins established under the circumstances

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[210] The second possibility is reserved for use by authorities applying the *prospective* system for imposing AD duties. As will be shown *infra*, some authorities calculate a provisional dumping and then impose on exporters the difference between the provisionally calculated and the actually observed dumping margin.

> referred to' in Article 6.8. Nothing in the text of Article 9.4 supports the United States' argument that the scope of this prohibition should be narrowed so that it would be limited to excluding only margins established 'entirely' on the basis of facts available. As noted earlier, Article 6.8 applies even in situations where only limited use is made of facts available. To read Article 9.4 in the way the United States does is to overlook the many situations where Article 6.8 allows a margin to be calculated, *in part*, using facts available. Yet the text of Article 9.4 simply refers, in an open-ended fashion, to 'margins established under the circumstances' in Article 6.8. Accordingly, we see no basis for limiting the scope of this prohibition in Article 9.4, by reading into it the word 'entirely' as suggested by the United States. In our view, a margin does not cease to be 'established under the circumstances referred to' in Article 6.8 simply because not every aspect of the calculation involved the use of 'facts available'.[211]

As a result, following this interpretation, an investigating authority must disregard *any* margins based on recourse to best information available. This interpretation is supported by the object and purpose of Article 9.4, the AB argued in *US – Hot-Rolled Steel*:

> Article 9.4 seeks to prevent the exporters, who were *not* asked to cooperate in the investigation, from being prejudiced by gaps or shortcomings in the information supplied by the investigated exporters. This objective would be compromised if the ceiling for the rate applied to 'all others' were, as the United States suggests, calculated – due to the failure of investigated parties to supply certain information – using margins 'established' even in part on the basis of the facts available.[212]

(iii) A single duty for all non-sampled exporters as well as for unknown exporters and new shippers?

It has been argued that a single rate should be applied to all non-sampled respondents.[213] The practice of some Members is different, however, as even in the case of sampling a so-called 'residual duty rate' will be calculated. Before we examine this question, which also relates to the question of which duty to apply to new shippers and unknown exporters, it seems an introduction to the issue is necessary as the AD Agreement has an important lacuna in this respect. It does not adequately define known and unknown exporters. Unfortunately case-law has not managed to get us out of the mess we are currently in.[214]

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211 Appellate Body Report, *US – Hot-Rolled Steel*, para. 122.

212 Appellate Body Report, *US – Hot-Rolled Steel*, para. 123.

213 For example, in the negotiations, see TN/RL/GEN/46.

214 As I will argue later in this section, this is one case where there is need for legislative amendment in order to avoid similar problems in the future.

An investigating authority will have to identify sources of supply and calculate individual dumping margins. If the sources of supply identified represent a big number, an investigation could be hampered in the case where each one of them was to be investigated. Therefore, the authority at hand can investigate only a sample (following the disciplines enshrined in Arts 6.10 and 9.4 AD). Sampling, of course, pre-supposes knowledge of all sources of supply.[215]

It could be, of course, that some exporters originating in the same country (with the exporters being investigated) are not known to the authority. They could be unknown because they managed to hide (let us call this, uncooperative behaviour), or because the authority did not take any reasonable efforts to identify them (for example, they continued to export and were never requested to appear before the authority), or for other reasons as well. With respect to such unknown exporters, that is, exporters who were exporting to the country investigating at the time the investigation takes place, but, for whatever reason, were not identified during the investigation process, the AD Agreement is silent as to whether, and if so, how much, duty they should be paying.

The AD Agreement deals with one category of exporters which could arguably be assimilated to unknown exporters: new exporters or new shippers in the AD jargon. These are exporters originating in the same country (with the exporters under investigation) who, at the time of the investigation, were not exporting to the country investigating. Art. 9.5 AD deals with this situation.[216]

In *Mexico – Antidumping Measures on Rice*, the Mexican investigating authority (*Economía*) imposed duties equalling the amount of the highest individual dumping margin calculated on unknown exporters who were not new shippers. This is the first case to discuss this issue comprehensively.

(a) 'New shippers' in the AD Agreement

The term 'new shippers' refers to exporters or producers of the like product that did not export to the investigating country during the (normally) one-year period that was used as the POI for the dumping determination. As they had not been exporting during that period, such new exporters cannot be accused of dumping. Only one provision in the Agreement, Article 9.5, explicitly deals with this situation. Art. 9.5 AD reads:

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215 At the moment when the investigation takes place. The treatment of new shipments will be discussed infra.

216 In a highly unsatisfactory manner, we should add, since, as a matter of law, we do not know if such exporters will be, for example, paying duties before they request an individual calculation or not. State practice on this score differs as to the amount of duty paid in such cases and has yet to be challenged before the WTO.

> If a product is subject to anti-dumping duties in an importing Member, the authorities shall promptly carry out a review for the purpose of determining individual margins of dumping for any exporters or producers in the exporting country in question who have not exported the product to the importing Member during the period of investigation, provided that these exporters or producers can show that they are not related to any of the exporters or producers in the exporting country who are subject to the anti-dumping duties on the product. Such a review shall be initiated and carried out on an accelerated basis, compared to normal duty assessment and review proceedings in the importing Member. No anti-dumping duties shall be levied on imports from such exporters or producers while the review is being carried out. The authorities may, however, withhold appraisement and/or request guarantees to ensure that, should such a review result in a determination of dumping in respect of such producers or exporters, anti-dumping duties can be levied retroactively to the date of the initiation of the review.

This provision is not a model of clarity[217] and case-law is only starting to complete a very incomplete contract in this respect.[218] There is no dispute that the particular exporter must take the initiative and identify itself, and also show that it has no (business) relation[219] to producers already subjected to AD duties. The reason for this requirement is to avoid the use of 'new' companies to circumvent the duty order in place. An exporter whose products are burdened with a high anti-dumping duty may simply start exporting through a related company to avoid these high anti-dumping duties. This 'new' exporter could then sell at a high export price for a while, and get a 0 per cent margin in an expedited review, such that no duties will have to be paid. This requirement that the exporters need to be able to show that they are not related to exporters subject to the duties attempts to prevent such circumvention.

A final problem relates to the basis for the expedited review to calculate the duty rate of the new exporter. A review has to be carried out promptly provided that the exporters in question can show that they are not related to any of the exporters subject to the duties.[220] That, together with a showing of no exports

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217 Most likely, purposefully so.

218 This seems prima facie rather odd: dumping is a private practice and it could very well be the reason that producers in the same country adopt very different pricing strategies. The AD Agreement, however, presumes that the opposite is true and will allow for individual calculations only if the presumption has been challenged.

219 The AD Agreement is not explicit at all as to what type of business relation should be addressed. Presumably, what is meant is that the new shipment is an independent exporter who does not have to follow the pricing policies of another exporter already subjected to AD duties. But the absence of a definition of the term 'related' poses clear problems and may lead to independent new exporters with some degree of relationship to 'old ' exporters being denied the right to an individual duty calculation.

220 The AD Agreement does not provide whether the procedural obligations of Article 5 and 6 and the substantive obligations of Articles 2 and 3 apply to this type of

during the original period of investigation, is the only condition for obtaining an expedited review and thus an individual margin of dumping. But, as was the case with the original investigation, a review period of investigation will need to be used which is sufficiently long to constitute a proper basis for comparing normal value with export price. The Panel and the Appellate Body in *Mexico – Antidumping Measures on Rice* considered that Article 9.5 'clearly does not subject the right to an expedited new shipper review to a showing of a "representative" volume of export sales',[221] as did the challenged provision of the Mexican law. While this may well be true, it appears that, inevitably, a new exporter will have to wait a while before he can ask for an expedited review so as to allow a certain period of export sales to provide the basis for a determination of information on normal value and export price.[222] This is one reason why allowing the imposition of a high residual duty rate to be applied prior to the request for review is really unfair on the new exporter. We will come back to the question of the duty to be applied prior to review in what follows.

If that much may be relatively clear, from there on it is an uphill interpretative battle. There are at least two *major* interpretative issues that need to be discussed:

(a) the first sentence seems to suggest that new shipments are at least suspected of being dumped. At the same time, Art. 9.5 AD is unclear as to whether such shipments will be burdened with duties anyway, or, conversely, whether this will be the case only after the new shipper investigation has ended. The first sentence suggests that new shipments pay duties, as a duty is imposed on a particular product from a particular country. The third sentence of Art. 9.5 AD, though, states that no duties are levied pending the outcome of the investigation. Should one infer that duties will not be in place unless, if following an individual calculation, a positive dumping margin has been established? If yes, then point (b) below is moot. Conversely, Art. 9.5 AD could be inter-

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review. A proposal has been submitted to address this shortcoming of the Agreement. TN/RL/GEN/44.

[221] Panel Report, *Mexico – Antidumping Measures on Rice*, para. 7.266. Appellate Body Report, *Mexico – Antidumping Measures on Rice*, para. 323.

[222] There exists, for example, a proposal in the negotiations to introduce such a requirement of showing 'bona fides commercial sales to the importing Member (examining such factors as normal commercial quantities, channels and methods of distribution, and the timing, pricing, terms and process of sales)' (TN/RL/GEN/91). For a similar proposal requiring 'commercially representative quantitities', see TN/RL/GEN/98.

preted as follows: new shipments will be burdened with duties.[223] If no request for an expedited review investigation has been submitted, duties will be in place. Assuming a request has been submitted, there will be a truce: duties will not be imposed during the investigation and, pending its outcome, they might be imposed retroactively, that is, as of the date of the initiation of the new shipper review investigation;[224] What to do with the duties that were levied prior to the initiation of the review is unclear; probably they remain collected.

(b) we have no information at all as to the level of duties to be imposed on new shipments prior to the calculation of the individual margin during a review, assuming that the second interpretation is correct. Should it be the weighted average as per Art. 9.4 AD? Or should it be some other rate? At the heart of this discussion is the legal relationship between Art. 9.4 and Art. 9.5 AD, a largely unresolved issue so far: the AD Agreement is unclear on this score, and case-law has not been of much help either.

The story told so far is unfortunately not a monument of clarity. Indeed, the AD Agreement is quite convoluted in this respect. We will try to bring some order to the discussion in what follows.

(b) Individual rates, all other rates and residual rates – trying to make sense of Articles 6.10, 9.4 and 9.5 AD Agreement

The relevant provisions of the Agreement are Article 6.10 (the principle of individual company-specific margin calculations), Article 9.4 dealing with the duty calculation for exporters that were not sampled, and Article 9.5 dealing with the duty to be calculated for new shippers. At the heart of our discussion are two questions. First, precisely whose duties should be calculated? To respond to this question we need to have an agreed understanding of the term 'known exporters' appearing in Art. 6.10 AD. Second, what is the amount of duty to be imposed on unknown exporters? We know from Article 9.5 that a so-called 'residual duty' may be imposed on products entering the country from exporters not identified by the investigating authority and for which no individual duty has been calculated. So unknown as well as new exporters, as

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[223] We do not want to over-complicate matters, but if a duty is applied to imports from the new exporter, it seems that this exporter is not only related to an exporter subject to the anti-dumping duty, he is an exporter subject to the duty and thus, according to the first sentence of Article 9.5, he is not entitled to an expedited review. And now we are stuck.

[224] Practice, especially among major players (like the US and the European Community) sides with this second interpretation.

per Art. 9.5 AD, must pay some duty, but we do not know who should be assimilated to an unknown exporter and what level duty it should be paying.

(1) Who are the known, and who the unknown exporters?

Art. 6.10 AD, we recall, requests determination of individual dumping margins for all *known* exporters. Art. 9.5 AD clearly deals with exporters who have not exported the product burdened with AD duties during the period of investigation. The working hypothesis of Art. 9.4 AD, on the other hand, is that an investigating authority has sampled producers. However, sampling, logically, cannot take place absent knowledge of the identity of all exporters. Hence, the first question to address is what is the duty of an investigating authority in this respect? How far should it go in terms of identifying exporters who could be dumping products on its market?

Recall that the AB on a number of occasions has revealed a preference in favour of an active investigating authority. In *Mexico – Antidumping Measures on Rice*, the AB addressed directly on this issue. In the case at hand, the Mexican investigating authority had limited its investigation to two US exporters identified by the petitioner and two that had *motu proprio* presented themselves to the Mexican authority. The Panel held the view that the Mexican investigating authority violated its obligations by not making a reasonable effort to identify exporters other than the four mentioned above. The AB disagreed with the Panel; it held, following a completely textual interpretation of Art. 6.10 AD (discussed earlier), that the term 'known' exporters appearing in Art. 6.10 AD does not include exporters that the investigating authority should have had knowledge of, but did not know at the time when the investigation was initiated (para. 255). In the case at hand, the Panel felt that one could reasonably expect that it is incumbent upon an active investigating authority to look for some easily-available information.[225] The AB, however, disagreed. As a result, the term 'known exporters' is now limited to exporters that were identified by the applicants or any of the interested parties and exporters who voluntarily identified themselves to the investigating authority. By inference, unknown exporters are not only those covered by Art. 9.5 AD (that is, new shipments: exporters who were not exporting during the investigation) but also those who were exporting during the period of investigation but were not identified (either by the petitioners or voluntarily) so that the investigating authority did not have knowledge of their existence.

[225] US exporters were being identified in a commercial publication that was before the Mexican investigating authority.

(2) The duty to be paid by unknown exporters and new shippers prior to review

As to new shipments, Art. 9.5 AD provides a response: at their request, individual duties will be calculated for all new shipments of producers who are not related to exporters who have already been burdened with a duty. We recall the interpretative problems signalled above, to which case-law has yet to respond: first, is there a duty in place for all exports from a particular country which will be applied to new shipments as well, and from which, precisely, new shipments will request exemption (or reduction)? If so, second, what is the rate of this duty?

With respect to the first question, as we stated earlier, the fact that Article 9.5 provides for the right to request an expedited review in order to calculate an individual duty for such new exporters necessarily implies that products exported by such new shippers may be burdened with a duty, if not, there would not be a need to provide for a right to request a review. So it is permitted to impose a residual duty on new exporters. But what about products supplied by exporters that were exporting during the period of investigation but had not been identified at the time of the investigation and thus remained 'unknown'? The AD Agreement does not expressly deal with this type of exporter at all. It seems that the only existing possibility, assuming a willingness to impose duties, is that such exporters come under the purview of Art. 9.5 AD. There is an inconvenience, however: the wording of Art. 9.5 AD seems to suggest that it covers only cases of exporters who were not exporting the product at hand during the period of investigation. Hence, an extension to cover producers that were exporting such product is arguably *contra legem*. Nevertheless, the general practice is to impose a duty on all subject products from the country investigated. A so-called 'residual' duty will be applied on other non-identified exporters. The reasoning seems to be that Article VI GATT 1994 and the AD Agreement allow a country to impose a duty on a dumped *product*. So the product may be burdened with a duty with the exception of those products exported by exporters for which a margin of dumping below *de minimis* was found to exist. In other words, all products from a particular country are burdened with a duty, except for products from exporters for which no margin of dumping was found during the investigation.

The second important question is then, what should be the rate of this residual duty to be applied to products exported by such unidentified exporters and new shippers (prior to review)? The question raised by the US claim in the *Mexico – Antidumping Measures on Rice* case was whether the Agreement imposes any limits on the amount of this residual duty. In US practice, Art. 9.4 AD is relevant for the interpretation of the obligations embedded in Art. 9.5 AD. US practice suggests that, indeed, the residual rate found in the context of an Art. 9.4 AD determination is to be applied to new shipments as well as other

unknown exporters.[226] The US was putting forward a claim that, consistent with their own practice, Mexico had to impose on new shipments, prior to the expedited review, a maximum AD duty which should not exceed the weighted average of duties imposed. In other words, the residual rate should equal the 'all others' rate calculated in accordance with Article 9.4 for exporters not included in the sample. The Panel was not convinced by this argument, as it considered that Article 9.4 of the AD Agreement provides a specific methodology with regard to the calculation of the duty for those interested parties that did not form part of the sample, but that there exists no requirement to apply that methodology in a case which does not involve sampling.[227] We quote from para. 7.159:

> The US argument that the placement of this provision immediately preceding Article 9.5 of the AD Agreement dealing with new shipper reviews implies that its rules also apply to non-shipping exporters is not convincing, as we do not find that anything can be deduced in and of itself from the sequence of provisions in the Agreement, particularly when the provision in question relates to an exceptional situation, while the subsequent provision does not. The United States also argues that the non-sampled interested parties and the new shippers dealt with by Article 9.5 are in a similar position and that by analogy the same Article 9.4 methodology for the calculation of a residual duty rate should apply. We are not convinced that the text of the Agreement supports this view. In this respect, we find particularly relevant the absence of any cross-referencing in Article 9.5 of the AD Agreement dealing with new shippers to the calculation methodology of Article 9.4 of the AD Agreement. This absence of cross-referencing is particularly conspicuous if one were to accept, *arguendo*, the analogous situation of non-sampled and non-shipping exporters. Indeed, especially in such a situation, one would expect the drafters to have explicitly referred to Article 9.4 of the AD Agreement. As on other occasions, where the drafters intended to see obligations apply in similar circumstances, they explicitly provided for such cross-referencing. We recall in this respect that the AB also found that the absence of such cross-referencing to obligations contained in other provisions is revealing of the absence of such an obligation. We find that Article 9.4 of the AD Agreement does not refer to non-shipping exporters outside a sampling situation, and that there was therefore no obligation for the Mexican authorities to calculate a residual duty margin for Producers Rice based on the 'neutral' methodology set forth in Article 9.4 of the AD Agreement. We therefore reject the US claim in this respect. (Italics in the original)

The above-quoted passage suggests that an investigating authority, when imposing duties on shipments coming from new exporters, does not have to apply a duty equivalent to the weighted average. This does not mean that, if it

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[226] The US authorities thus take the view that Art. 9.4 AD informs Art. 9.5 AD as to maximum amount of duties to be imposed.

[227] Panel Report, *Mexico – Antidumping Measures on Rice*, para. 7.158.

does so, it will be violating the AD Agreement. The question, nevertheless, remains as to what is the maximum permissible duty under the circumstances.[228]

Important in this respect seems to be to remember that the new shipper did not export during the POI and could thus be 'presumed innocent'. It appears however that, in practice, the authorities prefer to err on the side of caution in favour of the domestic industry and presume the worst. The earlier mentioned fear of circumvention of the anti-dumping duties through the use of allegedly 'new' exporters, related to the examined exporters for which a dumping margin was found to exist, is sometimes referred to as a justification for this approach. Nevertheless, and for those exporters that are truly new shippers, there is a high price to pay for this fear of circumvention. The imposition of a so-called residual rate, equal to the highest margin of dumping found to exist, for example, will hit the new shippers as hard as the shipments from the 'greatest' dumpers and the uncooperative exporters. In sum, new shipments will be presumed guilty. This approach may have a serious impact on the likelihood of new exporters entering the market. Indeed, an importer who knows that, when importing from this new exporter, the high anti-dumping duties become due, will probably not even start importing from this new source, even if an expedited review may be requested, the outcome of which is uncertain in any case. If fear of circumvention lies at the basis of this approach, it appears that better ways of dealing with this problem could be found, and the residual rate solution is certainly not optimal given the serious collateral effects on truly new shippers.

Probably, the absence of an explicit link between Art. 9.4 and 9.5 AD notwithstanding, it makes good sense to assume such a link. In this case (which is consonant with US practice), Art. 9.4 AD establishes the maximum rate to be paid on new shipments as well. New shipments could thus be burdened with a duty, but not above the overall average, such that it may not deter new exports to a particular market. Hence the provision for an expedited review, the function of which will be to establish a rate which corresponds to the pricing policy of the new exporter, and, eventually, no duties at all.

While US practice is thus to apply the 'all others' rate of Article 9.4 to all not individually examined exporters (whether non-sampled, unknown or simply not exporting during the period of investigation), EC-practice[229] suggests a third, residual, rate which applies to imports from unknown or new exporters: exporters that are not new shippers and kept quiet during the investigation, or

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228 The Panel, in its report on *Mexico – Antidumping Measures on Rice*, did not have to address this issue.

229 See the very comprehensive analysis in Vermulst and Waer (1997).

exporters that remained unknown during the investigation, the reasonable efforts of the EC authority to identify them notwithstanding, will see their exports burdened, not with the weighted average, but with a residual rate. Assuming that the EC authority has sampled three exporters who ship equal volumes to the EC market, and that they are found to be dumping by 10 per cent, 20 per cent and 30 per cent respectively, the EC authority will impose the duties mentioned above to the three investigated exporters; a 20 per cent (weighted average) duty on all identified exporters; and a 30 per cent (residual) rate on non identified exporters as well as on new shipments. The consistency of such practice with the multilateral rules has not been established as yet.[230]

However, in *Mexico – Antidumping Measures on Rice*, the Appellate Body did state that an authority is not permitted to impose a residual duty rate based on facts available. According to the AB, an authority which imposes a duty on unidentified exporters based on facts available, including facts from the petition, is acting in violation of Article 6.8 and paragraph 1 of Annex II. We quote from paras 259–60:

> The second sentence of paragraph 1 of Annex II conditions the use of facts from the petitioner's application on making the interested party 'aware' that, if the information is not supplied by it within a reasonable time, the investigating authority will be free to resort to these facts available. In other words, an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. An exporter that is unknown to the investigating authority – and, therefore, is not notified of the information required to be submitted to the investigating authority – is denied such an opportunity. Accordingly, an investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the Anti-Dumping Agreement and, therefore, with Article 6.8 of that Agreement.
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> The United States exporters that *Economía* did not investigate were not notified of the information it required. Notwithstanding this, *Economía* used facts available contained in the application submitted by the petitioner against these uninvestigated exporters.

According to the AB, putting exporters on notice that facts available will be used is a precondition for the use of facts available which for obvious reasons can never be met in the case of unidentified exporters. You cannot notify the

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230 But a proposal has been made to clarify that Article 9.4 only allows one single 'all other' rate for all non-sampled exporters and not one for non-sampled but known exporters and another one, a residual rate, for other non-sampled but unknown exporters. TN/RL/GEN/46.

person you have not identified. The AB addressed a situation in which the residual rate was based on petitioner data, and thus particularly adverse when compared to the margins of dumping calculated for the examined exporters. But the need to inform exporters of the fact that, in the absence of cooperation, facts available will be used, applies in all cases, and not only when the data used are provided by the petitioner. To a certain extent, any margin based on information other than data provided by the exporter itself is based on 'facts available'. Logically speaking, the AB's statement could thus be read to imply that no residual duty can be imposed on such unknown exporters. A rate based on the highest margin of an exporter individually calculated, as is the EC's practice, is also a facts available rate for the non-investigated exporter. If all the Appellate Body wanted to say was that facts available which are *adverse* may not be used to calculate a duty for unknown exporters, there remains a serious problem: when is the use of facts available 'adverse'? Is a residual duty based on the highest margin found for an investigated exporter less adverse than the use of information contained in the petition?

To conclude on this score, there is undeniably a problem with the lack of precision of the AD Agreement: beyond known exporters and new shipments, there is a third category of unknown exporters who were exporting during the period of investigation but have not been identified. The AD Agreement says nothing about them. Case-law did not manage to come up with a reasonable construction of the AD Agreement either. All we know so far is that the category of unknown exporters extends beyond new shipments (in the Art. 9.5 AD sense of the term). We lack information as to the duties to be applied to this category, as well as to the new exporters prior to their expedited review. Moreover, had the *Mexico – Antidumping Measures on Rice* been upheld by the AB on the issue regarding the duty to identify exporters, this category would probably be insignificant. Unfortunately, it was not the case. The AD Agreement, as it stands, does not specifically deal with the case of exporters who can, say, in bad faith, 'hide' during the investigation process.[231]

(e) Prospective and retrospective imposition of duties

In practice many WTO Members apply a *prospective* assessment of duties: once the dumping margin has been calculated (and assuming that it has been established that dumping has caused injury), all dumped imports in the market will be burdened with the applicable AD duty. Affected parties shall be promptly refunded for any duty paid in excess of the actual margin of dump-

[231] Although such behaviour is possible, the possibility for its occurrence should not be exaggerated either. Well-functioning bureaucracies (customs duties authorities) can identify the sources of supply of various goods.

ing. In other words, if it can be shown that the products were sold at prices such that the margin of dumping following imposition was less than the margin of dumping on which the original duty was calculated, the importer is entitled to a refund of the difference. For the future, however, the original duty will remain in place.

In the so-called retrospective system of the US,[232] on the other hand, once an AD order has been imposed on a product, the importer will have to pay a provisional duty[233] based on the rate calculated during the investigation. The products that enter the US market during the first year that the AD order is in place have not been *liquidated* until a final duty will have been paid. This final duty will be calculated on the basis of the export price of the product during the year following the imposition of the AD order. In the course of a duty assessment review or a (in US parlance) administrative review,[234] the US authority will compare the export prices of the goods over that year, and re-calculate the dumping margin that it will be applying on a definitive basis for all imports to its market (*retrospective* assessment). The definitive duty may be higher than the provisional duty, in case the dumping margin during the first year exceeds that found during the initial investigation, or lower (in the opposite case). Consequently, this may lead to either an additional bill for the importer, or to reimbursement. Only upon payment of the definitive duty will goods be considered to have been *liquidated*. It is this newly calculated rate which will then form the basis for the provisional duties to be paid the following year, and the process described above will start all over again.[235]

In both cases, a refund is mandated where an importer has paid duties in excess of the margin of dumping and the importer requests a refund. As the Appellate Body clearly stated in *Mexico – Anti-Dumping Measures on Rice*,

> The refund of duties is conditioned solely on (i) the request being made by an importer of the product subject to the anti-dumping duty; and (ii) the request having been 'duly supported by evidence'. Other than these requirements, we see no basis for an investigating authority to decline to affect the mandated refund. Indeed, failure to do so would result in the importer having paid a duty in excess of the dumping margin, contrary to Article 9.3.[236]

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232 See for the Appellate Body's description of this system, Appellate Body Report, *US – Zeroing (EC)*, para. 109.

233 Not to be confused with provisional duties under Art. 7 AD.

234 Not to be confused with administrative reviews or changed circumstances reviews under Art. 11 AD, see *infra*.

235 The fear for eventual higher definitive duties thus imposes a pricing discipline on exporters to the US market. [Is this not preventing them from dumping in the sense of the Byrd Amendment Panel and AB reports?]

236 Appellate Body, *Mexico – Antidumping Measures on Rice*, para. 312.

In a nutshell, the difference between the US duty assessment and a prospective assessment[237] of duties is as follows: (a) in the prospective system, the importer pays a duty, whereas in the US system the *provisional* duty may take the form of a cash deposit or guarantee; (b) in the US system, the administration itself will automatically review the duties in light of prices observed the preceding year, whereas in the *prospective* system the interested parties have to submit a request for reimbursement (in case duties imposed do not correspond to margins anymore).[238] Prospective imposition, however, should be distinguished from retroactive imposition of AD duties, a point to which we turn in what immediately follows.

(f) No retroactive AD duties

Irrespective of the system followed (prospective, retrospective), AD duties cannot be imposed retroactively except under the very limited conditions provided for in Art. 10 AD. Hence, AD duties have, in principle an *ex nunc* effect.[239]

The principle that AD duties cannot be imposed retroactively has two exceptions:

(a) *per* Art. 10.2 AD, duties can be imposed retroactively up to the moment when provisional measures had been imposed, if, following a finding of injury, provisional duties had been imposed; or, following a finding of threat of injury *and* a demonstration that, in the absence of provisional measures, injury would have materialized, provisional measures had been imposed;[240]

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[237] Which, in practice, is followed by the overwhelming majority of WTO Members.

[238] A proposal has been made to do away with this request requirement making it mandatory for the authorities to refund any excessive duties collected. Linked to this is the proposed amendment of Article 9.3 introducing a requirement to establish, upon request, the margin of dumping based upon normal values contemporaneous with the export transactions. TN/RL/GEN/131.

[239] Article 10.1 AD Agreement.

[240] The retroactive application is actually only a partial retroactivity: if the definitive anti-dumping duty is higher than the provisional duty paid, the difference shall not be collected, but if the definitive duty is lower, the difference shall be reimbursed (Article 10.3 AD Agreement). In the case of a determination of threat of injury without the additional demonstration of the preventive effect of the measure, the provisional duties paid shall be refunded and any bonds released in an expeditious manner (Article 10.4 AD Agreement). It goes without saying that, where a negative final determination was made, any cash deposits made during the period of provisional measures shall be refunded, and any bonds released (Article 10.5 AD Agreement).

(b) *per* Art. 10.6 AD, duties can be imposed retroactively until 90 days prior to the imposition of provisional measures, but in no case prior to the initiation of investigation,[241] if there is a history of dumping and injury, *or* if the importer was aware of dumping practices, *and, in either case*, the injury was caused by massive dumped imports in a short period which, because of *inter alia* timing and volume of the dumped imports, are likely to seriously undermine remedial effects that AD duties might have.[242]

In order to be able to collect duties retroactively to the period preceding the application of provisional measures, the Agreement provides in Article 10.7 that the authorities may, after initiation, take such measures as the withholding of appraisement or assessment as may be necessary for that purpose. The one condition is that the authorities must have sufficient evidence that the conditions for such extended retroactive application are satisfied. The Panel in *US – Hot-Rolled Steel* tried to square the requirements of Article 10.7 with the role it is to play in an investigation. According to the Panel in *US – Hot-Rolled Steel*, 'Article 10.7 measures serve the same purpose as an order at the beginning of a lawsuit to preserve the *status quo* – they ensure that at the end of the process, effective measures can be put in place should the circumstances warrant'.[243] According to the Panel, this implied that one should not be too demanding as far as evidence goes, and should also allow for such preliminary critical circumstances measures to be taken in case of an investigation initiated on the basis of a threat of material injury only. Whether one could have a retroactive duty applied in the case of a threat seems highly unlikely given the general structure of Article 10 as set forth above, but that, according to the Panel, was a question it did not need to address. The most interesting consideration of the Panel related to the 'massive dumped imports' requirement. As we noted earlier, this requirement is linked to the problem the retroactive measures are intended to address, that is, to avoid the remedial effect of the duty being undermined by massive dumped imports in a short period of time. A retroactive application of the duty up to the moment of initiation can only serve that purpose if the massive dumped imports take place between initiation and the application of provisional measures. The dumper uses this window to dump his product on the market quickly before leaving this market. The relevant period of time is thus, it seems, the period following initiation,

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241 As per Article 7.3 provisional measures may be applied as of 60 days following initiation.

242 The rationale for this provision is to address cases where exporters quickly dump their exports after the initiation of an investigation and stop exporting thereafter.

243 Panel Report, *US – Hot-Rolled Steel*, para. 7.163.

but prior to a preliminary determination. The Panel disagreed, and considered that, at least in so far as the possibility of taking conservatory measures under Article 10.7 was concerned, an authority is entitled to take into account an earlier 'short period of time'. *In casu*, the Panel agreed with the approach of the United States authority which compared a period of some months prior to the reference data of April 1998 with data for the period following these reference data, which the applicants alleged was the time that, because of press reports to this effect, it became public knowledge that an investigation was imminent:[244]

> Article 10.7 allows for certain necessary measures to be taken *at any time after initiation of the investigation*. In order to be able to make any determination concerning whether there are massive dumped imports, a comparison of data is obviously necessary. However, if a Member were required to wait until information concerning the volume of imports for some period after initiation were available, this right to act at any time after initiation would be vitiated. By the time the necessary information on import volumes for even a brief period after initiation were available, as a practical matter, the possibility to impose final duties retroactively to initiation would be lost, as there would be no Article 10.7 measures in place. Moreover, as with the situation if a Member were required to wait the minimum 60 days and make a preliminary determination under Article 7 before applying measures under Article 10.7, the possibility of retroactively collecting duties under Article 10.6 at the final stage would have been lost.
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> Moreover, in our view, it is not unreasonable to conclude that the remedial effect of the definitive duty could be undermined by massive imports that entered the country before the initiation of the investigation but at a time at which it had become clear that an investigation was imminent. We consider that massive imports that were not made *in tempore non suspectu* but at a moment in time where it had become public knowledge that an investigation was imminent may be taken into consideration in assessing whether Article 10.7 measures may be imposed. Again, we emphasize that we are not addressing the question whether this would be adequate for purposes of the final determination to apply duties retroactively under Article 10.6.[245]

While the Panel appeared to limit its statements to the question of conservatory measures under Article 10.7, it did at the same time seem to suggest that the massive dumped imports of Article 10.6 could be assessed on the basis of a period of time prior to initiation, if such imports were not made *in tempore non suspectu*.[246] In any case, the requirements for an actual retroactive application

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244 In fact an investigation was only initiated on 15 October 1998, almost six months later.

245 Panel Report, *US – Hot-Rolled Steel*, paras 7.166–7.167.

246 It is noteworthy that, in the *US – Hot-Rolled Steel* investigation in question, the US, in its ultimate determination whether to apply the duties retroactively up to

of definitive duties up to the moment of initiation remain unclear. It needs to be added that such retroactive application to initiation is highly exceptional in practice.

(g) Provisional duties

WTO Members can, when the conditions of Art. 7 AD have been met, impose provisional measures. There are some pre-conditions, though, that WTO Members have to respect for a lawful imposition of provisional AD duties:

(a) no provisional duties can be imposed sooner than 60 days from the date of initiation of the investigation (Art. 7.3 AD);
(b) parties must have had an opportunity to present their views during the course of the investigation so far (Art. 7.1(i) AD);
(c) an affirmative preliminary determination of dumping and consequent injury to the industry has been made (Art. 7.1(ii)AD),
(d) preliminary duties are judged necessary to prevent injury caused during the investigation (Art. 7(iii)AD);

The duties imposed should be preferably in the form of security (cash deposit or bond), although additional customs duties remain a possibility (Art. 7.2 AD). The level of such duties shall not be higher than the provisionally estimated margin of dumping. Art. 7.4 AD regulates the *period* for provisional duties in the following manner and limits its application, to, in principle, four months:[247]

> The application of provisional measures shall be limited to as short a period as possible, not exceeding four months or, on decision of the authorities concerned, upon request by exporters representing a significant percentage of the trade involved, to a period not exceeding six months. When authorities, in the course of an investigation, examine whether a duty lower than the margin of dumping would be sufficient to remove injury, these periods may be six and nine months, respectively.

A duty becomes a 'definitive' duty at the time of the investigating authority's final determination.[248] A product is subject to a duty as soon as the investiga-

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initiation, did compare a period prior to initiation with a period of time immediately following initiation to assess whether there were massive dumped imports in a short period of time. See Panel Report, *US – Hot-Rolled Steel*, footnote 114.

[247] Not surprisingly, in its report on *Mexico – Corn Syrup*, the Panel found that the application of provisional measures by Mexico for more than six months was inconsistent with Article 7.4. Panel Report, *Mexico – Corn Syrup*, para. 7.183.

[248] Appellate Body Report, *Mexico – Antidumping Measures on Rice*, para. 345. As the Appellate Body noted, 'the [AD and SCM] Agreements use the term 'definitive' to distinguish duties imposed after a *final* determination (following an investigation)

tion has been concluded and a final determination has been made deciding to impose anti-dumping or countervailing duties.[249]

It is important to note that the Agreement does not require authorities to make preliminary determinations. Put simply, if no preliminary determination is made, no provisional duties may be imposed. A number of Members have proposed to amend the Agreement to introduce an obligation to make a preliminary determination, the idea being that this would enhance transparency and predictability in anti-dumping proceedings.[250] In other words, a preliminary determination may work as an early warning system and assist interested parties in focusing their arguments and better defending their interests in the course of the investigation.

4 Duration and Review of AD Duties

(a) The necessity principle

Art. 11.1 AD states that 'An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury.' The AD Agreement provides two institutional avenues for the termination of AD duties:

(a) *automatically after 5 years* – all AD duties will have to be terminated five years after their original imposition unless an investigating authority demonstrates that their imposition is likely to lead to continuation or recurrence of both dumping and injury (this is the so-called *sunset clause* reflected in Art. 11.3 AD);
(b) *during the five years*, an investigating authority might have recourse to an administrative or so-called *changed circumstances review* either on its own initiative or upon request by an interested party (Art. 11.2 AD).

(b) Sunset clause

(i) The function of sunset clauses: duties for five years (in principle)

Art. 11.3 AD reads:

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from 'provisional' duties that may be imposed under certain conditions during the course of an investigation, namely, after a *preliminary* determination'. Appellate Body Report, *Mexico – Antidumping Measures on Rice*, para. 346.

249 Appellate Body Report, *Mexico – Antidumping Measures on Rice*, para. 347.

250 See TN/RL/GEN/102, TN/RL/GEN/108 and TN/RL/GEN/133.

> any definitive anti-dumping duty shall be terminated on a date not later than five years from its imposition (or from the date of the most recent review under paragraph 2 if that review has covered both dumping and injury, or under this paragraph), unless the authorities determine, in a review initiated before that date on their own initiative or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time prior to that date, that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury. The duty may remain in force pending the outcome of such a review.

The five-year period counts (a) *either* from the date of the original imposition; *or* (b) from the date of the most recent administrative/changed circumstances review under Art. 11.2 AD, *if* the review at hand covered both dumping and injury; *or* (c) from the date of the most recent sunset review. Hence, AD duties can, in principle, remain in place for a period longer than five years. How much longer depends on the outcome of successive sunset reviews. Since duties can stay in place after the five-year period only following a review, it is inferred that, absent such a review, any AD duties imposed will have to be eliminated. In the words of the Appellate Body in *US – Carbon Steel* dealing with the sunset provision in the SCM Agreement (which is identical to that of the AD Agreement, *mutatis mutandis*): 'An automatic time-bound termination of countervailing duties that have been in place for five years from the original investigation or a subsequent comprehensive review is at the heart of this provision. Termination of a countervailing duty is the rule and its continuation is the exception.'[251]

(ii) Two types of sunset reviews: self-initiated, and upon request

A sunset review may be initiated either *ex officio* or upon a duly substantiated request. When the latter occurs, the request must be deposited within a reasonable period of time prior to the expiry of the five-year period. The last sentence of Art. 11.3 AD clarifies that duties will remain in place during the review process. On the other hand, the AD Agreement does not impose an obligation to *start ex officio* sunset reviews on a specific date. As a result, WTO Members

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[251] Appellate Body Report, *US – Carbon Steel*, para. 88. Because the experience over the last 10 years with sunset reviews has been that the extension of the AD measure is the rule rather than the exception, it has been argued in the course of the negotiations to simply require that a duty be terminated after 5 years without possibility of extension. TN/RL/GEN/74. A less radical proposal seeks to introduce further disciplines in the conduct and substance of such sunset reviews to take care of some of the problematic outcomes of the case-law which will be discussed below. TN/RL/GEN/61. For another compromise proposal based on the principle of automatic termination at a defined point in time (but not necessarily five years), see TN/RL/GEN/104.

retain some discretion on this score. Since the imposed duties will remain in place while the review is going ahead, there is a risk that WTO Members might keep duties in place by starting a review at as late a stage as possible. This risk is somewhat addressed through the discipline enshrined in Art. 11.4 AD which requests that a review should normally be completed within 12 months.[252]

The US laws provide for an *automatic* initiation of sunset reviews. In other words, it is never the case that duties will lapse absent sunset review in the United States, since a review will *always* be initiated.[253] The AB, in its report on *US – Carbon Steel*, faced a complaint regarding review of countervailing duties. It described the US law in the following manner (para. 101):

> Section 751(c)(2) of the Tariff Act directs USDOC to publish a notice of initiation of a sunset review no later than 30 days before, *inter alia*, the fifth anniversary of the date of publication of a countervailing duty order. Section 351.218(b) of Title 19 of the Regulations confirms that USDOC will conduct a sunset review of *each* countervailing duty order. Both the Sunset Policy Bulletin and the SAA describe the initiation of sunset reviews by USDOC as 'automatic'. (Emphasis in the original)

The AB held the view that this law was not inconsistent with the requirements of the SCM Agreement (para. 118).[254] Confirmation that this interpretation is good law in the anti-dumping context as well, came with the Panel Report on *US – Corrosion-Resistant Steel Sunset Review (DS244)*. Facing the same issue, the Panel held for the proposition that automatic self-initiation procedures in the context of a sunset review are not inconsistent with the AD Agreement, because they do not necessarily result in continuation of the duties in place:

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[252] The term *normally* suggests that a certain degree of flexibility is very much on the cards.

[253] The relevant US laws are applicable to reviews of both countervailing and anti-dumping duties.

[254] Although this case-law concerns the interpretation of sunset provisions in the context of SCM, it is relevant for the purposes of reviews in the AD Agreement context as well, in light of the identical language and objective function pursued by the sunset reviews in the two Agreements. The AB came to the following legal conclusion:

> In sum, our review of the context of Article 21.3 of the *SCM Agreement* reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary standards set forth in Article 11 of the *SCM Agreement* relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.

Appellate Body Report, *US – Carbon Steel*, para. 116.

> On the basis of this textual analysis of the relevant provisions of the *Anti-dumping Agreement* cited by Japan, we do not agree with the view that the drafters intended to apply the evidentiary standards of Article 5.6 to the self-initiation of sunset reviews under Article 11.3. However, as the Appellate Body pointed out in *US – Carbon Steel*, this does not mean that the authorities are not bound by any evidentiary standard in deciding whether to continue the application of the measure for another five years in a sunset review. Our finding applies exclusively to the *initiation* of the sunset review on an *ex officio* basis and has no bearing on the evidentiary basis of the subsequent sunset review determinations. We therefore do not agree with Japan's argument that automatic self-initiation necessarily results in the continued application of the measure for another five years. Once the review is initiated, in order to properly decide to keep the measure in place the authorities are required to establish, on the basis of positive evidence, that there is a likelihood of continuation or recurrence of dumping and injury.[255] (Emphasis in the original)

(iii) The standard of review of investigating authorities: the need for a sufficient factual basis

Investigating authorities will have to demonstrate that revocation of anti-dumping duties would be likely to lead to continuation *or* recurrence of dumping and injury. Art. 11.3 AD makes it clear that the investigating authority will have to remove the duties 'unless the authorities determine . . . that the expiry of the duty would be *likely* to lead to continuation or recurrence of dumping *and* injury' (emphasis added).

The terms *continuation* and *recurrence* refer to two different factual situations: the first term presupposes that dumping and/or injury have not ceased to exist during the period of imposition of AD duties; the latter presupposes that the opposite has happened during the same period. The term *likely* has been interpreted already by the AB to mean *probable* (*US – Corrosion-Resistant Steel Sunset Review*, at para. 111): 'In view of the use of the word "likely" in Article 11.3, an affirmative likelihood determination may be made only if the evidence demonstrates that dumping would be probable if the duty were terminated – and not simply if the evidence suggests that such a result might be possible or plausible.'[256] The methodology used to demonstrate the likelihood of continuation or recurrence is not prejudged by the AD Agreement: Art. 11.3

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[255] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.45. The Panel declined to rule on a related argument made by Japan that such a required automatic sunset review takes away the discretionary authority to initiate a sunset review that is implied by the terms 'on its own initiative' as this claim was not, according to the Panel, properly before it. Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.46–7.54.

[256] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 111.

AD thus, imposes in this regard an obligation of *result*, rather than of *specific conduct*.

The Panel, in its report on *US – Corrosion-Resistant Steel Sunset Review*, dealt with the consistency of a US statute which expressed the *likely* standard in its negative formulation. It concluded on its consistency with Art. 11.3 AD and we quote from paras 7.227 and 7.228, and the Appellate Body did not disturb this finding:

> The phrase 'not likely' rather than 'likely' thus appears in the text of the Regulations. The crux of the disagreement between the parties is whether the language 'not likely' in the Regulations sets forth the standard under US law regarding the likelihood determinations in sunset reviews. We thus analyze the provisions of the Regulations in their legal context and in conjunction with the Statute.
>
> Under US law (as is probably the case in most other jurisdictions as well), a regulation is subordinate to a statute. In addition to that general observation, we note that the above text of the Regulations further confirms, by its own terms, that the Regulations are subservient to the Statute, by referring to the Statute's relevant provisions. Therefore, the Regulations set forth the procedural means of implementing the 'likely' standard provided for in the Statute regarding sunset determinations. In the context of its sunset review determinations, the DOC may come up with two possible conclusions: it may find that the continuation or recurrence of dumping is either likely or not likely. In each case, there are procedural steps to be taken by the DOC in order to proceed with and implement the sunset review determination. The text of the quotation above from the Regulations indicates what happens when the US administering authorities make a negative determination with respect to whether there is a likelihood of continuation or recurrence of dumping in a sunset review.[257]

The AB, in its report on *US – Oil Country Tubular Goods Sunset Reviews* addressed, *inter alia*, an argument by the complainant (Argentina) to the effect that an investigating authority is obliged, by virtue of Art. 11.3 AD, to establish a precise *time-frame within which* continuation or recurrence of dumping and injury would *likely occur*. In Argentina's view, Art. 11.3 AD imposes thus a temporal limitation which, the complainant added, must be imminent (para. 358).[258] The AB rejected Argentina's argument, and upheld the Panel's view in this respect. In its view, an assessment whether injury is likely to recur that focuses too far in the future would be highly speculative (para. 360):

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[257] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 7.227–7.228.

[258] The Panel in a case concerning the same products but with Mexico as the complainant, *US – Anti-Dumping Measures on Oil Country Tubular Goods* – also rejected a similar argument of Mexico that consisted of incorporating into Article 11.3 the same 'imminent' standard from Article 3.7 and 3.8 AD Agreement relating to a determination of threat of injury. See Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.106–7.107.

> We agree with the Panel that an assessment regarding whether injury is likely to recur that focuses 'too far in the future would be highly speculative', and that it might be very difficult to justify such an assessment. However, like the Panel, we have no reason to believe that the standard of a 'reasonably foreseeable time' set out in the United States statute is inconsistent with the requirements of Article 11.3. (Footnote omitted)[259]

However, this does not mean that Art. 11.3 AD imposes an obligation on investigating authorities to provide a precise time-frame during which the likelihood (of recurrence or continuation) should occur. According to the Appellate Body, what is important is that the determination of likelihood of continuation or recurrence of injury rest on a sufficient factual basis to allow the investigating authority to draw reasoned and adequate conclusions. A determination of injury can be properly reasoned and rest on a sufficient factual basis even though the time-frame for the injury determination is not explicitly mentioned.[260] As a result, it found that the US law, by not setting a precise time-frame in this respect, was not inconsistent with the AD Agreement.

In the same report, while agreeing with Argentina that the investigating authority's likelihood determinations under Article 11.3 must be based on 'positive evidence',[261] the AB made it clear that, since a review is by definition a forward-looking exercise, some speculation about future events cannot be avoided; in other words, the requirement to show *likelihood* on positive evidence should not be understood as a requirement to completely eliminate uncertainty about the course of future events:

> The requirements of 'positive evidence' must, however, be seen in the context that the determinations to be made under Article 11.3 are prospective in nature and that they involve a 'forward-looking analysis'.[262] Such an analysis may inevitably entail assumptions about or projections into the future. Unavoidably, therefore, the inferences drawn from the evidence in the record will be, to a certain extent, speculative. In our view, that some of the inferences drawn from the evidence on record are projections into the future does not necessarily suggest that such inferences are not based on 'positive evidence'. The Panel considered that the five factors addressed

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[259] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 360. Also see Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.111.

[260] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 364. Also see Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 166.

[261] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 340.

[262] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 105.

> by the USITC were supported by positive evidence in the USITC's record and, as we have explained, we see no reason to disagree with the Panel.[263]

The likelihood of continuation or recurrence of dumping and/or injury must be determined by an investigating authority. The term *determine*, appearing in the body of Art. 11.3 AD, has been interpreted in case-law as dictating a standard that obliges authorities to reach their conclusions on *positive evidence*, and to *motivate* them as well. Citing prior case-law to this effect, the AB, in its report on *US – Oil Country Tubular Goods Sunset Reviews*, provided its understanding of the obligation imposed on investigating authorities in this respect (paras 179–80):

> In *US – Corrosion-Resistant Steel Sunset Review*, the Appellate Body emphasized the importance of the terms 'determine' and 'review' in Article 11.3, stating:
>
> > The words 'review' and 'determine' in Article 11.3 suggest that authorities conducting a sunset review must act with an appropriate degree of diligence and arrive at a *reasoned conclusion* on the basis of information gathered as part of a process of *reconsideration and examination*. (Emphasis added)
>
> The Appellate Body also endorsed that panel's description of the obligation contained in Article 11.3, which description the Appellate Body found 'closely resemble[d]' its own understanding:
>
> > The requirement to make a 'determination' concerning likelihood therefore precludes an investigating authority from simply assuming that likelihood exists. In order to continue the imposition of the measure after the expiry of the five-year application period, it is clear that the investigating authority has to determine, on the basis of *positive evidence*, that termination of the duty is likely to lead to continuation or recurrence of dumping and injury. An investigating authority must have a *sufficient factual basis* to allow it to draw *reasoned and adequate conclusions* concerning the likelihood of such continuation or recurrence. (Emphasis added; original footnotes omitted)
>
> The plain meaning of the terms 'review' and 'determine' in Article 11.3, therefore, compels an investigating authority in a sunset review to undertake an examination, on the basis of positive evidence, of the likelihood of continuation or recurrence of dumping and injury. In drawing conclusions from that examination, the investigating authority must arrive at a reasoned determination resting on a sufficient factual basis; it may not rely on assumptions or conjecture.[264]

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[263] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 341.

[264] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras 179–80.

In sum, what is required is 'a sufficient factual basis to allow an authority to draw reasoned and adequate conclusions concerning the likelihood of recurrence or continuation of dumping and injury'. This finding was strengthened even more in a separate finding concerning the consistency of presumptions (a part of US laws governing reviews of duties) with the AD Agreement. The US law on sunset reviews contained what is termed two types of *waivers*: on the one hand, waivers applicable in situations where an interested party (exporter) has provided *incomplete* information to questions asked by the investigating authority during the review process (in US parlance, *deemed* waiver); on the other, waivers applicable in situations where the exporter has declared that it will not participate in the proceedings (*affirmative* waiver). In case an interested party waives its right to participate in the review process (either through affirmative or deemed waiver), the US investigating authority will presume likelihood of continuation or recurrence of dumping, without having to investigate to what extent this was actually the case. In short, the two waivers remove the burden from the investigating authority to demonstrate likelihood of continuation or recurrence of dumping by introducing presumptions to this effect through the so-called 'deemed' and 'affirmative' waivers. The Panel found both types of waivers to be WTO-inconsistent.[265]

On appeal, the US argued that the Panel erred since it did not sufficiently take into account the process followed by the US authorities: waivers are used when a company-specific review is being conducted; company-specific reviews, however, are only the first leg of the sunset review. Subsequent to this exercise, the US investigating authority will move on to examine the likelihood of recurrence or continuation of dumping on an order-wide basis. The AB rejected the US argument and confirmed the Panel's findings in this respect, since, even though reviews are order-wide, the input to the final determination is flawed by virtue of the fact that a determination is based on waivers, that is, not on positive evidence. We quote from the Appellate Body's finding:

> In this case, the Panel began its analysis of Argentina's claim by focusing on the *company-specific* likelihood determinations. The Panel found that these affirmative *company-specific* determinations are mandated by the waiver provisions without any further inquiry on the part of the USDOC and without regard to the record evidence – whether that evidence is submitted by the respondent or by another interested party. The Panel then concluded, on this basis, that the waiver provisions are inconsistent, as such, with Article 11.3. In our view, it was neither necessary nor relevant for the Panel to draw a conclusion as to the WTO-consistency of the *company-specific* determinations resulting from the waiver provisions. As we have observed, the relevant inquiry in this dispute is whether the *order-wide* likelihood determination would be

[265] See Panel Report, on *US – Oil Country Tubular Goods Sunset Reviews*, paras 7.91–7.99.

rendered inconsistent with Article 11.3 by virtue of the operation of the waiver provisions. It appears to us, therefore, that the Panel could not have properly arrived at a finding of consistency or inconsistency with Article 11.3 *until* it had examined how the operation of the waiver provisions could affect the order-wide determination. Had the Panel ceased its inquiry with the finding that the company-specific determinations are not 'supported by reasoned and adequate conclusions based on the facts before an investigating authority', the Panel would not have had a basis to conclude that the waiver provisions are inconsistent, as such, with Article 11.3.

The Panel, however, did not base its ultimate conclusion of inconsistency with Article 11.3 on its assessment of only the *company-specific* determinations made pursuant to the waiver provisions. Instead, the Panel correctly continued its analysis and examined the impact of the company-specific determinations on the *order-wide* determination. The Panel observed that, in the case where the respondent that waives its right to participate is the sole exporter from a country subject to a dumping order, the company-specific determination 'is likely to be conclusive' with respect to the order-wide determination. The Panel also noted that '[t]he United States concedes that company-specific likelihood determinations are "considered" when making an order-wide likelihood determination'. As support for this statement, the Panel quoted the United States' response to one of the Panel's questions. In addition, the Panel recalled that, in response to questioning from the Panel, the United States was unable to cite one example of a sunset review in which the USDOC had arrived at a negative *order-wide* determination after making affirmative *company-specific* determinations with respect to respondents that had waived the right to participate. The Panel concluded that, '[t]o the extent that' the company-specific determinations were taken into account in the order-wide determination, the order-wide determination could not 'be supported by reasoned and adequate conclusions based on the facts before the investigating authority'.

We agree with the Panel's analysis of the impact of the waiver provisions on order-wide determinations. Because the waiver provisions require the USDOC to arrive at affirmative company-specific determinations without regard to any evidence on record, these determinations are merely *assumptions* made by the agency, rather than findings supported by evidence. The United States contends that respondents waiving the right to participate in a sunset review do so 'intentionally', with full knowledge that, as a result of their failure to submit evidence, the evidence placed on the record by the domestic industry is likely to result in an unfavourable determination on an order-wide basis. In these circumstances, we see no fault in making an unfavourable order-wide determination by taking into account evidence provided by the domestic industry in support thereof. However, the USDOC also takes into account, in such circumstances, statutorily-mandated *assumptions*. Thus, even assuming that the USDOC takes into account the totality of record evidence in making its order-wide determination, it is clear that, as a result of the operation of the waiver provisions, certain *order-wide* likelihood determinations made by the USDOC will be based, at least in part, on statutorily-mandated *assumptions* about a company's likelihood of dumping. In our view, this result is inconsistent with the obligation of an investigating authority under Article 11.3 to 'arrive at a reasoned conclusion' on the basis of 'positive evidence'.[266] (Emphasis in the original)

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[266] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras 232–4.

(iv) Reviews and original investigations: different processes, different rules

The question whether standards applied during the original investigation are relevant at the review stage has been raised twice so far. The basic answer by the Panels and the Appellate Body has been that since reviews and original investigation are distinct processes with different purposes,[267] the disciplines applicable to original investigations cannot, therefore, be automatically imported into review processes.[268]

(1) No de minimis *rule in a sunset review*

Based on this premise, the Panel on *US – Corrosion-Resistant Steel Sunset Review* considered that the *de minimis* thresholds applicable during the original investigation in the absence of explicit language or cross-referencing to this effect are not applicable in the context of a review.[269] The Appellate Body had reached a similar conclusion in the countervailing duty context in the *US – Carbon Steel* case.[270]

(2) No need to conduct an Article 3 injury examination

The AB, in its report on *US – Oil Country Tubular Goods Sunset Reviews*, continued along the same lines considering that no injury examination in the sense of Article 3 AD Agreement is required in a sunset review. It thus upheld the Panel's finding that the obligations set out in Article 3 do not apply to likelihood-of-injury determinations in sunset reviews:

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[267] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 106–7; Appellate Body Report, *US – Carbon Steel*, para. 87.

[268] Appellate Body Report, on *US – Oil Country Tubular Goods Sunset Reviews*, para. 359.

[269] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 7.70–7.71. The Panel thus concluded as follows:

> On the basis of this textual analysis of the relevant provisions of the *Anti-dumping Agreement*, we conclude that the 2 per cent *de minimis* standard of Article 5.8 does not apply in the context of sunset reviews. In this context, we again observe that, in light of the qualitative differences between sunset reviews and investigations, it is unsurprising that the obligations applying to these two distinct processes are not identical.

Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.85.

[270] Appellate Body Report, *US – Carbon Steel*, paras 81–4.

> Given the absence of textual cross-references, and given the different nature and purpose of these two determinations, we are of the view that, for the 'review' of a determination of injury that has already been established in accordance with Article 3, Article 11.3 does not require that injury again be determined in accordance with Article 3. We therefore conclude that investigating authorities are not *mandated* to follow the provisions of Article 3 when making a likelihood-of-injury determination.[271]

The AB added, however, that an investigating authority may, without being obliged to do so, 'borrow' from its analysis under Art. 3 AD (the original investigation), when conducting its review analysis:

> This is not to say, however, that in a sunset review determination, an investigating authority is never required to examine any of the factors listed in the paragraphs of Article 3. Certain of the analyses mandated by Article 3 and necessarily relevant in an original investigation may prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a 'reasoned conclusion'. In this respect, we are of the view that the fundamental requirement of Article 3.1 that an injury determination be based on 'positive evidence' and an 'objective examination' would be equally relevant to likelihood determinations under Article 11.3. It seems to us that factors such as the volume, price effects, and the impact on the domestic industry of dumped imports, taking into account the conditions of competition, may be relevant to varying degrees in a given likelihood-of-injury determination. An investigating authority may also, in its own judgment, consider other factors contained in Article 3 when making a likelihood-of-injury determination. But the necessity of conducting such an analysis in a given case results from the requirement imposed by *Article 11.3* (not Article 3) that a likelihood-of-injury determination rests on a 'sufficient factual basis' that allows the agency to draw 'reasoned and adequate conclusions'.[272]

(3) No need to establish a causal link between likely dumping and likely injury

In a similar vein, the Appellate Body expressed the view that Article 11.3 requires an authority to make a determination concerning likelihood of dumping and injury but not of a causal link between the two. In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Appellate Body first confirmed

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[271] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 280. Also see Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.117. In this case, the Panel went on to examine whether the USITC determination of the likely volume of dumped imports, their likely price effects and like impact was that of an unbiased and objective investigating authority. See Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 7.122–7.143.

[272] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 284.

that a causal link between dumping and injury to the domestic industry is fundamental to the imposition and maintenance of an anti-dumping duty under the AD Agreement. Because the review contemplated in Article 11.3 is a distinct process with a 'different' purpose from the original investigation, however, the AB was of the view that a causal link between dumping and injury is not required to be established anew in a review conducted under Article 11.3.[273] We quote from paras 123–4 of the Appellate Body Report:

> Therefore, what is essential for an affirmative determination under Article 11.3 is proof of likelihood of continuation or recurrence of dumping and injury, if the duty expires. The nature and extent of the evidence required for such proof will vary with the facts and circumstances of the case under review. Furthermore, as the Appellate Body has emphasized previously, determinations under Article 11.3 must rest on a 'sufficient factual basis' that allows the investigating authority to draw 'reasoned and adequate conclusions'.[274] These being the requirements for a sunset review under Article 11.3, we do not see that the requirement of establishing a causal link between likely dumping and likely injury flows into that Article from other provisions of the GATT 1994 and the *Anti-Dumping Agreement*. Indeed, adding such a requirement would have the effect of converting the sunset review into an original investigation, which cannot be justified.
>
> Our conclusion that the establishment of a causal link between likely dumping and likely injury is not required in a sunset review determination does not imply that the causal link between dumping and injury envisaged by Article VI of the GATT 1994 and the *Anti-Dumping Agreement* is severed in a sunset review. It only means that re-establishing such a link is not required, as a matter of legal obligation, in a sunset review.[275]

The Appellate Body underlined that the nexus to be demonstrated under Article 11.3 is between 'the expiry of the duty' on the one hand, and the likelihood of 'continuation or recurrence of dumping and injury' on the other hand. But that this implies that there is no need to establish a causal link between the likely future dumping and injury, seems problematic to say the least. The term 'injury' used in the AD Agreement is always qualified in a certain way as 'injury *caused by*' dumped imports. There is no separate provision in the AD Agreement that deals with causation. Rather, Article 3 of the AD Agreement, entitled Determination of Injury, deals with injury and causation in a holistic manner. Article 3.5 AD Agreement which explicitly provides for the need to demonstrate a causal relationship is simply one of the para-

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[273] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 117–18.

[274] See, for example, Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 311.

[275] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 123–4.

graphs of Article 3. Moreover, the provisions of Article 3 commonly referred to as constituting the injury analysis properly speaking (Articles 3.1, 3.2 and 3.4) all relate to the volume of dumped imports and the effect of such imports on domestic prices as well as the impact of these imports on domestic producers. In other words, they do not require the authority to simply examine the state of the domestic industry as such. Rather, they require an examination of the *impact* of dumped imports on the domestic industry. The volume of dumped imports and their price effects are elements of a causation analysis, rather than an injury analysis *pur sang*. It appears therefore that an examination of likelihood of recurrence or continuation of injury must refer to likelihood of injury caused by dumping, and not just any injury.

Trying to read the Appellate Body Report in this case in the most positive manner, it could be argued that the Appellate Body only wanted to say that no new causation analysis is required in all cases, and that an authority may assume that such a causal link exists.[276] The Appellate Body did not say that this assumption may not be rebutted. After all, it emphasized the fundamental importance of the causal link between dumping and injury for the maintenance of any anti-dumping duty. This would mean that an authority may not simply disregard arguments concerning other factors affecting the industry such as non-subject imports from other countries. In this respect, we recall that the Appellate Body clearly emphasized that it must be demonstrated on the basis of positive evidence that there exists a nexus between the expiry of the duty and the recurrence or continuation of dumping and injury. A proper investigating authority cannot, it seems, simply ignore the intervening effect of an influx of imports from other sources, or an event such as a storm destroying a factory, for example. The injury may continue, but it has nothing to do with the expiry of the duty; rather, it is caused by an intervening factor, the non-subject imports, or the storm. Perhaps, all the Appellate Body was saying was that Article 3.5, like the rest of Article 3, does not as such apply to sunset reviews.

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[276] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para.121:

> An anti-dumping duty comes into existence following an original investigation that has established a causal link between dumping and injury to the domestic industry in accordance with the requirements of Article 3 of the *Anti-Dumping Agreement*, including, in particular, the requirement that the injury caused by any other known factor not be attributed to dumping. In contrast, when a 'review' takes place under Article 11.3, and it is determined that the 'expiry of the duty' would 'likely . . . lead to continuation or recurrence of dumping and injury', it is reasonable to assume that, where dumping and injury continues or recurs, the causal link between dumping and injury, established in the original investigation, would exist and need not be established anew.

(4) No disciplines on cumulation in a sunset review context

Next, came the issue whether cumulation was permissible at the review stage. The Panel on *US – Oil Country Tubular Goods Sunset Reviews* faced, *inter alia*, a claim that, in the absence of specific language to this effect, cumulation was not permissible in the context of sunset reviews; consequently, the US, by cumulating imports from various sources, was acting inconsistently with its obligations under the AD Agreement. The Panel, based on textual and contextual arguments, held the opinion that various provisions in the AD Agreement make it clear that cumulation is permissible throughout the investigation and the review processes, but that the standards regarding cumulation during the original investigation reflected in Art. 3.3 AD were not applicable in the context of reviews.[277] The AB confirmed this view,[278] rejecting the suggestion that this would imply a carte blanche for investigating authorities when cumulating:

> As the Appellate Body has observed, a sunset review determination under Article 11.3 must be based on a 'rigorous examination' leading to a 'reasoned conclusion'. Such a determination must be supported by 'positive evidence' and a 'sufficient factual basis'. These requirements govern all aspects of an investigating authority's likelihood determination, including the decision to resort to cumulation of the effects of likely dumped imports. As a result, Argentina's concerns that investigating authorities will be given '*carte blanche*' to resort to cumulation when

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[277] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras 7.323–7. 336. The Panel was of the view that 'the Agreement generally allows the use of cumulation and that Article 3.3 is not an authorization for cumulation. Rather, it sets out the conditions that must be fulfilled when cumulation is used in investigations'. Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.333. The Panel then noted that 'paragraph 3 of Article 3 is the only paragraph that contains the word "investigation" under Article 3. In our view, therefore, by its own terms Article 3.3 limits its scope of application to investigations'. Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.336. Also see Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.102.

[278] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 300–301:

> Given the express intention of Members to permit cumulation in injury determinations in original investigations, and given the rationale behind cumulation in injury determinations, we do not read the *Anti-Dumping Agreement* as prohibiting cumulation in sunset reviews.
>
> Turning to Argentina's argument that the prerequisites specified in Article 3.3(a) and (b) should be satisfied by investigating authorities when performing cumulative analyses in sunset reviews, we note that Argentina offers no textual support for its claim. Indeed, as we observed above, the opening text of Article 3.3 plainly limits its applicability to original investigations. (Footnote omitted)

> making likelihood-of-injury determinations is unfounded. We, therefore, conclude that the conditions of Article 3.3 do not apply to likelihood-of-injury determinations in sunset reviews. (Footnotes omitted) [279]

In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Appellate Body, on the one hand, confirmed its view that Article 3.3 does not apply to sunset reviews, but emphasized, on the other hand, that this does not imply that it is never necessary for an authority to determine whether such a cumulative assessment is appropriate in light of the conditions of competition in the market place. In other words, while there does not exist a legal requirement to do so, contrary to what is the case in an original investigation because of Article 3.3, the specific facts of the case may nevertheless require such an analysis of the appropriateness of cumulation:

> We do not, however, suggest that, when an authority chooses to cumulate imports in a likelihood-of-injury determination under Article 11.3, it is never necessary for it to determine whether such a cumulative assessment is appropriate in the light of the conditions of competition in the market place. In particular cases, a cumulative assessment of the effects of the imports may be found to be inappropriate and, therefore, inconsistent with the fundamental requirement that a determination rest on a sufficient factual basis and reasoned and adequate conclusions. However, this fundamental requirement derives from the obligations under Article 11.3 itself, and not from the conditions specified in Article 3.3.[280]

(5) No need for a determination of dumping

With respect to the calculation of dumping duties at the review stage, the obligations imposed on an investigating authority are also less stringent than the corresponding obligations during the original investigation. The Panel in its report on *United States – Corrosion-Resistant Steel Sunset Review* held for the proposition that, during the review, an investigating authority need not calculate in a precise manner the dumping margins which will result in case it removes the duties in place. Rather, because uncertainty is inherent in any

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[279] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 302. Also see Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 7.147–7.151.

[280] Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 171. As the Appellate Body noted, it may sometimes be necessary for an authority to examine whether imports are in the market together and competing against each other. Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 153. It found that the US investigating authority had done so in a correct manner in the review at hand. Appellate Body Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 156–9.

forward-looking study, some reasonableness-standard is most warranted in this context and, consequently, investigating authorities should not be requested to make a determination of dumping in the sense of Article 2 AD Agreement or provide a precise amount of dumping margins.[281] This does not mean, according to the Panel, that evidence of dumping may not be relevant for a likelihood of recurrence or continuation of dumping determination:

> Nevertheless, evidence relating to 'dumping' (or absence thereof) since the imposition of the order, while perhaps not mandated by Article 11.3, may well be a relevant fact to take into account in determining likelihood of continuation or recurrence of dumping in the future. It is logical to us that evidence relating to dumping (or the absence thereof) since the imposition of the order could well be instructive in a likelihood of continuation or recurrence of dumping determination. In our view, this evidence could be drawn from the results of administrative or other review procedures, or on the basis of other evidence gathered by the investigating authority during the sunset review itself and indicating the existence of dumping during the relevant period. Evidence of the existence of dumping in another jurisdiction might also be potentially relevant. We see no reason to believe, however, that the only evidence relating to the existence of dumping during the period of imposition of the order that can be considered is a full-blown determination of dumping made pursuant to Article 2. It must, however, be evidence which a reasonable mind would consider relevant to establishing the existence of dumping since the imposition of the order.[282]

On appeal, the AB confirmed this view:

> In making its findings on this issue, the Panel correctly noted that Article 11.3 does not expressly prescribe any specific methodology for investigating authorities to use in making a likelihood determination in a sunset review. Nor does Article 11.3 identify any particular factors that authorities must take into account in making such a determination. Thus, Article 11.3 neither explicitly requires authorities in a sunset review to calculate fresh dumping margins, nor explicitly prohibits them from relying on dumping margins calculated in the past. This silence in the text of Article 11.3 suggests that no obligation is imposed on investigating authorities to calculate or rely on dumping margins in a sunset review.
>
> We consider that it is consistent with the different nature and purpose of original investigations, on the one hand, and sunset reviews, on the other hand, to interpret the *Anti-Dumping Agreement* as requiring investigating authorities to calculate dumping margins in an original investigation, but not in a sunset review. In an original investigation, if investigating authorities of a Member do not determine a positive dumping margin, the Member may not impose anti-dumping measures based on that investigation. In a sunset review, dumping margins may well be relevant to,

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[281] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 7.62–7.180.

[282] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.180.

> but they will not necessarily be conclusive of, whether the expiry of the duty would be likely to lead to continuation or recurrence of dumping. (Footnotes omitted)[283]

However, the Appellate Body did make one important clarification, and overturned the Panel's ruling in this respect. The Appellate Body stated that, in case a WTO Member goes ahead and does calculate dumping margins – although no such requirement exists in the AD Agreement – it should do so only in accordance with Art. 2 AD. This implies that a review based on a dumping margin originally calculated on the basis of the Article 2.4.2-inconsistent zeroing methodology is inconsistent with Article 11.3 AD Agreement:

> Article 2 sets out the agreed disciplines in the *Anti-Dumping Agreement* for calculating dumping margins. As observed earlier, we see no obligation under Article 11.3 for investigating authorities to calculate or rely on dumping margins in determining the likelihood of continuation or recurrence of dumping. However, should investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. We see no other provisions in the *Anti-Dumping Agreement* according to which Members may calculate dumping margins. In the CRS sunset review, USDOC chose to base its affirmative likelihood determination on positive dumping margins that had been previously calculated in two particular administrative reviews. If these margins were legally flawed because they were calculated in a manner inconsistent with Article 2.4, this could give rise to an inconsistency not only with Article 2.4, but also with Article 11.3 of the *Anti-Dumping Agreement*.
>
> It follows that we disagree with the Panel's view that the disciplines in Article 2 regarding the calculation of dumping margins do not apply to the likelihood determination to be made in a sunset review under Article 11.3.[284] (Footnote omitted)

(6) No need for a company-specific likelihood determination

A closely connected issue occupied the Panel in its report on *US – Corrosion-Resistant Carbon Steel Sunset Review*: the question was asked, *inter alia*, whether an investigating authority would be required, by analogy with Article 6.10's obligation to calculate an individual margin of dumping for each exporter or producer to examine, to make a determination of likelihood of recurrence or continuation of dumping and injury for each exporter or producer under review. The Panel considered that no such 'company-specific' likelihood determination is required, and a determination could thus be made on an 'order-wide' basis:

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[283] Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 123–4.

[284] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras 127–8.

> The issue therefore is how Article 6.10 is to be understood in the context of sunset reviews. Article 11.3 requires the authorities to determine, *inter alia*, 'that the expiry of the duty would be likely to lead to continuation or recurrence of dumping and injury'. It therefore refers to a determination of likelihood of continuation or recurrence of dumping, rather than a 'determination of dumping'. It also refers to 'dumping' but not 'the margin of dumping'. By contrast, Article 6.10 applies to the calculation of 'margins of dumping' for each known exporter or producer concerned of the product under investigation. Considering that we have found no substantive requirement imposed by Article 11.3 or any other provision in the *Anti-dumping Agreement*, that an investigating authority must actually calculate the (likely) margin of dumping in a sunset review, we also find that the determination of likelihood of continuation or recurrence of dumping does not fall within the ambit of this aspect of Article 6.10, regulating the process of calculating margins of dumping. The provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.
>
> Having found that the obligation in Article 6.10 to determine company-specific margins of dumping does not operate so as to require that the *likelihood* determination that must be made under Article 11.3 must be made on a company-specific basis, we find that the United States did not act inconsistently with its obligations in this case by determining likelihood of continuation or recurrence of dumping on an order-wide basis.[285] (Emphasis in the original)

The AB confirmed this view. It acknowledged that Article 11.4 contains an explicit cross-reference to the provisions of Article 6 regarding evidence and procedure, making these rules applicable to review situations. However, paragraph 10 of Article 6, requiring the authority to calculate individual margins of dumping, cannot apply in a review because, according to the Appellate Body, in a review, an authority is not required under Article 11.3 to calculate dumping margins in the first place. Hence the requirement to make an individual company-specific determination as set forth in Article 6.10 cannot apply in a review situation:

> We have already concluded that investigating authorities are not *required* to calculate or rely on *dumping margins* in making a likelihood determination in a sunset review under Article 11.3. This means that the requirement in Article 6.10 that dumping margins, 'as a rule', be calculated 'for each known exporter or producer concerned' is not, in principle, relevant to sunset reviews. Therefore, the reference in Article 11.4 to '[t]he provisions of Article 6 regarding evidence and procedure' does not import into Article 11.3 an obligation for investigating authorities to calculate dumping margins (on a company-specific basis or otherwise) in a sunset review. Nor does Article 11.4 import into Article 11.3 an obligation for investigating author-

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[285] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, paras 7.207–7.208.

> ities to make their likelihood determination on a company-specific basis. We therefore agree with the Panel that '[t]he provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis'.[286]

This of course has the important consequence that a company can remain subject to an anti-dumping order even though it is no longer dumping, and its sales will continue to be monitored and remain under threat of anti-dumping action for another five years.

(v) Permissible evidence

The AB in its report on *US – Oil Country Tubular Goods Sunset Reviews*, specified that, when conducting its review, an investigating authority can use information from the record of the original investigation or subsequent reviews,[287] provided that it takes a fresh look at it. The Appellate Body did not specifically address the argument put forward by the complainant (Argentina) whether an investigating authority can base its conclusions solely on already used information, as it considered that this was not what the US had done in the case at hand. The Appellate Body did however agree with the views expressed by the Appellate Body in the countervailing duty case *US – Carbon Steel* that mere reliance on the determination made in the original investigation will not be sufficient:

> In *US – Carbon Steel*, the Appellate Body clarified that, in a sunset review, a 'fresh determination' on the *likelihood* of future injury is necessary because '[t]he nature of the determination to be made in a sunset review differs in certain essential respects from the nature of the determination to be made in an original investigation'. [288] Therefore, '[m]ere reliance by the authorities on the injury determination made in the original investigation will not be sufficient'.[289] *US – Carbon Steel* does not, however, establish a prohibition on investigating authorities from referring in a sunset review to information related to the original investigation.[290]

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[286] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Reviews*, para. 155.

[287] That is, from the record used to establish injurious dumping in the original investigation that led to the imposition of AD duties.

[288] Appellate Body Report, *US – Carbon Steel*, para. 87.

[289] Appellate Body Report, *US – Carbon Steel* para. 88 (footnote omitted).

[290] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 328.

In the same report, the AB also clarified that a decision to continue the imposition of duties can be based on limited observations: in the case at hand, Argentina complained that the US did not base their decision on positive evidence since, following the imposition of AD duties, there were only a few transactions between Argentina and the US.

The AB, upholding the Panel's view in this respect, held for the proposition that the small volume of export sales to the US market was not an impediment towards a finding that dumping will continue to occur were the duties in place to be revoked.[291] Consequently, limited observations, in the sense of small volume of export sales, might suffice for the purposes of conducting a lawful review; moreover, facts that have already been evaluated in the original investigation can be re-evaluated at the review stage. It appears, however, that an investigating authority cannot conduct a lawful investigation by limiting itself to facts already evaluated in the original investigation. Rather, 'a fresh determination, based on credible evidence'[292] will be necessary to establish that the continuation of the duty is warranted.

(vi) Procedural due process obligations in sunset reviews

Article 11.4 provides that the provisions of Article 6 regarding evidence and procedure shall apply to sunset (and changed circumstances) reviews. Such reviews shall be carried out expeditiously and shall normally be concluded within 12 months of initiation of the review.

In other words, the due process rights of interested parties are respected also in a sunset review. With respect to the applicability of the basic due process provisions of Articles 6.1 and 6.2, the AB in its reports on *US – Corrosion Resistant Steel Sunset Reviews* and *US – Oil Country Tubular Goods Sunset Review*, for example, stated that these procedural rules clearly apply to sunset reviews because of the cross-reference in Article 11.4 and that it is therefore very important, also in a sunset review, to allow for the full opportunity for interested parties to present evidence and defend their case. In the words of the Appellate Body in its report on *US – Corrosion Resistant Steel Sunset Review*:

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[291] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 346: 'We endorse the Panel's view that "[t]he simple fact that the number of price comparisons was limited does not make this aspect of the USITC's determination inconsistent with Article 11.3 of the [*Anti-Dumping Agreement*]."' Also see Panel Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 7.303.

[292] Appellate Body Report, *US – Carbon Steel*, para. 88.

> Article 6 requires all interested parties to have a full opportunity to defend their interests. In particular, Article 6.1 requires authorities to give all interested parties notice of the information required and ample opportunity to present in writing evidence that those parties consider relevant. Articles 6.2, 6.4 and 6.9 provide other examples of the kind of opportunities that investigating authorities must give each interested party. . . . They therefore confirm that investigating authorities have certain specific obligations towards each exporter or producer in a sunset review.[293]

The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* thus considered the above-mentioned US deemed waiver provisions from incomplete submissions in a sunset reviews to be inconsistent with Articles 6.1 and 6.2 AD Agreement:

> In our view, disregarding a respondent's evidence in this manner is incompatible with the respondent's right, under Article 6.1, to present evidence that it considers relevant in respect of the sunset review. The agency is clearly notified of a respondent's interest in participating in the sunset review by virtue of the respondent having filed a response – albeit an incomplete one. Moreover, the respondent will also be denied any opportunity to confront parties with adverse interests in a hearing, notwithstanding this respondent's clear expression of interest in participating in the sunset review. As a result, this respondent is denied its rights, pursuant to Article 6.2, to the 'full opportunity for the defence of [its] interests'.[294]

However, as we noted above, the due process requirements applicability apparently does not go so far as to require the authority to exclude from the renewed order any exporters whose imports are not likely to lead to a recurrence or continuation of dumping in the case where the duty were removed. As we discussed earlier, the Agreement allows an all or nothing approach, according to the Appellate Body.

5 Administrative Review of AD Duties

Much of what was said earlier concerning the non-applicability of a number of procedural and substantive rules of the Agreement to sunset reviews seem to be equally valid when dealing with administrative or changed circumstances reviews. We will therefore refrain from repeating a discussion on these issues.[295]

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[293] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 152.

[294] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 246.

[295] Not surprisingly a number of proposals have been made aimed at ensuring the application in reviews (whether duty assessment, new shipper, administrative or sunset reviews) of such substantive and procedural disciplines and safeguards of Articles 2, 3,

(i) The function of administrative/changed circumstances reviews

During the five-year period that AD duties are in place, an *administrative* review or changed circumstances review might take place *either* on the initiative of the domestic authority, *or* upon request (Art. 11.2 AD). The former will take place when warranted, but the latter only after a reasonable lapse of time has passed. Hence, the difference between sunset and administrative reviews is that the former will normally take place only shortly before the lapse of the five-year period, but the latter at any time after AD duties have been in place.[296]

An investigating authority, when conducting an administrative review, must (Art. 11.2 AD) 'examine whether the continued imposition of the duty is necessary to offset dumping, whether the injury would be likely to continue or recur if the duty were removed or varied, *or both*' (emphasis added). Hence, whereas with respect to sunset reviews, an investigating authority can decide to keep duties in place *only* if their removal would lead to continuation or recurrence of *both dumping and injury*, this is not the case in the context of administrative reviews: it suffices that the authority can show continuation *or* recurrence of one of the two elements (dumping, injury),[297] the review of continuation or recurrence of both elements being an option, but not an obligation. However, choosing the extent of an administrative review entails important repercussions as to the life of the AD duties in place:

(a) if a *narrow* review (for example, continuation or recurrence of *either* dumping *or* injury) takes place, duties will remain in place for a maximum period of five years counting from the date of the original imposition;
(b) if a *comprehensive* review (for example, continuation or recurrence of *both* dumping *and* injury) takes place, duties will remain in place for five years counting from the end of the administrative review. The administrative review will then function like an early sunset review.

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5 and 6 that apply to original investigations. See, TN/RL/GEN/10; TN/RL/GEN/44, TN/RL/GEN/52, TN/RL/GEN/61, TN/RL/GEN/117.

296 Although a review upon request can take place only after a reasonable period from the imposition of duties has lapsed, there is no such requirement as far as the self-initiated administrative review is concerned. Theoretically, an investigating authority might find it warranted to self-initiate a review shortly after the imposition of duties: this could be the case, for example, if the injured industry merges with the dumper.

297 Injury of course, must be resulting from dumping. The Panel, in its report on *US – DRAMS* confirmed this point of view in para. 6.28 of the report.

As to the question of the quantum of proof necessary to substantiate the conclusions of an administrative review, the Panel, in its report on *US – DRAMS* held that, since the subject-matter of an administrative review is forward-looking analysis which by necessity entails uncertainty, one cannot request from an investigating authority mathematical certainty when it formulates its conclusions. Some degree of imprecision is unavoidable, and thus, permissible:

> The necessity of the continued imposition of the anti-dumping duty can only arise in a defined situation pursuant to Article 11.2: *viz* to offset dumping. Absent the prescribed situation, there is no basis for continued imposition of the duty: the duty cannot be 'necessary' in the sense of being demonstrable on the basis of the evidence adduced because it has been deprived of its essential foundation. In this context, we recall our finding that Article 11.2 does not preclude *a priori* continued imposition of anti-dumping duties in the absence of present dumping. However, it is also clear from the plain meaning of the text of Article 11.2 that the continued imposition must still satisfy the 'necessity' standard, even where the need for the continued imposition of an anti-dumping duty is tied to the 'recurrence' of dumping. We recognize that the certainty inherent to such a prospective analysis could be conceivably somewhat less than that attached to purely retrospective analysis, reflecting the simple fact that analysis involving prediction can scarcely aspire to a standard of inevitability. This is, in our view, a discernable distinction in the degree of certainty, but not one which would be sufficient to preclude that the standard of necessity could be met. In our view, this reflects the fact that the necessity involved in Article 11.2 is not to be construed in some absolute and abstract sense, but as that appropriate to circumstances of practical reasoning intrinsic to a review process. Mathematical certainty is not required, but the conclusions should be demonstrable on the basis of the evidence adduced. This is as much applicable to a case relating to the prospect of recurrence of dumping as to one of present dumping. (Emphasis in the original)[298]

The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* agreed with the Panel which held that to require that a 'representative volume of export sales' has taken place as a condition for conducting a changed circumstances review was inconsistent with the Agreement.[299] As the Panel explained, even in the absence of such representative volume of export sales, changes could have occurred on the normal value side which justify and require an authority to examine whether the continued imposition of the duty is still warranted:

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[298] Panel Report, *US – DRAMS*, para. 6.43. Howse and Staiger (2006) have cast doubt on the manner in which Panels have approached this issue so far. In their view, Panels have approached the standard of review in a rather mechanistic and not too informative manner as to what an investigating authority should do when reviewing the likelihood of continuation or recurrence of AD duties: an investigating authority should, in their view, be evaluating whether there is a change in the competitive conditions (in a given market) that warrants a change in the existing policy as well.

[299] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, paras 315–16.

> Article 68 of the Act requires *as a rule* that *each time* an interested party is unable to show that volume of exports during the review period was representative, such a review is to be denied. This in our view is inconsistent with the Agreement. Under a changed circumstances review of Article 11.2 of the AD Agreement, the authority examines whether there is continued need for the measure and whether the duty is to be varied or removed. A situation could be envisaged where the positive information substantiating the need for a review that the interested party is to adduce in support of its request relates only to its domestic sales and the normal value side of the dumping margin. A possible example could be a case where an exporter requests a review based on an important and dramatic drop in the normal value for the product due to a change in the cost structure of the company for example. This will have an obvious effect on the dumping margin and may thus warrant a review that leads to the duty being removed or varied. The change in circumstances is unrelated to the export side of the equation. An interested party is entitled to a changed circumstances review under Article 11.2 of the AD Agreement and 21.2 of the SCM Agreement, if it submits positive information substantiating the need for a review. What such positive information relates to will depend from case to case, and such positive information does not, in our view, necessarily include that a representative number of exports sales were made. We consider that, by requiring the authority to reject a review each time the volume of export sales was not representative, even in cases where the change in circumstances is unrelated to the export price, Article 68 of the Act requires the authority to reject reviews in a manner which is inconsistent with Article 11.2 of the AD Agreement.[300,301]

In *US – Anti-Dumping Measures on Oil Country Tubular Goods*, the Panel did not consider inconsistent with the Agreement the US rule that considers a revocation of the duty under Article 11.2 warranted in case of three consecutive years of no dumping *and* sales in commercial quantities during that period in order to qualify for review and revocation. Important in the Panel's reasoning was the fact that interested parties were not limited to this possibility:

> Regarding Mexico's argument that three consecutive years without dumping should be sufficient, in all cases, to demonstrate that an anti-dumping duty is not warranted, we find no basis for such a conclusion in Article 11.2 While three years with no

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300 We acknowledge that the representativeness of the export sales can in certain situations be a relevant factor in determining whether it is appropriate to remove or vary the duty. A showing of such representativeness may thus be requested as part of the 'positive information substantiating the need for a review' which is to be submitted by the interested party requesting the review. Whether that is so will depend on the circumstances of each case. In our view, the rule of Article 68 of the Act fails to take these specific circumstances into account.

301 Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.259. The Appellate Body agreed that the condition of providing 'positive information substantiating the need for a review' may be satisfied in a particular case with information not related to export volumes. Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 314.

> dumping might be sufficient to demonstrate that continued imposition of an anti-dumping duty is not warranted in some cases, we cannot accept that it is necessarily sufficient in all cases. For instance, take an extreme example of an anti-dumping order on sales of transistor radios. A sale of one radio per year at a non-dumped price for three consecutive years might well be considered a mere token sale and not sufficient to demonstrate that continued imposition of the anti-dumping order is no longer warranted. Moreover, we note that, under the US system as we understand it, three years of no dumping *could*, in principle, serve as the basis for a request for review under the general changed circumstances provision, an option that was available in this case, but not taken by either Mexican exporter. In this case, the Mexican exporters chose to seek review and revocation under the more limited option provided for in US law, which requires a demonstration of three years of no dumping and sales in commercial quantities during that period in order to qualify for review and revocation. Given the availability of an alternative, we are not prepared to conclude that the USDOC determination at issue here is inconsistent with Article 11.2.[302]

(ii) When are self-initiated (ex officio) reviews warranted?

As already stated above, an administrative review can be launched upon request only after the lapse of a reasonable period of time. The term *reasonable period of time* has not been interpreted by Panels so far, probably because it has not created any major disputes in practice. On the other hand, Panels have been busy discussing disputes among WTO Members as to the conditions under which an *ex officio* review is warranted. We recall that, under Article 11.2, an authority '*shall* review the need for the continued imposition of the duties changed circumstances review, where warranted'. In other words, such a review is *required* if the situations warrants such a review, even without a request by the exporters concerned. So the question is, which situations are such that they require this changed circumstances review?

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[302] Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, para. 7.173. As the Panel explained, under the US system, requests for changed circumstances reviews can be based on the general 'changed circumstances' review provisions, or on the basis of no dumping for three years. In the latter case, a company seeking revocation on the basis of no dumping for three years must demonstrate its having made sales in the US market in commercial quantities during that period. The Panel thus considered that a company which does not satisfy the additional requirements for revocation on the basis of no dumping is nonetheless entitled to seek revocation of the anti-dumping duty order as applied to it under the general changed circumstances provision, providing it can provide information substantiating the need for review, as provided for in Article 11.2. See Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 7.164–7.165.

(a) Does a prolonged period of absence of dumping warrant a review?

The Panel, in its report on *US – DRAMS*, held for the proposition that absence of dumping for a period of three years and six months did not mandate a self-initiated review. We quote from paras 6.58–9: 'The issue before us is whether Article 11.2 necessarily requires an investigating authority, following three years and six months' findings of no dumping, to find that an *ex officio* Article 11.2 review of 'whether the injury would be likely to continue or recur if the duty were removed or varied' is 'warranted'.

> A review of 'whether the injury would be likely to continue or recur if the duty were removed or varied' could include a review of whether (1) injury that is (2) caused by dumped imports would be likely to continue or recur if the duty were removed or varied. With regard to injury, we believe that an absence of dumping during the preceding three years and six months is not in and of itself indicative of the likely state of the relevant domestic industry if the duty were removed or varied. With regard to causality, an absence of dumping during the preceding three years and six months is not in and of itself indicative of causal factors other than the absence of dumping. If the only causal factor under consideration is three years and six months' no dumping, the issue of causality becomes whether injury caused by *dumped* imports will recur. This necessarily requires a determination of whether dumping will recur. Thus, the 'injury' review that Korea believes is 'warranted' on the basis of three years and six months' no dumping would be entirely dependent upon a determination of whether dumping will recur. This is precisely the type of determination that the United States sought to make in the present case. The mere fact of three years and six months' findings of no dumping does not require the investigating authority to, in addition, self-initiate a review of 'whether the injury would be likely to continue or recur if the duty were removed or varied'.[303] (Emphasis in the original)

(b) Does devaluation warrant a review?

The Panel, in its report on *EC – Tube or Pipe Fittings* dealt, *inter alia*, with the argument by Brazil, whether the devaluation of Brazil's national currency (which time-wise coincided with the last weeks of the investigation) was in itself a reason for the European Community to launch on its own initiative a review of the necessity to keep in place the imposed anti-dumping duties. The Panel responded in the negative:

> We disagree. The devaluation occurred in January 1999, three quarters of the way through the period of investigation, and Brazil does not contest the finding of dump-

[303] Panel Report, *US – DRAMS*, paras 6.58–6.59. For a similar view, see Panel Report, *US – Anti-Dumping Measures on Oil Country Tubular Goods*, paras 7.173–7.174.

> ing during the IP in this context. While we cannot exclude the possibility that circumstances may warrant the simultaneous self-initiation of a review in certain circumstances, we find no basis in the Agreement for an obligation that the self-initiation of a review simultaneous with the imposition of the measure is *necessarily* warranted or that an authority *must* self-initiate a review immediately upon the imposition of measures on the basis of an affirmative dumping determination in respect of a recent past IP.[304] The determination of whether or not good and sufficient grounds exist for the self-initiation of a review necessarily depends upon the factual situation in a given case and will necessarily vary from case to case.[305]

The Panel thus concluded as follows:

> The findings of the panel in *US – DRAMS*[306] are relevant here. In examining the nature of a review conducted under Article 11.2 AD, that panel rejected the view that Article 11.2 'requires revocation as soon as an exporter is found to have ceased dumping, and that the continuation of an anti-dumping duty is precluded *a priori* in any circumstances other than where there is present dumping'. This reasoning would suggest to us that the *Anti-Dumping Agreement* does not require a decision to be made by the investigating authorities after the end of the IP not to impose duties, nor to review the imposition of a duty immediately after it is imposed based on events between the end of the IP and the time of imposition, much less on the basis of events occurring before the end of the IP.[307]

What is interesting is that the Panel in this case had also rejected a claim by Brazil that, for the same reason of devaluation towards the end of the POI, the

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[304] The argument that Articles 11.1 and 11.2 necessarily *require* the withholding of imposition of measures and/or the self-initiation of an immediate review is irreconcilable with note 22 of the *Anti-dumping Agreement*. Note 22 states that, in cases where anti-dumping duties are levied on a retrospective basis, 'a finding in the most recent assessment proceeding . . . that no duty is to be levied shall not by itself require the authorities to terminate the definitive duty'. If this view of Article 11.2 were to prevail, an investigating authority would be obligated under Article 11.2 perpetually to withhold the imposition of measures and/or to continuously assess the situation by repeatedly self-initiating a review, and note 22 would be rendered meaningless as there would never be duties imposed on which to conduct a re-assessment. This confirms our view that, once an investigating authority has established the existence of dumping during a recent past IP, an absence of dumping (assuming *arguendo* that there is such an absence, however its existence is established) at the time of the imposition does not, in and of itself – and in the absence of a new or changed circumstance not present during the IP – preclude the imposition of a measure or necessarily render a review 'warranted' so as to require the self-initiation of a review pursuant to Article 11.2. Brazil does not argue that such a new or changed circumstance arose *following* the IP, but only that the devaluation had lasting effects.

[305] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.116.

[306] Panel Report, *US – DRAMS*, paras 6.26–6.29.

[307] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.118.

determination could not be said to have been made on the basis of positive evidence as the data from before the devaluation are not informative of the situation that will prevail at the time of imposition of the duties. The Panel rejected this argument considering that these types of changes could be dealt with in subsequent reviews of the measure.[308] Apparently, however, this was not sufficient to require an *ex officio* review. One may argue that the exporters could have requested a review. True, but we recall that this can only be done after a reasonable period of time has lapsed and based on a duly substantiated request. In other words, the burden falls on the exporters, once again.

(iii) Publication requirements

A public notice must be issued any time a review is being initiated. Art. 12.3 AD deals with public notice in case of reviews: 'The provisions of this Article shall apply *mutatis mutandis* to the initiation and completion of reviews pursuant to Article 11 and to decisions under Article 10 to apply duties retroactively.'

G REMEDIES AGAINST ILLEGALLY IMPOSED AD DUTIES

1 Reimbursing Definitive Duties?

The question of remedies against illegal imposition of anti-dumping duties has provoked a series of discussions in GATT/WTO. In the GATT-era, some Panels, in application of the *restitutio in integrum* principle, had recommended that, in case of illegally imposed (anti-dumping and countervailing) duties, the GATT Member imposing such duties has the obligation to reimburse the injured exporter.[309] Although retroactivity (*ex tunc* effect) of remedies is not excluded in WTO law, there has not been a case where reimbursement of AD duties has been suggested by a WTO adjudicating body. Facing a specific request by Mexico to suggest reimbursement of illegally perceived anti-dumping duties, the Panel, in its report on *Guatemala – Cement II*, acknowledged that in the specific circumstances of the case a request for reimbursement may be justifiable. However, ultimately, because the issue at hand was highly contentious, the Panel refused to pronounce:

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308 See Panel Report, *EC – Tube or Pipe Fittings*, para. 7.106.

309 See Petersmann (1993) and Mavroidis (1993) on this score.

> We have determined that Guatemala has acted inconsistently with its obligations under the AD Agreement in its imposition of anti-dumping duties on imports of grey portland cement from Mexico. We have found these violations to be of a fundamental nature and pervasive. Indeed, in general terms we have found that:
>
> a) An unbiased and objective investigating authority could not properly have determined, based on the evidence and information available at the time of initiation, that there was sufficient evidence to justify initiation of the anti-dumping investigation;
> b) Guatemala conducted the anti-dumping investigation in a manner inconsistent with its obligations under various provisions of the AD Agreement;
> c) An unbiased and objective investigating authority could not properly have determined that the imports under investigation were being dumped, that the domestic producer of cement in Guatemala was being injured and that the imports were the cause of that injury.
>
> In light of the nature and extent of the violations in this case, we do not perceive how Guatemala could properly implement our recommendation without revoking the anti-dumping measure at issue in this dispute. Accordingly, we suggest that Guatemala revoke its anti-dumping measure on imports of grey portland cement from Mexico.
>
> In respect of Mexico's request that we suggest that Guatemala refund the anti-dumping duties collected, we note that Guatemala has now maintained a WTO-inconsistent anti-dumping measure in place for a period of three and a half years. Thus, we fully understand Mexico's desire to see the anti-dumping duties repaid and consider that repayment might be justifiable in circumstances such as these. We recall however that suggestions under Article 19.1 relate to ways in which a Member could implement a recommendation to bring a measure into conformity with a covered agreement. Mexico's request raises important systemic issues regarding the nature of the actions necessary to implement a recommendation under Article 19.1 of the DSU, issues which have not been fully explored in this dispute. Thus, we decline Mexico's request to suggest that Guatemala refund the anti-dumping duties collected.[310]

So, the only remedy available in WTO law consists of the amendment of the measure such that it is in conformity with the WTO Agreement during the reasonable period of time the measure may remain in force and duties continue to be collected. It has been proposed in the course of the negotiations to introduce a special and additional rule of dispute settlement in the AD Agreement which would prohibit a Member whose AD measure was found to be WTO-inconsistent to continue with any enforcement action (such as demands for cash deposits, assessment definitive duties on prior unliquidated entries and the prospective application of definitive duties) related to this inconsistent measure. This would imply that the inconsistent AD measure's application

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310 Panel Report, *Guatemala – Cement II*, paras 9.6–9.7.

would be suspended during the reasonable period of time used to bring the measure into conformity with the AD Agreement. An amended measure would then only be allowed to have effect following a declaration of compliance or expiration of the reasonable period of time and an absence of a reaction by the complaining Member or the finding of a DSU 21.5 Panel of compliance of the new measure. The proposal further suggests that this new measure would allow the imposing Member to collect duties under this new measure retroactively until the beginning of the reasonable period of time (that is, following the DSB ruling of inconsistency), as well as requiring the Member to refund any duties levied in excess of the newly calculated duty rate since the first shipment covered by the original measure.[311]

2 Alternative Ways of Implementation

The Agreement does not prescribe the ways of amending the measure so that it is brought into conformity with the WTO Agreement. To bring the anti-dumping measure into conformity may imply re-doing part of the investigation and re-calculating the margin of dumping, or simply withdrawing the WTO-inconsistent anti-dumping measure. Much will depend on the specific findings of the Panel. It seems that in the case where the Panel finds that the initiation of the investigation was WTO inconsistent, it will be difficult for a Member to maintain the fundamentally flawed anti-dumping measure.

The *US – Softwood Lumber VI (Article 21.5 – Canada)* case is a remarkable example of the kind of 'implementation' of a Panel's recommendation to bring the measure into conformity. We briefly recapitulate the facts of this case. The US was condemned once again in the ongoing Softwood Lumber-saga, for having imposed duties on Canada's exports in a WTO-inconsistent manner. The US was requested to implement the findings of the WTO adjudicating bodies. Without proceeding into any change in the measure itself, the US re-worked the rationale for imposition of duties. Canada challenged the legitimacy of this approach and its consistency with the WTO. From the legal point of view, the Panel's report on *US – Softwood Lumber VI (Article 21.5 – Canada)* merits a lot of attention, in light of its highly controversial outcome. The US, we recall, was found to be in violation of its obligations under the WTO and more, specifically, in violation of Art. 3.7 AD and 15.7 SCM (para. 7.5). The US was requested to implement the original Panel rulings. Under US procedures (Section 129), the competent authority re-visited its original determination. Without making any substantive changes, it simply re-focused the

311 TN/RL/GEN/37. It is interesting to note that this proposal comes from one of the traditional users of anti-dumping measures, Canada.

argument in the justification and presented it as its implementing measure. Canada disagreed. It legitimately took the view that it is impossible to comply without introducing a new measure. Standing case-law until this instance supported Canada's basic line of thinking.

The compliance Panel established to discuss Canada's legal challenge, disagreed (para. 8.1). To reach its final conclusion, the Panel accepted that the manner in which the US authority had now interpreted the same factual evidence was enough for a finding of implementation. Implicitly, hence, the Panel accepts that re-drafting a determination and re-focusing its weight amounts to a new measure.

What is very problematic indeed about this case is precisely the fact that the US was found to have implemented the original Panel's rulings, without undertaking any new measure, except for re-drafting their decision to impose duties. In a way, the Panel confused a substantive with a procedural violation: the US was found to be in violation of Art 3 AD, and not Art. 12 AD. Consequently, the US, at least with respect to Art. 3 AD, violated a substantive provision: it performed a WTO-inconsistent injury analysis. Such a violation can, to our mind, be healed through a re-drafting of the determination only in highly exceptional cases. Let us provide an illustration of this point: assume that the US had indeed performed a proper injury analysis but failed to communicate it to its intended audience. In such a case, Art. 12 AD is ipso facto violated. Is Art. 3 AD also violated? The WTO case-law on this score is highly problematic.[312] Assuming that violation of Art. 12 AD establishes a prima facie case of violation of Art. 3 AD as well, then, yes, a simple re-drafting could do the job in this case. Why in this case? Simply because the substantive provision (Art. 3 AD) had been, in practice, respected; what the investigating authority failed to observe was, in our example, the procedural step, the notification and public notice requirements, as expressed in Art. 12 AD.

There are, however, other cases as well: a WTO Member can, by not performing an injury analysis as required by the AD Agreement, violate Art. 3 AD. A notification/public notice which reproduces faithfully the injury analysis performed will be in violation of Art. 12 AD (because, for example, the impact of an important factor mentioned in Art. 3.4 AD has not been examined). In this latter case, re-drafting the original determination can simply never be accepted as an implementing measure necessary and sufficient to

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312 And, we should add, highly incoherent. There are cases which adopted the correct (to my mind) approach (absent indication in the determination, there should be a presumption at least that a procedural step has been omitted), and cases which go the other way.

achieve implementation of the report. One needs to re-do the injury analysis *ab initio*.

The question, hence, arises whether the case discussed here belongs in the first or the second category. The report does not at all clarify this point. As written, by not making a distinction like the one performed above, it is anyway of doubtful legal validity. Moreover, even with respect to the facts of the case this report could be wrong. A Panel would have to inquire to what extent the new measure addressed the concerns of the original Panel under Art. 3 AD. It failed miserably to do so. The end result is very disappointing and highly problematic.[313]

While the Appellate Body reversed the Panel's findings in favour of the United States in this case, it failed to address the underlying problem addressed above. In other words, the Appellate Body did not address the question whether it would in any case be possible for an authority to implement a negative ruling under one of the substantive provisions of the AD Agreement by merely re-writing the determination but without re-opening the investigation. The Appellate Body did, interestingly, note that 'a marked departure from the explanations given in the original determination may, when the evidence is essentially the same and no explanation is given for that departure, undermine the extent to which the explanations in the redetermination can be viewed as "reasoned and adequate"'.[314]

3 Which AD Measures can be Challenged before Panels

Art. 17.4 AD delineates the type of anti-dumping measures that can be properly submitted to a WTO adjudicating body. It reads:

> 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 antidumping 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.

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313 Anecdotally, we should add that a NAFTA Panel dealing with the same issue reached the opposite outcome on this score.

314 Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 126. The Appellate Body faulted the Panel for failing even to examine the question of the extent to which the same evidence that was before the USITC in the original determination was the basis for different explanations in the Section 129 Determination.

The AB, in its report on *Guatemala – Cement I*, dealt with a dispute between Mexico and Guatemala, concerning *inter alia*, whether the consistency of the initiation of investigation by Guatemala with the AD Agreement could be challenged before a Panel. It adopted a very narrow reading of Art. 17.4 AD:

> Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. 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 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.[315] (Emphasis in the original)

Following this ruling, the United States argued in a subsequent dispute that the complainant could not attack its anti-dumping legislation as such, since a national legislation did not figure in the list of measures of Art. 17.4 AD and was, thus, immune from legal challenge. The AB, in its report on *US – 1916 Act (EC)* rejected this argument. Adopting a narrow[316] reading of its decision in *Guatemala – Cement I*, it stated that Mexico was punished for not identifying a specific measure, and not for challenging the initiation of investigation. The Appellate Body considered that, in light of its rationale, Article 17.4 AD Agreement relates only to challenges against specific anti-dumping investigations:

> The United States appeals, on the basis of the wording of Article 17.4 of the *Anti-Dumping Agreement* and our Report in *Guatemala – Cement*, the Panel's finding that it had jurisdiction to examine the 1916 Act as such. According to the United States, Members cannot bring a claim of inconsistency with the *Anti-Dumping Agreement* against legislation as such independently from a claim of inconsistency of one of the three anti-dumping measures specified in Article 17.4, i.e., a definitive anti-dumping duty, a price undertaking or, in some circumstances, a provisional measure. The United States contends that:

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315 Appellate Body Report, *Guatemala – Cement I*, para. 79.

316 The view expressed by the AB in this case is hardly reconcilable with its first view on the issue. Still, the AB preferred a dramatic effort to reconcile the two decisions to an honourable admission of *revirement de jurisprudence.*

> [When a Member has] a law which [provides for the imposition of] duties to counteract dumping and, under the *Anti-Dumping Agreement*, if [another Member wishes] to challenge that law, then [the other Member must] wait until one of the three measures [referred to in Article 17.4 of the *Anti-Dumping Agreement*] is in place.
> . . .
> 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.
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> Important considerations underlie the restriction 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. In our view, by limiting the availability of dispute settlement proceedings related to an anti-dumping 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, 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.[317] (Emphasis in the original)

Following this ruling, it is now clear that AD national legislation can be challenged before a Panel. Indeed, subsequent practice has confirmed this view since not only mandatory legislation, but also administrative guidance (for example the so called US Sunset Policy Bulletin)[318] have been challenged before Panels ever since.

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[317] Appellate Body Report, *US – 1916 Act (EC)*, paras 55 and 72–74.

[318] Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, paras 81–9. The Appellate Body concluded as follows:

> 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'.

Appellate Body Report, *US – Corrosion Resistant Steel Sunset Review*, para. 88.

4 The Standard of Review that WTO Adjudicating Bodies will Adopt in Disputes under the AD Agreement

(a) The relationship between the generic and the specific standard

WTO adjudicating bodies (Panels *de jure*, and the Appellate Body *de facto*) have to observe the generic standard of review laid down in Art. 11 DSU. The AD Agreement, however, has its own standard of review (Art. 17.6 AD): this is the only instance in the WTO Agreement where a standard of review other than that provided for in Art. 11 DSU is provided for. Although Art. 17.5 AD is not properly speaking a standard of review, its close connection with Art. 17.6(i) AD justifies its inclusion in our discussion. It reads:

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

Art. 17.6 AD on the other hand, reads:

> 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.

The founding fathers thus reserved an anti-dumping-specific standard of review: in Art. 17.6 AD, they inserted a standard of review which is applicable only in disputes coming under the purview of the AD Agreement. Although, in practice so far, it is difficult to see in what precisely it differs from the generic standard of review enshrined in Art. 11 DSU, the argument has convincingly been made that, in theory, the AD standard of review is more

deferential towards WTO Members (AD investigating authorities) than is the Art. 11 DSU standard.[319] Practice shows that some (at least) Panels have preferred to apply simultaneously the two standards of review, that is, they see no contradiction between them: for example, the Panel Report on *US – Corrosion-Resistant Steel Sunset Review* held that the standard of review applicable in the context of sunset reviews would require it to apply both Art. 11 DSU and Art. 17.6 AD to the factual and legal issues before it. This expression of the standard of review is exemplary for that of Panels in the AD context generally:

> Thus, together, Article 11 of the *DSU* and Article 17.6 of the *Anti-dumping Agreement* set out the standard of review we must apply with respect to both the factual and legal aspects of our examination of the claims and arguments raised by the parties.[320]
>
> In light of this standard of review, in examining the claims under the *Anti-dumping Agreement* in the matter referred to us, we must evaluate whether the United States measures at issue are consistent with relevant provisions of the *Anti-dumping Agreement*. We may and must find them consistent if we find that the United States investigating authorities have properly established the facts and evaluated the facts in an unbiased and objective manner, *and* that the determinations rest upon a 'permissible' interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying sunset review, nor to substitute our judgment for that of the US authorities, even though we might have arrived at a different determination were we examining the record ourselves.[321]

While many Panels have adopted an attitude of reconciliation between the two standards, there are, however, examples to the opposite: the Panel, in its report on *US – Softwood Lumber VI* reflects the understanding of the Panel as to the differences between the generic and the AD standard of review in the following manner (para. 7.22):

> 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

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319 See on this issue Croley and Jackson (1996), and also Palmeter (1995).

320 Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan* ('*US – Hot-Rolled Steel*'), WT/DS184/AB/R, adopted 23 August 2001, paras 54–62.

321 Panel Report, *US – Corrosion Resistant Steel Sunset Review*, paras 7.4–5.

> 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.

Still, even this Panel did not explain how in practice the two standards could have led to different outcomes. According to Art. 17.6 AD hence, a WTO Panel when reviewing a dispute under the AD Agreement must, on the one hand, ensure that the establishment of facts was proper and, on the other, that the evaluation by the investigating authority was unbiased and objective, in the sense that its evaluation lies on a permissible interpretation of the AD Agreement. In accordance with Article 17.5, the basis on which the Panel conducts its review is the facts as properly brought before the investigating authority.[322] In the words of the Panel on *US – Hot-Rolled Steel* often referred to by Panels since:

> It seems clear to us that, under this provision, 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. Thus, for example, in examining the USITC's determination of injury under Article 3 of the AD Agreement, we would not consider any evidence concerning the price effects of imports that was not made available to the USITC under the appropriate US procedures. Japan acknowledges that Article 17.5(ii) must guide the Panel in this respect, but argues that it 'complements' the provisions of the DSU which establish that it is the responsibility of the panel to determine the admissibility and relevance of evidence offered by parties to a dispute. We agree, to the extent that it is our responsibility to decide what evidence may be considered. However, that Article 17.5(ii) and the DSU provisions are complementary does not diminish the importance of Article 17.5(ii) in guiding our decisions in this regard. It is a specific provision directing a panel's decision as to what evidence it will consider in examining a claim under the AD Agreement. Moreover, it effectuates the general principle that panels reviewing the determinations of investigating authorities in anti-dumping cases are not to engage in *de novo* review.[323] (Footnote omitted)

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[322] See, for example, Panel Report, *Guatemala – Cement II*, para. 8.19: 'In our review of the investigating authorities' evaluation of the facts, we will first need to examine evidence considered 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.'

[323] Panel Report, *US – Hot-Rolled Steel*, para. 7.6. Also see, for example, Panel Report, *Egypt – Steel Rebar*, para. 7.21; Panel Report, *US – Steel Plate*, para. 7.11; Panel Report, *US – Softwood Lumber V*, para. 7.37.

In a way, the question is whether, under Art. 11 DSU, a Panel must always privilege one interpretation, or, in a more extreme manner, whether there is always only one interpretation that is correct. There is no need to delve into a philosophical discussion of this issue at this point. Practice evidences many cases where Panels (and indeed, the AB), when applying the Art. 11 DSU standard of review, have been debating whether one or the other interpretation is correct. Words are not invariances, and their meaning depends on their context, which in turn, can be often evaluated in more than one way. Various Panels evidence dissenting opinions[324] and the AB as well recently, in its *US – Upland Cotton* report, has marked a first on this score. Hence, as a matter of law, this discussion seems futile. As a matter of pre-disposition, it could be the case that Panels operating in the AD Agreement will be entering their evaluation process with the resolve not to disturb findings by an investigating authority, unless fully persuaded about the contrary view. It will be, however, a quixotic test, to show if and how this has indeed been the case in practice.

(b) No *de novo* review

A Panel cannot proceed to a *de novo* review. By *de novo* review, GATT and WTO adjudicating bodies have understood certain deference towards the establishment and evaluation of facts by an investigating authority. They can, of course, sanction WTO Members for not properly establishing the record and can find that conclusions reached by them are inconsistent with the requirements of the AD Agreement. They will refrain, however, from substituting their own judgment on that of the investigating authority at hand. This implies *inter alia* that an authority is not to take into consideration evidence that was not appropriately submitted to the investigating authorities.[325] The problematic question remains what constitutes new facts and evidence and

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[324] See for example, the dissenting opinion of one Panellist in *US – Softwood Lumber V*, with respect to the practice of zeroing in which the Panellist in question relies heavily on the concept of 'more than one permissible interpretation'. Panel Report, *US – Softwood Lumber V*, paras 9.1–9.24.

[325] For example, Panel Report, *Egypt – Steel Rebar*, para. 7.21:

> It is clear to us (and indeed, there is no disagreement on this point between the parties) that the evidence in question, which was proffered by Turkey in the dispute to challenge determinations made by the IA during the anti-dumping investigation, was not made available to the Investigating Authority in conformity with the appropriate domestic procedures during the investigation, as required by Article 17.5.(ii), and it is clear as well that consideration of new evidence of this sort can be construed as a *de novo* review, which is not permissible. We thus will not take this evidence into consideration when reviewing the measures of the determinations and actions of the Egyptian Investigating Authority.

what is simply a different formatting or an analysis based on data that was before the authority. The standard was set by the Panel in *EC – Bed Linen*:

> Article 17.5(ii) of the AD Agreement provides that a panel shall consider a dispute under the AD Agreement 'based upon: . . . the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member'. It does not require, however, 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 in support of their arguments and to elucidate the parties' positions. Based on our review of the information that was before the European Communities at the time it made its decision, in particular that presented by India in its Exhibits, the parties' extensive argument regarding this evidence, and our findings with respect to India's claim under Article 5.4, we conclude that the Exhibit in question does not contain new evidence. Thus, we conclude that the form of the document, (that is, a new document) does not preclude us from considering its substance, which comprises facts made available to the investigating authority during the investigation. There is in our view no basis for excluding the document from consideration in this proceeding, and we therefore deny India's request.[326]

Subsequent Panels have adopted a similar distinction, but not always with very consistent results. The Panel in *US – Softwood Lumber V*, for example, excluded a regression analysis based on data that were before the investigating authority because it considered that such an analysis constituted new evidence that went beyond a mere mechanical re-formatting of appropriately submitted facts:

> In our view, a regression analysis involves an analysis of data which could be done in many different ways, and the choices made may have a significant impact on the conclusions drawn. A regression analysis is not mere data which can be taken at face value. Rather, further clarification is required, and an evaluation must be made of the probative value of such an analysis in light of such factors as the data chosen, the precise methodology used and the variables selected. It is the role of an investigating authority to perform such an evaluation of the evidence placed before it, and the role of a panel to review whether the investigating authority's evaluation was proper in light of the standard of review set forth in Article 17.6(i) of the *AD Agreement*. For us to consider a regression analysis that was not placed before the investigating authority would require us to perform a *de novo* review rather than to determine whether the investigating authority's evaluation of the facts was proper. Thus, while a regression analysis may be based upon data which are 'evidence' before an investigating authority, we consider that the result of a regression analysis using those data is 'evidence' in its own right, distinct from the underlying data on which it is based.
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> Canada relies upon the panel report in *EC – Bed Linen* for the proposition that

[326] Panel Report, *EC – Bed Linen*, para. 6.43.

> Article 17.5(ii) does not preclude a panel from reviewing data which are presented to it in a different format than they were presented to the investigating authority. We note, however, that the exhibit at issue in that dispute was a recapitulative table of the declarations of support for the application received from other domestic EC producers. The exhibit was therefore a 'marshalling' of the already submitted evidence and *not* a manipulation thereof. It seems clear to us that that factual situation differs substantially from the facts of this case: the evidence at issue was before the investigating authority during the investigation itself, and the very same information was submitted to the panel in a different format only – nothing was added to it, nor was anything subtracted from it. It was therefore merely a 'mechanical' exercise. The same cannot be said of the evidence in Exhibit CDA-77 – we note that the memorandum by the consultant who developed the regression analysis explaining how Exhibit CDA-77 was developed, covers seven pages, explaining the methodologies employed and the different options used. This, in itself, confirms to us that Exhibit CDA-77 contains more than the mere data which were already before DOC. We are therefore of the view that Canada's reliance on *EC – Bed Linen* is misplaced.[327] (Footnotes omitted)

However, that same Panel accepted as evidence charts which were not before the investigating authority as such charts only 'display in graphical form data which was before DOC during the course of the investigation'.[328] It seems there is a thin line between evidence which is merely marshalling the already submitted evidence, and which can be taken into account by a Panel, and evidence which constitutes 'a manipulation of already submitted facts and evidence', on which the Panel would not be allowed to base its review if it wants to avoid a *de novo* review.[329]

The Panel in its report on *EC – Tube or Pipe Fittings*, for example, constructed the standard of review in Art. 17.6 AD to be irreconcilable with a *de novo* review of the record:

> In light of this standard of review, in examining the matter referred to us, we must evaluate whether the determination made by the European Communities is consistent with relevant provisions of the *Anti-Dumping Agreement*. We may and must find that it is consistent if we find that the European Communities investigating authority has properly established the facts and evaluated the facts in an unbiased and objective manner, *and* that the determination rests upon a 'permissible' interpretation of the relevant provisions. Our task is not to perform a *de novo* review of the information and evidence on the record of the underlying anti-dumping investi-

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327 Panel Report, *US – Softwood Lumber V*, paras 7.40–7.41.

328 Panel Report, *US – Softwood Lumber V*, para. 7.168.

329 The Panel in *US – Steel Plate*, for example, considered that an affidavit based on data that were before the authorities at the time of the investigation was acceptable as it did not constitute new information: 'What the affidavits do is present the information submitted in a different manner than originally submitted, and adjust and sort it in various ways.' Panel Report, *US – Steel Plate*, para. 7.13.

> gation, nor to substitute our judgment for that of the EC investigating authority even though we may have arrived at a different determination were we examining the record ourselves.[330] (Emphasis in the original)

Hence (the impossibility to conduct a) *de novo* review is, in a way, the boundary of a Panel's mandate when adjudicating a dispute under the AD Agreement. Within the boundary thus established, a Panel will evaluate whether facts were properly established, whether they were evaluated in an unbiased manner, and whether the overall conclusion reached rests on a permissible interpretation of the AD Agreement. The 'no *de novo* review' standard is not exclusive to WTO disputes involving the AD Agreement, but is the standard applied in all trade remedies-related cases, whether anti-dumping, countervail or safeguards.[331]

However, it is important to bear in mind that the obligation to refrain from a *de novo* review must not be read as allowing a Panel simply to accept without critical analysis the conclusions of the investigating authority. As the Appellate Body in its report on *US – Lamb* emphasized, the Article 11 DSU standard of review is neither *de novo* review nor total deference:

> 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. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate *only* if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.
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> In this respect, the phrase '*de novo* review' should not be used loosely. If a panel concludes that the competent authorities, in a particular case, have *not* provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a *de novo* review. Nor has that panel substituted its own conclusions for those of the competent authorities. Rather, the panel has, consistent with

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330 Panel Report, *EC – Tube or Pipe Fittings*, para. 7.6.

331 For example, the Appellate Body in *US – Countervailing Duty Investigation on DRAMS* faulted the Panel for not abiding by this standard and for having conducted a *de novo* review of the US CVD measure. Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras 182–90.

> its obligations under the DSU, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 of the *Agreement on Safeguards*.[332]

In its report on *US – Softwood Lumber VI (Article 21.5 – Canada)* the Appellate Body further explained that it is not the mere existence of plausible alternatives that renders the investigating authority's determination implausible. However, what a Panel is to do is to examine the authority's determination in light of these plausible alternatives rather than in the abstract. This does not imply, according to the Appellate Body, that Panels must reject the authority's explanation if it does not rebut the alternatives. What is important is that the investigating authority has taken account of and responded to plausible alternative explanations that were raised before it and that, having done so, the explanations provided by it in support of its determination remain 'reasoned and adequate'.[333]

(c) Reviewing an investigating authority's determination – neither *de novo* review, nor total deference

The *US – Softwood Lumber VI (Article 21.5, Canada)* case provides a good illustration of the standard of review to be applied by a Panel when reviewing an authority's determination. The Panel on *US – Softwood Lumber VI (Article 21.5 – Canada)* referred to the requirement to refrain from conducting a *de novo* review to justify its highly deferential review of a re-determination by the USITC of a threat of injury determination found to be inconsistent by the Panel in the original case. The Panel emphasized that the fact that an alternative explanation of the data was possible does *not* constitute a violation. It thus rejected Canada's claims because Canada had failed to demonstrate that an objective investigating authority *could not* have reached the conclusions reached by the USITC, finding that the USITC's determinations were *not unreasonable*. The Panel even went one step further and considered that the point is not to debate each aspect of the determination but rather to examine this determination as a whole:

> While Canada's arguments demonstrate that there is a plausible alternative line of reasoning that could be followed, under the standard of review applicable in this case, this is not sufficient for us to find a violation. Moreover, we consider that while it may be possible to debate each aspect of the USITC determination, and come to different conclusions depending on the starting point and focus of each line of argument and analysis, our obligation is to consider whether the USITC's reason-

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332 Appellate Body Report, *US – Lamb*, paras 106–7.

333 Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 117, footnote 176.

> ing and conclusion as set forth in its determination were those of an objective decision maker in light of the facts, and not whether every possible argument is resolved in favour of that determination.[334]

Under the guise of the 'no *de novo* review' mantra, the Panel in this case fell into the opposite trap of showing total deference to the investigating authority. Such was the view of the Appellate Body which in unequivocal terms faulted the Panel for what it considered to be a clear legal error and failure to conduct an objective assessment as required by Article 11 DSU. The Appellate Body first explained what it considers to be the Panel's obligation under Article 11 DSU when reviewing a determination of an investigating authority:

> We begin our analysis with an examination of the requirements of Article 11 of the DSU in the context of the review by a panel of determinations made by investigating authorities. As Canada's appeal is primarily focused on the Panel's examination of how the USITC treated the evidence before it, we examine first the duties that apply to panels in their review of the *factual components* of the findings made by investigating authorities. The Appellate Body has considered these duties on several previous occasions.[335] It is well established that a panel must neither conduct a *de novo* review nor simply defer to the conclusions of the national authority. A panel's examination of those conclusions must be critical and searching, and be based on the information contained in the record and the explanations given by the authority in its published report. A panel must examine whether, in the light of the evidence

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[334] Panel Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 7.35. Also see Panel Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 7.56:

> Overall, it seems clear to us that Canada has presented a reasoned alternative interpretation of the evidence in the record. However, Canada has failed to demonstrate that the USITC's analysis and determination that imports were likely to increase substantially, taken as a whole and considered in light of the approach taken by the USITC in its analysis and determination, is not one that could be reached by an objective and unbiased investigating authority. This is particularly the case because Canada's arguments largely present an alternative, different interpretation of the evidence before the USITC. This is not, however, sufficient to demonstrate error in the interpretation on which the USITC actually based its decision, which relied in major part on the background and context of the poor financial performance of the domestic industry caused by low prices, the significant volume and increases of imports, and the substantial portion of apparent US consumption accounted for by those imports, during the period of investigation.

[335] See Appellate Body Report, *Argentina – Footwear (EC)*, paras 119–21; Appellate Body Report, *US – Cotton Yarn*, paras 74–8; Appellate Body Report, *US – Countervailing Duty Investigation on DRAMS*, paras 183 and 186–8; Appellate Body Report, *US – Hot-Rolled Steel*, para. 55; Appellate Body Report, *US – Lamb*, paras 101 and 105–8; Appellate Body Report, *US – Steel Safeguards*, para. 299; and Appellate Body Report, *US – Wheat Gluten*, paras 160–61.

> on the record, the conclusions reached by the investigating authority are reasoned and adequate. What is 'adequate' will inevitably depend on the facts and circumstances of the case and the particular claims made, but several general lines of inquiry are likely to be relevant. The panel's scrutiny should test whether the reasoning of the authority is coherent and internally consistent. The panel must undertake an in-depth examination of whether the explanations given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to support the inferences made and conclusions reached by it. The panel must examine whether the explanations provided demonstrate that the investigating authority took proper account of the complexities of the data before it, and that it explained why it rejected or discounted alternative explanations and interpretations of the record evidence. A panel must be open to the possibility that the explanations given by the authority are not reasoned or adequate in the light of other plausible alternative explanations, and must take care not to assume itself the role of initial trier of facts, nor to be passive by 'simply *accept[ing]* the conclusions of the competent authorities'.[336]

The Appellate Body then came to the conclusion that the Panel had failed to abide by this standard of review for the following reasons:

> In sum, the Panel's analysis, viewed as a whole, reveals a number of serious infirmities in the standard of review that it articulated and applied in assessing the consistency of the Section 129 Determination with Articles 3.5 and 3.7 of the *Anti-Dumping Agreement* and Articles 15.5 and 15.7 of the *SCM Agreement*. First, the Panel's repeated reliance on the test that Canada had *not* demonstrated that an objective and unbiased authority 'could not' have reached the conclusion that the USITC did, is at odds with the standard of review that has been articulated by the Appellate Body in previous reports. As we noted earlier, the standard applied by the Panel imposes an undue burden on the complaining party. Secondly, the 'not unreasonable' standard employed by the Panel at various reprises is also inconsistent with the standard of review that has been articulated by the Appellate Body in previous reports, and it is even more so for ultimate findings as opposed to intermediate inferences made from particular pieces of evidence. Thirdly, the Panel did not conduct a critical and searching analysis of the USITC's findings in order to test whether they were properly supported by evidence on the record and were 'reasoned and adequate' in the light of alternative explanations of that evidence. Fourthly, the Panel failed to conduct an analysis of whether the totality of the factors and evidence considered by the USITC supported the ultimate finding of a threat of material injury.[337]

(d) Proper establishment of facts

Under this heading, a Panel will review whether an investigating authority has properly established the factual record before it. In practice, this amounts to

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336 Appellate Body Report, *US – Lamb*, para. 106 (original emphasis).

337 Appellate Body Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 138.

examining whether it has diligently assembled the facts; in other words, a reasonableness test is applicable in this context. This conclusion seems warranted in light of the fact that Panels will not engage in a *de novo* review, that is, they do not understand their task as if they were to re-open the investigation process and redo the whole procedure, substituting thus their judgment to that of the investigating authority. The Panel in *US – Hot-Rolled Steel* expressed the requirement to examine whether the facts were properly established and evaluated in an unbiased and objective manner as required by Article 17.6 (i) AD Agreement in the following manner:

> The question of whether the establishment of facts was proper does not, in our view, involve the question whether all relevant facts were considered including those that might detract from an affirmative determination. Whether the facts were properly established involves determining whether the investigating authorities collected relevant and reliable information concerning the issue to be decided – it essentially goes to the investigative process. Then, assuming that the establishment of the facts with regard to a particular claim was proper, we consider whether, based on the evidence before the US investigating authorities at the time of the determination, an unbiased and objective investigating authority evaluating that evidence could have reached the conclusions that the US investigating authorities reached on the matter in question.[338] In this context, we consider whether all the evidence was considered, including facts which might detract from the decision actually reached by the investigating authorities.[339]

The whole of the record however, is not necessarily reflected in the various communications by the investigating authority: in accordance with Art. 12 AD, an investigating authority will be required to make public the essential elements only of the investigation which led it to its decision. As a result, it could be the case that an investigating authority disseminates less than the information that it used to reach its conclusions. The question, consequently, may arise whether such non-disclosed information should be considered as being part of the record and, if so, under what conditions. Following mutually inconsistent case-law on this issue, the Panel, in its report on *EC – Tube or Pipe Fittings*, made the following distinction: facts which have not been

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[338] We note that this is the same standard as that applied by the Panel in *Mexico – Corn Syrup*, which, in considering whether the Mexican investigating authorities had acted consistently with Article 5.3 in determining that there was sufficient evidence to justify initiation, stated: 'Our approach in this dispute will . . . be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation.' Panel Report, *Mexico – Corn Syrup*, para. 7.95.

[339] Panel Report, *US – Hot-Rolled Steel*, para. 7.26.

submitted to the investigating authority are not properly before the Panel because of Art. 17.5 AD. However, facts which have not been disclosed by the investigating authority, but on which the authority at hand has relied to reach its decision can (and should) be reviewed by a WTO Panel. We quote from paras 35 and 45 of the report:

> Brazil argues that the information is 'the same' as information contained in the record of the underlying investigation. Brazil asserts that the information may be 're-formatted', and is unable to confirm whether or not the information was available in this format or in the same way at the time of the investigation. However, Brazil concedes that this information, as contained in these Exhibits, was not submitted to the European Communities during the investigation. We are therefore prevented by Article 17.5(ii) from considering these Exhibits in the context of our Article 3 examination and do not take them into account in our review of the EC determination. Brazil invoked the panel report in *US – Hot-Rolled Steel* to support its view that we would act with full authority in denying the EC request and admitting the Exhibits in question. However, that panel confronted different claims, additional to those dealing with the substance of the determination of the investigating authority under the provisions of the *Anti-Dumping Agreement*, including a claim under Article X:3 of the *GATT 1994*. That panel made it clear that the evidence to be considered in connection with the complaining party's Article X claim was not limited by the provisions of Article 17.5(ii) of the *Anti-Dumping Agreement*. By contrast, Brazil's claims (in this context) are limited to Articles 3.4 and 3.5 of the *Anti-Dumping Agreement*, and their factual basis is therefore delineated by Article 17.5(ii).
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> . . . The *Panel* notes that the information in Exhibit EC-12 was not disclosed in any form to the interested parties in the course of the investigation. We wish to emphasize that we deplore the fact that this information, or an accurate non-confidential summary of any confidential information contained therein, was not disclosed to interested parties during the investigation, and that the *fact* of consideration of the elements discussed in EC-12 is not directly discernible from the published documents. It was apparently entirely unfamiliar to Brazil prior to the submission by the European Communities of Exhibit EC-12 in conjunction with the EC first written submission in these Panel proceedings. However, we understand that, in assessing the European Communities' compliance with Article 3, Articles 17.5 and 17.6(i) of the *Anti-Dumping Agreement* require us to examine the facts available to the investigating authority of the importing Member. These provisions do not prevent us from examining facts that were confidential and/or not disclosed to, or discernible by, the interested parties at the time of the final determination. We are therefore *required* by the Agreement to take into account all information upon which the investigating authority relied in order to reach its final determination, whether or not this information forms part of the non-confidential or disclosed record of the investigation or whether its consideration can be discerned from the published documents. This necessarily includes the information contained in Exhibit EC-12. We are guided by the Appellate Body Report in *Thailand-H-Beams*.[340] We consider

[340] Appellate Body Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* ('*Thailand – H-*

> that this Appellate Body Report thoroughly addresses and resolves the issue that arises here and that we are permitted, indeed *required*, to take the contents of Exhibit EC-12 into account in our examination of Brazil's claims concerning the EC injury analysis under Article 3.4.[341] (Emphasis in the original)

On appeal, the AB upheld the Panel's approach in the following terms:

> We recently stated, in *EC – Bed Linen (Article 21.5 – India)*, that 'we "will not interfere lightly with [a] panel's exercise of its discretion" under Article 17.6(i) of the *Anti-Dumping Agreement*.'
> . . .
> we find that the Panel did not fail to assess whether the European Commission's establishment of the facts was proper under Article 17.6(i), and did not incorrectly interpret the requirements of Articles 3.1 and 3.4 of the *Anti-Dumping Agreement* by including Exhibit EC-12 within its assessment of the European Commission's evaluation of the injury factors listed in Article 3.4. (Italics in the original)[342]

(e) Permissible interpretations

We recall that Article 17.6 (ii) AD Agreement provides that in the case 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. The Panel Report on *US – Hot-Rolled Steel* took the view that,

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Beams'), WT/DS122/AB/R, adopted 5 April 2001, paras 107, 111 and 118. The Appellate Body stated: 'the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does not imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on all relevant reasoning and facts before it' (para. 111); and 'Articles 17.5 and 17.6(i) require a Panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a Panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination' (para. 118).

341 Panel Report, *EC – Tube or Pipe Fittings*, paras 7.35 and 7.45.

342 Appellate Body Report, *EC – Tube or Pipe Fittings*, paras 125 and 133. Horn and Mavroidis (2006) are critical of this finding. In their view, it was impossible for Brazil to know of the precise basis on which the European Community had based its findings. The existing publication requirements unless interpreted in light of their intended function can lead to important shortcomings. They advance the view that there should be a presumption that items reflected in the order imposing duties should be presumed to have been evaluated by the investigating authority. In the opposite case, an investigating authority should carry the burden to establish whether and how it took into account an item not figuring in the order.

in order to evaluate whether the interpretation reached is a permissible one, the starting point of the Panel's analysis should be the VCLT.[343]

On appeal, the AB confirmed the Panel's position. It took the position that, in principle, the two standards, the anti-dumping specific Article 17.6 AD standard and the generic Article 11 DSU standard, should not be viewed as being mutually exclusive (*inclusio unius, exclusio altrius*). To reach a conclusion whether more than one interpretation could be permissible, exhaustion of the interpretative elements reflected in the VCLT was the necessary first step:

> We turn now to Article 17.6(ii) of the *Anti-Dumping Agreement*. The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *Anti-Dumping Agreement* 'in accordance with customary rules of interpretation of public international law'. Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention*'). Clearly, 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*.
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> The *second* sentence of Article 17.6(ii) bears repeating in full: 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.
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> 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'.

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[343] Panel Report, *US – Hot-Rolled Steel*, para. 7.27:

> Thus, in considering those aspects of the US determination which stand or fall depending on the interpretation of the AD Agreement itself rather than or in addition to the analysis of facts, we first interpret the provisions of the AD Agreement. As the Appellate Body has repeatedly stated, panels are to consider the interpretation of the WTO Agreements, including the AD Agreement, in accordance with the principles set out in the Vienna Convention on the Law of Treaties (the 'Vienna Convention'). Thus, we look to the ordinary meaning of the provision in question, in its context, and in light of its object and purpose. Finally, we may consider the preparatory work (the negotiating history) of the provision, should this be necessary or appropriate in light of the conclusions we reach based on the text of the provision. We then evaluate whether the US interpretation is one that is 'permissible' in light of the customary rules of interpretation of international law. If so, we allow that interpretation to stand, and unless there is error in the subsequent analysis of the facts under that legal interpretation under the standard of review under Article 17.6(i), the challenged action is upheld.

> 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*. In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*. We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation 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.
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> We cannot, of course, examine here which provisions of the *Anti-Dumping Agreement* do admit of more than one 'permissible interpretation'. Those interpretive questions can only be addressed within the context of particular disputes, involving particular provisions of the *Anti-Dumping Agreement* invoked in particular claims, and after application of the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention*.
>
> Finally, although 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.[344] (Emphasis in the original)

Such pronouncements confirm the intuition that, probably, the most appropriate way to describe the standard of review embodied in Art. 17.6 AD is as a compulsory inclusion of the *in dubio mitius* maxim. This maxim, which is not enshrined in the VCLT but is a direct reflection of the sovereignty principle, suggests that, when in doubt, a court should presume absence of transfer of sovereignty to the international plane, rather than the opposite. The Panel report on *Argentina – Poultry Antidumping Duties*, for example, was requested to judge whether 46 per cent of all domestic producers should be considered as a *major proportion of the total domestic production*, in accordance with Art. 4.1 AD. Without delving too much into a thorough discussion of this issue, the

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[344] Appellate Body Report, *US – Hot-Rolled Steel*, paras 57–62. Also see, *inter alia*, *US – Stainless Steel*, para. 6.4; Panel Report, *US – Steel Plate*, para. 7.5.

Panel accepted that this is indeed a permissible interpretation of the term.[345] In other words, following exhaustion of the elements enshrined in the VCLT, and absent a clear case of a unique interpretation as the only tenable interpretation, Panels, when adjudicating disputes in the AD context, will accept as lawful any interpretation which satisfies a reasonableness-test.

H PROVISIONS SPECIFIC TO DEVELOPING COUNTRIES

Unlike many other WTO Agreements, the Anti-Dumping Agreement does not provide for any real special and differential treatment provisions for developing countries. The fairly generally worded Article 15 is the only provision that deals with anti-dumping action taken by developed countries against developing countries. Art. 15 AD reads:

> It is recognized that special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures under this Agreement. Possibilities of constructive remedies provided for by this Agreement shall be explored before applying anti-dumping duties where they would affect the essential interests of developing country Members.

So the obligation is to give special regard to the situation of developing countries when considering the application of an anti-dumping measure. In concrete terms, the second sentence of Article 15 translates this requirement into an obligation to explore the possibility of constructive remedies. Note that the obligation applies only to developed countries, and no similar obligations exists when developing countries are considering an anti-dumping measure against other developing countries.[346]

1 What are Constructive Remedies?

The Panel in its report on *EC – Bed Linen* stated clearly that constructive remedies have to be read by reference to the remedies provided for in the AD Agreement itself. It thus concluded that price undertakings and the application of the lesser duty rule were two such constructive remedies:

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345 Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.341.

346 Which actually constitutes the large majority of the cases, as we showed in our introductory statistical overview.

> We cannot come to any conclusions as to what might be encompassed by the phrase 'constructive remedies provided for under this Agreement' – that is, means of counteracting the effects of injurious dumping – except by reference to the Agreement itself. The Agreement provides for the imposition of anti-dumping duties, either in the full amount of the dumping margin, or desirably, in a lesser amount, or the acceptance of price undertakings, as a means of resolving an anti-dumping investigation resulting in a final affirmative determination of dumping, injury, and causal link. Thus, in our view, imposition of a lesser duty, or a price undertaking would constitute 'constructive remedies' within the meaning of Article 15. We come to no conclusions as to what other actions might in addition be considered to constitute 'constructive remedies' under Article 15, as none have been proposed to us.[347]

This point was further clarified by the Panel in *EC – Tube or Pipe Fittings*. The Panel faced an argument by Brazil that the term *constructive remedies* could include remedies other than price undertakings, such as *quantitative undertakings*. The Panel rejected the argument by Brazil arguing that only remedies explicitly provided for in the AD Agreement could be considered to be constructive remedies in the Art. 15 AD sense of the term:

> We next examine Brazil's argument that there may be constructive remedies within the meaning of Article 15 other than 'lesser duty' and price undertakings. Brazil submits that the term 'constructive remedies' embraces undertakings other than price undertakings (for example, undertakings limiting the quantities to be exported to the European Communities, which Brazil asserts that the European Communities in practice accepts). Brazil therefore asserts that the European Communities failed to explore all the possibilities of constructive remedies by not considering undertakings other than price commitments. In the EC view, there is no need for the Panel to reach the issue of whether or not there may be other constructive remedies in addition to price undertakings or the application of the lesser duty rule. The European Communities assert that exploring other types of undertakings (other than price undertakings) is not a 'remedy' envisaged under the *Anti-Dumping Agreement*.
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> We do not agree with Brazil's assertion that the term 'constructive remedies' also embraces undertakings other than price undertakings (for example, undertakings limiting the quantities to be exported to the European Communities, which Brazil asserts that the European Communities in practice accepts) nor that 'any measure which would have a less restrictive impact than an anti-dumping duty should be allowed under Article 8'. In this context, we note that Article 8.1 also envisages the possibility that an exporter may undertake to 'cease exports to the area in question at dumped prices'. This provision refers specifically to an undertaking not to sell *at dumped prices*. It does not envisage a restraint on the quantity of the product exported. Furthermore, the title of Article 8 is 'Price Undertakings', rather than 'Undertakings', or 'Price or Other Undertakings'. These factors support our view that quantitative 'undertakings' are not a remedy foreseen in the *Anti-Dumping*

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347 Panel Report, *EC – Bed Linen*, para. 6.229.

> *Agreement*, and that Article 15 therefore does not impose any obligation to explore undertakings other than price undertakings in the case of developing country Members. Thus, we disagree with Brazil's argument that the *Anti-Dumping Agreement* 'does not prevent' WTO Members from accepting quantitative undertakings, tariff quotas or price quotas. We do not see such undertakings as remedies provided for by the Agreement and therefore do not consider that Article 15 *imposes an obligation* upon developed country Members to consider undertakings other than price undertakings.[348] (Italics in the original)

2 The Obligation to Explore Possibilities of Constructive Remedies in Article 15

Art. 15 AD does not request WTO Members to automatically apply constructive remedies when dumpers originate in a developing country. The Panel in its report on *US – Steel Plate* found that (para. 7.110a): 'the first sentence of Article 15 imposes no specific or general obligation on Members to undertake any particular action'. Rather, what is required is an obligation *to explore possibilities* of constructive remedies. Building on the finding of the Panels in *US – Steel Plate* and *EC – Bed Linen*, the Panel in its report on *EC – Tube or Pipe Fittings* understood the obligation imposed by virtue of Art. 15 AD on WTO Members in the following terms:

> We agree with Brazil that there is no requirement for any specific outcome set out in the first sentence of Article 15. We are furthermore of the view that, even assuming that the first sentence of Article 15 imposes a general obligation on Members, it clearly contains no operational language delineating the precise extent or nature of that obligation or requiring a developed country Member to undertake any specific action. The second sentence serves to provide operational indications as to the nature of the specific action required. Fulfilment of the obligations in the second sentence of Article 15 would therefore necessarily, in our view, constitute fulfilment of any general obligation that might arguably be contained in the first sentence. We do not see this as a 'reduction' of the first sentence into the second sentence, as suggested to us by Brazil. Rather the second sentence articulates certain operational modalities of the first sentence.
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> . . .
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> At this point in our analysis, it is sufficient for us to endorse the shared view of both parties that the imposition of a 'lesser duty' or a price undertaking would constitute 'constructive remedies' within the meaning of Article 15. As to the meaning of the requirement to 'explore' possibilities of constructive remedies, we also support the shared view of the parties that this obligation is affirmatively to 'explore' the possi-

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348 Panel Report, *EC – Tube or Pipe Fittings*, paras 7.77–7.78. The Panel on *US – Steel Plate* considered that the choice of a different methodology for calculating a dumping margin in the case of companies from developing countries was not such a constructive remedy. See Panel Report *US – Steel Plate*, para. 7.112.

> bility of – rather than affirmatively to 'propose' – constructive remedies. We believe that the concept of 'explore' cannot be understood to require any particular outcome with respect to the substantive decision that results from the exploration. We draw support for this point of view from the *EC-Bed Linen* panel report, which stated that:
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> > Article 15 does not require that 'constructive remedies' must be explored, but rather that the 'possibilities' of such remedies must be explored, which further suggests that the exploration may conclude that no possibilities exist, or that no constructive remedies are possible, in the particular circumstances of a given case. Taken in its context, however, and in light of the object and purpose of Article 15, we do consider that the 'exploration' of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome. Thus, in our view, Article 15 imposes no obligation to actually provide or accept any constructive remedy that may be identified and/or offered. It does, however, impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.[349]

This report thus also considered the *lesser duty rule* next to *price undertakings* as possible constructive remedies.[350] It re-affirmed, however, that there is no obligation other than to explore the possibility of implementing such remedies. The concept of 'explore' cannot be understood to require any particular outcome, either with respect to the substantive decision that results from the exploration, or with respect to any record of that exploration of the resulting decision. Nevertheless, and in spite of the very loose obligation on investigating authorities, the Panel in *EC – Bed Linen* came to the conclusion that the

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[349] Panel Report, *EC – Tube or Pipe Fittings*, paras 7.68 and 7.72. Also see Panel Report, *US – Steel Plate*, para. 7.114.

[350] With regard to the lesser duty rule as a constructive remedy, the Panel in *US – Steel Plate* rejected the idea that a Member which does not have a lesser duty rule in its domestic legislation should somehow be compelled to explore this possibility when applying duties to developing countries:

> India suggests that the USDOC should have considered applying a lesser duty in this case, despite the fact that US law does not provide for application of a lesser duty in any case. We note that consideration and application of a lesser duty is deemed desirable by Article 9.1 of the AD Agreement, but is not mandatory. Therefore, a Member is not obligated to have the possibility of a lesser duty in its domestic legislation. We do not consider that the second sentence of Article 15 can be understood to require a Member to consider an action that is not required by the WTO Agreement and is not provided for under its own municipal law.

Panel Report, *US – Steel Plate*, para. 7.116.

EC had failed to comply with the obligation of Article 15 to explore the possibilities of constructive remedies. The fact that the EC, although price undertakings were offered by the Indian companies investigated, simply rejected these offered undertakings out of hand was considered inconsistent with the obligation under Article 15:

> It is these facts which we must evaluate to determine whether the European Communities gave adequate consideration to, that is 'explored', the possibility of entering into an undertaking with the Indian producers. As noted above, while the obligation is on the European Communities to explore possibilities, we do not consider that this entails acceptance of any particular offer that might be made. In this case, it is clear to us that no formal proposal of a price undertaking was made. However, in light of the expressed desire of the Indian producers to offer undertakings, we consider that the European Communities should have made some response upon receipt of the letter from counsel for Texprocil dated 13 October 1997. The rejection expressed in the European Communities' letter of 22 October 1997 does not, in our view, indicate that the possibility of an undertaking was explored, but rather that the possibility was rejected out of hand. We cannot conclude, based on these facts, that the European Communities explored the possibilities of constructive remedies prior to imposing anti-dumping duties. In our view, the European Communities simply did nothing different in this case, than it would have done in any other anti-dumping proceeding – there was no notice or information concerning the opportunities for exploration of possibilities of constructive remedies given to the Indian parties, nothing that would demonstrate that the European Communities actively undertook the obligation imposed by Article 15 of the AD Agreement. Pure passivity is not sufficient, in our view, to satisfy the obligation to 'explore' possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned. Thus, we consider that the failure of the European Communities to respond in some fashion other than bare rejection, *particularly once the desire to offer undertakings had been communicated to it*, constituted a failure to 'explore possibilities of constructive remedies', and therefore conclude that the European Communities failed to act consistently with its obligations under Article 15 of the AD Agreement.[351]

In sum, when examining a claim under Article 15, Panels will examine whether the authorities actively considered with an open mind the possibility of constructive remedies. Finally, Panels have clarified that such an exploration is to be undertaken prior to the application of definitive anti-dumping duties. [352] In other words, there is no obligation to explore constructive remedies before the imposition of *provisional* measures.[353] While desirable, the

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351 Panel Report, *EC – Bed Linen*, para. 6.238.

352 Panel Report, *EC – Bed Linen*, para. 6.231.

353 Panel Report, *EC – Bed Linen*, para. 6.231; Panel Report, *EC – Tube or Pipe Fittings*, para. 7.82.

Panel in its report on *EC – Tube or Pipe Fittings* took the view that efforts to explore possibilities for constructive remedies do not have to be made publicly available by appearing in the final Order imposing AD duties.[354]

[354] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.424:

> While it would certainly be desirable for an investigating authority to set out steps it has taken with a view to exploring possibilities of constructive remedies, such exploration is not a matter on which a factual or legal determination must necessarily be made since, at most, it might lead to the imposition of remedies other than anti-dumping duties.

5. Conclusions

The WTO AD Agreement is an incomplete contract, in the sense that a lot of information necessary for the functioning of the contract is itself missing. Panels and the Appellate Body have through their case-law completed the missing information. To do that, they adopted a very careful approach, in the sense that they limited themselves to sources of law that somehow enjoy a 'multilateral approval'. This is how we explain, for example, the recourse to ADP recommendations on various issues regarding the POI. This is a highly commendable attitude, since ADP recommendations enjoy a degree of legitimacy (institutional recognition) that unilateral state practice does not. It is also an act of courage since, at this stage, there is still ambiguity as to the legal status of such acts: in the absence of a clear decision on their status in WTO primary law, the WTO adjudicating bodies has preferred to adopt a cautious case-by-case attitude in this context.

On the other hand, the AD Agreement contains substantial ambiguity. Its expressions are often very unclear and the relationship among the various provisions equally hazy. Recall, for example, our discussion on the relationship between Arts 6.10, 9.4 and 9.5 AD, or the conditions under which legitimate recourse to price construction can be made. In such cases, the attitude of Panels especially has been markedly pro-investigating authority. Panels have not been innocent bystanders, they have moved to clarify the embedded ambiguity; they have almost always done that in a manner that does not prejudge the discretion of investigating authorities. They did so even when the AB had instructed them to do the opposite, as the case-law on zeroing amply proves.

What is the outcome of all this? A contract which makes little (if any) economic sense has been interpreted in a manner that allows investigating authorities to abuse it even more. For the heart of the problem lies in the law itself and not in its interpretation, as the introductory remarks to this chapter aimed to demonstrate. As we write, there are ongoing negotiations aimed at tightening the screws a bit more (a process that has been going on at a very very slow pace since the *Kennedy round* AD Agreement was adopted). In what follows, we propose our own inventory of action in this context.

It is often said that anti-dumping measures are rare. This is not true: a simple count of the tariff lines involved in anti-dumping cases suggests that in the EC case, 5 per cent of tariff lines are under some kind of anti-dumping

coverage. In fact, worries are on the rise, with six new heavy users (all large export markets for the EC producers) of the anti-dumping instrument: Argentina, Brazil, India, Mexico, South Africa and Turkey (with China possibly becoming a member of the club). There is thus urgency to act.

A ACTIONS IN THE SHORT TERM

It is remarkable that anti-dumping policy does not even target dumping practices. It relies on procedures so strongly biased against foreign exporters that it catches many pricing policies having little to do with dumping (but rather reflecting healthy competitive behaviour) and it does not necessarily catch all possible dumping practices. That anti-dumping procedures leave very few chances to defending firms is reflected by the very high ratio of dumping cases ending up with protectionist measures: 62 per cent (US) and 70 per cent (EC) of all the cases initiated during the 1980s and early 1990s (and these figures are systematic underestimates to the extent that they do not include withdrawn complaints which may be private agreements between withdrawing plaintiffs and defending firms).

Limiting the most blatant of these biases could be done in the short run. It could be done unilaterally by the EC (or jointly by a group of WTO Members) along the following set of suggestions:

1. dumping should be the principal cause of material injury;
2. double protection (for instance, anti-dumping measures imposed on the top of quantitative restrictions) should not be allowed;
3. measures should last five years at most (implying stronger limits to review);
4. repeated initiations in a short period of time should not be allowed;
5. cumulation of imports from different countries should be banned or severely restricted, unless they come from the same firms or from the subsidiaries of the same firms;
6. aggregating products under the 'one single product' procedure should be severely restricted;
7. all zeroing practices (only export transactions that have been found dumped are used to calculate dumping margins) should be banned (all export transactions should be included in the investigation);
8. the anti-dumping authorities should produce short disclosure documents;
9. the use of the *de minimis rule* should be expanded in an economically sound way.
10. An interesting feature of this set of suggestions is that it can be shared by places such as Hong Kong, Japan or Chile.

B ACTION IN THE MEDIUM RUN

Anti-dumping measures are disguised safeguard measures. Anti-dumping, anti-subsidy safeguards are alternative instruments giving relief from import competition, with anti-dumping clearly favoured by complainants for purely procedural (economically unsound) reasons. The medium-term goal should be a single reformed safeguard procedure that would satisfy governments under protectionist pressure, but would be temporary (say, a maximum four years, as at present) and non-renewable (at present they are renewable once). Beyond the duration of the safeguard action, in order to continue to protect a particular sector, the government would have to seek renegotiation of the country's existing commitments under GATT Article XXI. One step in this direction would be to limit anti-dumping duties to four years and to stipulate that any continuation of the sectoral protection be effected through a non-renewable safeguard action.

The linkage between them strongly implies that anti-dumping, anti-subsidy and safeguard measures should be handled in a single negotiating group in the next round of multilateral negotiations.

Anti-dumping could take, as often as possible, the form of negotiated 'quantitative thresholds' (Messerlin 2000a). WTO Members could agree that no anti-dumping measure should be imposed in cases where the level of injury losses is less than an agreed threshold of the complainants' revenues for the year(s) used as the reference (pre-dumping) period. An approach based on quantitative thresholds is conceptually equivalent to tariffication. It tends to give a sense of the magnitude of the concessions granted by both sides, bringing anti-dumping more in line with the usual WTO negotiating techniques. It is also flexible enough to permit incremental reforms, to deliver the progressive liberalization that WTO Members are looking for, through progressive increases in the thresholds. This would avoid the current deadlock of binary choices between fully enforcing anti-dumping regulations and rejecting them totally.

C ANTI-DUMPING AS A SAFEGUARD

Putting anti-dumping and safeguards on a par would make a lot of sense from the perspective of the global WTO architecture. Most WTO Members use anti-dumping measures as a substitute for safeguard actions for dealing with industries in difficulty. The transitional product-specific safeguard provision strengthens China's stake in seeking substantial improvement in the whole WTO contingent protection regime – both anti-dumping and safeguards. During the Doha Round, China could try to expand the negotiations

on anti-dumping to safeguards (so far not explicitly included in the Doha negotiating programme) in order to make the entire contingent protection regime of the WTO more consistent.

One promising approach would be to tie together the concept of temporary protection embedded in safeguards and the basic concept of renegotiation under GATT Article XXVIII (Messerlin 2000a). Thus, for instance, at the end of the second period of enforcing a safeguard measure under the current safeguards agreement (based on GATT Article XIX), the country would be required either to renegotiate the tariff on the product subjected to safeguard measures or to eliminate the safeguard measure (shifting to anti-dumping or other trade remedies should be prohibited, in recognition that all instruments of contingent protection are substitutable). This mandatory aspect would help to change safeguard and anti-dumping procedures back to the transitory protection they were meant to be instead of the permanent protection they have become.

Can we be optimistic about meaningful reforms? A positive answer would logically require that the domestic interests that are hurt by foreign anti-dumping measures are smaller than the interests that benefit from anti-dumping protection. This reflects the well-known economic proposition that views protection more as a conflict between domestic export interests and import-competing interests than as a conflict between countries. To capture this aspect, the number of foreign anti-dumping measures in force against the exports of a top user should be adjusted by the size of the country's exports (See Table 1.1 on p. 4). These trade-adjusted measures mirror the intensity of foreign pressures imposed on the export interests of a country, thus giving an indication of the incentives of these export interests to contribute to the opening of domestic markets. These numbers can then be compared with the trade-adjusted anti-dumping measures in force by the country in question, which can be interpreted as an indication of the strength of the incentives of import-competing interests to induce their government to use anti-dumping. The observed imbalance between export interests and import-competing anti-dumping beneficiaries in the top twelve anti-dumping users – with the exceptions of China and Korea – suggests that it is unlikely that domestic coalitions in these key users, which are also key WTO players, are strong enough to support anti-dumping reforms in the WTO.

China could probably play a key role in this context, for it is at a crossroads. One road leads to more intensive use of anti-dumping for several reasons: as a retaliatory instrument against foreign anti-dumping, as a tool for China's progressive integration into the worldwide collusive dimension of anti-dumping (used as an instrument for segmenting world markets for the benefit of large firms) and as a back-door entry to old-fashioned protection, even at the risk of unravelling its scheduled trade liberalization. Another road leads to

a guiding role for China in arguing for stricter rules on the use of anti-dumping. As a small anti-dumping user and a key target of foreign anti-dumping, China will be one of the main beneficiaries of such a move, which will also help China negotiate an economically sound interpretation of the special provisions on anti-dumping and safeguards included in its WTO accession protocol. This new interpretation should be based on China meeting a few key and economically sound conditions: low tariffs, no core grey-area measures, no distribution monopolies. This interpretation is motivated by strong economic and political arguments. China and its trading partners have a common interest in establishing the strongest possible links between China's effective trade liberalization and agreement not to use these special provisions against Chinese exporters. This interpretation seeks to mobilize export interests in both China and the rest of the world to their mutual gain during the difficult implementation period of China's accession to the WTO.

PART II

Subsidies

In the next chapter, we will discuss a second type of contingent trade protection, countervailing duties. While countervailing duties is the term of art used in the WTO jargon, these measures are, to use the anti-*dumping* parallel, anti-*subsidy* measures. An importing country which establishes that imported products which have been subsidized by the exporting country enter its market causing injury to the domestic producers of the like product, is allowed to take anti-subsidy action to protect its own domestic industry. Countervailing measures are thus unilaterally imposed by the importing country following an investigation into the conditions for imposition of such measures. As we will discuss later, the WTO Agreement on Subsidies and Countervailing Measures (the 'SCM Agreement'), which disciplines both the *use of* subsidies and the possible unilateral *reaction against* subsidies, also provides for another, multilateral avenue using the WTO's dispute settlement mechanism.

6. General introduction to the agreement on subsidies and countervailing measures: 'thou shall not subsidize'

It is important to look at the economic analysis of subsidies – because it is often misrepresented or misunderstood – before introducing the GATT and WTO approaches. The economic views change substantially when export subsidies or production subsidies are examined.

A EXPORT SUBSIDIES

Economic analysis makes a clear distinction between export and production subsidies. It shows that export subsidies have a net negative welfare impact on the *subsidizing* country that is symmetrical to the one imposed by tariffs. Export subsidies induce the producers of the subsidizing country to produce 'too much' (more than they would do if only relying on their economic advantages) and they induce the consumers of the subsidizing country to consume 'too little' of the domestic product (less than in case of no export subsidy). This second effect is often neglected by policy makers. It is caused by the fact that, if the domestic price of the subsidized product does not match the domestic producers' revenue on the world market, these domestic producers would sell their whole output on the world market. In order to avoid such a situation, the domestic price of the subsidized product has to match the world price plus the export subsidy that constitutes the domestic producers' revenue on the world market; hence, it has to increase, reducing by the same token domestic demand. In sum, like tariffs, export subsidies hurt both sides (producers and consumers) of the domestic market in question. Note that economic analysis focuses on the welfare of the subsidizing country, not on the welfare of the trading partners of this country.

Turning to the trading partners' welfare (which is the focus of the WTO) two basic situations can be analysed. In the simplest case of an exporting country too small to influence world prices, its subsidized exports, having no impact on the world price of the product in question, have no impact on the welfare of its trading partners (but these exports may displace exporters of the

product from other countries). In a less extreme case, the subsidized exports may depress the price of the product in the export market, hence subsidizing *foreign* consumers while forcing (some) firms in the importing country to adjust to the price decrease (see Chapter 14). As a result, many economists have made the point that, instead of imposing countervailing measures, governments affected by foreign subsidies should be sending a 'thank you note' to the subsidizing government. Interestingly, the Treaty of Rome (1956) is much more in tune with economic analysis. On the one hand, it bans countervailing measures imposed by importing Member states (an approach consistent with the 'thank you note'). On the other hand, it allows complaints from the Member state(s) concerned, combined with an assessment of the Commission that may ultimately lead to the elimination of the subsidy by the subsidizing Member state – a recognition that subsidizing hurts the subsidizing country.

B PRODUCTION AND OTHER SUBSIDIES

Economic analysis has a much more nuanced approach of production subsidies which, often in practice, constitute the preferred instrument of industrial policy in most countries.[1] It shows that such subsidies are not as distorting as tariffs because they affect only the producers' side of the market, not the consumers' side (consumers may continue to buy the product at the world price, if there is no tariff on the product in question). Moreover, market failures or distortions may require some collective action. For instance, firms unable to take into account the social benefits associated with their production produce less than they should do. In such a case, a production subsidy *could* be a solution.

'Could' is a term on which to insist. A production subsidy could be less efficient for addressing the problem than another instrument, for instance a subsidy granted to a factor of production in short supply, or an appropriate regulation shaping more clearly the property rights of the various operators involved in the issue at stake, or a collective (not necessarily government-sponsored or initiated) behaviour among the interested operators in order to address an externality. A wise economic policy should thus list the instruments which could address the problem at stake, and then carefully choose the instrument ensuring most surely the achievement of the target and having the best cost–benefit ratio (Bhagwati and Ramasawmi, 1963). This conclusion is, to a large extent, a mere generalization of what makes a production subsidy supe-

[1] See Grossman and Helpman (2001).

rior to a tariff. A tariff could be seen as a production subsidy since it raises the domestic price, hence generating incentives to increase domestic production. But it has two limits in doing this: it does not necessarily address the key obstacle to a larger production (which may be due to factors not under the direct influence of the firms) and, as said above, it lessens the consumers' welfare.

That said, the fact remains that economic analysis has a relatively benevolent, though cautious, approach of subsidies (excluding export subsidies). This traditional approach is reinforced if one takes into account the political economy arguments presented in detail in the introduction to Chapter 14. In short, over-disciplining subsidies in the WTO context might make WTO Members reluctant to make tariff commitments in the first place (Bagwell and Staiger, 1995).

This benevolent approach deserves three remarks. Firstly, in the 1980s, the so-called 'strategic trade theory' has shifted the pendulum somewhat towards more active subsidizing policies.[2] However, the pendulum has quickly come back to the traditional (more cautious) economic stance, and it is important to understand the reason for such an evolution. The strategic trade theory focuses on markets under imperfect competition. Such markets tend, by nature, to offer more opportunities than firms – if left alone – are prepared to grab, hence the need for active public policies supporting firms' strategies. However, the strategic trade theory also shows that markets under imperfect competition are extremely sensitive to detailed features. For instance, a domestic firm may have a pessimistic or an optimistic assessment of the foreign firm's reactions to its own strategy in the world market. In the former case, the strategic trade theory suggests granting an export subsidy (the firm underestimates the opportunities offered by the market) or to introduce some regulation with equivalent effect. But, in the latter case, the strategic trade theory would suggest imposing an export tax (the firm overestimates the market opportunities) or some equivalent measure. In short, the correct interpretation of the strategic trade theory requires a dose of information that governments rarely enjoy (in our example, the government should know whether the domestic firm has an optimistic or pessimistic view of the world). As a result, the lessons from the strategic trade theory seem very difficult to implement. In such a case, the best policy is not to act (except when one is sure of having all the right information, an exceptional situation) since the benefits from not adopting ill-conceived measures may be greater than the losses from not adopting well-conceived measures – a bottom line echoing the lessons from many industrial policies of the 1970s and 1980s.

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[2] See Krugman (1983) and D'Andrea Tyson (1992).

Secondly, the benevolent attitude of economic analysis vis-à-vis subsidies should take into account the 'transparency' of the instruments. Tariffs (especially if *ad valorem*) are very transparent, contrary to subsidies. The lack of transparency on subsidies is not necessarily intentional. It derives from the difficulty of having an operational definition of subsidies, as best illustrated by the endless discussions on this topic. In this context, the crucial argument may be that most of the subsidies that have a significant impact on international trade are buttressed by barriers to imports (Snape 1987, 1991). In this sense, one may look at tariffs and subsidies as complements more than as substitutes (as is often the case).

Such an argument has an important operational consequence. It suggests that the best way to discipline subsidies is to reduce trade barriers, and that binding tariffs is the best proxy for binding subsidies. The Doha negotiations in agriculture offer a good illustration of this argument. Despite all the rethoric, farm subsidies will be very hard to bind in a serious way. There will remain a lot of water in the subsidy level, and a substantial degree of freedom to subsidize products, if only because subsidies are fungible and hard to monitor. What counts then is the tariff constraint: the lower the bound tariffs, the more costly subsidies will be (Messerlin 2007).

Finally, the above discussion on subsidies is crucial to offering an economically sound interpretation of the debate on 'policy space' which has dominated the Doha negotiations. Most supporters of the policy space notion from developing countries interpret this concept as consisting mostly of tariffs and other border measures, including export subsidies. Clearly, this interpretation is at odds with economic analysis. By contrast, economic analysis would tend to support 'policy space' if this term is defined as including production (and consumption) subsidies (and taxes) whether on goods, services or factors of production.

This shift from the border-related policy space to the 'behind-the-border' policy space is essential to provide the best environment for the debate on subsidies. For instance, the whole debate on the US, EU and Chinese subsidies on cotton to the detriment of Sub-Saharan African countries tends to focus on half of the problem, namely the constraint on and displacement of the African exports. But the second half of the question is: what would happen if, suddenly, the US, EU and Chinese subsidies were removed? The reaction of the Sub-Saharan African countries would then depend upon their behind-the-border policy, that is, their domestic policy space, defined in terms of financial support (subsidies) and/or in terms of regulatory support (that is, the best ways to connect African farmers to the world cotton markets).

What follows shows that, once again, the economic approach is notably different from the legal approach embodied in the WTO texts. Indeed, the WTO approach is, somewhat surprisingly, less open to the benevolent

economic analysis than the GATT used to be, with the 'gung ho' attitude of the WTO regime coming as a surprise.

C FROM THE GATT TO THE WTO

The attitude of the world trading system towards subsidies has not always been the same. The GATT followed a much more lenient approach on this score.[3] Some features remained the same: subsidies paid to domestic producers were (and continue to be) exempted from the national treatment obligation (Art. III.8(b) GATT); Art. VI GATT recognizes that subsidies may be a legitimate instrument of public policy, while also suggesting that their use in such a way as to cause material injury to trading interests of other WTO Members should be avoided; the same provision permits the unilateral remedy of countervailing duties against subsidized imports that cause material injury to the domestic industry (additional duties in excess of MFN bound rates) subject to certain conditions. The change comes with respect to export subsidies: Art. XVI GATT *discourages* the use of subsidies conditioned on exports ('export subsidies') or 'non-primary' products. The SCM Agreement *outlaws* them.

The subtlety with which the GATT framers dealt with subsidies reflects an understanding that they are an instrument of government policy in almost all, if not all, countries – indeed an instrument that is by no means necessarily economically inefficient (positive externalities and public goods, which are not internalized in market prices for particular products may justify subsidization, for example). At the same time, subsidies can also be seen as undermining the market access expectations that result from bargained tariffs and other trade concessions: bargaining down to a low tariff rate for, say, steel imports may be a pyrrhic victory if subsidies are granted in the importing country that are so high as to prevent any realistic possibility of import competition. In a nutshell, the GATT aimed to ensure that subsidies do not remove the incentive to make tariff concessions; the WTO went much further than that.[4]

The WTO regime takes issue with insights from economic theory and takes an unambiguous stance against subsidies.

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[3] For a comprehensive analysis, see Sykes (2003). See, also, Janow and Staiger (2003) on the same score. The more policy-type perspective of this issue is provided in an authoritative manner in Hoekman and Kostecki (2001) as well as Trebilcock and Howse (1999).

[4] According to Horlick and Clarke (1994) the SCM was possible thanks to a last minute compromise between the United States and the European Community who, following years of pursuing diametrically opposed opinions on this issue, enjoyed a period of *rapprochement* during the Clinton administration era.

Following the tradition inaugurated in previous rounds, the WTO Members negotiated during the Uruguay round an agreement on subsidies and countervailing measures. Contrary to past practices, however, the SCM is multilateral and thus binds all WTO Members. What drives the SCM is a common will (across WTO Members) to write an agreement which aims at promoting (short-term) producers' interests only. This is probably a useful rule of thumb that facilitates the understanding of its provisions.

In a nutshell, the SCM Agreement could be described as follows: the SCM Agreement embodies an uneasy compromise between different perspectives on subsidies, utilizing categories and concepts that (as will be seen) may not have any obvious economic or policy rationale, but instead reflect a difficult and in some respects incoherent political bargain. The SCM Agreement distinguishes between prohibited and actionable subsidies. A third category (non-actionable subsidies), which originally formed an integral part of the Agreement, as stated above, no longer exists. The SCM Agreement mentions by name the two prohibited subsidies: export subsidies and local content requirements; actionable subsidies are defined by default (any scheme which is a specific subsidy is actionable). There was initially room for three forms of subsidies (regional aid, environment, research and development) to be declared non-actionable (Art. 8 SCM). This provision was of a transitional character and WTO Members did not feel the need to keep it in place ad infinitum. The category of non-actionable subsidies of Article 8 SCM disappeared on 1 January 2000.

D UNILATERAL AND MULTILATERAL AVENUES FOR COUNTERACTING SUBSIDIES

The SCM Agreement offers two possibilities for counteracting subsidies: WTO Members can challenge the legality of the subsidization as such by bringing a complaint before the WTO or WTO Members can also, provided that the necessary institutional requirements are met, unilaterally impose countervailing duties (CVDs) against subsidies which injure their domestic industry producing the like product.

Hence the SCM Agreement provides for two *forms of relief*: a *multilateral* avenue, whereby a WTO Member will request the establishment of a Panel to adjudicate whether a particular subsidy programme is WTO-consistent or not; and a *unilateral* avenue, whereby a WTO Member, provided that it has respected the relevant conditions laid down in the SCM Agreement, can impose CVDs on subsidized imports.

As to the multilateral avenue, we should at the outset observe the following: faced with a finding that its scheme is a WTO-inconsistent subsidy, the

WTO Member concerned will have to bring its measures into compliance with the WTO. If it fails to do so, it might have to face countermeasures. Recourse to countermeasures, hence, is the *ultima ratio* of the multilateral avenue, the last resort to persuade a WTO Member to abandon its policies.

CVDs can only neutralize competitive effects of a subsidy in the domestic market; they cannot address or counter the competitive effect on the country's exports to a third country's market. The question arises whether the two forms of relief (that is, countermeasures and CVDs) can be used *simultaneously*. Footnote 35 to the SCM Agreement answers this question in the negative. It reads in pertinent part: 'however, with regard to the effects of a particular subsidy in the domestic market of the importing Member, only one form of relief (either a countervailing duty, if the requirements of Part V are met, or a countermeasure under Articles 4 or 7) shall be available'.

This provision, however, obliges WTO Members to choose one of the two avenues, but does not eliminate the choice itself. In other words, a WTO Member can choose whether to use the *multilateral* or the *unilateral* avenue, when it comes to addressing injury in its domestic market. Moreover, it obliges WTO Members to choose one of the two forms of relief only *with respect to injury in their domestic market*; this means that WTO Members can legitimately attack a subsidy by another WTO Member, by imposing CVDs to address injury in their domestic market (*unilateral* avenue), while pursuing the *multilateral* avenue to address injury suffered in their export markets.

Our focus for now will be on countervailing measures and we will examine, in this order, the conditions for imposition of such measures, their unilateral character and the procedural requirements for the investigation which are imposed by the SCM Agreement. Following a discussion of the WTO's countervailing measures regime, we will examine the multilateral avenue for dealing with subsidies under the WTO SCM Agreement.

7. Conditions for imposition of countervailing measures

Countervailing duty ('CVD') relief can be offered in case subsidized imports are causing injury to the domestic industry of the country of importation. In other words, for a CVD to be imposed, an investigation needs to establish the existence of (i) subsidized imports, (ii) injury to the domestic industry; and (iii) a causal link between the subsidized imports and the injury to the domestic industry. These conditions for imposition mirror those required for imposing anti-dumping measures. The obvious main difference is the fact that where, in anti-dumping, the dumping practice was the key, in an anti-subsidy action, it will be essential to demonstrate the existence of subsidization of the imported product. It is worth noting from the outset that the imports may well be subsidized and dumped at the same time. Depending on the kind of investigation initiated, the factual focus will be different, examining either subsidization or dumping. The two remaining conditions for imposition, injury to the domestic industry and the existence of the causal link between the (subsidized or dumped) imports are very similar, while not identical, in CVD and AD investigations.

A SUBSIDIZED IMPORTS

If there are no imports, or if it cannot be established that the targeted imported products have been subsidized, no countervailing duty can be imposed. A CVD measure thus stands or falls with the existence of a subsidy to the imported product. But what is a subsidy? The various GATT provisions dealing with subsidies, such as Articles III.8, VI or XVI talk about subsidies without providing an agreed definition of the term. Neither did the 1979 Tokyo Round Subsidies Code, entitled 'Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade'. While this Code for the first time elaborated on the obligations relating to the use of subsidies as well as the protective reaction against such subsidies, it did not set forth a definition of the term.[1]

[1] For an interesting description of the negotiating history of Article 1 and the

One of the most import innovations of the WTO SCM Agreement is that it for the first time provides a definition of a subsidy – a financial contribution which confers a benefit – as this term is to be understood in WTO parlance.[2] At the same time, it is worth noting that this definition did not come out of nowhere. Article 11.3 of the Tokyo Round Subsidies Code already referred to much the same practices which are now in the SCM Agreement grouped under the heading 'financial contribution'. The Tokyo Round Subsidies Code referred to these practices as 'subsidies' which may be 'granted with the aim of giving an advantage', or a 'benefit' to use the SCM jargon.[3]

Article 1 SCM Agreement defines a subsidy as a *financial contribution* by the government or a public body[4] that confers a *benefit*. In addition, the SCM Agreement states that a subsidy shall only be subject to the disciplines of the Agreement and may only be countervailed if the subsidy is *specific* to an enterprise or industry, or a group of enterprises or industries.[5] In sum, a financial contribution that does not confer a benefit is not a subsidy and neither is there a subsidy in the case where the government provides a benefit without making a financial contribution. The AB has made it clear that it sees 'the issues – and the respective definitions – of a "financial contribution" and a "benefit" as two separate legal elements in Article 1.1 of the *SCM Agreement*, which *together* determine whether a subsidy *exists*'.[6]

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change from the GATT Subsidies Code to the WTO SCM Agreement, see Panel Report, *US – Export Restraints*, paras 8.64–8.74.

[2] Bizarrely, rather than clarifying things, the introduction of this definition has given rise to a number of disputes involving subsidization. Where in the pre-WTO era, countries could not challenge the determination of a government practice as subsidization in the absence of an agreed definition of this term, a challenge of the existence of a subsidy is now standard procedure in any dispute concerning subsidization or the imposition of countervailing duties.

[3] Article 11.3 Tokyo Code provided as follows:

> Signatories recognize that the objectives mentioned in paragraph 1 above may be achieved, *inter alia*, by means of subsidies granted with the aim of giving an advantage to certain enterprises. Examples of possible forms of such subsidies are government financing of commercial enterprises, including grants, loans or guarantees; government provision or government financed provision of utility, supply distribution and other operational or support services or facilities; government financing of research and development programmes; fiscal incentives; and government subscription to, or provision of, equity capital.

[4] Or any kind of income or price support, Article 1.1 (a) (2) SCM Agreement.

[5] Article 1.2 and Article 2 SCM Agreement.

[6] AB Report, *Canada – Aircraft*, para. 157.

1 Financial Contribution by a Government or Public Body

According to the SCM Agreement, there are three types of financial contributions. The use of the abbreviation 'i.e.' in Article 1.1 (a) (1) SCM Agreement appears to imply that these are the only three types of government practices which may be considered to constitute a financial contribution. In other words, Article 1.1 SCM Agreement not only lists the three types of government involvement which, when conferring a benefit, shall be deemed to constitute subsidization, it also excludes from the scope of the Agreement all other government practices.[7]

The SCM Agreement considers that a financial contribution is provided by the government (i) in the case of a direct transfer of funds (such as grants, loans, and equity infusions) or a potential direct transfer of funds or liabilities (as in for example the case of a loan guarantee), (ii) when government revenue that is otherwise due is forgone or not collected (such as fiscal incentives in the form of tax credits); or (iii) in the case that the government provides goods or services other than general infrastructure, or when it purchases goods. In sum, a financial contribution exists when funds are provided by the government (either directly or indirectly through the provision of goods or services) or funds are not collected when due. According to the AB in *US – Softwood Lumber IV*, 'the concept of subsidy defined in Article 1 of the *SCM Agreement* captures situations in which something of economic value is transferred by a government to the advantage of a recipient'.[8] As the Panel in *US – Softwood Lumber III* noted, the term *financial* contribution in Article 1 SCM Agreement does not only refer to a money-transferring action, but encompasses as well an in-kind transfer of resources, such as goods or services which can be valued and which represent a value to the recipient:

> In other words, Article 1.1(a)(1) SCM Agreement provides that a *financial* contribution can exist not only when there is an act or an omission involving the transfer of money, but also in case goods or certain services are provided by the government. In short, Article 1.1(a)(1)(iii) SCM Agreement in its context and in light of its object and purpose establishes that a *financial* contribution also exists in case *goods* or *services* are provided which can be valued and which represent a value to the beneficiary in question. The word 'goods' in this context of 'goods or services' is intended to ensure that the term financial contribution is not interpreted to mean

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[7] See Panel Report, *US – Export Restraints*, para. 8.69. This is perhaps the important difference between the Tokyo Round Subsidies Code and the WTO SCM Agreement. Article 11.3 of the Tokyo Code provided that some of the government practices now listed under Article 1.1 (a) (1) financial contribution were some *examples* of possible forms of subsidies.

[8] AB Report, *US – Softwood Lumber IV*, para. 51.

> only a money-transferring action, but encompasses as well an in-kind transfer of resources, with the exception of general infrastructure.[9]

The list of Article 1 implies that other government practices which may well have an important effect on the market are not a financial contribution. In other words, even if such government practice would confer a benefit, they would not be considered to constitute a subsidy in the sense of the SCM Agreement. When a government has a law in place that exempts companies in, for example, the steel industry from certain environmental regulations (certain pollution standards for example), it may well be providing a benefit to the domestic industry, as it will allow these firms to save an important amount of money. However, if this does not entail the government forgoing revenue, such an exemption does not constitute a financial contribution. There is no subsidy. Similarly, the imposition by the government of an export restraint or an export tax, for example, may benefit domestic downstream producers as the suppliers of the taxed product may be inclined to sell their products to domestic downstream producers rather than exporting the product. The export restraint or tax may reduce the price of the good used as an input by downstream producers and may thus benefit these downstream producers. As the government is not providing funds, forgoing revenue which is due nor providing a good or service, it appears that an export ban or tax does not amount to a financial contribution in the sense of the SCM Agreement, and there will therefore be no subsidy to the downstream producers.[10] Generally speaking, so-called regulatory subsidies are thus not covered by the SCM Agreement. As the Panel in *US – Export Restraints* concluded on the basis of the negotiating history of Article 1 SCM Agreement, 'the introduction of the two-part definition of subsidy, consisting of "financial contribution" and "benefit", was intended specifically to prevent the countervailing of benefits from any sort of (formal, enforceable) government measures, by restricting to a finite list the kinds of government measures that would, if they conferred benefits, constitute subsidies'.[11] So, even if a government measure has an effect which is equivalent to that of a financial contribution as defined in Article 1 SCM Agreement and is thus functionally equivalent to what could be considered a subsidy, it will not be a subsidy unless the measure takes the form of a financial contribution as defined in Article 1.1 (a) SCM Agreement:

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[9] Panel Report, *US – Softwood Lumber III*, para. 7.24. Similar, Panel Report, *US – Softwood Lumber IV*, para. 7.26.

[10] This does not of course mean that such an export ban may not be incompatible with other GATT provisions such as Article XI, for example.

[11] Panel Report, *US – Export Restraints*, para. 8.73.

> In short, the negotiating history confirms that the introduction of the two-part definition of subsidy, consisting of 'financial contribution' and 'benefit', was intended specifically to prevent the countervailing of *benefits* from any sort of (formal, enforceable) government measures, by restricting to a finite list the *kinds* of government measures that would, if they conferred benefits, constitute subsidies. The negotiating history confirms that items (i)–(iii) of that list limit these kinds of measures to the transfer of economic resources from a government to a private entity. Under sub-paragraphs (i)–(iii), the government acting on its own behalf is effecting that transfer by directly providing something of value – either money, goods, or services – to a private entity.[12] Subparagraph (iv) ensures that the same kinds of *government* transfers of economic resources, when undertaken through explicit *delegation of those* functions to a private entity, do not thereby escape disciplines.
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> We recall our conclusion that sub-paragraph (iv), to fulfil this clearly-intended function as an anti-circumvention mechanism, cannot change (and in particular cannot expand beyond those actions identified in sub-paragraphs (i)–(iii)) the *nature* of the kinds of actions that can be considered financial contributions. If it did so, by allowing to be treated as financial contributions, on the basis of their *effects* on private entities, government measures such as export restraints that do *not* constitute government-entrusted or government-directed transfers of economic resources, the door would be reopened to the countervailing of *benefits* regardless of the nature of the government action that gave rise to them. This would effectively render the 'financial contribution' requirement meaningless, a result that would be at odds not only with the principles of effective treaty interpretation as discussed at length in the preceding sections, but also with the negotiating history of this requirement.[13]

(a) Financial contribution *sensu stricto* – direct or potential direct transfer of funds or liabilities

The first type of government practice considered to be a financial contribution is the government practice which involves a direct or potential direct transfer of funds or liabilities. Grants, loans, equity infusions, as well as loan guarantees, are examples of such transfers mentioned in the Agreement. The argument that such provisions of funds would only constitute a financial contribution in the case where funds were provided in the course of what could be considered to be normal government practices, such as the exercise of regulatory powers and taxation authority, was rejected by the Panel in *Korea – Commercial Vessels*.[14] According to the Panel in this case, the phrase 'govern-

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[12] As we have emphasized elsewhere, the question of the terms on which this is done is irrelevant to the existence of a financial contribution, and constitutes instead the separate question of 'benefit'. Nor, of course, do we mean to imply that for a government transfer of economic resources, to be a financial contribution, it would have to involve a cost to the government or a charge on the public account. This is clear from the text of the SCM Agreement as well as the relevant negotiating history cited above, and has been confirmed as well in past disputes (see below, p. 328).

[13] Panel Report, *US – Export Restraints*, paras 8.73–8.74.

[14] Korea asserted that even if a body is a public body, it does not make a financial contribution if it is not involved in a 'government practice'. Korea stated that the

ment practice' is used to denote the author of the action, rather than the nature of the action and thus covers all acts of governments or public bodies, irrespective of whether or not they involve the exercise of regulatory powers or taxation authority.[15]

(b) Financial contribution *by omission* – forgoing government revenue otherwise due

A financial contribution also exists when the government does not collect or in general forgoes revenue which is otherwise due, for example through fiscal incentives such as tax credits. But who determines which revenue the government is entitled to? In other words, when is government revenue 'otherwise due'? The WTO Agreements do not impose on WTO Member countries any particular taxation system, and countries did not make any commitments in this respect. Thus it could well be the case that the new government of country A decides to get rid of all taxes or decides to exempt certain types of incomes from taxes. It is clear that such tax regime changes could have a serious positive impact on the competitive relationship of producers from country A vis-à-vis their foreign competitors. Is such a change then necessarily the forgoing of government revenue, such that it constitutes a financial contribution, and thus possibly a subsidy?

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term 'government practice' means the exercise of government authority, e.g., regulatory powers and taxation authority. Korea argued that KEXIM, the Korean public body in question, was set up for the specific purpose of meeting needs of an industrial or commercial nature, i.e., activities involving the extension of financing facilities on markets where it competes with other public or private operators based on market-oriented principles. Korea argued that, in extending financing facilities KEXIM operates in a traditional banking capacity, performing functions normally performed by banks, not by governments. Panel Report, *Korea – Commercial Vessels*, paras 7.26–27.

[15] Panel Report, *Korea – Commercial Vessels*, para. 7.29:

> In our view, the phrase 'government practice' in Article 1.1(a)(1)(i) is simply a grammatical construction, or series of words, chosen because sub-paragraph (i) of Article 1.1(a)(1) could not have been drafted in the direct form. As such, it refers to cases ('practice') where governments or public bodies provide direct or potential direct transfers of funds. The phrase 'government practice' is therefore used to denote the author of the action, rather than the nature of the action. 'Government practice' therefore covers all acts of governments or public bodies, irrespective of whether or not they involve the exercise of regulatory powers or taxation authority. If the phrase 'government practice' fulfils the filtering role advocated by Korea, this phrase would presumably also have been included in sub-paragraphs (ii) and (iii) of Article 1.1(a)(1). In particular, we would have expected it to be included in sub-paragraph (iii), such that only the provision of goods and services pursuant to the exercise of regulatory powers or taxation authority would be covered by that provision. However, sub-paragraph (iii) is not drafted in this way. (Footnotes omitted)

In the *US – FSC* case, the AB for the first time addressed the problem of determining what constitutes revenue 'otherwise due'. The AB considered that the term 'otherwise due' implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. The basis for this comparison must be the tax rules applied by the Member in question. At the same time, the AB highlighted that a Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free *not* to tax any particular categories of revenues:[16]

> In our view, the '*foregoing*' of revenue '*otherwise* due' implies that less revenue has been raised by the government than would have been raised in a different situation, or, that is, 'otherwise'. Moreover, the word 'foregone' suggests that the government has given up an entitlement to raise revenue that it could 'otherwise' have raised. This cannot, however, be an entitlement in the abstract, because governments, in theory, could tax *all* revenues. There must, therefore, be some defined, normative benchmark against which a comparison can be made between the revenue actually raised and the revenue that would have been raised 'otherwise'. We, therefore, agree with the Panel that the term 'otherwise due' implies some kind of comparison between the revenues due under the contested measure and revenues that would be due in some other situation. We also agree with the Panel that the basis of comparison must be the tax rules applied by the Member in question. To accept the argument of the United States that the comparator in determining what is 'otherwise due' should be something other than the prevailing domestic standard of the Member in question would be to imply that WTO obligations somehow compel Members to choose a particular kind of tax system; this is not so. A Member, in principle, has the sovereign authority to tax any particular categories of revenue it wishes. It is also free *not* to tax any particular categories of revenues. But, in both instances, the Member must respect its WTO obligations.[17] What is 'otherwise due',

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[16] This does not mean that such decision not to tax certain revenues could not be considered as a form of subsidization, so the AB clarified in the *US – FSC (Article 21.5 – EC)* report. The AB underlined that Article 1 is merely a definition and does not contain any obligation, which implies that it considers that a Member is free to forgo revenue otherwise due, and is thus free to subsidize, as long as it complies with its obligations concerning subsidies as set forth in Articles 3 and 5 SCM Agreement. It seems, however, that what the Appellate Body is saying is that the benchmark is 'legitimately comparable income'; if a government exempts a particular category of income, then there is no financial contribution as the entire category of income is excluded. In other words, there is no revenue 'otherwise due', and there would be no subsidy. This is different from excluding a particular category of revenue for some producers or in certain circumstances only in which the revenue otherwise due would be foregone. Of course, it all depends on what you consider to be a 'particular category of income'.

[17] See *Japan – Taxes on Alcoholic Beverages* ('*Japan – Alcoholic Beverages*'), WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, p. 16, and *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R, adopted 12 January 2000, paras 59 and 60.

> therefore, depends on the rules of taxation that each Member, by its own choice, establishes for itself.[18]

In other words, as the AB made clear in the above quoted paragraph, to define whether a government scheme represents a *financial contribution*, WTO adjudicating bodies will focus on what income is due to a government according to national laws. In the absence of fiscal harmonization (the GATT being a negative integration type of contract in this respect), it is up to individual WTO Members to define their own fiscal policies. If, having defined the ambit of their own fiscal policy in a sovereign manner, they forgo income, they might (provided that the other conditions of Arts. 1 SCM and 2 SCM are met) be in fact granting a subsidy.

In the *US – FSC (Article 21.5 – EC)* implementation case that concerned the amendments made by the US to its FSC regime to bring it into compliance with its WTO obligations, the AB further clarified its interpretation of the term 'otherwise due'. According to the AB, the benchmark for determining whether revenue is otherwise due is the domestic fiscal treatment of *legitimately comparable income*:

> We do not, however, consider that Article 1.1(a)(1)(ii) always *requires* panels to identify, with respect to any particular income, the 'general' rule of taxation prevailing in a Member. Given the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a 'general' rule of taxation and 'exceptions' to that 'general' rule. Instead, we believe that panels should seek to compare the fiscal treatment of legitimately comparable income to determine whether the contested

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[18] AB Report, *US – FSC*, para. 90. In the *US – FSC (Article 21.5 – EC)* report, the AB clarified that it meant that a Member is free to forgo revenue otherwise due, and is thus free to subsidize, as long as it complies with its obligations concerning subsidies as set forth in Articles 3 and 5 SCM Agreement:

> In other words, Article 1.1 of the *SCM Agreement* does not prohibit a Member from foregoing revenue that is otherwise due under its rules of taxation, even if this also confers a benefit under Article 1.1(b) of the *SCM Agreement*. However, if a Member's rules of taxation constitute or provide a subsidy under Article 1.1, and this subsidy is specific under Article 2, the Member must abide by the obligations set out in the *SCM Agreement* with respect to that subsidy, including the obligation not to 'grant [ ] or maintain' any subsidy that is prohibited under Article 3 of the Agreement. It was in this context that we said in our Report in *US – FSC*, that, in principle, a Member is free not to tax any particular category of income it wishes, even if this results in the grant of a 'subsidy' under Article 1.1 of the *SCM Agreement*, provided that the Member respects its WTO obligations with respect to the subsidy.
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> AB Report, *US – FSC (Article 21.5 – EC)*, para. 86.

> measure involves the foregoing of revenue which is 'otherwise due', in relation to the income in question.[19]
>
> In addition, it is important to ensure that the examination under Article 1.1(a)(1)(ii) involves a comparison of the fiscal treatment of the relevant income for taxpayers in comparable situations. For instance, if the measure at issue is concerned with the taxation of foreign-source income in the hands of a domestic corporation, it might not be appropriate to compare the measure with the fiscal treatment of such income in the hands of a foreign corporation.[20]

In this particular case involving the exemption of certain foreign source income, the AB considered that it would be appropriate to compare the foreign source income carved out from gross income with the treatment of other foreign source income in general in the US:

> Accordingly, in identifying the normative benchmark for comparison in these proceedings, we must look to the United States' other rules of taxation applicable to the foreign-source income of United States' citizens and residents earned through the sale or lease of property, or through the performance of 'related' services.[21] In so doing, we must ascertain whether, and to what extent, the United States imposes tax on foreign-source income of United States citizens and residents, including the income covered by the measure at issue which the United States considers to be foreign-source income. In other words, our inquiry under Article 1.1(a)(1)(ii) is not simply ended at this stage of analysis because the measure involves an allocation of income between domestic- and foreign-source income. Rather, we must compare the way the United States taxes the portion of the income covered by the measure, which it treats as foreign-source, with the way it taxes other foreign-source income under its own rules of taxation.[22]

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[19] We recognize that a Member may have several rules for taxing comparable income in different ways. For instance, one portion of a domestic corporation's foreign-source income may not be subject to tax in any circumstances; another portion of such income may always be subject to tax; while a third portion may be subject to tax in some circumstances. In such a situation, the outcome of the dispute would depend on which aspect of the rules of taxation was challenged and on a detailed examination of the relationship between the different rules of taxation. The examination under Article 1.1(a)(1)(ii) of the *SCM Agreement* must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation.

[20] AB Report, *US – FSC (Article 21.5 – EC)*, paras 91–92.

[21] We recall that the measure applies to certain foreign corporations that elect to be treated as United States corporations. For the purpose of United States taxation, these corporations are deemed to be United States corporations. (See para. 93 and footnote 67). Thus we do not examine the United States' fiscal treatment of the foreign-source income of *foreign* corporations including foreign subsidiaries of United States corporations that do *not* elect to be treated as United States corporations. We do not, therefore, examine the rules of taxation for the foreign-source income of foreign subsidiaries of United States corporations. See United States' appellant's submission, paras 34–6.

[22] AB Report, *US – FSC (Article 21.5 – EC)*, para. 98.

Applying this test to the case at hand, the AB concluded that there appeared to be a marked contrast between the 'other rules' of taxation applicable to foreign-source income and the rules of taxation applicable to foreign source income as qualified in the FSC/ETI measure, so-called Qualified Foreign Trade Income (QFTI). Thus, according to the AB, 'For United States citizens and residents, the United States, in principle, taxes *all* foreign-source income, subject to permissible deductions, although the United States grants tax credits for foreign taxes paid. However, under the ETI measure, QFTI is definitively excluded from United States taxation.' This, together with the fact that taxpayers can elect to have their income treated more favourably as QFTI or see the normal rules for foreign source income applied to them, led the AB to the conclusion that the US forgoes revenue on QFTI which is otherwise due:

> In our view, the definitive exclusion from tax of QFTI, compared with the taxation of other foreign-source income, and coupled with the right of election for taxpayers to use the rules of taxation most favourable to them, means that, under the contested measure, the United States foregoes revenue on QFTI which is otherwise due.[23]

In *Canada – Autos*, an import duty exemption granted to certain cars was considered to constitute the forgoing of revenue otherwise due. As this exemption implied that the normal MFN import duty of 6.1 per cent would not have to be paid, the Canadian government had forgone revenue it otherwise would have raised.[24] Canada had argued in defence of its exemption, *inter alia* that it was analogous to the situation described in footnote 1 to Article 1 SCM Agreement. This footnote provides that duty exemption or duty remission upon exportation shall not be deemed to be a subsidy. The Canadian defence was rejected by the AB which clarified that 'footnote 1 to the *SCM Agreement* deals with duty and tax exemptions or remissions for *exported* products'[25] and not for imports as was the case for the Canadian duty exemption.

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23 AB Report, *US – FSC (Article 21.5 – EC)*, para. 105.

24 AB Report, *Canada – Autos*, para. 91:

> We note, once more, that Canada has established a normal MFN duty rate for imports of motor vehicles of 6.1 per cent. Absent the import duty exemption, this duty would be paid on imports of motor vehicles. Thus, through the measure in dispute, the Government of Canada has, in the words of *United States – FSC*, 'given up an entitlement to raise revenue that it could "otherwise" have raised'. More specifically, through the import duty exemption, Canada has ignored the 'defined, normative benchmark' that it established for itself for import duties on motor vehicles under its normal MFN rate and, in so doing, has forgone 'government revenue that is otherwise due'.

25 AB Report, *Canada – Autos*, para. 92.

It is worth noting that, in the case of revenue forgone or not collected, the financial contribution inevitably implies the conferral of a benefit. The distinction on which the AB put so much emphasis between these 'two separate legal requirements' of a subsidy disappear in this case. It is thus not surprising that footnote 1 to Article 1.1 (a) (1) (ii) SCM Agreement uses the term 'subsidy' rather than 'financial contribution' when it provides that a duty exemption or remission upon exportation shall not be deemed to be a subsidy.

In the context of this discussion of what constitutes the forgoing of revenue otherwise due, it seems important to address the special case of double taxation. The WTO does not impose uniform tax policies. As a result, regulatory asymmetry in tax policies is very much on the cards. In the same vein, it could very well be the case that the same transaction is taxed twice, assuming that one country imposes taxes by virtue of the nationality of the economic operator, and, another, by virtue of the place where a transaction takes place. A number of WTO Members address this issue, essentially, through bilateral agreements aiming at avoiding double taxation. A number of similar agreements have been signed and entered into force. By signing such agreements, a government is forgoing income, and forgoing income otherwise due is, in principle, a *financial contribution*, in the sense of Art. 1.1(a)(1)(ii) SCM.

Footnote 59[26] makes it clear that not every instance of forgone (under national laws) income will be deemed to qualify as (eventually)[27] a subsidy. It pertinently reads: 'Paragraph (e) is not intended to limit a Member from taking measures to avoid the double taxation of foreign-source income earned by its enterprises or the enterprises of another Member.' Paragraph (e), to which the footnote refers, is included in the Illustrative List of Export Subsidies (Annex 1 of the SCM) and reads as follows: 'The full or partial exemption, remission, or deferral specifically related to exports, of direct taxes or social welfare charges paid or payable by industrial or commercial enterprises.' Consequently, remission of taxes in order to avoid *double taxation* should not be understood to be an export subsidy in the SCM Agreement sense of the term.

The Appellate Body Report on *US – FSC (Article 21.5 – EC)* dealt specifically with this issue and provided the understanding of the Appellate Body as

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[26] For an excellent discussion of tax issues in trade agreements, see Avi-Yonah and Slemrod (2002).

[27] Eventually, since *financial contribution* is one of the three elements that must simultaneously co-exist for a subsidy to exist (in the SCM sense of the term). A government that forgoes income in an unspecific manner will not be subsidizing either. Footnote 59 does not address such a scenario, however: its value added stems from the fact that, even if the *specificity* element (see the discussion *infra*) has been met, a scheme aiming to avoid double taxation will still escape the SCM-disciplines.

to the relationship between measures taken to avoid double taxation and export subsidies, providing thus the legal test for distinguishing between what is acceptable and what is not in this context. In its view, a measure falls under footnote 59 if it exempts from taxation *only foreign-source income*. If it also exempts other (than foreign-source) income, then it cannot benefit from this provision:

> In conclusion, our examination discloses that the measure at issue is an extremely complex instrument. We set out to review whether the measure was 'tak[en] . . . to avoid the double taxation of foreign-source income' within the meaning of footnote 59 to the *SCM Agreement*. The ETI measure, viewed as a whole, does not permit us to conclude that this measure exempts *only* 'foreign-source income'. Rather, in some situations, the ETI measure exempts QFTI which is foreign-source income; in other situations, the ETI measure exempts QFTI which is not foreign-source; and, in yet other situations, the measure exempts QFTI which is a combination of both domestic- and foreign-source income.
>
> Certainly, if the ETI measure were confined to those aspects which grant a tax exemption for 'foreign-source income', it would fall within footnote 59. However, the ETI measure is not so confined. Rather, in several important respects, two of the three basic allocation rules of the ETI measure, the (1.2 and 15 per cent rules) provide an exemption for domestic-source income. We have said that avoiding double taxation is not an exact science and we recognize that Members must have a degree of flexibility in tackling double taxation. However, in our view, the flexibility under footnote 59 to the *SCM Agreement* does not properly extend to allowing Members to adopt allocation rules that systematically result in a tax exemption for income that has no link with a 'foreign' State and that would not be regarded as foreign-source under any of the widely accepted principles of taxation we have reviewed.
>
> For these reasons, even though parts of the ETI measure may be regarded as granting a tax exemption for foreign-source income, we find that the United States has not met its burden of proving that the ETI measure, viewed as a whole, falls within the justification available under the fifth sentence of footnote 59 of the *SCM Agreement*. Accordingly, we uphold the Panel's finding in paragraphs 8.107 and 9.1(a) of the Panel Report. (Emphasis in the original)[28]

(c) Financial contribution *'in kind'* – government provision of goods or services other than general infrastructure

A third type of financial contribution listed in Article 1 SCM Agreement exists when the government provides a good or service other than general infrastructure, or purchases goods. When the government provides an input to a producer, this input represents a certain value and it thus constitutes a 'financial' contribution, an in-kind transfer of resources. As the AB noted in *US – Softwood Lumber IV:*

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[28] AB Report, *US – FSC (Article 21.5 – EC)*, paras 184–186.

> As such, the Article contemplates two distinct types of transaction. The first is where a government provides goods or services other than general infrastructure. Such transactions have the potential to lower artificially the cost of producing a product by providing, to an enterprise, inputs having a financial value. The second type of transaction falling within Article 1.1(a)(1)(iii) is where a government purchases goods from an enterprise. This type of transaction has the potential to increase artificially the revenues gained from selling the product.[29]

(i) General infrastructure

When the government builds a road connecting the factory to the port, it arguably is providing a service to the producer whose factory site will now get easy access to the port. This producer will be able to reduce his transportation costs. The question of course is what is meant by 'general infrastructure'. What if this road also unlocks a whole community providing it with easier access to the country's capital? It could well be argued that, if the road can be used by a large number of people, road building and road maintenance are part of the traditional government responsibilities of providing public goods. How public does the use of these goods or services have to be for it to be categorized as general infrastructure which, when provided, will not be considered to constitute a financial contribution? And what about the government providing public goods? What if the government decides to build a filter for a factory so that it is no longer polluting the air and conforms with environmental regulations. The government is clearly providing a good or service, but it does this to make sure that its citizens can enjoy clean air. The government is thus providing a public good to its citizens. Yet it appears it does this by providing a financial contribution to the polluting factory. Would this not imply that the 'polluter pays' principle is forced upon governments if they want to avoid subsidizing their producers?

(ii) When are 'goods' 'provided'?

In *US – Softwood Lumber III* and *US – Softwood Lumber IV*, the question was raised whether trees can be considered 'goods' in the sense of Article 1 SCM Agreement.[30] The Panels and the AB clearly answered this question positively.

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[29] AB Report, *US – Softwood Lumber IV*, para. 53.

[30] Canada argued that standing timber, that is, trees attached to the land are not 'goods' in the sense of Article 1.1(a)(1)(iii). There was no dispute that trees are goods once they are harvested. The question raised by Canada's appeal was, rather, whether the term 'goods' in Article 1.1(a)(1)(iii) captures trees *before they are harvested*, that is, standing timber attached to the land (but severable from it) and incapable of being traded across borders as such. See AB Report, *US – Softwood Lumber IV*, para. 57.

The AB examined various dictionary definitions of the word 'goods', its French counterpart 'biens' and the Spanish 'bienes' to conclude that 'the ordinary meanings of these terms include a wide range of property, including immovable property'[31] and thus adopted a broad definition of 'goods' that includes 'property or possessions' generally. It considered that, in Article 1.1(a)(1)(iii), the only explicit exception to the general principle that the provision of 'goods' by a government will result in a financial contribution is when those goods are provided in the form of 'general infrastructure': 'In the context of Article 1.1(a)(1)(iii), all goods that might be used by an enterprise to its benefit – including even goods that might be considered *infrastructure* – are to be considered 'goods' within the meaning of the provision, unless they are infrastructure of a *general* nature.'[32]

In the *Softwood Lumber* cases, Canada made several arguments concerning the meaning of the term 'provide', which were all rejected by the AB. In the view of the AB, to provide means to 'make available' or 'put at the disposal of', concepts which require 'there to be a reasonably proximate relationship between the action of the government providing the good or service on the one hand, and the use or enjoyment of the good or service by the recipient on the other'.[33] In sum, the AB concluded that since stumpage arrangements give tenure holders a right to enter onto government lands, cut standing timber, and enjoy exclusive rights over the timber that is harvested, such arrangements represent a situation in which provincial governments provide standing timber. It thus disagreed with Canada's argument that the granting of an intangible

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[31] AB Report, *US – Softwood Lumber IV*, para. 59.

[32] AB Report, *US – Softwood Lumber IV*, para. 60. According to the AB, to accept the narrow definition suggested by Canada could lead to circumvention of the SCM disciplines and would thus be against the SCM Agreement's object and purpose:

> Moreover, to accept Canada's interpretation of the term 'goods' would, in our view, undermine the object and purpose of the *SCM Agreement*, which is to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions. It is in furtherance of this object and purpose that Article 1.1(a)(1)(iii) recognizes that subsidies may be conferred, not only through monetary transfers, but also by the provision of non-monetary inputs. Thus, to interpret the term 'goods' in Article 1.1(a)(1)(iii) narrowly, as Canada would have us do, would permit the circumvention of subsidy disciplines in cases of financial contributions granted in a form other than money, such as through the provision of standing timber for the sole purpose of severing it from land and processing it.

AB Report, *US – Softwood Lumber IV*, para. 64.

[33] AB Report, *US – Softwood Lumber IV*, para. 71.

right to harvest standing timber cannot be equated with the act of providing that standing timber. According to the AB, by granting a right to harvest, the provincial governments put particular stands of timber at the disposal of timber harvesters and allow those enterprises, exclusively, to make use of those resources.[34]

(d) Financial contribution by the government or a public body

When a financial contribution of the type described above is provided by private entities, it is, generally speaking, not a subsidy in the sense of the SCM Agreement. Only when a financial contribution is provided by the government or a public body do the disciplines of the SCM Agreement apply. This makes sense if one considers that the SCM Agreements, like all WTO Agreements relate to Members, that is, governments' behaviour, not that of private parties. Even the Anti-Dumping Agreement deals with the government's reaction to dumping rather than with the private enterprise's dumping practices itself. Two questions immediately come to mind: (i) what is a government or public body?; and (ii) can the behaviour of private parties never be considered to constitute a subsidy?

(i) Directly: 'A government or any public body within the territory of a Member'

Article 1 SCM Agreement indicates that throughout the Agreement the term 'government' is used to refer to the 'government or any public body within the territory of a Member'. First, it is well established that the 'government' in question refers to all types and layers of government within a country, whether they are acting at the Federal, State, or Provincial level. Under public international law, a Member State is responsible for the acts of all of its official bodies, independent of any constitutional or other internal attributions of governmental power. In other words, a financial contribution provided by the provincial authorities in country A will be a financial contribution by country A.

But what about parastatals, export credit agencies, and other entities which, although closely linked to the government, enjoy a certain degree of operational independence? Can their activities, such as the granting of loans, or equity infusions, be attributed to the State? The Agreement refers to financial contributions by the government or any public body within the territory of a Member. It does not define the term 'public body'. The Panel, in its report on *Korea – Commercial Vessels*, attempted a horizontal understanding of this

[34] AB Report, *US – Softwood Lumber IV*, para.75.

term, irrespective of idiosyncratic national law-attributes. Accepting that a *public body* might be operating in accordance with commercial considerations (hence actions by public bodies should not be equated to subsidies),[35] it went on to propose a *control* criterion to distinguish private from public bodies. In a sweeping statement, the Panel considered that 'if an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government':

> In our view, an entity will constitute a 'public body' if it is controlled by the government (or other public bodies). If an entity is controlled by the government (or other public bodies), then any action by that entity is attributable to the government, and should therefore fall within the scope of Article 1.1(a)(1) of the *SCM Agreement*. We consider that KEXIM is a 'public body' because it is controlled by GOK [Government of Korea]. This is evidenced primarily by the fact that KEXIM is 100 per cent owned by GOK or other public bodies. Evidence suggesting governmental control over KEXIM also lies in the fact that the operations of KEXIM are presided over by a President (Article 9(1) of the KEXIM Act) appointed and dismissed by the President of the Republic of Korea (Article 11(1) of the KEXIM Act), and that the KEXIM President shall be assisted by a Deputy President and Executive Directors (Article 9(2) and (3) of the KEXIM Act) to be appointed and dismissed by the Minister of Finance and Economy upon the recommendation of the President of KEXIM (Article 11(2) of the KEXIM Act). Government control is also exercised through the Ministerial approval of the annual KEXIM Operation Programs (Article 21 of the KEXIM Act). (Footnotes omitted)[36]

The Panel in this case does not explain what it considers to be 'control' by the government, apart from stating that, if an entity is 100 per cent owned by the government, it is controlled by the government. The Panel does not refer to the definition of 'control' as provided elsewhere in the SCM Agreement, in footnote 48 to Article 16 concerning the 'Definition of the Domestic Industry' which provides that 'one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter'. Still, the Panel focused on the fact that the government controls some of the main appointments and enjoys extensive control over the parameters within which the body in question must operate.[37] It thus seems that the Panel had a similar kind of definition in mind as the one set forth in footnote 48.

By emphasizing the 'control' element, the Panel was implicitly discarding two other factors that the European Communities, as the complainant in this

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35 Panel Report, *Korea – Commercial Vessels*, para. 7.44.
36 Panel Report, *Korea – Commercial Vessels*, DS 273, para. 7.50.
37 Panel Report, *Korea – Commercial Vessels*, para. 7.53C.

case, had suggested should drive the 'public body' determination: the public policy objective of such an entity and its access to state resources.[38] The Panel dismissed the public policy objective considering that 'although a public policy objective or creation through public statute might also be indicative of the public nature of an entity, this may not always be the case'.[39] The Panel did not express an opinion on the suggested criterion of access to state resources. In sum, the Panel considered government control over an entity to be the *necessary and sufficient* condition to consider such an entity to be a public body in the sense of the SCM Agreement.

The term 'public body' or 'public entity' is defined elsewhere in the WTO Agreements. Paragraph 5 (c) (i) of the GATS Annex on Financial Services which defines a 'Public entity' *inter alia* as 'a government, a central bank or a monetary authority, of a Member, or *an entity owned or controlled by a Member, that is principally engaged in carrying out governmental functions or activities for governmental purposes*, not including an entity principally engaged in supplying financial services on commercial terms'. Without explaining its position, the Panel 'questioned the relevance of the GATS Annex on Financial Services to an interpretation of Article 1.1 (a) (1) of the SCM Agreement'.[40] In light of the single undertaking approach of the WTO, this is a somewhat remarkable position to take. In any case, what this definition indicates is that the Members when discussing public entities in the context of GATS considered the possibility of an entity other than the 'govern-

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[38] The EC argued that KEXIM is a public body because (i) it is created and operates on the basis of a public statute giving the Government of Korea ('GOK') control over its decision-making, (ii) it pursues a public policy objective, and (iii) it benefits from access to state resources. See Panel Report, *Korea – Commercial Vessels*, para. 7.32.

[39] Panel Report, *Korea – Commercial Vessels*, para. 7.55. The Panel explained its position as follows:

> For example, the fact that a private philanthropist may pursue public policy objectives should probably not cause that person to be treated as a 'public body'. In addition, the privatization of a company might be finalized through a public statute. In all cases, though, we consider that public status can be determined on the basis of government (or other public body) control. Panel Report, *Korea – Commercial Vessels*, para. 7.55. The panel's explanation seems to miss the point, however. It was not suggested that a self-imposed public policy objective suffices to consider that an entity is a public body. However, what was proposed was a more subtle test based on a number of criteria which together may lead to a reasonable conclusion that the entity in question is a public body.

[40] Panel Report, *Korea – Commercial Vessels*, para. 7.47.

ment' as such to be considered as a public entity in case (i) there is government control or ownership over this entity *and* (ii) this entity is principally engaged in carrying out governmental functions or activities for governmental purposes. In other words, the GATS definition of a public entity seems to require more than just government ownership or control.

It appears that some WTO Members are also of the view that government ownership or control as such are not sufficient to consider an entity as a 'public body' in the sense of Article 1 SCM Agreement. Both the US and the EC, in their respective countervailing duty examinations into imports of DRAMs from Korea did not consider as 'public bodies' a number of Korean banks which were either 100 per cent, 80 per cent or government-owned in large proportion.[41] Instead, the investigating authorities examined whether these entities had been entrusted or directed by the government to provide various financial contributions. Both the Panel on *US – Countervailing Duty Investigation on DRAMS* and the Panel on *EC – Countervailing Measures on DRAM Chips* expressed some surprise at this decision of the authorities which only complicated matters for the investigating authorities. The Panel in *US – Countervailing Duty Investigation on DRAMS* noted that 'Depending on the circumstances, 100 per cent government ownership might well have justified the treatment of such creditors as public bodies' but that 'on the basis of the criteria provided for in US law, however, the DOC treated these 100 per cent owned Group B creditors as private bodies'.[42] It ultimately found against the US for failing to have demonstrated that the alleged private bodies were entrusted or directed by the government of Korea to have provided a financial contribution. The Panel again recalled that 'in our view, the DOC may well have been entitled under the *SCM Agreement* to treat 100 per cent GOK-owned Group B creditors as public bodies'.[43] Similarly the Panel on *EC – Countervailing Measures on DRAM Chips* stated that by reviewing the EC determination of entrustment or direction with respect to certain entities which were 100 per cent government-owned, it did not 'wish to imply that it would

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[41] For the purpose of this countervailing duty determination, the US investigating authority distinguished between (i) public bodies or what it called 'government authorities', (ii) government-owned and -controlled private creditors, and (iii) private creditors not owned or controlled by the GOK. See AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 131.

[42] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, footnote 29.

[43] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, footnote 80. The Appellate Body in *US – Countervailing Duty Investigation on DRAMS* referred to this footnote without any further comment. AB Report, *US – Countervailing Duty Investigation on DRAMS*, footnote 225.

not be possible or justified to treat a 100 per cent government owned entity as a public body, depending on the circumstances'.[44]

(ii) Indirectly: government entrustment or direction of a private body

In order to avoid circumvention of the subsidy disciplines, Article 1.1 (a) (1) (iv) provides that there is also a financial contribution by the government in case the government entrusts or directs a private body to provide a financial contribution in the sense of sub-paragraphs (i) to (iii) of Article 1.[45] Thus, in cases where the financial contribution was provided by a private body, the disciplines of the SCM Agreement will not apply as there is no financial contribution *by the government*, unless it can be demonstrated that the private body was entrusted or directed by the government to provide such a financial contribution.[46] As the Panel on *EC – Countervailing Measures on DRAM Chips* noted, '[T]he private body that is directed to provide a financial contribution or is entrusted to do so, is thus acting on behalf of the government, and its actions can therefore be ascribed to the government'.[47]

Having provided no definition of what is meant by a 'public body' it comes as no surprise that the Agreement does not provide a definition of a 'private body' either. Assumingly, it is a non-public body. The terms 'entrusts or directs' used in Article 1 have been interpreted to 'identify the instances where

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[44] Our task, however, is to review the determination actually made by the EC, not to make our own *de novo* interpretation of the facts in this case. Since the EC considered Woori Bank to be a private body, we will examine the question of entrustment or direction by the government with regard to Woori Bank. A similar consideration applies to our discussion and analysis of Chohung Bank and the KEB in which the government of Korea held 80 per cent and 43 per cent of the shares, respectively, at the time of the investigation.

Panel Report, *EC – Countervailing Measures on DRAM Chips*, footnote 129. The Panel in subsequent footnotes (such as footnotes 136 and 142) referred back to this consideration concerning the nature of these banks as private bodies rather than public bodies.

[45] As the AB noted in *US – Countervailing Duty Investigation on DRAMS*, 'Paragraph (iv), in particular, is intended to ensure that governments do not evade their obligations under the *SCM Agreement* by using private bodies to take actions that would otherwise fall within Article 1.1(a)(1), were they to be taken by the government itself. In other words, Article 1.1(a)(1)(iv) is, in essence, an anti-circumvention provision.' AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113.

[46] See Panel Report, EC – DRAMs, para. 7.50. As this same Panel further noted, 'In this context, the terms "entrust or direct" thus bridge the distance between private parties' actions, which fall outside the scope of the *SCM Agreement*, and the government behaviour to which the disciplines of the *SCM Agreement* apply'. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.53.

[47] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.52.

seemingly private conduct may be attributable to a government for purposes of determining whether there has been a financial contribution within the meaning of the *SCM Agreement*'.[48] In *US – Countervailing Duty Investigation on DRAMS*, the AB reached the following conclusion concerning the meaning of government entrustment or direction of private bodies:

> In sum, we are of the view that, pursuant to paragraph (iv), 'entrustment' occurs where a government gives responsibility to a private body, and 'direction' refers to situations where the government exercises its authority over a private body. In both instances, the government uses a private body as proxy to effectuate one of the types of financial contributions listed in paragraphs (i) through (iii). It may be difficult to identify precisely, in the abstract, the types of government actions that constitute entrustment or direction and those that do not. The particular label used to describe the governmental action is not necessarily dispositive. Indeed, as Korea acknowledges, in some circumstances, 'guidance' by a government can constitute direction. In most cases, one would expect entrustment or direction of a private body to involve some form of threat or inducement, which could, in turn, serve as evidence of entrustment or direction. The determination of entrustment or direction will hinge on the particular facts of the case.[49] (Footnote omitted)

In other words, a finding of entrustment or direction, therefore, requires that the government give responsibility to a private body – or exercise its authority over a private body – in order to effectuate a financial contribution.[50] Entrustment and direction do not cover the situation in which the government intervenes in the market in some way, which may or may not have a particular result simply based on the given factual circumstances and the exercise of free choice by the actors in that market.[51] According to the AB, this implies that government 'entrustment' or 'direction' cannot be inadvertent or a mere by-product of governmental regulation.[52]

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[48] AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 108.

[49] AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 116.

[50] AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 113. The AB considered that the Panel's interpretation of the term entrustment as 'delegation' and of 'direction' as 'command' was too narrow as governments are likely to have other means at their disposal to give authority to or exercise authority over a private body. AB Report, *US – Countervailing Duty Investigation on DRAMS*, paras 110–11.

[51] AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114, Panel Report, *US – Export Restraints*, para. 8.31.

[52] AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 114. The AB considered that this interpretation of these terms was in line with the object and purpose of the SCM Agreement:

> Furthermore, such an interpretation is consistent with the object and purpose of the *SCM Agreement*, which reflects a delicate balance between the Members that sought to impose more disciplines on the use of subsidies and those that sought to

But how to prove such government entrustment or directions in a countervailing duty context, especially taking into account that government may indeed be using private bodies to provide financial contributions to circumvent the subsidy disciplines and to avoid countervailing action? In other words, while evidence of government subsidization will in all cases present evidentiary problems, to show that the private body was not acting independently but rather on the government's behalf will present an insurmountable challenge to many investigating authorities. How to demonstrate that the government was doing more than 'merely encouraging' a private body to participate in a restructuring operation or a support programme?

The Panel on *EC – Countervailing Measures on DRAM Chips* recognized the problems of evidence gathering in countervail investigations, and stated that it did not 'want to be seen as requiring an investigating authority to come up with the smoking gun in the sense of a written order by the government to a private body to provide a financial contribution. We understand that, in most cases, the authority will have to base its decision on a number of arguments and pieces of evidence which perhaps when considered in combination may all point in the direction of government entrustment or direction, especially in cases where the level of cooperation by the interested parties is low'.[53]

In the countervailing duty investigation reviewed by the Panel, the EC relied on three types of circumstantial evidence to reach the conclusion that the government of Korea was entrusting or directing private bodies to participate in the restructuring of a failing Korean DRAMs producer. The Panel in this case considered that it was reasonable for an investigating authority to take into account any alleged non-commercial behaviour by private bodies as evidence of government entrustment or direction. Government ownership or control as well as lack of cooperation with the investigating authorities were two additional relevant factors that the authorities could take into considera-

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impose more disciplines on the application of countervailing measures. Indeed, the Appellate Body has said that the object and purpose of the *SCM Agreement* is 'to strengthen and improve GATT disciplines relating to the use of both subsidies and countervailing measures, while, recognizing at the same time, the right of Members to impose such measures under certain conditions'. This balance must be borne in mind in interpreting paragraph (iv), which allows Members to apply countervailing measures to products in situations where a government uses a private body as a proxy to provide a financial contribution (provided, of course, that the other requirements of a countervailable subsidy are proved as well). At the same time, the interpretation of paragraph (iv) cannot be so broad so as to allow Members to apply countervailing measures to products whenever a government is merely exercising its general regulatory powers. (Footnote omitted)

AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 115.

[53] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.109.

tion. In other words, the Panel considered that evidence to support a *benefit* determination, non-commercial behaviour, could be used also in support of a determination of entrustment or direction, thus blurring to a certain extent the distinction between the two separate elements of a subsidy, financial contribution and benefit. It makes perfect sense to adopt this approach, though, as private bodies may be assumed to behave in a commercial manner and the fact that they do not do so may be an indication that the government is entrusting or directing the private body to act in this way.

Secondly, the Panel considered that, even if an authority decides not to treat as a public body an entity with important government control, this does not imply that government control or shareholding becomes irrelevant – quite the contrary. In other words, government shareholding in a private body may lower the evidentiary threshold for establishing that the government exercised its shareholding power. While the Panel warned that shareholding power does not suffice as such, the Panel's ruling does imply that companies with important government shareholding are more likely to be accused of being used as vehicles for government subsidization.

Thirdly, and very importantly for an investigating authority faced with the difficult task of demonstrating the often hidden government entrustment or direction, the Panel expressed the view that a significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority:

> In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Depending on the circumstances of the cases, we consider that an authority may be justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. We consider relevant, in this respect, the following statement of the Appellate Body in the *US – Hot-Rolled Steel* case concerning the facts available provision of Article 6.8 of the *AD Agreement*, which is very similar both textually and contextually to Article 12.7 of the *SCM Agreement*:
>
> > [i]n order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities

> are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.[54] (Emphasis in original)

> While we acknowledge that this statement was, at least in part, based on several paragraphs of Annex II to the *AD Agreement*, we consider that a similar significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation.[55] The fact that the *SCM Agreement* does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same. Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority.[56] If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile. We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.[57]

The Panel's ruling in *EC – Countervailing Measures on DRAM Chips* was not appealed. However, in the appeal concerning the parallel *US – Countervailing Duty Investigation on DRAMS* case, the AB reversed that US Panel's ruling for examining pieces of evidence in isolation, rather than in their totality as the investigating authority had done. The AB emphasized the importance of this totality of facts approach in countervailing duty cases, and entrustment or direction cases in particular as the only way in which important circumstantial evidence could be taken into consideration by an authority:

> Moreover, if, as here, an investigating authority relies on individual pieces of circumstantial evidence viewed together as support for a finding of entrustment or

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54 Appellate Body Report, *United States – Hot-Rolled Steel*, para. 102.

55 In that respect, we see an important similarity between the power of an investigating authority to draw inferences from the failure to cooperate with the authority and the discretionary power of Panels in the WTO dispute settlement context, as well as international tribunals of various kinds in public international law, to draw such inferences, as recognized by the Appellate Body in the *Canada – Aircraft* case. (Appellate Body Report, *Canada – Aircraft*, para. 202.)

56 We thus disagree with the views expressed by China in its Third Party Oral statement, in this respect (China Third Party Oral Statement, paras 6–13).

57 Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.60–61.

> direction, a panel reviewing such a determination normally should consider that evidence in its totality, rather than individually, in order to assess its probative value with respect to the agency's determination. Indeed, requiring that each piece of circumstantial evidence, on its own, establish entrustment or direction effectively precludes an agency from finding entrustment or direction on the basis of circumstantial evidence. Individual pieces of circumstantial evidence, by their very nature, are not likely to establish a proposition, unless and until viewed in conjunction with other pieces of evidence. (Footnotes omitted)[58]

The AB noted that this approach is particularly relevant in cases of entrustment or direction under Article 1.1(a)(1)(iv), where much of the evidence that is publicly available, and therefore readily accessible to interested parties and the investigating authority, will likely be of a circumstantial nature.[59]

As to the standard of review which is applicable on this issue, the Appellate Body makes it clear that there is no need for compelling evidence for a finding of financial contribution to be legitimately made.[60] A lesser standard apparently will do the trick. As things stand, there is uncertainty as to how much less is required. The Appellate Body (*US – Countervailing Duty Investigation on DRAMS*) added that Panels cannot base their findings on evidence that was not reasonably before the investigating authority. In its words, Panels will be violating the standard of review embedded in Art. 11 DSU if they operate with the 'benefit of hindsight'.[61]

2 Any Form of Income or Price Support

Article 1.1 (a) (2) provides that, apart from a financial contribution by the government (Article 1.1 (a)(1)), 'any form of income or price support' which confers a benefit may also be considered a subsidy. This phraseology is taken directly from the first paragraph of Article XVI GATT 1994. Income or price support mechanisms play an important role in agricultural goods, and commodities in general. The issue involving subsidies in the form of income or price support will not so much be whether such income or price support has been granted, but rather whether it is consistent with the obligations of Members under the Agriculture Agreement and the SCM Agreement for example in so far as the prohibition on export subsidies is concerned. In the context of export subsidies, *Ad* Article XVI GATT 1994 stipulates with more detail in

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58 AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 150.

59 AB Report, *US – Countervailing Duty Investigation on DRAMS*, footnote 277.

60 AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 175 et seq.

61 AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 175.

which case such income or price support may be considered an export subsidy. The *US – Upland Cotton* case dealt with subsidies in the form of income or price support, the obvious existence of which was not something which was challenged by the US.

3 Benefit

As *inter alia* the Panel on *EC – Countervailing Measures on DRAM Chips* report makes clear, making a *financial contribution* is not tantamount to bestowing a *benefit* on a recipient; whereas the former examination takes place from the perspective of the donor, the latter's examination takes place from the perspective of the recipient.[62] Most importantly, in the words of this Panel:

> In sum, if the financial contribution is not provided by the government (or directed or entrusted by the government), it is of no concern to us. If the financial contribution is provided (or directed or entrusted) by the government but still does not confer an advantage over what was available on the market, there is no need to discipline such government behaviour which lacks a trade distorting potential.[63]

In other words, for a benefit to be demonstrated, a government needs to show that the recipient obtained an advantage which it could not obtain in the market place. There is, however, a sequence between financial contribution and benefit. As the Appellate Body put it in its report on *US – Countervailing Duty Investigation on DRAMS*, if no contribution took place, no benefit can result either.[64] Case-law has struggled with different analytical tools to determine whether a benefit[65] has been bestowed: in all cases adjudicated under the SCM Agreement, Panels have used the so-called 'private investor test' to distinguish between cases where a benefit has been bestowed and opposite cases. The intuition is that an economic operator who obtains from a government what it could not obtain from the market has received a benefit in the sense of Art. 1.2 SCM Agreement; there is, however, also case-law which uses the cost of production as the benchmark to define whether a benefit has been bestowed. This narrower construction has been used in two cases only (in *Canada – Dairy* and in the *EC – Export Subsidies on Sugar* case). Both cases concerned agricultural subsidies, and were adjudicated under the WTO Agreement on

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62 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.212.

63 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.175.

64 AB Report, *US – Countervailing Duty Investigation on DRAMS*, para. 205.

65 One should never lose sight of the fact that in the SCM context we deal with *pecuniary* subsidies only. Hence, our discussion of *benefit* does not cover other *benefits* (in the form of regulatory subsidies, for example) that an economic operator might receive from a government.

Agriculture. Moreover, as we will see, the private investor test has not always been used in an economics-friendly manner.

(a) Benefit: the private investor benchmark

A financial contribution by the government as such does not necessarily mean that a subsidy has been provided by the government. Only in the case where a benefit is conferred by the government's financial contribution will there be subsidization in the sense of Article 1 SCM Agreement. The SCM Agreement does not define the term 'benefit', in spite of its crucial role in transforming a government's financial contribution into a subsidy.[66]

Article 14 SCM Agreement which deals with the calculation of the amount of a subsidy in terms of benefit to the recipient makes explicit what is implied in Article 1.1 (b) SCM Agreement.[67] It provides that the term 'benefit' refers to benefit *to the recipient*, and uses *the market* or private investors as the benchmark for determining the existence and amount of benefit. The government provision of equity capital shall not be considered as conferring a benefit unless the investment decision can be regarded as inconsistent with the usual investment practice (including the provision of risk capital) of private investors in the territory of the Member concerned. In the case of a government loan, no benefit is conferred unless there is a difference between the amount that the firm receiving the loan pays on the government loan and the amount the firm would pay on a comparable commercial loan which the firm could actually obtain on the market. Similarly, a loan guarantee by the government confers a benefit in case there is a difference between the amount that the firm receiving the guarantee pays on a loan guaranteed by the government and the amount that the firm would pay on a comparable commercial loan absent the government guarantee.[68] Finally, if the government provides goods or services, such financial contribution shall not be considered as conferring a benefit unless it is made for less than adequate remuneration, which is to be determined in relation to the prevailing market conditions for the good or service in question.[69]

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66 In the Tokyo Round Subsidies Code, the term 'advantage' was used rather than 'benefit'. In the Code, to give certain enterprises an advantage was the aim of subsidization, and the advantage was thus not a constituent element of a subsidy as that term was used in the Code. Article 1 of the SCM Agreement adopts a slightly different approach and turns the conferral of a benefit into a separate legal element that together with the existence of a financial contribution by the government constitutes a subsidy.

67 It has been proposed in the course of the Doha Round of negotiations, to make the reference to the market benchmark explicit in Article 1 itself. TN/RL/GEN/101.

68 Note that, in the case of a government loan guarantee, Article 14 (c) does not require that the comparison be made with a loan which the firm could actually obtain on the market as was the case under (b).

69 See Article 14 SCM Agreement.

In the case of alleged subsidization by China (whether in a countervail context or in the context of a multilateral challenge of such alleged subsidies), China's Accession Protocol provides that Members may deviate from the methodology set forth in Article 14 for determining benefit, if there are special difficulties in that application. The importing WTO Member may then use methodologies for identifying and measuring the subsidy benefit which take into account the possibility that prevailing terms and conditions in China may not always be available as appropriate benchmarks. In applying such methodologies, where practicable, the importing WTO Member should adjust such prevailing terms and conditions before considering the use of terms and conditions prevailing outside China. Such methodologies have to be notified to the SCM Committee.[70]

WTO case-law has consistently interpreted the term 'benefit' as referring to an 'advantage' over what is available on the market place. In other words, there can be no benefit unless the financial contribution makes the recipient better off than it would otherwise have been absent the contribution. In *Canada – Aircraft*, the AB set out its understanding of the term 'benefit' which has since been repeated by Panels and the AB on numerous occasions:

> We also believe that the word 'benefit', as used in Article 1.1(b), implies some kind of comparison. This must be so, for there can be no 'benefit' to the recipient unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution. In our view, the marketplace provides an appropriate basis for comparison in determining whether a 'benefit' has been 'conferred', because the trade-distorting potential of a 'financial contribution' can be identified by determining whether the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.
>
> Article 14, which we have said is relevant context in interpreting Article 1.1(b), supports our view that the marketplace is an appropriate basis for comparison. The guidelines set forth in Article 14 relate to equity investments, loans, loan guarantees, the provision of goods or services by a government, and the purchase of goods by a government. A 'benefit' arises under each of the guidelines if the recipient has received a 'financial contribution' on terms more favourable than those available to the recipient in the market.[71]

By the same token, the Arbitrators' report on *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)* reads (para. 3.60):

> In the light of the above, we conclude that, in this case, it is appropriate to calculate the amount of the subsidy on the basis of the benefit conferred by the loan. We also agree with Canada that, in such a case, the amount of the subsidy should correspond

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[70] Accession of the People's Republic of China, Decision of 10 November 2001, WT/L/432, para.15.

[71] AB Report, *Canada – Aircraft*, paras 157–8.

> to the difference between the amount Air Wisconsin pays on the loan from EDC and the amount Air Wisconsin would pay on a comparable commercial loan which that company could actually obtain on the market.[72]

Sometimes the benefit (in the sense given to this term by the AB) from government financial contribution is quite obvious and requires little further examination. For example in the case where the financial contribution consists of government revenue forgone or not collected, there is an obvious benefit to the recipient of the 'contribution'. The Panel in the *US – FSC* case came to the following straightforward conclusion on the question of benefit resulting from the tax exemptions granted to foreign sales corporations:

> Having found that the various tax exemptions under the FSC scheme give rise to a financial contribution, our next task is to consider whether a benefit is thereby conferred. In our view, the financial contribution clearly confers a benefit, in as much as both FSCs and their parents need not pay certain taxes that would otherwise be due. Further, that benefit can be quite substantial: according to the US Department of Commerce, 'the tax exemption can be as great as 15 to 30 per cent on gross income from exporting'. We note that the United States has raised no contrary argument with respect to the issue of benefit. (Footnote omitted)

Similarly, in *Canada – Autos*, the Panel concluded:

> In our view, the fact that the manufacturer beneficiaries need not pay customs duties that would otherwise be due – and that would be paid by non-qualifying manufacturers – constitutes just such an advantage. We find that the financial contribution made through the import duty exemption, therefore, confers a benefit within the meaning of Article 1.1(a)(2) of the SCM Agreement.[73]

One may actually wonder whether the benefit element of a subsidy has any role to play in this kind of financial contribution which in its essence provides a benefit to the recipient. And if that is so, would this not raise questions concerning the validity of the interpretation of the term 'benefit' as referring to the position of the recipient compared to what the market had to offer? The market benchmark simply does not make sense in a 'government revenue forgone' situation. On the other hand, if one would interpret the term 'benefit' to be referring to an advantage in the competitive situation of the recipient, a 'benefit' examination would make sense in all situations as it would relate to the way the financial contribution affects the competitive position of the recipient.

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[72] Arbitrators' Report, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.60.

[73] Panel Report, *Canada – Autos*, para. 10.165.

(b) Benefit is not 'cost to government'

The AB considered that the term 'benefit' refers to benefit *to the recipient.* Whether there is a cost involved for the granting authority or not is simply not relevant in determining the existence of a subsidy. The AB thus put an end to a long-standing discussion that there can be no subsidization without some cost to the government.[74] For example, when the government provides a loan at a rate of 8 per cent which would be below the market rate of 10 per cent, it is providing a financial contribution in the form of a direct transfer of funds (a loan) thereby conferring a benefit on the borrower who receives the loan at an interest rate which is lower than he would have had to pay for this loan, had he been forced to go to a commercial bank. While one may think that the government is the one losing out on this deal, that is not necessarily so. Maybe the alternative for the government, if it wanted to raise some money, was to issue government bonds. If, at the time of granting the loan, the government bond rate was 6 per cent, the government would have had to pay out a 6 per cent interest. By granting the loan at 8 per cent it is not only able to finance the 6 per cent of the bonds, but it even makes 2 per cent profit. So, while this financial contribution confers a benefit on the recipient, there is no cost to the government. In the case where the financial contribution consists of a loan guarantee, it may well be that the government is never called upon to actually step in and disburse funds, yet the recipient of the government loan guarantee was probably able to obtain a loan he would not otherwise have received, or not at that rate, so there is a benefit independent of any government payment.

It is interesting to note that the cost to government consideration is nevertheless clearly present in the illustrative list of export subsidies of Annex I to the SCM Agreement, as well as in Annex IV relating to the calculation of the

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[74] The structure of Article 1.1 as a whole confirms our view that Article 1.1(b) is concerned with the 'benefit' to the recipient, and not with the 'cost to government'. The definition of 'subsidy' in Article 1.1 has two discrete elements: 'a financial contribution by a government or any public body' and 'a benefit is thereby conferred'. The first element of this definition is concerned with whether the *government* made a 'financial contribution', as that term is defined in Article 1.1(a). The focus of the first element is on the action of the government in making the 'financial contribution'. That being so, it seems to us logical that the second element in Article 1.1 is concerned with the 'benefit . . . conferred' on the *recipient* by that governmental action. Thus, sub-paragraphs (a) and (b) of Article 1.1 define a 'subsidy' by reference, first, to the action of the granting authority and, second, to what was conferred on the recipient. Therefore, Canada's argument that 'cost to *government*' is relevant to the question of whether there is a 'benefit' to the *recipient* under Article 1.1(b) disregards the overall structure of Article 1.1.

AB Report, *Canada – Aircraft*, para. 156.

total *ad valorem* subsidization.[75] Item j) of Annex I for example provides that the provision by governments of export credit guarantee or insurance programmes, of insurance or guarantee programmes against increases in the cost of exported products or of exchange risk programmes, at premium rates which *are inadequate to cover the long-term operating costs* and losses of the programmes are export subsidies. Item k) similarly focuses on the cost to government as an essential question in determining whether an export subsidy exists.[76] Panels rejected attempts to read an *a contrario* argument into Annex I such that for example export credit programmes at premium rates which *are* adequate to cover the long-term operating costs could not be considered as an export subsidy. We will come back to the Illustrative List later, when discussing export subsidies.

The fact that Annex IV of the Agreement provides that any calculation of the amount of a subsidy for the purposes of a presumption of serious prejudice shall be done in terms of the cost to the granting government was considered irrelevant for the purpose of interpreting the term benefit in Article 1.1 (b) SCM Agreement.[77] According to the AB, Annex IV deals with calculation of the amount of subsidization, not with the existence of a subsidy. Annex IV is thus not useful context for interpreting Article 1.1(b) of the SCM Agreement since it does not deal with the question whether a '*benefit*' has been conferred, or whether a measure constitutes a subsidy within the meaning of Article 1.1 SCM Agreement.[78] This is somewhat surprising, given the importance attached to Article 14 SCM Agreement which, as the title shows, also deals with the *calculation of the amount of a subsidy*, albeit in terms of benefit to the recipient.

(c) Benefit in terms of cost of production – agricultural subsidies

The Agreement on Agriculture does not set forth a definition of a subsidy and the SCM Agreement's definition thus applies to agricultural subsidies as well. However, the Agreement on Agriculture provides that *inter alia* certain 'payments' on the export of an agricultural product that are financed by virtue of government action are export subsidies for which reduction commitments have been undertaken. In *Canada – Dairy* the Appellate Body considered that

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75 Annex IV, para. 1 provides that any calculation of the amount of a subsidy for the purposes of a presumption of serious prejudice shall be done in terms of the cost to the granting government.

76 This different focus is perhaps not surprising given the fact that Annex I predates the SCM Agreement. It was already included in the Tokyo Round Code which did not have a similar definition of a subsidy as a financial contribution conferring a benefit.

77 AB Report, *Canada – Aircraft*, para. 159.

78 AB Report, *Canada – Aircraft*, para. 159.

the term 'payments' refers to a transfer of economic resources, and thus equated such payments to financial contributions in the context of the SCM Agreement. According to the AB, for a subsidy to exist, a benefit needs to be conferred by such payments:

> We believe that, in its ordinary meaning, the word 'payments', in the term 'payments-in-kind', denotes a transfer of economic resources, in a form other than money, from the grantor of the payment to the recipient. However, the fact that a 'payment-in-kind' has been made provides no indication as to the economic *value* of the transfer effected, either from the perspective of the grantor of the payment or from that of the recipient. A 'payment-in-kind' may be made in exchange for full or partial consideration or it may be made gratuitously. Correspondingly, a 'subsidy' involves a transfer of economic resources from the grantor to the recipient for less than full consideration. As we said in our Report in *Canada – Aircraft*, a 'subsidy', within the meaning of Article 1.1 of the *SCM Agreement*, arises where the grantor makes a 'financial contribution' which confers a 'benefit' on the recipient, as compared with what would have been otherwise available to the recipient in the marketplace. Where the recipient gives full consideration in return for a 'payment-in-kind' there can be no 'subsidy', for the recipient is paying market-rates for what it receives. It follows, in our view, that the mere fact that a 'payment-in-kind' has been made does not, *by itself*, imply that a 'subsidy', 'direct' or otherwise, has been granted.[79] (Footnote omitted)

The AB first suggested a market benchmark for determining benefit, as it considered that 'if goods or services are supplied to an enterprise, or a group of enterprises, at reduced rates (that is, at below market-rates), "payments" are, in effect, made to the recipient of the portion of the price that is not charged'.[80] It seems worth recalling that the provision of a good or service is in any case a financial contribution in the context of Article 1 SCM Agreement. Whether such provision of a good or service is a subsidy depends on whether a benefit is conferred by the financial contribution. In the Agriculture Agreement, the terms 'payments' and 'subsidies' seem to have been used interchangeably. Maybe this explains the apparent confusion of the issue of a financial contribution, or a payment, and that of a subsidy, that is, when this payment provides a benefit. In the compliance proceedings, the AB went beyond the market benchmark and imposed what it considers to be an objective benchmark for determining whether a benefit was conferred by the payments. The AB read the benefit element into the notion of a 'payment'. According to the AB, there is a 'payment' if the product is supplied at less than its 'proper value':

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79 AB Report, *Canada – Dairy*, para. 87.
80 AB Report, *Canada – Dairy*, para. 113.

> In short, we indicated that there are 'payments' under Article 9.1(c) when the price charged by the producer of the milk is less than the milk's *proper value* to the producer.
>
> Thus, the determination of whether 'payments' are involved requires a comparison between the price actually charged by the provider of the goods or services – the prices of CEM in this case – and some objective standard or benchmark which reflects the proper value of the goods or services to their provider – the milk producer in this case. We do not accept Canada's argument that, as the producer negotiates freely the price with the processor, and CEM prices are, therefore, market-determined, it is not necessary to compare these prices with an objective standard.[81]

The AB rejected both the domestic price and the world market price as appropriate benchmarks for determining the proper value of the good provided. This was so because the domestic price in that case was 'an administered price fixed by the Canadian government as part of the regulatory framework established by it for managing the supply of milk destined for consumption in the domestic market'.[82] With regard to the world market price, the AB was of the view that it provided one possible measure of the value of the milk to the producer, but that it gives no indication on the crucial question, namely, whether Canadian export production has been given an advantage:

> However, world market prices do not provide a valid basis for determining whether there are 'payments', under Article 9.1(c) of the *Agreement on Agriculture*, for, it remains possible that the reason CEM can be sold at prices competitive with world market prices is precisely because sales of CEM involve subsidies that make it competitive. Thus, a comparison between CEM prices and world market prices gives no indication on the crucial question, namely, whether Canadian export production has been given an advantage. Furthermore, if the basis for comparison were world market prices, it would be possible for WTO Members to subsidize domestic inputs for export processing, while taking care to maintain the price of these inputs to the processors at a level which equalled or marginally exceeded world market prices. There would then be no 'payments' under Article 9.1(c) of the *Agreement on Agriculture* and WTO Members could easily defeat the export subsidy commitments that they have undertaken in Article 3 of the *Agreement on Agriculture*. (Footnote omitted)[83]

The objective benchmark the AB considers appropriate for determining the proper value of the good provided is the *total cost of production.* In this case, the average total cost of production would be determined by dividing the fixed and variable costs of producing *all* milk, whether destined for domestic or

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81 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, paras 73–4.

82 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 81.

83 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 84.

export markets, by the total number of units of milk produced for both these markets[84]:

> For any economic operator, the production of goods or services involves an investment of economic resources. In the case of a milk producer, production requires an investment in fixed assets, such as land, cattle and milking facilities, and an outlay to meet variable costs, such as labour, animal feed and health-care, power and administration. These fixed and variable costs are the total amount which the producer must spend in order to produce the milk and the total amount it must recoup, in the long-term, to avoid making losses. To the extent that the producer charges prices that do not recoup the total cost of production, over time, it sustains a loss which must be financed from some other source, possibly 'by virtue of governmental action'.[85]

The AB was of the view that this benchmark is appropriate since it implies that 'the existence of "payments" is determined by reference to a standard that focuses upon the motivations of the independent economic operator who is making the alleged "payments" – here the producer – and not upon any government intervention in the marketplace'.[86] The AB also explicitly relied as contextual support for its interpretation of the Agriculture Agreement on items (j) and (k) of the SCM Agreement's Annex I list of export subsidies. As the AB points out, in these items dealing with government export credits, 'the measure of value is by reference to the cost to the government, as the service provider, of providing the service. Therefore, items (j) and (k) give contextual support and *rationale*, for using the cost of production as a standard for determining whether there are "payments" under Article 9.1(c) of the *Agreement on Agriculture* in these proceedings'.[87]

This standard has to be seen in the light of the circumstances of this case where the alleged payment was made by an independent economic operator and where the domestic price was administered. The cost of production standard was applied in a subsequent case by the Panel on *EC – Export Subsidies on Sugar*. According to the Panel, the situation regarding the sale of milk to dairy processors in *Canada – Dairy (Article 21.5 – New Zealand and US)* was quite relevant and similar to the matter before it.[88] It was therefore of the view

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84 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 96.

85 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 87.

86 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 92.

87 AB Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 93.

88 In the *Canada – Dairy (Article 21.5 – New Zealand and US)*case, the complainants were arguing that, as in *Canada – Dairy (Article 21.5 – New Zealand and US)* and *Canada – Dairy (Article 21.5 – New Zealand and US II*), one of the types of payment allegedly being made in the EC sugar regime involves domestic inputs sold to sugar producers at prices that are below the total costs of production of beet growers. The complainants argued that C beet (an input) is being sold to sugar producers at

that 'in the present dispute the total cost of production of C beet is an appropriate benchmark for determining whether the sales of C beet to C sugar producers provide a "payment" to the producers of C sugar within the meaning of Article 9.1(c) of the *Agreement on Agriculture*'.[89]

It appears that the total cost of production benchmark for determining an advantage/a benefit could thus be used, for example in a situation where the domestic market price is so distorted by the government's intervention in the market, or where there is no market price. In other words, this benchmark may be used in situations such as those referred to by the Panel in *US – Softwood Lumber IV*, as an alternative to the market benchmark set forth in Article 14 SCM Agreement. As already stated, this standard has been used only twice and, on both occasions, when dealing with farm products. Potentially it is at odds with the *private investor* test, which calls for considerations beyond the cost of production.

(d) Benefit *to the recipient*

Article 1 does not state that the financial contribution must confer a benefit on the recipient. WTO case-law however added the words 'to the recipient' to the benefit part of the subsidy definition, since a benefit 'does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a "benefit" can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term "benefit", therefore, implies that there must be a recipient'.[90] It is difficult to argue with the logic of this approach in theory.[91] Nevertheless, even the application of this basic rule is more complicated than may be expected.

(i) Who is the recipient – the privatization question

Article VI.3 of GATT 1994 allows for the imposition of countervailing duties for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of any merchandise. It also

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prices that do not remotely cover its cost of production. See Panel Report, *Canada – Dairy (Article 21.5 – New Zealand and US)*, para. 7.263.

89 Panel Report, *EC – Export Subsidies on Sugar*, para. 7.264.

90 AB Report, *Canada – Aircraft*, para. 154.

91 Although one could say that it is the financial contribution which necessarily requires a recipient, not so much the benefit. The benefit is rather a possible result of the financial contribution. Benefit could be construed as referring to an advantage over others, competitors in other markets for example. While it may well be so that it is difficult to imagine how a financial contribution may provide this kind of advantage in case a market rate was paid for the financial contribution, this does not necessarily imply that by not paying a market rate for the financial contribution a benefit in terms of a competitive advantage has been provided. That will depend on how the subsidies are used or how they have to be used.

provides that no countervailing duty shall be levied on any product in excess of an amount equal to the estimated bounty or subsidy determined to have been granted directly or indirectly on the manufacture, production or export of such product in the country of origin or exportation.[92] Similarly, Article 19.4 SCM Agreement limits the amount of the countervailing duty to the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and imported product. In all these provisions, the focus is on the *product* which is benefiting from a subsidy, rather than a recipient in the form of a natural or legal person.[93]

The problem whether the recipient of the subsidy benefit is the firm itself (as an independent legal person), the firm's owners or rather the firm's productive assets arose in the cases of *US – Lead and Bismuth II* and the following *US – Countervailing Measures on Certain EC Products*, otherwise the 'Privatization' cases, which concerned the continued imposition of countervailing measures after the privatization of formerly heavily subsidized government-owned companies. The US considered that even following privatization at arm's length and at fair market value, it was entitled to continue to impose countervailing duties on imports of these firms on the basis of the subsidies provided to the firm prior to privatization. In a changed circumstances review proceeding under Article 21.2 SCM Agreement, the US determined that the subsidy continued to exist since the new owners paid a market price for the privatized company but the amount paid was much less than the subsidies provided over the years prior to the privatization of the company. So the benefit *to the productive operations* of the company from the original financial contribution continued to exist. The EC considered that the countervailing duties were no longer justified as the *new owner* of the firm paid fair market value for the firm and could therefore not be considered to have received a benefit. The Panel and the AB sided with the EC, applying the benefit to recipient test outlined above, the recipient must be a natural or legal person.[94] The conclusion was that,

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92 Similarly, footnote 36 to Article 10 SCM Agreement.

93 This argument was examined but rejected by the AB in *US – Lead and Bismuth II:*

> It is true, as the United States emphasizes, that footnote 36 to Article 10 of the *SCM Agreement* and Article VI:3 of the GATT 1994 both refer to subsidies bestowed or granted directly or indirectly 'upon the manufacture, production or export of any merchandise'. In our view, however, it does not necessarily follow from this wording that the 'benefit' referred to in Article 1.1(b) of the *SCM Agreement* is a benefit to *productive operations*.

AB Report, *US – Lead and Bismuth II*, para. 56.

94 AB Report, *US – Lead and Bismuth II*, para. 58.

by paying a market price for the company, it cannot be held that the *new owner* was better off than he would otherwise have been absent the financial contribution or that the financial contribution provided an advantage over what was available on the marketplace.[95] No benefit was conferred by the old financial contribution to the new owner of the privatized firm.

The 'Privatization' cases revealed that in principle the subsidy is considered to have disappeared in the case of privatization at fair market value of a previously heavily subsidized firm because the new owner of the privatized firm allegedly did not receive a benefit from the subsidies bestowed on the firm prior to its privatization. The arguments that the subsidies still reside in the assets of the privatized firm and that this firm would not have existed at the time of privatization but for the subsidies were all rejected by the Panel and the AB. Important in the AB's consideration was the fact that the market place serves as the benchmark for determining the existence of a benefit, and it is therefore not the utility value of the assets of the firm which is important, but rather, their market value. If a market price has been paid for the firm and its assets, there can be no benefit. We quote from the AB report on *US – Countervailing Measures on Certain EC Products*:

> The United States argues, on appeal, that the Panel's finding that the benefit must always necessarily be extinguished upon privatization suffers from a 'basic economic misconception' because 'subsidies shift the recipient's supply curve and . . . subsequent privatization does not move the supply curve back to where it had been, and thus, . . . does not affect the continued existence of the subsidy.' The United States contends that the fact that the private owner pays full market price for the enterprise indicates only that the private *owner* is not receiving a *new* subsidy. It does not indicate, in the view of the United States, that 'from the perspective of *the legal person producing the subject merchandise*' (original emphasis), the effect of the subsidy has been eliminated. The United States supports this argument by noting that a change in ownership 'of a subsidy recipient does not *remove* the new equipment, extract knowledge from the workers, or increase the previously lowered debt load'. (Emphasis added)
>
> The United States advanced similar arguments before the Panel. In considering these arguments, the Panel found that '[t]he United States seems to be "attaching" the benefit to the production activity', and noted that 'countervailing duties are *not* designed to counteract all market distortions or resource misallocations which might have been caused by subsidization'. (Original emphasis)
>
> . . .
>
> We agree with the United States that, irrespective of the price paid by the new private owner, privatization does not *remove* the equipment that a state-owned enterprise may have acquired (or received) with a financial contribution and that, consequently, the same firm may 'continue[]' to make the same products on the same equipment. However, this observation serves only to illustrate that, following privatization, the

[95] AB Report, *US – Lead and Bismuth II*, para. 68; Panel Report, *US – Lead and Bismuth II*, para. 6.81.

> *utility value* of equipment acquired as a result of a financial contribution is not extinguished, because it is transferred to the newly-privatized firm. But, the *utility value* of such equipment to the newly-privatized firm is legally irrelevant for purposes of determining the continued existence of a 'benefit' under the *SCM Agreement*. As we found in *Canada – Aircraft*, the value of the 'benefit' under the *SCM Agreement* is to be assessed using the *marketplace* as the basis for comparison. It follows, therefore, that once a fair market price is paid for the equipment, its *market value* is redeemed, regardless of the utility the firm may derive from the equipment. Accordingly, it is the *market value* of the equipment that is the focal point of analysis, and not the equipment's *utility value* to the privatized firm.
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> The United States also argues that, irrespective of the price at which the new owners acquire the state-owned enterprise, 'the artificially enhanced competitiveness generated by the subsidies' will not be eliminated, as the firm will continue to produce 'at the same costs and in the same volumes'. We fail to see the basis for the assumption by the United States that, regardless of the sale price of the firm, its costs and volume of production will remain the same, since these costs include, as a necessary component, the cost of capital. Indeed, the Panel noted that private investors are 'profit-maximizers', who will seek to 'recoup[ ] through the privatized company . . . a market return on the full amount of their investment'. For example, if a government makes a 'financial contribution' that 'benefit[s]' a state-owned enterprise, and then sells that enterprise for *less* than its fair market price, would this not normally result in a 'better off' return for the private capital newly invested in that enterprise? Would that not suggest, as a consequence, that the under-priced enterprise may then attract more investment than it would have attracted otherwise, if the government had sold it for fair market price? Why would this government-induced additional investment not then reduce the enterprise's cost of raising capital (either by borrowing it from the bank or from, say, shareholders) and, ultimately, reduce the firm's overall costs of production? The United States' argument fails to address such questions and advances no additional reasons why we should disturb the Panel's finding on this point. Hence, we fail to see why *a firm's* cost and volume of production will necessarily remain the same '[o]n the day before and the day after the sale of some or all of a steel producer's shares', irrespective of the price paid for the property and of whether it adequately reflects 'fair market value' or not.[96] (Footnotes omitted)

In the absence of a benefit to the new owner of the firm, there is no subsidy, whatever the amount of the financial contributions made in the past to this company. But how much would the new owner have had to pay if he would have had to set up a new firm himself? And more importantly, if the benefit identifies the trade-distorting potential of the subsidy as Panels and the Appellate Body have consistently stated, can it really be argued that the trade distortion caused by the original subsidies has disappeared simply because a new owner paid a fair market price for this firm?

In spite of its clear stance on this matter, the AB did decide to build in a caveat stating that it is not necessarily so that in *each* case of privatization at

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[96] AB Report, *US – Countervailing Measures on Certain EC Products*, paras 99–100 and 102–3.

fair market value, the subsidy disappears. According to the AB, while this may assumed to be the case, this presumption is rebuttable:

> In effect, the Panel interpreted the *SCM Agreement* as containing an *irrebuttable presumption* that would compel investigating authorities to conclude that the remaining part of a benefit resulting from a prior financial contribution necessarily has been extinguished in all cases where there is privatization at arm's length and for fair market value. In other words, according to the Panel, a benefit can *never* continue to exist for the new owner after privatization at arm's length and for fair market value. We do not agree.
>
> Markets are mechanisms for exchange. Under certain conditions (such as unfettered interplay of supply and demand, broad-based access to information on equal terms, decentralization of economic power, an effective legal system guaranteeing the existence of private property and the enforcement of contracts), prices will reflect the relative scarcity of goods and services in the market. Hence, the actual exchange value of the continuing benefit of past non-recurring financial contributions bestowed on the state-owned enterprise will be fairly reflected in the market price. However, such market conditions are not necessarily always present and they are often dependent on government action.
>
> Of course, every process of privatizing public-owned productive assets takes place within the concrete circumstances prevailing in the market in which the sale occurs. Consequently, the outcome of such a privatization process, namely the price that the market establishes for the state-owned enterprise, will reflect those circumstances. However, governments may choose to impose economic or other policies that, albeit respectful of the market's inherent functioning, are intended to induce certain results from the market. In such circumstances, the market's valuation of the state-owned property may ultimately be severely affected by those government policies, as well as by the conditions in which buyers will subsequently be allowed to enjoy property.
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> The Panel's absolute rule of 'no benefit' may be defensible in the context of transactions between two private parties taking place in reasonably competitive markets; however, it overlooks the ability of governments to obtain certain results from markets by shaping the circumstances and conditions in which markets operate. Privatizations involve complex and long-term investments in which the seller – namely the government – is not necessarily always a passive price taker and, consequently, the 'fair market price' of a state-owned enterprise is not necessarily always unrelated to government action. In privatizations, governments have the ability, by designing economic and other policies, to influence the circumstances and the conditions of the sale so as to obtain a certain market valuation of the enterprise.[97]

In other words, according to the Appellate Body, even if the privatization has taken place at arm's length, it would still be possible to rebut the 'no benefit' presumption, if it could be demonstrated that the market price paid by the new

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[97] Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, paras 121–124.

owner was not a fair market value price, because of particular circumstances in which the privatization took place. A somewhat similar approach was taken by the Appellate Body in its discussion of the term 'prevailing market conditions' in the context of Article 14 (d) in the *US – Softwood Lumber IV* dispute (see below).

Grossman and Mavroidis (2003, 2005) have taken issue with these decisions. In their view, the price paid is simply irrelevant when it comes to deciding whether a benefit continues to exist. At the heart of their disagreement with the Appellate Body's decision lay their understanding of the term *benefit*. The authors attempt a contextual reading of the term. We quote from p. 86:

> the only interpretation of the term 'benefit' in Article 1.1 of the *SCM Agreement* that is consistent with the aims and objectives of those who drafted the Agreement is one that attributes benefit whenever a firm's competitive position is advantaged relative to what it would have been *but for* the government's financial contribution. We view the main objective of the *SCM Agreement* as being to discourage subsidies that threaten harm to competing producers in importing countries. To achieve this objective, it makes no sense to interpret 'benefit' in terms of the financial wealth of the owners of a firm. Rather, the potentially adverse effects of a subsidy on producers in an importing country can be avoided only if a subsidy is deemed to exist whenever a government's financial contribution impacts the competitive situation in an industry. And, as we have argued, the price at which a change in ownership takes place has no bearing on the subsequent competitive conditions. (Italics and emphasis in the original)

In the authors' view, no presumption that the benefit has *passed through* is legitimate either. It is through an investigation that national authorities will determine whether *pass through* of subsidies has indeed been the case. They point out that events that occur subsequent to the payment of a subsidy may render inframarginal an investment that was formerly unprofitable. If an investment becomes inframarginal, it is impossible to argue that the subsidy is the cause of ongoing injury. In such circumstances, the injury would be present even if the subsidy had never been paid.[98]

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[98] Horn and Mavroidis (2005a) alert us to the fact that, in theory, absence of benefit does not *necessarily* amount to a *no subsidy*-benchmark. This test lies on the hypothesis 'revoke measure, *ceteris paribus*', which is a plausible, pragmatic way to deal with the situation at hand. However, the *ceteris paribus* part of the test is associated with conceptual problems. In their thinking, the *no subsidy*-benchmark is not necessarily a situation where the subsidy has been removed *and* nothing else has changed. For, it could very well be the case that removal of the subsidy equals its replacement by another, say lawful measure. We quote from p. 232 of their paper the relevant passage:

> Consider the following highly stylized illustration. A government has two instru-

(ii) Pass-through of the benefit

The *US – Softwood Lumber III* and *US – Softwood Lumber IV* cases brought another important question to the surface. Is it possible to impose countervailing measures on products from producers which did not themselves receive a financial contribution? In other words, can one financial contribution confer a benefit on two recipients? The US had imposed countervailing duties on imports of softwood lumber from Canada based on a determination of subsidization of the lumber producers through the stumpage programmes from the Canadian government. These stumpage programmes were found to provide a good, standing timber (trees) to the tenured timber harvesters at less than market price. The timber harvesters sell the tree to the log producer who sells his log to a lumber producer who turns the logs into all sorts of lumber products. It is not the trees, nor the logs, which are exported or countervailed. Only the lumber products are. While the US found that a great number of timber harvesters were at the same time processing the trees into logs and ultimately lumber, it also acknowledged that some timber harvesters were just harvesting trees and turning them into logs, then selling the logs to unrelated lumber producers. The lumber producer in question did not receive the government-provided good, that is, the government's tree, but rather a log. Does the lumber producer nevertheless benefit from the cheap trees that were provided by the government to the harvester/log producers? That depends. In the case where the log producer sells his logs to an unrelated lumber producer, it will need to be examined whether the price paid for the log was a *fair market price*. Failure to examine whether the benefit passed through from the log producer to the

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ments, an actionable specific subsidy of *s* and a non-actionable lawful instrument with effects equivalent to a smaller specific subsidy *r*. The government's preferred rate of subsidization is equal to *s*. Its first choice would therefore be to use the actionable subsidy, but when unable to do so, it uses the other instrument, and provides a subsidy equal to *r*. Now let the CVD equal the difference in price with and without the subsidy. How large will it be? If the no-subsidy benchmark were taken to be the situation where neither of the instruments is used, then the CVD would equal *s*, this being the difference in price between the two situations. But if instead the no-subsidy benchmark is meant to capture *the situation as it would be absent the actionable subsidy*, the difference in price would be $s - r$, which is potentially a much smaller number than s. Differently put, the *effect* of the actionable subsidy is not to change the subsidy with the amount *s* but with $s - r$.

The authors concede, however, that these problems may or may not prove to be important in practice. On the other hand, although probably theoretically sound, the evidentiary standards associated with this approach are very demanding. There are good reasons to avoid going down this road, especially if the likelihood of a counterfactual where a legal avenue is privileged over a subsidy (as opposed to no action at all) is quite small.

lumber producer invalidates the countervailing measure on imports of lumber from these producers. In general where the recipient of a financial contribution and the alleged recipient of the benefit are different, unrelated entities, it must be examined whether the benefit of the financial contribution has been passed through from the recipient of the financial contribution to the producer of the exported product allegedly subsidized. The key question is always whether a fair market price has been paid by the downstream producer to the upstream producer for the allegedly subsidized input.[99] That was the view of the Panels and the AB dealing with this question.[100] We quote from paras 140–47 of the AB Report on *US – Softwood Lumber IV*:

> The phrase 'subsid[ies] bestowed . . . *indirectly*', as used in Article VI:3, implies that financial contributions by the government to the production of *inputs* used in manufacturing products subject to an investigation are not, in principle, excluded from the amount of subsidies that may be offset through the imposition of countervailing duties on the *processed product*. Where the producer of the input is not the same entity as the producer of the processed product, it cannot be presumed, however, that the subsidy bestowed on the input passes through to the processed product. In such case, it is necessary to analyse to what extent subsidies on inputs may be included in the determination of the total amount of subsidies bestowed upon processed products. For it is only the subsidies determined to have been granted upon the *processed products* that may be offset by levying countervailing duties on those products.
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> In our view, it would not be possible to determine whether countervailing duties levied on the processed product are *in excess* of the amount of the total subsidy accruing to that product, without establishing whether, and in what amount, subsidies bestowed on the producer of the input flowed through, downstream, to the producer of the product processed from that input. Because Article VI:3 permits *offsetting*, through countervailing duties, no more than the 'subsidy determined to have been granted . . . directly or indirectly, on the manufacture [or] production . . . of such *product*', it follows that Members must not impose duties to offset an amount of the input subsidy that has *not* passed through to the countervailed processed products. It is only the amount by which an indirect subsidy granted to producers of inputs flows through to the processed product, together with the amount of subsidy bestowed directly on producers of the processed product, that may be offset through the imposition of countervailing duties. The definition of 'countervailing duties' in footnote 36 to Article 10 of the *SCM Agreement* supports this interpretation of the requirements of Article VI:3 of the GATT 1994.

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[99] If the upstream and the downstream producer are related, such a pass-through of the benefit may be presumed, but this presumption should be rebuttable. If it can be shown that a fair market value was paid by the related downstream producer, the benefit cannot be considered to have passed through.

[100] A proposal has been submitted to incorporate this case-law into the SCM Agreement by adding a footnote to Article 1.1 (b) SCM Agreement explicitly requiring such a pass-through analysis in case the financial contribution is received by one entity and a benefit is allegedly conferred thereby to an unrelated entity so as to constitute the bestowal of an indirect subsidy. TN/RL/GEN/86.

This interpretation is also borne out by the general definition of a 'subsidy' in Article 1 of the *SCM Agreement*. According to that definition, a subsidy shall be deemed to exist only if there is both a *financial contribution* by a government within the meaning of Article 1.1(a)(1),[101] and a *benefit* is thereby conferred within the meaning of Article 1.1(b).[102] If countervailing duties are intended to offset a subsidy granted to the producer of an input product, but the duties are to be imposed on the *processed product* (and not the input product), it is *not* sufficient for an investigating authority to establish only for the *input* product the existence of a financial contribution and the conferral of a benefit on the input producer. In such a case, the cumulative conditions set out in Article 1 must be established with respect to the processed product, especially when the producers of the input and the processed product are not the same entity. The investigating authority must establish that a *financial contribution* exists; and it must also establish that the benefit resulting from the subsidy has passed through, at least in part, from the input downstream, so as to *benefit* indirectly the processed product to be countervailed.

In this respect, the Appellate Body's interpretation of the term 'benefit' in *Canada – Aircraft* is useful:

> A 'benefit' does not exist in the abstract, but must be received and enjoyed by a beneficiary or a recipient. Logically, a 'benefit' can be said to arise only if a person, natural or legal, or a group of persons, has in fact received something. The term 'benefit', therefore, implies that there must be a recipient.[103]

Thus, for a potentially countervailable subsidy to exist, there must be a financial contribution by the government that confers a benefit on a *recipient*. Where a subsidy is conferred on input products, and the countervailing duty is imposed on processed products, the initial recipient of the subsidy and the producer of the eventually countervailed product, may not be the same. In such a case, there is a *direct recipient* of the benefit – the producer of the *input* product. When the input is subsequently processed, the producer of the *processed product* is an *indirect recipient* of the benefit – provided it can be established that the benefit flowing from the input subsidy is passed through, at least in part, to the processed product. Where the input producers and producers of the processed products operate at *arm's length*, the pass-through of input subsidy benefits from the direct recipients to the indirect recipients downstream cannot simply be presumed; it must be established by the investigating authority. In the absence of such analysis, it cannot be shown that the essential elements of the subsidy definition in Article 1 are present in respect of the *processed product*. In turn, the right to impose a countervailing duty on the processed product for the purpose of offsetting an input subsidy, would not have been established in accordance with Article VI:3 of the GATT 1994, and, consequently, would also not have been in accordance with Articles 10 and 32.1 of the *SCM Agreement*.

The panel report, adopted under GATT 1947, in *US – Canadian Pork* reasoned along the same lines under Article VI:3. That panel dealt with a situation where

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101 Or income or price support within the meaning of Article 1.1(a)(2).

102 Appellate Body Report, *Brazil – Aircraft*, para. 157.

103 Appellate Body Report, *Canada – Aircraft*, para. 154.

Canada had granted subsidies to swine producers, while the United States imposed countervailing duties on imports of pork products.[104] The panel noted that:

> Article VI:3 stipulates that a countervailing duty levied on any product shall not exceed an amount equal to the subsidy granted directly or indirectly on the production of 'such product'. *According to this clear wording, the United States may impose a countervailing duty on pork only if a subsidy has been determined to have been bestowed on the production of pork;* the mere fact that trade in pork is affected by the subsidies granted to producers of swine is not sufficient.[105] (Emphasis added)

It is also useful to refer to *US – Countervailing Measures on Certain EC Products*, where the Appellate Body stated that:

> . . . under Article VI:3 of the GATT 1994, investigating authorities, before imposing countervailing duties, must ascertain the precise amount of a subsidy attributed to the imported products under investigation. In furtherance of this obligation, Article 10 of the *SCM Agreement* provides that Members must 'ensure' that duties levied for the purpose of offsetting a subsidy are imposed only 'in accordance with' the provisions of Article VI:3 of the GATT 1994 and the *SCM Agreement.* Moreover, Article 19.4 of the *SCM Agreement*, consistent with the language of Article VI:3 of the GATT 1994, requires that '[*n*]*o countervailing duty* shall be levied on any imported product in excess of the amount of the *subsidy found to exist*'. . . . In sum, these provisions set out the obligation of Members to limit countervailing duties to the amount and duration of the subsidy found to exist by the investigating authority.[106] (Original italics; underlining added; footnotes omitted)

In the light of the above, GATT/WTO dispute settlement practice is consistent with and confirms our interpretation that, where countervailing duties are used to offset subsidies granted to producers of input products, while the duties are to be imposed on *processed* products, and where input producers and downstream processors operate at *arm's length*, the investigating authority must establish that the benefit conferred by a financial contribution directly on input producers is passed through, at least in part, to producers of the processed product subject to the investigation. Therefore, we agree with the Panel that:

> If it is not demonstrated that there has been such a pass-through of subsidies from the subsidy recipient to the producer or exporter of the product, then it cannot be said that subsidization in respect of that product, in the sense of Article 10, footnote 36, and Article VI:3 of GATT 1994, has been found.[107]

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104 GATT Panel Report, *US – Canadian Pork*, para. 4.3. The Panel noted that swine producers and pork producers were separate industries operating at arm's length and that the subsidies granted to swine producers could have only indirectly bestowed a subsidy on the production of pork.

105 GATT Panel Report, *US – Canadian Pork*, para. 4.6.

106 Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 139.

107 Panel Report, para. 7.91.

> This would mean that a financial contribution conferring a benefit on tenure-holding harvesters of *timber* could be offset by imposing countervailing duties on exports of *timber* – or, in other words, *logs* – without carrying out a pass-through analysis.[108] However, if countervailing duties on *softwood lumber products* are meant to offset a financial contribution received by and conferring a benefit directly on producers of *timber/logs*, the investigating authority must establish that those benefits have been passed through, at least in part, from producers of logs to producers of softwood lumber (and remanufactured lumber), which are the products subject to the investigation.[109]

So, in sum, it appears possible to impose countervailing duties on imports from producers which never received a financial contribution by the government as long as it can be established that these producers benefited from the financial contribution. This has important consequences. Suppose a steel company received a grant from the government which allows it to lower its cost of production. Before, it could not find buyers for its steel at a price of 100USD per tonne as its competitors were charging only 80USD per tonne. Thanks to the grant, it is able to produce steel at 50USD per tonne, and it decides to make up for lost profits in the past by selling with a small profit margin at 55USD per tonne, well below the market price. The car company which in an arm's length transaction buys steel from this steel company at a price of 55USD per tonne is 'benefiting' from this strategic decision by the steel company. As it did not pay market value for the steel, it could however find itself caught in a CVD investigation for benefiting from government subsidies, even though it negotiated the price at arm's length.

(e) The market benchmark – but which market?

The AB considered that the market provides the appropriate benchmark for determining whether a benefit was conferred by a financial contribution. But the AB did not explain which market it had in mind, the world market, a constructed perfectly competitive market, or the domestic market probably influenced by all sorts of government intervention.

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[108] Provided that all the other conditions for using countervailing measures as set forth in Part V of the *SCM Agreement* are met.

[109] AB Report, *US – Softwood Lumber IV*, paras 140–47. At the implementation stage a problem arose as the AB has used the term 'arm's length' instead of the term 'unrelated' on a number of occasions. For Canada, however, the term 'arm's length' has to do exclusively with corporate affiliation – any transaction between unaffiliated parties is, by definition, an arm's length transaction. Thus, for Canada, the Appellate Body used the term 'arm's length' synonymously with 'unrelated'. The implementation Panel sided with Canada that this was an unfortunate but unintentional use of a different term by the AB. Panel Report, *US – Softwood Lumber IV (Article 21.5 – Canada)*, para. 4.82.

The Panel in *US – Softwood Lumber III* and *US – Softwood Lumber* IV examined the USDOC's analysis of alleged benefit conferred on the lumber producers from the provision of a good (trees) by the Canadian government on the basis of the text of Article 14 (d) SCM. Article 14 (d) SCM Agreement clearly provides for a specific benchmark in these situations by referring to the *prevailing market conditions in the country of provision*, in this case Canada. According to the Panel, the US should have used the market price for trees on private land in Canada as the benchmark. As the US used prices for trees in the US, the Panel found against the US on the benefit analysis. The AB overturned the Panel's decision stating that not any market may form the appropriate benchmark for measuring benefit and that it could well be the case that a market is so distorted by the government's financial contribution that taking the distorted market as the benchmark would not reveal the true trade distortion caused by the subsidies. According to the AB it suffices that the benchmark *relates to* the prevailing market conditions in the country of provision.

The Panel's analysis in *US – Softwood Lumber IV* was based on the precise language of Article 14 SCM Agreement which it considered to 'govern the benefit analysis an investigating authority is to perform in order to determine the existence and amount of a subsidy in cases, such as the one before us, where the financial contribution at issue consists of the provision of a good or service by the government'.[110]

In other words, the Panel rejected the suggestion that Article 14 provided only 'guidelines' and based its conclusion on the text of Article 14 SCM Agreement.[111] The Panel concluded that, 'as long as there are prices determined by independent operators following the principle of supply and demand, even if supply or demand are affected by the government's presence in the market, there is a "market" in the sense of Article 14(d) [of the] SCM Agreement'.[112] Remarkably, the Panel explicitly acknowledged that, as a matter of economic logic, the US argument was on strong grounds. However, in its view, its role was not to amend the clear content of a provision, even if itself it was not persuaded by the logic of the said provision. Amendments could lawfully be entered only by the principals (the WTO Membership) and not by the agents (Panels):

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110 Panel Report, *US – Softwood Lumber IV*, para. 7.45.

111 The Panel considered that 'The precise detailed method of calculation is not determined, in that sense Article 14 (a)–(d) SCM Agreement are guidelines, but the framework within which this calculation is to be performed is clearly determined and limited in a mandatory manner by the prevailing market conditions in the country of provision.' Panel Report, *US – Softwood Lumber IV*, para. 7.49.

112 Panel Report, *US – Softwood Lumber IV*, para. 7.60.

> We also recognize the more subtle problem of economic logic identified by the United States. The United States argues that the problem of reading the text of Article 14 (d) SCM Agreement to require that, as soon as there is a market, no matter how small or affected by the government intervention in the market, such market prices are to be used in determining the adequacy of the remuneration, is that it could lead to a circular comparison of a government price with, in effect, itself. We acknowledge that the concern raised by the United States may be a legitimate one in certain cases. In the situation addressed by Article 14 (d) SCM Agreement, the government fulfils a role normally also played by private market players: it provides goods or services. In these situations, the government is acting on the market and, by so doing, may influence the private market. Whether and to what extent such government action influences the private market will of course depend upon the particular circumstances, but there could be cases in which that influence is substantial or even determinative of conditions in the private market. In such cases, a comparison of the conditions of the government financial contribution with the conditions prevailing in the private market would not fully capture the extent of the distortion arising from the government financial contribution, a result that in our view would not necessarily be the most sensible one from the perspective of economic logic.
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> That said, we do not believe that it would be appropriate for this Panel to substitute its economic judgment for that of the drafters. The Appellate Body has repeatedly emphasized, and we cannot but agree, that under Article 31 of the Vienna Convention on the Law of Treaties the interpretation of a treaty must be based on the text, as a proper interpretation is first of all a textual interpretation. For all the reasons set forth above, we do not consider that Article 14 (d) can, consistent with customary rules of interpretation of public international law, be understood in the manner urged by the United States. We consider that our task is to interpret the applicable provisions as they exist and apply the text of the Agreement to the facts before us, not to rule on the economic logic of the text as it stands.
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> In sum, our conclusion on the basis of the text of Article 14 (d) SCM Agreement is that, as long as there are prices determined by independent operators following the principle of supply and demand, even if supply or demand are affected by the government's presence in the market, there is a 'market' in the sense of Article 14(d) SCM Agreement. The problem raised by the United States of comparing in certain situations the government price with a market price significantly affected by the government's price, is in our view inherent in the text of Article 14 (d) SCM Agreement. We consider that, if the Members feel the rules as laid down in the WTO Agreements do not address certain situations in what they consider to be a satisfactory manner, they should raise this issue during negotiations. Our task consists of interpreting the Agreement to explain what it means, not what in our view it should mean, nor are we allowed to read words in to the text of the Agreement which are not there, even if we were to consider that the text inadequately addresses certain specific situations.[113] (Footnotes omitted)

The AB agreed with the Panel: '[t]he text of Article 14 (d) [of the] SCM Agreement does not qualify in any way the "market" conditions which are to be used as the benchmark . . . [a]s such, the text does not explicitly refer to a "pure" market, to a market "undistorted by government intervention", or to a

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[113] Panel Report, *US – Softwood Lumber IV*, paras 7.58–7.60.

"fair market value"'.[114] According to the AB, the Spanish and French versions of Article 14(d) do not support the contention either that the term 'market' qualifies the term 'conditions' so as to exclude situations in which there is government involvement.[115]

However, according to the AB, while private prices in the market of provision will generally represent an appropriate measure of the 'adequacy of remuneration' for the provision of goods, this may not always be the case. Therefore, 'investigating authorities may use a benchmark other than private prices in the country of provision under Article 14(d), if it is first established that private prices in that country are distorted because of the government's predominant role in providing those goods'.[116] Only such an interpretation is in line with the objective of Article 14 (d) SCM Agreement which is to establish whether the recipient is better off than he would have been absent the government financial contribution:

> Under the approach advocated by the Panel (that is, private prices in the country of provision must be used whenever they exist), however, there may be situations in which there is no way of telling whether the recipient is 'better off' *absent the financial contribution*. This is because the government's role in providing the financial contribution is so predominant that it effectively determines the price at which private suppliers sell the same or similar goods, so that the comparison contemplated by Article 14 would become circular.[117]

The AB thus considered that the Panel's interpretation frustrates the object and purpose of the SCM Agreement, which includes disciplining the use of subsidies and countervailing measures while, at the same time, enabling WTO Members whose domestic industries are harmed by subsidized imports to use such remedies:[118]

> This is because the determination of the existence of a benefit is a necessary condition for the application of countervailing measures under the *SCM Agreement*. If the calculation of the benefit yields a result that is artificially low, or even zero, as could be the case under the Panel's approach, then a WTO Member could not fully offset, by applying countervailing duties, the effect of the subsidy as permitted by the Agreement.[119]

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114 AB Report, *US – Softwood Lumber IV*, para. 87.

115 The phrase used in the French version is '*aux conditions du marché existantes*' and the Spanish version is '*condiciones reinantes en el mercado*'.

116 AB Report, *US – Softwood Lumber IV*, para. 90.

117 AB Report, *US – Softwood Lumber IV*, para. 93.

118 AB Report, *US – Softwood Lumber IV*, para. 95, referring to Appellate Body Report, *US – Carbon Steel*, paras 73–4.

119 AB Report, US – Softwood Lumber IV, para. 95.

If this is the object and purpose, one may wonder whether the same argument would not have to prevail in the privatization case: would it not be reasonable to allow the continued imposition of countervailing duties following privatization if the effect of the subsidy is still being felt, in spite of the fact that the new owner paid a market price?

In sum, the AB concluded that a market was too distorted to be used as a benchmark and that it would not be possible to use in-country market prices to calculate the benefit in case 'the government's participation in the market as a provider of the same or similar goods is so predominant that private suppliers will align their prices with those of the government-provided goods'.[120]

The Appellate Body's findings are not very persuasive here. It seems that at the heart of its thesis lies a confusion between methods and guidelines. Art. 14(d)SCM, while allowing unilateral definition of methods applied to calculate a benefit, imposes on them an inflexible component: the respect of its guidelines. True, as it is written in its present form, it does not sufficiently account for *Softwood Lumber* types of situations. And yes, ultimately, the current drafting might lead to unreasonable outcomes. Still, it is not for the Appellate Body to re-write the contract. Assuming it believed that the current draft was untenable, it would have to move to the preparatory work to review the debate on this issue. It chose not to do that and availed itself of a role similar to that of a legislator. This is not its institutional role, however. The Panel's attitude should be commended here: when realizing the shortcomings of the current draft, it signalled the problem to the founding fathers while applying an erroneous (to its mind) test. This is the ultimate frontier of the authority entrusted to WTO adjudicating bodies. In the absence of an *ex aequo et bono* type of jurisdiction, WTO adjudicating bodies will be well-advised to follow the Panel and move away from any form of impermissible judicial activism in the future.

(f) Distinguishing between the existence of a benefit and the calculation of the amount of benefit

The analysis of the Panel and the AB in *US – Softwood Lumber IV* was

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[120] AB Report, *US – Softwood Lumber IV*, para. 101. The AB added however the following caveat:

> Thus, an allegation that a government is a significant supplier would not, on its own, prove distortion and allow an investigating authority to choose a benchmark other than private prices in the country of provision. The determination of whether private prices are distorted because of the government's predominant role in the market, as a provider of certain goods, must be made on a case-by-case basis, according to the particular facts underlying each countervailing duty investigation.

AB Report, *US – Softwood Lumber IV*, para. 102.

completely based on the text of Article 14 SCM, the provision considered to govern the benefit determination. The Panel in *EC – Countervailing Measures on DRAM Chips* followed a slightly different approach and separated the question of the existence of a benefit from that of the calculation of a benefit: the *existence* of a benefit is to be determined in accordance with Article 1, and refers to the market. Article 14 is merely context for Article 1. However, when it comes to the question of *calculation of the amount* of benefit, the text of Article 14 SCM Agreement applies:

> In our view, there are two distinct questions to be addressed. The first relates to the *existence* of a benefit, the second deals with the *calculation* of the amount of the benefit. In other words, a finding that the financial contribution was provided on terms more favourable than what the market place provided for is, in our view, sufficient to find that a benefit existed. Our view is based on our interpretation of the term 'benefit' as it appears in Article 1.1 of the *SCM Agreement* which determines when a subsidy is deemed to *exist*, read in the context of the *SCM Agreement* and Article 14 thereof, in particular. Whether such a finding allows an authority to consider the full amount of the financial contribution as the amount of the benefit and treat it like a grant, is, in our view, a different question which relates to the *calculation* of the amount of the benefit, rather than its existence.
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> Both questions are at issue in this case. Whilst the existence of a benefit under Article 1.1(b) is legally and logically distinct from the calculation of the amount of the benefit under Article 14, we will address both of these questions in this section of our Report, and to the extent necessary to resolve this dispute, primarily because this was the way in which the EC's findings with regard to each of the alleged subsidy programmes, as well as each of the parties, handled these two issues.[121]

The Panel applied this distinction when examining the various financial contributions in question.[122] When it came to applying the guidelines of Article 14 for the calculation of the amount of benefit, the Panel emphasized the importance of approaching the question from the perspective of the recipient rather than from the provider of the financial contribution:

> We recall that, in essence, the investigating authority found that the record showed that the financial situation of Hynix was such that no reasonable private investor would have been willing to provide funds to this company, whether in the form of a loan, a loan guarantee or an equity infusion, as it was clear that the chances of ever recovering the money invested were minimal. In sum, the EC considered that the market would not have provided the financing to Hynix. In such a situation, the funding provided, in whatever form, is equal to the provision of risk capital for which Article 14(a) of the *SCM Agreement* does not provide a precise method for

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[121] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.187–7.179.

[122] For the government guarantee for example, see Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.189–7.190.

> calculating benefit. It simply states that a benefit is conferred if the investment decision can be regarded as inconsistent with the usual investment practice – including for the provision of risk capital – of private investors in the territory of that Member. According to the EC, the record showed that this was the case. The benefit then consisted of the financing which no reasonable investor would have provided to Hynix, and the alleged subsidy programmes were all, irrespective of their terms and conditions, treated as grants.
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> In our view, there is a basic problem with the EC's grant methodology, and that is, simply put, that a loan, a loan guarantee, a debt-to-equity swap that requires the recipient to repay the money or to surrender an ownership share in the company is not the same as a grant and can not reasonably be considered to have conferred the same benefit as the provision of funds without any such obligation. For the recipient, a loan clearly has a different value than a grant as it involves a debt that is owed to someone and will appear as such in a company's balance sheet. It is thus obviously less beneficial for a company to be given a loan than it is to be given a grant. Similarly, the issuance of new equity, directly or through a debt-to-equity swap, dilutes the ownership claims of existing shareholders. We note that, in a benefit analysis, it is the perspective of the recipient that is important, not that of the provider of the financial contribution. In that sense, we find erroneous the starting point of the EC's calculation of the amount of benefit, which focuses on the expectation of the provider of the funds to see his money back. The question of benefit is not about the cost to the provider of the financial contribution, it is about the benefit to the recipient.[123]

The Panel recognized the difficulty in applying Article 14 in various circumstances and considered that, in light of the problems dealing with the prescribed methodology for calculating benefit in Article 14 of the *SCM Agreement*, an investigating authority is entitled to considerable leeway in adopting a reasonable methodology:

> We realize that it may be difficult to directly apply Article 14 of the *SCM Agreement* which contains guidelines for the calculation of the subsidy in terms of the amount of the benefit. In the absence of a comparable commercial loan, it may well be difficult to apply for example Article 14(b) dealing with loans and referring the investigating authority to a comparable commercial loan that could actually be obtained on the market. Article 14(c) refers to a comparable commercial loan, which may well be difficult to find. In light of these problems dealing with the prescribed methodology for calculating benefit in Article 14 of the *SCM Agreement*, we consider that an investigating authority is entitled to considerable leeway in adopting a reasonable methodology. As we stated earlier, we do not consider that the EC's grant methodology passes this basic reasonableness test. Any methodology used must, in our view, reflect the fact that the situation of Hynix is less favourable in case it has to repay the money provided, or dilute the ownership of existing share-

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[123] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.211–12. The approach of the Panel is actually very similar to that of the GATT Panel on *US – Lead and Bismuth I*. GATT Panel Report, *US – Lead and Bismuth I*, para. 518.

holders, compared to the situation that it could keep the money provided in the form of a grant.[124,125]

This distinction between the existence of a benefit and the calculation of the amount of a benefit has its appeal, and clearly worked out well in this particular case. By using this distinction, the Panel could more clearly indicate to the parties what it considered to be the problem with the measure in question. On the other hand, to say, as the Panel seems to be doing, that Article 14 does not deal with the existence of benefit, but rather with the calculation of the amount of benefit, is not entirely correct. Of course the title of Article 14 suggests that this provision deals with the calculation of the amount of the subsidy in terms of benefit to the recipient, and it deals with the method for calculating the benefit to the recipient as becomes clear from the chapeau of Article 14. However, the guidelines set forth in paragraphs (a) to (d) with which the calculation methodology has to comply also clearly deal with the *existence or non-existence* of a benefit. Whether it is the provision of equity capital, a loan, a loan guarantee or a good or service, each of the paragraphs provides that the financial contribution '*shall not be considered as conferring a benefit*, unless' this or that. Only in the case of loans and loan guarantees (Article 14 (b) and (c)) does the text actually state what the amount of the benefit is. So, Article 14 seems to be as much about the existence of a benefit as it is about the calculation of the amount of the benefit.

4 Specificity

Only subsidies which are *specific to certain enterprises* are subject to the disciplines of the SCM Agreement, and only such specific subsidies may be countervailed.[126] The rationale for limiting the disciplines of the SCM Agreement to 'specific' subsidies only seems to have been that it was considered that only specific subsidies can lead to inefficient resource allocation, thus leading to trade distortions. If a subsidy is generally available, then all productive units in a country can benefit from this and there will be no diversion of resources to certain enterprises which would otherwise not have attracted such resources. So, if the government decides to grant interest-free loans to all producers to support the economy, these subsidies are considered

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124 In our view, the EC must base its calculation of benefit on alternative benchmarks, in Korea or elsewhere, and such an alternative methodology could, for example, include the investment practices related to 'junk bonds' and 'vulture funds'.

125 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.213.

126 Article 1.2 SCM Agreement. It was at the insistence of the US that this concept of specificity which the US already applied in US countervailing duty law and practice prior to the conclusion of the SCM Agreement was introduced at the time of the Uruguay Round.

to be non-specific and cannot be countervailed. From the perspective of the importing country this may be difficult to accept, because the competitive position of the exporter who is able to have access to interest-free loans has clearly improved *vis-à-vis* the domestic producer in the importing country. Such subsidized imports may well cause injury to the domestic industry, yet no protection may be offered to the domestic producers for lack of specificity of the subsidy.

Two types of subsidies are deemed to be specific, and no further examination of the specificity of such subsidies needs to be undertaken: export subsidies and import substitution subsidies are the two types of prohibited subsidies which are specific per se.[127] This is somewhat bizarre, because it implies that, if the government grants the same interest-free loans to exporters, contingent upon exportation, such subsidies are now all of a sudden specific, simply based on the export contingency of the subsidy in question. It seems like saying that the 'export industry' is a specific industry in itself. And what about subsidies contingent upon the use of local goods over imported goods? If this is the general government policy, and any enterprise which commits itself to using domestic products as inputs rather than imported goods will receive the subsidy in question, where is the specificity and the alleged risk of distorted resource allocation to these companies? It appears that the specificity concept comes from US CVD law and Members realized that it could lead to certain 'prohibited subsidies' escaping the disciplines of the Agreement, unless one simply accepted as a fiction that such subsidies are always 'specific' without attaching any real meaning to this term. Maybe the drafters should simply have stated that prohibited subsidies are prohibited and the disciplines apply, whether they are specific or not. It appears that would have been a better way of getting around the matter, if one were convinced that introducing the specificity concept was a good idea in the first place of course.

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[127] Article 2.3 SCM Agreement. See for example *US – Upland Cotton*, para. 7.1153:

> We recall our findings that user marketing (Step 2) payments to domestic users and exporters under section 1207(a) of the FSRI Act of 2002 are prohibited subsidies under Articles 3.1(a) and (b) of the *SCM Agreement*. As we have found that user marketing (Step 2) payments to domestic users and exporters under section 1207(a) of the FSRI Act of 2002 'fall within the provisions of Article 3', we consequently find that these are 'specific' subsidies within the meaning of Article 2.3 of the *SCM Agreement*. Furthermore, because of the substantial similarities between user marketing (Step 2) payments to domestic users and exporters under section 1207(a) of the FSRI Act of 2002 and under section 136 of the FAIR Act of 1996, we find that the latter are also specific within the meaning of Article 2.3 of the *SCM Agreement*.

(a) Specific to 'certain enterprises'

A subsidy is specific to certain enterprises if it is specific to an enterprise or a group of enterprises or to an industry or a group of industries within the jurisdiction of the granting authority.[128] The Agreement does not define an 'industry' in any particular way.[129] The Panel in *US – Softwood Lumber IV* clearly rejected the argument that the term 'industry' is to be defined with reference to a particular and specifically defined product. The subsidy may be specific to an industry such as the 'steel' industry or, in the case in question, the 'lumber' industry even when this industry produces a wide variety of slightly different products. In *US – Softwood Lumber IV*, Canada argued that more than 200 separate products are manufactured by companies holding harvesting rights, together forming about 23 separate industries.[130] This, according to Canada, is hardly a 'limited number of industries'. Rejecting Canada's approach, the Panel expressed the view that specificity under Article 2 SCM is to be determined at the enterprise or industry level, not at the product level. In the Panel's opinion, the text of Article 2 SCM Agreement does not require a detailed analysis of the end-products produced by the enterprises involved, nor does Article 2.1 (c) SCM Agreement provide that only a limited number of *products* should benefit from the subsidy:

> The *New Shorter Oxford Dictionary* defines an industry as 'a particular form or branch of productive labour; a trade, a manufacture'. Both parties seem to agree that the common practice is to refer to industries by the type of products they produce. It seems therefore that the term 'industry' in Article 2 SCM Agreement is not used to refer to enterprises producing specific goods or end-products. Indeed, even Canada agrees that a single industry may make a broad range of end-products and still remain an 'industry' within the meaning of Article 2 SCM Agreement. We note in this respect that Canada considers that 'it may be completely appropriate to find that producers of a wide variety of steel products (or automobile products or textile products, etc) are a group of "steel industries" (or "automobile industries", "textile industries", etc.) because of the similarity and the relatedness of their output products'. Canada also does not dispute that a subsidy limited to a single large industry (such as 'steel', 'autos', 'textiles', 'telecommunications', or the like) could be found specific, even though the producers make a diversity of products.

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128 Article 2.1 SCM Agreement.

129 A proposal has been made in the negotiations to clarify the term by adding a reference to an international standard industrial classification, the United Nations *International Standard Industrial Classification of All Economic Activities* (ISIC), which identifies and names industries, and groups them into various levels of aggregation. TN/RL/GEN/6.

130 Canada considers as separate industries such industries as the 'wooden kitchen cabinet and bathroom vanity industry' and the 'wooden door and window industry', to mention just two.

> The USDOC Determination considered that only a group of wood product industries, consisting of the pulp and paper mills and the sawmills and re-manufacturers which are producing the subject merchandise used the stumpage programmes. It does not seem that USDOC simply labelled an aggregation of producers as a group of industries merely because they use a particular programme. In our view, the opposite was the case. As Canada recognized, the stumpage programme can clearly only benefit certain enterprises in the wood product industries which can harvest and/or process the good provided, standing timber. In sum, the text of Article 2 SCM Agreement does not require a detailed analysis of the end-products produced by the enterprises involved, nor does Article 2.1 (c) SCM Agreement provide that only a limited number of *products* should benefit from the subsidy. In our view, it was reasonable of the USDOC to reach the conclusion that the use of the alleged subsidy was limited to an industry or a group of industries. We consider that the 'wood products industries' constitutes at most only a limited group of industries – the pulp industry, the paper industry, the lumber industry and the lumber remanufacturing industry – under any definition of the term 'limited'. We do not consider determinative in this respect the fact that these industries may be producing many different end-products. As we discussed above, specificity under Article 2 SCM is to be determined at the enterprise or industry level, not at the product level.[131]

But just how big can an industry be? Is a subsidy specific if it is limited to 'the agricultural industry'? The Panel in *US – Upland Cotton* avoided answering this thorny question. The Panel agreed with the *US – Softwood Lumber IV* Panel that 'an industry, or group of "industries" may be generally referred to by the type of products they produce', but added that the breadth of this concept of 'industry' may depend on several factors in a given case. At a certain moment a subsidy would cease to be specific because it is sufficiently broadly available throughout an economy as not to benefit a particular limited group of producers of certain products. According to the Panel, the plain

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131 Panel Report, *US – Softwood Lumber IV*, paras 7.120–7.121. In a footnote to this paragraph, the Panel further explained its view:

> We consider therefore not determinative either the fact that a distinction may be made on the basis of the specific products produced into 23 industries, as Canada is suggesting. Irrespective of the question whether 23 industries could still be considered to be a limited number in absolute or relative terms, we are of the view that for the purposes of Article 2 SCM Agreement, it was entirely legitimate of the USDOC to group such alleged separate industries as the 'wooden kitchen cabinet and bathroom vanity industry' and the 'wooden door and window industry' together with other similar industries into a group of wood products industries. In a similar vein, it appears to us that, whether a 'group' is required to produce similar products or not in order to be considered a 'group' under Article 2 SCM Agreement, an issue which we need not and do not decide, the industries producing wood products are, in our view, obviously producing sufficiently similar products to be considered as a 'group' of industries for the purposes of Article 2 SCM Agreement.

words of Article 2.1 indicate that specificity is a general concept, and the breadth or narrowness of specificity is not susceptible to rigid quantitative definition.[132] The *US – Upland Cotton* Panel thus came to the following conclusion.

> In our view, the industry represented by a portion of United States agricultural production that is growing and producing certain agricultural crops (and certain livestock in certain regions under restricted conditions) is a sufficiently discrete segment of the United States economy in order to qualify as 'specific' within the meaning of Article 2 of the *SCM Agreement*.
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> As a factual matter, we have found that the crop insurance subsidy is not universally available for all agricultural production. Rather, it is generally limited to certain 'crops', it differentiates among such crops and it is only available in certain regional 'pilot programmes' in respect of livestock. The facts of this case therefore do not require us to address the United States argument that the crop insurance subsidy is generally available to the United States agricultural sector as a whole, and thus, according to the United States, would not be specific within the meaning of Article 2.[133]

(b) *De iure* and *de facto* specificity

A subsidy is specific in the sense of the Agreement if the granting authority or the legislation pursuant to which it operates, explicitly limits access to a subsidy to certain enterprises or industries. Apart from this type of *de iure* specific subsidy, a subsidy may also be considered 'specific' if factors such as the use of the subsidy by a limited number of certain enterprises, the predominant use by certain enterprises or the granting of disproportionately large amounts of subsidy to certain enterprises give reasons to believe that the subsidy is in fact specific. The manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy may also be taken into consideration.[134] While these factors are explicitly mentioned in the SCM Agreement, there does not exist an obligation to examine in each case all four of these listed factors.[135]

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132 Panel Report, *US – Upland Cotton*, para. 7.1142.

133 Panel Report, *US – Upland Cotton*, paras 7.1151–1152.

134 Article 2.1 (c) SCM Agreement. It has been proposed in the course of the DDA negotiations that a footnote be added to the end of the phrase 'the granting of disproportionately large amounts of subsidy to certain enterprises' in Article 2.1(c) requiring that disproportionality be determined with reference to a relevant objective benchmark, such as the relative importance of recipient industries, in terms of production value, within the jurisdiction of the granting authority. TN/RL/GEN/6.

135 Panel Report, US – Softwood Lumber IV, para. 7.123:

> In our view, if the drafters had wanted to impose a formalistic requirement to examine and evaluate all four factors mentioned in Article 2.1 (c) SCM Agreement in all cases, they would have equally explicitly provided so as they have done elsewhere in the SCM Agreement. They did not do so. (Footnote omitted)

In the *US – Offset Act (Byrd Amendment)* case, the Panel was able to avoid the interesting question whether Byrd Amendment payments are limited to a 'group' of enterprises or industries, given the fact that they are funded from AD/CVD duties which are in large part collected from a small group of industries such as the steel, plastics and chemicals industry and will thus in large part be redistributed to such industries.[136] The Panel did not express any views on the US argument that Byrd Amendment payments are available in principle to any producer of any product on which anti-dumping or countervailing duties could be collected, creating a universe of potential recipients far too large and varied to be considered a 'group'.

The Agreement explicitly provides that a subsidy shall *not* be considered as 'specific' if access to a subsidy has been limited by 'objective' criteria or conditions defined as 'criteria or conditions which are neutral, which do not favour certain enterprises over others, and which are economic in nature and horizontal in application, such as number of employees or size of enterprise'.[137] These criteria must be clearly spelled out in an official document so as to be capable of verification. Eligibility under these criteria should be automatic and the criteria should be strictly adhered to, of course.[138] So, if a subsidy is available to small and medium-sized enterprises this subsidy would not be considered 'specific'. On the other hand, if the subsidy is available to enterprises with more than 2000 employees, it could well be that, because of the limited number of such enterprises, the subsidy could be considered de facto specific, based on the factors mentioned above. In other words, it is not because an objective criterion is used and strictly adhered to, that the subsidy can never be specific. De facto specificity may exist precisely in case of any appearance of non-specificity.[139]

The question may be raised in cases such as this one, whether it needs to be demonstrated that the granting authority deliberately wished to limit access to certain enterprises by introducing this specific quasi-objective criterion. The Panel in *US – Softwood Lumber IV*, was of the view that no such element of intent is required for a finding of *de facto* specificity:

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136 A report by the General Accounting Office concluded that nearly two-thirds of all payments made under the Byrd Amendment have gone to just three industries: steel, bearings and candle-makers. The report also states that half of the 1billion USD collected between 2001 and 2004 went to five of the 770 recipients and 80 per cent of the revenues went to 39 companies. See *Wall Street Journal*, 27 September 2005. GAO Report, 'Issues and Effects of Implementing the Continued Dumping and Subsidies Offset Act' (GAO-05-979), September 2005.

137 Article 2.1 (b) and footnote 2 SCM Agreement.

138 Article 2.1 (b) SCM Agreement.

139 Article 2.1 (c) SCM Agreement.

> In our view, Article 2 SCM Agreement is concerned with the distortion that is created by a subsidy which either in law or in fact is not broadly available. While deliberate action by a government to restrict access to a subsidy that is in principle broadly available, through the use of discretion, could well be the basis for a finding of *de facto* specificity, we see no basis in the text of Article 2, and 2.1 (c) SCM Agreement in particular, for Canada's argument that if the inherent characteristics of the good provided limit the possible use of the subsidy to a certain industry, the subsidy will not be specific unless access to this subsidy is limited to a sub-set of this industry, i.e. to certain enterprises within the potential users of the subsidy engaged in the manufacture of similar products. (Footnote omitted)[140]

B INJURY AND CAUSATION

As already stated, a WTO Member wishing to impose CVDs, will have to demonstrate that a subsidy is causing injury to the domestic industry producing the like product. As to the demonstration of a subsidy, we refer to our discussion above. In what follows, we focus on the interpretation of the terms 'injury', the domestic industry producing the like product, and 'causality'. Many of the provisions of the SCM Agreement are very similar to those of the AD Agreement in respect of these issues. The case-law reveals that Panels and the AB consider that the interpretations given of similar provisions in the AD context provide good guidance for the interpretation of similar provisions in the CVD context, and vice versa.[141] This makes perfect sense given the great

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[140] Panel Report, *US – Softwood Lumber IV*, para. 7.116. Canada had argued that the Canadian government never intentionally limited access to the stumpage programmes to lumber producers, but that such a predominant use of the stumpage programmes by the lumber producers was to be explained by the fact that the alleged financial contribution consisted of the provision of trees, which, thanks to its inherent characteristics, are of interest mainly to a limited number of log and lumber producers.

[141] See for example, Panel Report, *US – Corrosion Resistant Steel Sunset Review*, para. 7.75; Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.218, and 7.351 concerning the non-attribution requirement where the Panel made the following statement:

> The non-attribution requirement in anti-dumping investigations has been addressed by the Appellate Body in several recent cases. Although it has not been specifically considered in a countervailing duty case, given that the relevant provisions in the two Agreements are identical, and in light of the 'need for the consistent resolution of disputes arising from anti-dumping and countervailing duty measures' (*Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures*), it is clear to us that the requirement is the same in the context of both anti-dumping and countervailing duty investigations.

functional similarities between CVD and AD in so far as injury, causation and procedure is concerned. It is also in line with the Ministerial Declaration On Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures adopted at Marrakesh at the conclusion of the Uruguay Round which recognized the need for a consistent resolution of disputes arising from anti-dumping and countervailing duty measures. In other words, for those provisions which have not been addressed in case-law in the CVD context, we refer to our discussion of the interpretation given by Panels and the AB of such similar provisions in the AD context.

1 Injury

The demonstration of injury is addressed in Art. 15 SCM. In the SCM Agreement, as in the AD context, the term 'injury' is used to refer to a situation of material injury, threat of material injury or material retardation in the establishment of an industry.[142] Articles 15.1–6 deal with injury in general, while Articles 15.7 and 15.8 contain special additional obligations in cases of threat of injury. But it is clear that CVDs can be lawfully imposed to address both current material injury or a threat of injury.

For injury to be shown, a WTO Member must conduct (a) an objective examination based on positive evidence regarding (b) the volume of the subsidized imports and (c) their effect on prices in the domestic market for like products, as well as (d) the consequent impact of these imports on the domestic producers of such like products.[143]

(a) An *objective examination* based on *positive evidence*

Panels in the CVD context have consistently referred with approval to state-

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[142] Fn 45 SCM Agreement. The latter situation of material retardation does not seem to have been of any practical meaning so far.

[143] Article 15.1 SCM Agreement. As Article 15.3 provides, an injury analysis may be conducted on a cumulative basis under the following conditions: (i) imports of a product from more than one country are simultaneously subject to countervailing duty investigations; (ii) the amount of subsidization established in relation to the imports from each country is more than *de minimis* as defined in paragraph 9 of Article 11; (iii) the volume of imports from each country is not negligible; and (iv) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between the imported products and the conditions of competition between the imported products and the like domestic product. This is similar to what is provided for in Article 3.3 AD Agreement. The meaning of the *de minimis* standard in the SCM context is different from that in the AD context, however.

ments made by the Appellate Body when interpreting the terms 'positive evidence' and 'objective examination' in the AD context. For example, the Panel Report on *US – Softwood Lumber VI* dealt *inter alia*, with the interpretation of the terms 'positive evidence' and 'objective examination'. It quoted verbatim para. 114 of the Appellate Body Report on the anti-dumping case, *EC – Bed Linen (Article 21.5 – India)*, which itself was quoting from its *US – Hot-Rolled Steel* decision:

> The term 'positive evidence' relates, in our view, to the *quality* of the evidence that authorities may rely upon in making a determination. The word 'positive' means, to us, that the evidence must be of an *affirmative, objective* and *verifiable* character, and that it must be *credible*. (Emphasis in original).
>
> The Appellate Body has defined an 'objective examination':
>
> The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and, subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. (Footnote omitted)
>
> The Appellate Body summed up the requirement to conduct an 'objective examination' as follows:
>
> In short, an 'objective examination' requires that the domestic industry, and the effects of dumped imports, be investigated in an *unbiased* manner, *without favouring the interests of any interested party*, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[144] (Footnote omitted, emphasis in original)

After quoting these various AB statements, the Panel in *US – Countervailing Duty Investigation on DRAMS* considered that '[We] shall be guided by these statements by the Appellate Body in determining whether or not the ITC's

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144 Panel Report, *US – Softwood Lumber VI*, para. 7.28, quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para.114, quoting. Appellate Body Report, *US – Hot-Rolled Steel*, para. 193; also see Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.272; Panel Report, *US – Countervailing Duty Investigation on DRAMS*, paras 7.215–7.217, both quoting the AB Report, *US – Hot-Rolled Steel*, paras 192–4.

injury determination is consistent with paragraphs 2, 4 and 5 of Article 15 of the SCM Agreement'.[145]

(b) Volume of subsidized imports

An evaluation of the volume requires that an investigating authority consider whether there has been a significant[146] increase in subsidized imports, either in absolute terms or relative to production or consumption in the importing Member. This evaluation of the volume of subsidized imports under Article 15.2 is not alone determinative in an injury determination. As the Panel in *EC – Countervailing Measures on DRAM Chips* noted, 'Rather, it forms part of an overall assessment of injury to the domestic industry and is conducted so as to provide guidance to the investigating authority in the context of this assessment of injury and causation.'[147] In other words, Article 15.2 does not require a particular finding of an increase in the volume of subsidized imports, nor does the absence of an increase in subsidized imports necessarily imply no injury.[148] The obligation on the authority is to *consider* whether there has been a significant increase. A Panel will examine the evidence on which the investigating authority based its determination and review whether

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[145] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.218. Similar to the views expressed by the AB with respect to the role of Article 3.1 AD Agreement, in the countervailing duty context, Panels have consistently considered that Article 15.1 SCM Agreement is an overarching provision which informs the more detailed obligations set forth in the remainder of Article 15 SCM Agreement. See, e.g., Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.275, quoting from AB Report, *Thailand – H-Beams*, para. 106. For that reason, Panels have first examined the consistency of the measures with the specific obligations contained in Articles 15.2–5 SCM Agreement. Also see, Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.217; Panel Report, *US – Softwood Lumber VI*, para. 7.26.

[146] The Panel in *EC – Countervailing Measures on DRAM Chips* considered that the ordinary meaning of the term 'significant' 'encompasses "important", "notable", "major" as well as "consequential"', which all suggest something more than just a nominal or marginal movement. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307.

[147] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.290.

[148] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.302, fn. 230, referring in support of this view to AB Report, *EC – Tube or Pipe Fittings*, para. 111, fn 114. Also see Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.233, fn 224. The US investigating authority found that the volume of subsidized imports was significant but made no finding on whether the increase in subsidized imports was significant. This is not per se inconsistent with Article 15.2 SCM Agreement according to the Panel. Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.234.

the determination made was the result of an objective determination based on positive evidence.[149]

(i) Increase in absolute or relative terms

Panels have refused to impose stringent obligations on investigating authorities in respect of this requirement. The Panel in *US – Countervailing Duty Investigation on DRAMS* considered that Article 15.2 sets forth three alternative ways in which an authority may comply with Article 15.2, suggesting that it suffices for an authority to consider an absolute increase or an increase relative to production or an increase relative to consumption.[150] The Panel in *EC – Countervailing Measures on DRAM Chips* faced the argument that an absolute increase in certain circumstances is uninformative of the possible injurious effect of subsidized imports. In the case at hand, Korea argued that, by measuring the volume of DRAMs imports in megabits, which are always increasing owing to technological developments, an absolute increase is meaningless. According to Korea, only a market share analysis could lead to meaningful conclusions. The Panel considered that 'even assuming, *arguendo*, that given the specific characteristics of the DRAMs market it would not be reasonable from an economic perspective for an investigating authority to reach conclusions about a significant increase based on an increase in absolute terms, the language of Article 15.2 confers considerable latitude on an investigating authority'.[151] The Panel was of the view, that 'It is up to WTO Members, if they so choose, by amending the SCM Agreement to narrow this provision.'[152] At the same time, however, it should be noted that Panels so far have not been required to rule on a determination by an investigating authority which did not look at both an absolute increase and a relative increase. Even in the *EC – Countervailing Measures on DRAM Chips* case, the EC authority had concluded that the subsidized imports increased both in relative and absolute terms. So it remains to be seen whether Panels would really be willing to accept a determination which is based on an absolute increase without examining the volume in relative terms, or where the market share of the subsidized imports was declining, for example.[153]

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149 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.291.

150 Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.233.

151 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307.

152 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.307.

153 In *US – Countervailing Duty Investigation on DRAMS*, the Panel considered reasonable the US investigating authority dismissal of data which showed a decrease in market share of the subsidized imports as this decrease was allegedly due to the

(ii) Subsidized imports

The term 'subsidized imports' refers to all imports from a source found to have been subsidized above *de minimis* level.[154] In other words, imports from exporters not found to have been receiving subsidies are to be excluded from this determination. In fact the level of such non-subsidized imports will be one of the 'other factors' that will need to be examined in the context of the causation and not attribution analysis under Article 15.5 SCM Agreement. The mere fact that imports from subsidized and non-subsidized sources are discussed side by side by the authority is not inconsistent with the Agreement. What matters is the use made of the data and whether the consideration required by Article 15.2 was made on the basis of data concerning imports found to have been subsidized.[155] Neither is it relevant under Article 15.2 that subsidized imports decreased in relative terms compared to non-subsidized imports, since this is not the focus of the volume determination under Article 15.2 SCM Agreement.[156]

The Panel in *EC – Countervailing Measures on DRAM Chips* considered that it was not unreasonable of the investigating authority to consider a merger between the entity found to have been receiving subsidies and another company as merely adding production facility to the subsidized producer. It thus did not consider that the volume of imports from this company which was later merged with the subsidized company should have been added to the initial volume of imports from the subsidized company.[157] Similarly, the fact that the greatest increase in subject imports took place prior to the subsidies were being provided was not considered determinative in the context of Article 15.2, as 'Article 15.2 does not require an investigating authority to demonstrate that all of the subject imports covered by the period of injury investigation are subsidized.'[158]

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pendency of the CVD investigation. Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.242.

[154] The Panel in *EC – Countervailing Measures on DRAM Chips* referred with approval to Panels and the AB in the AD context, and, in particular AB Report *on EC – Bed Linen (Article 21.5 – India)*, para. 113. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.298, fn. 227.

[155] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.298.

[156] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.243.

[157] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.302.

[158] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.245.

(c) Price effect of subsidized imports

An evaluation of the effects of the subsidized imports on prices will require that an investigating authority consider whether there has been significant price undercutting as compared with the price of a like product in the importing Member, significant price depression or price suppression. The SCM Agreement makes it clear that the overall evaluation can be based on one or several factors.

Article 15.2 does not impose any particular methodology for analysing prices. What is important is that the methodology chosen is reasonable and objective.[159] Neither does Article 15.2 require an authority to establish what caused the price undercutting.[160] Of course, as recognized by the Panel in *EC – Countervailing Measures on DRAM Chips*, 'Article 15.5 . . . requires that the effects found, including those with regard to price, must be put in context by examining all other known factors affecting the industry at the same time.'[161]

With respect to the period of data collection, the Panel in *EC – Countervailing Measures on DRAM Chips* rejected the argument that a pricing analysis must include the most recent period prior to initiation. The data on which the injury analysis is based should be sufficiently recent in order for these data to be relevant and probative such as to constitute positive evidence. But the Panel considered that, since the EC gathered data which covered three years, including the last full year for accounting purposes prior to the initiation, its analysis was clearly based on the recent past.[162]

(d) Consequent impact on the state of the domestic industry

The SCM Agreement, in Article 15.4, requires that the examination of the impact of the subsidized imports on the domestic industry include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes.[163] It adds that this list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.

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159 Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.334 and 7.336.

160 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.328.

161 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.338.

162 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.341.

163 This list is very similar, while not identical, to the list of factors set forth in Article 3.4 AD Agreement.

The SCM Agreement thus reflects an indicative list of proxies, recourse to which should demonstrate injury. Case-law makes it clear that all factors mentioned in the body of Article 15.4 SCM *must* be evaluated by the investigating authority.[164] The obligation of evaluation imposed by Article 15.4 is not confined to these listed factors, however, but extends to *all* relevant economic factors. Whether a factor is relevant depends, *inter alia*, on the nature of the industry being examined.[165] The Panel on *EC – Countervailing Measures on DRAM Chips* stated that relevant economic factors are not to be confused with other causal factors, such as the general economic downturn or the export performance of the domestic industry, which are to be examined as part of the causation and non-attribution analysis of Article 15.5.[166]

What is ultimately required is that these various factors be examined in their overall context. It is not required that each and every factor show a negative trend. A proper evaluation of the impact of the subsidized imports on the domestic industry is dynamic in nature and should take account of changes in the market that determine the current state of the industry.[167]

2 Causation and Non-attribution

The requirement to establish a causal link between the subsidized imports and injury is laid down in Art. 15.5 SCM Agreement. It contains a *positive* obligation to demonstrate that it is the subsidized imports which are causing the injury. In addition it sets forth the *negative* obligation not to attribute injury caused by other factors to the subsidized imports. In this respect, Article 15.5 requires that the authority examine any known factors other than the subsidized imports which are at the same time injuring the domestic industry. The last sentence of Art. 15.5 SCM Agreement explicitly mentions factors the review of which may help observe the non-attribution requirement:

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164 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.356, referring to the established case-law in the AD context. The Panel thus found that the EC had acted in a manner inconsistent with Article 15.4 by having failed to examine the factor 'wages' in its investigation. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.362.

165 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.363. According to the Panel in this case, the question of evaluation of such other not listed factors should have been raised during the investigation.

166 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.365. The Panel in *US – Countervailing Duty Investigation on DRAMS* came to a similar conclusion with respect to the so-called 'boom–bust' cycle so typical of the DRAMs industry. Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.292.

167 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.372, fn 270.

> Factors which may be relevant in this respect include, inter alia, the volumes and prices of nonsubsidized imports of the product in question, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry.

The Panel Report on *US – Softwood Lumber VI* made it clear that, under the causality requirement, an investigating authority must not only ensure that it has shown that injury has been caused by subsidies, but also that it has not been caused by factors other than subsidies. This much, however, adds nothing to the legislative prescription. The Panel made two important clarifications: wrong facts/assumptions and absence of any discussion of specific factors which might have caused injury are fatal; a WTO Member committing such errors is deemed not to have respected the causality requirement.

With respect to the first point, the Panel held that the causality requirement cannot be satisfied if it is predicated on wrong facts/assumptions. In this case, the US investigating authority, based on evidence before it, reached the conclusion that subsidized imports from Canada would increase substantially. This conclusion was crucial in the overall findings of the US investigating authority. In the Panel's view, however, such a conclusion was unwarranted in light of the facts of the case.[168] Having reached this conclusion, the Panel went on to find that the US, by erring on such an important issue, could not satisfy the requirements of Art. 15.5 AD:

> As discussed above, we have found that the USITC's determination is inconsistent with the requirements of Article 3.7 of the AD Agreement and Article 15.7 of the SCM Agreement in that the conclusion that imports would increase substantially is not one that could have been reached by an unbiased investigating authority based on an objective examination of the evidence concerning relevant factors in the investigation. The entire analysis of the USITC with respect to causation rests upon the likely effect of substantially increased imports in the near future. Having found that a fundamental element of the causal analysis is not consistent with the Agreements, it is clear to us that the causal analysis cannot be consistent with the Agreements. We therefore find that the determination is not consistent with Article 3.5 of the AD Agreement and Article 15.5. of the SCM Agreement in this regard.[169]

It seems worth pointing out that a causal link may be established between subsidized imports and the injury to the domestic industry, even in the absence of any increase in subsidized imports. Increased imports are not a condition for imposition of a CVD measure but merely an element in the overall assessment

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168 Panel Report, *US – Softwood Lumber VI*, para. 7.89 et seq.
169 Panel Report, *US – Softwood Lumber VI*, para. 7.122.

of injury and causation. This led the Panels in *EC – Countervailing Measures on DRAM Chips* and *US – Countervailing Duty Investigation on DRAMS* to the remark that there is no generalized requirement to establish a temporal correlation between increased subsidized imports and injury in the context of a countervail investigation.[170] According to the Panel in *EC – Countervailing Measures on DRAM Chips*, 'the absence of a temporal correlation certainly raises a flag, but it is not an absolute barrier to a finding of injury'.[171]

With respect to the second point, relating to the failure to discuss certain intervening factors, the Panel in *US – Softwood Lumber VI* held the view that the omission to discuss specifically the impact that some other factors might have had on the domestic industry constitutes a breach of the obligation to respect non-attribution. In the Panel's view, the failure to discuss future effects of the domestic supplies of lumber in this context constituted a glaring omission):

> A glaring omission is the failure to discuss the likely future effects of domestic supplies of lumber. The single reference to domestic oversupply and its potential effect on the domestic industry in the future is in a footnote in the section of the report discussing price declines during the period of investigation. The last sentence of that footnote cites a consultant's report stating that lumber overproduction had been 'curbed considerably [in the United States] but remains a problem in Canada'. Even were this single statement drawn from a consultant's report deemed sufficient to support the conclusion that there would be no US oversupply affecting lumber prices in the future, there is nothing in the report to link such a conclusion to the USITC's analysis of causation of material injury in the near future.
>
> We do not mean to suggest that all aspects of the investigating authorities' determination must be entirely contained in the specific parts of the report dealing with particular issues. Certainly, in dispute settlement, a Member may argue the consistency of an anti-dumping or countervailing duty determination based on the entirety of that determination. However, that does not excuse the investigating authority from the necessity of, at the time of its determination, providing an adequate explanation of its analysis such that a Panel can, with confidence, understand the reasoning underlying the decision that was actually made in order to be able to assess its consistency with the relevant provisions of the Agreements.
>
> Given the overall absence of discussion of other factors potentially causing injury in the future, we would conclude that the USITC determination is not consistent with the obligation in Article 3.5 of the AD Agreement and Article 15.5 of the SCM Agreement that 'injuries caused by these other factors must not be attributed' to the subject imports.[172]

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[170] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, para. 7.320, fn. 283; Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.399, fn 277.

[171] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.399, fn 277.

[172] Panel Report, *US – Softwood Lumber VI*, paras 7.135–7.137.

It should be noted here that the other factors mentioned in this passage are not included in the list of Art. 15.5 SCM Agreement. However, one should not jump to conclusions: the Panel did not, it seems, intend to extend the list mentioned in Art. 15.5 SCM Agreement. The investigating authority, however, in the case at hand, had acknowledged the relevance of this other factor. The Panel essentially condemned the fact that the investigating authority, on the one hand, acknowledged its relevance and, on the other, refused to evaluate its impact. The relevance of other factors will inevitably, be discussed case by case. Case-law, in the context of anti-dumping, seems to support the view that the treatment of other factors should not be equated to an obligation to look beyond the list of Art. 15.5 SCM Agreement, factors brought to the attention of the authority during the investigation process, and factors otherwise explicitly acknowledged by the authority (as the one mentioned here).

All of the above is based on findings by Panels, not the Appellate Body. At the moment of writing, the Appellate Body has not pronounced on the causation and non-attribution in the SCM context. It did so however in the anti-dumping context, as we discussed in our earlier discussion in the AD chapter. However, the views expressed in the context of Article 3.5 AD Agreement by the AB on non-attribution and the need to separate and distinguish the nature and extent of the injury caused by other factors were adopted into the SCM Agreement by the Panels in *US – Countervailing Duty Investigation on DRAMS*[173] and *EC – Countervailing Measures on DRAM Chips*.[174] According to the Panel in *EC – Countervailing Measures on DRAM Chips*, while the AB had not provided guidance as to how an investigating authority should examine other known factors, it was of the view that an authority must do more than simply list other known factors and then dismiss their role with bare qualitative assertions such as 'the factor did not contribute in any significant way to the injury'. In the Panel's view, 'an investigating authority must make a better effort to quantify the impact of

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[173] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, paras 7.351–7.353.

[174] The Panel in *EC – Countervailing Measures on DRAM Chips* quoted the AB's own summary of its interpretation of the non-attribution requirement in *EC – Tube or Pipe Fittings*. Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.404, fn 281. It then added the following: 'We note that a parallel obligation in the AD Agreement has been interpreted by Panels and the Appellate Body to require an investigating authority to separate and distinguish the injury caused by such other known factors. In light of the identical wording and role of the non-attribution requirement in the SCM Agreement, we are of the view that Article 15.5 contains a similar requirement to separate and distinguish the injury caused by factors other than subsidized imports.' Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.404.

other known factors, relative to subsidized imports, preferably using elementary economic constructs or models'.[175] It thus faulted the EC investigating authority for acknowledging on the one hand the negative impact on the industry of certain other factors such as the economic downturn in the market, overcapacity of the domestic industry, and other non-subsidized imports, but failing to examine the extent of this negative effect. The Panel was of the view that a mere conclusory assertion that the effect was not such as to break the causal link between subsidized imports and injury, without any quantitative or thorough qualitative support, does not suffice to separate and distinguish the injury that might have been caused by the subsidized imports.[176]

3 Threat of Injury

As to threat of injury, the SCM Agreement requests that a demonstration that threat of injury indeed occurred must be based on facts and not merely on allegation, conjecture or remote possibility (Art. 15.7 SCM). In addition, the change in circumstances which would create a situation in which the subsidy would cause injury must be clearly foreseen and imminent. In making a determination regarding the existence of a threat of material injury, the investigating authorities should consider, *inter alia*, such factors as (i) nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom; (ii) a significant rate of increase of subsidized imports into the domestic market indicating the likelihood of substantially increased importation; (iii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased subsidized exports to the importing Member's market, taking into account the availability of other export markets to absorb any additional exports; (iv) whether imports are entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and (v) inventories of the product being investigated.[177] The Agreement adds that not one of these factors by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further subsidized exports are imminent

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[175] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.405.

[176] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.408, 7.413, 7.420, 7.427, 7.434.

[177] Article 15.7 SCM Agreement. This list is similar to that contained in Article 3.7 AD Agreement, apart from the factor relating to the nature of the subsidy and its likely trade effects. We thus refer to our discussion of this obligation in our chapter on threat of injury in the AD context.

and that, unless protective action is taken, material injury would occur. In a threat situation, the application of countervailing measures shall be considered and decided with special care.[178]

The Panel Report on *US – Softwood Lumber VI* held the view that authorities do not have to go so far as to specify one particular event that will cause injury in the future; indicating a 'progression' of circumstances by and large suffices to meet the requirements of the SCM Agreement in this respect:

> As noted above, we do not disagree, in principle, with the United States' view that Article 3.7 and Article 15.7 do not require that the investigating authority identify a specific event that will change such that a situation of no injury will become a situation of injury in the future. In this case, the facts the United States points to as demonstrating the 'progression' of circumstances which would create a situation in which injury would occur in the near future are thoroughly intertwined with the USITC's discussion of the present condition of the domestic industry, the present impact of imports, and the facts asserted in support of the conclusion that imports will increase substantially. Thus, in our view, the USITC considered these various elements in concluding that the continuation of the trends in the situation of the domestic industry, coupled with predicted substantially increased imports, would result in an imminent change in circumstances such that injury would occur. However, while this may be enough to allow us to conclude that the USITC considered whether there would be a change in circumstances such that the dumped and subsidized imports would cause injury, it does not answer the question whether the overall determination of threat, based on the totality of the factors considered, is consistent with the requirements of the Agreements.[179]

The Panel in *US – Softwood Lumber VI* agreed with the views expressed by the Panel in *Mexico – Corn Syrup* that there must be, in every case in which threat of injury is found, an evaluation of the condition of the industry in light of the Article 15.4 factors to establish the background against which the impact of future dumped/subsidized imports must be assessed, in addition to an assessment of the specific threat factors.[180] But there is no need for a second 'predictive injury' analysis.[181]

With regard to the listed factors in Article 15.7, the Panel in *US – Softwood Lumber VI* considered that the authority has an obligation to *consider* these factors, but is not obliged to make a finding or determination with respect to the factors considered.[182] Moreover, the failure to consider a factor at all or to

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178 Article 15.8 SCM Agreement. For a discussion of the special care obligation, we refer to our chapter on the similar requirement under Article 3.8 AD Agreement. See Panel Report, *US – Softwood Lumber VI*, paras 7.33–7.37.

179 Panel Report, *US – Softwood Lumber VI*, para. 7.60.

180 Panel Report, *US – Softwood lumber VI*, para. 7.105.

181 Panel Report, *US – Softwood Lumber VI*, paras 7.105 and 7.111.

182 Panel Report, *US – Softwood Lumber VI*, para. 7.67.

adequately consider a particular factor would not necessarily demonstrate a violation of this provision. All will depend on the particular facts of the case, the totality of the factors considered and the explanations given.[183]

In the implementation case dealing with the way the US implemented the recommendations of the Panel in *US – Softwood Lumber VI*, the Panel expressed the view that a Panel will be more deferential to the investigating authority when examining a threat of injury determination compared to a material injury determination:

> The possible range of reasonable predictions of the future that may be drawn based on the observed events of the period of investigation may be broader than the range of reasonable conclusions concerning the present that might be drawn based on those same facts. That is to say, while a determination of threat of material injury must be based on the facts, and not merely on allegation, conjecture, or remote possibility, predictions based on the observed facts may be less susceptible to being found, on review by a panel, to be outside the range of conclusions that might be reached by an unbiased and objective decision maker on the basis of the facts and in light of the explanations given.[184]

C THE DOMESTIC INDUSTRY PRODUCING THE LIKE PRODUCT

Like the AD Agreement, the SCM Agreement provides that the term 'domestic industry' refers to the *domestic producers as a whole of the like products* or to those of them whose collective output of the products constitutes *a major proportion of the total domestic production of those products.* In the case that producers are *related* to the exporters or importers or are themselves *importers* of the allegedly subsidized product or a like product from other countries,[185] such producers may be excluded from this definition, and the term 'domestic industry' may be interpreted as referring to the rest of the producers.[186]

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[183] Panel Report, *US – Softwood Lumber VI*, para. 7.68.

[184] Panel Report, *US – Softwood Lumber VI (Article 21.5 – Canada)*, para. 7.13.

[185] Article 4.1 (i) of the AD Agreement provides that only importers of the allegedly dumped product may be excluded from the domestic industry while Article 16.1 SCM Agreement seems to allow an authority to exclude, not only importers of the subject product but also importers of the like product from other countries.

[186] Article 16.1 SCM Agreement. The term 'related to' is interpreted in the SCM Agreement in the same way as in the AD Agreement. Footnote 48 to Article 16.1 SCM provides that 'producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that

The term 'like product' is defined in footnote 46 to the SCM Agreement in the following terms:

> Throughout this Agreement the term 'like product' ('produit similaire') shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

This definition of the like product is identical to that provided for in the AD Agreement. This definition implicitly evidences a statutory preference for narrow definitions of the term 'like product'. This preference has not always been confirmed in practice. The Panel Report on *Indonesia – Autos* established a parallelism as to the like product analysis between Art. III.2, first sentence GATT and the SCM Agreement provision on this score and considered that the closely resembling characteristics referred to in the definition include but are not limited to physical characteristics:

> In our view, the analysis as to which cars have 'characteristics closely resembling' those of the Timor logically must include as an important element the physical characteristics of the cars in question. This is especially the case because many of the other possible criteria identified by the parties are closely related to the physical characteristics of the cars in question. Thus, factors such as brand loyalty, brand image/reputation, status and resale value reflect, at least in part, an assessment by purchasers of the physical characteristics of the cars being purchased. Although it is possible that products that are physically very different can be put to the same uses, differences in uses generally arise out of, and assist in assessing the importance of, different physical characteristics of products. Similarly, the extent to which products are substitutable may also be determined in substantial part by their physical characteristics. Price differences also may (but will not necessarily) reflect physical differences in products. An analysis of tariff classification principles may be useful because it provides guidance as to which physical distinctions between products were considered significant by Customs experts. However, we do not see that the SCM Agreement precludes us from looking at criteria other than physical characteristics, where relevant to the like product analysis. The term 'characteristics closely resembling' in its ordinary meaning includes but is not limited to physical characteristics, and we see nothing in the context or object and purpose of the SCM Agreement that would dictate a different conclusion.[187]

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the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter'.

[187] This interpretation is confirmed by the negotiating history of this definition. As noted above, this definition of 'like product' is virtually unchanged from that which first appeared in the Kennedy Round Anti-Dumping Code. Thus, the penultimate draft of that Code defined the term 'like product' to mean a product which 'has physical

> Although we are required in this dispute to interpret the term 'like product' in conformity with the specific definition provided in the SCM Agreement, we believe that useful guidance can nevertheless be derived from prior analysis of 'like product' issues under other provisions of the WTO Agreement. Thus, we note the statement of the Appellate Body in *Alcoholic Beverages (1996)*[188] that, in this context as in any other, the issue of 'like product' must be considered on a case-by-case basis, that in applying relevant criteria panels can only use their best judgment regarding whether in fact products are like, and that this will always involve an unavoidable element of individual, discretionary judgment. With this in mind, we now proceed to consider the application of these general principles to the case at hand.[189]

One would expect that, as a result of this parallelism, it would have adopted a very narrow definition of the term 'like product'.[190] Still, the Panel went on to find that a kit car is a like product to a finished car:

> We do not consider that an unassembled product *ipso facto* is not a like product to that product assembled. Recalling the view of the Appellate Body that tariff classification may be a useful tool in like product analysis, we note that, under the General Rules for the Interpretation of the Harmonized System:
>
> > Any reference in a heading to an article shall be taken to include a reference to that article complete or unfinished, provided that, as presented, the incomplete or unassembled article has the essential character of the complete or unfinished article.
>
> We think that a comparable approach to the relation between assembled and unassembled products makes good sense in the context of this dispute. It appears that, in order to avoid paying 200 per cent duties on CBU passenger cars, EC and US car producers ship to Indonesia virtually complete CKD kits that are effectively 'cars in a box'. Accordingly, we believe that they can properly be considered to have characteristics closely resembling those of a completed car.[191] (Footnote omitted)

The 'like product' question is very important as it determines which industry is entitled to protection through CVD measures. Only in the case where the injury is suffered by the domestic industry which produces a product that is

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characteristics close to those of the exported product'. T.64/NAB/W/16, dated 3 March 1967. In the revised draft of 28 March 1967, the word 'physical' had been deleted from the text, which was revised to the formulation ('characteristics closely resembling') that exists today. T.64/NAB/W/17.

188 Op. cit., pp. 19–23.

189 Panel Report, *Indonesia – Autos*, paras 14.173–14.174.

190 After all, in *Japan – Alcoholic Beverages II*, the Appellate Body noted that 'We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.' Appellate Body Report, *Japan – Alcoholic Beverages II*, p. 21.

191 Panel Report, *Indonesia – Autos*, para. 14.197.

like the subsidized product will it be entitled to protection. For example, where the product that is being imported and which has received subsidies is wine, only the domestic wine producers may be protected. Yet it could well be that the wine producers are able to withstand the competition from imported subsidized wine, by passing the costs on to the grape producers who have to accept lower prices for their grapes. So the domestic grape producers are the ones actually suffering injury caused by the subsidies provided to wine. As grapes are not a like product to wine, the domestic industry producing grapes will not be the industry that is the subject of the injury examination. In other words, the like product question is closely related to the question of subsidies to upstream producers benefiting downstream products which are exported. In our example, it could well be that the subsidies were initially given to the grape producers in the exporting country which passed all or part of the benefit on to the wine producers. If such a pass-through can be established, it would be possible to countervail the downstream product that is exported, wine, even though the subsidies were initially granted to a product that is not like the exported product. In any case, the domestic industry to be examined and protected is the domestic industry producing the product which is imported, and has received subsidies. In our example, the imported product is wine and not grapes, and although both the grape and the wine producers in the exporting country may have been subsidized, only the domestic wine industry may be protected through CVDs as that is the industry producing the like product.

The Panels on *US – Softwood Lumber III* and *US – Softwood Lumber IV* acknowledge that subsidies to an input (upstream subsidies) can result in benefits for the final product (downstream benefits). As a result, an investigating authority can lawfully impose CVDs on the final product, even though such product might not be considered a like product to one of its inputs that has benefited from the subsidy. Importantly, as we discussed at length when dealing with the question of pass-through of the benefit, this is only in the case where it can be demonstrated that the subsidies passed through to the product that was exported and countervailed.[192]

[192] In the appeal of the *US – Softwood Lumber IV* case, the Appellate Body considered that there was no need to examine pass-through in case lumber, the exported subject product, is sold by a tenured sawmill to an unrelated sawmills as both are producers of the subject product. AB Report, *US – Softwood Lumber IV*, para. 163.

8. Procedural requirements relevant to the countervailing duty investigation

The procedural obligations concerning initiation and conduct of the countervailing duty investigation are very similar or, on various occasions, identical to those set forth in the AD Agreement with respect to AD investigations. Much of what we said in respect of these obligations in the AD context could thus be transposed to this chapter dealing with countervailing duty procedures. In what follows, we will therefore simply describe the obligations as they appear in the SCM Agreement and point to the small number of differences that exist between AD and CVD investigations. Where appropriate we refer to case-law in the CVD context interpreting these provisions. It seems fair to say, however, that much of what we said, based on the case-law in the AD context, is equally applicable in the CVD context.

1 Initiation

Article 11 SCM Agreement deals with the initiation of an investigation. Except in special circumstances, an investigation to determine the existence, degree and effect of any alleged subsidy shall be initiated upon a written application by or on behalf of the domestic industry. Such an application shall include sufficient evidence of the existence of (a) a subsidy and, if possible, its amount, (b) injury and (c) a causal link between the subsidized imports and the alleged injury. The application shall contain such information as is reasonably available to the applicant on a number of items listed in Article 11.2 SCM, such as the identity of the applicant; the description of the allegedly subsidized product, the existence, amount and nature of the subsidy in question; and the injury to a domestic industry caused by subsidized imports.

The Agreement clarifies that simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The authorities shall review the accuracy and adequacy of the evidence provided in the application to determine whether the evidence is sufficient to justify the initiation of an investigation. If, in special circumstances, the authorities concerned decide to initiate an investigation without having received a written application by or on behalf of a domestic industry for the initiation of such investigation, they shall proceed only if they have

sufficient evidence of the existence of a subsidy, injury and causal link to justify the initiation of an investigation.

In the case of an initiation at the request of the domestic industry, an authority will also need to examine whether the domestic industry filing the application had standing to do so. An investigation shall not be initiated unless the authorities have determined that the application was supported by those domestic producers whose collective output constitutes more than 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. In addition, a second threshold needs to be met. The Agreement provides that no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry.

Article 11.9 is the mirror provision of Article 5.8 AD Agreement and sets forth the *de minimis* thresholds that apply in CVD cases. An application shall be rejected and an investigation shall be terminated promptly as soon as the authorities concerned are satisfied that there is not sufficient evidence either of subsidization or of injury to justify proceeding with the case. There shall be immediate termination in cases where the amount of a subsidy is *de minimis*, or where the volume of subsidized imports, actual or potential[1], or the injury, is negligible. For the purpose of this paragraph, the amount of the subsidy shall be considered to be *de minimis* if the subsidy is less than 1 per cent ad valorem.[2] For developing countries this *de minimis* threshold is 2 per cent and for least developed countries and so-called Annex VII countries even 3 per cent.[3] The Agreement does not specify the level of imports that is considered negligible. Only with respect to imports from developing countries does Article 27.10 SCM Agreement provide that in the case where the volume of subsidized imports represents less than 4 per cent of the total imports of the like product in the importing Member, it is considered negligible, unless

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[1] The inclusion of the term 'potential' is problematic as it suggests that there is no need to terminate the investigation even if imports are negligible, as long as it is determined that, potentially, such import volumes could become more than negligible. Tellingly, such a term is absent from Article 27.10 in respect of imports from developing countries.

[2] It is recalled that the *de minimis* level in the AD context (Article 5.8) was 2 per cent without any special and differential treatment for developing country imports.

[3] Article 27.10 and 27.11. It seems that the 3 per cent threshold is no longer applicable as Article 27.11 provides that it 'shall expire eight years from the date of entry into force of the WTO Agreement', which was in 2003. The eight years period seems linked to the developing country export subsidy phase out requirement, though, and as this phase out requirement does not apply to LDC and Annex VII countries, it could be argued that they can still benefit from this higher *de minimis* threshold.

imports from developing country Members whose individual shares represent less than 4 per cent collectively account for more than 9 per cent.

Investigations shall, except in special circumstances, be concluded within one year. As Article 11.11 clearly states, an investigation shall in no case take more than 18 months after its initiation.

2 Evidence Gathering/Conduct of the Investigation

(a) Due process in the investigation

The due process provisions that we discussed in the AD context also prevail in the CVD context, as the language in Article 12 SCM Agreement is almost verbatim the same as that of Article 6 AD Agreement. The noteworthy difference is the obvious involvement of the Interested Member, the subsidizing government.[4] In that sense, a CVD investigation does not simply relate to private parties' behaviour, but inevitably also involves an examination of the practices of another WTO Member government. This makes the investigation more politically sensitive, which goes a long way in explaining the relative lack of popularity of CVD measures compared to AD measures.

The quintessential requirement imposed on an investigating authority is to ensure even-handedness (due process) when performing its tasks, since, during the investigation process, different interests will be represented: on the one hand the foreign exporters and domestic consumers, and, on the other, the domestic industry. For example, as we discussed earlier, an investigating authority is required, by virtue of Art. 15.1 SCM, to perform an objective examination of the matter before it. In its report on *EC – Countervailing Measures on DRAM Chips*, the Panel almost verbatim quoted (paras 7.271–7.276) from a report issued in the area of anti-dumping: in *US – Hot-Rolled Steel*, the Appellate Body provided its understanding of the term 'objective examination' and what it precisely entails in terms of tasks to be performed by an investigating authority:

> The term 'objective examination' aims at a different aspect of the investigating authorities' determination. While the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination, the term 'objective examination' is concerned with the investigative process itself. The word 'examination' relates, in our view, to the way in which the evidence is gathered, inquired into and,

[4] It is noted that the government of the exporting country is not listed as an interested party in Article 12.9 SCM Agreement while it was so listed in Article 6.11 AD Agreement. In the SCM Agreement, the 'interested member' appears alongside the interested parties. This may perhaps be explained by the fact that the authorities have certain specific obligations with regard to the exporting country government which are not due to other interested parties. See for example Article 13 on consultations.

> subsequently, evaluated; that is, it relates to the conduct of the investigation generally. The word 'objective', which qualifies the word 'examination', indicates essentially that the 'examination' process must conform to the dictates of the basic principles of good faith and fundamental fairness. 'In short, an "objective examination" requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation. The duty of the investigating authorities to conduct an 'objective examination' recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process.[5] (Emphasis in the original)

This is not the only due process clause in the SCM Agreement. WTO Members investigating the necessity to impose CVDs have to respect due process in numerous other instances.

Interested Members and all interested parties in a countervailing duty investigation are to be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question. Subject to the requirement to protect confidential information, evidence presented in writing by one interested Member or interested party shall be made available promptly to other interested Members or interested parties participating in the investigation. Interested Members and interested parties also shall have the right, upon justification, to present information orally. However, any decision of the investigating authorities can only be based on such information and arguments as were on the written record of this authority and which were available to interested Members and interested parties participating in the investigation, due account having been given to the need to protect confidential information.

The authorities shall whenever practicable provide timely opportunities for all interested Members and interested parties to see all information that is (i) relevant to the presentation of their cases, that is (ii) not confidential, and that is (iii) used by the authorities in a countervailing duty investigation, and to prepare presentations on the basis of this information.

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom the supplier acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of

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[5] AB Report, *US – Hot-Rolled Steel*, para. 193.

the party submitting it.[6] If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct. Requests for confidentiality should not be arbitrarily rejected. The investigating authority may request the waiving of confidentiality only regarding information relevant to the proceedings.[7]

Except in case of a determination based on facts available, the authorities, during the course of an investigation, have to satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties upon which their findings are based. This may be done through on-the-spot verifications, provided that they have notified in good time the Member in question and unless that Member objects to the investigation. Further, the investigating authorities may carry out investigations on the premises of a company and may examine the records of a company if (a) the company so agrees and (b) the Member in question is notified and does not object. Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof to the firms to which they pertain and may make such results available to the applicants.

The Panel in *US – Countervailing Duty Investigation on DRAMS* was of the view that an interested Member should either object to the verification taking place on its soil, or not, but that it cannot be considered to have objected to the verification if it simply expressed concerns about certain aspects of the conduct of the verification. In what is a quite sweeping pro-investigating authority statement, the Panel considered that such right of objection cannot be extended to encompass a right to dictate the specific procedures to be followed during the investigation proceedings. That such an outright refusal to allow for a verification visit to take place may lead to the application of facts available was not a persuasive argument, the Panel found. Whether that is so

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[6] The authorities shall require interested Members or interested parties providing confidential information to furnish nonconfidential summaries thereof.

[7] Footnote 43 to Article 12.4 SCM Agreement. When it comes to confidential information provided to a Panel, in principle, by virtue of Art. 4 DSU, confidentiality should be respected. In practice, however, Panels have adopted the habit of providing for procedures aimed at dealing specifically with the treatment of (business) confidential information. See pp. 167–70 in the Panel Report on *Korea – Commercial Vessels*, where Attachment 2 to the Panel Report explains the more or less typically followed procedures regarding protection of business confidential information (BCI).

will actually depend as much on the investigating authority and whether it has itself acted in a reasonable, objective and impartial manner.[8]

The authorities shall, before a final determination is made, inform all interested Members and interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. It is provided that such disclosure should take place in sufficient time for the parties to defend their interests.

(b) Facts available

The SCM Agreement also contains a provision, Article 12.7, which allows the authorities to make determinations on the basis of the facts available in case any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation.[9] It is interesting to note that, although the language is identical to that of the AD Agreement in Article 6.8, the SCM Agreement does not contain an annex similar to Annex II to the AD Agreement entitled 'Best Information Available In Terms Of Paragraph 8 of Article 6'.[10] However, the Panel on *EC – Countervailing Measures on DRAM Chips* considered that 'the fact that the *SCM Agreement* does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same'.[11] The Panel was thus of the view that investigating authorities are entitled to expect a high degree of cooperation from interested parties, to the best of their abilities, and would be entitled to draw inferences that may be adverse from a refusal to cooperate with the authorities. In other words, this Panel was of the view that, even in the absence of a paragraph 7 of Annex II AD Agreement parallel in the SCM Agreement, an authority is entitled to draw adverse inferences from the refusal to cooperate. We quote from this report in full:

> In reviewing the findings of the investigating authority, the extent to which the interested parties cooperated with the authority is, of course, also a relevant element to be taken into account. In those cases where certain essential information which was clearly requested by the investigating authority is not provided, we consider that this uncooperative behaviour may be taken into account by the authority when weighing the evidence and the facts before it. The fact that certain information was withheld from the authority may be the element that tilts the balance in a certain direction. Depending on the circumstances of the cases, we consider that an authority may be

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[8] Panel Report, *US – Countervailing Duty Investigation on DRAMS*, paras 7.404–7.407.

[9] Article 12.7 SCM Agreement.

[10] The introduction of such an Annex has been proposed in the course of the negotiations. TN/RL/GEN/93.

[11] Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.61.

justified in drawing certain inferences, which may be adverse, from the failure to cooperate with the investigating authority. We consider relevant, in this respect, the following statement of the Appellate Body in the *US – Hot-Rolled Steel* case concerning the facts available provision of Article 6.8 of the *AD Agreement*, which is very similar both textually and contextually to Article 12.7 of the *SCM Agreement*:

> '[i]n order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the "best of their abilities" – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.'[12] (Emphasis in original)

While we acknowledge that this statement was, at least in part, based on several paragraphs of Annex II to the *AD Agreement*, we consider that a similar significant degree of cooperation is to be expected of interested parties in a countervailing duty investigation.[13] The fact that the *SCM Agreement* does not contain a similar Annex is not determinative as the role played by the facts available provision in an anti-dumping investigation and a countervailing duty investigation is the same. Article 12.7 of the *SCM Agreement* is an essential part of the limited investigative powers of an investigating authority in obtaining the necessary information to make proper determinations. In the absence of any subpoena or other evidence gathering powers, the possibility of resorting to the facts available and, thus, also the possibility of drawing certain inferences from the failure to cooperate play a crucial role in inducing interested parties to provide the necessary information to the authority.[14] If we were to refuse an authority to take such cases of non-cooperation from interested parties into account when assessing and evaluating the facts before it, we would effectively render Article 12.7 of the *SCM Agreement* meaningless and inutile. We wish to add that we do not suggest that non-cooperation provides a blank cheque for simply basing a determination on speculative assumptions or on the worst information available. Ultimately, the determination has to be made on the basis of the available *facts*, and not on mere speculation. Therefore, and in the absence of such supporting facts, mere non-cooperation by itself does not suffice to justify a conclusion which is negative to the interested party that failed to cooperate with the investigating authority.[15]

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[12] Appellate Body Report, *US – Hot-Rolled Steel*, para. 102.

[13] In that respect, we see an important similarity between the power of an investigating authority to draw inferences from the failure to cooperate with the authority and the discretionary power of Panels in the WTO dispute settlement context, as well as international tribunals of various kinds in public international law, to draw such inferences, as recognized by the Appellate Body in the *Canada – Aircraft* case. (Appellate Body Report, *Canada – Aircraft*, para. 202.)

[14] We thus disagree with the views expressed by China, in its Third Party Oral statement, in this respect. (China Third Party Oral Statement, paras 6–13.)

[15] Panel Report, *EC – Countervailing Measures on DRAM Chips*, paras 7.60–7.61. The Panel in its report on *Mexico – Anti-Dumping Measures on Rice* also seemed to consider the essential obligations set forth in Annex II AD Agreement to be implied in Article 12.7 SCM Agreement. It considered that 'In light of the almost identical wording of Article 12.7 of the SCM Agreement, our analysis under Article 6.8 of the AD Agreement applies to Article 12.7 SCM of the Agreement as well'. Panel Report, *Mexico – Anti-Dumping Measures on Rice*, footnote 207.

The Panel Report on *EC – Countervailing Measures on DRAM Chips* concluded that 'Article 12.7 identifies the circumstances in which investigating authorities may overcome a lack of information, in the response of the interested parties, by using "facts" which are otherwise "available" to the investigating authority.'[16] This report distinguishes between questions relating to the weight given to various pieces of information and evidence in general, on the one hand, and a situation in which information that was requested was not provided and other information available thus had to be used, on the other. The Panel thus rejected the argument of Korea that the EC gave undue weight to the documents and that its reading of these documents was improperly coloured by the alleged failure of Korea to provide these documents itself:

> That, in our view, is not a matter of relevance to the use of Article 12.7 of the *SCM Agreement* which deals with a situation in which information is not provided, or cannot be used and other secondary source information is used instead. The weighing of the information and the evidence before it, is part of the discretionary authority of the investigating authority.[17]

The *EC – Countervailing Measures on DRAM Chips* report further reveals two instances where recourse to Article 12.7 SCM is legitimate: (a) if the requested party provides false information; in the case at hand, Korea had denied that high-level government officials took part in a meeting, and subsequently, full proof that the meeting took place and was attended by such high-level people became available. In the eyes of the Panel, the European Communities had legitimate recourse to Article 12.7 SCM and looked for information from secondary sources, since necessary information was not disclosed;[18] (b) if the requested party provides insufficient information, and no information at all when subsequently requested: in the case at hand, Korea provided the EC authority with a one-page excerpt from a 200-page report. The European Communities took the view that the report at hand was quite relevant to the investigation; it requested additional information, but did not obtain any information (additional to the one-page excerpt). The Panel took the view that, in light of Korea's response, the European Community could legitimately have had recourse to information from secondary sources.[19]

(c) Consultation requirement

A special feature of a CVD investigation is the requirement to enter into

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16 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.245.
17 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.249.
18 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.254.
19 Panel Report, *EC – Countervailing Measures on DRAM Chips*, para. 7.259.

consultations with the exporting country government under Article 13 SCM Agreement. Consultations should be held as soon as possible after an application under Article 11 is accepted, and in any event before the initiation of any investigation. The aim is to clarify the situation as to the matters referred to in the application and to arrive at a mutually agreed solution. Furthermore, throughout the period of investigation, Members the products of which are the subject of the investigation are to be afforded a reasonable opportunity to continue consultations. The Agreement emphasizes that no affirmative determination whether preliminary or final may be made without reasonable opportunity for consultations having been given.[20] The Agreement adds, however, that these provisions regarding consultations are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating the investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with the provisions of this Agreement.

3 Provisional Measures

Article 17 SCM Agreement allows for the possibility of imposing provisional measures. When the authorities judge it necessary to prevent injury being caused during the investigation, provisional measures may be imposed. These measures may only be imposed after a preliminary affirmative determination has been made that a subsidy exists and that there is injury to a domestic industry caused by subsidized imports. This in turn implies that an investigation has been properly initiated, a public notice has been given to that effect and interested Members and interested parties have been given adequate opportunities to submit information and make comments.[21] It is therefore not surprising that the SCM Agreement provides that provisional measures are not to be applied sooner than 60 days from the date of initiation of the investigation: earlier seems impossible.

Such provisional measures may take the form of provisional countervailing duties guaranteed by cash deposits or bonds equal to the amount of the provisionally calculated amount of subsidization. The measures may stay in place for a maximum of four months, meaning that only four months' worth of entries may be covered by provisional measures. In other words, the four months does not refer to the period during which cash deposits or bonds are taken, but rather to the period during which the affected imports enter for consumption.[22]

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20 Footnote 44 to Article 13.2 SCM Agreement.

21 Article 17.1 SCM.

22 The Panel in its report on *US – Softwood Lumber III* thus faulted the US for

4 End of the Investigation and Imposition of Measures

(a) Undertakings

After an affirmative preliminary determination of subsidization and injury caused by such subsidization, the investigation may nevertheless come to a halt, temporarily or permanently, without the imposition of provisional measures or final countervailing duties if so-called 'satisfactory voluntary undertakings' have been received.[23] The undertaking may come from the exporting country government which undertakes to eliminate or limit the subsidy or take other measures concerning its effects. But it may also concern a commitment by one or more of the exporters under investigation to revise their prices so that the investigating authorities are satisfied that the injurious effect of the subsidy is eliminated. Such exporter undertakings require the prior consent of the exporting Member, though.

The Agreement caps the price increase as it caps the amount of a countervailing duty. The price increases under such undertakings shall not be higher than necessary to eliminate the amount of the subsidy, and it is desirable that the price increases be less than the amount of the subsidy if such increases would be adequate to remove the injury to the domestic industry.

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having imposed provisional measures less than 60 days after initiation and for a period of more than four months. Panel Report, *US – Softwood Lumber III*, para. 7.101:

> The USDOC initiated its countervailing duty investigation on 23 April 2001, and applied retroactive provisional measures on imports entering from 19 May 2001, i.e. less than 60 days after initiation. The USDOC applied provisional measures on imports entering from 19 May 2001, until 14 December 2001, which is 4 months after the Preliminary Determination. In total, the provisional measure thus covered imports for a period of almost 7 months. We therefore find that the US application of provisional measures during the period prior to the 60 days after initiation, and for longer than 4 months, is inconsistent with Article 17.3 and 17.4 SCM Agreement.

[23] Article 18.1 SCM Agreement. Article 18.4 provides that the investigation may be continued at the request of the exporting Member, or simply when the importing member so decides, and this in spite of the acceptance of voluntary undertakings:

> If an undertaking is accepted, the investigation of subsidization and injury shall nevertheless be completed if the exporting Member so desires or the importing Member so decides. In such a case, if a negative determination of subsidization or injury is made, the undertaking shall automatically lapse, except in cases where such a determination is due in large part to the existence of an undertaking. In such cases, the authorities concerned may require that an undertaking be maintained for a reasonable period consistent with the provisions of this Agreement. In the event that an affirmative determination of subsidization and injury is made, the undertaking shall continue consistent with its terms and the provisions of this Agreement.

Once accepted, the compliance with an undertaking may be monitored, and any government or exporter from whom an undertaking has been accepted may be requested to provide periodically information relevant to the fulfilment of such an undertaking, and to permit verification of pertinent data. The Agreement, in Article 18.6, provides that, in the case of violation of an undertaking, the authorities of the importing Member may take expeditious actions which may constitute immediate application of provisional measures using the best information available. In addition, definitive duties may be levied retroactively up to 90 days before the application of such provisional measures, except that any such retroactive assessment shall not apply to imports entered before the violation of the undertaking.

Undertakings are completely voluntary both from the point of view of the exporters or exporting members and from the viewpoint of the importing country's authorities. In other words, not offering or not agreeing to an undertaking cannot be held against you,[24] and neither can an authority be forced to accept any undertakings. The authorities of the importing Member may refuse to accept undertakings because to do so would be impractical, for example if the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. Where practicable, the authorities are to provide to the exporter the reasons which have led them to consider acceptance of an undertaking as inappropriate, and they shall, to the extent possible, give the exporter an opportunity to make comments thereon.

(b) Imposition and collection of countervailing duties

(i) Imposition of duties

Article 19 SCM Agreement provides that, upon completion of an investigation, and in case a final determination is made of the existence and amount of the subsidy and that, through the effects of the subsidy, the subsidized imports are causing injury, countervailing duties may be imposed. Again, as was the case in respect of AD duties, there is *no obligation* to impose CVD measures.[25] Moreover, if the subsidy or subsidies are withdrawn, no measures may be imposed either.[26]

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[24] Article 18.5 SCM Agreement.

[25] Article 19.2, 'The decision whether or not to impose a countervailing duty in cases where all requirements for the imposition have been fulfilled, and the decision whether the amount of the countervailing duty to be imposed shall be the full amount of the subsidy or less, are decisions to be made by the authorities of the importing Member.'

[26] It is not clear, though, what is meant with the withdrawal of the subsidy as we discuss later in the context of challenging prohibited subsidies under Article 4 SCM Agreement.

The maximum amount of the countervailing duty is the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product. The SCM Agreement also contains a lesser duty provision, providing that it is desirable that the duty be less than the total amount of the subsidy if such lesser duty would be adequate to remove the injury to the domestic industry.

Importantly, though, there is very little guidance in the Agreement as to the methodology to be used for calculating the amount of the subsidy, which caps the amount of the duty that can be imposed. As we will discuss later, calculation and allocation of subsidies questions may become relevant also in the context of the multilateral disciplines on subsidies and the amount of the countermeasures that may be imposed in case a Member fails to comply with a DSB recommendation to withdraw the subsidy.

Basically, only two provisions deal with the calculation of the amount of the subsidy. Article 14 SCM concerns the calculation of the subsidy in terms of benefit to the recipient;[27] while Annex IV deals with the calculation of the total *ad valorem* subsidization (paragraph 1(a) of Article 6). The latter is based on a cost-to-government approach, while the former approaches the calculation question using the benefit to the recipient as the starting point. So, although in terms of establishing the existence of a benefit as a necessary part of the existence of a subsidy, cost to government has been rejected as a relevant benchmark, it seems that the cost to government may still be used when calculating the amount of the subsidy. In any case, neither of the two provisions mentioned is very technical. Neither addresses difficult calculation questions concerning, for example, allocation of subsidies or the difficulties in calculating the subsidy amount in the case of non-recurring subsidies.

A Report by the Informal Group of Experts (IGE) to the Committee on Subsidies and Countervailing Measures discusses the various technical problems relating to the calculation of the amount of the subsidy.[28] It distinguishes

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[27] As such, Article 14 SCM Agreement deals with countervailing duty proceedings only. Nevertheless, it has been used, as we discussed earlier, as context for the determination of the existence of a benefit under Article 1 and has thus found its way into Parts II and III of the SCM Agreement as well.

[28] G/SCM/W/415/Rev.2 of 15 May 1998. At the time of the GATT, the GATT Committee on Subsidies and Countervailing Measures had already dealt with this question as well. In April 1985, the Committee promulgated its Guidelines on Amortization and Depreciation. SCM/64; BISD 32S/154. The GATT Panel on *US – Lead and Bismuth I* dealt with many of the calculation questions which are still under discussion today. The Guidelines of the Committee guided the parties and the Panel in this case. This GATT Panel seemed to accept certain often used tools such as the average useful life of the assets (AUL) as the basis for the subsidy allocation or the use of a discount rate for allocating the subsidy over time. GATT Panel Report, *US – Lead and Bismuth I*, paras 559 et seq.

between non-recurring subsidies the benefits of which may have to be allocated over time, and recurring subsidies which are fully expended in the course of the year of receipt. It makes a number of recommendations concerning *inter alia* the average useful life of the physical depreciable assets of the recipient of the subsidy as the basis for allocating the subsidy benefits; the time value of money; the need to take account of inflation, and so on. The 21 recommendations made by this Informal Group of Experts have formed the basis for a number of proposals that were made in the course of the negotiations to introduce some technical guidelines on subsidy calculations.[29]

The SCM Agreement also contains what could be considered a hortatory public interest test where it states that it is desirable that procedures be established which would allow the authorities concerned to take due account of representations made by domestic interested parties, including consumers and industrial users of the imported product subject to investigation, whose interests might be adversely affected by the imposition of a countervailing duty.[30] No such expression of desirability can be found in the AD Agreement.

The SCM Agreement does not set forth an express obligation to calculate individual duties for each exporter, like Article 6.10 AD Agreement. Still, it appears that, as the amount of subsidization will be different for each exporter, an individual duty will normally be imposed.[31]

While exceptional in practice, Article 19.3 SCM Agreement allows WTO Members to impose duties on an aggregate basis; that is, all imports originating in a country found to be granting subsidies will be burdened with CVDs, irrespective of whether all individual exporters have benefited from subsidies. Individual non-investigated exporters originating in a country the exports of which have been found to be subsidized have the right to request an expedited

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[29] In particular, see the detailed papers submitted by the United States on this topic (TN/RL/GEN/4, TN/RL/GEN/12, TN/RL/GEN/17, TN/RL/GEN/45, TN/RL/GEN/130) as well as earlier documents such as TN/RL/W/19, TN/RL/W/85, TN/RL/W/192. It has been proposed to include a new Annex to the SCM Agreement, entitled 'Allocation and Expensing of Subsidy Benefits', to provide additional guidance as to the calculation of subsidy benefits, once a measure has been found to be a specific subsidy. TN/RL/GEN/130.

[30] Article 19.2 and footnote 50.

[31] In *EC – Countervailing Duty on DRAM Chips* for example, the EC investigating authority calculated individual margins and ended up imposing duties on Hynix while not doing the same for Samsung (both Korean companies subject to investigation). A proposal has been tabled by the EC to introduce a requirement to calculate an individual duty in the CVD context as well, with the possibility of sampling. The level of the duty to be paid by non-sampled exporters would, as in the AD context, be the weighed average of the duty of the sampled exporters. TN/RL/GEN/93. Also see TN/RL/GEN/96.

review to establish their rate (if any) of subsidies received.[32] This view was confirmed by the Appellate Body, in its report on *US – Softwood Lumber IV*:

> We agree with the United States that Article 19 of the *SCM Agreement* authorizes Members to perform an investigation on an *aggregate* basis. Article 19.3 requires that countervailing duties 'shall be levied, in the appropriate amounts in each case, on a *non-discriminatory basis* on imports of such product from *all sources* found to be subsidized and causing injury' (emphasis added). Article 19.3 further provides that '[a]ny exporter whose exports are subject to a definitive countervailing duty *but who was not actually investigated* . . . shall be entitled to an expedited *review* in order that the investigating authorities promptly establish an *individual* countervailing duty rate for that exporter' (emphasis added). Accordingly, countervailing duties shall be imposed, on a non-discriminatory basis, on *all sources* found to be subsidized, although *no prior* investigation of all *individual* exporters or producers is required by Article 19. This implies that countervailing duties may be imposed on imports of products subject to the investigation, even though specific shipments from exporters or producers that were not investigated individually might not at all be subsidized, or not subsidized to an extent equal to a countervailing duty rate calculated on an aggregate (country-wide) basis.
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> We also observe that Article 19.4 requires the calculation of countervailing duties in terms of 'subsidization *per unit* of the subsidized and exported product' (emphasis added). In our view, the reference to calculation of countervailing duty rates on a per unit basis under Article 19.4 supports the interpretation that an investigating authority is permitted to calculate the total amount and the rate of subsidization on an aggregate basis.[33]

Such an application of duties on an aggregate basis does not imply, however, that there is no longer any need to establish the basic conditions for the imposition of countervailing duties, that is, subsidy, injury to the domestic industry and causation. In the case of subsidies to upstream producers, this

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[32] Article 19.3 SCM. Article 19.3 SCM thus fulfils the role of Articles 6.10.2 and 9.5 AD Agreement together it seems, as there is no 'new shipper' provision like Article 9.5 AD Agreement in the SCM Agreement. Under Article 19.3 SCM, any exporter whose exports are subject to a definitive countervailing duty but who was not actually investigated for reasons other than a refusal to cooperate, shall be entitled to an expedited review in order that the investigating authorities promptly establish an individual countervailing duty rate for that exporter. The Panel in *Mexico – Anti-Dumping Measures on Rice* which dealt with joint claims against a piece of Mexican legislation dealing with new shipper reviews under both Article 9.5 AD Agreement and 19.3 SCM Agreement considered that Article 19.3 SCM does not allow an authority to require the showing of a representative volume of exports as a precondition for conducting an expedited individual review. Panel Report, *Mexico – Anti-Dumping Measures on Rice*, para. 7.268. The introduction of a new shipper provision has been proposed in the course of the negotiations. TN/RL/GEN/93. Also see TN/RL/GEN/96.

[33] Appellate Body Report, *US – Softwood Lumber IV*, paras 152–3.

implies that it must in any case first be established that the subsidy was passed through to the downstream producers.[34]

(ii) Non-retroactivity of final countervailing measures

In principle, CVD measures, whether provisional or final, may not be imposed retroactively, and thus apply *ex tunc*. This means that any provisional duties shall be refunded and any bonds released in an expeditious manner.[35] There are two exceptions to this general principle, similar to what was explained in the AD context.

First, definitive countervailing duties may be levied retroactively back to the date of application of provisional measures in case of a finding of current material injury.[36] In case a determination is made of only threat of injury, duties may only be applied retroactively if, in addition, it can be shown that the provisional measures prevented the injury from materializing. Final duties may in such circumstances be applied retroactively for the period for which provisional measures, if any, have been applied. So the retroactivity is limited by the period of application of provisional measures, and by the amount collected as provisional duties. Indeed, the SCM Agreement provides that, if the definitive countervailing duty is higher than the amount guaranteed by the cash deposit or bond, the difference shall not be collected. Moreover, if the definitive duty is less, the excess amount shall be reimbursed or the bond released in an expeditious manner. It is clear that, if no provisional measures had been applied to start with, the definitive duties may not be applied retroactively.

Second, the Agreement in Article 20.6, allows for the retroactive application *beyond the period of application of provisional measures*, in 'critical circumstances where for the subsidized product in question the authorities find

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[34] Appellate Body Report, *US – Softwood Lumber IV*, para. 154:

> Therefore, turning to the issue in this case, before being entitled to impose countervailing duties on a processed product, for the purpose of offsetting an input subsidy, a Member must first determine, in accordance with Article 1.1, that a financial contribution exists, and that the benefit conferred directly on the input producer has been passed through, at least in part, to the producer of the processed product.

[35] Of course, where a final determination is negative, any cash deposit made during the period of the application of provisional measures shall be refunded and any bonds released in an expeditious manner (Article 20.5).

[36] It should be noted that the possibility to impose duties retroactively exists only with respect to definitive and not with respect to preliminary duties, as the Panel in its report on *US – Softwood Lumber III* made clear. See Panel Report, *US – Softwood Lumber III*, paras 7.93–4.

that injury which is difficult to repair is caused by massive imports in a relatively short period of a product benefiting from subsidies paid or bestowed inconsistently with the provisions of GATT 1994 and of this Agreement'. When the authorities deem this necessary, in order to preclude the recurrence of such injury, the definitive countervailing duties may be assessed on imports which were entered for consumption not more than 90 days *prior* to the date of application of provisional measures.[37] The SCM Agreement does not explicitly allow Members to take such measures as the withholding of appraisement or assessment as may be necessary to collect anti-dumping duties retroactively, as was the case in the AD Agreement, Article 10.7. Nevertheless, it appears to be implied, in the right to apply measures retroactively, that a Member is entitled to take such measures as are necessary to be able to enjoy that right in practice, which would include for example the withholding of appraisement.[38]

5 Duration and Review of Countervailing Measures

Article 21.1 SCM states that CVDs will remain in place *as long as* and *to the extent necessary* to counteract injurious subsidization. As the Appellate Body noted in *US – Carbon Steel*, Article 21.1 sets forth a general rule that, after the imposition of a countervailing duty, the continued application of that duty is subject to certain disciplines.

> These disciplines relate to the *duration* of the countervailing duty ('only as long as . . . necessary'), its *magnitude* ('only . . . to the extent necessary'), and its *purpose* ('to counteract subsidization which is causing injury'). Thus, the general

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[37] Article 20.6 SCM Agreement. It is noteworthy that the SCM Agreement does not contain a counterpart to Article 10.8 AD Agreement which limits the period of retroactive application to the date of initiation of the investigation.

[38] This seems to have been the view held by the Panel on *US – Softwood Lumber III*:

> We agree with the United States that a Member is allowed to take measures which are necessary to preserve the right to later apply definitive duties retroactively. In our view, an effective interpretation of the right to apply definitive duties retroactively requires that a Member be allowed to take such steps as are necessary to preserve the possibility of exercising that right. What kind of measures may thus be taken by the Member concerned will have to be determined on a case-by-case basis.

Panel Report, *US – Softwood Lumber III*, para. 7.95. The Panel considered that requiring the posting of a bond or cash deposit, in other words the application of provisional measures, went beyond such necessary conservatory measures. Panel Report, *US – Softwood Lumber III*, para. 7.98.

> rule of Article 21.1 underlines the requirement for periodic review of countervailing duties and highlights the factors that must inform such reviews.[39]

The quite open-ended statement in Article 21.1 SCM Agreement is 'operationalized' through the two types of review provided for in the SCM system: the sunset and the administrative review,[40] as set forth in Articles 21.3 and 21.2 SCM Agreement, respectively.

(a) Sunset reviews

According to Article 21.3 SCM, all countervailing measures have to be withdrawn five years after their imposition, unless the WTO Member concerned has conducted a review and has concluded that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury. The Appellate Body in its report on *US – Carbon Steel* underlined 'termination of a countervailing duty is the rule and its continuation is the exception'.[41] In other words, absent a sunset review, all CVDs in place must immediately be withdrawn:

> Article 21.3 imposes an explicit temporal limit on the maintenance of countervailing duties. For countervailing duties that have been in place for five years, the terms of Article 21.3 require their termination *unless* certain specified conditions are met. Specifically, a Member is permitted *not* to terminate such duties only if it conducts a review and, in that review, determines that the prescribed conditions for the continued application of the duty are satisfied. The prescribed conditions are 'that the expiry of the duty would be likely to lead to continuation or recurrence of subsidization and injury'. If, in a sunset review, a Member makes an affirmative determination that these conditions are satisfied, it may continue to apply countervailing duties beyond the five-year period set forth in Article 21.3. If it does not conduct a sunset review, or, having conducted such a review, it does not make such a positive determination, the duties must be terminated.[42]

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39 Appellate Body Report, *US – Carbon Steel*, para. 70.

40 An explanation is warranted here in order to avoid creating confusion: the term *administrative* review that we have privileged here should not be confused with its homonym in US practice. In US practice this term aims to capture the review undertaken in order to liquidate entries. In the US system (contrary to what is the case in the EC system), goods that have been found to be subsidized will be burdened with a provisional deposit pending definitive calculation at the end of the year. Then, in the context of a *US administrative review*, or duty assessment review, the goods concerned will either have to be further burdened or the opposite. What we have termed here *administrative* review is sometimes referred to (in WTO parlance) as *changed circumstances* review. In the absence of an official term for the procedure under Art. 21.2 SCM, various nominations compete for prominence.

41 AB Report, *US – Carbon Steel*, para. 88.

42 Panel Report, *US – Carbon Steel*, para. 63.

The starting point for counting the five-year period is not necessarily that of the original imposition. Article 21.3 SCM makes it clear that (i) if an administrative review (see *infra*) has taken place, and (ii) if this review covered both subsidization and injury, then the date when such a review took place becomes the starting point to count the five-year period. The Agreement notes that the mere fact that the last duty assessment review (as used in retrospective systems) led to the conclusion that no duty was to be levied does not necessarily require the authorities to terminate the definitive duty.[43] Neither does the Agreement seem to require the termination of the duty after the subsidy allocation period has ended. In other words, it seems possible that, although an investigating authority allocated the subsidy over a four-year period of time, the countervailing duty would remain in place for the full five-year period. In the course of the negotiations, it has therefore been proposed that, in case the subsidy has a predetermined period of validity or has a period of validity attributed to it by the investigating authority (for example when determining levels of duty), the countervailing duty measures should be terminated once the end of such allocation periods has been reached. In other words, there should be no finding of likelihood of continuation or recurrence of subsidization unless evidence exists that the expired programmes or programme has been, or is likely to be, renewed or replaced by other forms of subsidization.[44]

A sunset review may be initiated on the importing Member's own initiative before the five-year deadline or upon a duly substantiated request made by or on behalf of the domestic industry within a reasonable period of time before the five-year deadline expires. There are no specific evidentiary requirements for such self-initiated sunset reviews. So, unlike what happens in original investigation initiation decisions, where Article 11.6 provides that the authorities need to have sufficient evidence of subsidization, injury and a causal link to justify initiation of an investigation, sunset reviews may be automatically initiated every five years.[45] According to the Appellate Body in its report on *US – Carbon Steel*:

> As we have seen, Article 21.3 requires the termination of countervailing duties within five years unless the prescribed determination is made in a review. Article 21.3 contemplates initiation of this review in one of two alternative ways, as is made clear through the use of the word 'or'. Either the authorities may make their determination 'in a review initiated . . . on their own initiative'; or, alternatively, the

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43 Footnote 52 to Article 21.3 SCM.

44 TN/RL/GEN/93. Also see TN/RL/GEN/96 for a clarification of this proposal to ensure that it is not misread to allow for duties to remain in place beyond the five-year period simply because the authorities allocated the subsidy over such a longer period of time.

45 Appellate Body Report, *US – Carbon Steel*, para. 118.

> authorities may make the determination 'in a review initiated . . . upon a duly substantiated request made by or on behalf of the domestic industry . . .'. The words 'duly substantiated' qualify only the authorization to initiate a review upon request made by or on behalf of the domestic industry. No such language qualifies the first method for initiating a sunset review, namely self-initiation of a review by the authorities.
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> . . .
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> In sum, our review of the context of Article 21.3 of the SCM Agreement reveals no indication that the ability of authorities to self-initiate a sunset review under that provision is conditioned on compliance with the evidentiary standards set forth in Article 11 of the SCM Agreement relating to initiation of investigations. Nor do we consider that any other evidentiary standard is prescribed for the self-initiation of a sunset review under Article 21.3.[46]

Assuming a sunset review has taken place, CVDs will have to be withdrawn at the end of the five-year period, *unless*, in the context of the sunset review, the investigating authority has demonstrated that withdrawal *would be likely to lead to continuation or recurrence of subsidization and injury*. If this is the case, then CVDs may remain in place.[47] The Agreement does not set forth any precise methodology for making such a determination of likelihood of continuation or recurrence of subsidization and injury. The Panel in *US – Carbon Steel* considered that such a determination, although inherently prospective, must nevertheless rest on 'a sufficient factual basis':[48]

> An investigating authority's determination of the likelihood of continuation or recurrence of subsidisation should rest on the evaluation of the evidence that it has gathered during the original investigation, the intervening reviews and finally the sunset review. In our view, a likelihood analysis based on this evidentiary framework would be consistent with the requirements of Article 21.3.
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> In our view, one of the components of the likelihood analysis in a sunset review under Article 21.3 is an assessment of the likely rate of subsidisation. We do not consider, however, that an investigating authority must, in a sunset review, use the same calculation of the rate of subsidisation as in an original investigation. What the investigating authority must do under Article 21.3 is to assess whether subsidisation is likely to continue or recur should the CVD be revoked. This is, obviously, an inherently prospective analysis. Nonetheless, it must itself have an adequate basis in fact. The facts necessary to assess the likelihood of subsidisation in the event of revocation may well be different from those which must be taken into account in an original investigation. Thus, in assessing the likelihood of subsidisation in the event of revocation of the CVD, an investigating authority in a sunset review may well consider, *inter alia*, the original level of subsidisation, any changes in the original

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46 Appellate Body Report, *US – Carbon Steel*, paras 103 and 116.

47 Assuming a sunset review which starts before the five-year period extends beyond this period, duties can lawfully stay in place until completion of the review process. See Article 21.3 SCM Agreement.

48 Panel Report, *US – Carbon Steel*, para. 8.94.

> subsidy programmes, any new subsidy programmes introduced after the imposition of the original CVD, any changes in government policy, and any changes in relevant socio-economic and political circumstances.[49]

In the case at hand, the US investigating authority had taken the original CVD rate found in the original investigation as a starting-point and had then subtracted from that rate the share of two subsidy programmes found to have been terminated after the imposition of the original CVD. In other words, the factual basis of the DOC's determination was limited to the original rate of subsidization and the fact that two of the original subsidy programmes were terminated after the imposition of the original CVD order.[50] The Panel considered that the DOC's likelihood determination, which did not go beyond simple arithmetic calculation, lacked sufficient factual basis, in particular because the US DOC refused to accept information that would have been relevant to the assessment of the likelihood of subsidization.[51]

While there needs to be a sufficient factual basis for the likelihood determination, the Appellate Body considered that the mere fact that a review leads to a rate of subsidization below the *de minimis* level, as set forth in Article 11.9 for original investigations, does not require an authority to terminate the measure. The Appellate Body came to this conclusion on the basis of the absence of any *de minimis* standard in the text of Article 21 in general and Article 21.3 SCM Agreement in particular, as well as the fact that original investigations and sunset reviews are distinct processes with different purposes, and thus different rules may well apply in these circumstances.[52] The Appellate Body added, however, that this does not imply that a likelihood determination should not be based on sufficient factual evidence:

> Where the level of subsidization at the time of the review is very low, there must be persuasive evidence that revocation of the duty would nevertheless lead to injury to the domestic industry. Mere reliance by the authorities on the injury determination made in the original investigation will not be sufficient. Rather, a fresh determination, based on credible evidence, will be necessary to establish that the continuation of the countervailing duty is warranted to remove the injury to the domestic industry.[53]

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49 Panel Report, *US – Carbon Steel*, paras 8.95–6.

50 Panel Report, *US – Carbon Steel*, para. 8.116.

51 Panel Report, *US – Carbon Steel*, para. 8.117. In particular, the DOC declined the request made by the German exporters that a calculation memorandum from the original investigation be placed on the record of the sunset review on the grounds that the submission was untimely, while it concerned information that was actually in the investigating authority's possession, and which was clearly relevant to the likelihood determination.

52 Appellate Body Report, *US – Carbon Steel*, paras 87–8. A proposal exists to introduce such a *de minimis* standard in reviews as well. TN/RL/GEN/93.

53 Appellate Body Report, *US – Carbon Steel*, para. 88.

The *US – Carbon Steel* case has been the only one so far to have dealt with sunset reviews in CVD cases.[54] However, given the similar role of sunset reviews in the CVD and AD context, and the identical language of the AD Agreement in Article 11.3 and the SCM Agreement, Article 21.3, the conclusions of our earlier discussion of the case-law in the AD context are equally applicable in the context of sunset reviews of countervailing measures.

The treatment of sunset reviews has attracted a lot of interest in the ongoing Doha round of multilateral negotiations. A group of WTO Members called Friends of Antidumping, have issued a series of papers illustrating the perverseness of the existing regime.[55] As things stand, practice confirms that (in both anti-dumping and countervailing) the majority of sunset reviews end up with a decision in favour of continued imposition: between 1998 and 2003, 54 per cent of all orders were extended in the United States, the corresponding number for the European Community during the same period reaching 60 per cent.[56] It is noted that the prospect of more than one sunset review of the same CVD measure is not excluded, as there is no limit to the total amount of sunset review proceedings that may be conducted.

(b) Administrative reviews or changed circumstances reviews

Art. 21.2 SCM Agreement makes provision for an administrative review to examine whether the continued imposition of the duty is necessary. It can be initiated ex officio, provided that a reasonable time since the imposition of CVDs has lapsed. It may also be initiated upon request by an interested party, at any time following the original imposition, provided that the interested party submits positive information substantiating the need for a review. If as a

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[54] This is, apart from the privatization cases and the case *US – Countervailing Measures on Certain EC products* in particular which, however, dealt with the specific situation of privatization. In this context, the Appellate Body, has ruled that, 'in sunset reviews, the investigating authority, before deciding to continue to countervail pre-privatization, non-recurring subsidies is obliged to "examine the conditions of such privatizations and to determine whether the privatized producers received any benefit from the prior subsidization to the state-owned producers"'. Appellate Body Report, *US – Countervailing Measures on Certain EC products*, para. 149. As became clear in the Article 21.5 implementation case, neither the Panel nor the Appellate Body established a precise methodology for an investigating authority to follow when examining the conditions of the privatization at issue. Panel Report, *US – Countervailing Measures on Certain EC products (Article 21.5 – EC)*, para. 7.115.

[55] There is plethora of untenable results. Case-law in the field of anti-dumping (the provisions are identical to those in SCM) has, in the name of (exaggerated) *textualism*, justified numerous decisions by investigating authorities to continue the imposition of anti-dumping duties. Among the many papers tabled by the *Friends of Antidumping*, see TN/RL/W/6 of 19 March 2003.

[56] See TN/RL/W/111 of 27 May 2003.

result of this review the authorities determine that the countervailing duty is no longer warranted, it shall be terminated immediately.[57]

The subject-matter of an administrative review does not necessarily overlap with that of a sunset review. Irrespective of whether it has been initiated ex officio or upon request, an investigating authority could investigate whether (i) the continued imposition of duties is necessary to offset subsidization; or (ii) whether the injury would be likely to recur if the duty in place were removed or varied; or (iii) whether subsidization resulting in injury will continue/recur, assuming that the duties in place were to be varied or removed. Only (iii) corresponds to the subject-matter of a sunset review. It is recalled that, in case a changed circumstances review covers both subsidization and injury, such a review may form the basis for the extension of the measure for another five years, as it functions as a sort of early sunset review.

(i) Initiation of administrative reviews

The Appellate Body, in its report on *US – Carbon Steel*, held for the proposition that, whereas in the context of an administrative review the submission of positive evidence is a threshold issue to initiate the review at the request of an interested party, an ex officio initiation, whether it be of an administrative review or a sunset review, does not know of a similar requirement:

> Article 21.2 differs from Article 21.3 in that the former identifies certain circumstances in which the authorities are under an obligation to review ('shall review') whether the continued imposition of the countervailing duty is necessary. In contrast, the principal obligation in Article 21.3 is not, *per se*, to conduct a review, but rather to terminate a countervailing duty unless a specific determination is made in a review. We note that Article 21.2 sets down an explicit evidentiary standard for requests by interested parties for a review under that provision. In order to trigger the authorities' obligation to conduct a review, such requests must, *inter alia*, include 'positive information substantiating the need for review'. Article 21.2 does not, on its face, apply this same standard to the initiation by authorities 'on their own initiative' of a review carried out under that provision. Thus, Article 21.2 contemplates that, for reviews carried out pursuant to that provision, the self-initiation by the authorities of a review is not governed by the same standards that apply to initiation upon request by other parties.[58] (Emphasis in the original)

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[57] Although the Agreement makes no explicit mention of this possibility, it appears that a changed circumstances review could also lead to the level of the duty being varied. In light of the fact that the aim of the review is to examine whether continued imposition is still necessary, it seems that the duty may only be varied down, i.e. no higher duty may be the result of this review.

[58] Appellate Body Report, *US – Carbon Steel*, para.108.

This passage does not explain at all what are the applicable standards, in the context of an ex officio review. This issue has proved to be quite thorny in GATT/WTO adjudication. It was first discussed in the GATT Panel on *US – Swedish Steel Plate*. The Panel there privileged a rather restrictive reading of the corresponding provision in the Tokyo round anti-dumping agreement, leaving it, for all practical purposes, at the discretion of the investigating authority to decide whether it will ex officio initiate a review or not. That Panel, in other words, did nothing to complete the open-ended terms 'where warranted' appearing in Article 9 of the Tokyo round anti-dumping agreement, which also appear in Article 21.2 SCM Agreement. Case-law in the WTO era has not added anything to the existing lacuna.[59]

(ii) Positive information substantiating the need for a review

There is an important distinction between original investigations and administrative reviews. In an original investigation, the investigating authority must establish that *all* conditions set out in the SCM Agreement for the imposition of countervailing duties are fulfilled. In an administrative review, however, the investigating authority must address those issues which have been raised before it by the interested parties or, in the case of an investigation conducted on its own initiative, those issues which warranted the examination.[60]

An important question which has arisen is whether, in the context of an administrative review, an investigating authority needs to show that a benefit will continue to be conferred on the subsidized entity to demonstrate recurrence of subsidization and/or injury. In the case at hand, *US – Lead and Bismuth II*, at stake was the decision by the US investigating authority to continue with the imposition of duties imposed on economic operators which had previously (for example, pre-privatization) benefited from non-recurring subsidies.

The Appellate Body, in its report on *US – Lead and Bismuth II*, made a distinction between the obligation of WTO Members to show existence of a benefit conferred by a subsidy during the original investigation and in subsequent reviews. It concluded that, in the context of an administrative review under Article 21.2, an investigating authority must not *always* establish the existence of a 'benefit' during the period of review. Rather, an investigating authority might legitimately presume that a 'benefit' continues to flow from an

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[59] We refer to the discussion of the equivalent provision in the AD Agreement dealing with administrative reviews where we referred to a Panel Report on *US – DRAMS* that did not consider that a period of more than three years of no dumping 'warranted' an ex officio review. Panel Report, *US – DRAMS*, para. 6.60.

[60] Appellate Body Report, *US – Lead and Bismuth II*, para. 63.

untied, non-recurring 'financial contribution', thus assuming subsidization continues. However, this presumption is not irrebutable. In a case of change of ownership, as the case before it, an investigating authority should review whether a benefit would continue to exist:

> We have already stated that in a case involving countervailing duties imposed as a result of an administrative review, Articles 21.1 and 21.2 of the *SCM Agreement* are relevant. As discussed above, Article 21.1 allows Members to apply countervailing duties 'only as long as and to the extent necessary to counteract subsidization . . .'. Article 21.2 sets out a review mechanism to ensure that Members comply with this rule. In an administrative review pursuant to Article 21.2, the investigating authority may be presented with 'positive information' that the 'financial contribution' has been repaid or withdrawn and/or that the 'benefit' no longer accrues. On the basis of its assessment of the information presented to it by interested parties, as well as of other evidence before it relating to the period of review, the investigating authority must determine whether there is a continuing need for the application of countervailing duties. The investigating authority is not free to ignore such information. If it were free to ignore this information, the review mechanism under Article 21.2 would have no purpose.
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> Therefore, we agree with the Panel that while an investigating authority may presume, in the context of an administrative review under Article 21.2, that a 'benefit' continues to flow from an untied, non-recurring 'financial contribution', this presumption can never be 'irrebuttable'. In this case, given the changes in ownership leading to the creation of UES and BSplc/BSES, the USDOC was *required* under Article 21.2 to examine, on the basis of the information before it relating to these changes, whether a 'benefit' accrued to UES and BSplc/BSES.[61]

The Appellate Body in its report on *US – Countervailing Measures on Certain EC Products* further clarified this position. The Appellate Body referred to its earlier *US – Lead and Bismuth II* report to conclude that 'an investigating authority undertaking an administrative review has an obligation under Article 21.2 of the SCM Agreement to determine whether a "benefit" continues to exist when information suggesting that a benefit no longer exists is presented to that authority'.[62]

The case at hand dealt with the so-called 'same-person methodology' applied by the United States when reviewing the need for continued imposition of CVDs following privatization of a previously subsidized firm. The factual aspects of the method are described in para. 145 of the report, and in para. 146, the Appellate Body explains that what this method entails is inconsistent with the obligations under Article 21.2 SCM Agreement. This is so

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61 Appellate Body Report, *US – Lead and Bismuth II*, paras 61–2.

62 Appellate Body Report, *US – Countervailing Measures on Certain EC Products*, para. 141, referring to Appellate Body Report, *US – Lead and Bismuth II*, para. 61.

because, according to the AB, Article 21.2 SCM Agreement sets forth an obligation to take into account positive information substantiating the need for a review:

> The Panel stated, and the United States agreed before the Panel and on appeal, that the 'same person' method requires the USDOC to 'consider'[ ] that the benefit attributed to the state-owned producer can be automatically attributed to the privatized producer without any examination of the condition of the transaction when the agency determines the post-privatization entity is not a new legal person. It is only if the USDOC finds that a new legal person has been created that the agency will make a determination of whether a benefit exists, and, in such cases, the inquiry will be limited to the subject of whether a new subsidy has been provided to the new owners.
>
> Thus, under the 'same person' method, when the USDOC determines that no new legal person is created as a result of privatization, the USDOC will conclude from this determination, without any further analysis, and irrespective of the price paid by the new owners for the newly-privatized enterprise, that the newly-privatized enterprise continues to receive the benefit of a previous financial contribution. This approach is contrary to the obligation in Article 21.2 of the SCM Agreement that the investigating authority must take into account in an administrative review 'positive information substantiating the need for a review'. Such information could relate to developments with respect to the subsidy, privatization at arm's length and for fair market value, or some other information. The 'same person' method impedes the USDOC from complying with its obligation to examine whether a countervailable 'benefit' continues to exist in a firm subsequent to that firm's change in ownership. Therefore, we find that the 'same person' method, as such, is inconsistent with the obligations relating to administrative reviews under Article 21.2 of the SCM Agreement.

In other words, as the US investigating authority will never, in the context of an administrative review, or a sunset review for that matter, be in a position to examine whether a benefit continues to exist, even if presented with evidence to this effect, in US law what should be a rebuttable becomes an irrebuttable presumption. This is why the Appellate Body found that the US legislation at hand was in violation of the Art. 21.2 SCM as well as Article 1 SCM:

> In our view, this finding, relating to administrative reviews, leads inevitably to the conclusion that the 'same person' method, as such, is also inconsistent with the obligations of the SCM Agreement relating to original investigations. In an original investigation, an investigating authority must establish all conditions set out in the SCM Agreement for the imposition of countervailing duties. Those obligations, identified in Article 19.1 of the SCM Agreement, read in conjunction with Article 1, include a determination of the existence of a 'benefit'. As in the administrative reviews, the 'same person' method necessarily precludes a proper determination as to the existence of a 'benefit' in original investigations where the pre- and post-privatization entity are the same legal person. Instead, in such cases, the 'same person' method establishes an irrebuttable presumption that the pre-privatization 'benefit' continues to exist after the change in ownership. Because it does not permit the investigating authority to satisfy all the prerequisites stated in the SCM

> Agreement before the imposition of countervailing duties, particularly the identification of a 'benefit', we find that the 'same person' method, as such, is inconsistent with the WTO obligations that apply to the conduct of original investigations.[63]

(iii) No *de minimis* standard

As we explained earlier, the Appellate Body in its report on *US – Carbon Steel* provided clarification with regard to the non-applicability of any *de minimis* standard in sunset or administrative reviews.[64] In other words, when reviewing duties, WTO Members do not have to abide by the *de minimis* thresholds set for a subsidy in the original investigation reflected in Art. 11.9 SCM. It is recalled that, in accordance with Art. 11.9 SCM, duties cannot be imposed if a subsidy is less than 1 per cent *ad valorem*. The US legislation governing reviews, imposed a 0.5 per cent *ad valorem* threshold for a subsidy to be countervailable. The Panel agreed with the complainants that the *de minimis* threshold applicable to the original imposition of CVDs is legally relevant for reviews as well. The United States appealed this finding, arguing that legislative silence must mean something. The Appellate Body concurred with the United States and reversed the Panel's findings on this score.[65]

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[63] Appellate Body Report, *US – Countervailing measures on certain EC products*, para. 147.

[64] Appellate Body Report, *US – Carbon Steel*, para. 71.

[65] Appellate Body Report, *US – Carbon Steel*, paras 88–9. Concurring, Grossman and Mavroidis (2005). As we noted earlier, it has been proposed to introduce such a *de minimis* standard in reviews. TN/RL/GEN/93.

9. Counteracting subsidies – a two-track approach

A COUNTERVAIL AS A UNILATERAL REMEDY

In the case where a WTO Member can demonstrate that subsidized imports are causing injury to the domestic industry, it is allowed to take unilateral action against such a subsidy, in order to offset or counteract the subsidy causing injury.[1] Such countervailing duties are therefore a form of unilateral relief, much like anti-dumping measures. This implies that a Member does not need the WTO's approval before it can impose a countervailing duty. While the unilateral nature of the remedy has obvious advantages, it also presents some shortcomings in dealing with subsidies.

First, countervailing measures may protect a domestic industry from country A from injury suffered in country A's domestic market due to subsidized imports from country B, but it does not provide any relief in case the subsidies are distorting a third country market (country C) in which the domestic industry has an interest. Neither can one address the negative effects of the subsidies (from the point of view of the domestic industry) in the market of the subsidizing Member (the market of country B).

Second, to conduct a countervailing duty investigation in accordance with the rules and procedures of the SCM Agreement is a complicated, time and resource-consuming enterprise. As a countervailing duty investigation concerns the subsidization practice of another government and not a private company's practice as is the case in anti-dumping, such an investigation may prove to be particularly difficult and delicate. Moreover, the end-result of the investigation may at best be the imposition of a countervailing duty. While such a duty may offset the effects of the subsidy, it does not imply that the product in question is no longer subsidized. The imposition of a countervailing duty may protect the domestic industry at home, but maybe at the expense of the domestic industry's export performance, as the subsidized products move to other markets. Because of this likely trade diverting effect of a countervailing duty, the problem may not be solved but simply moved to another

[1] Article VI.3 GATT; Article 10 SCM Agreement and footnote 36.

market in which the domestic industry was also present and will also feel the effects of the subsidies.

Third, and this is a very practical problem, it is not an easy task to calculate the amount of subsidization such that the duty will effectively offset the subsidy bestowed on the imported product. The SCM Agreement does not provide for much guidance. It allows for the calculation of the amount of the subsidy in terms of benefit to the recipient. But on other occasions, the Agreement also talks about the cost to government as the starting point for calculating the amount. When the benefit to the recipient is the starting point, Article 14 SCM Agreement provides for specific market benchmarks which appear easy to apply in theory but present many practical problems. Even determining the amount of benefit by using the benefit to the recipient as the starting point is not a straightforward exercise. Article 14 refers to a market benchmark but is not very detailed or specific as to the way in which such a market benchmark is to be determined. And what if there is no private market for the product, or the market would not have provided the financial contribution in question, how does one determine the existence and amount of benefit? Article 14 does not provide a clear answer to such questions.

B MULTILATERAL APPROACH – USING THE WTO DISPUTE SETTLEMENT MECHANISM

The SCM Agreement disciplines the use of subsidies and provides for a mechanism to enforce such disciplines through the WTO, in addition to the possibility of unilateral countervailing duty action. The conditions for obtaining WTO relief and the kind of relief offered are different, depending on whether the subsidies in question are prohibited or actionable. Using the WTO mechanism implies a multilateral approach based on the WTO dispute settlement mechanism, rather than the unilateral approach of countervailing measures.

Under the SCM Agreement, subsidies are classified as prohibited (Art. 3 SCM), actionable (Art. 5 SCM) and non-actionable (Art. 8 SCM). The first and the third category are defined in the SCM Agreement: a subsidy is prohibited if it is conditioned upon *export performance* or upon *local content* requirements. A subsidy was non-actionable if it respected the conditions laid down in Article 8 SCM (as to its amount), and is granted for purposes of *environmental protection*, to make up for *regional inequalities* within a WTO Member, or in order to promote *research and development* (R&D). This category of 'non-actionable' subsidies was included in the SCM Agreement on a provisional basis for five years, subject to review (Art. 31 SCM). In the absence of an agreement between the WTO Membership to extend the transitional period, the safe harbour for non-actionable subsidies in the SCM Agreement no longer exists.

Actionable subsidies are defined by default: all government schemes which qualify as subsidies are, in principle, actionable subsidies. In accordance with Art. 5 SCM, a WTO Member challenging an actionable subsidy must demonstrate that the specific subsidy at hand causes adverse effects in the sense of injury to its domestic industry, nullification or impairment of benefits accruing to it, or *serious prejudice* to its interests.[2]

1 Multilateral Disciplines on Prohibited Subsidies

Two types of subsidies are prohibited by virtue of Article 3 SCM Agreement: (i) subsidies contingent upon export performance, so-called 'export subsidies'; and (ii) subsidies contingent upon the use of domestic goods over imported goods, also known as import substitution subsidies or local content subsidies.[3] It is the condition for granting the subsidy which puts these subsidies in the prohibited category. In other words, it is because the subsidy is 'conditional' or 'dependent upon'[4] export performance or import substitution that they are prohibited. These subsidies are prohibited *irrespective of their effect*. In other words, there is no need to demonstrate any injury or other adverse effects on domestic producers, or the market in general, to take action against these

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[2] There is nothing that precludes a Member from challenging the same measure as both a prohibited subsidy and an actionable subsidy. Prohibited subsidies are simply a sub-set of the total universe of subsidies, and all subsidies are actionable, even prohibited subsidies. See Panel Report, *Korea – Commercial Vessels*, para. 7.334.

[3] In the course of the negotiations, it has been proposed to expand the category of prohibited subsidies to include 'those instances of government intervention that have a similarly distortive impact on competitiveness and trade as do export and import substitution subsidies'. Subsidies listed in Article 6.1 which are presumed to cause serious prejudice have been suggested as one possible new category of prohibited subsidies. TN/RL/GEN/94. In an updated version of this proposal, the US proposed that additional types of subsidies, representing what it considered to be the most extreme forms of government economic intervention, be included in an expanded prohibited category. These additional subsidy types include: loans to uncreditworthy companies; the provision of equity capital in a manner inconsistent with the usual investment practice of private investors; and other forms of financing that a company would be unlikely to receive from commercial sources. TN/RL/GEN/1446. Another proposal has been to include as prohibited subsidies the so-called 'dual-pricing' practices of some countries and the provision of financing by the government on terms inadequate to cover long term operating costs and losses. TN/RL/GEN/135.

[4] These are the terms used by the AB in various cases as alternatives to explain the term 'contingent upon'. See Appellate Body Report, *Canada – Aircraft*, paras 162–80; Appellate Body Report, *US – FSC*, paras 96–121; Appellate Body Report, *Canada – Autos*, paras 95–117; Appellate Body Report, *Canada – Aircraft (Article 21.5 – Brazil)*, paras 25–52; AB Report, *US – FSC*, Article 21.5 EC, para. 111.

prohibited subsidies whose negative effects are presumed.[5] In the course of the ongoing round of trade negotiations, Members are discussing introducing a special set of disciplines dealing with fisheries subsidies. This could involve prohibiting certain types of fisheries subsidies, while including other types of such subsidies in a new non-actionable category. In light of the immature state of the negotiations on this topic, we will not expand on the question of fisheries subsidies here.[6]

(a) Illustrative list of export subsidies – annex I

Article 3 SCM Agreement provides that export subsidies are subsidies contingent in law or in fact, whether solely or as one of several other conditions, upon export performance, including those illustrated in annex I.

Annex I to the SCM Agreement entitled *Illustrative List of Export Subsidies* offers a non-exhaustive list of export subsidies which are per se prohibited. It contains 12 items. A subsidy coming under the purview of the *Illustrative List* is 'deemed to be a prohibited export subsidy'[7] and is ipso facto prohibited: no additional need to demonstrate that satisfaction of the threshold embedded in Art. 3.1 SCM Agreement was necessary. For example, the Appellate Body in *US – Upland Cotton* upheld the finding of the Panel in that case that the US measure was covered by item j) of the *Illustrative List* of export subsidies in annex I and that it was therefore per se a violation of Article 3 SCM Agreement.[8]

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[5] The 'action' in question is set forth in Article 4 SCM Agreement. A Member may react against such subsidies by engaging the WTO Dispute Settlement Mechanism. A Member will not conduct its own investigation to establish the prohibited nature of the subsidy but rather will request the establishment of a Panel which will decide the case based on the arguments of the parties.

[6] The reader may be interested in looking at some of the proposals submitted by Members in the course of the negotiations such as contained in the following documents: TN/RL/GEN/36, TN/RL/GEN/39, TN/RL/GEN/41, TN/RL/GEN/47, TN/RL/GEN/54, TN/RL/GEN/57, TN/RL/GEN/70, TN/RL/GEN/79, TN/RL/GEN/100, TN/RL/GEN/114, TN/RL/GEN/127, TN/RL/GEN/134.

[7] Appellate Body Report, *Brazil – Aircraft*, para. 179.

[8] Appellate Body Report, *US – Upland Cotton*, para. 674. The Panel in *US – Upland Cotton* noted the following reasoning:

> We recall that Article 3.1(a) of the *SCM Agreement* sets out a prohibition on subsidies contingent upon export performance, 'including those illustrated in Annex I'. Annex I – the Illustrative List of Export Subsidies – contains item (j). We have found that the challenged United States export credit guarantee programmes meet the definitional elements of a per se export subsidy in item (j). As they are among those 'illustrated in Annex I' for the purposes of Article 3.1(a), they are included in the subsidies contingent upon export performance prohibited by Article 3.1(a) of the *SCM Agreement*.

Panel Report, *US – Upland Cotton*, para. 9.947, footnote 1125.

There have been a number of cases under this *Illustrative List* dealing mainly with the export credit provisions of items (j) and (k) of the *Illustrative List*.[9] The problem of interpreting the *Illustrative List* flows from the fact that it predates the SCM Agreement. In fact, the *Illustrative List* dates back to 1965 and was subsequently incorporated in the Tokyo Round Subsidies Code. The terminology used thus also predates the SCM Agreement. The export credit provisions in this List for example appear to apply a cost-to-government standard for determining whether an export subsidy exists, and do not use the *financial contribution – benefit* dichotomy of Article 1 SCM Agreement.

(i) A brief overview of the prohibited export subsidies listed in annex I

The examples of export subsides set forth in the Illustrative List are particular types of government action which, even in the absence of such an Illustrative List, most probably would be considered to constitute export subsidies. In fact, the backbone of the List is formed by the three broad categories of financial contributions of Article 1 SCM (discussed above). It concerns (i) the government providing a good or service to exporters, including transport and freight charges (items (c) and (d)); the forgoing of income by providing tax advantages to exporters through exemptions, remissions or deferrals of direct or indirect taxes, or import charges (paragraphs (e) to (i)); and the direct or potential direct transfer of funds in the form of export credits and exports credit guarantees (paragraphs (j) and (k)).[10]

The benchmark for the establishment of a benefit is in general the conditions that apply for domestic production or consumption. In item (c) for example, if the government provides for internal transport and freight charges on export shipments on terms more favourable than for domestic shipments, an export subsidy is being provided. In the realm of tax advantages, item (f), for example, provides that an export subsidy shall be deemed to exist in case of special deductions directly related to exports or export performance, over and above those granted in respect to production for domestic consumption, in the calculation of the base on which direct taxes are charged.[11]

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[9] See *Canada – Aircraft*, *Brazil – Aircraft*, *Korea – Commercial Vessels* and *US – Upland Cotton*.

[10] In addition, the List refers to two items which are not really examples of export subsidies, but rather provide a generally worded definition of such subsidies without providing much clarification: 'the provision by government of direct subsidies to a firm or an industry contingent upon export performance' (item (a)) and 'any other charge on the public accounting constituting an export subsidy in the sense of Article XVI of GATT 1994' (item (l)). The only remaining item concerns currency retention schemes which involve a bonus on exports.

[11] The fact that any advantages are provided merely to offset advantages

With respect to duty drawbacks, export credit and export credit guarantees, the 'domestic product' benchmark for obvious reasons cannot and therefore does not apply. In the case of duty drawbacks, the basic rule is that the remission or drawback of import charges in excess of those originally levied on the imported input that are consumed in the production of the exported product constitutes an export subsidy.[12] In other words, if a bicycle producer imported tyres and paid a 10 per cent import duty on these tyres and subsequently re-exports the finished bike (with the imported tyres), it would be an export subsidy if the government remits more than the 10 per cent paid upon importation of the tyres. Actually, footnote 1 to Article 1 SCM Agreement already stated as much. The provision of export credits and export credit guarantees, discussed in items (j) and (k), merit somewhat more attention.

(ii) Export credits and export credit guarantees, items (j) and (k) annex I

The government may play a very important role as a facilitator of export sales in case of important and costly transactions by providing export credits or export credit guarantees. In the case of export credits provided by the government or a government export credit agency, the government will extend credit to the foreign buyer of the exported goods. In other words, the government of the exporter grants the purchaser of the goods, the importer, an extended term to pay for these goods. Especially in the case of large contracts involving for example aircraft or ships, the terms of credit can considerably influence the purchasing decision. An export credit guarantee programme guarantees such intervention in case of default of the borrower and thus also influences the price for the product.[13] Export credits and export credit guarantees are thus

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bestowed on competing products from another Member does not affect the analysis of the situation under the Illustrative List. This is in line with the general approach taken by the SCM Agreement. See Panel Report, *Brazil – Aircraft*, paras 7.25–7.26:

> In essence, Brazil's approach to 'material advantage' boils down to an argument that an admitted export subsidy should not be deemed to be prohibited if it can be demonstrated merely to offset some advantage or advantages available to the competing product of another Member. We consider that such an interpretation would produce results that would be contrary to the object and purpose of the SCM Agreement.

Panel Report, *Brazil – Aircraft*, para. 7.26.

[12] Item (i) provides for further clarification and refers in this respect to Annex II and Annex III.

[13] In the words of the Panel in *Korea – Commercial Vessels*, 'an instrument may only be designated as an 'export credit guarantee' if it guarantees an export credit. An instrument will guarantee an export credit if it covers default by a borrower in respect of an export credit provided to that borrower'. Panel Report, *Korea – Commercial Vessels*, para. 7.213.

actually services rendered to the purchaser which may make the product of the seller, the exporter, more appealing than would otherwise have been the case. In that sense it is a financial contribution to the exporter.

The Panel in *Korea – Commercial Vessels* referred to the OECD definition concerning export credits[14] to conclude that only credit conferred to a *foreign buyer* constitutes an export credit.[15] A loan to the exporter is thus not an export credit, even if closely related to export performance.[16] It may well be an export subsidy of course. This difference is important because, as will be discussed below, item (k) contains a safe haven for export credits that comply with the OECD Arrangement. If a certain form of support cannot qualify as an export credit, it cannot benefit from the safe haven either.

An important aspect of the deal is the price that the seller will have to pay for this service and the interest rate to be charged by the export credit agency to the buyer. Items (k) and (j) mainly use a cost-to-government benchmark to determine whether an export subsidy exists. But case-law has introduced a market benchmark as well.

An export credit guarantee is deemed to be a prohibited export subsidy in case the export credit guarantee is provided at premiums which are inadequate to cover the long-term operating costs and losses of the guarantee programmes.[17] Similarly, an export credit extended at rates below those which

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[14] The following definition is set forth in the Organization for Economic Cooperation and Development ('OECD') Handbook on Export Credits relied on by the EC in this case:

> Broadly defined, an export credit is an insurance, guarantee or financing arrangement which enables a foreign buyer of exported goods and/or services to defer payment over a period of time. . . . Export credits may take the form of 'supplier credits' extended by the exporter or of 'buyer credits' where the exporter's bank or other financial institution lends to the buyer (or his bank).

Panel Report, *Korea – Commercial Vessels*, para. 7.316.

[15] Panel Report, *Korea – Commercial Vessels*, para. 7.323.

[16] Pre-export financing is not an export credit either. Panel Report, *Korea – Commercial Vessels*, paras 7.326–7.327.

[17] Item (j) Annex I SCM. It has been argued that this test actually institutionalizes a bias in favour of developed countries due to the fact that developed countries have generally higher credit ratings than developing countries. Some argue that, based on their higher credit ratings, developed countries are able to provide export credit guarantees that lower the overall interest rate to below market levels, if compared to the overall interest rate offered by international capital markets without the guarantee. It has therefore been proposed to add an Article 14 (b) SCM–type language that would include the practice where developed countries provide guarantees at rates that are so low that the overall interest rate is below market. TN/RL/GEN/66. Also see TN/RL/W/5.

the government actually have to pay for the funds so employed (or would have to pay for the funds if they borrowed on international capital markets) or the payment by the government of all or part of the costs incurred by exporters or financial institutions in obtaining credits, in so far as they are used to secure a material advantage in the field of export credit terms.[18] This language thus ties each WTO Member to its own cost of capital. It has been argued that this constitutes an important disadvantage for developing countries as the cost of capital for developing countries is higher than for developed countries owing primarily to perceived risk. By tying each member to its own cost of capital, item (k), it has been suggested, precludes negotiation of more competitive rates such as those offered by Members with lower costs of funds, thus creating a larger safe harbour for developed countries as opposed to developing countries. [19]

In any case, in both export credits and export credit guarantees, cost to the granting government is what determines whether the export credit or the guarantee is a prohibited export subsidy. The terms 'used to secure a material advantage in terms of export credits' has been interpreted to refer to a market benchmark. If the rates are commercial interest rates, the export credits are not considered to have been used to secure a material advantage and will therefore not be deemed to be a prohibited subsidy.

An important safe haven is provided for in the second sentence of item (k) in case the government applies the interest rate provisions agreed upon within the OECD.[20] In such a case, the last sentence of item (k) of Annex I explicitly provides that such export credits shall not be considered to be a prohibited export subsidy. This reference to the OECD's interest rate provisions has been interpreted by the AB in *Brazil – Aircraft* to mean the OECD's Commercial Interest Reference Rates (CIRR). The AB further considered this safe haven provision to be useful context for determining whether the export credits were

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[18] Item (k) first sentence Annex I SCM Agreement.

[19] TN/RL/GEN/66. It has been proposed to amend the language of the first sentence of item (k) to simply refer to the granting of export credits at rates below those available on international capital markets, so as to make sure that export credits are not supplied at rates below market level. TN/RL/GEN/66.

[20] Item (k)'s reference to 'an international undertaking of official export credits to which at least twelve original members to this Agreement are parties as of 1 January 1979' is generally understood to be a reference to the OECD Arrangement on export credits. AB Report, *Brazil – Aircraft*, para. 180. Panel Report, *Canada – Aircraft, (Article 21.5 – Brazil)*, para. 5.78. It is important to note that the reference in item (k) has been interpreted to refer not to the interest rate provisions of the OECD Arrangement as they existed at the time of conclusion of the Uruguay Round, but to whatever version of the Arrangement is in force at the time the financing support is offered. A proposal has been submitted in the course of the negotiations to clarify that the 'international undertaking' of item (k) is a reference to the OECD Arrangement as it existed at the time of conclusion of the Uruguay Round. TN/RL/GEN/66.

'used to secure a material advantage in the field of export credit terms', one of the conditions in item (k), first sentence, for deeming the export credits to be a prohibited subsidy. According to the AB, the fact that a particular *net* interest rate (that is, the actual interest rate applicable in a particular export sales transaction after deduction of the government payment) is below the relevant CIRR is a positive indication that the government payment in that case has been used to secure a material advantage in the field of export credit terms:

> The *OECD Arrangement* establishes minimum interest rate guidelines for export credits supported by its participants ('officially-supported export credits'). Article 15 of the Arrangement defines the minimum interest rates applicable to officially-supported export credits as the Commercial Interest Reference Rates ('CIRRs'). Article 16 provides a methodology by which a CIRR, for the currency of each participant, may be determined for this purpose. We believe that the *OECD Arrangement* can be appropriately viewed as one example of an international undertaking providing a specific market benchmark by which to assess whether payments by governments, coming within the provisions of item (k), are 'used to secure a material advantage in the field of export credit terms'. Therefore, in our view, the appropriate comparison to be made in determining whether a payment is 'used to secure a material advantage', within the meaning of item (k), is between the actual interest rate applicable in a particular export sales transaction after deduction of the government payment (the '*net* interest rate') and the relevant CIRR.
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> It should be noted that the commercial interest rate with respect to a loan in any given currency varies according to the length of maturity as well as the creditworthiness of the borrower. Thus, a potential borrower is not faced with a single commercial interest rate, but rather with a range of rates. Under the *OECD Arrangement*, a CIRR is the *minimum* commercial rate available in that range for a particular currency. In any given case, whether or not a government payment is used to secure a '*material* advantage', as opposed to an 'advantage' that is not 'material', may well depend on where the *net* interest rate applicable to the particular transaction at issue in that case stands in relation to the range of commercial rates available. The fact that a particular *net* interest rate is below the relevant CIRR is a positive indication that the government payment in that case has been 'used to secure a material advantage in the field of export credit terms'.[21]

In general, if export credits are granted at CIRR or at another commercial interest rate, they shall not be deemed to be a prohibited subsidy.[22] Whether this immediately implies that such export credits can never be considered to be a prohibited subsidy is a different question we discuss later.

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21 AB Report, *Brazil – Aircraft*, paras 180–81.

22 In the implementation case, *Brazil – Aircraft (Article 21.5 – Canada)*, the Appellate Body clarified that CIRR is not the only possible market benchmark in assessing whether export credits were used to secure a material advantage in the field of export credit terms. See AB Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 64.

An important consequence of the safe haven provision and the important role attached to the OECD Arrangement's CIRR is thus that a group of WTO Members that are also Members of the OECD and Participants to the OECD Arrangement on Guidelines for Officially Supported Export Credits (the 'OECD Arrangement') are in fact in control of the situation.[23] They determine the CIRR. This question of a sub-group of WTO Members possibly creating a more favourable situation for themselves through the OECD Arrangement was an important reason for rejecting Members to be allowed to match another Member's export credit terms, as permitted (by way of derogation) by the OECD Arrangement. This matching of officially supported export credit terms provided by another government permitted by the OECD Arrangement could result in a particular case in net interest rates below the relevant CIRR. Only Participants in the OECD Arrangement, a sub-set of WTO Members would have access to the export credit terms offered, so only those Participants would actually know which terms they would be allowed to match. Non-Participants would be at a systematic disadvantage as they would not have access to the information about the terms and conditions being offered or matched by Participants The Panels in *Canada – Aircraft (Article 21.5 – Brazil)* and *Canada – Aircraft Credits and Guarantees* refused to allow the second paragraph of item (k) to be 'interpreted in a manner that allows that subgroup of Members to create for itself de facto more favourable treatment than under the SCM Agreement than is available to all other WTO Members'.[24]

More in general, the Panel in *Canada – Aircraft (Article 21.5 – Brazil)* considered important that, in the OECD Arrangement itself, matching was considered permissible in case of a prior derogation from the agreed rules by another OECD Participant. In other words, matching was permitted as a derogation from the OECD Arrangement. It was of the view that complying with a derogation allowed for under the OECD Arrangement is not the same as applying the interest rate provisions of that Arrangement, which is what the second sentence of item (k) requires. The Panel in *Canada – Aircraft Credits and Guarantees* agreed with that Panel's ruling which it summarized as follows:

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[23] The Participants in the Arrangement currently are Australia, Canada, the European Community, Japan, Korea, New Zealand, Norway, Switzerland and the United States. Arrangement on Officially Supported Export Credits – 2007 Revision, TD/PG(2007)18, Article 3 (available on the OECD website). In the course of the negotiations, a proposal has been submitted to clarify the SCM Agreement and Annex I in particular to ensure that a minority of WTO Members is not allowed to change unilaterally the rules that have been negotiated and agreed to by all WTO Members. For the specifics, see TN/RL/GEN/66.

[24] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.172. Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.132.

> With regard to matching, the *Canada – Aircraft – 21.5* panel took the view that offers that matched a *permitted exception* (an action itself foreseen and permitted within limits by the *Arrangement*) 'conformed' with the provisions of the *OECD Arrangement* and, hence, also 'conformed' with the interest rates provisions in the sense of the safe haven clause. In contrast, offers that matched a *derogation* (an action itself not permitted under any circumstances by the *Arrangement*) were not 'in conformity' with the provisions of the *OECD Arrangement* and, as a result, were also not 'in conformity' with the interest rates provisions in the sense of the safe haven clause. The *Canada – Aircraft – Article 21.5* panel stated, in this regard, that, if it were accepted that matched derogations were 'in conformity' with the interest rates provisions of the *OECD Arrangement*, then the concept of 'conformity' could not possibly discipline official financing support. The *Canada – Aircraft – Article 21.5* panel also recalled that non-Participants to the *OECD Arrangement* would not, as a matter of right, have access to information regarding the terms and conditions offered or matched by Participants. Such information was available only to Participants. Thus, if matched derogations were eligible for the safe haven in the second paragraph of item (k), non-Participants would be at a systematic disadvantage vis-à-vis Participants. The *Canada – Aircraft – Article 21.5* panel also stressed the importance of avoiding an interpretation of item (k), second paragraph, that would lead to structural inequity in respect of developing country Members.
>
> The findings of the *Canada – Aircraft – Article 21.5* panel on item (k) were not appealed by Canada (or Brazil) and were subsequently adopted by the DSB on 4 August 2000. The findings of that panel regarding the exclusion of the matching of a derogation from the item (k) safe haven were found 'persuasive' by the *Brazil – Aircraft – Second Article 21.5* panel. The report of that panel was not appealed by Canada (or Brazil) and was subsequently adopted by the DSB on 23 August 2001. We consider that the findings of both the abovementioned panels are persuasive, and endorse those panels' interpretations of the second paragraph of item (k). The approach of these panels appears to us to be entirely consistent with the wording of the second paragraph of item (k). Indeed, if one were to accept that the matching of a derogation could fall within the item (k) safe haven, one would effectively be accepting that a Member could be 'in conformity with' the 'interest rates provisions' of the *OECD Arrangement* even though that Member failed to respect the CIRR (or a permitted exception). In our view, such an interpretation would be unjustified.[25] (Footnotes omitted)

It thus concluded that Canada failed to establish that the matching of a derogation could, as a matter of law, be 'in conformity with' the 'interest rates provisions' of the *OECD Arrangement.* In other words, it found that the matching of a derogation could not fall within the scope of the item (k) safe haven. [26]

It is interesting to note that, since the issuance of these reports, the OECD Arrangement has been modified and some additional information sharing with

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[25] Panel Report, *Canada – Aircraft Credits and Guarantees*, paras 7.164–7.165. The Panel subsequently rejected a number of additional arguments by Canada and third parties. Panel Report, *Canada – Aircraft Credits and Guarantees*, paras 7.166–7.180.

[26] Panel Report, *Canada – Aircraft Credits and Guarantees*, para. 7.180.

non-Participants has been agreed on.[27] Non-Participants will be informed of the export credit terms offered by OECD Participants, an offer which it could match. A non-Participant will not be informed however of the terms finally agreed upon by the OECD Participant. So, while it has information on the export credit terms offered which it can match, a non-Participant has no information on the final terms actually agreed upon which it would be allowed to match.

Another important change to the Arrangement has been that matching is no longer provided for as a derogation but is now considered to be part and parcel of the Arrangement. Matching is considered to be 'in conformity' with the Arrangement.[28] It is unclear whether these changes to the OECD Arrangement are sufficient such that any matching of a below CIRR offer by another WTO Member would be considered in line with the OECD interest rate provisions and would therefore qualify for the safe haven of item (k) of Annex I.

It is interesting to note that in 2007, the world's major civil aircraft exporting countries, including OECD countries as well as Brazil, a non-OECD country, concluded an OECD agreement limiting government support through export credits in the aircraft sector in the so-called '2007 Sector Understanding on Export Credits for Civil Aircraft'. This Aircraft Sector Understanding has been incorporated into the 2007 version of the OECD's Export Credit Arrangement, and is clearly aimed at putting an end to the kind of trade disputes over export credits as the WTO system witnessed over the last ten years. The participation of a non-OECD country like Brazil is an important development in this respect.

(iii) An '*a contrario*' – reading of annex I

It has been argued that the *Illustrative List* (the 'List') could also serve as an affirmative defence in cases where a measure was clearly covered by the List but did not 'meet' all the requirements set forth in the List. The Panel in *Brazil – Aircraft (Article 21.5 – Canada)* rejected this a contrario argument, relying *inter alia* on footnote 5 SCM Agreement, which provides that 'Measures referred to in Annex I as *not* constituting export subsidies shall *not* be prohibited under this or any other provision of this Agreement' (emphasis added).

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[27] Arrangement on Officially Supported Export Credits – 2007 Revision, TD/PG(2007)18/, Article 4. Also, see Article 5 of the 2007 Sector Understanding on Export Credits for Civil Aircraft (available on the OECD website).

[28] Arrangement on Officially Supported Export Credits – 2005 Revision, TD/PG(2007)18/, Article 18. Also, see Article 35 of the 2007 Sector Understanding on Export Credits for Civil Aircraft (available on the OECD website)

The Panel concluded that only subsidies which are affirmatively listed in Annex I as *not* being prohibited export subsidies are permissible.[29] Similarly, an affirmative defence could be based on cases where the List contains some form of *affirmative* statement that a measure is not subject to the Article 3.1(a) prohibition, that it is *not* prohibited, or that it is allowed, such as, for example, the first and last sentences of footnote 59 and the proviso clauses of items (h)[30] and (i)[31] of the Illustrative List. In any other situation, the mere fact that the specific conditions of one of the items of the List has not been met does not imply that this measure is not a prohibited export subsidy. It simply means that it is not deemed to be a prohibited subsidy under Annex I. Whether this measure is or is not a prohibited export subsidy will then ultimately depend on the analysis under Article 3.1 SCM Agreement.

The *Brazil – Aircraft* Panel rejected the argument that the absence of an *a contrario* reading of the Illustrative List, would render meaningless some of the clauses of this List:

> To borrow a concept from the field of competition law, the Illustrative List could be seen as analogous to a list of *per se* violations. Seen in this light, the material advantage clause is not 'ineffective', in the sense that it is reduced to redundancy or inutility, by a finding that the first paragraph of item (k) cannot be used *a contrario* to establish that a measure is permitted. To the contrary, the material advantage nevertheless continues to serve an important role by narrowing the range of measures that would otherwise be subject to the '*per se*' violation set forth in the first paragraph of item (k), as discussed below.[32]

In a puzzling statement, the Appellate Body in *Brazil – Aircraft (Article 21.5 – Canada)* distanced itself from the views expressed by the Panels and seemed to indicate that it would be willing to accept an a contrario reading of the Illustrative List:

> If Brazil had demonstrated that the payments made under the revised PROEX were not 'used to secure a material advantage in the field of export credit terms', and that such payments were 'payments' by Brazil of 'all or part of the costs incurred by

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29 Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, paras 6.34–6.37.

30 '. . . provided, however, that prior-stage cumulative indirect taxes *may be* exempted, remitted or deferred on exported products even when not exempted, remitted or deferred on like products sold for domestic consumption, if the prior stage cumulative indirect taxes are levied on inputs that are consumed in the production of the exported product' (emphasis added).

31 '. . . provided, however, that in particular cases a firm *may use* a quantity of home market inputs equal to, and having the same quality and characteristics as, the imported inputs as a substitute for them'.

32 Panel Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 6.42; referred to in Panel Report, *Korea – Commercial Vessels*, para. 7.311.

> exporters or financial institutions in obtaining credits', then we would have been prepared to find that the payments made under the revised PROEX are justified under item (k) of the Illustrative List. However, Brazil has not demonstrated that those conditions of item (k) are met in this case. In making this observation, we wish to emphasize that we are not interpreting footnote 5 of the *SCM Agreement*, and we do not opine on the scope of footnote 5, or on the meaning of any other items in the Illustrative List.[33]

The Panel in *Korea – Commercial Vessels*, however, refused to read such an approval of an *a contrario* argument into the Appellate Body's statement, and continued to apply the above explained rejection of the a contrario argument:

> However, we do not accept that this amounts to a reversal of the panel's findings, nor a legal finding by the Appellate Body that an *a contrario* interpretation of the first paragraph of item (k) is permissible. This is because the Appellate Body explicitly stated that '[i]n making this observation, we wish to emphasize that we are not interpreting footnote 5 of the *SCM Agreement*, and we do not opine on the scope of footnote 5, or on the meaning of any other items in the Illustrative List.' In light of this clarification by the Appellate Body, we consider that there is nothing in the Appellate Body statement that would cause us not to be guided by the abovementioned reasoning of the *Brazil – Aircraft – Article 21.5* panel.[34]

(b) Prohibited subsidies (Article 3.1): contingency on export performance or import substitution

(i) Contingency

Assuming a scheme is not reflected in the *Illustrative List* of export subsidies, the complainant will have to demonstrate that the scheme at hand is either *de jure* or *de facto* contingent upon export performance or import substitution. A subsidy is 'contingent upon' export performance or import substitution if export performance or import substitution is *one of the conditions* for granting the subsidy. As noted by the AB in *Canada – Aircraft*, this common understanding of the word 'contingent' as 'conditional' or 'dependent for its existence on something else' is borne out by the text of Article 3.1(a), which makes an explicit link between 'contingency' and 'condition-

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[33] Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 80. It added however that it did not believe it was necessary to rule on these general questions in order to resolve this dispute. The Panel in the second implementation case, *Brazil – Aircraft (Article 21.5 – Canada II)* noted that the Appellate Body had declared its earlier finding on the *a contrario* issue 'moot' and of 'no legal effect', but nevertheless, after recalling the essence of its earlier finding, discussed above, reaffirmed its earlier views. Panel Report, *Brazil – Aircraft (Article 21.5 – Canada II)*, para. 5.275.

[34] Panel Report, *Korea – Commercial Vessels*, para. 7.197.

ality' in stating that export contingency can be the sole or 'one of several other *conditions*'.[35]

(ii) In law or in fact

With regard to export subsidies, the letter of Art. 3.1 (a) SCM ('either in law or in fact') leaves no doubt that the subsidy programme which appears to be neutral but is, in fact, contingent upon export performance, is also prohibited. The prohibition of *de facto* export contingency operates as an anti-circumvention provision against attempts by WTO Members to link benefits to exports without explicitly stating in the law that this has indeed been the case. Preventing circumvention of the SCM disciplines was an important consideration in the AB's inclusion of de facto contingency also in the context of import substitution subsidies.[36] In *Canada – Autos*, the AB thus clarified that subsidies which are not *in law* but only *in fact* contingent upon the use of domestic goods over imported goods (import substitution subsidies) are also prohibited, even though Article 3.1 (b) does not explicitly provide for such de facto contingency.[37]

The Appellate Body in its report on *Canada –Aircraft* discussed the different *evidentiary standards* required to demonstrate the existence of a *de jure* or a *de facto* subsidy. It explained why, in its view, the latter was a more demanding standard, in the following terms:

> In our view, the legal standard expressed by the word 'contingent' is the same for both *de jure* and *de facto* contingency. There is a difference, however, in what evidence may be employed to prove that a subsidy is export contingent. *De jure* export contingency is demonstrated on the basis of the words of the relevant legislation, regulation

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[35] AB Report, *Canada – Aircraft*, para. 166. Interestingly, in a footnote the Appellate Body distanced itself from the 'but for' test applied by the Panel in determining whether contingency existed or not. The Appellate Body noted that the Panel considered that the most effective means of demonstrating whether a subsidy is contingent in fact upon export performance is to examine whether the subsidy would have been granted *but for* the anticipated exportation or export earnings (Panel Report, para. 9.332). It considered that while the Panel did not err in its overall approach to de facto export contingency, Panels must interpret and apply the language actually used in the treaty. Appellate Body Report, *Canada – Aircraft*, fn. 102

[36] According to the AB, 'a finding that Article 3.1(b) extends only to contingency "in law" upon the use of domestic over imported goods would be contrary to the object and purpose of the SCM Agreement because it would make circumvention of obligations by Members too easy'. AB Report, *Canada – Autos*, para. 142. The AB thus overturned the Panel's finding that Article 3.1(b) did not prohibit subsidies contingent *in fact* on import substitution.

[37] AB Report, *Canada – Autos*, paras 139–43.

> or legal instrument. Proving *de facto* export contingency is a much more difficult task. There is no single legal document which will demonstrate, on its face, that a subsidy is 'contingent . . . in fact . . . upon export performance'. Instead, the existence of this relationship of contingency, between the subsidy and the export performance, must be inferred from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case. . . . We note that satisfaction of the standard for determining *de facto* export contingency set out in footnote 4 requires proof of three different substantive elements: first, 'the granting of a subsidy'; second, 'is . . . tied to . . .'; and third, 'actual or anticipated exportation or export earnings'.[38] (Italics in the original).

Contingent in law (de iure)

In sum, a subsidy is contingent 'in law' upon export performance or import substitution when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. For example, you will get one dollar for each unit exported. The subsidy is then clearly *de iure* contingent upon export performance. However, such *de iure* contingency will not necessarily need to be *explicitly*, that is, *expressis verbis* provided in the subsidy programme. In the words of the AB in *Canada – Autos*, 'such conditionality can also be derived by necessary implication from the words actually used in the measure':

> . . . a subsidy is contingent 'in law' upon export performance when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure. . . . [F]or a subsidy to be *de jure* export contingent, the underlying legal instrument does not always have to provide expressis verbis that the subsidy is available only upon fulfillment of the condition of export performance. Such conditionality can also be derived by necessary implication from the words actually used in the measure.[39]

For example, in the *US – FSC* and the *US – FSC (Article 21.5 – EC)* cases, the AB upheld the Panel's finding that the combination of the requirements to *produce property in* the United States for *use outside* the United States gave rise to export contingency under Article 3.1(a) of the SCM Agreement.[40] On that basis the AB considered the subsidies to be contingent *in law* upon export performance.

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38 Appellate Body Report, *Canada – Aircraft*, paras 167–9.

39 AB Report, *Canada – Autos*, para. 100, as quoted in Appellate Body Report, *US – FSC (Article 21.5 – EC)*, para. 112.

40 AB Report, *US – FSC (Article 21.5 – EC)*, para. 118.

The examination of whether a subsidy is in law contingent upon export performance or the use of domestic goods over imported goods may require an individual analysis per recipient of the requirements for obtaining the subsidy. In *Canada – Autos*, the AB reversed the Panel's ruling that the subsidy in question which was conditional upon a certain Canadian value added requirement was not *de iure* contingent on the use of domestic goods over imported goods (import substitution). According to the Panel, in order to obtain the subsidy, it was not necessarily always the case that a company had to use domestic goods over imports. The domestic content requirement also referred to direct labour costs, manufacturing overheads, general and administrative expenses and depreciation.[41] The AB turned the argument of the Panel around: what is important is not that it is *not always necessary* to use domestic goods to obtain the subsidy, but rather that it is *never necessary*. Only then could the Panel have reached the conclusion it did. However, according to the Appellate Body, in the absence of an individual analysis of the impact of the requirement for each recipient, the Panel was simply unable to reach such a conclusion:

> The Panel's reasoning implies that under no circumstances could *any* value-added requirement result in a finding of contingency 'in law' upon the use of domestic over imported goods. We do not agree. We noted that the definition of 'Canadian value added' in the MVTO 1998 *requires* a manufacturer to report to the Government of Canada the *aggregate* of certain listed costs of its production of motor vehicles, and that the first such cost item specified is the cost of Canadian parts and materials *used* in the production of motor vehicles in its factory in Canada. It seems to us that whether or not a particular manufacturer is able to satisfy its specific CVA requirements without using any Canadian parts and materials in its production depends very much on the *level* of the applicable CVA requirements. For example, if the level of the CVA requirements is very high, we can see that the use of domestic goods may well be a necessity and thus be, in practice, required as a *condition* for eligibility for the import duty exemption. By contrast, if the level of the CVA requirements is very low, it would be much easier to satisfy those requirements *without* actually using domestic goods; for example, where the CVA requirements are set at 40 per cent, it might be possible to satisfy that level simply with the

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41 Panel Report, *Canada – Autos*, para. 10.216:

> In this regard, we recall that the definition of 'CVA' in the MVTO 1998 includes, in addition to parts and materials of Canadian origin, such other elements as direct labour costs, manufacturing overheads, general and administrative expenses and depreciation. Thus, and depending upon the factual circumstances, a manufacturer might well be willing and able to satisfy a CVA requirement without using any domestic goods whatsoever. Under these circumstances, it would be difficult for us to conclude that access to the import duty exemption is contingent, i.e. conditional or dependent, in law on the use of domestic over imported goods within the meaning of the SCM Agreement.

> aggregate of other elements of Canadian value added, in particular, labour costs. The multiplicity of *possibilities* for compliance with the CVA requirements, when these requirements are set at low levels, may, depending on the specific level applicable to a particular manufacturer, make the use of domestic goods only one *possible* means (means which might not, in fact, be utilized) of satisfying the CVA requirements.
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> In our view, the Panel's examination of the CVA requirements for specific manufacturers was insufficient for a reasoned determination of whether contingency 'in law' on the use of domestic over imported goods exists. For the MVTO 1998 manufacturers and most SRO manufacturers, the Panel did not make findings as to what the actual CVA requirements are and how they operate for individual manufacturers. Without this vital information, we do not believe the Panel knew enough about the measure to determine whether the CVA requirements were contingent 'in law' upon the use of domestic over imported goods. We recall that the Panel did make a finding as to the level of the CVA requirements for one company, CAMI. The Panel stated that the CVA requirements for CAMI are 60 per cent of the cost of sales of vehicles sold in Canada. At this level, it may well be that the CVA requirements operate as a condition for using domestic over imported goods. However, the Panel did *not* examine how the CVA requirements would actually operate at a level of 60 per cent.[42] (Footnotes omitted)

Contingent in fact (de facto)

A subsidy may also be contingent *in fact* upon export performance or import substitution. According to the Appellate Body, the existence of this de facto relationship of contingency between the subsidy and export performance or import substitution, must be inferred from 'the total configuration of the facts constituting and surrounding the granting of the subsidy'.[43] In other words, it may well be that the conditions for obtaining a subsidy appear neutral and not directly linked to export performance. Yet the requirements imposed on the recipient of the subsidy are such that they reveal the underlying and assumed contingency. As footnote 4 to Article 3 SCM Agreement explains, the de facto contingency 'standard is met when the facts demonstrate that the granting of a subsidy, without having been made legally contingent upon export performance, is in fact tied to actual or anticipated exportation or export earnings'. It further adds that the mere fact that a subsidy is granted to enterprises which export shall not for that reason alone be considered to be an export subsidy within the meaning of this provision.

In its report on *Canada – Aircraft*, the AB expressed its views on the meaning of the term de facto contingent upon export performance.[44] It concluded that proof of three different substantive elements is required by virtue of foot-

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42 AB Report, *Canada – Autos*, paras 130–31.
43 Appellate Body Report on *Canada – Aircraft*, para. 167.
44 Appellate Body Report on *Canada – Aircraft*, para. 167–74.

note 4: first, the '*granting* of a subsidy'; second, 'is . . . *tied to* . . .'; and, third, 'actual or anticipated exportation or export earnings'.[45]

The Appellate Body considered that it is the *granting* of the subsidy which is tied to export performance, and thus rejected the argument that an analysis of 'contingent . . . in fact . . . upon export performance' should focus on the reasonable knowledge of the recipient.[46] In addition, the Appellate Body considered that the term 'tied to' implies that the facts must 'demonstrate' that the granting of a subsidy is *tied to* or *contingent upon* actual or anticipated exports. In other words, a relationship of conditionality or dependence must be demonstrated. It does *not* suffice therefore to demonstrate solely that a government granting a subsidy *anticipated* that exports would result.[47] This is actually the third condition, which 'should not be confused with'[48] the second condition. The fact that a subsidy was granted with the knowledge, or with the anticipation, that exports will result (third condition), is not sufficient, because that alone is not proof that the granting of the subsidy is *tied to* the anticipation of exportation (second condition).[49] It is clear that whether exports were anticipated or 'expected' is to be gleaned from an examination of objective evidence, and is not merely a matter of expectations of the granting authority.[50]

The importance of the recipient's export orientation

The fact that the subsidy is granted to a company that exports, is not sufficient to make the subsidy de facto export contingent. So much is clear from the second sentence of footnote 4 SCM. Nevertheless, it seems that the knowledge at the time when the contract was concluded that the beneficiary company earned the majority of its income from exports was crucial in the reasoning of the Panel in *Australia – Automotive Leather II*.[51] In this case the Panel found that a subsidy was de facto export subsidy based on the following factors:

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45 AB Report, *Canada – Aircraft*, para. 169.

46 Appellate Body Report, *Canada – Aircraft*, para. 170.

47 Appellate Body Report, *Canada – Aircraft*, para. 171. As we noted earlier, in a footnote the Appellate Body distanced itself from the *but for* test applied by the Panel in determining whether contingency existed or not. Appellate Body Report, *Canada – Aircraft*, fn. 102.

48 Appellate Body Report, *Canada – Aircraft*, para. 172.

49 Appellate Body Report, *Canada – Aircraft*, para. 172.

50 Appellate Body Report, *Canada – Aircraft*, para. 172.

51 Panel Report, *Australia – Automotive Leather II*, paras 9.66–9.71. The Panel came to the following conclusion:

> All of the facts, weighed together, lead us to conclude that the three subsidy payments under the grant contract are in fact tied to Howe's actual or anticipated exportation or export earnings. These payments are conditioned on Howe's agree-

- Australia agreed to pay Howe (a private economic operator) 30 million Australian dollars in three instalments, if Howe were to meet certain sales and investment targets;
- The terms of the contract between Australia and Howe did not require from the latter to export. It provided, however, the latter with incentives to do so;
- The knowledge, at the time when the contract was concluded, that Howe earned the majority of its income from exports was crucial in the Panel's evaluation;
- The government of Australia provided the subsidies in question only to Howe, the only *exporter* of automotive leather,
- For Howe to meet the targets set, exporting was *passage oblige*, since the Australian market was too small to absorb its production.

This Panel Report was not appealed, but it seems doubtful that it would have withstood the AB's review. Indeed, the Appellate Body Report on *Canada – Aircraft* when dealing with a subsidy paid by TPC (a Canadian entity) to Canadian aircraft producers, took a narrower, more stringent view on this issue. Paying particular attention to footnote 4 to the SCM, it held that mere knowledge that the beneficiary is exporting does not suffice for the *de facto* threshold to be met. Something more is required:

> There is a logical relationship between the second sentence of footnote 4 and the 'tied to' requirement set forth in the first sentence of that footnote. The second sentence of footnote 4 precludes a panel from making a finding of *de facto* export contingency for the sole reason that the subsidy is 'granted to enterprises which export'. In our view, merely knowing that a recipient's sales are export-oriented does not demonstrate, without more, that the granting of a subsidy is tied to actual or anticipated exports. The second sentence of footnote 4 is, therefore, a specific expression of the requirement in the first sentence to demonstrate the 'tied to' requirement. We agree with the Panel that, under the second sentence of footnote 4, the export orientation of a recipient may be taken into account as *a* relevant fact, provided that it is one of several facts which are considered and is not the only fact supporting a finding.[52]

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ment to satisfy, on the basis of best endeavours, the aggregate performance targets. The second and third grant payments are, in addition, explicitly conditioned on satisfaction, on a best endeavours basis, of interim sales performance targets. Given the export-dependent nature of Howe's business, and the size of the Australian market, these sales performance targets are, in our view, effectively, export performance targets. The sales performance targets set out in the grant contract, in conjunction with the other facts enumerated above, therefore lead us to the conclusion that the grant of the subsidies was conditioned on anticipated exportation.

Panel Report, *Australia – Automotive Leather II*, para. 9.71.

[52] Appellate Body Report, *Canada – Aircraft*, para. 173.

The Panel in *Canada – Aircraft* had considered a number of factors, 16 in total, which together pointed in the direction of an underlying export contingency.[53] These 16 factors covered a variety of matters.[54] The Appellate Body upheld the Panel's finding of de facto export contingency as it considered that that the Panel did not make the export orientation of the regional aircraft industry the 'effective test', as Canada had argued on appeal:

> In keeping with the standard set forth in footnote 4, the fact of the Canadian industry's export orientation seems to us not to have been given undue emphasis by the Panel. Rather, this fact was simply one of a number of facts that, when considered together, the Panel found demonstrated that the granting of subsidies by TPC was 'tied to' actual or anticipated exports.
>
> We recall our finding that the Panel could be understood as having treated the nearness-to-the-export-market factor as giving rise to a legal presumption in determining whether TPC assistance was 'contingent . . . in fact . . . upon export performance'. However, we also have said that this factor may, in certain circumstances, be a relevant factor in making such a determination. In our view, in the circumstances of this case, the Panel did not err in taking this nearness-to-the-export-market factor into consideration, together with all the other facts that the Panel considered. Moreover, in our view and in light of all the facts the Panel considered, the Panel would, in all probability, have concluded that TPC assistance to the Canadian regional export industry was 'contingent . . . in fact . . . upon export performance', even if it had not taken this factor into account.[55] (Footnote omitted)

In sum, the recipient's export orientation may be a relevant factor in determining de facto contingency on export performance but it should not be given undue emphasis. It has been argued that the de facto export contingency standard may be biased against countries with a relatively small domestic market, as companies from these countries may depend heavily on export earnings. Any support provided to such companies is more likely to be seen as an illegal export subsidy because of the export orientation of these firms. Proposals have therefore been submitted in the course of the negotiations to amend and clarify footnote 4 to state that the mere fact that a subsidy is granted to enter-

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53 Panel Report, *Canada – Aircraft*, paras 9.340–9.341.

54 The Appellate Body listed some of the most important factors as including TPC's statement of its overall objectives; types of information called for in applications for TPC funding; the considerations, or eligibility criteria employed by TPC in deciding whether to grant assistance; factors to be identified by TPC officials in making recommendations about applications for funding; TPC's record of funding in the export field, generally, and in the aerospace and defence sector, in particular; the nearness-to-the-export-market of the projects funded; the importance of projected export sales by applicants to TPC's funding decisions; and the export orientation of the firms or the industry supported. Appellate Body Report, *Canada – Aircraft*, para. 175.

55 Appellate Body Report, *Canada – Aircraft*, paras 176–7.

prises which export, regardless of the level of export, shall not for that reason alone be considered to be an export subsidy.[56]

(c) Remedies in case of prohibited subsidies

In general, the Agreement provides that if the Panel and/or Appellate Body find that a prohibited subsidy has been granted, it will 'recommend that the subsidizing Member withdraw the subsidy without delay'[57] and will 'specify in its recommendation the time period within which the measure must be withdrawn'[58]. WTO Panels may request a *Permanent Group of Experts* (PGE), established to this effect, to pronounce on the prohibited character of a subsidy scheme (Art. 4.5 SCM). All PGE decisions are binding on Panels that requested them.[59]

In the event the recommendation is not followed within the time-period specified by the Panel, authorization shall be granted to the complaining Member to take 'appropriate countermeasures'.[60] Footnote 9 SCM adds that appropriate countermeasures 'should not be disproportionate taking into account the fact that the subsidies dealt with are prohibited.[61] In case of a dispute, an arbitrator shall determine whether the countermeasures are appropriate.

The important difference compared to the unilateral countervailing duty approach is thus that, at least in the case of prohibited subsidies, the multilateral track leads to the withdrawal of the subsidy. In other words, if successful,

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56 TN/RL/GEN/80. Not surprisingly, this proposal was submitted by Australia which had a bad experience with de facto export contingency in the *Australia – Leather II case* discussed earlier. In Australia's view, 'WTO case law has appeared to place a greater weight on the export propensity of a product in the range of factors which are examined to determine export contingency.' TN/RL/GEN/22. Also see TN/RL/GEN/34. A proposal by another Member, Brazil, going in a somewhat different direction would consider as prohibited a subsidy granted only to enable the fulfilment of export contracts or arrangements. In other words, in case domestic sales are not even contemplated, the subsidy should always be considered to have been in fact tied to export performance. TN/RL/GEN/88.

57 Article 4.7 SCM.

58 Article 4.7 SCM.

59 The PGE was established following a decision by the SCM Committee (WTO Doc. G/SCM/4 of 22 June 1995). The members of the PGE are selected based on proposals by the Members. Independency and impartiality requirements are imposed through the mentioned decision. Probably because all PGE decisions are binding on Panels, hence, Panels might feel they are losing too much authority by requesting the PGE to pronounce on the character of a subsidy, so far there has not been one single reported case where recourse to the PGE-facility has been made. There have been nine cases involving export subsidies so far (DS46, 70, 108, 126, 139, 142, 222, 267, 273) and in none of them recourse to PGE was made.

60 Article 4.10 SCM.

61 Footnote 9 to Article 4.10 SCM.

the multilateral track not only provides temporary protection to the domestic industry, but rather removes the alleged cause of the problem, which is the subsidization.

(i) 'Withdraw the subsidy'

Art. 4.7 SCM makes it clear that, if a subsidy is found by a WTO adjudicating body to be prohibited, the subsidizing WTO Member will be requested to *withdraw the subsidy without delay*.[62] In 'normal' Panel proceedings, the Panel will on the basis of Article 19 DSU, recommend the losing party to 'bring its measure into conformity'. While it may 'suggest ways in which the member concerned could implement' this recommendation, Panels in general have refrained from doing so, leaving the member in question free to decide on the most appropriate form of implementation. The situation in the case of a prohibited subsidies is thus very different. In the case of a finding of a violation, Article 4.7 SCM Agreement requires as the only possible way of complying with the Panel's ruling, the withdrawal of the subsidy without delay.

The Panel will specify in its recommendation the time period within which the subsidy must be withdrawn. In most cases brought before the WTO, the time period provided for withdrawing the subsidy has been 90 days.[63] Panels have considered the nature of the measures and issues regarding implementation to be relevant in determining the period for withdrawal.[64] For such practical reasons, the Panels in *US – FSC* and *US – Upland Cotton* granted the US a relatively long period of time for withdrawal of the subsidy: in these two

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[62] Janow and Staiger (2003) advance good arguments demonstrating that, the regulatory provision to ban export subsidies is, in most cases, at odds with economic theory. Still, as already alluded to earlier, the regulatory framework opted for total ban on export subsidies.

[63] See Panel Report, *Australia – Automotive Leather II*, para. 10.7; Panel Report, *Brazil – Aircraft*, para. 8.5; Panel Report, *Canada – Aircraft*, para. 10.4; Panel Report, *Canada – Autos*, para. 11.7; Panel Report, *Canada – Aircraft II*, para. 8.4; Panel Report, *Korea – Commercial Vessels*, para. 8.5.

[64] For example, the Panel in *Canada – Autos* reached the following conclusion about the term 'without delay':

> Thus, in examining what time-period would represent withdrawal 'without delay' in a particular case, we consider that we may take into account the nature of the steps necessary to withdraw the prohibited subsidy. We do not, however, agree with Canada that we should take into account the existence or absence of adverse or trade-distorting effects resulting from the prohibited subsidy, nor the time required to design replacement measures, as these factors are not related to the consideration of what time-period would represent withdrawal 'without delay'.
>
> Panel Report, *Canada – Autos*, para. 11.6

cases, 'without delay' amounted to about six months following adoption of the report by the Dispute Settlement Body.[65] The Appellate Body in *Brazil – Aircraft* confirmed that Article 4 SCM contains special rules which override the relevant provisions with respect to recommendations made by Panels and the time-frame for implementation of Article 21.3 DSU:

> With respect to implementation of the recommendations or rulings of the DSB in a dispute brought under Article 4 of the *SCM Agreement*, there is a significant difference between the relevant rules and procedures of the DSU and the special or additional rules and procedures set forth in Article 4.7 of the *SCM Agreement*. Therefore, the provisions of Article 21.3 of the DSU are not relevant in determining the period of time for implementation of a finding of inconsistency with the prohibited subsidies provisions of Part II of the *SCM Agreement*. Furthermore, we do not agree with Brazil that Article 4.12 of the *SCM Agreement* is applicable in this situation. In our view, the Panel was correct in its reasoning and conclusion on this issue. Article 4.7 of the *SCM Agreement*, which is applicable to this case, stipulates a time-period. It states that a subsidy must be withdrawn 'without delay'. That is the recommendation the Panel made.[66]

In the case of *recurring* subsidies, it seems clear what is intended with the requirement to 'withdraw' the subsidy without delay: if payments continue to be made, the subsidy has not been withdrawn.[67]

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[65] Panel Report, *US – FSC*, para. 8.8: 'Given that implementation of the Panel's recommendation will require legislative action (a fact recognized by the European Communities), that the United States fiscal year 2000 starts on 1 October 1999, and that this Report is not scheduled for circulation to Members until September 1999 (and, if appealed, might not be adopted until as late as early spring 2000), it is not in our view a practical possibility that the United States could be in a position to take the necessary legislative action by 1 October 1999. That being so, and acting in good faith, there is no way that this could be described as a "delay". However, this objective timing constraint would not be present with effect from the following fiscal year (2001), which commences on 1 October 2000. As this would be the first practicable date by which the United States could implement our recommendation, it satisfies the "without delay" standard set forth in Article 4.7. Accordingly, we specify that FSC subsidies must be withdrawn at the latest with effect from 1 October 2000.' It should be noted that on 12 October 2000, the DSB acceded to the United States' request 'that the DSB modify the time-period in this dispute so as to expire on 1 November 2000'. WT/DS108/11, 2 October 2000, and WT/DSB/M/90, paras 6–7; Panel Report, *US – Upland Cotton*, para. 8.3: 'at the latest within six months of the date of adoption . . . or 1 July 2005 (whichever is earlier).'

[66] Appellate Body Report, *Brazil – Aircraft*, para. 192.

[67] See e.g. Appellate Body Report, *Brazil – Aircraft (Article 21.5 – Canada)*, para. 45: 'In our view, to continue to make payments under an export subsidy measure found to be prohibited is not consistent with the obligation to "withdraw" prohibited export subsidies, in the sense of "removing" or "taking away". Or, as the Panel in *Canada – Aircraft (Article 21.5 – Brazil)*, for example, noted, '. . . a Member cannot be

In the case of *non-recurring* subsidies that have been granted in the past, it is less clear what the requirement 'to withdraw' such subsidies without delay entails.[68] The Panel on *Australia – Automotive Leather II* considered that an interpretation of 'withdraw the subsidy' that encompasses repayment of the prohibited subsidy seemed 'a straightforward reading of the text of the provision'.[69] It came to the following conclusion:

> Based on the ordinary meaning of the term 'withdraw the subsidy', read in context, and in light of its object and purpose, and in order to give it effective meaning, we conclude that the recommendation to 'withdraw the subsidy' provided for in Article 4.7 of the SCM Agreement is *not* limited to prospective action only but may encompass repayment of the prohibited subsidy.[70]

Going further than what the complainant had argued was required, the Panel concluded that repayment *in full* of the subsidy, and not just the prospective portion of the subsidy as allocated over time, was the only way 'to withdraw' such subsidies:

> As discussed above, we do not view the distinction drawn by the parties between the 'prospective' and past portions of a subsidy to be meaningful. Thus, this distinction

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understood to have withdrawn a prohibited subsidy if it has not *ceased to provide* such a subsidy, as that Member therefore would not have ceased to violate its WTO obligations in respect of such a subsidy. In our view, therefore, Canada's obligation arising from the DSB's recommendation in this dispute includes the obligation to cease providing prohibited export subsidies to the regional aircraft sector under the TPC'. Panel Report, *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.10. Also see Panel Report, *US – FSC (Article 21.5 – EC)*, para. 8.167.

[68] That is why in the course of the negotiations a proposal has been put forward to require Panels to specify in each case what constitutes 'withdrawal'. According to this proposal, what constitutes withdrawal of the subsidy necessarily depends upon the facts and circumstances surrounding the granting of the subsidy, including, but not limited to, whether the subsidy granted confers an ongoing benefit. TN/RL/GEN/97, TN/RL/GEN/115. Also see TN/RL/GEN/35 for a good overview of the many questions relating to the 'withdrawal of a subsidy' which have yet to be answered.

[69] Panel Report, *Australia –Automotive Leather II (Article 21.5 – US)*, para. 6.27.

[70] Panel Report, *Australia –Automotive Leather II (Article 21.5 – US)*, para. 6.39. This approach has not been adopted by other implementation Panels dealing with prohibited subsidies. Maybe this is so because none of the parties argued in favour of such an approach. The Panel in *Canada – Aircraft (Article 21.5 – Brazil)* was hiding behind the agreement of the parties not to argue in favour of repayment to conclude that 'a panel's findings under Article 21.5 of the DSU should be restricted to the scope of the 'disagreement' between the parties. In the present case, therefore, we do not consider it necessary to make any finding as to whether Article 4.7 of the SCM Agreement may encompass repayment of subsidies found to be prohibited. *Canada – Aircraft (Article 21.5 – Brazil)*, para. 5.48.

> provides no basis for a conclusion that repayment of less than the full amount of the prohibited subsidy would suffice to satisfy a recommendation to withdraw the subsidy. In this regard, we note that the United States' line of reasoning in calculating the 'prospective' benefit of past subsidies raises a number of questions. In the first place, taking back the full amount of the prohibited subsidy necessarily eliminates the benefit conferred. Moreover, as is evident in this dispute, the valuation of the benefit of a subsidy, its allocation over time, and the calculation of the 'prospective portion' thereof, are complicated questions, for which there are no guidelines in the SCM Agreement.[71] It seems to us unlikely that the negotiators of the SCM Agreement intended 'withdraw the subsidy' to involve these complex questions of allocation over time without some indication in the text of the Agreement to that effect. The parties have made no other arguments which would support a conclusion that anything less than full repayment would satisfy the requirements of Article 4.7.
>
> Having concluded that Article 4.7 of the SCM Agreement encompasses repayment, we can find no basis for concluding that anything less than full repayment would suffice to satisfy the requirement to 'withdraw the subsidy' in a case where repayment is necessary.[72]

The Panel thus considered that Australia's purely prospective remedy, that is, Australia's removal of the sales performance targets which operated as de facto export targets, was insufficient to 'withdraw the subsidy.[73]

While case-law has brought some clarification, many questions still remain: can the subsidy be considered to have been withdrawn if the presumed adverse effects have been removed? What if the subsidy has been fully

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[71] While some Members have developed methodologies for the valuation of subsidy benefits in the context of countervailing duty procedures, these are not universally accepted or consistent. Moreover, their relevance and applicability in the context of the Article 4.7 recommendation is not apparent.

[72] Panel Report, *Australia – Automotive Leather II (Article 21.5 – US)*, paras 6.44–6.45. This Panel Report prompted one Member to make several proposals concerning the meaning of this term 'withdrawal of the subsidy', suggesting that a footnote be added to clarify that if the prohibited subsidy is terminated, the subsidy should be considered to have been withdrawn. TN/RL/GEN/35, TN/RL/GEN/97, TN/RL/GEN/115.

[73] Panel Report, *Australia –Automotive Leather II (Article 21.5 – US)*, paras 6.47–6.48:

> . . . the removal of the sales performance targets today cannot change the fact that, at the time the subsidies were provided, they were contingent upon anticipated export performance. The purely prospective remedy proposed by Australia of changing after the fact the conditions on which the subsidy was provided, essentially by erasing the sales performance targets from the grant contract, in our view would be completely ineffective in this case.
>
> Thus, we conclude that, in the circumstances of this case, repayment is necessary in order to 'withdraw' the prohibited subsidies found to exist.

disbursed but the benefit continues because of the subsidized assets' useful life? Is a different treatment required for non-recurring subsidies and recurring subsidy programmes which are renewed on an annual basis? Would it suffice to replace the prohibited subsidy with an actionable subsidy by removing the 'export contingency' of the subsidy programme to 'withdraw the subsidy'? All these questions remain unanswered.

(ii) Appropriate countermeasures in the absence of compliance

In case the recommendation to withdraw the subsidy is not followed, the injured party can have recourse to *appropriate countermeasures* (Art. 4.10 SCM Agreement). A footnote to Art. 4.10 SCM explains that *appropriate* means *not disproportionate*.[74] Consequently, one observes a variance between the remedy in the case a prohibited subsidy is maintained and the remedy in all other violations of the WTO Agreement: Art. 22.4 DSU (which is applicable in all other cases) uses the term *equivalent* to capture the relationship between the damage inflicted and the amount of permissible counteraction against a persisting violation. Similarly, Article 7.9 SCM Agreement provides that in case of actionable subsidies, countermeasures may be allowed to be taken 'commensurate with the degree and nature of the adverse effects determined to exist'. So the damage suffered by the complainant forms the benchmark for determining the level of countermeasures in both cases. In the case of prohibited subsidies that are not withdrawn following a DSB recommendation to do so, however, the countermeasures may be *appropriate*, as long as they are not *disproportionate*. The choice of words cannot be accidental.

The term 'appropriate countermeasures', however, is far from being self-interpreting. Based on the notion that the case of prohibited subsidies is the only instance where the *WTO Agreement* not only explicitly outlaws a practice (whereas, in all other cases outlawing a practice is the privilege of the WTO adjudicating body), but also modifies the substantive content of a Panel's (or Appellate Body's) *recommendation*,[75] WTO adjudicating bodies have consistently (so far) held the view that the punishment of prohibited subsidies

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[74] Footnotes 9 and 10 SCM provide as follows with respect to the term 'appropriate countermeasures': 'This expression is not meant to allow countermeasures that are disproportionate in light of the fact that the subsidies dealt with under these provisions are prohibited.'

[75] As we discussed earlier, whereas Art. 19 DSU requests Panels, assuming that they have found that a violation occurred, to *recommend* that the WTO Member concerned bring its measures into compliance, without specifying how, Art. 4.7 SCM requests from Panels, in case they found that a *prohibited* subsidy was granted to *recommend* that 'the subsidizing Member withdraw the subsidy without delay'.

through countermeasures can be harder than the punishment of any other breach of the *WTO Agreement*.

The report on *Brazil – Aircraft (Article 22.6 – Brazil)* had the opportunity to clarify the ambit of *appropriate countermeasures* and explain the relationship between Art. 4.10 SCM Agreement and Art. 22.4 DSU.[76] It linked the amount of the countermeasures to the amount of the subsidy. This case (and its 'twin' dispute, *Canada – Aircraft*) concerned (export) subsidization by Canada and Brazil of their respective national aircraft producers. To base its finding that the quantification of appropriate countermeasures should be linked to a benchmark other than the damage suffered by the complainant (as is the case under Article 22.4 DSU for all violations of the WTO Agreement and 7.9 SCM Agreement in the case of actionable subsidies), the Arbitrators first explained the difference they saw in the function of the remedy against a prohibited subsidy, as opposed to remedies to address any other nullification or impairment of WTO Members' rights. Important in their reasoning was the fact that they considered that the purpose of Article 4 SCM is to achieve the withdrawal of the prohibited subsidy:

> the purpose of Article 4 is to achieve the withdrawal of the prohibited subsidy. In this respect, we consider that the requirement to withdraw a prohibited subsidy is of a different nature than removal of the specific nullification or impairment caused to a Member by the measure. The former aims at removing a measure which is presumed under the WTO Agreement to cause negative trade effects, irrespective of who suffers those trade effects and to what extent. The latter aims at eliminating the effects of a measure on the trade of a given Member; the fact that nullification or impairment is established with respect to a measure does not necessarily mean that, in the presence of an obligation to withdraw that measure, the level of appropriate countermeasures should be based only on the level of nullification or impairment suffered by the Member requesting the authorisation to take countermeasures.[77]

They then rejected arguments by Brazil to the effect that the proposed benchmark, the amount of the subsidy, was not reasonable. The Arbitrators argued that the subsidy benchmark was not too onerous since, in all likelihood, Brazil gained much more from its subsidies than it actually invested. They also rejected an argument to the effect that their benchmark amounted to (impermissible under WTO practice) punitive damages:

> Our interpretation of the scope of the term 'appropriate countermeasures' in Article 4 of the SCM Agreement above shows that this would not be the case. Indeed, the level of countermeasures simply corresponds to the amount of subsidy which has to

[76] Report of the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.42–3.60.

[77] Report of the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.48.

> be withdrawn. Actually, given that export subsidies usually operate with a multiplying effect (a given amount allows a company to make a number of sales, thus gaining a foothold in a given market with the possibility to expand and gain market shares), we are of the view that a calculation based on the level of nullification or impairment would, as suggested by the calculation of Canada based on the harm caused to its industry, produce higher figures than one based exclusively on the amount of the subsidy. On the other hand, if the actual level of nullification or impairment is substantially lower than the subsidy, a countermeasure based on the actual level of nullification or impairment will have less or no inducement effect and the subsidizing country may not withdraw the measure at issue.
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> Brazil also claimed that countermeasures based on the full amount of the subsidy would be highly punitive. We understand the term 'punitive' within the meaning given to it in the Draft Articles. A countermeasure becomes punitive when it is not only intended to ensure that the State in breach of its obligations bring its conduct into conformity with its international obligations, but contains an additional dimension meant to sanction the action of that State. Since we do not find a calculation of the appropriate countermeasures based on the amount of the subsidy granted to be disproportionate, we conclude that, a fortiori, it cannot be punitive.[78]

The same logic (to link the amount of countermeasures to the amount of subsidy paid) was followed in the Arbitrators' report on *US – FSC (Article 22.6 – US)*. The Arbitrators, extensively referring to public international law and the *International Law Commission* Reports on *State Responsibility*,[79] held that the European Communities (complainant) should be authorized to adopt countermeasures up to USD 4043 million, that is, the amount of subsidies paid by the United States to its national producers (beneficiaries under the FSC scheme).[80] One should however add a caveat here: the Arbitrators claim that, following calculation of the elasticities, they would have ended up with a similar number, had they used the EC *trade effects* as the benchmark.[81] The Arbitrators clarified that trade effects are not a priori ruled out as a benchmark. It was simply of the view that Article 4.10 SCM Agreement does not require a trade effects test to be used, nor did it limit the countermeasures in this way.[82]

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[78] Report of the Arbitrators, *Brazil – Aircraft (Article 22.6 – Brazil)*, paras 3.54–3.55.

[79] Report of the Arbitrators, *US – FSC (Article 22.6 – US*), paras 5.30–5.62.

[80] Report of the Arbitrators, *US – FSC (Article 22.6 – US)*, paras 6.1–6.30. With respect to the terms 'not disproportionate', the arbitrators considered that 'the entitlement to countermeasures is to be assessed in light of the legal status of the wrongful act and the manner in which the breach of that obligation has upset the balance of rights and obligations as between Members. It is from that perspective that the judgment as to whether countermeasures are disproportionate is to be made'. Arbitrator, *US – FSC (Article 22.6 – US)*, para. 5.24.

[81] Report of the Arbitrators, *US – FSC (Article 22.6 – US)*, para 6.57.

[82] Report of the Arbitrators, *US – FSC (Article 22.6 – US)*, paras 6.33–6.34.

To allow one complaining member to take countermeasures of an amount equal to the full amount of the subsidy, may prove problematic in case there are more complainants or in case more Members decide to challenge the same measure in subsequent WTO proceedings. This *US – FSC (Article 22.6 – US)* report added a few words to address the (hypothetical) situation where, subsequent to the EC challenge, another WTO Member decided to attack the same US measure (the FSC scheme):

> This is an appropriate point at which to underline that there is one matter that is particular to the circumstances of this case and is material to this conclusion, yet has not – up to this point – been expressly dealt with.
>
> In the circumstances of this case, the European Communities is the sole complainant seeking to take countermeasures in relation to this particular violating measure. That is also, in our view, a relevant consideration in our analysis. Had there been multiple complainants each seeking to take countermeasures in an amount equal to the value of the subsidy, this would certainly have been a consideration to take into account in evaluating whether such countermeasures might be considered to be not 'appropriate' in the circumstances. That is not, however, the situation before us.
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> The reasoning we have followed above could be construed – in a purely abstract manner – to be as inherently applicable to any other Member as to the complainant in this case viz. the European Communities. We would simply underline, in this regard, that in this case, we were not presented with a multiple complaint but a complaint by one Member. Thus we have not been obliged to consider whether or how the entitlement to countermeasures based on our reasoning above should be allocated across more than one complainant. Thus to the extent that there would be an issue of allocation, as it were, it need not – and did not – enter into consideration as an element to otherwise 'discount' the European Communities' entitlement to countermeasures in this particular case.
>
> Understandably, it would be our expectation that this determination will have the practical effect of facilitating prompt compliance by the United States. On any hypothesis that there would be a future complainant, we can only observe that this would give rise inevitably to a different situation for assessment. To the extent that the basis sought for countermeasures was purely and simply that of countering the initial measure (as opposed to, e.g., the trade effects on the Member concerned) it is conceivable that the allocation issue would arise (although due regard should be given to the point made in footnote 84 above). We take note, on this point, of the statement by the European Communities:
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> > . . . it may well be that the European Communities would be happy to share the task of applying countermeasures against the United States with another member and voluntarily agree to remove some of its countermeasures so as to provide more scope for another WTO Member to be authorized to do the same. This will be another fact that future arbitrators could take into consideration.
>
> It must be stressed, however, that there is no mechanical automaticity to this. The essence of such assessments is that it is a matter of judging what is appropriate in the case at hand. There could well be other factors to take into account in their own right, e.g., if for instance the matter of bilateral trade effects were essentially at issue.[83]

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[83] Report of the Arbitrators, *US – FSC (Article 22.6 – US)*, paras 6.26–6.30. The

Consequently, on both occasions where a WTO adjudicating body had to define the term *appropriate countermeasures in the context of prohibited subsidies*, it did so by linking it to the amount of subsidy paid rather than the trade effects caused. From a legal perspective, the foundation would be that the damage, in case recourse to a prohibited subsidy is being made, is not the trade effects caused, but rather the act of providing prohibited export/import substitution subsidization itself.

Interestingly, the Arbitrators in *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, took the logic based on the need to induce compliance which was at the heart of the other Arbitrators' reasoning concerning 'appropriate' countermeasures to its extreme. The Arbitrators used the amount of the subsidy as the benchmark[84] and calculated the amount of the subsidy to be USD 206, 497, 305.[85] They then continued however to examine whether any adjustments needed to be made to this amount to make it 'an appropriate level of countermeasures.' In their view, an upward adjustment of this amount was justified in order to induce compliance, in light of Canada's statements that it would not withdraw the subsidy.[86] So the Arbitrators added 20 per cent to the level of the countermeasures in order to induce compliance:

> Recalling Canada's current position to maintain the subsidy at issue and having regard to the role of countermeasures in inducing compliance, we have decided to adjust the level of countermeasures calculated on the basis of the total amount of the subsidy by an amount which we deem reasonably meaningful to cause Canada to reconsider its current position to maintain the subsidy at issue in breach of its

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Arbitrators' claim that they would have ended up with the same amount, had they used the EC trade effects as a benchmark to quantify the appropriateness of countermeasures, and this passage seem hard to reconcile. The Arbitrators calculated total trade effects (something which is discernible from the report): then if the trade effects calculation is correct, this is a case where (totalk) trade effects yield a number as high as the amount of subsidy paid. However, since the number chosen is a number within a range of possibilities, we simply do not know if the EC injury is within the lower or the higher ebb of the range. In other words, the European Communities might have been over- or under-compensated depending on the placement of its injury within the range calculated in the Arbitrators' report. Be it as it may though, Esserman and Howse (2004) voiced their dissatisfaction with this report, arguing that the ultimate remedy was clearly disproportionate, in violation of the standard enshrined in Art. 4.10 SCM.

[84] Report of the Arbitrators, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.51. The amount of the subsidy was calculated on the basis of the benefit to the recipient. i.e. the benefit conferred by the loan, rather than the amount of the loan as such. Report of the Arbitrators, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.60.

[85] Report of the Arbitrators, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.90.

[86] Report of the Arbitrators, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, para. 3.107.

> obligations. We consequently adjust the level of countermeasures by an amount corresponding to 20 per cent of the amount of the subsidy as calculated in Section III.E above, i.e.:
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> US$206,497,305 x 20% (US$41,299,461) = US$247,796,766.
>
> As we have noted in paragraph 3.120, adjustments such as the one we are making cannot be precisely calibrated. There is no scientifically based formula that we could use to calculate this adjustment. In that sense, the adjustment might be viewed as a symbolic one. Even so, we are convinced that it is a justified adjustment in light of the circumstances of this case and, in particular, the need to induce compliance with WTO obligations. Without such an adjustment, we would not be satisfied that an appropriate level of countermeasures had been established in this case.[87]

2 Multilateral Disciplines on Actionable Subsidies

Actionable subsidies, unlike prohibited subsidies, are not specifically defined; they are defined by default: any scheme which qualifies as subsidy under the SCM Agreement (that is, which meets the criteria laid down in Arts. 1 and 2 SCM) is an actionable subsidy. If an actionable subsidy causes adverse effects to the interests of other Members, the affected members may take action against such subsidies, either multilaterally or, in the particular case of 'injury', unilaterally.[88] Article 5 SCM Agreement sets forth the three types of adverse effects: (i) injury to the domestic industry, (ii) nullification or impairment of benefits, and (iii) serious prejudice. In the case where the subsidy has one of these three forms of 'adverse effects', it is actionable.

(a) Injury

As footnote 11 to Article 5 SCM clearly states, the term 'injury' is used here in the same way as it is used in the countervailing duty context.[89] In other words, the 'injury' that could form the basis for a multilateral action against subsidies causing such adverse effects in the market of the importing country, is the same as that described above in the countervailing duty context. A

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[87] Report of the Arbitrators, *Canada – Aircraft Credits and Guarantees (Article 22.6 – Canada)*, paras 3.121–3.122.

[88] That is, one particular type of adverse effects, injury, may, as we discussed earlier, allow a member to take unilateral action in the form of countervailing measures as well.

[89] And, in the countervailing duty context, footnote 45 to Article 15 SCM Agreement indicates, the term 'injury' under the SCM Agreement shall be taken to refer to material injury, threat thereof or material retardation in the establishment of an industry and shall be interpreted in accordance with the provisions of Article 15 SCM Agreement.

Member, when faced with injury to the domestic industry caused by subsidies may react unilaterally by imposing countervailing duties, or it may choose the multilateral option and request the establishment of a Panel. The SCM Agreement explains that only one form of relief shall be available in the case of injury to the domestic industry.[90] So, either the imposition of countervailing duties or the multilateral remedy of seeing the subsidy withdrawn or the adverse effects removed.[91]

(b) Nullification or impairment

Article 5(b) SCM makes it clear that adverse effects can also take the form of nullification or impairment of benefits accruing either directly or indirectly to other Members under GATT 1994 in particular the benefits of concessions bound under Article II of GATT 1994. A footnote to Art. 5(b) SCM explains that the term *nullification or impairment* should be understood as synonymous to the term used in GATT 1994, i.e. in Article XXIII.1(b). That is, through such a legal action, a WTO Member can challenge a legal (actionable, as opposed to prohibited) subsidy measure, to the extent that it nullifies or impairs its benefits resulting from its participation in the WTO.

The Panel in the *US – Offset Act (Byrd Amendment)* distinguished between the presumption of nullification or impairment arising out of a violation of a provision of the WTO Agreement in Article 3.8 DSU and the adverse effects-type of nullification or impairment in the subsidies context:

> We recall that we have already found that the CDSOA violates AD Articles 5.4 and 18.1, SCM Articles 11.4 and 32.1, and GATT Article VI:2 and 3. In our view, however, the presumption of nullification or impairment resulting from the violation of these provisions under DSU Article 3.8 is not sufficient to demonstrate nullification or impairment for the purpose of SCM Article 5(b). The presumption arising under Article 3.8 DSU relates to nullification or impairment caused by the violation at issue. Thus, if a measure violates Article 18.1 of the AD Agreement and Article VI:2 of the GATT 1994, that violation would be presumed to cause nullification or impairment, by virtue of the non-conformity of that measure with the relevant provision(s) of the AD Agreement. For the purpose of SCM Article 5(b), however, Mexico must show that the use of a subsidy caused nullification or impairment. It is suggested that the fact that the CDSOA is in violation of AD Article 18.1 and GATT Article VI:2 does not address this issue, since our finding of violation of these provisions says nothing of the effects resulting from the use of CDSOA as a subsidy. It merely addresses the status of the CDSOA as a 'specific action against dumping' or subsidization. Furthermore, we agree with the United States that reliance on the presumption of nullification or impairment resulting from Article 3.8 DSU in the context of an Article 5 SCM claim would eliminate the primary distinction between

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90 Footnote 35 to Article 10 SCM Agreement.

91 So far, there has not been any case before the WTO in which a Member multilaterally challenges another Member's subsidy programme because it causes injury.

> prohibited subsidies under Article 3, where effects are presumed, and actionable subsidies under Article 5, where the complaining party must demonstrate adverse effects.[92] (Footnote omitted)

In other words, nullification or impairment of benefits may be presumed under Article 3.8 DSU in case of violation of any of the WTO Agreements, but providing a subsidy other than a prohibited subsidy is not a violation of the SCM Agreement. It seems therefore that the term nullification or impairment of benefits in Article 5(b) SCM is more akin to so-called 'non-violation' complaints under Article XXIII:1(b) GATT. This was the view held by the Panel in the *US – Offset Act (Byrd Amendment)* case. With respect to non-violation nullification or impairment, the Panel followed the *Japan – Film* approach, finding that three elements must be established in order to uphold an Article XXIII:1(b) GATT claim: (i) the application of a measure by a WTO Member; (ii) the existence of a benefit accruing under the applicable agreement; and (iii) the nullification or impairment of a benefit as a result of the application of a measure.[93]

The *US – Offset Act (Byrd Amendment)* Panel considered that for the purposes of claims of 'non-violation' nullification or impairment arising under SCM Article 5(b), therefore, 'the "application" of a measure encompasses the "use" of a subsidy, in the sense of the grant or maintaining of a subsidy'.[94] Furthermore, the Panel was of the view that footnote 12 to Article 5(b) of the SCM Agreement, which provides that '[t]he term "nullification or impairment" is used in this Agreement in the same sense as it is used in the relevant provisions of GATT 1994, and the existence of such nullification or impairment shall be established in accordance with the practice of application of these provisions', would 'appear to be a codification of GATT practice regarding non-violation complaints'.[95] The one adopted GATT case in this respect, the *EEC – Oilseeds* Panel, considered that non-violation nullification or impairment would arise when the effect of a tariff concession is systematically offset or counteracted by a subsidy programme. The Panel in *US – Offset Act (Byrd Amendment)* considered this to be 'a reasonable approach, since a standard of "systematic offsetting/counteracting" would preserve the exceptional nature of the "non-violation" nullification or impairment remedy'.[96,97,98]

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92 Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.119.

93 Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.120 referring to Panel Report, *Japan – Film*, para. 10.41.

94 Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.122.

95 Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.126.

96 In the context of subsidies, there is a tension between the right of a Member to subsidize (except prohibited subsidies), on the one hand, and the legitimate expectations of improved market access resulting from negotiated tariff concessions, on the

(c) Serious prejudice

'Serious prejudice to the interests of another Member' is the third type of 'adverse effects' listed in Article 5 SCM Agreement. In fact, so far, all the subsidy cases brought before the WTO have been based on allegations that the subsidy in question caused serious prejudice.[99] According to Art. 5(c) SCM, a WTO Member should not, through its subsidies, cause *serious prejudice* to the interests of another WTO Member. This provision does not define the term *serious prejudice* any further. However, Article 6 SCM Agreement, entitled 'Serious Prejudice', does provide further clarification. Article 6.1 SCM which provided for a *presumption* of serious prejudice in certain well defined circumstances, had

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other. Any subsidy to domestic producers is likely to have some adverse effect on the competitive relationship between domestic and imported products. However, the fact that there will be some impact should not be sufficient to uphold a claim of non-violation nullification or impairment. Otherwise, any specific domestic subsidy programme which is related to a product on which there is a tariff concession could constitute the non-violation nullification or impairment of benefits. This would hardly make non-violation nullification or impairment an 'exceptional' or 'unusual' remedy, as the Appellate Body has said it should be.

[97] Mexico would appear to agree with such an approach, since it has argued 'non-violation' nullification or impairment on the basis that 'offset payments will *systematically* upset the competitive relationship between Mexican products and like United States products legitimately expected by Mexico' (Mexico's second written submission, para. 83).

[98] Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.127. Ultimately the Panel concluded that Mexico failed to establish that the granting of the subsidies would have such an impact since it was not clear which amounts would be disbursed under the Offset Act in the future, as the level of the disbursements depended on the level of the duties collected. Neither did the Panel consider that maintaining the Offset Act would lead to nullification because of the alleged unpredictability of the amount of subsidies for the competitors of the Mexican exporters. The Panel agreed with the US that commitments made under GATT Articles II and VI do not include an express or implied promise of total predictability:

> In any event, we consider that the unpredictability relied on by Mexico could result from any subsidy programme which does not fix the exact amount of subsidy to domestic producers in advance, or from a Member's decision to bestow *ad hoc*, non-recurring subsidies. Our acceptance of Mexico's argument would have far-reaching consequences, and would run counter to the Appellate Body's statement that 'non-violation' nullification or impairment 'should be approached with caution and should remain an exceptional remedy'. To uphold Mexico's claim would be tantamount to finding that any form of unpredictable subsidization causes 'non-violation' nullification or impairment

Panel Report, *US – Offset Act (Byrd Amendment)*, para. 7.130.

[99] As we noted earlier, a 'nullification or impairment' allegation was rejected in the Byrd Amendment case, though. See *supra*.

been enacted to serve on a provisional basis.[100] Since WTO Members could not agree on its extension, it has, by virtue of Article 31 SCM, been effectively repealed.[101] Some Members have argued for its re-introduction and have suggested ways of clarifying this provision.[102]

At the moment, however, it is in practice Article 6.3 SCM Agreement which defines the four situations of negative effects that are considered to constitute serious prejudice. Art. 6.3 SCM Agreement which explains under what circumstances serious prejudice may arise, reads as follows:

> Serious prejudice in the sense of paragraph (c) of Article 5 may arise in any case where one or several of the following apply:
> (a) the effect of the subsidy is to displace or impede the imports of a like product of another Member into the market of the subsidizing Member;
> (b) the effect of the subsidy is to displace or impede the exports of a like product of another Member from a third country market;
> (c) the effect of the subsidy is a significant price undercutting by the subsidized product as compared with the price of a like product of another Member in the same market or significant price suppression, price depression or lost sales in the same market;
> (d) the effect of the subsidy is an increase in the world market share of the subsidizing Member in a particular subsidized primary product or commodity as compared to the average share it had during the previous period of three years and this increase follows a consistent trend over a period when subsidies have been granted.

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100 Article 31 SCM Agreement. Article 6.1 gave an important evidentiary advantage to the complainant wishing to challenge a subsidy as it sufficed to establish that the subsidy was of the kind described in Article 6.1 in order for a rebuttable presumption of serious prejudice to exist. Hence the complainant was relived of the difficult burden of having to demonstrate the alleged prejudicial effects of the subsidy. Messerlin (1995) takes issue with Art. 6.1 SCM which uses, in its view, a wrong benchmark (a percentage of the subsidy paid, instead of its trade effects) to define *serious prejudice*.

101 Nevertheless, the Panel Report in *US – Upland Cotton*, was of the view that it could still serve as 'useful guidance' in the interpretative process. Panel Report, *US – Upland Cotton*, para. 1377, footnote 1487. Also see Panel Report, *Korea – Commercial Vessels*, para. 7.583.

102 For example, see TN/RL/GEN/14, TN/RL/GEN/81, TN/RL/GEN/113, TN/RL/GEN/112. One of the suggestions for improving the re-introduced Article 6.1 would be to do away with the cost-to-government benchmark for determining the total *ad valorem* amount of the subsidy for the purposes of Article 6.1 (a) as currently provided for in Annex IV. One of the reasons why Members seem to be keen to get rid of this benchmark is the fact that it is difficult to administer. The problems relating to the calculation of the ad valorem subsidization in terms of cost to government are also discussed in the Report of the Informal Group of Experts to the Committee on Subsidies and Countervailing Measures. G/SCM/W/415/Rev.2 dated 15 May 1998. It has also been proposed to 'elevate' this category of 'presumed serious prejudice' subsidies to the category of prohibited subsidies of Article 3 SCM Agreement. TN/RL/GEN/94.

Sub-paragraph 3(b) is further explained in Art. 6.4 SCM Agreement (change in relative shares of the market to the disadvantage of the non-subsidized like product). Sub-paragraph 3(c) is further explained in Art. 6.5 SCM Agreement (comparison of prices between subsidized and non-subsidized goods at the same level of trade to quantify the size of price undercutting). Annex V SCM Agreement entitled 'Procedures for Developing Information Concerning Serious Prejudice' sets forth a special procedure for assisting parties involved in dispute settlement in obtaining information and evidence concerning serious prejudice claims.

Serious prejudice thus covers the negative effect of the subsidies (a) *in the market of the subsidizing Member*, as well as (b) in a *third country* market. It further relates to (c) situations of *significant price undercutting, price depression or price suppression in any market*, as long as the effects are felt in the same market, which may be the world market. And finally, (d) in the case of subsidies for primary products or commodities, serious prejudice exists in case of an *increase in world market share* over a relevant period of time during which subsidies have been granted.[103]

The term 'serious prejudice *to the interest of* another Member' does not go so far as to allow a Member to claim serious prejudice based on effects felt by a company of that Member but with regard to products not originating in the complaining Member. This was clearly stated by the Panel in *Indonesia – Autos*:

> In our view, the text of Article XVI and of Part III of the SCM Agreement make clear that serious prejudice may arise where a Member's trade interests have been affected by subsidization. We see nothing in Article XVI or in Part III that would suggest that the United States may claim that it has suffered adverse effects merely because it believes that the interests of US *companies* have been harmed where US *products* are not involved. The United States has cited no language in Article XVI:1 or Part III suggesting that the nationality of producers is relevant to establishing the existence of serious prejudice. Accordingly, given that serious prejudice may only arise in the case at hand where there is 'displacement or impedance of imports of a like product from another Member' or price undercutting 'as compared with the like product of another Member', we do not consider that the United States can convert such effects on products from the European Communities into serious prejudice to US interests merely by alleging that the products affected were produced by US companies.[104]

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[103] Article 27.9 contains special rules for determining serious prejudice in case of subsidies provided by developing countries. It stipulates that multilateral action may only be undertaken in case of serious prejudice in the sense of Article 6.3(a) (effects in the subsidizing Member's market) or in case of injury to the domestic industry or in case the subsidies are covered by Article 6.1 SCM Agreement, as was the case in the *Indonesia – Autos* dispute. Panel Report, *Indonesia – Autos*, paras 14.156–14.162.

[104] Panel Report, *Indonesia – Autos*, para. 14.201.

The Panel in *Korea – Commercial Vessels* emphasized the difference between serious prejudice and injury to the domestic industry. It thus rejected the argument that to demonstrate the existence of serious prejudice to a Member's trade interests, the *SCM Agreement* requires additional elements beyond those referred to in Article 6, such as injury to the domestic industry, and/or the importance of that industry to the overall interests of the complaining party:

> In short, we see serious prejudice as an entirely different concept from injury. Rather than having to do with the condition of a particular domestic industry within the territory of a Member (the subject matter of injury analysis), in our view serious prejudice has to do in the first instance with negative effects on a Member's *trade interests* in respect of a product caused by another Member's subsidization. Article 6.3 demonstrates this in providing that the recognized 'adverse effects' of subsidies on these interests include, in the context of serious prejudice, lost import or export volume or market share in respect of a given product (displacement or impedance, more than equitable share), and adverse price effects (implying lost trade revenue/income in respect of the product), or some combination thereof, in variously defined markets.
>
> Of course, negative effects of this type on a Member's trading interests in a product also would tend to be felt in the performance of the domestic industry producing that product. In this regard, we do not mean to suggest that particular effects on a given industry (e.g., employment, profitability, etc.) could not be examined in the context of serious prejudice.[105] Indeed, it is likely that situations such as those referred to in *SCM* Article 6 could manifest themselves in an impact on the state of the industry in question, and this might constitute relevant information in a given case. In this regard, we note that in this dispute the EC has presented certain information about the state of its shipbuilding industry. Our point is, rather, that we disagree that establishment of something similar to serious injury in the sense of the Agreement on Safeguards to the industry producing the product in question is a *required* element for a finding of serious prejudice'.[106]

It thus came to the following conclusion:

> We conclude from this that serious prejudice to a Member's interests, in the sense of *SCM* Article 5(c), consists of adverse effects on that Member's trade in a partic-

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[105] We note that the *US – Upland Cotton* Panel (at para. 7.1392 and footnote 1493) took a similar view.

[106] Panel Report, *Korea – Commercial Vessels*, paras 7.578–579. According to the Panel, the use of the term 'may arise' in the chapeau of Article 6.3 is merely an indication that the list in Article 6.3 is not exhaustive: 'That is, this list consists of examples of some situations that constituted serious prejudice (and/or nullification or impairment), with the word 'may' leaving open the possibility that other situations as well might give rise to or constitute serious prejudice.' Panel Report, *Korea – Commercial Vessels*, para. 7.601. It does not imply that to find that the effects listed in Article 6.3 would not be sufficient in and of themselves to conclude to the existence of serious prejudice.

> ular product in a specified market, resulting from subsidization by another Member. That is, the situations listed in Article 6.3(a)–(d) in themselves constitute serious prejudice.[107]

So it suffices to demonstrate one of these effects of Articles 6.3 (a) to (d) to establish serious prejudice.[108] This view is in line with previous GATT and WTO case-law. GATT Panels also adopted a rather mechanistic understanding of the term, equating, for example, *price depression* to *serious prejudice*: both the *EC – Sugar Exports (Australia)* (para. 4.26) and the *EC – Sugar Exports (Brazil)* (paras 41.14–4.15) cases followed this understanding of the term. WTO Panels, by the same token, use a finding of price suppression or depression (as the case may be) as determinative for finding that *serious prejudice* has occurred. This has been the case in both the *Indonesia – Autos* report (para. 14.238) and in *US – Upland Cotton* where the Panel stated (para. 7.1390):

> the Article 6.3(c) examination is determinative . . . for a finding of serious prejudice under Article 5(c). That is, an affirmative conclusion that the effects-based situation in Article 6.3(c) exists is sufficient basis for an affirmative conclusion that 'serious prejudice' exists for the purposes of Article 5(c) of the SCM Agreement.

While the Agreement provides that in principle four situations could give rise to a serious prejudice situation, it seems noteworthy that, so far, successful claims have only been made with regard to Article 6.3(c) SCM Agreement, significant price undercutting,[109] price suppression or price depression.[110] The Panel in *US – Upland Cotton* rejected Brazil's claims based on an increase in world market share under Article 6.3(d). The Panel in *Indonesia – Autos* considered that the complainants had failed to demonstrate displacement or impediment of imports of like passenger cars from the Indonesian market.

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107 Panel Report, *Korea – Commercial Vessels*, para. 7.587.

108 The Panel in *US – Upland Cotton* also considered that a Panel would be permitted to find serious prejudice upon finding that one of these listed effects-based situations exists. According to the Panel, '[T]here is an explicit and bald textual linkage between Article 6.3(c) and Article 5(c) through the cross-reference in the chapeau of Article 6.3 of the *SCM Agreement*. This textual linkage contains no additional express criteria to establish serious prejudice within the meaning of Article 5(c)'. Panel Report, *US – Upland Cotton*, paras 7.1370–7.1371. Neither is it necessary to demonstrate that the effects found were sufficiently 'serious', as according to the Panel in *US – Upland Cotton*, 'If the drafters had intended that the complaining Member should separately establish that the prejudice caused by the effects of the subsidy was 'serious', they would have defined the requirements for this purpose'. Panel Report, *US – Upland Cotton*, para. 7.1389.

109 Panel Report, *Indonesia – Autos*, para. 14.255.

110 Panel Report, *US – Upland Cotton*, para. 7.1333.

Article 6.3(b) relating to displacing exports from a third country market has not even been invoked so far.

(i) Displacement or impediment of imports

Articles 6.3(a) and 6.3(b) provide that a subsidy has an adverse effect if it has the effect of displacing or impeding imports into the market of the subsidizing Member or a third country market, respectively. Displacement relates to a situation where sales volume has declined, while impedance relates to a situation where sales which otherwise would have occurred were impeded.[111] The Panel on *Indonesia – Autos* examined claims relating to both displacement and impediment of imported cars (in particular cars from Japan, the EC and the US) due to subsidization of the Indonesian carmaker (producing the 'Timor') and thus clarified the meaning of these two terms.

First, the Panel examined the claim of *displacement* of imported cars by the introduction of a subsidized Indonesian car by looking at market share and sales data. It appeared that, while market share of the European-like cars had fallen, sales volume in absolute figures did not go down.[112] The explanation for the loss of market share with no decline in absolute sales volume seemed to have been that the size of the Indonesian market expanded after the introduction of the Indonesian Timor.[113] As the data to answer the question whether sales of EC models in absolute terms would have been higher than those actually achieved, had the Indonesian model not been introduced, were inconclusive, the Panel rejected the claim of displacement.[114] Serious prejudice must be demonstrated by positive evidence.[115]

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111 Panel Report, *Indonesia – Autos*, para. 14. 218. The Panel in *Indonesia – Autos* thus considered that 'the question before us is therefore whether the market share and sales data above would support a view that, *but for* the introduction of the subsidized Timor, sales of EC C Segment passenger cars *would have been greater* than they were' (emphasis added). Panel Report, *Indonesia – Autos*, para. 14.218.

112 It is interesting to note that the Panel was of the view that had Article 6.4 SCM which concerns the impediment or displacement of exports from third countries applied to the situation of displacement or impediment under Article 6.3(a), a showing of a change in relative market shares to the disadvantage of the non-subsidized like product might have sufficed for establishing a *prima facie* case of serious prejudice. Panel Report, *Indonesia – Autos*, para. 14.215. It was for textual reasons – i.e. the explicit reference in Article 6.4 to Article 6.3(b) and not to Article 6.3(a) – that the Panel refused to apply the Article 6.4 guidelines for impediment to Article 6.3(a) cases. Panel Report, *Indonesia – Autos*, para. 14.210.

113 Panel Report, *Indonesia – Autos*, para. 14.216–14.217.

114 Panel Report, *Indonesia – Autos*, para.14.220.

115 Panel Report, *Indonesia – Autos*, para.14.222.

With respect to *impediment*, the Panel considered that it must review the information 'with an eye to whether it demonstrates that (i) there were concrete plans to increase sales of EC-origin passenger cars to the Indonesian market through the introduction of new models; and that (ii) the new models were not introduced because of the subsidies pursuant to the National Car programme.'[116] Again, the Panel was of the view that the complainants failed to adduce sufficient positive evidence.[117] The Panel gave an indication of the kind of evidence it was expecting, while stating clearly that it refused to base its decision on general assertions:

> We do not mean to suggest that in WTO dispute settlement there are any rigid evidentiary rules regarding the admissibility of newspaper reports or the need to demonstrate factual assertions through contemporaneous source information. However, we are concerned that the complainants are asking us to resolve core issues relating to adverse trade effects on the basis of little more than general assertions. This situation is particularly disturbing, given that the affected companies certainly had at their disposal copious evidence in support of the claims of the complainants, such as the actual business plans relating to the new models, government documentation indicating approval for such plans (assuming the 'approval' referred to by the complainants with respect to the Optima means approval by the Indonesian government), and corporate minutes or internal decision memoranda relating both to the initial approval, and the subsequent abandonment, of the plans in question.[118,119]

(ii) Increase in world market share in a subsidized primary product or commodity

According to Article 6.3(d), with respect to primary products or commodities, the subsidy has an adverse effect if it leads to an increase in world market share of this commodity as compared to the average share it had during a previous period of three years.[120] The Panel on *US – Upland Cotton* held that the phrase 'world market share' of the subsidizing Member in Article 6.3(d) of the *SCM Agreement* 'refers to share of the world market *supplied* by the subsidizing Member of the product concerned'.[121] The Panel defined the 'world

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116 Panel Report, *Indonesia – Autos*, para.14.227.

117 Panel Report, *Indonesia – Autos*, para.14.236.

118 For example, if Ford and Chrysler in fact abandoned their plans to introduce the Escort and Neon after determining that the Timor would undercut the prices of those models by USD 5000, contemporaneous company documents reflecting this assessment could have been submitted and might have been highly probative.

119 Panel Report, *Indonesia – Autos*, para. 14.234.

120 Article 6.3(d) adds that this increase has to follow a consistent trend over a period when subsidies have been granted.

121 Panel Report, *US – Upland Cotton*, para. 7.1464 (emphasis added). It is noteworthy that, on appeal, the Appellate Body applied judicial economy and considered

market' as the global geographical area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices. It thus saw no foundation in the plain meaning of these terms to find that 'world market' as used in Article 6.3(d) would necessarily *not* include the domestic market of the subsidizing Member.[122] It thus rejected Brazil's argument that the share in question refers to the world market share of exports of the product only:

> According to Article 6.3(d), it is the 'share of the subsidizing Member' that must be examined. Thus, we need to examine the portion of the world market that is satisfied by the subsidizing Member's producers. We are of the view that a plain reading of the combined terms 'share of the subsidizing Member' and 'world market' in Article 6.3(d) calls for an examination of the portion of the world's supply that is satisfied by the subsidizing Member's producers
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> Therefore, we disagree with Brazil's argument that a Member's share of the world market would necessarily consist solely of the Member's exports as a proportion of the world export market, and would not embrace relevant developments within the domestic market of the Member. Like Brazil, we believe that a Member's exports are relevant to an examination under this provision. However, unlike Brazil, we also believe that a Member's supply (which may not ultimately be exported) is also a relevant consideration for the purposes of this provision.[123]

The term 'world market share' used in Article 6.3(d) is to be distinguished from the share of 'world export trade' as used in Article XVI:3 GATT 1994 and Article 27 SCM Agreement. According to the Panel on *US – Upland Cotton*, in the context of Part III of the SCM Agreement dealing with actionable subsidies which concerns both export and production subsidies, 'it is not only entirely reasonable, but also necessary, to read the phrase 'world market share' in a manner which takes into account both production and exports'.[124] At the same time, however, the Panel also rejected the United States' argument that a Member's share of the world market within the meaning of Article 6.3(d) would necessarily include a Member's own *consumption*.[125]

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that an interpretation of the phrase 'world market share' in Article 6.3(d) of the *SCM Agreement* was unnecessary for purposes of resolving this dispute. The Appellate Body thus neither upheld nor reversed the Panel's interpretation of the phrase 'world market share' in Article 6.3(d). Appellate Body Report, *US – Upland Cotton*, para. 511.

122 Panel Report, *US – Upland Cotton*, paras 7.1431–7.1432.

123 Panel Report, *US – Upland Cotton*, paras 7.1434–7.1435.

124 Panel Report, *US – Upland Cotton*, para. 7.1450. The Panel was of the view that Article XVI:3 GATT 1994 related to export subsidies only, while Articles 5 and 6.3(d) concern all subsidies whether export related or not. Panel Report, *US – Upland Cotton*, paras 7.1462–7.1463.

125 Panel Report, *US – Upland Cotton*, para. 7.1436. The US had suggested that that 'US cotton's share of total world consumption' is 'US exports plus domestic US

(iii) Price suppression/depression/undercutting

Article 6.3(c) lists price suppression, price depression and price undercutting as three forms of adverse effects. Article 6.8 indicates that the existence of serious prejudice pursuant to Articles 5(c) and 6.3(c) is to be determined on the basis of information submitted to or obtained by the Panel, including information submitted in accordance with Annex V of the *SCM Agreement*.[126]

Significant price undercutting

In *Indonesia – Autos*, the Panel upheld a claim that the subsidized Indonesian car, the Timor, significantly undercut the prices of EC-like products in the Indonesian market. The evidence showed that both the market and the list prices of the Indonesian Timor were much lower than those of the EC origin like cars. The Panel admonished the EC for not having made any adjustments to these prices to account for physical differences affecting price comparability, as required by Article 6.5 SCM Agreement. Still, after having attempted to make some adjustments, the Panel concluded that the physical differences identified could not possibly account for these enormous differences in price.[127] The Panel thus concluded that the price undercutting of around 42–52 per cent was significant:

> We note that under Article 6.3(c) serious prejudice may arise only where the price undercutting is 'significant'. Although the term 'significant' is not defined, the inclusion of this qualifier in Article 6.3(c) presumably was intended to ensure that margins of undercutting so small that they could not meaningfully affect suppliers of the imported product whose price was being undercut are not considered to give rise to serious prejudice. This clearly is not an issue here. To the contrary, it is our

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consumption divided by total world consumption'. Panel Report, *US – Upland Cotton*, para. 7.1425. The Panel came to the following conclusion:

> By contrast, a focus on a Member's consumption share, plus exports, in world consumption in Article 6.3(d) would run counter to the underlying object and purpose of the subsidy disciplines in the agreement. We do not find tenable the proposition that the expression 'world market share' in Article 6.3(d) includes the increase in consumption of the Member granting the subsidy. It is simply unfathomable to us why an agreement that focuses on subsidies in respect of products would contain a provision effectively limiting an increase in a Member's *consumption* of a product, including of their own product.

Panel Report, *US – Upland Cotton*, para. 7.1451.

126 Annex V contains 'Procedures for Developing Information Concerning Serious Prejudice'.

127 Panel Report, *Indonesia – Autos*, para. 14.251.

> view that, even taking into account the possible effects of these physical differences on price comparability, the price undercutting by the Timor of the Optima and 306 cannot reasonably be deemed to be other than significant.[128]

A similar claim with respect to US-like cars was rejected for the simple reason that no US-like cars were sold to Indonesia.[129] In other words, there can be no price undercutting, if the like product is not sold in the same market.

Significant price depression/suppression

The term '*price suppression*' refers to the situation where prices either are prevented or inhibited from rising (that is, they do not increase when they otherwise would have) or they do actually increase, but the increase is less than it otherwise would have been. *Price depression* refers to the situation where prices are pressed down, or reduced.[130]

The term 'significant' in the context of 'significant price suppression' in Article 6.3(c), means, according to the Panel in *US – Upland Cotton*, 'important, notable or consequential'.[131] It is a relative concept, and what is significant with respect to one product or one market may not be with respect to another market.[132] So, depending on the product and the market under consideration, 'a relatively small decrease or suppression of prices could be significant because, for example, profit margins may ordinarily be narrow, product homogeneity means that sales are price sensitive or because of the sheer size of the market in terms of the amount of revenue involved in large volumes traded on the markets experiencing the price suppression'.[133] The term *significant*, appearing in Art. 6.3(c) SCM, has thus been interpreted by WTO Panels as involving a *de minimis* threshold. Confirming prior case-law, the Panel Report on *Korea – Commercial Vessels* stated that '. . . only price suppression or price depression of sufficient magnitude or degree, seen in the context of the particular product at issue, to be able to meaningfully affect suppliers should be found to be "significant" in the sense of SCM Article 6.3(c)'.[134]

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128 Panel Report, *Indonesia – Autos*, para. 14.254.

129 Panel Report, *Indonesia – Autos*, para. 14.239.

130 This was the definition applied by the Panel in *US – Upland Cotton*, which the Appellate Body in that case agreed with. Appellate Body Report, *US – Upland Cotton*, para. 423, referring to Panel Report, *US – Upland Cotton*, para. 7.1277. Also see Panel Report, *Korea – Commercial Vessels*, para. 7.533.

131 Panel Report, *US – Upland Cotton*, para. 7.1326. Also see Panel Report, *Korea – Commercial Vessels*, para. 7.570.

132 Panel Report, *US – Upland Cotton*, paras 7.1329–7.1330.

133 Panel Report, *US – Upland Cotton*, para. 7.1330.

134 Panel Report, *Korea – Commercial Vessels*, para. 7.571.

For serious prejudice to exist, Article 6.3 (c) requires that there is (a) significant price depression or suppression which is (b) felt in the same market. Of course it will also need to be established, as for all serious prejudice situations, that the serious prejudice is *caused by* the subsidies. We will come back to the need to establish a causal link between the subsidies and its alleged adverse effects later. At this stage it seem noteworthy that, with respect to the causation element in a situation of price suppression, both the Panel in *Korea – Commercial Vessels*[135] and the Appellate Body in *US – Upland Cotton* considered that the term 'suppression' contains some sort of built-in causation requirement, and the factors that lead to a determination of the existence of price suppression may also be relevant to the question of the cause of such suppression. So it may be difficult to separate the existence of any suppression from the cause of such suppression, although this is what the Panel in *US – Upland Cotton* had done. The Appellate Body did not fault the Panel for this, but did note the problems inherent in its approach:

> However, the ordinary meaning of the transitive verb 'suppress' implies the existence of a subject (the challenged subsidies) and an object (in this case, prices in the world market for upland cotton). This suggests that it would be difficult to make a judgment on significant price *suppression* without taking into account the effect of the subsidies. The Panel's definition of price suppression, explained above, reflects this problem; it includes the notion that prices 'do not increase when they *otherwise* would have' or 'they do actually increase, but the increase is less than it *otherwise* would have been'. The word 'otherwise' in this context refers to the hypothetical situation in which the challenged subsidies are absent.[136] (Footnotes omitted)

Demonstrating price suppression/price depression

We will have a closer look at the two constituent elements of a serious prejudice claim under Article 6.3(c): the effect of the subsidy is (a) price depression/suppression; (b) in the same market.

(a) Evidence of significant price depression or suppression

In *US – Upland Cotton*, the Panel reached the conclusion of price suppression based on three factors: (a) the relative magnitude of the United States' production and exports in the world upland cotton market; (b) general price trends (in the world market as revealed by the A-Index); and (c) the nature of the subsidies at issue, and in particular, whether or not the nature of these subsidies is such as to have discernible price suppressive effects.[137] The Panel did not

135 Panel Report, *Korea – Commercial Vessels*, para. 7.534.
136 Appellate Body Report, *US – Upland Cotton*, para. 433.
137 Panel Report, *US – Upland Cotton*., para. 7.1280.

consider it necessary to quantify the suppression to conclude that it was significant. Rather, these same factors as well as the readily available evidence of the order of magnitude of the subsidies[138] led the Panel to the conclusion that the price suppression in question was 'certainly not, by any means . . . an insignificant or unimportant world price phenomenon'.[139]

The Appellate Body upheld all of the Panel's conclusions and pointed to the relevance of such factors as the general price trends, the nature of the subsidies and the relative magnitude of the subsidized product share of the market:

> In the absence of explicit guidance on assessing significant price suppression in the text of Article 6.3(c), we have no reason to reject the relevance of these factors for the Panel's assessment in the present case. An assessment of 'general price trends' is clearly relevant to significant price suppression (although, as the Panel itself recognized, price trends alone are not conclusive). The two other factors – the nature of the subsidies and the relative magnitude of the United States' production and exports of upland cotton – are also relevant for this assessment.[140]

When examining price suppression, the effects of recurring subsidies may be allocated over time and are not limited to the year in which the subsidy was granted. The Appellate Body said as much in *US – Upland Cotton*:

> . . . we are not persuaded by the United States' contention that the effect of annually paid subsidies must be 'allocated' or 'expensed' solely to the year in which they are paid and that, therefore, the effect of such subsidies cannot be significant price suppression in any subsequent year. We do not agree with the proposition that, if subsidies are paid annually, their effects are also necessarily extinguished annually.[141]

(b) In the same market

The price suppression or price depression effects of Article 6.3(c) have to be felt *in the same market*. Unlike sub-paragraphs (a), (b) and (d), Article 6.3(c) does not further specify *which* market this is: that of the subsidizing Member, of a third country, of the importing Member or the world market. The Appellate Body in *US – Upland Cotton* agreed with the Panel that in the absence of any such specification in Article 6.3(c) the 'market' in question could be any national, regional or other market, including the 'world market': 'Thus, the ordinary meaning of the word "market" in Article 6.3(c), when read in the context of the other paragraphs of Article 6.3, neither

138 Panel Report, *US – Upland Cotton*, para. 7.1332.
139 Panel Report *US – Upland Cotton*, para. 7.1333.
140 Appellate Body Report, *US – Upland Cotton*, para. 434.
141 Appellate Body Report, *US – Upland Cotton*, para. 482.

requires nor excludes the possibility of a national market or a world market.[142,143]

Two products may be considered to be in the same market if they were engaged in actual or potential competition in that market, even if they are not necessarily sold at the same time and in the same place or country.[144] As the Panel and the Appellate Body in *US – Upland Cotton* pointed out, 'the scope of the "market", for determining the area of competition between two products, may depend on several factors such as the nature of the product, the homogeneity of the conditions of competition, and transport costs'.[145] And this could be the world market if it can be demonstrated that the subsidized product and the affected member's product compete in the same market, the world market.[146] What the Appellate Body in *US – Upland Cotton* thus concluded is that the subsidized product and the affected member's product necessarily have to be *directly competitive products* in order to be able to be 'in the same market'. Whether they have to be 'like products' was a question the Appellate Body felt it did not need to resolve.

The Panel in *Korea – Commercial Vessels* was more outspoken about the issue of like products. It concluded 'that "like product" as defined in footnote 46 to Article 15 of the SCM Agreement is not a legal requirement for claims of price suppression/price depression pursuant to Article 6.3(c).'[147] The Panel based this conclusion mainly on the absence of an explicit reference to the 'like product' in Article 6.3(c) with respect to price suppression and price depression, while for price undercutting the Agreement explicitly required that it was the price of the like product that was undercut by the subsidized imports.[148] According to the Panel, the 'basic analytical question would be how to demonstrate such a causal relationship between the subsidy or subsidies in question, on the one hand, and movements in the prices of the product

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142 This stands to reason, given that the purpose of the 'actionable subsidies' provisions in Part III of the *SCM Agreement* is to prevent Members from causing adverse effects to the interests of other Members through the use of specific subsidies, wherever such effects may occur.

143 Appellate Body Report, *US – Upland Cotton*, para. 406. The Appellate Body had earlier agreed with the Panel's definition of a 'market' as 'the area of economic activity in which buyers and sellers come together and the forces of supply and demand affect prices', as well as with the Panel's view that the 'degree to which a market is limited by geography will depend on the product itself and its ability to be traded across distances'. Appellate Body Report, *US – Upland Cotton*, paras 404–5.

144 Appellate Body Report, *US – Upland Cotton*, para. 408.

145 Appellate Body Report, *US – Upland Cotton*, para. 408, referring to Panel Report, *US – Upland Cotton*, para. 7.1237 and footnote 1357 to para. 7.1240.

146 Appellate Body Report, *US – Upland Cotton*, para. 409.

147 Panel Report, *Korea – Commercial Vessels*, para. 7.553.

148 Panel Report, *Korea – Commercial Vessels*, paras 7.545–7.553.

of concern to the complaining Member in the relevant market on the other hand',[149] if indeed the allegedly affected product is not 'like' the subsidized product.

In other words, product characteristics may have an important role to play in demonstrating the causal link between the subsidy and the alleged price effect.[150] In practical terms, it will be difficult to demonstrate that the suppression of prices for a particular product was caused by subsidies provided to a product that is not like this product. Acknowledging that it will be difficult to effectively make claims regarding products that do not compete in the same relevant product market with the subsidized entities, the Panel came up with some reasonable examples where this could indeed be the case. We quote from footnote 296:

> . . . a case involving alleged significant suppression or depression of the price for a given kind of narrowly-defined product due to product-specific subsidization of a physically identical product produced by another Member, product definition issues presumably would figure little if at all in respect of the evidence necessary to demonstrate causation. The situation presumably would be quite different where the alleged subsidy was in respect of an input product, while significant price suppression or depression was alleged in respect of a downstream product of the complainant, or where a subsidy in respect of one product was alleged to cause significant suppression or depression in respect of a completely unrelated product. Clearly, in the latter two cases, product definition issues would create a significant, if not insurmountable evidentiary hurdle in respect of causation.

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149 Panel Report, *Korea – Commercial Vessels*, para. 7.557.

150 Panel Report, *Korea – Commercial Vessels*, paras 7.559–7.560:

> Obviously, the prices in question will have to be identified as prices for some product or products in particular, of interest to the complainant, in a specified market. It will then be the complainant's burden to demonstrate the causal relationship between the subsidy and the particular price effects that it alleges (i.e., in respect of the particular product or products, however defined, of interest to the complainant). That is, we view the product issue ultimately as pertaining to the demonstration of causation, on the basis of such facts as may be relevant to the particular case.
>
> In this regard, we would observe that the nature of the demonstration that the complainant will need to make to establish causation in any given case, and the difficulty of doing so, will depend on a number of factors and factual circumstances, including but not limited to the breadth of the description of the product on which the complainant brings its case. Such factors might include among others the nature of the subsidy, the way in which the subsidy operates, the extent to which the subsidy is provided in respect of a particular product or products, conditions in the market, the conceptual distance between the activities of the subsidy recipient and the products in respect of which price suppression/price depression is alleged.

On the one hand, one could say that in the abstract, this passage makes good sense. Were one to condition claims of *serious prejudice* on a prior *like product* analysis, one would run the risk that examples such as the ones mentioned above rest unaccounted for.[151] On the other hand, much the same could be said for a price undercutting, or a displacement or impediment analysis, yet there, the language of the Article 6.3 is clear, the affected product has to be 'like' the subsidized product. The Panel in *Korea – Commercial Vessels* did not come up with one good reason why in the case of price suppression/price depression, no such like product analysis is required while, in all of the other serious prejudice situations, rightly or wrongly so, it is. Likewise in a countervailing duty context, the injurious effect of the subsidies may well be felt by upstream producers rather than by the producers of the like product, yet the Agreement limits the possibility of acting against such subsidies to situations in which it can be demonstrated that the like product producers have been injured. It is unfortunate that the Panel reached its textual conclusion without any proper explanation why a different approach is warranted in the case of serious prejudice-type of price suppression/depression.

Interestingly, in case the world market is the 'same market', the Appellate Body was of the view in *US – Upland Cotton*, as was the Panel, that a suppression effect of the 'world price' for cotton as indicated in a so-called 'A-Index' sufficed for making the price suppression determination and that it was not necessary to determine whether prices of *Brazilian* Cotton, the like product, had been suppressed as a consequence of US subsidies. In the view of the Panel, these world prices would inevitably affect prices wherever Brazilian and US cotton compete:

> In our view, it was sufficient for the Panel to analyze the price of upland cotton in general in the world market. The Panel did so by relying on the A-Index. The Panel specifically found, based on its reading of the evidence before it:
>
> > [P]rices for upland cotton transactions throughout the world are . . . largely determined by the A-Index price.
>
> Therefore, the Panel found that the A-Index adequately reflected prices in the world market for upland cotton. The Panel also found that 'developments in the world upland cotton price would inevitably affect prices' wherever Brazilian and United States upland cotton compete, 'due to the nature of the world prices in question and the nature of the world upland cotton market, and the relative proportion of that

[151] The text of Art. 6.3(c) SCM Agreement is not a model of clarity: textually, it is true that the like-product analysis is linked to *price undercutting* only. It is not linked to *price suppression or depression*. As a matter of economic logic, however, it is difficult to sustain why such a differentiated approach was chosen.

> market enjoyed by the United States and Brazil'. It was not necessary, in these circumstances, for the Panel to proceed to a separate analysis of the prices of Brazilian upland cotton in the world market.[152] (Footnotes omitted)

(iv) The effect of the subsidy – existence of a causal link

(a) Causation

Article 6.3 SCM Agreement clearly states that the effects described in Article 6.3 SCM as constituting serious prejudice have to be 'the effects of the subsidy'. There must be, in other words, a causal relationship between the *subsidy* and the effects listed in Article 6.3 SCM Agreement. The question remains how to establish the existence of such a relationship. Article 6.3 is silent on this issue. The Panel in *Korea – Commercial Vessels* considered that the text of Article 6.3 implies a 'but for' approach to causation and would thus require a Panel to examine the counterfactual.[153] This 'but for' approach requires, in the case of displacement, the complainants to demonstrate that *but for* the subsidy, the complainants could have expected to participate proportionately in a growing market; or in the case of impeding exports, it requires a demonstration that *but for* the subsidies, the complainants' sales and/or market share would have increased, or would have increased more than they did in fact. Such a framework implies also analysing the various factors contributing to the particular market situation forming the subject of the complaint, that is, supply and demand factors, production costs, relative efficiency and so on.[154]

By way of example, we refer to the Panel's decision in *US – Upland Cotton*. In this case, the Panel found a causal link to exist between the price-contingent subsidies and the significant price suppression for four main reasons:[155] (1) the United States exerts a substantial proportionate influence in the world upland cotton market; (2) the price-contingent subsidies are directly linked to world prices for upland cotton, thereby insulating United States producers from low prices; (3) there is a discernible temporal coincidence of suppressed world market prices and the price-contingent United States subsidies; and (4) credible evidence on the record concerning the divergence

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152 Appellate Body Report, *US – Upland Cotton*, para. 417.

153 Panel Report, *Korea – Commercial Vessels*, para. 7.612. The Panel considered that this 'but for' approach was consistent with the approach taken in both *Indonesia – Autos* and *US – Upland Cotton*, the two prior serious prejudice disputes under *SCM* Article 6.3. According to the Panel, the *Indonesia – Autos* Panel explicitly adopted such an approach, in respect of the displacement/impedance of imports claims. Panel Report, *Korea – Commercial Vessels*, para. 7.613.

154 Panel Report, *Korea – Commercial Vessels*, para. 7.615.

155 Panel Report, *US – Upland Cotton*, paras 7.1347–7.1355.

between United States producers' total costs of production and revenue from sales of upland cotton since 1997 supports the proposition that United States upland cotton producers would not have been economically capable of remaining in the production of upland cotton had it not been for the United States subsidies at issue and that the effect of the subsidies was to allow United States producers to sell upland cotton at a price lower than would otherwise have been necessary to cover their total costs.

The Appellate Body upheld the Panel's reliance on these factors.[156] It emphasized that the nature of the subsidies[157] (in this case the subsidy was directly linked to world prices for upland cotton, thereby insulating United States producers from low prices) as well as the magnitude of the subsidy play an important role in establishing price suppression as an effect of the subsidy, but that ultimately all relevant factors had to be taken into consideration:

> However, in assessing whether 'the effect of the subsidy is . . . significant price suppression', and ultimately serious prejudice, a panel will need to consider the effects of the subsidy on prices. The magnitude of the subsidy is an important factor in this analysis. A large subsidy that is closely linked to prices of the relevant product is likely to have a greater impact on prices than a small subsidy that is less closely linked to prices. All other things being equal, the smaller the subsidy for a given product, the smaller the degree to which it will affect the costs or revenue of the recipient, and the smaller its likely impact on the prices charged by the recipient for the product. However, the size of a subsidy is only one of the factors that may be relevant to the determination of the effects of a challenged subsidy. A panel needs to assess the effect of the subsidy taking into account all relevant factors.[158]

In sum, the standard applied in the serious prejudice case is that of a 'but for' test; the question to be answered is whether but for the subsidies, would the same situation have arisen. At the same time, and in spite of an explicit obligation to do so in the text of the SCM Agreement in the serious prejudice context, Panels have also examined other factors that were affecting the market at the same time with a view to determining whether such factors would have the effect of attenuating the causal link, or of rendering not 'significant' the effect of the subsidy.

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156 Appellate Body Report, *US – Upland Cotton*, paras 449–53.

157 Appellate Body Report, *US – Upland Cotton*, para. 450.

158 Appellate Body Report, *US – Upland Cotton*, para. 461. The Appellate Body considered that this does not imply that a Panel is required to quantify the amount of the subsidy. It considered that the rationale for part III differs from that of part V where such quantification is required because no CVDs may be imposed in excess of the amount of the subsidy. Appellate Body Report, *US – Upland Cotton*, para. 464.

(b) Non-attribution

Article 6.3 SCM Agreement does not impose a non-attribution requirement as exists in the countervail context, (Article 15.5 SCM). Nevertheless, two Panels, in the cases *US – Upland Cotton* and *Korea – Commercial Vessels* considered it 'logical and appropriate'[159] to analyse other possible causal factors, with a view to determining whether such factors would have the effect of attenuating the causal link, or of rendering not 'significant' the effect of the subsidy.[160] In its report on *US – Upland Cotton*, the Panel concluded that the condition of a causal link requires a Panel to ensure that the significant price suppression *is* 'the effect of the subsidy' within the meaning of Article 6.3(c) and that this necessarily calls for an examination of United States subsidies, within the context of other possible causal factors, to ensure an appropriate attribution of causality.[161] The Appellate Body agreed with this approach:

> As the Panel pointed out, 'Articles 5 and 6.3 . . . do not contain the more elaborate and precise "causation" and non-attribution language' found in the trade remedy provisions of the *SCM Agreement*. Part V of the *SCM Agreement*, which relates to the imposition of countervailing duties, requires, *inter alia*, an examination of 'any known factors other than the subsidized imports which at the same time are injuring the domestic industry'. However, such causation requirements have not been expressly prescribed for an examination of *serious prejudice* under Article 5(c) and Article 6.3(c) in Part III of the *SCM Agreement*. This suggests that a panel has a certain degree of discretion in selecting an appropriate methodology for determining whether the 'effect' of a subsidy is significant price suppression under Article 6.3(c).
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> Nevertheless, we agree with the Panel that it is necessary to ensure that the effects of other factors on prices are not improperly attributed to the challenged subsidies. Pursuant to Article 6.3(c) of the *SCM Agreement*, '[s]erious prejudice in the sense of paragraph (c) of Article 5 may arise' when 'the effect of *the subsidy* is . . . significant price suppression' (emphasis added). If the significant price suppression found in the world market for upland cotton were caused by factors other than the challenged subsidies, then that price suppression would not be 'the effect of' the challenged subsidies in the sense of Article 6.3(c). Therefore, we do not find fault with the Panel's approach of 'examin[ing] whether or not 'the effect of the subsidy' is the significant price suppression which [it had] found to exist in the same world market' and separately 'consider[ing] the role of other alleged causal factors in the record before [it] which may affect [the] analysis of the causal link between the United States subsidies and the significant price suppression'.[162] (Footnotes omitted)

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159 Panel Report, *Korea – Commercial Vessels*, para. 7.618; also see Panel Report, *US – Upland Cotton*, para. 7.1344.

160 Panel Report, *Korea – Commercial Vessels*, para. 7.618.

161 Panel Report, *US – Upland Cotton*, para. 7.1344.

162 Appellate Body Report, *US – Upland Cotton*, paras 436–7.

The Panel in *US – Upland Cotton* examined other factors, and found that the fact certain other factors

> may have contributed to lower, and even suppressed, world upland cotton prices during MY 1999–2002, do not attenuate the genuine and substantial causal link that we have found between the United States' mandatory price-contingent subsidies at issue and the significant price suppression. Nor do they reduce the effect of the mandatory price-contingent subsidies to a level which cannot be considered 'significant'.[163]

In other words, the other factors contributed to the price suppression but even without them the subsidies would still have had a significant price suppressing effect. The Appellate Body found no legal error in the Panel's causation analysis, although it expressed its disappointment about the fact that in its reasoning, the Panel 'could have provided a more detailed explanation of its analysis of the complex facts and economic arguments arising in this dispute . . . in order to demonstrate precisely how it evaluated the different factors bearing on the relationship between the price-contingent subsidies and significant price suppression'.[164]

(d) Remedies in case of actionable subsidies

In case a WTO Member has reason to believe that it has suffered adverse effects as a result of subsidies granted by another WTO Member, it will consult the latter on the appropriate action to be taken on the issue. In case of no agreement, the former can always submit the case to a WTO Panel which will deal with the issue within strict time-limits (Arts. 7.4–7.7 SCM). The strict limits imposed might have a negative impact on the information gathering process. Gathering information, on the other hand, is far from being an easy task in cases involving *serious prejudice*. This is why Annex V to the SCM provides for procedures aimed at facilitating this process. To this effect, the DSB shall designate a representative, the task of whom, in accordance with para. 4 of Annex V, is 'to ensure the timely development of the information necessary to facilitate expeditious subsequent multilateral review of the dispute. In particular, the representative may suggest ways to most efficiently solicit necessary information as well as encourage the cooperation of the parties'.[165]

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163 Panel Report, *US – Upland Cotton*, para. 7.1363.

164 Appellate Body Report, *US – Upland Cotton*, para. 458.

165 For a first application of this institutional facility, see paras 1.17–1.19 of the Panel Report on *Indonesia –Autos*. For a first, comprehensive application, pp. 159–64 of the Panel Report on *Korea – Commercial Vessels*, where the working procedures for the designated representative are explained, and it is made clear that the latter managed

Art. 7.8 SCM Agreement requests from the WTO Member causing adverse effects through its subsidies 'to remove the adverse effects or . . . withdraw the subsidy'. So, irrespective of whether *adverse effects* result in *serious prejudice, nullification and impairment or injury*, a WTO Member that has proved their existence can request a WTO Panel to recommend that the subsidizing WTO Member removes the effect or withdraws the subsidy altogether (Art. 7.8 SCM Agreement). It is not clear how to deal with non-recurring subsidies which have been fully disbursed at the time of the DSB ruling to 'remove the adverse effects', but may continue to benefit future production.[166]

The statutory deadlines for completion of the Panel's work are shorter when compared to 'normal' Panel proceedings under the DSU (Arts. 7.4–7.7 SCM). In case of non-compliance, the injured WTO Member can take countermeasures *commensurate with the degree and nature* of the adverse effects determined to exist. Art. 7.9 SCM Agreement reads in this respect:

> In the event the Member has not taken appropriate steps to remove the adverse effects of the subsidy or withdraw the subsidy within six months from the date when the DSB adopts the panel report or the Appellate Body Report, and in the absence of agreement on compensation, the DSB shall grant authorization to the complaining Member to take countermeasures, commensurate with the degree and nature of the adverse effects determined to exist, unless the DSB decides by consensus to reject the request.

In case of disagreement between the parties as to whether the proposed countermeasures respect the letter of Art. 7.9 SCM Agreement, an Arbitrator will define their level (Art. 7.10 SCM Agreement). There has been no practice so far in the context of Art. 7.9 SCM Agreement. As a result, one can only speculate as to the precise scope of the term *commensurate with the degree and nature.* This term is hardly self-interpreting (the SCM Agreement is largely incomplete in this respect), and it is through subsequent adjudication that it will, eventually, be completed. It seems *prima facie*, however, that this term looks closer, from a quantification perspective, to the term *equivalent* appearing in Art. 22.4 DSU, than to the term *appropriate* countermeasures appearing in Art. 4.10 SCM Agreement.

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to respect the 60-day period enshrined in para. 5 of Annex V. An Annex V information gathering was also initiated in *US – Upland Cotton*. Panel Report, *US – Upland Cotton*, para. 1.3.

166 A proposal has been submitted in the course of the negotiations to clarify that in determining appropriate steps to remove adverse effects in such circumstances, the benefit of the subsidy that was fully disbursed prior to the expiration of the compliance period shall be allocated over the total production of the products to which the subsidy is properly attributable under GAAP. TN/RL/GEN/14.

10. Thou shall not be punished in any other way

Art. 32.1 SCM states that: 'No specific action against a subsidy of another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement.' The interpretation of this provision was the core subject-matter of the dispute between the United States and a host of WTO Members regarding the US Continued Dumping and Subsidy Offset Act of 2000 (the 'CDSOA'), also known as the 'Byrd Amendment'. According to this law, the United States promised to disburse the monetary equivalent of all anti-dumping/countervailing duties perceived to those US economic operators that had supported a petition to initiate an investigation. Both the Panel and the Appellate Body held that the Byrd Amendment was violating Art. 32.1 SCM. The Appellate Body, in its report on *US – Offset Act (Byrd Amendment)*, held the view that the US legislation at hand was specific legislation against subsidization: specific, because it was linked to anti-dumping or CVD proceedings; against, because the Byrd payments had an adverse bearing on subsidies and they did not feature among the permissible actions against subsidization (undertakings, provisional or definitive CVDs). We quote from para. 256:

> Because the CDSOA has an adverse bearing on, and, more specifically, is designed and structured so that it dissuades the practice of dumping or the practice of subsidization, and because it creates an incentive to terminate such practices, the CDSOA is undoubtedly an action 'against' dumping or a subsidy, within the meaning of Article 18.1 of the Anti-Dumping Agreement and of Article 32.1 of the SCM Agreement.

Horn and Mavroidis (2006) critically distance themselves from this ruling. In their view, the economic theory that the Appellate Body used for striking down the legislation was inadequately motivated, and it is not clear at all how general the Appellate Body believes its theory to be. The validity of the theory itself is very doubtful, if it is meant to describe the typical impact across industries of the contested legislation. The authors point to cases where the Byrd payments might not discourage at all foreign subsidization; to the contrary, they might encourage additional subsidization.[1]

[1] In their argument, the Appellate Body has further (implicitly) reduced the

Subsequent practice seems to distance itself from the Byrd ruling, although it is probably too early to draw any definitive conclusions on this score. In *EC – Commercial Vessels*, the Panel faced, *inter alia*, an argument by Korea that the EC TDM (Temporary Defence Mechanism) Regulation was in violation of Art. 32.1 SCM. Korea and the European Community had reached an agreement on subsidization of their respective shipyards. Through the TDM, the European Community would deviate from its commitments and grant subsidies to the ship-building sector, since Korea had not respected its own commitments in this respect.[2]

The Panel agreed with the view that the TDM was a specific action related to subsidization, but distanced itself from the view that it was *against* subsidization (paras 7.154–7.174). In its view, a counter-subsidy (like the TDM)[3] is not in and of itself against subsidization. For the Panel, a scheme is against subsidy, in the sense of Art. 32.1 SCM, if it contains some element additional to the potential impact on competition. The Panel considered that in the *US – Offset Act (Byrd Amendment)* case, the Appellate Body had focused its analysis on the fact that the financial resources for the Byrd subsidies were coming from foreign competitors that were dumping or exporting subsidized goods:

> The Appellate Body's ruling in *US – Offset Act (Byrd Amendment)* provides the Panel with the relevant parameters for assessing whether a measure is 'against' the subsidy of another Member. First, the Appellate Body indicated that an analysis whether a measure is 'against' a subsidy must assess whether the design and structure of the measure has the effect of dissuading the practice of dumping or subsidization, or creates an incentive to terminate such practices. Second, the Appellate Body in applying its 'design and structure' analysis focused almost exclusively on the existence of a 'transfer of financial resources' between foreign producers/exporters and their domestic competitors. Put simply, we understand the Appellate Body to be saying that the 'decisive basis' for ruling that the *Offset Act* was a 'measure' against dumping or subsidization was the fact that the greater dumping or subsidization, the more financial resources were taken from the foreign exporters/producers and given to domestic competitors. It was the dissuasive nature of this aspect of the design or structure of the Offset Act that made it a measure 'against' dumping or subsidization. By contrast, the Appellate Body not only did *not* rely on the existence of subsidization in response to dumping or subsidization as the basis for its ruling, but it ruled that it was neither necessary nor relevant for

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relevance of the distinction between mandatory and discretionary legislation. In previous case-law, the Appellate Body would condemn mandatory legislation because it would *always* lead to WTO inconsistencies. In the case at hand, it condemned a US legislation which *might* lead to WTO inconsistencies.

[2] The TDM Regulation is fully described in para. 7.43 of the report.

[3] This is however, what *Byrd* payments are all about: a counter-subsidy (when they operate against foreign subsidies).

> the Panel to have conducted an examination of the effects of the subsidy on conditions of competition between domestic and imported products.[4] (Footnote omitted; emphasis in original)

This requirement, the existence of a transfer of financial resources from the foreign producers to the domestic producer receiving the subsidies, is, in the Panel's view, necessary since otherwise the judge would effectively be adding to the disciplines on subsidies, beyond those existing in Parts II (prohibited) and III (actionable) of the SCM Agreement: those that affect or mitigate conditions of competition.[5] It is not, however, the role of the judge to act as a legislator and this Panel declined to assume such responsibilities. The Panel thus came to the following conclusion:

> Taking the Appellate Body's reasoning in *US – Offset Act (Byrd Amendment*) into account, we conclude that a subsidy provided in response to another Member's subsidy – that is to say, a counter-subsidy – will not, merely because of its impact on conditions of competition, constitute specific action 'against' that subsidy and therefore be proscribed by the SCM Agreement. Rather, there must be some *additional* element, inherent in the design and structure of the measure, that serves to dissuade, or encourage the termination of, the practice of subsidization. One such element would be where the counter-subsidy was funded through a transfer of financial resources between the foreign producer/exporter and the domestic competitor. There may well be other elements which would satisfy this requirement, although we will not attempt *ex ante* to define what those elements might be. The Panel will therefore examine the TDM Regulation in light of these conclusions.
>
> The Panel considers that the factual and legal arguments of Korea do not warrant a conclusion that the design and structure of the TDM Regulation demonstrate its nature as an action 'against' a subsidy of another Member.[6]

As things stand now, it remains to be seen whether the sweeping Byrd Amendment conclusions will be re-affirmed, or set aside in future case-law. We pointed out above, however, our dissatisfaction with the Byrd Amendment test.

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4 Panel Report, *EC – Commercial Vessels*, para. 7.160.
5 Panel Report, *EC – Commercial Vessels*, para. 7.161.
6 Panel Report, *EC – Commercial Vessels*, paras 7.164–7.165.

11. Special and differential treatment

Article 27 sets forth a whole list of exceptions to the general rules on subsidies with respect to developing countries. Most of these provisions are transitional in nature and allow developing countries more time to eliminate some subsidies programmes which would otherwise be in violation of the rules on prohibited subsidies of Article 3 SCM Agreement. Most of these transitional arrangements have now expired and a lot of the special and differential treatment provisions of Article 27 have thus lost their meaning. The Agreement also contains some additional exceptions for developing countries involved in countervailing duty examination, which continue to apply. In what follows we will provide a brief overview of the special and differential rules for developing countries.

A special and differential treatment (that is, essentially a longer transitional period during which prohibited subsidies will be tolerated and in general a more 'relaxed' approach vis-à-vis subsidies) is provided for developing country Members (Art. 27 SCM Agreement) and for Members in the process of transformation from centrally planned to market economies (Art. 29 SCM Agreement).[1]

Article 27 distinguishes between developing countries in general, on the one hand, and so-called 'Annex VII countries', including least developed countries, on the other. Those countries listed in Annex VII to the SCM Agreement are (a) least developed countries designated as such by the United Nations which are Members of the WTO; and (b) any of the following WTO Member countries as long as their GNP per capita remains below USD 1000 per annum: Bolivia, Cameroon, Congo, Côte d'Ivoire, Dominican Republic, Egypt, Ghana, Guatemala, Guyana, India, Indonesia, Kenya, Morocco, Nicaragua, Nigeria, Pakistan, Philippines, Senegal, Sri Lanka and Zimbabwe. Honduras was later added to this list.

Different rules apply to these different categories of developing countries when it comes to the prohibition on export subsidies and import substitution subsidies.[2]

[1] The special transition periods for such economies under Article 29 SCM have expired.

[2] It is noted that Article 29 also contained some special rules for transition economy countries which were granted a 7-year phase-out period for prohibited subsidies.

A EXPORT SUBSIDIES

1 Annex VII Countries Including Least Developed Countries

With regard to the prohibited export subsidies, Article 27.2 provides that the Annex VII countries may continue to grant such export subsidies. They remain countervailable nevertheless. In other words, the prohibition on export subsidization is not applicable so long as these countries remain included in Annex VII, do not graduate from this list by reaching a per capita GNP of more than USD 1000 GNP, or lose their LDC status. At the launch of the Doha development round a couple of precisions were made in regard of these non-LDC Annex VII countries.[3] It was decided that Members do not leave Annex VII(b) until GNP per capita reaches USD 1000 *in constant 1990 dollars* for three consecutive years (so long as this does not make them worse off). This calculation methodology (G/SCM/38, App.3) applies since 1 January 2003. It was also provided that a Member which graduates from Annex VII(b) may be re-included if its GNP per capita falls back below USD 1000 (in 1990 constant dollars).

2 Other Developing Countries

Other developing countries were given an eight-year phase-out period of such prohibited export subsidies.[4] They were allowed to continue to grant such export subsidies during this period. In other words, the prohibition did not apply, but the subsidies did remain actionable.[5] This phase-out period ended on 1 January 2003. However, Article 27.4 provides for an extension mechanism, and allows the Committee on Subsidies and Countervailing Measures to extend the eight-year transition period for developing country Members after examining 'all relevant economic, financial and development needs'. A

Similarly, Article 28 provided for a transition period of three years for developed countries. All these special transition periods have expired by now.

[3] An Annex VII country which reached export competitiveness in the sense of Article 27.6 SCM Agreement in a given product will have to phase out its export subsidies within a period of eight years.

[4] Article 27.2 SCM Agreement. Article 27.4 provided for a number of conditions which applied in order to be able to benefit from this eight-year waiver: these export subsidies had to be phased out, preferably in progressive manner; a member was not allowed to increase the level of export subsidies; and it had to eliminate the subsidies faster when the use of such export subsidies was inconsistent with development needs. The complainant bore the burden of proving that a developing country Member did not comply with at least one of Article 27.4 conditions. See Appellate Body Report, *Brazil – Aircraft*, para. 141.

[5] Article 27.7 SCM Agreement.

number of Article 27.4 extensions were granted. Such extensions are subject to annual consultations to determine necessity of maintaining the export subsidies. An extension could be requested only once, one year prior to the expiry of the transition period.[6] If a member reaches export competitiveness with respect to a particular product, it graduates from the extension, and will have to phase out the exports subsidies within a period of 2 years.[7] By 2007, all extensions will be terminated and the prohibition will, *mutatis mutandis*, apply to all developing countries other than those mentioned in Annex VII SCM.

B IMPORT SUBSTITUTION SUBSIDIES

The second category of prohibited subsidies in Article 3 concerns import substitution subsidies. Article 27.3 granted an eight-year phase-out period to least developed countries, and a five-year phase-out period for other developing countries.[8] All these phase-out periods have expired by now, and the prohibition on such import substitution subsidies of Article 3.1 (b) thus applies to all countries.

C ADDITIONAL SPECIAL AND DIFFERENTIAL RULES

1 Serious Prejudice

In addition, Article 27 provides for special and differential rules for developing countries with respect to a determination of serious prejudice under Article 5(c) and Article 6 SCM Agreement. Article 27.8 SCM provides that the presumption of serious prejudice which was provided for in Article 6.1 shall not apply in case subsidies have been granted by developing countries. However, this presumption has lapsed, and thus no longer applies. In other words, for subsidies from developing or developed countries alike, it will need to be demonstrated through positive evidence that the subsidies caused serious prejudice in the sense of Article 6.3 SCM.

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6 Article 27.4 SCM Agreement. Such an extension does not affect the rights and obligations under other WTO Agreements, and the Agreement on Agriculture in particular. These export subsidies remain actionable.

7 Export competitiveness is defined in Article 27.5 as a share of 3.25 per cent of world trade of that product for two consecutive years. Members may request the WTO Secretariat to calculate another Member's share of world trade for a product. Calculations have been requested with regard to textile products in the case of Colombia, Thailand and India.

8 Countries in transformation were given a seven-year phase-out period by Article 29 SCM.

One important aspect of special and differential treatment concerning multilaterally actionable subsidies does remain however. Article 27.9 SCM Agreement limits the possibilities of taking multilateral action against subsidies provided by a developing country to the situation described in Article 6.3 (a), displacing or impeding imports from another Member into the market of the subsidizing developing country Member.[9] A finding of serious prejudice caused by subsidies provided by developing countries may only be found on that basis, and not on the basis of any of the other situations described in Article 6.3 (b)–(d). In addition, injury to the domestic industry of the country importing the subsidized product may also warrant action.

2 *De Minimis* Levels of Subsidization

With respect to countervailing duty investigations Articles 27.10 and 27.11 SCM Agreement set forth a special *de minimis* level of subsidization and a negligible volume of imports which requires an authority to terminate the investigation in case the imports come from developing country Members. The *de minimis* level of subsidization in the case of subsidies granted by developing countries is 2 per cent of the value of the subsidies calculated on a per unit basis, while for Annex VII countries this level is 3 per cent.[10] The amount of subsidized imports from developing countries is considered negligible if it represents less than 4 per cent of total imports of the like product in the country of importation, unless imports from developing countries which individually represent less than 4 per cent collectively account for more than 9 per cent of total imports of the like product.

3 Privatization-related Subsidies

Subsidies in the form of direct forgiveness of debt or to cover social costs are not actionable multilaterally, when granted 'within and directly linked to a privatization programme of a developing country', provided that the subsidies are granted for a limited period and result in the eventual privatization of the enterprise concerned.[11]

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9 Unless, the subsidy is covered by Article 6.1 SCM Agreement.

10 Article 11.9 SCM Agreement sets the *de minimis* level for subsidies by developed countries at 1 per cent. No negligibility thresholds is determined with respect to the volume of subsidized imports from developed countries.

11 Article 27.13 SCM Agreement.

12. Standard of review

The Appellate Body, in its report on *US – Lead and Bismuth II*, was confronted with the issue of whether the standard of review in the context of the SCM Agreement should be identical to that practised in the WTO Anti-dumping agreement (Article 17.6 AD Agreement) or, conversely, whether the generic standard of review enshrined in Art. 11 DSU was also applicable in the SCM Agreement context. The Appellate Body ruled that, in the absence of specific language mandating an exception (similar to that embedded in Art. 17.6 of the WTO Anti-Dumping Agreement), the generic standard of review was applicable in the SCM Agreement context as well.[1] Although we have yet to see a case where the choice of a standard of review had an impact on the outcome of a dispute, it is generally perceived that the generic standard of review is less deferential towards an investigating authority than its anti-dumping-specific counterpart.[2] Nevertheless, and telling of the lack of practical implication of the choice of standard of review (that is, the generic or the anti-dumping specific standard), the Panel on *US – Softwood Lumber VI*, did not consider it 'either necessary or appropriate to conduct separate analyses of the USITC determination'[3] involving a single injury determination with respect to both subsidized and dumped imports, under the two Agreements. The Panel did indicate that, given the similarity of the countervailing duty process and the anti-dumping process, inconsistent results are to be avoided. In other words, the standard of review should be the same when examining an injury determination in a CVD case and an anti-dumping case:

> 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,

[1] Appellate Body Report, *US – Lead and Bismuth II*, paras 44–51.

[2] See however, the standard of review applied by the Appellate Body in *US – Countervailing Duty Investigation on DRAMs*. Arguably, this is quite a deferential standard and raises again questions as to the *practical* differences were an adjudicating body to choose between Art. 17.6 AD and Art. 11 DSU.

[3] Panel Report, *US – Softwood Lumber VI*, para. 7.17.

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.[4]

[4] Panel Report, *US – Softwood Lumber VI*, para. 7.18.

13. Concluding remarks

The issue of subsidies is, conceptually, one of the toughest in international trade theory, especially because it is very difficult to construct the (non-subsidy) counterfactual. The SCM Agreement has taken a position against subsidies which neglects this point, and further is, in other ways, at odds with economic theory. As Janow and Staiger (2003) put it in a nutshell:

> The fundamental point is that the standard economic rationale for the purpose of negotiations over trade policy is that trade volumes are inefficiently low when governments set their trade policies unilaterally. As a consequence, from this perspective, the central task of trade negotiations is to expand trade volumes beyond their unilateral levels to more efficient levels. Since agreements to restrict export subsidies are agreements to restrict trade volumes below unilateral levels, it may be concluded that such agreements appear to run counter to the essential purpose of international trade agreements. Any economic argument in support of international agreements to restrict export subsidies must overcome this basic dilemma.

The SCM Agreement provides no response to this statement: it, in fact, implicitly (if not explicitly altogether) rejects it. It proceeds on the basis that subsidies must be stopped, irrespective of their overall welfare implications. The SCM Agreement adopts an injury to competitors standard (and not an injury to competition standard) and allows countervailing action any time producers' interests have been hurt. As things stand, this is one of the least economics-informed agreements in the WTO. At the same time, it evidences the willingness of the WTO Membership to promote producers' interests only in the context of this agreement.

The SCM Agreement further took a position which inherently favours 'big' markets, when it comes to counteracting subsidies: recourse to the unilateral option, that is, fast relief, will be more effective if the population of the effects of subsidization is concentrated in the import market of the competitor. Compared to the multilateral, the unilateral option is relief within months, as opposed to (possible) relief (assuming the relief provided is worth pursuing) after years.

PART III

Safeguards

14. The rationale for safeguards

The GATT Article XIX safeguard provision was only invoked in 150 instances between 1947 and 1994. Many of these cases were lodged between 1975 and 1978, that is, just before the GATT Members fully realized the potential of the anti-dumping instrument, triggering the 'anti-dumping boom' of the 1980s and 1990s. This initial 'unpopularity' of the safeguard was mostly due to two features imposed by GATT Article XIX: a safeguard measure should be non-discriminatory among trading partners, and it could be subjected to compensation to be granted to trading partners (and retaliation by them if there was a disagreement on the level of compensation between the country imposing a safeguard and its trading partners). The first condition was clearly putting any country initiating a safeguard at odds with the coalition of all the existing and potential exporters of the product concerned. The second condition was imposing an *ex ante* unknown price on the measure envisaged. None of these conditions were relevant in the case of 'voluntary export restraints' (VERs) and other 'grey measures' – the most used, though GATT-inconsistent, instruments of protection of the 1960s and 1970s. And, none of these conditions were required by anti-dumping procedures, the preferred instrument since the early 1980s.

The Uruguay negotiators were very conscious of the substitutability between the various instruments of contingent protection. As a result, they tried to make more attractive the use of safeguard measures, in the hope of reducing the use of anti-dumping measures and ensuring the implementation of the ban on voluntary export restraints and other grey measures. In particular, the Uruguay Safeguard Agreement specified that compensations could not be requested in most instances for the first three years that a safeguard measure is in effect.

Despite such changes, safeguards remain relatively unpopular, compared to anti-dumping. There have been more safeguard investigations initiated between 1995 and 2005, but their number remains relatively modest (120 by developing countries and 25 by developed countries) with 70 measures imposed (59 by developing countries and 11 by developed countries). However, a word of caution may be necessary here. Looking at the mere number of cases does not fully reflect the renewed importance of safeguard compared to anti-dumping. This is because a safeguard action tends to have a

coverage systematically wider than an anti-dumping action, for two reasons. Firstly, its 'non-discriminatory' feature means that a safeguard action covers all the countries in the world – although, as shown below, the users of safeguards tend successfully to circumvent this non-discriminatory provision through various ways. Secondly, the coverage in terms of goods of a safeguard action may be much greater than the coverage of an anti-dumping action. There is no systematic measure of how much greater is, on average, the coverage in terms of countries and products of a safeguard action compared to the coverage of an anti-dumping action. Some safeguard cases (steel case) suggest that a safeguard action can be the equivalent of up to 50 anti-dumping actions.

The last decade has also witnessed the emergence of new provisions close to Article XIX: specific safeguards in the Uruguay Agreement in Agriculture (Article 5) in the General Agreement on Trade in Services (Article X) and in the Agreement on Apparel, Textile and Clothing (Article 6) and a specific safeguard associated to acceeding countries (particularly targeting at China). There have been hundreds of safeguard restrictions taken under the separate provisions on agriculture and textiles. Last but not least, the Doha negotiators have show a strong attraction to introduce a host of new provisions of this type in a potential Agreement. No wonder then that there is some renewal of interest in the safeguard actions, as best illustrated by the substantial number of WTO dispute settlement proceedings dealing with safeguards.

That said, safeguards are temporary trade barriers, and as such hurt trading partners. A natural question is therefore whether they could nevertheless be defended from an efficiency point of view, that is, whether the existence of such an instrument in a trade agreement increases the size of the cake that its members share. Safeguards may indeed play such a role, but their practical implementation is beset with the risk of abuse.[1]

A SAFEGUARDS AS A 'SAFETY VALVE EASING ADJUSTMENT'?[2]

The economic environment is constantly changing: new products and production technologies are discovered, consumer tastes change, governments come

[1] See Sykes (1990, 1991) for analysis of the role of safeguards in trade agreements, in particular as viewed from the perspective of public choice theory. See also Deardorff's (1987) treatment of the role of tariff and non-tariff safeguards when social preferences are represented by a Corden 'conservative social welfare function'. See also Bagwell and Staiger (1990, 2005).

[2] This section borrows heavily from Horn and Mavroidis (2003).

and go, there are wars, investments are made, new firms see the light of day and so on. For a trade agreement to be fully efficient, it would need to adapt to these changes. This adaptation could be fully achieved only under two special circumstances. If the parties could perfectly foresee the path of events, then they could specify an agreement (contract) at the outset that would specify how the agreement terms would change along this path. Alternatively, in the absence of perfect information, the parties may want to renegotiate the agreement any time a change occurs, and write a fully state contingent contract specifying commitments for each possible outcome of the underlying economic environment.[3] It would, under either of these circumstances, be possible to specify a trade agreement that ex post ensures the desirable levels of trade. If desirable, this agreement could ensure a gradual adjustment to the changed environment. Hence, in neither case would there be a role for any provision that allowed for an ex post change in tariff bindings.[4]

Tariff bindings in actual trade agreements are typically not conditioned on external events, however. There is therefore a need for instruments that allow ex post adjustment of effective levels of bindings (that is, for escape clauses) and the GATT includes several provisions to this effect. Some of them are remedies to problems that are not related to specific industries. Arts XII and XVIII-B allow for protective measures in response to economy-wide macroeconomic (balance of payments) disturbances. Art. XXVIII could address problems in specific industries since it permits renegotiation with other contracting parties of particular bindings. It might thus allow for more long-run, but also presumably more time-consuming, solutions to problems of ex post inefficient tariff bindings.

What is then, the role of Art. XIX GATT, and the SG Agreement[5] in this arsenal of escape clauses? Such safeguard measures can be unilaterally imposed, and might for this reason be a quicker response to changes in the

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[3] The difference between the two scenarios is that, in the former, the contract would specify the commitments of the Members at each date. These would then vary over time in response to changes in the external environment. In the latter case, since the realization of these external events would be unknown at the contracting date, the contract would specify for each date commitments for each possible realization. This would thus be a significantly larger contract, but would in principle achieve the same thing as the first contract.

[4] Tariffs are the only permissible form of protection in the WTO regime which cannot be countered; quotas are illegal, domestic measures have to observe the non-discrimination principle, and subsidies can be challenged either through countervailing duties or through other legal mechanisms. As of 2001, there are no non-actionable subsidies.

[5] As will be shown in detail *infra*, the safeguards regime of the WTO is reflected in Art. XIX GATT and the WTO Safeguards (SG) Agreement.

economic environment in particular industries (depending on the administrative requirements imposed on safeguard investigations) than for instance an Art. XXVIII renegotiation.[6] But Art. XIX GATT safeguards are not the only measures that can be unilaterally imposed – both anti-dumping duties and countervailing duties can be imposed without negotiation with the exporting country.

However, Art. XIX GATT safeguards differ from the latter measures in two important ways. Firstly, safeguards recognize that the problem flows from the failure of the domestic import-competing industry that has been unable to face an import surge from the foreign exporters without being exposed to 'unfair' competition (a point underlined in section D below). Secondly, and this is a logical consequence of the first point, safeguards are temporary measures. They are meant to temporarily slow the pace of adjustment to changes in the external economic environment, whereas anti-dumping measures and countervailing duties can be in place for as long as the dumping or subsidization continues.[7]

Both aspects make central the notion of 'adjustment costs', and the use of the safeguard measures in practice is frequently tied to this notion. The question then arises whether such an instrument can be defended from an economic point of view, in the sense that it might enhance the efficiency of the trade agreement, that is, increase the size of the pie the parties to the contract share through the agreement.

The economic notion of 'adjustment costs' is amorphous.[8] The interpretation we have in mind refers to the cost accruing owing to the transition from one equilibrium to another (and thus does not involve a comparison of the final outcome with the initial situation). To define more precisely such costs we need to agree on the criterion according to which costs are evaluated. We start by considering adjustment costs from the point of view of social welfare maximization. But we will discuss other objectives as well.

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[6] We implicitly assume that there are costs associated with contracting, so that the parties do not negotiate a new contract each time the environment changes.

[7] Suppose that a WTO Member imposes a four-year safeguard measure on steel. At the end of this period, it has two options: either to extend the measure up to four (additional) years (Art. 7.2 SGA), or alternatively not to extend it. In the first case, it has to wait for another eight-years before imposing a safeguard measure on steel anew; in the second case, four years. No similar rule applies in the case of anti-dumping, where after the sunset of a measure five years after its imposition (11.3 Anti-dumping Agreement), the importing country can effectively extend the anti-dumping measure.

[8] Trade theory often pays lip service to the existence of adjustment costs, but relatively little work has been done on their sources and consequences.

Consider an import-competing domestic industry (lamb meat production, say) that has suffered a severe negative shock: foreign capacity has permanently expanded, and prices have fallen significantly as a result. As matters stand, the industry has to shed 12 000 people. Suppose first that they could all immediately find employment in the beef meat industry, but at lower wages. This lowering of the wage would (ideally adjusted by the price decreases generated by cheaper imports) obviously be costly to workers. But it would not be considered as an adjustment cost, since it would simply reflect differences between two full capacity equilibria, with no transitional period in between: the lowering of the wage is not a cost incurred during the transition from one employment situation to another.

Let it now take each worker six months to search for new employment, no matter what, and during this period the worker has to remain unproductive. This would be a social adjustment cost: during the transition period the economy is temporarily producing at less than its long-run full capacity. But this cost does not depend on the speed of adjustment, since each worker by assumption has to be unemployed for six months, no matter what. This period of reduced output is essentially an unavoidable investment in a more efficient production pattern. It would hence not provide a rationale for imposing a safeguard measure that gradually moved workers into the beef industry, since such a measure would not affect the total magnitude of adjustment costs, but would just cause a costly delay to the necessary adjustment.

As a third possibility, assume that each quarter 6000 vacancies are opened in the beef meat industry. A fine-tuned safeguard that gradually reduced the work force in the lamb meat industry could then ensure that 6000 workers were reallocated during the first quarter, and another 6000 the next, without anyone having to be temporarily unemployed. By contrast, if all 12 000 had to leave the lamb meat industry immediately, 6000 of them would be unemployed for a quarter.[9] The speed at which the adjustment takes place thus affects the aggregate adjustment costs, and there is a case for a safeguard. This provides efficiency-enhancing rationale for safeguards: to reduce temporarily the pace of adjustment in order to reduce adjustment costs.

This example deserves several remarks:

(a) The example presumes that the alternative to the safeguard is that all 12 000 workers immediately leave the industry. But why do not 6000 workers remain in the lamb industry during the first quarter and offer to

[9] To make the case even stronger, suppose that workers lose productive skills during their period of unemployment, or lose self-confidence and thus search less intensively for new jobs, or suffer mentally from the unemployment.

work at sufficiently low wages for the industry to want to retain them? If wages were reduced this way, there would be no unnecessary loss of output during the transition, and hence no case for a safeguard (or at least a weaker case). The reason must be some form of inflexibility in the wage, arising from, for instance, labour union resistance to wage cuts, or minimum wage legislation. More generally, in order for government intervention to have an efficiency-enhancing role to play, the privately perceived incentives to cope with adjustment must be incorrect from a social point of view (or from a government point of view). If the private sector puts the same emphasis on these costs as the government, and has access to the same (possibly imperfect) information about the future evolution of the economy, and the economy is not distorted in other respects, it does not suffice that there are adjustment cost that depend on the pace of adjustment, for a role for safeguards to exist. For instance, in the example above, the implicitly assumed wage rigidity implied that the cost of labour perceived by the lamb meat industry exceeded the true social cost of this labour, which should reflect the opportunity cost of workers.

(b) The example presumes that the shock to international prices is permanent, and the economy will therefore eventually have to adapt to the new circumstances. If the shock were temporary, a safeguard could under certain circumstances serve a slightly different role, by preventing adjustment costs to arise from resources first moving out and then back into the industry. Again, for such a role to arise it must be that the owners of these resources do not have the right incentives, as perceived from a social point of view, to avoid these adjustment costs by letting resources remain in the industry during the temporary slump.

(c) The examples above presume for simplicity's sake that the government has full information about relevant aspects of the future. In practice, there is of course often considerable *uncertainty* about whether negative shocks are transitory or permanent, and this uncertainty may influence the appropriate length and magnitude of a safeguard measure. But this uncertainty does not in itself add any reason for a government intervention in the form of a safeguard, as long as the government is not better informed than the private sector.

(d) In the examples above, the adjustment costs stemmed from the reallocation of labour. But one can tell similar stories for the reallocation of other factors of production, machinery, for instance.

The reasoning has so far identified two desirable properties of safeguards, which contribute to enhance the efficiency of a trade contract. In their capacity of providing escape from inflexible contract terms, they may increase the

efficiency of the contract after external shocks (even in the absence of adjustment costs that depend on the speed of adjustment). But they also have a separate role to play: to reduce temporarily the rate of adjustment in order to reduce the total amount of adjustment costs.

There may be a related, additional source of efficiency gains from safeguards, a source that is often emphasized in the policy debate: safeguards may induce countries to liberalize further. Consequently, the combined effect of the induced liberalization as well as the possibility to increase tariffs *ex post*, may result in a fall in the average level of protection.[10] Another version of this argument, based more on a public choice approach where governments are driven at least partly by other motives than social welfare maximization, is discussed by Sykes (1991). The argument is that governments may after trade negotiations face strong pressure for protection in certain industries. A safeguard mechanism makes it possible to give in to such pressures, and thus to avoid political setbacks if participating in liberalization. As a result, governments are more prone to liberalize *ex ante*. While this is not a unique feature of safeguards (it is shared by other escape clause mechanisms), the potential of safeguards to avoid adjustment costs might serve as an additional motive for governments to liberalize.

B SAFEGUARDS AS AN INSURANCE SCHEME

Some of the problems (and virtues) associated with safeguard actions are illuminated by viewing them as *insurance* mechanisms, an inexact but useful analogy.[11] An essential character of both trade agreements and insurance contracts is that one side in the contractual relationship may be subject to an adverse shock after the signing of the agreement. In an insurance contract there is a net transfer of resources from the insurance company to the insured party. Similarly, Art. XIX GATT permits a Member that is exposed to a sufficiently severe negative shock to increase a trade barrier – that is, to hedge against the possibility that certain 'unforeseen' events occur. Formally, the Member has to provide *substantially equivalent* compensation to its trading partners, but it seems likely that trading partners will not achieve full compensation: they

[10] Important as this effect may seem, we are not aware of any serious empirical evidence of its existence.

[11] Such a perspective on safeguards is natural also from a theoretical point of view, since malfunctioning private insurance markets may serve as a basis for welfare-enhancing unilateral trade policy interventions. Of relevance to the issues discussed here is also the 'tariffs as insurance' literature.

would have to go through a possibly lengthy and costly dispute procedure to obtain the compensation, which would serve to reduce their incentives to insist on full compensation.

The similarity between safeguards and insurance schemes does not stop here, however. Just as regular insurance contracts seek to limit the possibility of abuse through complex restrictions on their applicability, many of the features of Art. XIX GATT and the SG Agreement can be seen as attempts to limit such problems. For instance, a basic problem in the case of regular insurance contracts is the conflict between risk sharing and moral hazard: on the one hand, it is desirable to reduce the risk that a risk-averse party is exposed to by letting a less risk-averse party carry more of the risk. The fact that this is efficiency enhancing (yields gains from trade) is evidenced by the insured party's willingness to pay an insurance premium to be relieved of the risk. On the other hand, the insurance may adversely affect the insured party's incentives to avoid risk – it may cause a *moral hazard* problem.

It is easy to identify potential *moral hazard* problems in the context of safeguards: in particular, countries could be tempted to refrain from undertaking measures that would prepare the economy for shocks that might occur in a liberalized trade environment in the expectation of being able to rely on safeguards should a problem arise. A number of the requirements in Art. XIX GATT and in the SG Agreement are naturally seen as means to limit such incentives. For instance, a safeguard can only be invoked in the case where the injury *inter alia* stems from increased *imports*. A *first-best* risk-sharing contract (the optimal contract in a situation without moral hazard problems and so on) would not restrict the insurance to injury from increased imports. But if any domestic negative shock could to a significant extent be passed on to trading partners, the incentive for countries to pursue reasonable policies would be diminished. On the other hand, when disturbances emanate from abroad, it is less likely that they are the result of negligence or beggar-thy-neighbour behaviour by the importing country. Furthermore, in order to verify that increased imports are really the source of injury, WTO Members are required to establish a *causal link* between the two, just like regular insurance contracts require the insured party to verify any claims. Another defence against moral hazard is the requirement that the safeguard solves a problem that could not have been prevented through diligent behaviour – the import surge must be *unforeseen*.[12]

[12] We will return to a detailed discussion of *increased imports causing injury* to the domestic industry producing the *like product* as a result of *unforeseen developments*; that is, the conditions which must be cumulatively met for safeguards to be imposed in a WTO-consistent manner.

The notion of 'unforeseen developments' is central to safeguard as an insurance scheme, and the use of the safeguard measures in practice is frequently tied to this notion. In this context, three remarks are useful. Firstly, for how long can an event be said to be 'unforeseen'? From an economic perspective, it would seem appropriate to relate unforeseen developments to 'recent' concessions. However, most WTO Members do not share this view, and routinely relate unforeseen events to concessions granted many years ago.

Secondly, could unforeseen events include macroeconomic events, such as financial crises or currency variations? From an economic point of view, a positive answer to this question seems far-fetched or unbalanced, because, if macroeconomic events may reduce the expected gains from a given trade concession, they may, at the same time, increase the gains expected from other concessions. However, WTO Members routinely tend to focus on the first impact and to ignore the second one.

Lastly, could a safeguard measure taken by a WTO Member constitute an unforeseen development for other WTO Members and hence constitute a basis for adopting safeguard actions? This question is crucial since it has the capability to trigger a cascade of safeguards, as indeed occurred in the steel industry in the early 2000s. WTO Members tend to see a safeguard measure taken by one Member as an unforeseen development to the extent that it may generate fluctuations in the terms of trade and change trade flows. Such an approach relies on a crude perception of the potentially diverted trade flows that ignores factors which could reduce, or even counterbalance, the initial trade diversion. For instance, the trade diversion predicted by the European Commission following the US (2002) safeguard measures on steel did not materialize.

Another generic problem facing the design of an insurance contract arises when the outcome is not perfectly observable. For instance, theft is often by its very nature hard to verify, and an insurance company largely has to trust that reported theft has actually occurred (even though it is also aided by laws against fraudulent insurance claims). When certain outcomes are not observable to the party providing the insurance, the contract needs to be designed so as to guarantee that the insured party has incentives not to over-report, or such that it is only based on circumstances that are verifiable by the insurer. A very similar problem may arise in the context of safeguards in trade agreements, where there is a need to prevent Members from claiming injury that has not occurred. In response, a country wanting to impose safeguards has to provide evidence that its industry is suffering *serious injury*, or imminent threat to do so. Both the distribution of the burden of proof, as well as the fact that the injury must be serious, tend to ease the observability problem.

Consequently, there are at least two potentially efficiency enhancing features of escape clauses in general: they allow for *ex post* correction of contract terms in response to changes in external events, and they temporarily

reduce the rate of adjustment in order to reduce the total amount of adjustment costs. In addition, they may thereby also provide incentives for further *ex ante* liberalization. A distinguishing feature of Art. XIX GATT (and SG Agreement) safeguards, is that they are temporary measures that can be invoked *ex post* in response to external shocks. They are more quickly administered than Art. XXVIII renegotiations, and they are not conditioned on a finding of dumping by foreign firms, or subsidization by foreign governments.

C DRAWBACKS

We have so far painted a rather rosy picture of safeguards (and escape clauses more generally). This picture requires several crucial caveats. Firstly, it helps identify circumstances under which a safeguard might improve matters relative to a situation where *nothing* is done. It has not been argued, however, that an import restriction would be the *best* way of coping with the problem. For instance, if the source of the wage rigidity cannot be removed, it might still be preferable to use employment subsidies, or even production subsidies, since these do not distort consumer prices to the same extent.[13]

Secondly, we have neglected any impact that the safeguard may have on the incentives eventually to move out of the industry, by implicitly assuming away any form of strategic interaction between the private sector and the government at a later stage. In practice, firms and workers often remain in the protected industry with the rational expectation that the government will continue to adjust them also in the future. There is a notable body of economic literature exploring various aspects of this essential point. For instance, it has been shown that tariffs or quotas that remain in place until a firm adopts a new technology (in such a case, adjustment is defined as the need of a domestic firm to catch up foreign technology) always delay the timing of the firm's technology adoption decision. Indeed, as pointed out by Bown (2005), the targeting principle (one instrument for one problem) suggests that it is not possible for a single restricting safeguard policy to be the most efficient instrument at inducing *both* resource entry (as in the above catching up case) and resource exit (as in the above lamb meat example).

Thirdly, the reasoning above showed how social adjustment costs might provide a rationale for social welfare-maximizing governments to include a safeguard provision in a trade agreement. But such costs should also be of concern to governments that are more sensitive to the influence of special

[13] Of course, if the concern is not efficiency but equity, temporary income support might be better.

interest groups. The weight that such a government puts on these costs may depend on who is carrying them, but the fact that the economy's productive capacity is reduced from a rapid rate of adjustment should reasonably be of concern to a broad range of government types.[14] In this respect, it is worth noting that the economic literature taking into account the interactions between industry adjustment, lobbying and the political response suggests that the use of safeguard measures can raise future protection to the extent that it reduces adjustment, hence that it fails to reduce future lobbying efforts.

Fourthly, very little is known empirically about the magnitude of social adjustment costs. Economists often dismiss these as being small and swamped by the gains from trade liberalization, even though it is acknowledged that they typically fall upon a few individuals, while the benefits from trade liberalization are spread over many more. Even less is known empirically about the extent to which adjustment costs depend on the speed of trade liberalization. But, for what it is worth, our intuition suggests that the speed of adjustment can indeed often importantly affect aggregate adjustment costs.

Last, but not least, attention should be paid to the true impact of the non-discriminatory clause. There are two main different ways for safeguard measures to incorporate a discriminatory dimension. Firstly, there are formal exceptions for partners in preferential trade agreements and for small developing countries. As expected, these formal exceptions tend to allow the exporters from the exempted countries to gain market share at the expense of the non-exempted countries. Secondly, non-discrimination can be channelled through the type of safeguards measures taken. Safeguards based on quantitative restrictions preserve existing market shares better than tariff-based safeguards and hence discriminate against exporters whose market share has recently been growing. Lastly, safeguards tend to cause bigger decreases in market shares for fast-growing exporters and new entrants.

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[14] Are adjustment costs in the sense of reduced aggregate output *necessary* for governments to rationally include a safeguard provision in a trade agreement? We here have to speculate, since we are not aware of any literature to lean against. But just like an accident involving a large number of casualties seems to attract more media and political attention than several smaller accidents combined, there also seem to exist 'political adjustment costs' that depend on the speed of adjustment. For instance, large layoffs may be more costly politically than the same number of layoffs when spread over a period of time, even if the total amount of unemployment remains the same in both cases, due to more negative media coverage. If so, there would be a role for a safeguard mechanism, even without adjustment costs in the sense discussed above.

D SAFEGUARDS AND VOLUNTARY EXPORT RESTRAINTS (VERs)

Art. XIX GATT and Art. 2.2 SG (as of the advent of the WTO), request WTO Members to apply safeguard measures irrespective of their origin. Hence, the WTO regime does not allow interested states to *target* particular exporters (sources of supply). This regime was perceived as quite inflexible by countries interested in targeting specific sources of supply. Hence, a practice parallel to that of safeguards developed in the 1960s to the 1980s: some GATT contracting parties, upon request, would agree to limit their export towards particular destinations. This is how the notorious *voluntary export restraints* (VERs) saw the light of day. So a VER is not a formal treaty, it is, in practice, a unilateral reduction of exports.[15]

The legality of VERs was not formally tested by a GATT Panel.[16] There were admittedly few, if any, incentives to mount a legal challenge: the requesting state would not normally be attacking a practice it requested; and the country limiting its exports was adjusting itself in a comfortable second-best, as the work of Smith and Venables (1991) has demonstrated, whereby they could capture monopoly rents while re-thinking their output strategies.[17] The absence of a formal condemnation notwithstanding, a series of good arguments could be advanced in support of the opinion that they violate both Art. XI GATT (since they effectively amount to a quantitative restriction) and Art. XIX GATT (in light of their discriminatory character).

Art. 11.2 SG put an official end in this discussion, as far as its legal dimension is concerned, by outlawing recourse to VERs.[18] However, a footnote to Art. 11.2 SG reads: 'An import quota applied as a safeguard measure in conformity with the relevant provisions of GATT 1994 and this Agreement may, by mutual agreement, be administered by the exporting Member.' The wording of this provision does not exclude VERs having been introduced by the back door: indeed, a QR administered by the exporter has all the ingredi-

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15 The reduction, of course, would not take place absent a request to this effect.

16 Although the Panel Report *Japan – Trade in Semiconductors* faced facts which closely resemble a VER.

17 Mattoo and Mavroidis (1995) discuss the invocability of EC competition laws to challenge the consistency of the VER on cars concluded between Japan and the European Community. They conclude that, in all likelihood, Japanese producers could hide behind 'sovereign compulsion' defence with good chances of thwarting a legal challenge against them.

18 This does not mean, however, that the incentives to conclude such arrangements have been abolished as well. On the other hand, in the absence of an *ex officio* complaint in the WTO legal system, it is difficult to see how, if concluded, they will be challenged before the WTO.

ents of a VER. However, a closer look points to a different direction: first, only QRs in conformity with this Agreement will, if at all, be administered by the exporter. This means that the procedural requirements reflected in this Agreement will have to be respected (*quod non* in a case of a VER); second, the term administered appearing in the footnote probably means that the exporting country is simply entrusted with the duty to ensure that no more than the quantities unilaterally defined by the Member taking the safeguard action will be exported. It does not necessarily mean that the rents will stay with the exporter. The rents could, theoretically at least, stay with the importer.[19] Legally speaking, this understanding of the footnote is in line with a contextual interpretation of Art. 11.2 SG, since, by virtue of Art. 11 SG, VERs are outlawed.

That said, it should be underscored that many anti-dumping measures consist in VERs. For instance, the 'quantity undertakings' in EU anti-dumping practice are undertakings taken by the defendants to limit their exports to the European market(s) covered by an anti-dumping investigation. This observation deserves two comments. Firstly, it means that the frequent statement made by trade officials according to which the VERs ban imposed by the Uruguay Round has been a success should not be taken very seriously. Secondly, it means that the WTO regime still maintains at least two elements making expensive the use of contingent protection (the above footnote in the case of safeguard, and the possibility of undertakings in the case of anti-dumping) echoing the need of 'cash payments' for an optimally constrained use of contingent protection (Bagwell and Staiger 2005).

E SAFEGUARDS AND *UNFAIR* TRADE

The AB, in its report on *US – Line Pipe*, had the opportunity to underscore its understanding that safeguards should be distinguished from other contingent protection in that they do not address, what the AB termed, *unfair* trade (para. 80):

> Before turning to the first issue raised in this appeal, it is useful to recall that safeguard measures are extraordinary remedies to be taken only in emergency situations. Furthermore, they are remedies that are imposed in the form of import restrictions in the absence of any allegation of an unfair trade practice. In this, safeguard measures differ from, for example, anti-dumping duties and countervailing duties to counter subsidies, which are both measures taken in response to unfair trade practices. If the conditions for their imposition are fulfilled, safeguard measures may thus be imposed on the 'fair trade' of other WTO Members and, by

[19] This point is credited to lengthy discussions with Jagdish Bhagwati and Anastasios Tomazos.

> restricting their imports, will prevent those WTO Members from enjoying the full benefit of trade concessions under the *WTO Agreement*. (Italics in the original)

This observation serves as a discouragement 'light-heartedly' to have recourse to safeguard measures. We will return to a discussion of this point *infra*, when we discuss the standard of review applied by WTO adjudicating bodies.

F INJURY AND CAUSATION IN THE SAFEGUARD CONTEXT

The safeguard instrument has triggered a lively debate on how to define the two key terms of 'injury' and 'causal relation', and how to give them an economically sound operational interpretation.

This debate was driven by two reasons. Firstly, imposing a safeguard measure requires proving the existence of a 'serious' injury, compared to the weaker 'material' injury condition imposed by anti-dumping provisions. A higher injury threshold has been perceived as requiring more elaborate evaluation methods than the mere recourse to trends and descriptive data used in anti-dumping. Secondly, because the safeguard insrument does not refer to unfair trade, but rather underscores the failure of the domestic industry to face foreign competition, it was more friendly to the introduction of better assessment procedures before triggering measures, in particular concerning the causal link between import surge and injury. This last incentive was particularly strong in the US because the first US regulations on safeguard (Section 201 of the 1974 Trade Act) specified that imports must be a 'more (or no less) important source of injury than any other factor' for it to constitute a 'substantial' cause. Such a condition was clearly requiring the listing of the potential sources of injury, separating them and quantifying their respective impact before permitting trade reliefs.

All this fits well the economic approach for which the mere coincidence of a higher level of imports and a lower level of domestic production does not mean that imports have caused injury. In such a context, the fact that many safeguard investigations have not gone further than the mere observation of such a coincidence means simply that their outcomes can be easily challenged, including in the WTO. Interestingly there are far fewer disputes on safeguards than on anti-dumping.

Economic analysis provides two broad frameworks making it possible to assess injury with some rigor, and to give a precise operational meaning to the causality condition. What follows describes the simplest possible framework (the 'decomposition' approach) which seems to be the most in tune with the safeguard instrument because it focuses on quantities – be it the surge of

imports or the higher threshold of injury (which can be first expressed in terms of declining domestic production) (Kelly 1988; Irwin 2003). The second framework is examined in the anti-dumping chapter because it focuses more on price aspects which are closer to the dumping notion.

The decomposition approach is based on the three basic components (curves) which define an open market, namely domestic demand, domestic supply and foreign supply (imports). Any equilibrium in this market is jointly determined by these three components, and this equilibrium can be disturbed by shifts in one or two of these components, or in all of them.

It is useful to assume first that only one of the three components is shifting at a given time. In this case, the resulting equilibrium change is easy to derive. For instance, a shift in foreign supply mirroring – say, more efficient foreign producers (one leaves aside the debate about whether this increased efficiency should be seen as an 'unforeseen' event, or not) – reduces the domestic price in the importing country. In turn, this lower price increases domestic consumption and reduces domestic production, and these two changes generate larger imports. In this first scenario, injury has occurred (domestic production has decreased) and its cause is clearly the increased efficiency of the foreign suppliers. Let us now examine a second scenario consisting in an increase in domestic demand. If domestic and foreign supply are unchanged (once again, one component shifts at a given time) the domestic price increases, triggering an increase in imports and domestic production. This second scenario describes a 'no injury' situation since domestic production increases (even though domestic petitioners may argue that they do not get all the benefits of the increased domestic demand since imports do also increase). A third scenario consists in examining the case of a decline in domestic demand, with (now) unchanged domestic and foreign supply. Such a decline reduces the domestic price, hence domestic production – an injury situation. But imports cannot be seen as a source of injury because the decline of the domestic price also reduces foreign supply (imports). All these scenarios with only one of the three market components shifting at a time lead to relatively straightforward conclusions about the existence (or not) of injury and the causal relation between injury and imports.

Reaching such clear assessments becomes much more complex when all the three components are shifting simultaneously; unfortunatly, this is generally what happens in the real world. Then there is the need to isolate the impact of the various shifts, and to have a quantitative breakdown of their relative importance. For achieving these goals, the decomposition approach consists in setting four relations (equations). The demand relation states that domestic demand is a decreasing function of the price, the production relation that domestic supply is an increasing function of the price, and the import relation that foreign supply is an increasing function of the price. The fourth relation

imposes the condition that the market should be cleared by stating that domestic demand is equal to the sum of domestic and foreign supply. Simple calculations based on these four relations allow us to express ('decompose') any change in domestic supply as the combined result of three independent changes (in demand, supply and import) weighted by the appropriate price elasticities of demand, supply and import (Irwin 2003).

Such a quantitative decomposition of the observed change in domestic production into three distinguishable changes (related to demand, import and production) does provide an answer to the legal question of whether imports constitute a 'substantial' cause to the observed injury, or not. For instance, the fact that the import change is negative and of (at least) the same magnitude as the production change is evidence that imports may be a substantial cause of the domestic injury.

This simple decomposition method has a crucial advantage from an operational point of view. It does not impose heavy requirements in terms of data. Data about the pre-shock and post-shock market equilibria are provided by the investigation itself, and estimates of elasticities can be drawn from available sources. That said, this method has limits. The most important one is that it does not show much more than can be seen from the quantity and price trends since the decomposition calculations are fundamentally based on the observed values of the prices and quantities. Another limit is that the decomposition approach makes use of elasticities which are rarely specifically estimated for the case examined and hence represent some risks of errors (that can be managed by allowing multiple elasticities estimates in order to see whether the results are robust, or not, for a wide range of estimates). These limits have induced economists to develop alternative frameworks, described at the beginning of the anti-dumping chapter (Chapter 1).

15. The regulation of safeguards in the WTO

A A TYPOLOGY OF SAFEGUARD MEASURES

A list of all possible *forms* of safeguard measures is not explicitly reflected in the WTO SG Agreement or Article XIX GATT 1994.[1] The latter simply provides that under certain circumstances a Member may be free 'to suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, tariff increases above the bound rate may clearly be used as a safeguard measure. Actually, Article 7 SG provides that provisional safeguard measures should take the form of such tariff increases. But definitive safeguard measures could take the form of quantitative restrictions or any type of quota system as well, as becomes evident from Article 5 SG. Art. 5.1 SG states, *inter alia*: '. . . *if* a quantitative restriction is used' (emphasis added) and Article 5.2 deals with 'cases in which a quota is allocated among supplying countries'. Article 5.1 *in fine* states that Members should choose measures most suitable for the achievement of the objectives, that is, to prevent or remedy serious injury and to facilitate adjustment.

Actually, based on the notifications by WTO Members to the Safeguards Committee, it appears that *ad valorem* tariff increases are the most widely used safeguards instrument. Almost as popular are tariff rate quotas (TRQ) whereby Members reserve a favourable tax rate for a small initial quantity imported. Specific tariff increases are third on the ranking. Quantitative restrictions with some quota system are a distant fourth only.[2] In other words, although one often associates safeguard measures with quantitative restrictions, a quantitative restriction clearly does not exhaust the realm of possible safeguard measures that can be lawfully imposed under the SG Agreement, quite to the contrary.

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[1] This is one of the many differences between the Safeguards Agreement and the Anti-Dumping, SCM/CVD Agreement where the three types of measures are exhaustively listed: provisional measures, anti-dumping/countervailing duties in the form of tariff increases and undertakings. No other 'specific action against dumping/subsidization' may be taken.

[2] Based on the notifications until 7 November 2005, we counted 24 *ad valorem* tariffs, 21 TRQs, 18 specific tariff increases, and 7 QR/Quota measures; 2 variable tariff increases complete the picture.

B WHO CAN IMPOSE SAFEGUARDS AND AGAINST WHOM?

1 Who can Impose Measures?

According to Art. 2 SG Agreement, *individual WTO Members* have the right to impose safeguards (provided of course, that they respect the conditions laid down in the SG Agreement). According to footnote 1 to Art. 2 SG, *a customs union may* impose safeguard measures, *either* as a single unit, *or* on behalf of one of its members.[3] The Appellate Body distinguished between a measure imposed *by the customs union* on behalf of one of its members and a measure imposed by a WTO Member, which happens to be a member of a customs union as well, for itself. In the latter situation, footnote 1 does not apply and is thus not relevant.[4]

In the case of a customs union imposing a measure on behalf of one of its members, footnote 1 specifies that all the requirements for the determination of serious injury or threat thereof shall be based on the conditions existing in that member state and the measure shall be limited to that member state. In other words, it would be possible to have a customs union like, for example, the EC imposing a safeguard measure on behalf of France, if serious injury to the French domestic industry was demonstrated. The safeguard measure would be limited to France, in the sense that the measure, for example the tariff increase, would not apply to exports to Italy. It appears that the 'increased imports' condition also applies only with respect to imports into France, although footnote 1 does not clearly say so.

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[3] Up to the end of 2005, case-law evidences no case where a customs union imposed safeguards on behalf of one of its members. It has always been individual members of a customs union imposing safeguards on their own.

[4] AB Report, *Argentina – Footwear (EC)*, para. 108:

> Therefore, at the time the safeguard measures at issue in this case were imposed by the Government of Argentina, these measures were not applied by MERCOSUR 'on behalf of' Argentina, but rather, they were applied by Argentina. It is Argentina that is a Member of the WTO for the purposes of Article 2 of the *Agreement on Safeguards*, and it is Argentina that applied the safeguard measures after conducting an investigation of products being imported into *its* territory and the effects of those imports on *its* domestic industry. For these reasons, we do not believe that footnote 1 to Article 2.1 applies to the safeguard measures imposed by Argentina in this case. As a result, we find that the Panel erred in assuming that footnote 1 applied, and we, therefore, reverse the legal reasoning and findings of the Panel relating to footnote 1 to Article 2.1 of the *Agreement on Safeguards*.

2 Against Whom are Measures to be Applied?

(a) Application on an MFN basis

Article 2.2 sets forth the important obligation that a safeguard measure be imposed on the imported product 'irrespective of its source'. In other words, and different from the country-specific application of AD duties and CVD measures, safeguard measures are in principle imposed on an MFN basis. It is an all or nothing type of measure, taken in reaction to an increase in imports, from whatever source (and not imports from a particular country). As will be discussed below, Article 9 SG Agreement provides for an exception for developing countries under certain circumstances.

(b) The special case of customs unions or free trade areas – the parallelism principle

In a number of cases involving the application of a safeguard measure by a member of a customs union or a free trade area, *in casu*, Argentina, as a member of MERCOSUR,[5] and the US, as a member of NAFTA, the question of application of safeguard measures on an MFN basis was addressed. Both Argentina and the US had excluded from the scope of their challenged safeguards measures, imports from the other customs union/free trade area members.[6]

The special situation of a customs union or a free trade area as an area in which duties and other restrictive regulations of commerce are eliminated on substantially all the trade between the union or area members (as required by paragraph 8 of Article XXIV GATT 1994) raises two questions: the first is whether members of such an area or union are *required to* impose safeguard measures on other area or union members because of the MFN requirement in Article 2.2 SG Agreement. A second question that arises is whether free trade area or customs union members are actually *allowed* under Article XXIV.8 of GATT 1994 to impose such trade restrictive measures as safeguard measures on each other. Of crucial importance in the discussion is the fact that the last sentence of footnote 1 SG provides that 'Nothing in this Agreement prejudges the interpretation of the relationship between Article XIX and paragraph 8 of Article XXIV of GATT 1994.'

In the cases dealt with so far, the Appellate Body avoided answering these two questions by pointing to the particular facts of the cases. Instead it applied

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[5] MERCOSUR stands for the customs union between Argentina, Brazil, Paraguay and Uruguay.

[6] While these cases thus involved free trade area members rather than members of a customs union, it appears that the relevant findings of the Panels and Appellate Body in these free trade area cases can be applied in a customs union context as well.

the so-called 'parallelism principle'. Both Argentina and the US had included in their examination of *increased imports* and consequent *serious injury*, imports from their customs union/free trade area partners. In so doing, Argentina and the US were not allowed to subsequently exclude from the measure their customs union or free trade area partner imports. In *Argentina – Footwear (EC)*, the AB emphasized that it was not facing a situation where a customs union applied a measure on behalf of a member of the customs union. Rather, an individual WTO Member, Argentina, which happened to be in a customs union, examined imports from all sources and was thus under Article 2.2 SG Agreement obliged to impose its safeguard measure on imports from all sources, including those from other MERCOSUR countries:

> As we have noted, in this case, Argentina applied the safeguard measures at issue after conducting an investigation of products being imported into Argentine territory and the effects of those imports on Argentina's domestic industry. In applying safeguard measures on the basis of this investigation in this case, Argentina was also required under Article 2.2 to apply those measures to imports from all sources, including from other MERCOSUR member States.
>
> On the basis of this reasoning, and on the facts of this case, we find that Argentina's investigation, which evaluated whether serious injury or the threat thereof was caused by imports from *all* sources, could only lead to the imposition of safeguard measures on imports from *all* sources. Therefore, we conclude that Argentina's investigation, in this case, cannot serve as a basis for excluding imports from other MERCOSUR member States from the application of the safeguard measures.[7] (Emphasis in the original)

In *US – Wheat Gluten*, the AB confirmed that there existed a necessary parallelism between the imports examined and the imports covered by the measure. An authority which examines imports from all sources is precluded from applying the measure only to a sub-set of such imports examined. In other words, such an authority puts itself in any case off-side.[8] Whether complying

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[7] Appellate Body Report, *Argentina – Footwear (EC)*, paras 112–13. The AB did not consider whether Article XXIV GATT could be used as a defence to a violation of Article 2.2 SG Agreement as Argentina did not argue before the Panel that Article XXIV of the GATT 1994 provided it with a defence to a finding of violation of a provision of the GATT 1994. Appellate Body Report, *Argentina – Footwear (EC)*, para. 110.

[8] Appellate Body Report, *US – Wheat Gluten*, para. 96:

> The same phrase – 'product . . . being imported' – appears in *both* these paragraphs of Article 2. In view of the identity of the language in the two provisions, and in the absence of any contrary indication in the context, we believe that it is appropriate to ascribe the *same* meaning to this phrase in both Articles 2.1 and 2.2. To include imports from all sources in the determination that increased imports are causing serious injury, and then to exclude imports from one source from the application of

with the parallelism principle necessarily implies a WTO consistent measure, ceteris paribus,[9] is not clear from the Appellate Body's reports, as the facts of the case examined in for example, *Argentina – Footwear(EC)* did not require it to make such statements: 'we wish to underscore that, as the issue is not raised in this appeal, we make no ruling on whether, as a general principle, a member of a customs union can exclude other members of that customs union from the application of a safeguard measure'.[10]

Similarly, and summing up prior case-law, the AB, in its report on *US – Line Pipe*, shied away from clarifying in more general terms the relationship between Article XXIV of GATT and Article 2.2 Safeguards Agreement and avoided addressing head on the issue:

> . . . we do not prejudge whether Article 2.2 of the *Agreement on Safeguards* permits a Member to exclude imports originating in member states of a free-trade area from the scope of a safeguard measure. We need not, and so do not, rule on the question whether Article XXIV of the GATT 1994 permits exempting imports originating in a partner of a free-trade area from a measure in departure from Article 2.2 of the *Agreement on Safeguards*. The question of whether Article XXIV of the GATT 1994 serves as an exception to Article 2.2 of the *agreement on Safeguards* becomes relevant in only two possible circumstances. One is when, in the investigation by the competent authorities of a WTO Member, the imports that are exempted from the safeguard measure *are not considered* in the determination of serious injury. The other is when, in such an investigation, the imports that are exempted from the safeguard measure *are considered* in the determination of serious injury, *and* the competent authorities have *also* established explicitly, through a reasoned and adequate explanation, that imports from sources outside the free-trade area, alone, satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2. The first of these two possible

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the measure, would be to give the phrase 'product being imported' a *different* meaning in Articles 2.1 and 2.2 of the *Agreement on Safeguards*. In Article 2.1, the phrase would embrace imports from *all* sources whereas, in Article 2.2, it would exclude imports from certain sources. This would be incongruous and unwarranted**.** *In the usual course, therefore, the imports included in the determinations made under Articles 2.1 and 4.2 should correspond to the imports included in the application of the measure, under Article 2.2*. (Emphasis added, footnote omitted)

[9] What we mean is this: in all cases before the WTO so far, the authorities themselves started by including in the examination imports from their partners. They were then precluded from excluding such imports later without a new determination that the remaining imports alone satisfied the requirements of the SG Agreement. But no case addressed the question whether in case an authority decides not to apply the measure to its partners, and excludes their imports from the examination, such a measure would – assuming that the conditions for imposition of a measure are met by the remaining imports – necessarily be WTO consistent. In other words, we know what is not consistent, but we do not know yet for sure what is consistent.

[10] Appellate Body Report, *Argentina – Footwear (EC)*, para. 114.

> circumstances does not apply in this case; it is *not* the case here that the imports that were exempted from the line pipe measure – those from Canada and Mexico – were *not* considered in the determination of serious injury. It is undisputed that they were so considered. The second of these two possible circumstances also does not apply in this case. The competent authority – in this case, the USITC – has not provided in its determination a *reasoned and adequate explanation* that 'establish[es] explicitly' that imports from non-NAFTA sources satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.[11] (Emphasis in the original)

However it seems reasonable to extend the application of the parallelism principle to state that in situations where customs union or free trade area partner imports were excluded from the coverage of the examination, such imports may also be excluded from the coverage of the measure. This may be concluded on the basis of the fact that in *US – Wheat Gluten*, *US – Line Pipe* and *US – Steel Safeguards*, the AB examined whether a reasoned and adequate explanation had been provided by the US that imports other than those from NAFTA partners were causing serious injury to the domestic industry.[12]

As the AB found this not to be the case, it did not have to pronounce itself on the question whether complying with the parallelism principle necessarily implies that the measure is WTO consistent, and whether Article XXIV may serve as a defence to a violation of Article 2.2 on the basis of footnote 1. It is noteworthy that the Panel in *US – Line Pipe*[13] considered that Article XXIV *does* provide such a defence. The Appellate Body, after having found a violation of the parallelism principle, declared these Panel findings 'moot and as having no legal effect'.[14]

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[11] AB Report, *US – Line Pipe*, para. 198.

[12] Appellate Body Report, *US – Wheat Gluten*, para. 98; Appellate Body Report, *US – Line Pipe*, para. 188:

> Having determined that Korea did establish a *prima facie* case of violation of parallelism of the line pipe measure, we now examine whether the United States rebutted Korea's argument. To do so, it would be necessary for the United States to demonstrate, consistent with our ruling in *US – Wheat Gluten*, that the USITC provided a *reasoned and adequate explanation* that *establishes explicitly* that imports from non-NAFTA sources 'satisfied the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*'. (Footnote omitted)

[13] See Panel Report, *US – Line Pipe*, paras 7.135–7.163.

[14] Appellate Body Report, *US – Line Pipe*, para. 199:

> Given these conclusions, we need not address the question whether an Article XXIV defence is available to the United States. Nor are we required to make a

It is important to recall that the parallelism principle as discussed in the various cases mentioned was clearly linked to the special case of free trade area partners or custom union members and the text of footnote 1. It would not be correct to say that the Appellate Body was suggesting that any country could impose safeguard measures on a selective basis as long as there was a parallelism between the imports examined and the imports targeted in the measure. A safeguard measure is not an anti-dumping or countervailing measure. The question only arises because an argument could be made on the basis of footnote 1 and the relationship between the Safeguards Agreement and Article XXIV of GATT 1994 that it would be legitimate to exclude such free trade area/customs union partner imports. Similarly, the parallelism principle has been applied in one other situation where the Safeguards Agreement itself explicitly provides for an exception to the MFN principle of Article 2.2, the case of negligible imports from developing countries under Article 9. We refer to our discussion of this matter below. In the absence of such an authorization from the SG Agreement itself or the GATT in general, there is no basis for not applying the measure on an MFN basis and the parallelism question thus does not even arise.

With the caveat that the Appellate Body has been reluctant to pronounce itself clearly on this matter, it appears safe to conclude a WTO Member, which is a member of a free trade area or a customs union, wishing to take safeguard measures, can (a) *either* account for imports from all WTO Members (the members of the free trade area or customs union where it belongs included) and then, on this basis, demonstrate injury; (b) *or* account for imports from all WTO Members minus imports from the members of the free trade area or customs union where it belongs and then establish injury on this basis.

It cannot however, account for imports of *all* WTO Members, and then impose safeguard measures against a sub-set of the WTO Membership (that is, all but the members of the free trade area or customs union where it belongs): a *parallelism* must, therefore, exist between the *origin of imports* and the *identity* of WTO Members which will eventually face safeguard measures. The Appellate Body summarized its case-law in the *US – Steel Safeguards* case in the following manner:

> Thus, where, for purposes of applying a safeguard measure, a Member has conducted an investigation considering imports from *all* sources (that is, *including* any members of a free-trade area), that Member may not, subsequently, without

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determination on the question of the relationship between Article 2.2 of the *Agreement on Safeguards* and Article XXIV of the GATT 1994. We, therefore, modify the findings and conclusions of the Panel relating to these two questions contained in paragraphs 7.135 to 7.163 and in paragraph 8.2(10) of the Panel Report by declaring them moot and as having no legal effect.

> any further analysis, exclude imports from free-trade area partners from the application of the resulting safeguard measure. As we stated in *US – Line Pipe*, if a Member were to do so, there would be a 'gap' between, on the one hand, imports covered by the investigation and, on the other hand, imports falling within the scope of the safeguard measure.[15] In clarifying the obligations of WTO Members under the 'parallel' requirements of the first and second paragraphs of Article 2 of the *Agreement on Safeguards*, we explained in *US – Line Pipe* that such a 'gap' can be justified under the *Agreement on Safeguards* only if the Member establishes:
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> > . . . 'explicitly' that imports from sources covered by the measure 'satisf[y] the conditions for the application of a safeguard measure, as set out in Article 2.1 and elaborated in Article 4.2 of the *Agreement on Safeguards*.[16]
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> We further explained, in that same appeal, that, in order to fulfil this obligation in Article 2, 'establish[ing] explicitly' signifies that a competent authority must provide a 'reasoned and adequate explanation of how the facts support their determination' ,[17] adding that '[t]o be explicit, a statement must express distinctly all that is meant; it must leave nothing merely implied or suggested; it must be clear and unambiguous'. [18,19]

To satisfy the parallelism principle it would in any case be necessary to make a determination on whether imports from those sources that were ultimately included in the safeguard measure '*alone*, in and of themselves, the conditions for the application of a safeguard measure'.[20]

The response to the second and more fundamental question, i.e are customs union members or free trade area partners even allowed to impose such trade restrictive measures as safeguard measures on one another, depends on the interpretation of the so-called *internal* requirement set forth in article XXIV.8 GATT, for example, the obligation for members of a customs union to liberalize substantially all trade among them, certain exceptions notwithstanding. Art. XIX GATT does not feature in Article XXIV.8 of GATT 1994 among the measures that can be exempted from this rule. The Panel in *Argentina – Footwear (EC)* addressed the question and came to the conclusion that Article XXIV does not prohibit customs union members from imposing safeguard measures on each other.[21] On appeal, the Appellate Body reversed the Panel's ruling in this respect as it was of the view that in the absence of any Article XXIV defence by Argentina, the Panel was not justified in considering the

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15 Appellate Body Report, *US – Line Pipe*, para. 181.
16 Ibid., quoting *US – Wheat Gluten*, para. 98.
17 Appellate Body Report, *US – Line Pipe*, para. 181, quoting *US – Lamb*, para. 103.
18 Appellate Body Report, *US – Line Pipe*, para. 194.
19 Appellate Body Report, *US – Steel Safeguards*, paras 441–2.
20 See e.g. Appellate Body Report, *US – Steel Safeguards*, para. 465.
21 Panel Report, *Argentina – Footwear*, para. 8.97.

relevance and scope of Article XXIV.[22] Nevertheless, the case-law which requires a parallelism and thus also the application of safeguard measures on customs union or free trade area partners in case their imports were covered by the examination, clearly indicates that to do so is not prohibited, quite to the contrary it seems.

3 Exclusion of Developing Countries

In accordance with Article 9 of the Safeguards Agreement, a safeguard measure is not to be applied against imports from developing country members in case their share of imports does not exceed 3 per cent. In case there are several of such developing country members, safeguard measures may still be applied against such imports if the imports from these developing country members collectively account for more than 9 per cent of total imports of the product concerned.

Also in case developing country imports are excluded from the measure, it must be demonstrated that the imports that are covered by the measure, alone, in and of themselves, were sufficient to cause serious injury. So, if imports from developing countries are excluded on the basis of Article 9 SG Agreement, an authority must establish in a clear manner that imports from sources other than the excluded developing countries fulfilled all the conditions for the imposition of a measure. We quote from the Appellate Body in *US – Steel Safeguards*:

> As we explained in *US – Wheat Gluten* and *US – Line Pipe*, a competent authority must establish, unambiguously, with a reasoned and adequate explanation, and *in a way that leaves nothing merely implied or suggested*, that imports from sources covered by the measure, *alone*, satisfy the requirements for the application of a safeguard measure. We are *not* suggesting that very low imports volumes, either from some, or from all, of the excluded sources at issue, are irrelevant for a competent authority's findings or the reasoned and adequate explanation underpinning such findings. We recognize that, where import volumes from excluded sources are very small, it is quite possible that the explanation underpinning the competent authority's conclusion need not be as extensive as in circumstances where the excluded sources account for a large proportion of total imports. Nevertheless, even if an explanation need not necessarily be extensive, the requisite explicit finding *must still be provided*. That finding must be contained in the authority's report, must be supported by a reasoned and adequate explanation, and – as we stated above – must address imports from all covered sources, excluding *all* of the non-covered sources. Nowhere in the *Agreement on Safeguards* is there any indication that these important principles can be disregarded in circumstances where imports from some or all sources are at low levels.[23]

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22 Appellate Body Report, *Argentina – Footwear (EC)*, para. 101.

23 Appellate Body Report, *US – Steel Safeguard*, para. 472.

So the parallelism principle also applies in the case of low volume imports from developing countries which are to be excluded if they are negligible under Article 9 SG Agreement.

There is a problem in squaring the application of the parallelism principle in the case of low volume developing country imports with the finding by the Appellate Body in *US – Line Pipe* that there is no need to *explicitly* exclude developing countries from the scope of the measure. According to the Appellate Body, as long as the measure does not effectively apply to such developing country imports, Article 9 has been complied with.[24] But how would it be possible to comply with the parallelism principle without explicitly excluding those developing country imports and examining whether the remaining imports to which the measure applies, in and of themselves, fulfil the conditions for the imposition of a safeguard measure? It seems that, by imposing the parallelism principle also in the developing country context as the AB did in *US – Steel Safeguard*, it *de facto* reversed its ruling on the possible implicit consistency with Article 9.1 in *US – Line Pipe*.

C THE CONDITIONS FOR A LAWFUL IMPOSITION OF SAFEGUARDS

1 Due Process

A WTO Member may apply a safeguard measure only following an investigation by the competent authorities of that Member pursuant to procedures previously established and made public.[25] As in the case of anti-dumping and countervailing measures, an investigation is required before a safeguard measure may be imposed. As is the case with other instruments of contingent protection, *due process* considerations guide the investigation process. However, as will be shown in what immediately follows, *due process*-type of clauses are far less ambitious in the context of the SG- than their counterparts in the context of the AD- and SCM-Agreements

(a) Initiation

First, there is nothing in the Safeguards Agreement relating to the initiation phase. There is nothing subjecting the decision to initiate an investigation to certain procedural or substantive conditions. So, unlike other contingent protection instruments, there is nothing like a distinction between *self-initiated*

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24 Appellate Body Report, *US – Line Pipe*, paras 127–8.

25 Article 3.1 Safeguards Agreement.

(*ex officio*) and *upon request* investigations. This does not mean that an investigation cannot be requested by a private party. The SG Agreement does not prejudge this issue. In fact, the legislative requirements are the same irrespective of how an investigation has been initiated by a private party or *ex officio*. What is clear is that, contrary to the AD and SCM Agreements, there are no standing requirements reflected in the SG Agreement and no other threshold conditions that must be met for an investigation to be lawfully launched. It could be, for example, the case that one economic operator representing a very minor proportion of the domestic industry requests initiation of investigation: an investigation *could* be launched, assuming the investigating authority agrees. That is, there is no need, *neither* for the private party *nor* for the investigating authority to show some preliminary evidence of increased imports resulting from unforeseen developments and causing injury to the domestic industry. It suffices that the investigating authority has decided to initiate the process. As we stated earlier, in the context of anti-dumping measures, the mere fact of initiating an investigation may have a trade distorting effect. That is why in the AD/CVD context, the requirements imposed on both applicants and the investigating authority of sufficient evidence to justify initiation and of sufficient support for an investigation are important in avoiding frivolous investigations. These rules play an essential role in maintaining the balance between the authorities' right to investigate and impose measures and the exporters' right to be able to trade without undue interference or harassment.

Surprisingly therefore, an instrument that is supposed, in the words of the AB, to combat *fair* trade and should be used in extraordinary circumstances only, is not associated with a legal framework that will impose stringent conditions on WTO Members wishing to avail themselves of this possibility.

(b) Article 3.1 and the general due process requirement

Second, the main, if not the only, due process provision of the SG Agreement is Article 3 which unlike its counterparts in AD Agreement or SCM Agreement is of a very general nature and lacks specification as to how the various due process obligations listed therein are to be complied with.

Art. 3.1 SG requires from an investigating authority of a WTO Member (1) to provide reasonable public notice to all interested parties; (2) to provide all such parties with the opportunity to present evidence and their views and to respond to the presentations of other parties; and (3) to publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law (Art. 3.1 SG).[26] Article 3.2 SG incorporates the requirement to

[26] The only other obligation is that Members conduct such safeguards investigations in accordance with procedures previously established and made public.

protect confidential information, a requirement which is similarly present in Articles 6.5 AD Agreement and 12.4 SCM Agreement. Such confidential information may not be disclosed without the permission of the party submitting it. There is no express provision guaranteeing interested parties access to the file, apart from the very general need to provide 'reasonable public notice to all interested parties'. Nor does the Safeguard Agreement contain any disclosure obligations as set forth in, for example, Articles 6.4 and 6.9 AD Agreement.

In spite of the general nature of the obligations under Article 3, the Appellate Body showed a great willingness not to read these general obligations as being devoid of any practical meaning. Rather, the opposite is the case, as the Appellate Body used the general nature of the obligations as a basis for introducing the essential aspects of practically all of the procedural safeguards of the more detailed AD and CVD provisions into the Safeguards Agreement. In its report on *US – Wheat Gluten*, the Appellate Body gave a central role to the interested parties as the primary source of information, and imposed an exacting standard of activity on investigating authorities:

> We turn, therefore, for context, to Article 3.1 of *Agreement on Safeguards*, which is entitled '*Investigation*'. Article 3.1 provides that 'A Member may apply a safeguard measure only following an *investigation* by the competent authorities of that Member . . .' (emphasis added). The ordinary meaning of the word 'investigation' suggests that the competent authorities should carry out a 'systematic inquiry' or a 'careful study' into the matter before them. The word, therefore, suggests a proper degree of activity on the part of the competent authorities because authorities charged with conducting an inquiry or a study – to use the treaty language, an 'investigation' – must actively seek out pertinent information.
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> The nature of the 'investigation' required by the *Agreement on Safeguards* is elaborated further in the remainder of Article 3.1, which sets forth certain investigative steps that the competent authorities '*shall include*' in order to seek out pertinent information (emphasis added). The focus of the investigative steps mentioned in Article 3.1 is on 'interested parties', who must be notified of the investigation, and who must be given an opportunity to submit 'evidence', as well as their 'views', to the competent authorities. The interested parties are also to be given an opportunity to 'respond to the presentations of other parties'. The *Agreement on Safeguards*, therefore, envisages that the interested parties play a central role in the investigation and that they will be a primary source of information for the competent authorities.
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> . . .
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> In that respect, we note that the competent authorities' 'investigation' under Article 3.1 is *not limited* to the investigative steps mentioned in that provision, but must simply '*include*' these steps. Therefore, the competent authorities must undertake additional investigative steps, when the circumstances so require, in order to fulfil their obligation to evaluate all relevant factors.[27] (Footnote omitted)

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[27] Appellate Body Report, *US – Wheat Gluten*, paras 53–5.

With respect to the need to allow interested parties to present their views and respond to other parties' views, the Panel, in its report on *US – Steel Safeguards*, took the restrictive view that Art. 3.1 SG Agreement does not require 'the competent authority to send to interested parties "draft findings" of its demonstration relating to unforeseen developments in order to allow them to comment prior to the publication of the competent authority's reports':[28]

> By inviting comments in response to the questionnaires, and addressing the issue during its public hearings, the Panel is of the view that the United States has complied with its Article 3.1 obligation to provide 'appropriate means in which importers, exporters and other interested parties [can] present evidence and their views'. (Footnote omitted)[29]

Nevertheless, the absence of an explicit, in the sense of a 'clear and unambiguous' explanation of the pertinent issue of fact and law as the existence of unforeseen developments in the published report was considered WTO inconsistent by the Appellate Body.[30] In this case, the complainant (European Community) complained that the United States (defendant) had not fully justified how it had met the *unforeseen developments* requirement. On appeal, the AB took the view, that for compliance with Art. 3.1 SG Agreement to be achieved, a WTO Member must set forth findings and reasoned conclusions on *all* pertinent issues of facts and law since this is the only basis (along with requirements under Art. 4 SG[31]) that Panels can base their findings upon:

> It is precisely by 'setting forth findings and reasoned conclusions on all pertinent issues of fact and law', under Article 3.1, and by providing 'a detailed analysis of the case under investigation as well as a demonstration of the relevance of the factors examined', under Article 4.2(c), that competent authorities provide panels with the basis to 'make an objective assessment of the matter before it' in accordance with Article 11. As we have said before, a panel may not conduct a *de novo* review of the evidence or substitute its judgment for that of the competent authorities.[32] Therefore, the 'reasoned conclusions' and 'detailed analysis' as well as 'a demonstration of the relevance of the factors examined' that are contained in the report of a competent authority, are the only bases on which a panel may assess

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28 Panel Report, *US – Steel Safeguards*, para. 10.65.

29 Panel Report, *US – Steel Safeguards*, para. 10.64.

30 Appellate Body Report, *US – Steel Safeguards*, para. 297. The Appellate Body interpreted the obligation in Article 3.1 to mean that 'the competent authorities are required by Article 3.1, last sentence, to "give an account of" a "judgement or statement which is reached in a connected or logical manner or expressed in a logical form", "distinctly, or in detail."' Appellate Body Report, *US – Steel Safeguards*, para. 287.

31 Art. 4.2(c) SG Agreement has a much narrower scope compared to Art. 3 SG, as it requires from WTO Members to publish their findings on injury (or threat thereof).

32 Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.

> whether a competent authority has complied with its obligations under the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994. This is all the more reason why they must be made explicit by a competent authority.[33]

Thus, responding to a US argument that failure to explain a pertinent issue of fact or law in an Order imposing safeguards should not amount to a finding by a Panel that no investigation had been conducted at all, the AB held that such a finding is actually quite *appropriate* in light of the absence of a reasoned explanation in conformity with Art. 3.1 SG Agreement:

> As we stated above, because a panel may not conduct a *de novo* review of the evidence before the competent authority, it is the *explanation* given by the competent authority for its determination that alone enables panels to determine whether there has been compliance with the requirements of Article XIX of the GATT 1994 and of Articles 2 and 4 of the *Agreement on Safeguards*. It may well be that, as the United States argues, the competent authorities have performed the appropriate analysis correctly. However, where a competent authority has not provided a reasoned and adequate explanation to support its determination, the panel is not in a position to conclude that the relevant requirement for applying a safeguard measure has been fulfilled by that competent authority. Thus, in such a situation, the panel has no option but to find that the competent authority has not performed the analysis correctly.[34]

(c) Publication and notification

Third, the Safeguards Agreement does not impose any detailed *publication* requirements. So, while Articles 12 AD Agreement and 22 SCM Agreement contain specific obligations concerning public notice of the initiation of the investigation and the measures taken, both provisional and final, there is nothing of that kind in the Safeguards Agreement. All that Article 3.1 SG requires is that the investigation shall include 'reasonable public notice to all interested parties', and that the authorities 'shall publish a report setting forth their findings and reasoned conclusions reached on all pertinent issues of fact and law'. But it does not in any way specify this obligation further.[35]

On the other hand, a separate and important *notification* requirement is included in Article 12 of the Safeguards Agreement which requires that the WTO Committee on Safeguards be duly notified, in a timely manner. Assuming that a WTO Member wishes to initiate an investigation, it will have to notify the *Committee on Safeguards* of its decision (Art. 12.1(a) SG). The same duty exists with respect to the decision to impose provisional measures,

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33 Appellate Body Report, *US – Steel Safeguards*, para. 299.

34 Appellate Body, *US – Steel Safeguards*, para. 303.

35 There is of course a clear difference between notice *to interested parties*, and *public* notice, i.e to the public in general.

impose or extend definitive measures, as well as all findings of injury or threat thereof caused by increased imports (Article 12.1(b) and (c)).

The duty to notify is accompanied by the obligation to do so *immediately* upon making such a finding or taking such a decision. The Appellate Body in *US – Wheat Gluten* considered that the ordinary meaning of the term immediately 'implies a certain urgency':

> The degree of urgency or immediacy required depends on a case-by-case assessment, account being taken of the administrative difficulties involved in preparing the notification, and also of the character of the information supplied. As previous panels have recognized, relevant factors in this regard may include the complexity of the notification and the need for translation into one of the WTO's official languages.[36] Clearly, however, the amount of time taken to prepare the notification must, in all cases, be kept to a minimum, as the underlying obligation is to notify 'immediately'.
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> 'Immediate' notification is that which allows the Committee on Safeguards, and Members, the *fullest possible period* to reflect upon and react to an ongoing safeguard investigation. Anything less than 'immediate' notification curtails this period.[37]

With respect to a notification concerning the initiation of an investigation, the AB held that a delay of 16 days was not consistent with the requirements of the SG Agreement; with respect to notification concerning findings of injury caused by increased imports, the AB held that a delay of 26 days is not consistent with the requirements of the SG Agreement either (paras 111, 112 and 116). In both cases, the limited content of the notification was an important element in considering that the notification could have been made sooner.[38] With respect to notifications concerning a decision to apply or extend a safeguard, the AB held that the passage of five days between the date when a decision was taken and its notification is not in contravention of the SG Agreement (para. 129).

Article 12.2 and 12.3 set forth the information that is to be contained in the notifications. A WTO Member which is about to apply or extend a safeguard measure, shall provide the *WTO Committee on Safeguards* with all pertinent information including *inter alia* evidence of injury, or threat thereof, and

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[36] Panel Report, para. 7.128, *Korea – Dairy Safeguard*, WT/DS98/R, adopted, 12 January 2000, as modified by the Appellate Body Report, *supra*, footnote 29, quoted in para. 8.193 of the Panel Report.

[37] Appellate Body Report, *US – Wheat Gluten*, paras 105–106.

[38] The Panel in *Korea – Dairy* also considered that a delay of 14 days for the limited notification of the initiation of an investigation, 40 days for notifying the injury finding, and 24 days for the decision to apply a measure was inconsistent with Article 12.1. Panel Report, *Korea – Dairy*, paras 7.134, 7.136 and 7.145.

information on the proposed measure and its expected duration (Art. 12.2 SG Agreement). At the same time, it will provide all interested WTO Members with the possibility to engage in consultations prior to the imposition of the safeguard measure (Art. 12.3 SG Agreement). The aim of these consultations is to allow affected Members to review the notified information, exchange views on the measure proposed, and reaching an understanding on ways to maintain a substantially equivalent level of concessions or adequate trade compensation (Article 12.3 SG Agreement).

The Appellate Body in *Korea – Dairy* agreed with the view of the Panel that the notification serves essentially a transparency and information purpose:

> We think that the notification serves essentially a transparency and information purpose. In ensuring transparency, Article 12 allows Members through the Committee on Safeguards to review the measures. Another purpose of the notification of the finding of serious injury and of the proposed measure is to inform Members of the circumstances of the case and the conclusions of the investigation together with the importing country's particular intentions. This allows any interested Member to decide whether to request consultations with the importing country which may lead to modification of the proposed measure(s) and/or compensation.[39]

The notifications under Article 12.2 of the finding of injury or threat thereof, and of the decision to take a measure has to be made *prior to the application* of the measure and in sufficient time before the application in order to allow for meaningful consultations. The AB, in its report on *US – Line Pipe* confirmed that WTO Members must provide interested parties with enough time so as to ensure that consultations will be meaningful. In the case at hand, the AB held that the United States, by providing less than 20 days to Korea for consultations, violated its obligations under Art. 12.3 SG Agreement (paras 107 and 111–13):

> Article 12.3 does not specify precisely how much time should be made available for consultations. Therefore, a finding on the adequacy of time in any particular case must necessarily be addressed on a case-by-case basis. The facts before us in this case are these: Korea learned of the actual measure on 11 February 2000 – 18 days before the measure took effect. Korea learned of the effective date of the measure on 18 February 2000 – 11 days before the measure took effect. And, lastly, the United States filed a notification of the measure pursuant to Article 12.1(c) of the *Agreement on Safeguards* on 22 February 2000 – eight days before the measure took effect.
> . . .
> We are mindful of the need for Members to act quickly when applying a safeguard measure. A safeguard measure is, as we have stressed, an extraordinary measure that is applied in extraordinary circumstances. As we have said, the amount of time

[39] Appellate Body Report, *Korea – Dairy*, para. 111 referring to Panel Report, *Korea – Dairy*, para. 7.126.

needed for a meaningful exchange must be judged on a case-by-case basis, depending on the prevailing circumstances. In this case, we do not believe it would have been possible, under the circumstances, to have a meaningful exchange within the period following the proclamation of the effective date of the measure, or even during the period following the issuance of the press release. It would not have been possible, in our view, for Korea to have analysed the measure, considered its likely consequences, conducted appropriate consultations domestically, and prepared for consultations with the United States in so short a time. Indeed, the United States appears to have recognized the need for adequate time to prepare for the consultations held on 24 January 2000 with respect to the measure recommended by the USITC. Those consultations took place 77 days after the initial notification under Article 12.1(b) and 47 days after the announcement of the USITC recommendations. Korea may not have needed that much time to prepare for consultations, but, in our view, Korea needed more time than it got.

The United States also argues that '[s]ince Korea never attempted to hold such consultations, its assertions that they could not be meaningful are pure speculation, and cannot create a *prima facie* case of a breach of the Safeguards Agreement'. We are not persuaded by this argument. The obligation of an importing Member under Article 12.3 is to 'provide adequate opportunity for *prior* consultations' (emphasis added). That obligation cannot be met if there is insufficient time prior to the application of the measure to have a *meaningful* exchange. The importing Member's failure to provide information about a safeguard measure to an exporting Member sufficiently in advance of that measure taking effect is not excused by the fact that the exporting Member did not request consultations during that inadequate time-period.

In the light of these considerations, we uphold, albeit for different reasons, the conclusion of the Panel in paragraph 8.1(7) of the Panel Report that the United States acted inconsistently with its obligations under Article 12.3 of the *Agreement on Safeguards* by failing to provide an adequate opportunity for prior consultations on the line pipe measure with Korea, a Member having a substantial interest as an exporter of line pipe. (Italics in the original)[40]

The requirement under Article 12.2 to provide in a notification the Safeguards Committee with all pertinent information on a number of matters, was considered to be different and less demanding than the requirement under Article 3.1 SG Agreement *in fine* to 'publish a report setting forth their findings and reasoned conclusion reached on all pertinent issues of fact and law'.[41]

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[40] Appellate Body Report, *US – Line Pipe*, paras 107, 111–13.

[41] Panel Report, *Korea – Dairy*, para. 7.125:

But Article 12 refers to 'all pertinent information', while Article 3 refers to 'all pertinent issues of fact and law'. The term 'information' differs from 'issues of fact and law', the former being more general. Based on the ordinary meaning of the terms and their context, a distinction may be made between the less stringent requirement of 'all pertinent information' for the purpose of the WTO notification (Article 12), and 'all pertinent issues of fact and law' for the purpose of the final report (Article 3) which must be published domestically. 'Information' (Article 12)

Nevertheless, according to the AB in *Korea – Dairy*, a notification which does not set forth the findings with regard to all of the 4.2 SG injury factors does not include '*all* pertinent information on . . . serious injury':[42]

> In concluding that there is a minimum objective standard, we do not mean to suggest that 'evidence of serious injury' should include all the details of the recommendations and reasoning to be found in the report of the competent authorities. We agree with the Panel that, if such had been the intention of the drafters of the *Agreement on Safeguards*, they would have simply referred back to Articles 3 and 4 when requiring 'evidence of serious injury' in Article 12.2. There is, however, an intermediate position between notifying the full content of the report of the competent authorities and giving the notifying Member the discretion to determine what may be included in a notification. To comply with the requirements of Article 12.2, the notifications pursuant to paragraphs 1(b) and 1(c) of Article 12 must, *at a minimum*, address all the items specified in Article 12.2 as constituting 'all pertinent information', as well as the factors listed in Article 4.2 that are required to be evaluated in a safeguards investigation.[43] (Footnote omitted)

2 Distinguishing the Right to Safeguard Action, and its Application

The AB, in its report on *US – Line Pipe*, advanced a distinction between (a) the *right* to impose a safeguard; and (b) the lawful *application* of a safeguard. For a *right* to exist, a WTO Member must ensure that it has met all of the requirements enshrined in Art. 2.1 SG Agreement *and* Art. XIX GATT, namely, it must show that its domestic industry has suffered serious injury as a result of unforeseen developments that have led to increased imports; for an *application* to be lawful, the safeguard measure may be applied only to the extent necessary to counteract the resulting damage (paras 83–4):

> A WTO Member seeking to apply a safeguard measure will argue, correctly, that the *right* to apply such measures must be respected in order to maintain the *domestic* momentum and motivation for ongoing trade liberalization. In turn, a WTO Member whose trade is affected by a safeguard measure will argue, correctly, that the *application* of such measures must be limited in order to maintain the *multilateral* integrity of ongoing trade concessions. The balance struck by the WTO Members in reconciling this natural tension relating to safeguard measures is found in the provisions of the *Agreement on Safeguards*.
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> This natural tension is likewise inherent in two basic inquiries that are conducted in interpreting the *Agreement on Safeguards*. These two basic inquiries are: *first*, is there a right to apply a safeguard measure? And, *second*, if so, has that right been

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on a matter is certainly less comprehensive than a 'report setting forth . . . reasoned conclusions' (Article 3) on the same matter.

[42] Appellate Body Report, *Korea – Dairy*, para. 113.
[43] Appellate Body Report, *Korea – Dairy*, para. 109.

> exercised, through the application of such a measure, within the limits set out in the treaty? These two inquiries are separate and distinct. They must not be confused by the treaty interpreter. One necessarily precedes and leads to the other. *First*, the interpreter must inquire whether there is a right, under the circumstances of a particular case, to apply a safeguard measure. For this right to exist, the WTO Member in question must have determined, as required by Article 2.1 of the *Agreement on Safeguards* and pursuant to the provisions of Articles 3 and 4 of the *Agreement on Safeguards*, that a product is being imported into its territory in such increased quantities and under such conditions as to cause or threaten to cause serious injury to the domestic industry. *Second*, if this first inquiry leads to the conclusion that there *is* a right to apply a safeguard measure in that particular case, then the interpreter must next consider whether the Member has applied that safeguard measure 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment', as required by Article 5.1, first sentence, of the *Agreement on Safeguards*. Thus, the right to apply a safeguard measure – even where it has been found to exist in a particular case and thus can be exercised – is not unlimited. Even when a Member has fulfilled the treaty requirements that establish the right to apply a safeguard measure in a particular case, it must do so 'only to the extent necessary . . .'. [44] (Italics in the original)

This distinction has been faithfully (indeed, sometimes *verbatim*) reproduced in subsequent case-law.[45] In what follows we first examine the conditions under which a right to impose a safeguard can be lawfully exercised, before we move to examine the conditions for its lawful application. As the Panel in *US – Steel Safeguards* pointed out, Articles 2, 3 and 4 of the Safeguards Agreement and Article XIX GATT are relevant to examine whether a *right* to impose measures exist, while Article 5 Safeguard Agreement concerns the *application* of such measures:

> In examining whether the United States had a right to impose the specific safeguard measures at issue, the Panel will concern itself with the application of Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT 1994 (the latter being relevant in particular for the assessment of whether the United States was faced with unforeseen developments) in reviewing the report of the competent authority. In relation to the second enquiry, when assessing the appropriateness of such safeguards measures, the importing Member is obliged, when challenged by a WTO Member who has made a prima facie case of inconsistency with Article 5.1 of the Agreement on Safeguards, to justify before the Panel that the safeguard measures were imposed only to the extent necessary to prevent or remedy injury and allow for readjustment. Reversals of this burden of proof may take place.[46]

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44 Appellate Body Report, *US – Line Pipe*, paras 83–4.

45 See, for example, para. 10.14 of the Panel Report on *US – Steel Safeguards*.

46 Panel Report, *US – Steel Safeguards*, para. 10.16.

3 The Right to Impose Safeguards – The Conditions

Art. 2 SG Agreement (entitled *Conditions*) stipulates that for a safeguard to be imposed, three conditions must be cumulatively met: (a) a product is being imported in *increased quantities*; (b) so as to *cause*; (c) *serious injury* to the domestic industry producing the like or directly competitive product. Case-law added a fourth condition: the increased imports have to be the result of *unforeseen developments.* We will discuss each of these conditions in turn, starting with the condition that was unforeseen by the Safeguards Agreement: unforeseen developments.

(a) Condition 1: unforeseen developments

(i) A requirement, according to the AB

The AB, in its report on *Argentina – Footwear (EC)*, held the view that meeting the three conditions mentioned above (increased imports – causing – serious injury) does not suffice for safeguards to be lawfully imposed; a WTO Member must further demonstrate that imports increased *as a result of unforeseen developments*. To reach this conclusion, the AB borrows from Art. 1 SG Agreement which states that safeguard measures will be understood to be the measures provided for in Art. XIX GATT (paras 83, 84, 93 and 94):

> We see nothing in the language of either Article 1 or Article 11.1(a) of the *Agreement on Safeguards* that suggests an intention by the Uruguay Round negotiators to *subsume* the requirements of Article XIX of the GATT 1994 within the *Agreement on Safeguards* and thus to render those requirements no longer applicable. Article 1 states that the purpose of the *Agreement on Safeguards* is to establish 'rules for the application of safeguard measures which shall be understood to mean *those measures provided for* in Article XIX of GATT 1994' (emphasis added). This suggests that Article XIX continues in full force and effect, and, in fact, establishes certain prerequisites for the imposition of safeguard measures. Furthermore, in Article 11.1(a), the ordinary meaning of the language 'unless such action *conforms with the provisions of that Article applied in accordance with this Agreement'* (emphasis added) clearly is that any safeguard action must *conform with* the provisions of Article XIX of the GATT 1994 *as well as* with the provisions of the *Agreement on Safeguards.* Neither of these provisions states that any safeguard action taken after the entry into force of the *WTO Agreement* need only conform with the provisions of the *Agreement on Safeguards.*
>
> Thus we conclude that any safeguard measure imposed after the entry into force of the *WTO Agreement* must comply with the provisions of *both* the *Agreement on Safeguards and* Article XIX of the GATT 1994.
>
> . . .
>
> Our reading is supported by the context of these provisions. As part of the context of paragraph 1(a) of Article XIX, we note that the title of Article XIX is: '*Emergency Action on Imports of Particular Products'*. The words 'emergency

> action' also appear in Article 11.1(a) of the *Agreement on Safeguards*. We note once again, that Article XIX:1(a) requires that a product be imported '*in such increased quantities* and *under such conditions* as *to cause or threaten serious injury* to domestic producers' (emphasis added). Clearly, this is not the language of ordinary events in routine commerce. In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'. And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, a Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation. The remedy that Article XIX:1(a) allows in this situation is temporarily to 'suspend the obligation in whole or in part or to withdraw or modify the concession'. Thus, Article XIX is clearly, and in every way, an extraordinary remedy.
>
> This reading of these phrases is also confirmed by the object and purpose of Article XIX of the GATT 1994. The object and purpose of Article XIX is, quite simply, to allow a Member to adjust temporarily the balance in the level of concessions between that Member and other exporting Members when it is faced with 'unexpected' and, thus, 'unforeseen' circumstances which lead to the product 'being imported' in 'such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers of like or directly competitive products'. In perceiving and applying this object and purpose to the interpretation of this provision of the *WTO Agreement*, it is essential to keep in mind that a safeguard action is a 'fair' trade remedy. The application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.[47] (Emphasis in the original)

The soundness of this construction is doubtful. Art. 1 SG is entitled *General Provision* and, if at all, refers to the *types* of safeguard measures that can be lawfully imposed. It does not purport to regulate the conditions under which a safeguard can be lawfully imposed. By contrast, Art. 2 SG which *is* entitled *Conditions* does not mention *unforeseen developments* among the conditions that must be observed. The fact that the Appellate Body itself considered the 'unforeseen developments' not to be a 'condition' for imposing safeguard measures, but rather 'a circumstance which must be demonstrated as a matter of fact' only adds to the confusion.[48] In any case, for all practical purposes, it

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47 Appellate Body Report, *Argentina – Footwear (EC)*, paras 83–4 and 93–4.

48 Appellate Body Report, *Argentina – Footwear (EC)*, para. 92; Appellate Body Report, *Korea – Dairy*, para. 85. In effect, this distinction is meaningless, as the Appellate Body required, as for any other condition, the same reasoned and adequate demonstration of the existence of this 'circumstance', i.e. of unforeseen developments resulting in increased imports. The Appellate Body thus rejected a US argument that a different standard of review should be applied to 'unforeseen developments' because it

seems that the AB added a condition and thus, as we will see, opened the door to additional problems.[49]

What needs to be demonstrated is not merely the existence of unforeseen developments, but rather the existence of a logical link between the unforeseen developments and the resulting increase in imports for *each of the products* subject to the safeguard measure. This was clearly stated by the Appellate Body in its report on *US – Steel Safeguards*:

> There must, therefore, be a 'logical connection' linking the 'unforeseen developments' and an increase in imports of the product that is causing, or threatening to cause, serious injury. Without such a 'logical connection' between the 'unforeseen developments' and *the product* on which safeguard measures may be applied, it could not be determined, as Article XIX:1(a) requires, that the increased imports of 'such product' were 'a result of' the relevant 'unforeseen development'. Consequently, the right to apply a safeguard measure to *that product* would not arise.
>
> For this reason, when an importing Member wishes to apply safeguard measures on imports of several products, it is not sufficient merely to demonstrate that 'unforeseen developments' resulted in increased imports of a broad category of products that included the specific products subject to the respective determinations by the competent authority. If that could be done, a Member could make a determination and apply a safeguard measure to a broad category of products even if imports of one or more of those products did not increase and did not result from the 'unforeseen developments' at issue. Accordingly, we agree with the Panel that such an approach does not meet the requirements of Article XIX:1(a), and that the demonstration of 'unforeseen developments' must be performed for *each* product subject to a safeguard measure.
>
> . . .
>
> We also agree with the European Communities that '[i]n the present case where the ITC relied upon macroeconomic events having effects across a number of industries, it was for the ITC to demonstrate the 'logical connection' between the alleged unforeseen development[s] and the increase in imports in relation to each measure, not for the Panel to read into the report linkages that the ITC failed to make'. Consequently, we do not find error in the Panel's finding that the USITC was required to provide a reasoned and adequate explanation demonstrating that the

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was not a 'condition' but merely a 'circumstance'. Appellate Body Report, *US – Steel Safeguards*, paras 274–6.

[49] Remarkably, the AB did not spend any time discussing the historical context and the preparatory work in general when deciding on this issue. As a result, the AB report reflects no official account of the will of the founding fathers on this issue. The two Panels on *Korea – Dairy* and *Argentina – Footwear (EC)* that examined the same issue reached the conclusion that 'unforeseen developments' is not a condition for imposing safeguards. While they did so without expressly referring to the negotiating history, they did attempt to explain the absence of this criterion from the Safeguards Agreement by pointing to the rationale for this criterion in the original Article XIX GATT 1947 and to past practice which ignored this criterion. See Panel Report, *Korea – Dairy*, paras 7.42–7.49; Panel Report, *Argentina – Footwear (EC)*, paras 8.64–8.66.

> alleged 'unforeseen developments' resulted in increased imports for *each* product subject to a safeguard measure.[50] (Footnotes omitted)

So, the unforeseen developments cannot be equated with increased imports; rather, the increased imports are *the result of* the unforeseen developments. Unforeseen developments and increased imports are two distinct matters, as was clearly explained by the Panel in *Argentina – Preserved Peaches*:

> It is important to note that Article XIX:1(a) refers to 'imports in such increased quantities and under such conditions' as to cause or threaten serious injury as a result of 'unforeseen developments' and the effect of obligations. The link between these elements, according to which one has certain effects 'as a result' of the other, means that they must be two distinct things. This is consistent with the approach of the Appellate Body in its reports in *Argentina – Footwear (EC)* and *Korea – Dairy* where it referred to a 'logical connection' between these elements:
>
> > In this sense, we believe that there is a logical connection between the circumstances described in the first clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.[51]
>
> The text of Article XIX:1(a) cannot support an interpretation that would equate increased quantities of imports with unforeseen developments.[52]

A necessary by-product of this *extension* of the conditions under which safeguards can be lawfully imposed, is the incorporation in the SG Agreement-regime of the language in Art. XIX GATT that imports must have increased as a result of *obligations assumed* under the GATT. Arguably, this language does not add much to Art. 2 SG Agreement: in the absence of committing to tariff-bindings, a WTO Member flooded with imports will simply raise its applied rate of duties, instead of conducting a full-fledged safeguards-investigation and be requested to comply with various requirements.[53]

(ii) Developments that are 'unforeseen'

By introducing this requirement, the AB requests from WTO Members that increased imports were due to unforeseen developments, and not to the

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[50] Appellate Body Report, *US – Steel Safeguards*, paras 318–19 and 322.

[51] *See* Appellate Body Reports in *Argentina – Footwear (EC)*, paragraph 92 and *Korea – Dairy*, paragraph 85, quoted with approval in *US – Lamb*, paragraph 72.

[52] Panel Report, *Argentina – Preserved Peaches*, paras 7.17–7.18.

[53] See however, Horn and Mavroidis (2003) for a comprehensive discussion of this issue.

'normal' course of trade. Evidently, assuming a concession has been made, other things being equal, one would expect (foresee) increased imports. Such 'normal' expansion of imports is not captured. The problem obviously is where to draw the line. It is of course not an easy exercise to *precisely* determine *ex ante* by how much trade will expand as a result of tariff reductions. Hence, this test cannot be applied with mathematical precision. On the other hand, one possible interpretation of this term could be that it refers to events completely exogenous to trade, for example a fire to the only domestic industry producing the like product. Case-law has contributed some, albeit not far-reaching clarifications in this respect.

Unforeseen versus unforeseeable

In its report on *Korea – Dairy*, the AB had, *inter alia*, the opportunity to explain its understanding of the term *unforeseen*. In its view, *unforeseen* should be read as synonymous to *unexpected*, as opposed to *unpredictable* which would be synonymous to *unforeseeable* (para. 84):

> To determine the meaning of the clause – 'as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions . . .' – in sub-paragraph (a) of Article XIX:1, we must examine these words in their ordinary meaning, in their context and in light of the object and purpose of Article XIX. We look first to the ordinary meaning of these words. As to the meaning of 'unforeseen developments', we note that the dictionary definition of 'unforeseen', particularly as it relates to the word 'developments', is synonymous with 'unexpected'. 'Unforeseeable', on the other hand, is defined in the dictionaries as meaning 'unpredictable' or 'incapable of being foreseen, foretold or anticipated'. Thus, it seems to us that the ordinary meaning of the phrase 'as a result of unforeseen developments' requires that the developments which led to a product being imported in such increased quantities and under such conditions as to cause or threaten to cause serious injury to domestic producers must have been 'unexpected'. With respect to the phrase 'of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions', we believe that this phrase simply means that it must be demonstrated, as a matter of fact, that the importing Member has incurred obligations under the GATT 1994, including tariff concessions. Here, we note that the Schedules annexed to the GATT 1994 are made an integral part of Part I of that Agreement, pursuant to paragraph 7 of Article II of the GATT 1994. Therefore, any concession or commitment in a Member's Schedule is subject to the obligations contained in Article II of the GATT 1994.[54]

Unforeseen, but when?

The next question of course is, when should developments be unforeseen? The

[54] Appellate Body Report, *Korea – Dairy*, para. 84.

Panel Report on *Argentina – Preserved Peaches*, reflecting prior case-law by the AB, records the view that developments should be unforeseen *at the time when concessions were made* (paras 7.26–28):

> We recall that the Appellate Body in both *Argentina – Footwear (EC)* and *Korea – Dairy* quoted the following statement in the *US – Fur Felt Hats* GATT Working Party report of 1951:
>
> > . . . 'unforeseen developments' should be interpreted to mean developments occurring after the negotiation of the relevant tariff concession which it would not be reasonable to expect that the negotiators of the country making the concession could and should have foreseen at the time when the concession was negotiated.
>
> In its report in *Korea – Dairy*, the Appellate Body made the following finding:
>
> > In our view, the text of Article XIX:1(a) of the GATT 1994, read in its ordinary meaning and in its context, demonstrates that safeguard measures were intended by the drafters of the GATT to be matters out of the ordinary, to be matters of urgency, to be, in short, 'emergency actions'. And, such 'emergency actions' are to be invoked only in situations when, as a result of obligations incurred under the GATT 1994, an importing Member finds itself confronted with developments it had not 'foreseen' or 'expected' when it incurred that obligation.
> >
> > We will apply this interpretation and determine whether the competent authorities assessed whether the developments which they identified were unforeseen as at the time the relevant obligation was negotiated. We emphasize that we are not now discussing the time at which the competent authorities must demonstrate the existence of unforeseen developments in order to adopt a safeguard measure.[55] (Footnotes omitted)

This has been criticized as being a highly unworkable test. Sykes (2003) explains that in light of the variables that might influence a potential trade outcome, it is simply impossible to reasonably request from a WTO Member to foresee events that will occur in the not immediate future. To make matters worse, it could, *theoretically* at least, be the case that the time-span is quite long: what if a WTO Member did not make any bindings[56] after the Kennedy or the Tokyo round?[57] Should it still be held liable for not having foreseen events occurring thirty years later? Grossman and Mavroidis (2004) advanced a proposal to the effect that the last round of trade negotiations should be the

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55 Panel Report, *Argentina – Preserved Peaches*, paras 7.26–7.28.

56 As we will see *infra*, usually recourse to safeguards will take place against imports of products which a WTO Member has included in its list of concessions (bindings).

57 The first round took place in the 1960s, whereas the second in the 1970s.

point in time that counts for the purposes of this exercise. Still, the authors accept that even such delimitation cannot by itself take care of all problems that the satisfaction of the *unforeseen developments* requirement might give rise to.

(iii) The need to demonstrate the existence of 'unforeseen developments'

The AB, in its report on *US – Lamb* clarified that, a domestic investigating authority must demonstrate in the order imposing safeguard measures that it observed the *unforeseen developments* requirement. Absence of demonstration is fatal: paras 72–3 relevantly read:

> Although we stated in these two Reports that, under Article XIX:1(a) of the GATT 1994, unforeseen developments 'must be demonstrated as a matter of fact', we did not have occasion, in those two appeals, to examine when, where or how that demonstration should occur. In conducting such an examination now, we note that the text of Article XIX provides no express guidance on this issue. However, as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, 'in order for a safeguard measure to be applied' consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied. Otherwise, the legal basis for the measure is flawed. We find instructive guidance for where and when the 'demonstration' should occur in the 'logical connection' that we observed previously between the two clauses of Article XIX:1(a). The first clause, as we noted, contains, in part, the 'circumstance' of 'unforeseen developments'. The second clause, as we said, relates to the three 'conditions' for the application of safeguard measures, which are also reiterated in Article 2.1 of the Agreement on Safeguards. Clearly, the fulfilment of these conditions must be the central element of the report of the competent authorities, which must be published under Article 3.1 of the Agreement on Safeguards. In our view, the logical connection between the 'conditions' identified in the second clause of Article XIX:1(a) and the 'circumstances' outlined in the first clause of that provision dictates that the demonstration of the existence of these circumstances must also feature in the same report of the competent authorities. Any other approach would sever the 'logical connection' between these two clauses, and would also leave vague and uncertain how compliance with the first clause of Article XIX:1(a) would be fulfilled.
>
> In this case, we see no indication in the USITC Report that the USITC addressed the issue of 'unforeseen developments' at all. It is true that the USITC Report identifies two changes in the type of lamb meat products imported into the United States. These were: the proportion of imported fresh and chilled lamb meat increased in relation to the proportion of imported frozen lamb meat; and, the cut size of imported lamb meat increased. The USITC Report mentions the first of these changes in examining the 'like products' at issue, and mentions both changes under the heading 'causation' while describing the substitutability of domestic and imported lamb meat in the domestic marketplace. However, we observe that the USITC Report does not discuss or offer any explanation as to why these changes could be regarded as 'unforeseen developments' within the meaning of Article XIX:1(a) of the GATT 1994. It follows that the USITC Report does not

> *demonstrate* that the safeguard measure at issue has been applied, *inter alia*, '. . . as a result of unforeseen developments'. (Italics in the original)

This approach proved problematic, especially with respect to any safeguard investigations terminated prior to the AB's re-introduction of the 'unforeseen developments' test in its reports on *Korea – Dairy* and *Argentina – Footwear (EC)*. As investigating authorities seemed to have been under the impression that this requirement had been written out of the Safeguards Agreement by its omission from Article 2 SG, none of the reports referred to such unforeseen developments. A fatal flaw, according to the AB. The Panel in *US – Steel Safeguards* was aware of this problem and decided to take a lenient approach to authorities which after having terminated the investigation re-opened the file to introduce an examination of the unforeseen developments element. The Panel in its report on *US – Steel Safeguards* held the view that, in case of a multi-stage review (in the present case the US investigating authority first issued a report imposing safeguards and then added its findings on unforeseen developments), there is no inconsistency if the investigating authority adds its findings on unforeseen developments at a later stage provided that such findings precede time-wise the application of the safeguard measure.[58]

But just how much explanation or analysis of this requirement which is not mentioned in the Safeguards Agreement is required? The Panel Report on *Argentina – Preserved Peaches* records the view that one phrase is not enough to show that the unforeseen developments requirement was taken into account: demonstration of unforeseen developments, in the Panel's view, amounts to a *reasoned explanation* as to why such developments were unforeseen.[59] By the same token, the AB in its report on *US – Steel Safeguards* held the view that an investigating authority must lay out a reasoned and adequate explanation supporting the view that a development was unforeseen.[60] In the same report, the AB stated that it does not suffice that a WTO Member *considered* data which could be relevant to an unforeseen developments evaluation. It must also *explain* how such data satisfies the *unforeseen developments* requirement:

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58 Panel Report, *US – Steel Safeguards*, para. 10.58.

59 Panel Report, *Argentina – Preserved Peaches*, para. 7.33:

> A mere phrase in a conclusion, without supporting analysis of the existence of unforeseen developments, is not a substitute for a demonstration of fact. The failure of the competent authorities to demonstrate that certain alleged developments were unforeseen in the foregoing section of their report is not cured by the concluding phrase.

60 Appellate Body Report, *US – Steel Safeguards*, para. 279.

> Unlike the United States, we do not see the two cases as the same. The issue in this case is not whether certain data referred to in the USITC report had, in fact, been 'considered' by the USITC. The USITC may indeed have 'considered' all the relevant data contained in its report or referred to in the footnotes thereto. However, it did not use those data to *explain* how 'unforeseen developments' resulted in increased imports. Rather, as the Panel found, 'the text to which the footnotes correspond is either totally unrelated to an explanation of unforeseen developments, or it deals generally with imports without specifying from where those imports came'. Hence, what is wanting here is not the data, but the reasoning that uses those data to support the conclusion. The USITC did not, in our view, provide a conclusion that is supported by facts and reasoning, in short, a 'reasoned conclusion', as required by Article 3.1. Moreover, as we have stated previously, it was for the USITC, and not the Panel, to provide 'reasoned conclusions'. It is not for the Panel to do the reasoning for, or instead of, the competent authority, but rather to assess the adequacy of that reasoning to satisfy the relevant requirement. In consequence, we cannot agree with the United States that the Panel was 'required' to consider the relevant data to which the USITC referred in other sections of its report to support the USITC's finding that 'unforeseen developments' had resulted in increased imports; and, for the reasons mentioned, we do not see how our findings in *EC – Tube or Pipe Fittings* support the United States' view to that effect.[61] (Footnote omitted)

As the Panel in *US – Steel Safeguards* concluded, whether an explanation is sufficient and adequate depends on the fact-specific circumstances of each case:

> The nature of the facts, including their complexity, will dictate the extent to which the relationship between the unforeseen developments and increased imports causing injury needs to be explained. The timing of the explanation, its extent and its quality are all factors that can affect whether a explanation is reasoned and adequate.[62]

(iv) What could constitute ' unforeseen developments' – lessons from case-law

It is interesting to note that, so far, none of the safeguard measures challenged before the WTO passed the 'unforeseen developments' hurdle. As we noted earlier, investigating authorities only started to look into the question of unforeseen developments following the rulings of the Appellate Body in *Korea – Dairy* and *Argentina – Footwear (EC)* establishing the need to demonstrate such unforeseen developments in early 2000.[63] So not surpris-

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61 Appellate Body Report, *US – Steel Safeguards*, para. 329.

62 Panel Report, *US – Steel Safeguards*, para. 10.115.

63 This became painfully clear in the Appellate Body Report on *US – Lamb* where the Appellate Body confronted the US with its earlier expressed view that there

ingly, in all cases, Panels and the Appellate Body found an inconsistency based on an absence of a reasoned and adequate explanation in the report of the investigating authorities of the existence of unforeseen developments and their logical link to increased imports. The *US – Steel Safeguards* case, which is the most recent decision on safeguards, was the first that dealt with a decision by an investigating authority that explicitly decided to address the question of unforeseen developments in an attempt to comply with this 'new' condition. Actually, the US authorities had done so by preparing a Second Supplementary Report, addressing in particular, unforeseen developments.[64] Still, the measure failed to pass muster as the authorities were still found to have failed to provide a sufficient, adequate and reasoned explanation linking the possible unforeseen developments to the specific increase in imports of the products covered by the measure. In the words of the Panel:

> the weakness of the USITC Report is that, although it describes a plausible set of unforeseen developments that may have resulted in increased imports to the United States from various sources, it falls short of demonstrating that such developments actually resulted in increased imports into the United States causing serious injury to the relevant domestic producers.[65]

So, really, we do not know what could be considered as 'unforeseen developments'. What the Panel referred to as a 'plausible set of circumstances' which the US authorities had identified, concerned the Asian and Russian financial crisis at the end of the 1990s, and the strong US dollar and economy.[66] In the words of one of the US Commissioners,

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was no need for a demonstration of unforeseen developments. The absence of any explanation of unforeseen developments in the US authorities' report of the Lamb safeguard measure thus did not come as a surprise to the Appellate Body. See Appellate Body Report, *US – Lamb*, paras 73–4. It is recalled that both the *Korea – Dairy* and *Argentina – Footwear(EC)* reports were adopted on 12 January 2000.

[64] As the Panel noted, 'at no point in the initial USITC Report is the issue of "unforeseen developments" per se mentioned, except, as the complainants have pointed out, in a footnote in the separate view of one commissioner explaining that although such a demonstration is required in WTO law, it is not required by US law'. Panel Report, *US – Steel Safeguards*, para. 10.116.

[65] Panel Report, *US – Steel Safeguards*, para. 10.122. The Panel's ruling in this regard was upheld by the Appellate Body which also emphasized the importance of an adequate and reasoned explanation of the link between the unforeseen developments and the resulting increased imports. Appellate Body Report, *US – Steel Safeguards*, para. 330.

[66] Panel Report, *US – Steel Safeguards*, para. 10.121. For the complete description of the US authorities' discussion of the unforeseen developments, see Panel Report, *US – Steel Safeguards*, para. 10.110.

> It is apparent that these increased imports were the result of the unforeseen global financial crises in Asia and Russia, as well as unanticipated levels of global steel overcapacity, the collapse of foreign steel markets, emerging countries beginning massive steel production, and foreign producers focusing their sales into the lucrative US market.[67]

With respect to the type of facts that may be considered as 'unforeseen developments', the Panel in its report on *US – Lamb* referred with approval to the 1951 GATT report of the Working Party in *US – Fur Felt Hats* a case relating to the withdrawal of a concession by the United States on women's fur hats and hat bodies. The Members of the Working party agreed

> that the *fact that hat styles had changed did not constitute an 'unforeseen development'* within the meaning of Article XIX, but that the effects of the special circumstances of this case, and 'particularly the *degree to which the change in fashion affected the competitive situation*, could not reasonably be expected to have been foreseen by the United States authorities in 1947, and that the condition of Article XIX that the increase in imports must be due to unforeseen developments and to the effect of the tariff concessions can therefore be considered to have been fulfilled.[68] (Emphasis added)

The GATT *US – Fur Felt Hats* case is still used as the reference point for establishing the existence of unforeseen developments (as it is the only one so far where the unforeseen developments criterion of Article XIX GATT 1947 – now GATT 1994 – was found to have been met). The *US – Fur Felt Hats* case (sometimes referred to as the 'Hatters Fur' case) really states that not so much the development had to be unforeseen (the change in fashion) but rather the damaging effect on the domestic industry of such a change. Interestingly, this case was referred to by the Panel in *Argentina – Footwear (EC)* as evidence that the unforeseen developments criterion could be read out of Article XIX, as the test as developed by the Working Party was so easily met:

> It is probably fair to say that the interpretation of 'unforeseen developments' in that case made it easier for user governments of safeguard measures to meet this condition. Therefore, it has been argued that the *Hatters Fur* case essentially read the unforeseen developments condition out of the text of Article XIX:1(a) of GATT 1947.[69,70]

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67 Panel Report, *US – Steel Safeguards*, para. 10.111.

68 *Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under Article XIX of the GATT* ('*US – Fur Felt Hats*'), GATT/CP/106, adopted 22 October 1951, at paragraph 12, as quoted in Panel Report, *US – Lamb*, para. 7.23.

69 Jackson, John H., *World Trade and the Law of GATT*, Indianapolis (1969), pp. 560 *et seq*.

70 Panel Report, *Argentina – Footwear (EC)*, para. 8.65.

A similar view was expressed by the *Korea – Dairy* Panel. According to the Panel on *Korea – Dairy*, 'although the Working Party considered that this phrase (as a result of unforeseen developments) contained a criterion to be respected, it rendered satisfaction of this criterion automatic, since it would not be reasonable to expect a contracting party to foresee that imports would cause serious injury to its domestic industry'.[71] Still, and contrary to the conclusions reached by the Panels, the Appellate Body in *Korea – Dairy* and *Argentina – Footwear (EC)* considered that the GATT case of *US – Fur Felt Hats* actually supported its conclusion leading to the re-introduction of the 'unforeseen developments' test in the Safeguards Agreement.[72] Unfortunately, the Appellate Body did not comment on the Panel's analysis of this GATT case as effectively, in the way it had applied this test, having read the test out of the Article XIX GATT.

(b) Condition 2: increased quantities of imports

(i) The role of 'increased imports' compared with other contingent trade remedy instruments

Art. 2.1 SG Agreement provides that for safeguards to be imposed, a product must be imported in such *increased quantities, absolute or relative to domestic production* so as to cause serious injury.[73]

From the outset it is worth nothing one very important difference between the 'increased imports' criterion in the safeguard context and the similar requirement to consider whether 'there has been a significant increase in the volume of dumped/subsidized imports' in the context of the Anti-dumping Agreement and the SCM Agreement. In the safeguards context, increased imports is *an independent condition for imposition* of a measure. Its importance is similar to a finding of dumping or subsidization in the AD/CVD

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[71] Panel Report, *Korea – Dairy*, para. 746, fn. 425.

[72] Appellate Body Report, *Korea – Dairy*, para. 89; Appellate Body Report, *Argentina – Footwear (EC)*, para. 96.

[73] Economic theory suggests that imports per se can never be a cause of injury, for they represent the difference between consumption and domestic production at a given price-level: imports are a *proximate* and not the *ultimate* cause. Sykes (2003) has correctly criticized the SG Agreement for being economically naïve in this respect. One possible way to avoid this issue is to interpret the term increased imports as a pure procedural requirement and also request that investigating authorities have the duty to investigate the reasons that explain *why* imports have risen. Such an approach has been advanced as a possible second best that helps avoid a costly re-negotiation of the SG Agreement by Grossman and Mavroidis (2004).

context. Without an increase in imports, no safeguard measure. As we explained in the AD and CVD section, the increased imports examination plays a far less important role in the AD/CVD context. It is not an independent condition but rather forms part of the overall injury-to-the-domestic-industry analysis. And, as Article 3.2 AD and 15.2 SCM Agreement clearly indicate, and as Panels and the Appellate Body have consistently emphasized, 'not one or several of these factors can necessarily give decisive guidance'. In short, anti-dumping or countervailing measures may be imposed even in the absence of an increase in imports.

There are two additional, albeit less important differences to note. First, the increase in imports in the safeguards context is to be determined in absolute terms or in terms of imports relative to production, rather than to production *or consumption* as is the case in the AD/CVD context. Second, while the increase in imports in the safeguards context is not qualified as necessarily having to be 'significant' as in the AD/SCM Agreement, the increase has to be of such a nature that it is capable of causing serious injury.

(ii) The need to examine trends to determine increased imports

The term *increased quantities* was interpreted by the AB in its report on *Argentina – Footwear (EC)*, where it ruled that Panels should be looking at *trends* instead of isolated transactions or absolute numbers based on an end-point to end-point comparison (para. 129):

> We agree with the Panel that Articles 2.1 and 4.2(a) of the Agreement on Safeguards require a demonstration not merely of any increase in imports, but, instead, of imports 'in such increased quantities . . . and under *such* conditions *as to* cause or threaten to cause serious injury'. In addition, we agree with the Panel that the specific provisions of Article 4.2(a) require that 'the rate and amount of the increase in imports . . . in absolute and relative terms' (emphasis added) must be evaluated. Thus, we do not dispute the Panel's view and ultimate conclusion that the competent authorities are required to consider the trends in imports over the period of investigation (rather than just comparing the end points) under Article 4.2(a). As a result, we agree with the Panel's conclusion that 'Argentina did not adequately consider the intervening trends in imports, in particular the steady and significant declines in imports beginning in 1994, as well as the sensitivity of the analysis to the particular end points of the investigation period used'. (Emphasis in the original)

(iii) A sudden, recent and sharp increase, both quantitatively and qualitatively: facts and fiction

In its report on *Argentina – Footwear (EC)*, the Appellate Body emphasized that not just *any* increase over a period of time will do. It is, rather, necessary

for the competent authorities to focus on recent imports.[74] The AB held the later much repeated view that trends of imports should be *recent, sudden, sharp* and *significant enough, both quantitatively and qualitatively,* so as to cause serious injury:

> We recall here our reasoning and conclusions above on the meaning of the phrase 'as a result of unforeseen developments' in Article XIX:1(a) of the GATT 1994. We concluded there that the increased quantities of imports should have been 'unforeseen' or 'unexpected'. We also believe that the phrase 'in *such* increased quantities' in Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994 is meaningful to this determination. In our view, the determination of whether the requirement of imports 'in such increased quantities' is met is not a merely mathematical or technical determination. In other words, it is not enough for an investigation to show simply that imports of the product this year were more than last year – or five years ago. Again, and it bears repeating, not just *any* increased quantities of imports will suffice. There must be '*such* increased quantities' as to cause or threaten to cause serious injury to the domestic industry in order to fulfil this requirement for applying a safeguard measure. And this language in both Article 2.1 of the *Agreement on Safeguards* and Article XIX:1(a) of the GATT 1994, we believe, requires that the increase in imports must have been recent enough, sudden enough, sharp enough, and significant enough, both quantitatively and qualitatively, to cause or threaten to cause 'serious injury'.[75] (Emphasis in the original)

While on the basis of the Appellate Body's reasoning one could have come to the conclusion that in the absence of an increase during the most recent period examined, no safeguard measures may be imposed, later case-law showed that this is not necessarily so, as evidenced by the following statement of the AB in its report on *US – Steel Safeguards*:

> We agree with the United States that Article 2.1 does *not* require that imports need to be increasing at the time of the determination. Rather, the plain meaning of the phrase 'is being imported in such increased quantities' suggests merely that imports must *have* increased, and that the relevant products continue 'being imported' in (such) increased quantities. We also do *not* believe that a decrease in imports at the end of the period of investigation would necessarily prevent an investigating authority from finding that, nevertheless, products continue to be imported 'in such increased quantities'.[76]

According to the Appellate Body, what is important in such a case is the explanation to be provided by the authorities as to why in the presence of a recent decrease in imports, the 'increase imports' condition is nevertheless met:

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74 Appellate Body Report, *Argentina – Footwear (EC)*, para. 130.
75 Appellate Body Report, *Argentina – Footwear(EC)*, para. 131.
76 Appellate Body Report, *US – Steel Safeguards*, para. 367.

> In the absence of a reasoned and adequate explanation in the USITC report relating to the decrease in imports that occurred at the end of the period of investigation, the USITC could not be said to have adequately explained the existence of 'such increased quantities' within the meaning of Article 2.1.
> . . .
> The lack of a reasoned and adequate explanation relating to the decrease that occurred immediately before the USITC's determination is all the more significant, in our view, because the evidence of that decrease is arguably the most relevant of all the data gathered during the investigation, for purposes of assessing whether a product '*is being imported* in such increased quantities'. We emphasized in *US – Lamb* 'the relative importance, within the period of investigation, of the data from the end of the period, as compared with the data from the beginning of the period'.[77] Once more, we do so here.[78,79]

If the increase in imports does not have to be recent, one may wonder what remains in such a case of the alleged 'emergency' character of a safeguard measure, as emphasized by the Appellate Body on earlier occasions.[80] The alleged requirement that the increase in imports be sudden because of the emergency character of a safeguard measure has also been interpreted rather widely. The Panel in *US – Steel Safeguards*, paid mere lip-service to this emergency character as it required that the increase be sudden,[81] but, as we will see in our discussion of some of the data of that case, it then completely ignored this alleged requirement. For example, the Panel found that a 'steady' increase

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[77] Appellate Body Report, *US – Lamb*, footnote 88 to para. 138.

[78] We note that a decrease at the end of a period of investigation may, for instance, result from the seasonality of the relevant product, the timing of shipments, or importer concerns about the investigation. As we have said, the text of Article 2.1 does not necessarily prevent, in our view, a finding of 'increased imports' in the face of such a decline.

[79] Appellate Body Report, *US – Steel Safeguards*, paras 368 and 370. The Panel in this case had stated that in an evaluation of a recent decrease, 'factors that must be taken into account are the duration and the degree of the decrease at the end of the relevant period of investigation, as well as the nature, for instance the sharpness and the extent, of the increase that intervened beforehand'. Panel Report, *US – Steel Safeguards*, para. 10.163.

[80] See, e.g, Appellate Body Report, *US – Steel Safeguards*, para. 347.

[81] Panel Report, *US – Steel Safeguards*, para. 10.166:

> Moreover, the Panel recalls that the very purpose of a safeguard measure is to address the results of unexpected events (unforeseen developments pursuant to Article XIX of GATT), namely increased imports causing serious injury. This unforeseen and unexpected character of the developments resulting in the increased imports as well as the emergency nature of safeguard measures calls for an assessment of whether imports increased suddenly so that the situation became one of emergency for which safeguard measures became necessary. The Panel believes therefore that increased imports must be 'sudden'.

was an increase in imports in the sense of Article 2.1.[82] So the imports do not have to be recent or sudden after all.

On the other hand, a recent and sharp increase may also not be sufficient to meet the 'increased imports' test, as such an increase has to be examined *qualitatively* as well, in light of the overall trends during the period of analysis.[83] In other words, a sudden, recent, and sharp increase in imports that followed a period of decreasing imports, may not be the kind of increase that warrants safeguard action, as becomes evident from the Panel's report on *Argentina – Preserved Peaches*. The Panel was of the view that an *overall decrease* of imports (not examined in terms of the relative changes in domestic production) between the start and the end of the reference period implies that the 'increased imports' requirement is not satisfied, unless an adequate and reasoned explanation to the contrary is provided:

> The Panel finds it highly significant that the volume of imports in absolute terms declined over the period of analysis – by a seventh in terms of volume and over a third in terms of price. It is highly significant that the volume of imports in absolute terms declined over the period 1996 to 1998 by more than the increase which the competent authorities identified from 1998 to 2000, and that this was due to an unusual factor which is acknowledged on the record. This decrease and the reason for it affected the significance of the later increase, so that it was qualitatively different from an increase of the same quantity under other circumstances. Its significance may have been that of a recovery and not an increase that was significant enough for the purposes of Article 2.1 and Article XIX:1(a).
>
> We find that the competent authorities did at least acknowledge all the facts. Having done so, they then took no further account of any of them for the purposes of their determination other than those in the last two years of the period of analysis. They did not consider how this affected qualitatively the increase in the last two years of the period of analysis. Therefore, the Panel considers that their explanation was not adequately reasoned.[84]

The Panel on *US – Steel Safeguards* held the view that an *absolute increase* in imports, provided that it is, recent, sudden, sharp and significant enough so as to cause injury, satisfies the requirements of Art. 2.1 SG even *without* examining the increase in *relative* terms (para. 10.234). This is so, even though the Panel recognized that an increase in absolute terms may even go hand in hand

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[82] Panel Report *US – Steel Safeguards*, para. 10.245. See case 4 scenario below.

[83] Panel Report, *Argentina – Preserved Peaches*, para. 7.64; also see Panel Report, *US – Line Pipe*, para. 7.209. As both Panels note, the Appellate Body took a similar view that recent trends should not be analysed in isolation in an injury determination. Appellate Body Report, *US – Lamb*, para. 138.

[84] Panel Report, *Argentina – Preserved Peaches*, paras 7.60–61. In this case, the authorities acknowledged that an unusual factor – the bad harvest in the major exporting country – affected the base year chosen for the increased imports determination.

with an equally strong, or stronger increase of domestic production and a flourishing domestic industry, in which case there would be no relative increase, and there may not be *any causation of serious injury*.[85] Similarly, the Panel was of the view that 'as a legal matter, a decrease in absolute terms does not invalidate the sufficiency of a relative increase'.[86]

The same Panel Report provides some good graphic illustrations of trends in imports that were considered to satisfy the requirements of Art. 2.1 SG Agreement and cases where they did not. Case 1 (para. 10.179) and Case 2 (para. 10.207) are instances where in the Panel's view the graphic representation of imports does not satisfy the requirements of Art. 2.1 SG Agreement (essentially because the most recent events were not taken into account).[87] Case 3 (para. 10.212) and Case 4 (para. 10.222) are instances where, in the Panel's view, the graphic representation satisfies the requirements of Art. 2.1 SG Agreement.

Case 1

The trends in imports, both in absolute and in relative terms, are shown in the following figures illustrating the data relied upon by the USITC. See Figure 15.1 on p. 517.

Case 2

The trends in imports, both in absolute and in relative terms, are shown in Figure 15.2 on p. 518, illustrating the data relied upon by the USITC.

The United States appealed the Panel's findings arguing that the recent decrease in imports did not impair the overall finding that imports had increased when comparing the level of imports in the beginning and at the end of the investigation period. As we noted earlier, the AB found that, when in the presence of significant decrease in the level of imports over the most recent segment of the investigation, a WTO Member must show how such decrease did not detract from the overall conclusion that imports have increased.[88] By not providing such explanation, the United States failed, in the AB's view, to meet the requirements of the SG Agreement.

Case 3

The trends in imports, both in absolute and in relative terms, are shown in Figure 15.3 on p. 519 illustrating the data relied upon by the USITC.

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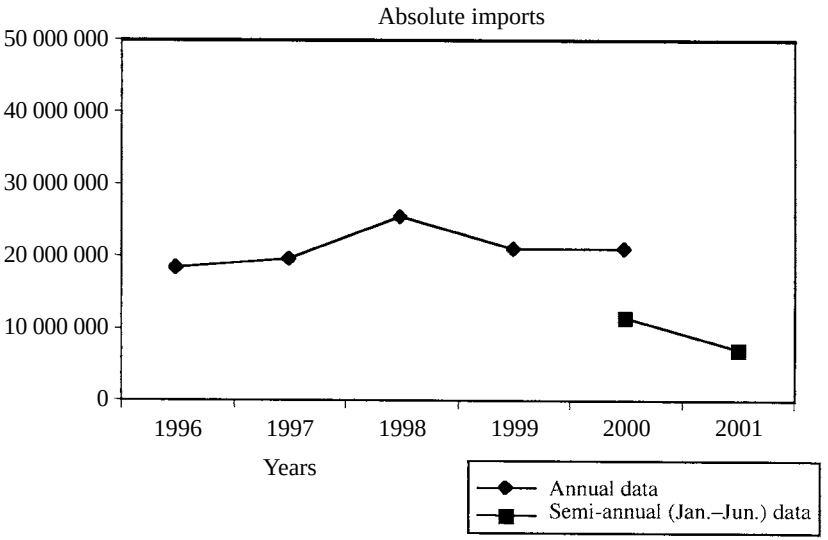
85 Panel Report, *US – Steel Safeguards*, para. 10.234.
86 Panel Report, *US – Steel Safeguards*, para. 10.218.
87 See paras 10.183 and 10.209, respectively.
88 Appellate Body Report, *US – Steel Safeguards*, paras 368–70.


Absolute imports
50 000 000
40 000 000
30 000 000
20 000 000
10 000 000
0
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

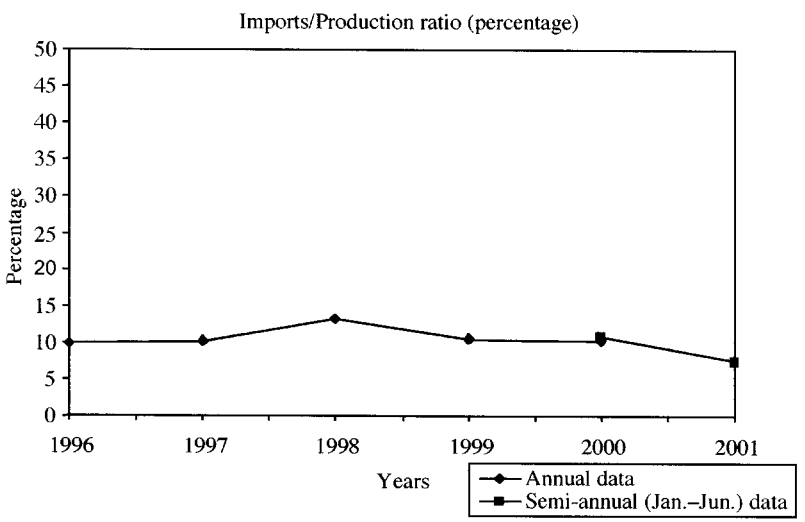
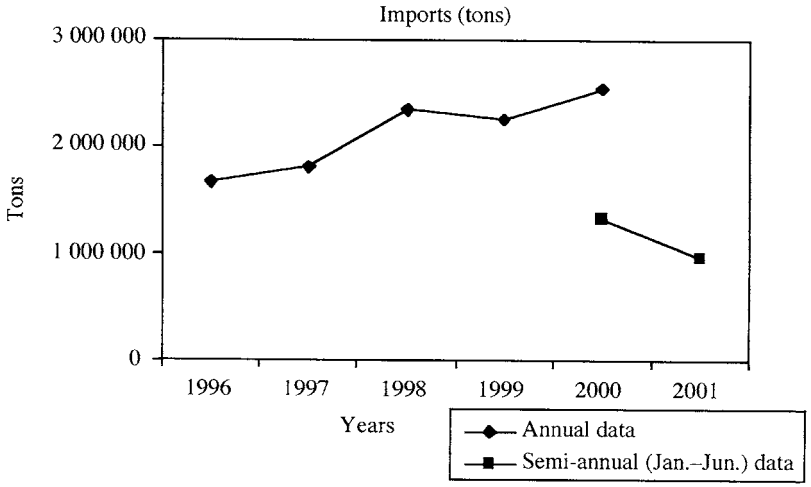

Imports/Production ratio (percentage)
Percentage
50
45
40
35
30
25
20
15
10
5
0
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

Figure 15.1


Imports (tons)
3 000 000
2 000 000
1 000 000
0
Tons
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

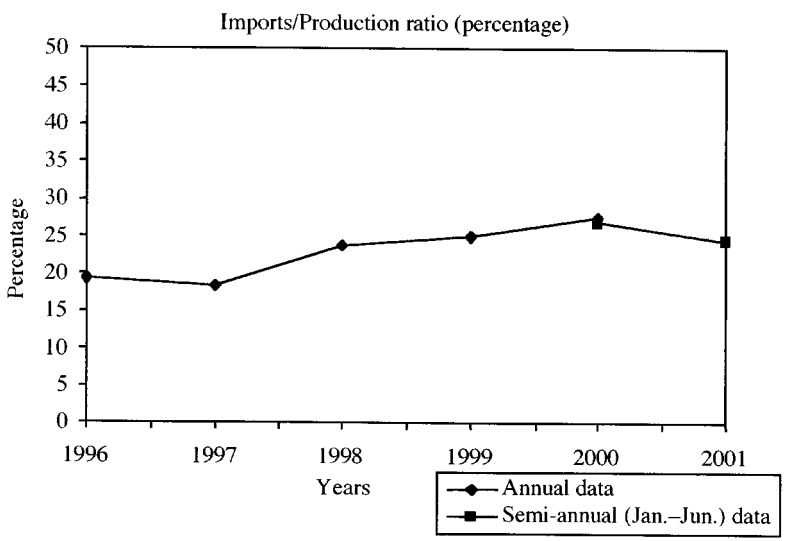
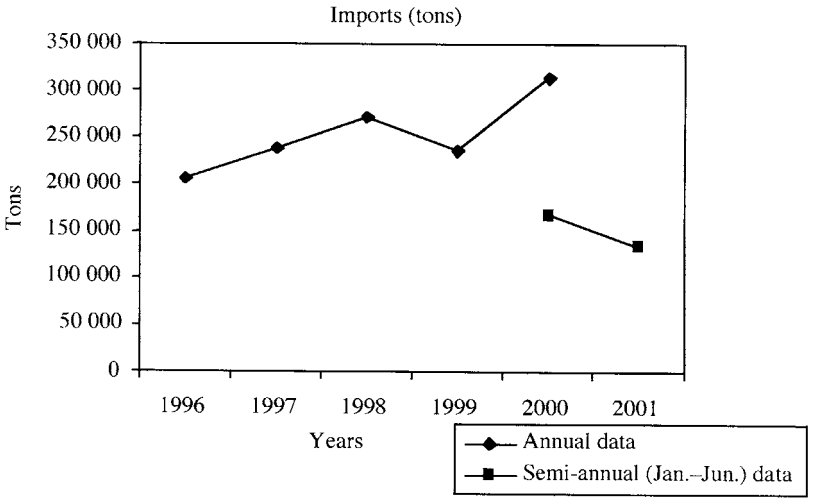

Imports/Production ratio (percentage)
50
45
40
35
30
25
20
15
10
5
0
Percentage
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

Figure 15.2


Imports (tons)
350 000
300 000
250 000
200 000
150 000
100 000
50 000
0
Tons
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

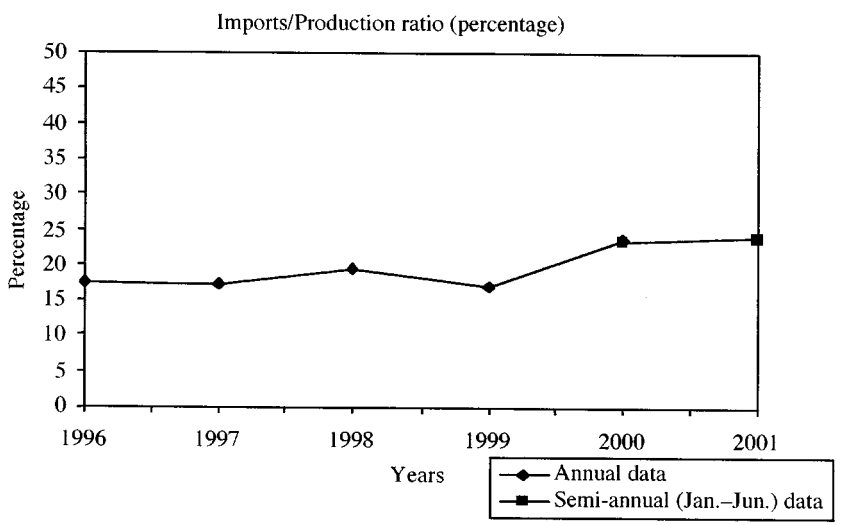
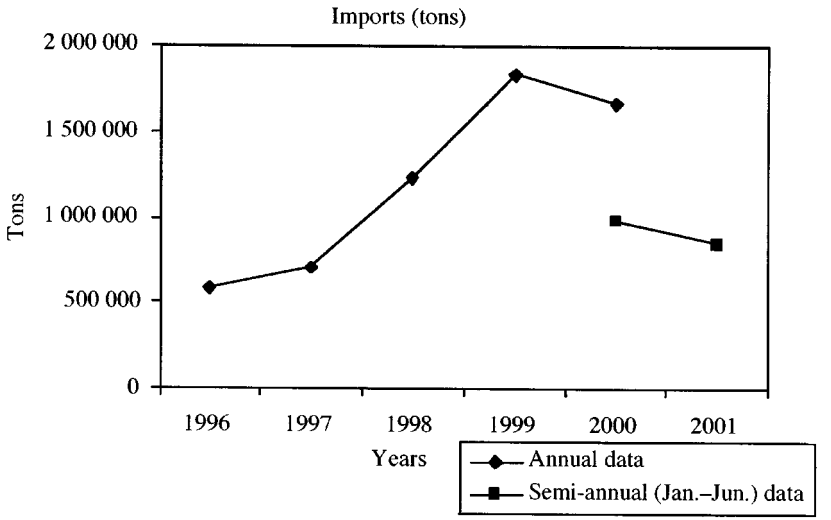

Imports/Production ratio (percentage)
50
45
40
35
30
25
20
15
10
5
0
Percentage
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

Figure 15.3


Imports (tons)
2 000 000
1 500 000
1 000 000
500 000
0
Tons
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

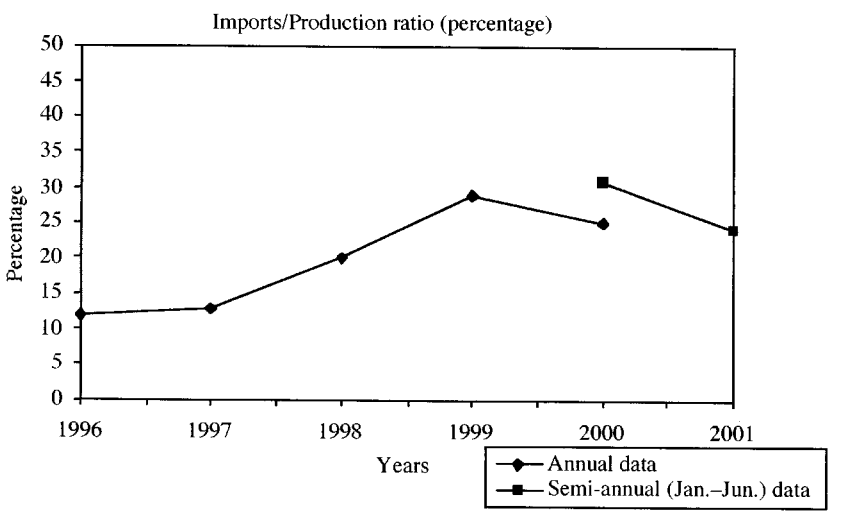

Imports/Production ratio (percentage)
50
45
40
35
30
25
20
15
10
5
0
Percentage
1996
1997
1998
1999
2000
2001
Years
Annual data
Semi-annual (Jan.–Jun.) data

Figure 15.4

Case 4

The trends in imports, both in absolute and in relative terms, are shown in Figure 15.4 on p. 520, illustrating the data relied upon by the USITC.

Under both scenarios, the *trend* (as opposed to a comparison of the level of imports at the beginning and the end of the period of investigation) was a steady increase in imports. This observation, in the Panel's view satisfied the requirements of Art. 2.1 SG, the slight reduction of the level at the end of the period of investigation not detracting from the validity of the finding.

In sum, it appears that the Panel in *US – Steel Safeguards* correctly, albeit somewhat cynically, reworded the Appellate Body's famous 'sudden, recent and sharp' mantra to find that an increase which 'evidences a *certain degree of* recentness, suddenness, sharpness and significance'[89] (emphasis added) is an increase in the sense of Article 2.1 Safeguards. In other words, at the end of the day any increase which is more than a negligible increase based on an evaluation of trends over a period of time suffices in order to comply with the increased imports criterion. Perhaps the most important test is whether the authorities have provided an adequate, reasoned and reasonable explanation of how the facts support the determination with respect to increased imports, as this is the standard of review of the factual aspects of a determination of an increase in imports consistently applied by Panels.[90]

(iv) The period of investigation for examining an increase in imports

The Agreement does not provide any guidance with respect to the period of investigation to be used for examining this increase in imports.[91] What is

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[89] Panel Report, *US – Steel Safeguards*, para. 10.167. A statement the Appellate Body actually agreed with as being a correct interpretation of what it had said in *Argentina – Footwear (EC)*. Appellate Body Report, *US – Steel Safeguards*, para. 361.

[90] Panel Report, *Argentina – Preserved Peaches*, para. 7.43:

> We recall that the standard of review of the factual aspects of a determination of an increase in imports as formulated by the Panel in *US – Line Pipe*, following the Panel in *US – Wheat Gluten*, which we will also apply:
>
> > '[W]hether the published report on the investigation contains an adequate, reasoned and reasonable explanation of how the facts in the record before the ITC support the determination made with respect to increased imports.'

See Panel Report, *US – Line Pipe*, para. 7.194.

[91] As noted by the Panel in *Argentina – Preserved Peaches*, 'none of these provisions [Article XIX GATT 1994, Articles 2.1 and 4.2 (a) SG Agreement] establish a minimum period for the investigation, nor any so-called "base period" within the inves-

important, according to the Appellate Body, is that the relevant investigation period should not only *end* in the very recent past, but 'should *be* the recent past'.[92] Moreover, the period of investigation should be sufficiently long to allow conclusions to be drawn regarding the existence of increased imports. The Panel in *US – Line Pipe* thus concluded that a five-year period of investigation was justified:

> We are of the view that by choosing a period of investigation that extends over 5 years and six months, the ITC did not act inconsistently with Article 2.1 and Article XIX. This conclusion is based on the following considerations: first, the Agreement contains no specific rules as to the length of the period of investigation; second, the period selected by the ITC allows it to focus on the recent imports; and third, the period selected by the ITC is sufficiently long to allow conclusions to be drawn regarding the existence of increased imports.[93]

The period of investigation for examining increased imports tends to be the same as that for examining serious injury. This is different from what is the practice in a dumping or subsidization situation, where in general the period of investigation for dumping or subsidization is shorter (normally one year) than the period for determining material injury (normally three years). The Panel in *US – Line Pipe* explained and justified this different practice in the safeguards context in the following manner:

> We are of the view that one of the reasons behind this difference is that, as found by the Appellate Body in *Argentina – Footwear Safeguard*, 'the determination of whether the requirement of imports "in such increased quantities" is met is not a merely mathematical or technical determination'. The Appellate Body noted that when it comes to a determination of increased imports 'the competent authorities are required to consider the *trends* in imports over the period of investigation'. The evaluation of trends in imports, as with the evaluation of trends in the factors relevant for determination of serious injury to the domestic industry, can only be carried out over a period of time. Therefore, we conclude that the considerations that the Appellate Body has expressed with respect to the period relevant to an injury determination also apply to an increased imports determination.[94] (Footnotes omitted)

It is in this respect interesting to note that, in an anti-dumping or countervailing duty investigation, increased imports are examined precisely in the context of the injury determination and are thus also examined over a longer

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tigation period on which to base a determination of an increase in imports'. Panel Report, *Argentina – Preserved Peaches*, para. 7.50. Also see for example Panel Report, *US – Steel Safeguards*, para. 10.159.

92 Appellate Body Report, *Argentina – Footwear (EC)*, footnote 130.

93 Panel Report, *US – Line Pipe*, para. 7.201.

94 Panel Report, *US – Line Pipe*, para. 7.209.

period of time, i.e. the period examined for injury purposes of normally three years.

(c) Condition 3: serious injury or threat of serious injury to the domestic industry

(i) Definition of serious injury and threat of serious injury

The SG Agreement allows the imposition of safeguard measures if the WTO Member concerned has shown either *serious injury* or *threat of serious injury*. Serious injury is defined in Article 4.1 of the Safeguards Agreement as 'a significant overall impairment in the position of the domestic industry'.[95]

The same provision states that 'threat of serious injury' shall be understood to mean serious injury that is clearly imminent, adding that a determination of the existence of a threat shall be based on facts and not merely on allegation, conjecture or remote possibility.[96] The Safeguards Agreement thus contains a definition of a threat of serious injury, but does not list any specific factors that need to be taken into account as was the case in Article 3.7 AD/15.7 SCM Agreement for AD/CVD proceedings. This is surprising, not in the least because the factors to be examined in the AD/CVD context relate to the possibility of further future increased imports. In light of the important role given to increased imports in the safeguards context, it would have made even more sense in the safeguards context to require an authority in a threat determination to be examining the same projected future increase in imports.

The AB, in its report on *US – Lamb* supplied its understanding of the two terms (paras 124 and 125):

> The standard of 'serious injury' set forth in Article 4.1(a) is, on its face, very high. Indeed, in *United States – Wheat Gluten Safeguard*, we referred to this standard as 'exacting'. Further, in this respect, we note that the word 'injury' is qualified by the adjective 'serious', which, in our view, underscores the extent and degree of 'significant overall impairment' that the domestic industry must be suffering, or must be about to suffer, for the standard to be met. We are fortified in our view that the standard of 'serious injury' in the *Agreement on Safeguards* is a very high one when we contrast this standard with the standard of 'material injury' envisaged under the *Anti-Dumping Agreement*, the *Agreement on Subsidies and Countervailing Measures* (the '*SCM Agreement'*) and the GATT 1994. We believe that the word 'serious' connotes a much higher standard of injury than the word 'material'.
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> Moreover, we submit that it accords with the object and purpose of the *Agreement on Safeguards* that the injury standard for the application of a safeguard

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[95] We recall that there is no similar definition in the AD Agreement or the SCM Agreement of the term 'material injury'.

[96] Article 4.1(b) SG. These general requirements are very similar to those set forth in Article 3.7 AD and 15.7 SCM Agreement.

> measure should be higher than the injury standard for anti-dumping or countervailing measures, since, as we have observed previously:
>
> > [t]he application of a safeguard measure does not depend upon 'unfair' trade actions, as is the case with anti-dumping or countervailing measures. Thus, the import restrictions that are imposed on products of exporting Members when a safeguard action is taken must be seen, as we have said, as extraordinary. And, when construing the prerequisites for taking such actions, their extraordinary nature must be taken into account.
>
> Returning now to the term 'threat of serious injury', we note that this term is concerned with 'serious injury' which has not yet occurred, but remains a future event whose actual materialization cannot, in fact, be assured with certainty. We note, too, that Article 4.1(b) builds on the definition of 'serious injury' by providing that, in order to constitute a 'threat', the serious injury must be 'clearly imminent'. The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated 'serious injury' must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury '*shall be based on facts and not merely on allegation, conjecture or remote possibility*' (emphasis added). To us, the word 'clearly' relates also to the factual demonstration of the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.[97] (Italics in the original)

So, *serious* is a higher standard than material, but what is the *material injury* standard in the first place? If at all, this passage suggests that the AB is going to request definitions of injury that are at least as rigorous as those taking place in the context of the AD Agreement. What is 'significant' or 'serious' is of course very subjective. In none of the cases dealt with so far, has a Panel addressed this concept. Rather, Panels have consistently examined whether an adequate, reasoned and reasonable explanation has been provided by the authorities of their finding of a significant overall impairment of the industry. It remains to be seen whether in practice there is any meaningful difference between 'material' injury and 'serious' injury, or whether it would not be more correct to state that in both cases, a finding of injury which is *not insignificant* will be upheld by WTO Panels.

It is important to refer to the standard of review applied by Panels in reviewing an injury determination in the Safeguards context: whether an adequate, reasoned and reasonable explanation has been provided by the investigating authority of how the facts support the determination made. In

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97 Appellate Body Report, *US – Lamb*, paras 124–5.

other words, a Panel may neither substitute its conclusions for those of the authorities in a so called *de novo* review, but it should not show total deference to the investigating authority's determination either, if not the review would not be meaningful. In *US – Lamb*, the Appellate Body translated this general standard in practical terms in the following way, highlighting the need to examine the adequacy of the authority's explanation and reasoning in light of some alternative plausible explanation of the facts:

> Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some *alternative explanation* of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.[98]

(ii) Determining serious injury – evaluating all relevant factors

The Agreement requires an authority to evaluate all relevant factors and

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[98] Appellate Body Report in *US – Lamb*, paragraph 106. The Panel in *Argentina – Preserved Peaches* thus considered 'the temporal focus of the competent authorities' evaluation of the data in making their determination of a threat of serious injury, and whether their explanation was adequate in the light of any plausible alternative explanation of the facts'. Panel Report, *Argentina – Preserved Peaches*, para. 7.104. It reached the following conclusion:

> The directors who voted in favour of the preserved peaches measure viewed the data for the most recent period in isolation and did not acknowledge the alternative plausible explanation. The considerable increase in imports in 2000 and deterioration in certain injury factors – viewed in isolation – led them to a potentially very different conclusion from an evaluation in the light of all data before the competent authorities. They explained their finding on the basis of the most recent period and did not offer any explanation of that data in light of the longer term data which was before them. They did not seek to deal with the alternative plausible explanation, even though it was disclosed in the technical report.
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> The Panel is not substituting its own opinion for that of the competent authorities. In fact, the Panel has not formed its own opinion on either the situation of the domestic industry or the capacity of imports to cause serious injury in 2001. Rather, the Panel finds that for the reasons given above, the explanation of the determination of a threat of serious injury was not reasoned or adequate as required by Article 4.2(a).

Panel Report, *Argentina – Preserved Peaches*, paras 7.116–7.117.

mentions eight factors which must be examined in particular: the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment.[99] The Appellate Body in *Argentina – Footwear (EC)* emphasized that in addition to a technical examination of all the listed factors and any other relevant factors, an authority is to examine the overall position of the domestic industry.[100] According to the Appellate Body, 'it is only when the *overall position* of the domestic industry is evaluated, in light of all the relevant factors having a bearing on a situation of that industry, that it can be determined whether there is "a significant overall impairment" in the position of that industry'.[101]

In other words, even in the absence of a sentence as found in the AD/SCM Agreement (Articles 3.4/15.4) that 'not one or several of these factors can necessarily give decisive guidance', in the safeguards context as well, no single relevant factor can be accorded decisive importance.[102]

Similar to the interpretation given by Panels and the Appellate Body with respect to the mandatory nature of the 15 and 16 factors enumerated in Article 3.4 AD and 15.4 SCM Agreement respectively, the AB also considered that an authority is required to always examine and evaluate,[103] at a minimum, these eight factors. In addition, Article 4.2(a) requires an authority to evaluate all other objective and quantifiable factors that are relevant to the situation of the industry concerned.[104] The Appellate Body in *US – Wheat Gluten* made it clear that an investigating authority cannot remain passive and rely on the interested parties to raise a factor other than the eight listed factors as relevant:

> However, in our view, that does *not* mean that the competent authorities may limit their evaluation of 'all relevant factors', under Article 4.2(a) of the *Agreement on Safeguards*, to the factors which the interested parties have raised as relevant. The competent authorities must, in every case, carry out a full investigation to enable them to conduct a proper evaluation of all of the relevant factors expressly

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99 Article 4.2(a) SG Agreement.

100 Appellate Body, *Argentina – Footwear (EC)*, para. 139.

101 Appellate Body Report, *Argentina – Footwear (EC)*, para. 139.

102 Appellate Body Report, *Argentina – Footwear (EC)*, para. 139. Appellate Body Report, *US – Lamb*, footnote 99.

103 As recalled by *inter alia* the Panel on *Argentina – Preserved Peaches*, an 'evaluation' is more than the simple listing of the data. Panel Report, *Argentina – Preserved Peaches*, paras 7.98–7.99.

104 Appellate Body Report, *Argentina – Footwear (EC)*, para. 136: 'Article 4.2(a) of the *Agreement on Safeguards* requires a demonstration that the competent authorities evaluated, at a minimum, each of the factors listed in Article 4.2(a) as well as *all other factors that are relevant to the situation of the industry concerned*.'

> mentioned in Article 4.2(a) of the *Agreement on Safeguards*. Moreover, Article 4.2(a) requires the competent authorities – and *not the interested parties* – to evaluate fully the relevance, if any, of 'other factors'. If the competent authorities consider that a particular 'other factor' may be relevant to the situation of the domestic industry, under Article 4.2(a), their duties of investigation and evaluation preclude them from remaining passive in the face of possible short-comings in the evidence submitted, and views expressed, by the interested parties. In such cases, where the competent authorities do not have sufficient information before them to evaluate the possible relevance of such an 'other factor', they must investigate fully that 'other factor', so that they can fulfil their obligations of evaluation under Article 4.2(a).
>
> Thus, we disagree with the Panel's finding that the competent authorities need only examine 'other factors' which were '*clearly* raised before them as relevant by the interested parties in the domestic investigation' (emphasis added). However, as is clear from the preceding paragraph of this Report, we also reject the European Communities' argument that the competent authorities have an open-ended and unlimited duty to investigate all available facts that might possibly be relevant.[105] (Footnotes omitted)

Authorities are not required to show that each listed injury factor is declining but, rather, they must reach a determination in light of the evidence as a whole.[106] According to the Panel in *US – Lamb*, this implies that authorities 'may arrive at a threat determination *even if the majority of firms within the relevant industry is not facing declining profitability*, provided that an evaluation of the injury factors *as a whole* indicates threat of serious injury' (emphasis added).[107] While the Appellate Body agreed with this view, as '[P]rofits are simply one of the relevant factors mentioned in Article 4.2(a) and to accord that factor decisive importance would be to disregard the other relevant factors', it did consider that 'it will be a rare case, indeed, where the relevant factors as a whole indicate that there is a threat of serious injury, even though the "majority of firms in the industry" is not facing declining profitability'.[108]

(iii) Determining serious injury – the period of investigation

As was the case for increased imports, the Agreement does not provide any guidance on the period of investigation to be used for evaluating serious injury. Actually, everything we said in the context of the increased imports investigation about the need for the period of investigation to be the recent past, without however examining the recent past in isolation and the requirement of using a

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105 Appellate Body Report, *US – Wheat Gluten*, paras 55–6.

106 Appellate Body Report, US – Lamb, para. 144; Panel Report, US – Lamb, para. 7.203.

107 Panel Report, US – Lamb, para. 7.188.

108 Appellate Body Report, US – Lamb, footnote 99.

period of investigation which is sufficiently long so as to allow appropriate conclusions to be drawn regarding the state of the domestic industry, are equally valid in the context of the serious injury to the domestic industry inquiry.[109] According to the Panel in *US – Wheat Gluten*, 'any determination of serious injury must pertain to the *recent* past':[110]

> It seems to us logical that if the increase in imports that the investigating authorities must examine must be recent, so also must be any basis for a determination by the authorities as to the situation of the domestic industry. Given that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, we consider it essential that *current* serious injury be found to exist, up to and including the very end of the period of investigation.

Still, and in spite of its above quoted statement concerning the important role of the recent past, the Panel considered that data which revealed a recent improvement in the situation of the industry did not necessarily invalidate a serious injury finding:

> such upturns in a number of factors would not necessarily preclude a determination of serious injury. It is for the investigating authorities to assess and weigh the evidence before them, and to give an adequate, reasoned and reasonable explanation of how the facts support the determination made.[111]

In other words, it seems that serious injury has to be present in the recent past (that is, the industry has to 'remain seriously injured'), but it must not necessarily have occurred in the recent past. This is of course a bit bizarre, in light of the emphasis on the recent past when examining the increased imports factor. One would expect a certain time lag for the increased imports to cause the negative effects. So, when it comes to serious injury, it seems difficult to conclude that imports have caused serious injury if the state of the domestic industry is actually improving in the last year of the period of investigation. We will examine if, and to what extent, this causation problem has been dealt

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109 Appellate Body Report, *US – Lamb*, para. 138 and footnote 88. Also see, Panel Report, *US – Line Pipe*, para. 7.200.

110 Panel Report, *US – Wheat Gluten*, para. 8.81.

111 Panel Report, *US – Wheat Gluten*, para. 8.85. In this case, the information on which the USITC had based its serious injury determination indicated that there were identifiable improvements in several factors in the last year of the period of investigation, 1997: capacity utilization, production and sales were improving, wages were rising and inventories were being depleted. 'All signs of a positive trend in the industry', according to the Panel. Still the Panel found that, in their totality, the USITC findings on serious injury contain an adequate, reasoned and reasonable explanation of how the facts as a whole support the determination of serious injury made by the USITC, including its determination that the domestic industry remained seriously injured in 1997. Panel Report, *US – Wheat Gluten*, paras 8.85–6.

with in the section dealing with the requirement to establish a causal link between the increased imports and the serious injury found to exist.

(iv) Determining serious injury – no price analysis required

Whereas in the AD/CVD context a price analysis is required as part of the injury analysis, no such requirement exists in Safeguards. This is another important difference between the AD/CVD injury test[112] and the Safeguards serious injury examination. The argument that the requirement to conduct a price analysis was implied by the requirement of Article 2.1 to establish that increased imports entered the country 'under such conditions' as to cause serious injury, was rejected by the Panel in *Korea – Dairy*:

> Although the prices of the imported products will most often be a relevant factor indicating how the imports do, in fact, cause serious injury to the domestic industry, we note that there is no explicit requirement in Article 2, that the importing Member perform a price analysis of the imported products and the prices of the like or directly competitive products in the market of the importing country.
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> We consider that the phrase 'and under such conditions' does not provide for an additional criterion or analytical requirement to be performed before an importing Member may impose a safeguard measure. We are of the view that the phrase 'and under such conditions' qualifies and relates both to the circumstances under which the products under investigation are imported and to the circumstances of the market into which products are imported, both of which must be addressed by the importing country when performing its assessment as to whether the increased imports are causing serious injury to the domestic industry producing the like or directly competitive products. In this sense, we consider that the phrase 'under such conditions' refers more generally to the obligation imposed on the importing country to perform an adequate assessment of the impact of the increased imports at issue and the specific market under investigation.[113]

While it appears that no price analysis is required for a safeguard to be imposed lawfully, this does not imply that price effects of the imports may be ignored altogether. The Panel in *US – Wheat Gluten* considered that, even though 'price' is not mentioned as a relevant factor under Article 4.2(a), it may be a very 'relevant factor' that needs to be examined, and which may be important in a causation analysis as part of the conditions of competition:

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112 Article 3 AD Agreement and Article 15 SCM Agreement.

113 Panel Report, *Korea – Dairy*, paras 7.51–2. The Panel on *Argentina – Footwear (EC)* similarly held that the phrase 'under such conditions' does not constitute a specific legal requirement for a price analysis. Panel Report, *Argentina – Footwear (EC)*, para. 8.249.

> Price is not expressly listed in Article 4.2(a) SA as a 'relevant factor' having a bearing on the situation of the domestic industry. However, this is not to say that 'price' may not be a relevant factor in a given case. An imported product can compete with a domestic product in various ways in the market of the importing country. Clearly, the relative price of the imported product is one of these ways, but it is certainly not the only way, and it may be irrelevant or only marginally relevant in a given case.[114]

(v) Threat of serious injury

An investigating authority invoking threat of serious injury will be required to demonstrate that, absent safeguards, injury will happen imminently, that is, in the very near future. A demonstration that injury is 'clearly imminent' has to be 'based on facts and not merely on allegation, conjecture or remote possibility'.[115] Therefore, according to the Appellate Body in *US – Lamb*, it must be manifest that the domestic industry is on the brink of suffering serious injury:

> (. . .) The word 'imminent' relates to the moment in time when the 'threat' is likely to materialize. The use of this word implies that the anticipated 'serious injury' must be on the very verge of occurring. Moreover, we see the word 'clearly', which qualifies the word 'imminent', as an indication that there must be a high degree of likelihood that the anticipated serious injury will materialize in the very near future. We also note that Article 4.1(b) provides that any determination of a threat of serious injury 'shall be based on facts and not merely on allegation, conjecture or *remote possibility*' (emphasis added). To us, the word 'clearly' relates also to the *factual* demonstration of the existence of the 'threat'. Thus, the phrase 'clearly imminent' indicates that, as a matter of fact, it must be manifest that the domestic industry is on the brink of suffering serious injury.[116]

The Panel Report on *Argentina – Preserved Peaches* reflects the Panel's view that an investigating authority must demonstrate at least a *projection* that there is a strong likelihood that injury will happen; otherwise, it will not have met the requirements of the SG Agreement with respect to the threat of serious injury standard. The *capacity* of imports to cause serious injury, which the authorities found to exist, is not enough (para. 7.122):

> The 'capacity' of imports is a reference to the *possibility* of causing serious injury, not a threat. The directors purported to identify the threat in the following paragraph of their conclusion, but they did not indicate any degree of likelihood that serious injury would occur, let alone a high degree of likelihood. There was a statement that the increase in imports in the most recent period was 'sharp' but the conclusion was

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114 Panel Report, *US – Wheat Gluten*, para. 8.109.
115 Article 4.1(b) SG Agreement.
116 Appellate Body Report, *US – Lamb*, para. 125.

> not drawn that this indicated that the imports that would cause serious injury were about to occur. There was just an acknowledgement of the possibility. There was no attempt to make a projection of what was about to occur, nor a fact-based assessment of the likelihood of the imports increasing. In the light of the flawed temporal focus of the analysis of the data, the use of the most recent data did not necessarily indicate the future state of imports. In the light of the alternative explanation that the imports were recovering to their historical levels, the most recent increase did not necessarily indicate that they would continue to increase either at all or at the same rate.[117]

In other words, serious injury must not simply be the possible consequence of increased imports, it must be the likely consequence. What is required is a fact-based assessment of the likelihood of imports increasing and a projection of what is about to occur.

Of course, and as noted by the Appellate Body in its report on *US – Lamb*, there is an unavoidable tension between requesting a future-oriented study (such as the one required for threat of injury to be determined) and, at the same time, obliging the investigating authority to come up with hard data. Future incorporates uncertainty. A likelihood-standard (that the projected facts will occur) emerges as the appropriate standard to evaluate the findings of an investigating authority. Critically, an investigating authority must provide adequate justification for its final findings. To do that, it should certainly examine recent data, as 'data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury'.[118] However, as was emphasized by the Appellate Body, recent data should not be examined in isolation from the data for the entire period of investigation, but rather, in its context (paras 136–8):

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[117] Panel Report, *Argentina – Preserved Peaches*, para. 7.122.

[118] Appellate Body Report, *US – Lamb*, para. 137. As we discussed earlier, recent data are crucial in a safeguards investigation, not only in a 'threat' situation. The Panel in *US – Wheat Gluten* made the obvious link to the requirement to demonstrate increased imports to require that an evaluation of serious injury also be based on the most recent information:

> It seems to us logical that if the increase in imports that the investigating authorities must examine must be recent, so also must be any basis for a determination by the authorities as to the situation of the domestic industry. Given that a safeguard measure will necessarily be based upon a determination of serious injury concerning a previous period, we consider it essential that *current* serious injury be found to exist, up to and including the very end of the period of investigation.

Panel Report, *US – Wheat Gluten*, para. 8.81.

> We recall that, in making a 'threat' determination, the competent authorities must find that serious injury is 'clearly imminent'. As we have already concluded, this requires a high degree of likelihood that the anticipated serious injury will materialize in the very near future. Accordingly, we agree with the Panel that a threat determination is 'future-oriented'. However, Article 4.1(b) requires that a 'threat' determination be based on 'facts' and not on 'conjecture'. As facts, by their very nature, pertain to the present and the past, the occurrence of future events can never be definitively proven by facts. There is, therefore, a tension between a future-oriented 'threat' analysis, which, ultimately, calls for a degree of 'conjecture' about the likelihood of a future event, and the need for a fact-based determination. Unavoidably, this tension must be resolved through the use of facts from the present and the past to justify the conclusion about the future, namely that serious injury is 'clearly imminent'. Thus, a fact-based evaluation, under Article 4.2(a) of the *Agreement on Safeguards*, must provide the basis for a projection that there is a high degree of likelihood of serious injury to the domestic industry in the very near future.
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> Like the Panel, we note that the *Agreement on Safeguards* provides no particular methodology to be followed in making determinations of serious injury or threat thereof. However, whatever methodology is chosen, we believe that data relating to the most recent past will provide competent authorities with an essential, and, usually, the most reliable, basis for a determination of a threat of serious injury. The likely state of the domestic industry in the very near future can best be gauged from data from the most recent past. Thus, we agree with the Panel that, in principle, within the period of investigation *as a whole*, evidence from the most recent past will provide the strongest indication of the likely future state of the domestic industry.
>
> However, we believe that, although data from the most recent past has special importance, competent authorities should not consider such data in isolation from the data pertaining to the entire period of investigation. The real significance of the short-term trends in the most recent data, evident at the end of the period of investigation, may only emerge when those short-term trends are assessed in the light of the longer-term trends in the data for the whole period of investigation. If the most recent data is evaluated in isolation, the resulting picture of the domestic industry may be quite misleading. For instance, although the most recent data may indicate a decline in the domestic industry, that decline may well be a part of the normal cycle of the domestic industry rather than a precursor to clearly imminent serious injury. Likewise, a recent decline in economic performance could simply indicate that the domestic industry is returning to its normal situation after an unusually favourable period, rather than that the industry is on the verge of a precipitous decline into serious injury. Thus, we believe that, in conducting their evaluation under Article 4.2(a), competent authorities cannot rely exclusively on data from the most recent past, but must assess that data in the context of the data for the entire investigative period.[119] (Emphasis in the original, footnotes omitted)

(vi) No need to make discrete findings of either serious injury or threat thereof

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[119] Appellate Body Report, *US – Lamb*, paras 136–8.

The AB, in its report on *US – Line Pipe* had the opportunity to address the question whether an investigating authority can, using the *same* set of facts, show 'serious injury *or* threat of serious injury'. It was addressing a claim to the effect that a *discrete* finding of either injury or threat of injury is required, for a lawful imposition of safeguard measures to be the case. The Panel had taken the view that a discrete finding is necessary, since, in its view, the same set of facts cannot simultaneously support a finding of injury and a finding of threat of injury. Adopting a textual interpretation, the AB reversed the Panel in this respect and held the view that, a discrete finding is *not* required by the Agreement. Doing that, the AB took the view that the threat-standard is a lower threshold than the serious injury-standard. What is important for the right to impose a safeguard measure to exist is that at least a threat of injury be established: (paras 169–172):

> As we see it, these two definitions reflect the reality of how injury occurs to a domestic industry. In the sequence of events facing a domestic industry, it is fair to assume that, often, there is a continuous progression of injurious effects eventually rising and culminating in what can be determined to be 'serious injury'. Serious injury does not generally occur suddenly. Present serious injury is often preceded in time by an injury that threatens clearly and imminently to become serious injury, as we indicated in *US – Lamb*. Serious injury is, in other words, often the realization of a threat of serious injury. Although, in each case, the investigating authority will come to the conclusion that follows from the investigation carried out in compliance with Article 3 of the *Agreement on Safeguards*, the precise point where a 'threat of serious injury' becomes 'serious injury' may sometimes be difficult to discern. But, clearly, 'serious injury' is something *beyond* a 'threat of serious injury'.
>
> In our view, defining 'threat of serious injury' separately from 'serious injury' serves the purpose of setting a *lower threshold* for establishing the *right* to apply a safeguard measure. Our reading of the balance struck in the *Agreement on Safeguards* leads us to conclude that this was done by the Members in concluding the Agreement so that an importing Member may act sooner to take preventive action when increased imports pose a 'threat' of 'serious injury' to a domestic industry, but have not yet caused 'serious injury'. And, since a 'threat' of 'serious injury' is defined as 'serious injury' that is 'clearly imminent', it logically follows, to us, that 'serious injury' is a condition that is above that *lower threshold* of a 'threat'. A 'serious injury' is *beyond* a 'threat', and, therefore, is *above* the threshold of a 'threat' that is required to establish a right to apply a safeguard measure.
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> We emphasize that we are dealing here with the first of two inquiries we have previously mentioned that must be conducted by an interpreter of the *Agreement on Safeguards*: whether there is a right in a particular case to apply a safeguard measure. The question at issue is whether the right exists in this particular case. And, as the right exists if there is a finding by the competent authorities of a 'threat of serious injury' or – something *beyond* – 'serious injury', then it seems to us that it is irrelevant, *in determining whether the right exists*, if there is 'serious injury' or only 'threat of serious injury' – so long as there is a determination that there is *at least* a 'threat'. In terms of the rising continuum of an injurious condition of a domestic industry that ascends from a 'threat of serious injury' up to 'serious

> injury', we see 'serious injury' – because it is something *beyond* a 'threat' – as necessarily *including* the concept of a 'threat' and *exceeding* the presence of a 'threat' for purposes of answering the relevant inquiry: is there a right to apply a safeguard measure?
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> Based on this analysis of the most relevant context of the phrase 'cause or threaten to cause' in Article 2.1, we do not see that phrase as necessarily meaning *one or the other, but not both*. Rather, that clause could also mean *either one or the other, or both in combination*. Therefore, for the reasons we have set out, we do not see that it matters – for the purpose of determining whether there is a right to apply a safeguard measure under the *Agreement on Safeguards* – whether a domestic authority finds that there is 'serious injury', 'threat of serious injury', or, as the USITC found here, 'serious injury or threat of serious injury'. In any of those events, the right to apply a safeguard is, in our view, established.
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> We disagree with the Panel that a requirement of a discrete determination of serious injury or threat of serious injury results from the language of Article 5.1. The Panel's finding is based on the assumption that the permissible extent of the measure depends upon one of two objectives: either of preventing the threat of future injury, or of remedying present injury. As we explain later in this Report, the permissible extent of a safeguard measure is defined by the share of serious injury that is attributed to increased imports, not by the characterization the competent authority ascribes to the situation of the industry. For this reason, we believe the Panel's reasoning on Article 5.1 does not resolve or, in fact, pertain to the issue raised in this appeal relating to the textual interpretation of Article 2.1. (Emphasis in the original)[120]

(d) Condition 4: existence of a causal link between increased imports and serious injury

A determination that increased imports caused or are threatening to cause serious injury may only be made in case the investigation demonstrates 'the existence of the causal link' between the increased imports and serious injury. When factors other than increased imports are causing injury to the domestic industry at the same time, 'such injury shall not be attributed to increased imports'. This is what Article 4.2(b) Safeguards Agreement provides for: a causation requirement and a non-attribution requirement.

There is an important body of WTO case-law on this issue by now, under the Safeguards Agreement as well as under the AD and SCM Agreements which contain very similar provisions.[121] In a nutshell, case-law stands for the proposition that, under the non-attribution requirement, an investigating authority will be requested to *separate and distinguish the effects* of increased imports from the effects that other factors might have had on the state of its

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120 Appellate Body Report, *US – Line Pipe*, paras 169–72. The wisdom of this finding is doubtful. Assuming no change in a set of facts, it is difficult to imagine how threat of injury will happen in case no injury has been caused.

121 The relevance of the AD case-law for the causation requirement under the Safeguards Agreement (and vice versa) was explicitly recognized by the Appellate Body Report on *US – Line Pipe*. Appellate Body Report, *US – Line Pipe*, para. 214.

domestic industry producing the like or directly competitive product. It is only after having complied with this so-called 'non-attribution requirement' that the causal link between increased imports and injury may be established.

An interpretation that required an authority to establish, following separation of the effects of various factors, that increased imports alone, that is, in and of themselves, are the cause of serious injury was rejected by the Appellate Body.[122] However, the obligation to impose safeguard measures so as to counteract only the percentage of injury suffered (assuming that this has indeed been the case) as a result of increased imports (and not the whole of the injury in case factors other than imports have contributed therein), is, in the AB's view, an obligation resulting from Art. 5.1 SG which concerns the *application* of safeguards.

(i) The non-attribution requirement

As already briefly discussed above, Art. 4.2 SG Agreement imposes a *double* requirement of causality: whereas the first sentence of Art. 4.2b SGA requests from investigating authorities to demonstrate that imports have caused injury, the second sentence – often referred to as the *non-attribution* clause – further requests that, when factors other than imports cause injury, the injury caused by such factors should not be attributed to imports. Hence, the (very realistic) working hypothesis of this second sentence is that it could be the case that more than one factor affects a particular outcome. The AB made it clear that there is a logical/temporal sequence between the two sentences in the sense that, one cannot reach the conclusion that serious injury has been caused by imports unless one has first undertaken the exercise under the non-attribution requirement. In its report on *US – Lamb*, the AB pertinently ruled to this effect (para. 180): 'the "causal link" between increased imports and serious injury can only be made *after* the effects of increased imports have been properly assessed, and this assessment, in turn, follows the separation of the effects caused by all the different causal factors'.[123]

The obligation to separate the effects caused by various factors was reflected in very clear terms in the AB Report on *US – Wheat Gluten* (para. 70): 'The need to ensure a proper attribution of injury under Article 4.2(b) indicates that competent authorities must take account, in their determination, of the effects of increased imports *as distinguished from* the effects of other factors' (emphasis in the original). Or in the words of the Appellate Body in *US – Lamb*:

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122 Appellate Body Report, *US – Wheat Gluten*, para. 79.
123 Appellate Body Report, *US – Lamb*, para. 180.

> the final identification of the injurious effects caused by increased imports must follow a prior separation of the injurious effects of the different causal factors. If the effects of the different factors are not separated and distinguished from the effects of increased imports, there can be no proper assessment of the injury caused by that single and decisive factor.[124]

It led the Appellate Body in *US – Line Pipe* to the following conclusion on the non-attribution requirement:

> we are of the view that, with respect to Article 4.2(b), last sentence, competent authorities are required to identify the nature and extent of the injurious effects of the known factors other than increased imports, as well as explain satisfactorily the nature and extent of the injurious effects of those other factors as distinguished from the injurious effects of the increased imports.[125]

In sum, what is required under the non-attribution requirement of Article 4.2(b) SG is that the authority identify the nature and extent of the injurious effects of the known factors other than increased imports. To do this, an authority is required to separate and distinguish the effects caused by other factors from the effects of the increased imports.

Two questions arise: (a) *how* will separation occur and (b) what happens *post*-separation? Furthermore, how to separate and distinguish?

The first question was addressed by the AB its report on *US – Lamb* (para. 181):

> We emphasize that the method and approach WTO Members choose to carry out in the process of separating the effects of the other causal factors is not specified by the *Agreement on Safeguards*. What the Agreement requires is simply that the obligation in Article 4.2 must be respected when a safeguard measure is applied.[126]

The obvious question, however, is whether one can properly separate and distinguish the effects of increased imports from the effects of other factors without in some way or another quantifying these various factors' effects. While there does not seem to exist an explicit legal obligation in the Safeguards Agreement to do so, the Panel in *US – Steel Safeguards* did consider that 'quantification may be particularly desirable in cases involving

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124 Appellate Body Report, *US – Lamb*, para. 180.

125 Appellate Body Report, *US – Line Pipe*, para. 215.

126 Appellate Body Report, *US – Lamb*, para. 181. Although the methodology is not prejudged, it is difficult to imagine how an investigating authority can honour this test without recourse to econometrics: Grossman (1986), Irwin (2002) and Kelly (1988), who argued the simpler and more easy-to-use methodology, have all come up with proposals in this respect.

complicated factual situations where qualitative analyses may not suffice to more fully understand the dynamics of the relevant market'.[127] The Panel went on to consider that in certain circumstances quantification may even be *necessary* to establish non-attribution explicitly on the basis of a reasoned and adequate explanation:

> In addition, the Panel considers that quantification may, in certain cases, be entailed in the obligation on competent authorities to establish non-attribution 'explicitly' on the basis of a reasoned and adequate explanation. In this regard, the Panel recalls that, as stated on several occasions by the Appellate Body, WTO Members are expected to interpret and apply their WTO obligations in good faith. Moreover, in light of the obligations imposed on competent authorities to consider all plausible alternative explanations submitted by the interested parties, we believe that a competent authority may find itself in situations where quantification and some form of economic analysis are necessary to rebut allegedly plausible alternative explanations that have been put forward. While the wording of the provisions of the Agreement on Safeguards does not require quantification in the causal link analysis per se, the circumstances of a specific dispute may call for quantification.
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> Having said that quantification may be desirable, useful and sometimes necessary depending on the circumstances of a case, the Panel recognizes that quantification may be difficult and is less than perfect. Therefore, the Panel is of the view that the results of such quantification may not necessarily be determinative. We consider that an overall qualitative assessment that takes into account all relevant information, must always be performed. Nevertheless, in the Panel's view, even the most simplistic of quantitative analyses may yield useful insights into the overall dynamics of a particular industry and, in particular, into the nature and extent of injury being caused by factors other than increased imports to a domestic industry.
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> Regarding argumentation by the parties as to the form which quantification should take, the Panel considers that this will depend again upon the complexity of the situation under consideration. The approach adopted should enable a competent authority to apportion, even roughly, the injury attributable to factors other than increased imports that may come into play in the context of a particular industry. The more complex the situation, the more necessary a sophisticated analysis becomes. Whatever approach or model is adopted, it should be applied in good faith and with due diligence. It seems to us that this is demanded by the good faith interpretation and application of Articles 2.1, 4.2(b) and 3.1 of the Agreement on Safeguards.[128] (Footnotes omitted)

Post-separation

To separate and distinguish the effects of other factors is one thing, but what is the authority supposed to do with the results? Two Panels on *US – Wheat Gluten* and *US – Lamb* had been of the view that once the effects of the other factors were separated and distinguished from the effects of the imports, an

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127 Panel Report, *US – Steel Safeguards*, para. 10.336.

128 Panel Report, *US – Steel Safeguards*, paras 10.340–10.342.

authority was required to determine that the imports *in and of themselves* were responsible for the serious injury. The Appellate Body rejected this approach. It emphasized the fact that the text of Article 4.2(b) only requires that a causal *link* be established, which it viewed as a requirement to establish that imports *contributed to* the injury, rather than being the necessary and sufficient cause of such injury. The Appellate Body thus advocated a two-step approach, requiring the authority to (1) distinguish the effects of increased imports from that of other factors and (2) attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors (attribution).[129] It rejected the idea that, following the attribution of the effects to these other factors, and thus by implication to imports, there was a need to exclude the effects of other factors (what the AB considered to be the Panel's step 3) or to determine that imports alone were capable of causing serious injury (considered to be the Panel's step 4).[130]

The question of causation and non-attribution in particular has led to many conceptual discussions and linguistic analysis. At the end of the day, however,

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[129] Appellate Body Report, *US – Wheat Gluten*, para. 69. The two-step approach relates to the non-attribution requirement. The AB was of the view that a third and final step would then be 'to determine whether "the causal link" exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*'. AB Report, *US – Wheat Gluten*, para. 69.

[130] In *US – Wheat Gluten*, the Appellate Body first summarized the four-step process the Panel had considered as required in the following manner:

> It seems to us that the Panel arrived at this interpretation through the following steps of reasoning: first, under the first sentence of Article 4.2(b), there must be a 'causal link' between increased imports and serious injury; second, the non-'attribution' language of the last sentence of Article 4.2(b) means that the effects caused by increased imports must be *distinguished from* the effects caused by other factors; third, the effects caused by other factors must, therefore, be *excluded* totally from the determination of serious injury so as to ensure that these effects are not 'attributed' to the increased imports; fourth, the effects caused by increased imports *alone*, excluding the effects caused by other factors, must, therefore, be capable of causing serious injury.

It then concluded as follows:

> For these reasons, we agree with the first and second steps we identified in the Panel's reasoning; however, we see no support in the text of the *Agreement on Safeguards* for the third and fourth steps of the Panel's reasoning.

Appellate Body Report, US – Wheat Gluten, paras 66 and 79.

what it comes down to, once more, is the need to provide an adequate and reasoned explanation as to the impact of other factors on the state of the domestic industry.[131] To explain adequately is to comply with the substantive causation obligation under Article 4.2 (b), as becomes clear from the following statement of the Appellate Body in *US – Line Pipe*:

> Thus, to fulfil the requirement of Article 4.2(b), last sentence, the competent authorities must establish explicitly, through a reasoned and adequate explanation, that injury caused by factors other than increased imports is not attributed to increased imports. This explanation must be clear and unambiguous. It must not merely imply or suggest an explanation. It must be a straightforward explanation in express terms.[132]

In *US – Wheat Gluten*, for example, the Appellate Body considered that the US had failed to ensure non-attribution with respect to the effect of increased US industry capacity as a cause of injury, as the data revealed that this factor may have played a very important role in the deteriorating state of the industry.[133] According to the Appellate Body, the US authorities did not 'adequately evaluate' the complexities of this issue and, in particular, whether the increases in average capacity, during the investigative period, were causing injury to the domestic industry at the same time as increased imports.[134] And in *US – Lamb*, the Appellate Body was of the view that 'in the absence of any meaningful explanation of the nature and extent of the injurious effect' of other factors, the US failed to ensure that it had not attributed injury to increased imports which was actually caused by other factors.[135]

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131 See Appellate Body Report, *US – Lamb*, para. 175.

132 Appellate Body Report, *US – Line Pipe*, para. 217.

133 According to the Appellate Body, the data on the record showed that 'but for the increase in average capacity, the rate of capacity utilization of the domestic industry would have been only slightly lower in 1997 than it was in 1993; . . ., even if the increase in imports had been significantly lower than it actually was, the rate of capacity utilization would, nonetheless, have been significantly lower in 1997 than it was in 1993'. Appellate Body Report, *US – Wheat Gluten*, para. 89.

134 Appellate Body Report, *US – Wheat Gluten*, paras 90–91. On this issue, the USITC simply observed that 'but for the increase in imports, the [domestic] industry would have operated at 61 per cent of capacity in 1997, which is much closer to the level at which the industry operated early in the investigative period when it operated reasonably profitably'.

135 Appellate Body Report, *US – Lamb*, para. 186:

> In the absence of any meaningful explanation of the nature and extent of the injurious effects of these six 'other' factors, it is impossible to determine whether the USITC properly separated the injurious effects of these other factors from the injurious effects of the increased imports. It is, therefore, also impossible to determine

It was in terms of a failure to provide a reasoned and adequate explanation demonstrating that a causal link existed between increased imports and serious injury that the Panel found inconsistencies with *inter alia* Article 4.2(b) for nine product categories[136] in the *US – Steel Safeguards* case.[137]

(ii) A relationship of cause and effect

Post-separation, the causal link between imports and serious injury must be established.[138] In para. 68 of its report on *US – Wheat Gluten*, the AB takes the view that a causal link refers to a relationship of cause and effect such that increased imports contribute to 'bringing about', 'producing' or 'inducing' the serious injury:

> . . . the word 'causal' means 'relating to a cause or causes', while the word 'cause', in turn denotes a relationship between, at least, two elements, whereby the first

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whether injury caused by these other factors has been attributed to increased imports. In short, without knowing anything about the nature and extent of the injury caused by the six other factors, we cannot satisfy ourselves that the injury deemed by the USITC to have been caused by increased imports does not include injury which, in reality, was caused by these factors.

[136] Panel Report, US – Steel Safeguards, para. 10.418 (CCFRS); para. 10.422 (tin mill products); para. 10.444 (hot-rolled bar); para. 10.468 (cold-finished bar); para. 10.486 (rebar); para. 10. 502 (welded pipe); para. 10. 535 (FFTJ); para. 10.568 (stainless steel bar); para. 10.572 (stainless steel wire).

[137] Interestingly, the Appellate Body decided to apply judicial economy and did not make any rulings in this respect. It did however, when asked to provide guidance, state that 'guidance may be found in our previous rulings', and then referred to the relevant part of various Appellate Body Reports dealing with causation issues in the context of both the Safeguards and the Anti-dumping Agreement. See Appellate Body Report, *US – Steel Safeguards*, paras 485–91.

[138] As already discussed briefly *supra*, imports are an endogenous variable and as such can never *cause* injury. Sykes (2003) explains as much when stating that imports are simply the difference between consumption and domestic supply (at a given price, of course). The same set of factors (exogenous variables, like technology, cost structure etc.) that influence imports also influence domestic supply. Hence, it can never be that case that imports cause injury. Rather, investigating authorities should look elsewhere (to exogenous variables) for what causes injury to their domestic production. Hence, in Sykes' view, the WTO judge has in his/her hands an intellectually unworkable tool in the form of the causality requirement. Grossman and Mavroidis (2004) agree with Sykes' analysis. They argue, however, that unless the WTO judge is imaginative, he/she risks penalizing WTO Members for failing to meet an unworkable (and hence impossible to meet) standard. In their view, one way out would be for the judge to interpret the causality-requirement as tantamount to permitting the imposition of safeguards every time there are changes in the import supply curve (which in turn are due to exogenous variables).

> element has, in some way, 'brought about', 'produced' or 'induced' the existence of the second element. The word 'link' indicates simply that increased imports have played a part in, or contributed to, bringing about serious injury so that there is a causal 'connection' or 'nexus' between these two elements.[139] (Footnote omitted)

In *US – Wheat Gluten*, the AB explains that a *genuine* and *substantial* relationship between cause and effect must exist for the causality-requirement to have been met (para. 69):

> Article 4.2(b) presupposes, therefore, as a first step in the competent authorities' examination of causation, that the injurious effects caused to the domestic industry by increased imports are *distinguished from* the injurious effects caused by other factors. The competent authorities can then, as a second step in their examination, attribute to increased imports, on the one hand, and, by implication, to other relevant factors, on the other hand, 'injury' caused by all of these different factors, including increased imports. Through this two stage process, the competent authorities comply with Article 4.2(b) by ensuring that any injury to the domestic industry that was *actually* caused by factors other than increased imports is not 'attributed' to increased imports and is, therefore, not treated as if it were injury caused by increased imports, when it is not. In this way, the competent authorities determine, as a final step, whether 'the causal link' exists between increased imports and serious injury, and whether this causal link involves a genuine and substantial relationship of cause and effect between these two elements, as required by the *Agreement on Safeguards*. (Emphasis in the original)[140]

This 'genuine and substantial relationship' language should not be confused with the substantial cause standard which is the standard applicable in the context of safeguards by US investigating authorities.[141] While the Appellate

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139 Appellate Body Report, *US – Wheat Gluten*, para. 68.

140 Appellate Body Report, *US – Wheat Gluten*, para. 69.

141 The US Court of Appeals for The Federal Circuit (CAFC) in its *Gerald Metals Inc.*, decision of 23 December 1997 (97–1077) describes as follows the *substantial cause* standard which is reflected in US statutes:

> '. . . the statute requires the injury to occur "by reason of" the LTFV imports. This language does not suggest that an importer of LTFV imports goods can escape countervailing duties by finding some tangential or minor cause unrelated to the LTFV goods that contributed to the harmful effects on domestic market prices. By the same token, this language does not suggest that the Government satisfies its burden of proof by showing that the LTFV goods themselves contributed only minimally or tangentially to the material harm.
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> . . .
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> Hence, the statute requires adequate evidence to show that the harm occurred "by reason of" the LTFV imports, not by reason of a minimal or tangential contribution to material harm caused by LTFV goods.' (pp. 9–10 of the decision. N.B.: LTFV stands for 'Less Than Fair Value').

Body has yet to issue a definitive ruling on this US standard as such, the fact that the US causation analysis in all cases challenged so far was found to have been inconsistent, tends to suggest that the substantial cause standard may not be adequate to comply with the causation requirement of Article 4.2(b) Safeguards Agreement.[142]

But what does an authority need to do in order to establish a genuine and substantial relationship? How does one go about establishing that the serious injury is *caused by* the increased imports? In *Argentina – Footwear (EC)*, the Appellate Body agreed with the following analysis by the Panel of what is required to comply with the causation requirement of Article 4.2(b):[143]

> . . . we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[144]

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[142] In addition certain statements by the AB and the Panel in *US – Lamb* and *US – Line Pipe*, respectively suggest that, when challenged as such, the substantial cause standard will be found wanting. In *US – Lamb*, the AB stated as follows:

> 'Although an examination of the relative causal importance of the different causal factors may satisfy the requirements of United States law, such an examination does not, for that reason, satisfy the requirements of the Agreement on Safeguards.' Appellate Body Report, *US – Lamb*, para. 184.

And in *US – Line Pipe*, the Panel was of the view that the US substantial cause standard merely assesses the injurious effects of the other factor at issue against the injurious effects of increased imports and the remaining other factors, and thus reached the following conclusion:

> 'We do not consider that such an analysis allows an investigating authority to determine whether there is "a genuine and substantial relationship of cause and effect" between the serious injury and the increased imports.' Panel Report, *US – Line Pipe*, para. 7.289.

[143] Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

[144] Panel Report, *Argentina – Footwear (EC)*, para. 8.229. For the use of a similar test see Panel Report, *US – Wheat Gluten*, para. 8.91; Panel Report, *US – Lamb*, para. 7.232. Also see Panel Report, *US – Steel Safeguards*, paras 10.297 et seq.

In other words, a causation analysis involves a three-step analysis of (1) correlation in trends, (2) the conditions of competition between the imports and domestic like products, and (3) the effects of other factors on the domestic industry. As we discussed above the latter part of the analysis can itself be divided into two steps (separate and distinguish effects of other factors and attribute effects to imports).

While an analysis of the correlation in trends and a conditions of competition analysis are very useful tools in establishing the causal link, and have become in practice standard means of conducting such an analysis, there is no obligation to establish causation in this manner. As the Panel in *US – Steel Safeguards* concluded, 'Ultimately, it is for the competent authority to decide upon the analytical tool it considers most appropriate to perform this compelling analysis in demonstrating the existence of a causal link.'[145] Because of the common practice by Panels to examine causation by reviewing (i) whether the investigating authority has established correlation between the movements in imports and the injury factors and (ii) whether the conditions of competition have been examined and support a determination of causation, we will next focus on these two aspects of a causation analysis.[146]

Correlation: temporal coincidence between increased imports and serious injury

In *Argentina – Footwear (EC)*, the Appellate Body agreed with the Panel that in an analysis of causation, 'it is the *relationship* between the movements in imports (volume and market share) and the movements in injury factors that must be central to a causation analysis and determination'.[147] This is not to say that a causal link is established when an investigating authority observes a mere *correlation* between imports and injury: *causality* should not be confused with *correlation.* Nevertheless, in its report on *Argentina – Footwear (EC)*, the AB referred with approval to the following statement by the Panel establishing a negative presumption in case of an absence of correlation:

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145 Panel Report, *US – Steel Safeguards*, para. 10.308. The Panel reiterated the viewpoint that as the temporal coincidence between imports and injury becomes less clear, the more compelling the explanation will have to be concerning causation. Panel Report, *US – Steel Safeguards*, paras 10.306–10.307.

146 We recall that the non-attribution analysis is a third aspect of what is sometimes referred to as a 'three-step' test in applying the causation standard of Article 4.2(b) SG Agreement. See Panel Report, *US – Lamb*, para. 7.232. The non-attribution requirement was discussed in a separate section above.

147 Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

> While such a coincidence [between an increase in imports and a decline in the relevant injury factors] by itself cannot *prove* causation (because, *inter alia*, Article 3 requires an explanation – i.e., 'findings and reasoned conclusions'), its absence would create serious doubts as to the existence of a causal link, and would require a *very* compelling analysis of why causation still is present.[148]

On the other hand, correlation, in the sense of simultaneous presence of increased imports and injury is not a *sine qua non* for a finding on causality. The Panel Report on *US – Steel Safeguards* evidences the attitude of the Panel to examine the causality requirement from this perspective, and to distinguish between instances where there is coincidence between increased imports and injury and instances where this has not been the case: the Panel accepts, in this latter context, that there may be a time lag between the increase in imports and the manifestation of their effects on the domestic industry.[149] The Panel is, however, of the view there are temporal limits to the extent of this time lag, depending on the industry:

> The Panel considers that there are limits in temporal terms on the length of lags between increased imports and the manifestation of the effects that are acceptable for the purposes of a coincidence analysis under Article 4.2(b) of the Agreement on Safeguards. The limits that apply would, undoubtedly, vary from industry to industry and factor to factor. Generally speaking, the more rigid the market structure associated with a particular industry, the more likely a lag in effects would exist, at least in relation to some factors. Conversely, the more competitive the market structure, the less tenable it is that lagged effects could be expected. In addition, the Panel considers that while lags may be expected in relation to some factors (for example, employment), lags in the manifestation of effects are less likely to exist in relation to other injury factors such as production, inventories and capacity utilization, which, ordinarily, would react relatively quickly to changes taking place in the market, such as an influx of imports if increased imports are causing serious injury. If the competent authority does rely upon a lag as between the increased imports and the injury factors, we consider that such a lag must be fully explained by the competent authority on the basis of objective data.[150]

The Panel, summing up the prior case-law, requests more of an explanation from investigating authorities when there is no time-coincidence between increased imports and injury:

> In the present dispute, the question arises as to how a causal link must be established for the purposes of Article 4.2(b) in cases where there is an *absence of coincidence*. By absence of coincidence we mean situations where coincidence does not exist or an analysis of coincidence has not been undertaken. In this regard, we agree with

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148 Panel Report, *Argentina – Footwear (EC)*, para. 8.238, as quoted in Appellate Body Report, *Argentina – Footwear (EC)*, para. 144.

149 Panel Report, *US – Steel Safeguards*, para. 10.310.

150 Panel Report, *US – Steel Safeguards*, para. 10.312. The Panel considered that a one year time lag may be acceptable. Panel Report, *US – Steel Safeguards*, para. 10.311.

> statements made by the panel and Appellate Body in *Argentina – Footwear (EC)* and the panel in *US – Wheat Gluten*, that coincidence in movements in imports and the movements in injury factors would ordinarily tend to support a finding of causation, while *the absence of such coincidence would ordinarily tend to detract from such a finding and would require a compelling explanation as to why a causal link is still present*.[151]

At the same time the Panel is cautious enough to repeat that coincidence in and of itself does not amount to causation:

> We understand from the foregoing, firstly, that the term 'coincidence' refers to the relationship between the movements in imports and the movements in injury factors. The panel and Appellate Body made it clear that, in considering movements in imports, it is necessary to look at movements in import volumes and import market shares. In our view, the word 'coincidence' in the current context refers to the *temporal* relationship between the movements in imports and the movements in injury factors. In other words, upward movements in imports should normally occur at the same time as downward movements in injury factors in order for coincidence to exist. We note that, below, we qualify these comments to take account of cases where a lag exists between the influx of imports and the manifestation of the effects of injury suffered by the domestic industry.
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> . . .
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> The Panel emphasizes that the Appellate Body in *Argentina – Footwear (EC)* upheld the panel's statement that 'coincidence by itself *cannot prove* causation' (emphasis added). The Panel considers that there are situations where a coincidence analysis may not suffice to prove causation or where the facts may not support a clear finding of coincidence and that, therefore, such situations may call for further demonstration of the existence of a causal link. Indeed, there may be situations where a competent authority, as part of its overall demonstration of the existence of a causal link, undertakes different analyses, with a view to proving that a genuine and substantial relationship of cause and effect exists between increased imports and serious injury.[152] (Italics and emphasis in the original, footnotes omitted)

Conditions of competition

The Panel in *Argentina – Footwear (EC)* considered that, in addition to a trends/correlation analysis, a causation analysis requires an examination of the conditions of competition between the imported products and the like or directly competitive products. According to the Panel, 'for an analysis to demonstrate causation, it must address specifically the nature of the interaction between the imported and domestic products in the domestic market of the importing country'.[153] While this may imply a price analysis, this is not necessarily so, as much will depend on the product in question:

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151 Panel Report, *US – Steel Safeguards*, para. 10.303.
152 Panel Report, *US – Steel Safeguards*, paras 10.299 and 10.305.
153 Panel Report, *Argentina – Footwear (EC)*, para. 8.250.

> We note in this regard that there are different ways in which products can compete. Sales price clearly is one of these, but it is certainly not the only one, and indeed may be irrelevant or only marginally relevant in any given case. Other bases on which products may compete include physical characteristics (e.g., technical standards or other performance-related aspects, appearance, style or fashion), quality, service, delivery, technological developments consumer tastes, and other supply and demand factors in the market. In any given case, other factors that affect the conditions of competition between the imported and domestic products may be relevant as well. It is these sorts of factors that must be analysed on the basis of objective evidence in a causation analysis to establish the effect of the imports on the domestic industry.[154]

Still, the Panel in *US – Steel Safeguards* considered that price is an important, if not the most important factor in a conditions of competition analysis:

> A consideration of the various factors that have been mentioned provides context for the consideration of *price*, which, in the Panel's view, is an important, if not the most important, factor in analysing the conditions of competition in a particular market, although consideration of prices is not necessarily mandatory. [. . .] Indeed, we consider that relative price trends as between imports and domestic products will often be a good indicator of whether injury is being transmitted to the domestic industry (provided that the market context for such trends are borne in mind) given that price changes have an immediate effect on profitability, all other things being equal. In turn, profitability is a useful measure of the state of the domestic industry.[155] (Footnote omitted)

It seems there exists a relationship between the depth of detail and degree of specificity required in a causation analysis and the breadth and heterogeneity of the like or directly competitive product definition. In case a very broad product definition is used, 'the analysis of the conditions of competition must go considerably beyond mere statistical comparisons for imports and the industry as a whole, as given their breadth, the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market'.[156]

To conclude, assuming that an investigating authority has: (a) examined all relevant factors that might be causing injury; (b) separated and distinguished

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154 Panel Report, *Argentina – Footwear (EC)*, para. 8.251. Also see, Panel Report, *US – Wheat Gluten*, para. 8.109–10; Panel Report, *US – Steel Safeguards*, para. 10.318.

155 Panel Report, US – Steel Safeguards, para. 10.320.

156 Panel Report, *Argentina – Footwear (EC)*, fn 557. The Panel in *US – Steel Safeguards* agreed with this view and concluded that 'As to *how detailed* an analysis of the conditions of competition must be, the Panel is of the view that the more complicated the factual situation, the more important it is for a number of factors to be taken into consideration'. Panel Report, *US – Steel Safeguards*, para. 10.323.

the effects caused by increased imports from those caused by other factors; and that (c) it finds that there exists a causal link between increased imports and serious injury or threat thereof, it has comp[lied] with its *substantive* obligations under the causality-requirement, and can lawfully impose safeguards. The extent of permissible safeguards will be discussed *infra*.

Before we move to discuss the permissible extent of safeguards, there is one last question to address: the definition of the domestic industry producing the like product. We turn to this question in what immediately follows.

4 A Safeguard to Protect the Domestic Industry Producing the Like or Directly Competitive Product

Article 4.1(c) provides that in determining injury, a 'domestic industry' shall be understood to mean the producers as a whole of the like or directly competitive products operating within the territory of a member, or those whose collective output of the like or directly competitive products constitutes a major proportion of the total domestic production of those products. This definition raises two issues concerning (i) the scope of like or directly competitive products; and (ii) the data to be used as the basis of the determination concerning the state of the domestic industry.

(a) Like or directly competitive products

While the AD and SCM Agreements contain a definition of the term 'like product', the Safeguards Agreement does not. It seems justified to assume, however, that the same definition of a 'like product' applies in this context: a product which is identical to the imported product i.e., alike in all respects, or in the absence of such a product, a product which has characteristics closely resembling those of the imported product.[157] In the AD/SCM context this definition has led to a focus on the physical characteristics of the product, as we discussed earlier.

The term 'directly competitive products' seems to refer to a wider group of products, that is, those products which are not necessarily physically alike but nevertheless compete in the same market. The term has not been interpreted in the context of a dispute concerning the Safeguards Agreement. However, the Appellate Body did express its views on this term as it also appears in the now defunct Agreement on Textiles and Clothing (ATC) as part of the special safeguard provision in that Agreement. According to the Appellate Body, two products are 'competitive' if they are *commercially interchangeable* or if they offer *alternative ways of satisfying the same consumer demand*. They do not

157 Article 2.6 AD Agreement; footnote 46 SCM Agreement.

actually have to be presently competing with one another for these two products to be competitive products. It is the capacity of products to compete in the same market which is important:

> According to the ordinary meaning of the term 'competitive', two products are in a competitive relationship if they are commercially interchangeable, or if they offer alternative ways of satisfying the same consumer demand in the marketplace. 'Competitive' is a characteristic attached to a product and denotes the *capacity* of a product to compete both in a current or a future situation.[158]

Because of the qualifier 'directly', the Appellate Body was of the view that 'a safeguard action will not extend to protecting a domestic industry that produces unlike products which have only a remote or tenuous competitive relationship with the imported product'.[159]

A similar emphasis on consumer preference, both actual and future potential, as well as on substitutability as determinative in the consideration of two products as directly competitive can be deduced from the GATT Article III jurisprudence which seems to be obviously relevant in this respect.[160] In terms of substitutability, the difference between like products and directly competitive products is that 'like' products are perfectly substitutable and that 'directly competitive' products are characterized by a high, but imperfect, degree of substitutability.[161]

It is, therefore, clear that the definition of what constitutes the domestic industry for purposes of the injury analysis in the Safeguards context (producers of the like or directly competitive product) is wider than the scope of the domestic industry in the AD/CVD case which was limited to the like product

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158 Appellate Body Report, *US – Cotton Yarn*, para. 96.

159 Appellate Body Report, *US – Cotton Yarn*, para. 98.

160 In *US – Cotton Yarn*, the Appellate Body referred to its analysis concerning the term 'directly competitive products' in its reports on *Korea – Alcoholic Beverages* and *Japan – Alcoholic Beverages II*. It even provided a summary of its relevant findings in this respect as the basis for its analysis of the term in the safeguards context of the ATC. Appellate Body Report, *US – Cotton Yarn*, para. 91. *See* Panel Report on *Chile – Taxes on Alcoholic Beverages*, adopted on 12 January 2000, WT/DS87/110/R, paragraphs 7.14ff. Appellate Body Report on *Japan – Taxes on Alcoholic Beverages*, adopted on 1 November 1996, WT/DS8/10/11/AB/R, paragraph 6.28; Panel and Appellate Body Reports on *Korea – Taxes on Alcoholic Beverages*, adopted on 17 February 1999, WT/DS75/84/R and WT/DS75/84/AB/R, paragraph 10.38; Report of the Panel on *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, adopted on 10 November 1987, BISD 34S/83; Report of the *Working Party on Border Tax Adjustment*, adopted on 2 December 1970, BISD 18S/97, paragraph 18.

161 Appellate Body Report, *US – Cotton Yarn*, fn. 68; Also see, for example *Korea – Alcoholic Beverages*, para. 118.

producers only.[162] After all, 'like' products are a sub-set of directly competitive or substitutable products: all like products are, by definition, directly competitive products, whereas not all 'directly competitive' products are 'like'.[163]

The AB, in its report on *US – Cotton Yarn* explained that the term 'domestic industry of the like or directly competitive product' should be interpreted in a *product*-oriented (as opposed to producer-oriented) manner. It thus expressed its preference for demand-side criteria and relegated the relevance of supply-side considerations:

> A plain reading of the phrase 'domestic industry producing like and/or directly competitive products' shows clearly that the terms 'like' and 'directly competitive' are characteristics attached to the domestic products that are to be compared with the imported product. We are, therefore, of the view that the definition of the *domestic industry* must be product-oriented and not producer-oriented, and that the definition must be based on the products produced by the *domestic industry* which are to be compared with the imported product in terms of their being like or directly competitive.[164]

In its report on *US – Lamb*, the AB repeated this point: 'The focus must . . . be on the identification of the *products*, and their "like or directly competitive" relationship, and not on the *processes* by which those products are produced',[165] (emphasis in the original). So the fact that there is a high degree of vertical integration between an input producer and a producer of the final like product is not relevant in defining the domestic industry producing the like product.[166]

In *US – Lamb*, the US argued that producers of the *input* product may, under certain circumstances, also be considered part of the domestic industry producing the *final product* investigated. It had thus included in its safeguards

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162 Panel Report, *US – Lamb*, para. 7.117:

> This being said, it is clear on the face of the Safeguards Agreement that the product coverage of a safeguard investigation can potentially be broader than in an anti-dumping or countervail case, to the extent that 'directly competitive' products are involved. In our view, this apparent additional latitude that exists under the Safeguards Agreement may be related to the basic purpose of the Safeguards Agreement and GATT Article XIX, namely to provide an effective safety valve for industries that are suffering or are threatened with serious injury caused by increased imports in the wake of trade liberalization.

163 Appellate Body Report, *Korea – Alcoholic Beverages*, para. 118.

164 Appellate Body Report, *US – Cotton Yarn*, para. 86.

165 Appellate Body Report, *US – Lamb*, para. 94.

166 Appellate Body Report, *US – Lamb*, para. 94.

investigation of imports of lamb meat not only the domestic producers of lamb meat (the breakers and packers) but also the growers and feeders of live lamb in the US. It considered that this was justified, 'because, as the USITC has found: (1) there is a "continuous line of production" from the raw product, live lambs, to the end-product, lamb meat; and (2) there is a "substantial coincidence of economic interests" between the producers of the raw product and the producers of the end-product'.[167]

The Appellate Body, like the Panel,[168] in no unclear terms rejected this argument concluding that it is not permitted under Article 4.1(c) to include input producers as part of the industry producing the 'like' end-product:

> In our view, under Article 4.1(c), input products can only be included in defining the 'domestic industry' if they are 'like or directly competitive' with the end-products. If an input product and an end-product are not 'like' or 'directly competitive', then it is irrelevant, under the *Agreement on Safeguards*, that there is a continuous line of production between an input product and an end-product, that the input product represents a high proportion of the value of the end-product, that there is no use for the input product other than as an input for the particular end-product, or that there is a substantial coincidence of economic interests between the producers of these products. In the absence of a 'like or directly competitive' relationship, we see no justification, in Article 4.1(c) or any other provision of the *Agreement on Safeguards*, for giving credence to any of these criteria in defining a 'domestic industry'.[169]

The Appellate Body thus concluded that by expanding the 'domestic industry' to include producers of other products, namely, *live lambs*, the USITC defined the 'domestic industry' inconsistently with Article 4.1(c) of the *Agreement on Safeguards* as this should have been limited only to *packers and breakers of lamb meat*.[170]

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167 Appellate Body Report, *US – Lamb*, para. 89

168 Panel Report, *US – Lamb*, paras 7.71–7.77 and 7.118. The Panel considered that 'a given enterprise can be considered as a producer of only those goods that it actually makes. By this logic, a producer that makes primary or intermediate goods used in the production of further processed goods must be considered a producer of the primary or intermediate good, rather than of the processed good that it does not itself ever produce'. Panel Report, *US – Lamb*, para. 7.70.

The Panel considered that past Panel reports concerning industry definition in the context of the SCM and AD Agreements were relevant to its interpretation and application of the industry definition under the Safeguards Agreement and found support for its analysis in GATT Panel Reports in *United States – Wine and Grape Products*, *Canada – Manufacturing Beef CVD* and *New Zealand – Finnish Transformers*. See Panel Report, *US – Lamb*, paras 7.75, 7.78–7.100.

169 Appellate Body Report, *US – Lamb*, para. 90.

170 Appellate Body Report, *US – Lamb*, paras 95–6. For the sake of completeness, it should be added that the USITC had not made a finding that live lamb was a

When determining the scope of the like or directly competitive product, it is obvious that the scope of the product investigated plays a determinative role.[171] There is no provision in the Safeguards Agreement which determines how the imported 'product concerned' is to be defined, nor how broad or narrow such a definition may be. Nevertheless, the Panel in *US – Steel Safeguards* considered that the product definition must be such that it allows for the possibility of conducting a meaningful causation analysis and a conditions of competitions test in particular. In this case, the US investigating authority had relied on data that sometimes referred to the wider CCFRS (certain carbon flat rolled steel products) category and sometimes to some of the products included in the wider category.[172] On its own admittance, reliance on combined data could sometimes involve double-counting. The improper product definition led the Panel to find that the United States had acted inconsistently with their obligations to demonstrate causality under Article 4.2(b) SG Agreement:

> In our view, the imported product and the like or directly competitive products must be defined in such a way that the causal link analysis required by Article 4.2(b) can be undertaken. More particularly, they must be defined in such a way that, for example, a coincidence or a conditions of competition analysis may be undertaken. They must also be defined in such a way that it can be established that injury suffered by producers of the like or directly competitive products caused by factors other than increased imports is not attributed to the increased imports. In our view, if the imported products or the like or directly competitive products are defined in such a way that prevents the proper application of the causation requirements contained in Article 4.2(b), the causation determination will necessarily be inconsistent with the prescriptions of Article 4.2(b).
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> In our view, CCFRS was defined in such a way that prevented the proper application of the causation requirements contained in Article 4.2(b). We consider that the USITC itself effectively admitted that CCFRS could not be subjected to the application of the causation requirements given the fact that, on a number of occasions, it relied upon data for the items that constituted CCFRS rather than for CCFRS as a whole without explaining why and how such specific data on such

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product directly competitive with lamb meat. In particular, the USITC defined lamb meat as the like product, and identified the growers, feeders, packers and breakers as producers of that *like* product. See Panel Report, *US – Lamb*, fn. 154.

171 As the Appellate Body noted in *US – Lamb*, 'the first step in determining the scope of the domestic industry is the identification of the products which are "like or directly competitive" with the imported product. Only when those products have been identified is it possible then to identify the "producers" of those products'. Appellate Body, *US – Lamb*, para. 87.

172 The Panel considered that the difficulties encountered in reviewing the USITC's causation analysis for this product are associated with the fact that CCFRS comprises five constituent items, namely, slab, plate, hot-rolled steel, cold-rolled steel and coated steel. Panel Report, *US – Steel Safeguards*, para. 10.358.

> items related to the determination concerning CCFRS as a whole. In addition, the USITC itself admitted that the reliance on combined data for 'the five types of certain carbon flat-rolled steel . . . may involve double-counting'. Finally, as noted above, we do not consider that the grouping of the various products that constituted CCFRS renders it amenable to conditions of competition analysis because it becomes difficult, if not impossible, for the competent authority to identify the proper locus of competition while undertaking a conditions of competition analysis for the purposes of establishing a causal link for CCFRS.[173] (Footnotes omitted)

In other words, in line with what the Panel in *Argentina – Footwear (EC)* had noted in the context of the conditions of competition test, if the product definition is too broad, no meaningful analysis of the conditions of competition is possible, and the causation requirement cannot be met.[174]

(b) Representativeness of the data concerning the 'domestic industry'

The domestic industry is referred to in Article 4.1(c) as the domestic producers *as a whole*, or those whose collective output constitutes *a major proportion* of the total domestic product. But how much data is necessary for a finding of injury to be lawful? In *US – Lamb*, the AB held the view that the data used had to be sufficiently representative of the 'domestic industry' to allow determinations to be made about that industry: 'competent authorities must have a *sufficient* factual basis to allow them to draw reasoned and adequate conclusions concerning the situation of the "domestic industry". The need for such a sufficient factual basis, in turn, implies that the data examined, concerning the relevant factors, must be representative of the "domestic industry"'.[175]

However, according to the Appellate Body, it is not necessary for an investigating authority to gather data from the whole of the industry producing the like or directly competitive product. It suffices that it has before it data from a statistically valid sample so that they are sufficiently representative to give a true picture of the particular domestic industry in question. Absent such data, the findings risk being found inconsistent with the SG Agreement:

> We do not wish to suggest that competent authorities must, in every case, actually have before them data pertaining to all those domestic producers whose production, taken together, constitutes a major proportion of the domestic industry. In some

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173 Panel Report, *US – Steel Safeguards*, paras 10.416–17.

174 This is so because, under a broad definition, 'the statistics for the industry and the imports as a whole will only show averages, and therefore will not be able to provide sufficiently specific information on the locus of competition in the market'. Panel Report, *Argentina – Footwear (EC)*, para. 8. 261, footnote 557, quoted in Panel Report, *US – Steel Safeguards*, para. 10.378.

175 Appellate Body Report, *US – Lamb*, para. 131.

> instances, no doubt, such a requirement would be both impractical and unrealistic. Rather, the data before the competent authorities must be sufficiently representative to give a true picture of the 'domestic industry'. What is sufficient in any given case will depend on the particularities of the 'domestic industry' at issue. In this case, the Panel's conclusion that the data before the USITC was not sufficiently representative is, in our view, a finding that turns on the particularities of the United States' lamb meat industry, as defined by the USITC, and we see no reason to disturb this finding of the Panel. We note, moreover, that the USITC itself acknowledged that the data before it for growers did not represent a 'statistically valid sample'.[176] (Footnote omitted)

The question is whether the following scenario would be acceptable in the eyes of the Appellate Body: there are five domestic producers, three of which are requesting the initiation of the investigation. They represent, let us assume, 75 per cent of total production – obviously a major proportion of total output. The data for all three is not very similar however, as one is still doing relatively well while number two is in some difficulty and number three is operating at a loss. Would it be acceptable to use the data of number three, assuming he represents 25 per cent of total production, or 33 per cent of the total production of the three examined producers? Is that a 'statistically valid sample' for the domestic producers representing a major proportion of total output? Or would only an analysis based on data from numbers two and three which together represent assumingly, 50 per cent of total production, or 66 per cent of selected producers' output be a 'statistically valid' sample? Is statistically valid equal to truly representative, and what is the benchmark to be used? These questions remain unanswered.

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[176] Appellate Body Report, *US – Lamb*, para. 132. The Panel in *US – Lamb* had reached the following conclusion:

> Thus, in our view, the crucial problem with the data used by the USITC relates to the representativeness of the questionnaire data where they *were* used (e.g., employment, financial indicators), and not with the use of USDA data where available. In particular the low data coverage for growers and feeders (approximately 6 per cent), the lack of financial data for interim 1997 and 1998 for grower/feeders, and the uneven data coverage for packers and breakers (especially in the financial data as outlined above) raises serious doubts as to whether the data represent a 'major proportion' of the domestic industry, in the sense of SG Article 4.1(c).
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> This lack of representativeness is likely compounded by the fact that the USITC defined the domestic industry broadly as including growers and feeders, as the conclusions drawn from the data pertaining to only a small proportion of US growers and feeders are central to the USITC's overall finding of threat of serious injury.

Panel Report, *US – Lamb*, paras 7.218–19.

5 Panel's Standard of Review when Evaluating Injury and Causation

In a separate section we discuss the general standard of review for Panels in the safeguards context. For now, we focus on the specific application of this general standard of review in case Panels are asked to examine the injury and causation analysis of an investigating authority conducting a safeguards investigation.

What a Panel will be reviewing is whether an investigating authority has provided a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports and that increased imports caused injury. We quote from the AB report on *US – Lamb* (para. 103):

> . . . an 'objective assessment' of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated *all relevant factors*, and, second, a panel must review whether the authorities have provided a *reasoned and adequate explanation* of how the facts support their determination. Thus, the panel's objective assessment involves a *formal* aspect and a *substantive* aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination. (Italics in the original)

The standard of review for Article 4 – injury and causation claims – has been articulated by the Panel in *US – Steel Safeguards* in a comprehensive manner:

> In addition, the Appellate Body has provided us with specific guidance with respect to the application of the standard of review in cases involving claims under Article 4 of the Agreement on Safeguards. In particular, in *Argentina – Footwear (EC)*, the Appellate Body stated that the Panel in that case was obliged by the terms of Article 4 to assess whether the competent authorities had examined all the relevant facts and had provided a reasoned explanation.[177] In *US – Lamb*, the Appellate Body added that a panel can assess whether the competent authority's explanation for its determination is reasoned and adequate only if the panel critically examines that explanation in depth and in the light of the facts before the panel. The Appellate Body stated that, therefore, panels must review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of that data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plausible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation.[178] Further, the Appellate Body in *US – Line Pipe* stated that a mere assertion that injury caused by other factors has not been attributed to increased imports does not establish

177 Appellate Body Report, *Argentina – Footwear (EC)*, para. 121.
178 Appellate Body Report, *US – Lamb*, para. 106.

explicitly with a reasoned and adequate explanation that injury caused by factors other than increased imports was not attributed to increased imports.[179]

We have further guidance as to how to apply the standard of review in relation to the competent authorities' causation analysis. In particular, in *Argentina – Footwear (EC)*, the panel stated:[180]

> Applying our standard of review, we will consider whether Argentina's causation analysis meets these requirements on the basis of (i) whether an upward trend in imports coincides with downward trends in the injury factors, and if not, whether a reasoned explanation is provided as to why nevertheless the data show causation; (ii) whether the conditions of competition in the Argentine footwear market between imported and domestic footwear as analysed demonstrate, on the basis of objective evidence, a causal link of the imports to any injury; and (iii) whether other relevant factors have been analysed and whether it is established that injury caused by factors other than imports has not been attributed to imports.[181,182]

D THE APPLICATION OF SAFEGUARDS

1 Strictly to the Extent Necessary

Art. 5.1 SG requires from WTO Members to 'apply safeguard measures only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment'. Although intuitively one would have thought of this provision as a mere procedural requirement, the AB in its *US – Line Pipe* jurisprudence elevated this provision to one of the most important provisions in the SG Agreement edifice. In a nutshell, the AB held the view that, by virtue of this provision, an investigating authority that has separated the effects caused by imports and other factors can only apply the safeguard up to the level of that part of the injury attributable to imports in isolation. Assuming, for example, that it can be shown that, increased imports account for 20 per cent of the total injury suffered, a WTO Member, by virtue of Art. 5.1 SG Agreement, can impose safeguards to counteract the 20 per cent only, and not the total amount of injury suffered.

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179 Appellate Body Report, *US – Line Pipe*, para. 220.

180 While the Appellate Body in *Argentina – Footwear (EC)* did not specifically comment on these causation findings, it did state that it saw 'no error in the Panel's interpretation of the causation requirements, or in its interpretation of Article 4.2(b) of the *Agreement on Safeguards*': Appellate Body Report, *Argentina – Footwear (EC)*, para. 145.

181 Panel Report, *Argentina – Footwear (EC)*, para. 8.229.

182 Panel Report, *US – Steel Safeguards*, paras 10.284–5.

A small detour to the facts of the case is warranted in order to understand the precise effect of the *US – Line Pipe* jurisprudence. When imposing safeguards, the United States applies the so-called '*substantial cause*' standard. According to this standard, the USITC,[183] after it has distinguished the effects caused by various factors, will impose safeguards to counteract the whole of the injury caused, *provided* that increased imports are the relatively speaking *more important source* of injury.

In the present case, the USITC identified six factors, other than increased imports, as the possible contributing causes of serious injury. The USITC further found that one of the six factors, namely, declining demand in the oil and gas sector, contributed to the serious injury. However, since increased imports had a greater impact on injury than this factor, the USITC, in application of the *substantial cause*-standard, imposed safeguards to counteract all of the injury caused to the US domestic industry.[184]

The AB accepted Korea's claim that Art. 5.1 SG Agreement imposed a limit on the amount of injury than can be counteracted through safeguards in case where factors other than increased imports simultaneously contribute to injury. To reach this conclusion, the AB followed a multi-step reasoning. It started by explaining that its prior rulings on the obligation to separate the effects of various factors simultaneously causing injury were pertinent only to address the issue whether *a right* to impose a safeguard exists:

> We begin our analysis of this issue by observing that the United States is mistaken in its characterization of our finding in paragraph 70 of our Report in *US – Wheat Gluten*. As we have said, two basic inquiries are relevant to the process of determining whether, in the circumstances of a particular case, a safeguard measure is consistent with the rules set out in the *Agreement on Safeguards*: first, it must be determined that the conditions have been met for applying a safeguard measure; second, if it is established that such a right exists, then it must be determined whether the measure has been applied 'only to the extent necessary to prevent or remedy serious injury and to facilitate adjustment'. Paragraph 70 of our Report in *US – Wheat Gluten* addressed the first of these two inquiries. In stating that Article 4.2(b) should not be read as necessarily implying that increased imports, *on their own*, must be capable of causing serious injury, or that injury caused by other factors must be *excluded* from the determination of serious injury, we were addressing the question of whether there is a right to apply a safeguard measure; we were not addressing the permissible extent of the application of a safeguard measure.
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> The United States is, therefore, mistaken in maintaining that our ruling in *US – Wheat Gluten* supports the proposition that Article 5.1, first sentence, permits a Member to apply a safeguard measure to prevent or remedy 'the *entirety* of the seri-

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183 The US International Trade Commission, that is, the *ratione materiae* competent to conduct safeguard investigations, US authority.

184 Appellate Body Report, *US – Line Pipe*, paras 203 and 207.

> ous injury experienced by the domestic industry'. The United States submits that because we 'decided that in accordance with Article 4.2(a) serious injury was the entirety of the condition of the industry', it follows that the serious injury to which Article 5.1, first sentence, refers must be the 'entirety' of the serious injury. But, our ruling in *US – Wheat Gluten* makes no mention of the permissible extent to which a safeguard measure may be applied, nor of the 'entirety' of serious injury as it relates to that permissible extent. The permissible extent of a safeguard measure is the subject of Article 5.1, first sentence. The meaning of Article 5.1, first sentence, was not at issue in *US – Wheat Gluten*; it is at issue here.[185] (Italics and emphasis in the original, footnotes omitted)

Having settled that it was now for the first time entering new territory, the AB goes on to explain why a WTO Member can, in a WTO-consistent manner, apply safeguards only to the extent necessary to remedy the part of injury caused by increased imports. In its view, textual reasons (the wording of Art. 5.1 SGA), contextual reasons (the wording of other SGA provisions closely relating to the subject-matter of Art. 5.1 SGA), as well as the object and purpose of the SGA support this view:

> We think it reasonable to assume that, as the Agreement provides only one definition of 'serious injury', and as the Agreement does not distinguish the 'serious injury' to which Article 5.1 refers from the 'serious injury' to which Article 4.2 refers, the 'serious injury' in Article 5.1 and the 'serious injury' in Article 4.2 must be considered as one and the same. On this, we agree with the United States. But, contrary to what the United States argues, the fact that these two provisions refer to the same 'serious injury' does not necessarily lead to the conclusion that a safeguard measure may address the 'entirety' of the 'serious injury', including the part of the 'serious injury' that is attributable to factors other than increased imports.
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> This is because Article 5.1, first sentence, sets out the maximum permissible extent to which a safeguard measure may be applied. With its emphasis on the 'entirety' of the 'serious injury', the United States seems to read the word 'all' as if it were between the word 'remedy' and the words 'serious injury' in this provision, so that the phrase would be 'remedy *all* serious injury'. But the word 'all' is not there. And, as we have said more than once, words must not be read into the Agreement that are not there.
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> . . .
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> In our view, the non-attribution language of the second sentence of Article 4.2(b) has two objectives. First, it seeks, in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required 'causal link' between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports. Second, it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports. As we read the Agreement, this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence. Indeed, as we see it, this is the only possible

185 Appellate Body Report, *US – Line Pipe*, paras 242–3.

> interpretation of the obligation set out in Article 4.2(b), last sentence, that ensures its consistency with Article 5.1, first sentence. It would be illogical to require an investigating authority to ensure that the 'causal link' between increased imports and serious injury not be based on the share of injury attributed to factors other than increased imports while, at the same time, permitting a Member to apply a safeguard measure addressing injury caused by all factors.
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> . . .
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> If the pain inflicted on exporters by a safeguard measure were permitted to have effects beyond the share of injury caused by increased imports, this would imply that an exceptional remedy, which is not meant to protect the industry of the importing country from unfair or illegal trade practices, could be applied in a more trade-restrictive manner than countervailing and anti-dumping duties. On what basis should the *WTO Agreement* be interpreted to limit a countermeasure to the extent of the injury caused by unfair practices or a violation of the treaty but not so limit a countermeasure when there has not even been an allegation of a violation or an unfair practice?
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> . . .
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> The object and purpose of the *Agreement on Safeguards* support this reading of the context of Article 5.1, first sentence. The *Agreement on Safeguards* deals only with *imports*. It deals only with measures that, under certain conditions, can be applied to *imports*. The title of Article XIX of the GATT 1994 is 'Emergency Action on *Imports* of Particular Products' (emphasis added). It seems apparent to us that the object and purpose of both Article XIX of the GATT 1994 and the *Agreement on Safeguards* support the conclusion that safeguard measures should be applied so as to address only the consequences of *imports*. And, therefore, it seems apparent to us as well that the limited objective of Article 5.1, first sentence, is limited by the consequences of *imports*.[186] (Italics and emphasis in the original)

The AB then naturally concluded that Art. 5.1 SG Agreement requires WTO Members to impose safeguards only to the extent necessary to counteract injury caused by increased imports.[187]

It is noteworthy that Article 5.1 SA does not contain any non-attribution language such as can be found in Article 4.2(b) SA concerning the determination of the causal link. It is, to say the least, surprising that the AB brings the non-attribution language, which it seemed to have read out of the agreement for all practical intents and purposes when it came to the causation analysis, back through the back door of Article 5.1 SA dealing with the application of the measure. The term attribution is not mentioned in Article 5.1, yet it seems as if only in the context of the application of the measure,

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[186] Appellate Body Report, *US – Line Pipe*, paras 249–50, 252, 257 and 258.

[187] Appellate Body Report, *US – Line Pipe*, para. 260. The AB considered that the authority does not need to justify the precise level of the measure, other than a quantitative restriction, as long as it complied with this substantive requirement. AB Report, *US – Line Pipe*, para. 234.

the non-attribution requirement will have its true effect and can fulfil its role.[188]

Does this safeguards ruling have implications for the application of measures in the AD/CVD context? The AD and SCM Agreements contain non-attribution language in their respective provisions dealing with injury and causation (Article 3.5 AD/15.5 SCM) similar to the non-attribution language of Article 4.2(b) Safeguards Agreement. However, in terms of the legitimate level of the measure to be imposed upon a finding of dumping/subsidization, injury and the causal link, the texts of the various Agreements differ and the situation is more complicated.

On the one hand, in the AD and CVD context, the Agreements clearly link the maximum amount of the duty/measure to the margin of dumping or subsidization rather than to the injury.[189] Therefore, the argument used by the Appellate Body in *US – Line Pipe* to support its reasoning is factually inaccurate. We recall that the AB argues that, since in case of 'unfair' trade remedies the measure is limited by the amount of the injury inflicted, then, *a fortiori*, such limitations should also apply to 'fair' trade actions such as safeguard measures.[190] As we pointed out, however, in the AD/CVD context, the amount of the duty is limited by the margin of dumping or subsidization and *not* necessarily by the amount of the injury caused by dumping or subsidization. In other words, and unless the AB is suggesting that the lesser duty rule is in fact mandated by the non-attribution language in the AD/SCM Agreement,[191] it is not so that the WTO Agreement limits a countermeasure to the extent of the injury caused by unfair practices.

On the other hand, 'injury' is an important benchmark in the AD/CVD context as well. This is certainly so for those Members applying the lesser duty rule as, in such cases, the level of the measure is linked to the injury. But it is

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188 After all, according to the AB, the two objectives of the non-attribution language in Article 4.2 (b) are (i) 'in situations where several factors cause injury at the same time, to prevent investigating authorities from inferring the required "causal link" between increased imports and serious injury or threat thereof on the basis of the injurious effects caused by factors other than increased imports; and (ii) it is a benchmark for ensuring that only an appropriate share of the overall injury is attributed to increased imports'. Although it is not immediately clear to us what the AB means with this second objective, it nevertheless found that precisely 'this latter objective, in turn, informs the permissible extent to which the safeguard measure may be applied pursuant to Article 5.1, first sentence'. AB Report, *US – Line Pipe*, para. 252.

189 Article 9.3 AD Agreement; Article 19.4 SCM Agreement.

190 Appellate Body Report, *US – Line Pipe*, para. 257.

191 Or even by customary international law and the rules on state responsibility, as the Appellate Body seems to consider that non-attribution is really an expression of the principle of proportionality of countermeasures in public international law. See Appellate Body Report, *US – Line Pipe*, paras 256–9.

equally true in a more general manner as Articles 11 AD and 21 SCM provide that the measure may only remain in place for as long as and to the extent necessary to counteract the injury. After all, it is because of the injurious effect of the dumping or subsidization that a member is allowed to impose AD/CVD measures. The injury to the domestic industry is the raison d'être of AD/CVD action. It is in this context that one could actually introduce the reasoning of the Appellate Body in *US – Line Pipe* that the 'injury' in question is only that part of the total injury which is caused by dumped or subsidized imports in isolation. It would have the 'incidental effect' of requiring authorities to conduct a more thorough analysis of the role of various factors on the state of the domestic industry thus improving the generally deplorable level of the causation analysis of most investigating authorities.

2 Safeguard Measures: the Special Case of Quantitative Restrictions

(a) Minimum quantity of imports in case of QRs

Article 5 does not specify which kind of measures can be used as a safeguard measure,[192] but quantitative restrictions are certainly one of them, as Article 5 contains a number of specific disciplines concerning quota allocation and quota modulation. The basic rule in case of safeguards in the form of quantitative restrictions is that 'such a measure shall not reduce the quantity of imports below the level of a recent period which shall be the average of imports in the last three representative years for which statistics are available, unless clear justification is given that a different level is necessary to prevent or remedy serious injury.'[193]

So the overall quantity of imports that, at a minimum, should be allowed to enter the country is the average of the last three representative years for which statistics are available. If imports increased during the last three years from 100 tonnes over 150 tonnes to 200 tonnes in year three, at least 150 tonnes should be allowed to enter the country after imposition of a safeguard quota. There is of course a question about the meaning of the term 'representative'. It could be argued that, in the case of a sudden and sharp increase in imports in the last year of the period of investigation (the ideal safeguards situation according to the Appellate Body), this last year was not 'representative' of normal import volumes, but rather the result of some unforeseen developments. Excluding this last year from the representative period would of course

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192 The Appellate Body in *Korea – Dairy*, referred to three types, it seems by way of example: quantitative restrictions, tariffs and tariff rate quotas. Appellate Body Report, *Korea – Dairy*, para. 98. We discussed the various types of safeguard measures notified to the Committee on Safeguards at the beginning of this section.

193 Article 5.1 SG.

have serious implications on the minimum amount of imports to be allowed in.

Restricting imports by imposing a quantitative restriction which lowers the amount of imports to below the average of the last three representative years for which statistics are available (in our example, anything below 150 tonnes, whether 120 tonnes, 50 tonnes or zero for that matter) is possible if a *clear justification* is given that such a different level is necessary to prevent or remedy serious injury.

The need for such a clear justification in this particular situation, led the Appellate Body in *Korea – Dairy*[194] and *US – Line Pipe*[195] to conclude that in all other situations (that is, in case of safeguard measures other than QRs and in case of QRs respecting the average level requirement) there is no need for an authority to provide an explanation of why the level of the measure is actually necessary to prevent or remedy serious injury:

> However, we do not see anything in Article 5.1 that establishes such an obligation for a safeguard measure *other* than a quantitative restriction which reduces the quantity of imports below the average of imports in the last three representative years. In particular, a Member is *not* obliged to justify in its recommendations or determinations a measure in the form of a quantitative restriction which is consistent with 'the average of imports in the last three representative years for which statistics are available'.[196]

So, while there is a *substantive* obligation to ensure compliance, there is *no procedural* obligation to demonstrate such compliance.

> Thus, our findings in *Korea – Dairy* establish that Article 5.1 imposes a general substantive obligation, namely, to apply safeguard measures only to the permissible extent, and also a particular procedural obligation, namely, to provide a clear justification in the specific case of quantitative restrictions reducing the volume of imports below the average of imports in the last three representative years. Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied.[197]

This is of course quite bizarre, especially in light of what we said earlier concerning the implication of the non-attribution requirement in the context of the application of a safeguard measure. More in general, it is quite surprising given the fact that almost anything from unforeseen developments over increased imports to serious injury and the causal link has to be adequately explained in a reasoned and reasonable manner in order to allow a Panel to

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194 Appellate Body Report, *Korea – Dairy*, paras 99 and 103.
195 Appellate Body Report, *US – Line Pipe*, para. 234.
196 Appellate Body Report, *Korea – Dairy*, para. 99.
197 Appellate Body Report, *US – Line Pipe*, para. 234.

review the determination made. This was not merely a procedural requirement as we highlighted earlier, but it was considered to form part of the substantive obligation of the investigating authority. However, when it comes to the application of the measure, the situation is apparently different. There is no need to explain or justify the level of the measure, as long as you comply with the substantive obligation to ensure that the level is not higher than necessary. In other words, as we stated earlier, there is a substantive obligation to isolate the injury caused by other factors from the total injury so as to counteract only that part of the injury caused by increased imports. But there is no need to provide a justification or an explanation. So, in fact, it would be up to the complaining party in a WTO dispute settlement procedure to demonstrate that the amount of injury counteracted was higher than the amount of injury caused by increased imports.[198] It sure seems that the Appellate Body realized the problematic outcome of this approach, and therefore, in *US – Line Pipe*, expressed the view that such a justification of the measure, while not required as such, would in any case be the 'incidental effect' of the required reasoned and adequate explanation of the causal link analysis under Articles 3.1 and 4.2(b) SG Agreement:

> This does not imply, as Korea seems to assert, that the measure may be devoid of justification or that the multilateral verification of the consistency of the measure with the *Agreement on Safeguards* is impeded. The Member imposing a safeguard measure must, in any event, meet several obligations under the *Agreement on Safeguards*. And, meeting those obligations should have the effect of clearly explaining and 'justifying' the extent of the application of the measure. By separating and distinguishing the injurious effects of factors other than increased imports from those caused by increased imports, as required by Article 4.2(b), and by including this detailed analysis in the report that sets forth the findings and reasoned conclusions, as required by Articles 3.1 and 4.2(c), a Member proposing to apply a safeguard measure should provide sufficient motivation for that measure. Compliance with Articles 3.1, 4.2(b) and 4.2(c) of the *Agreement on Safeguards* should have the incidental effect of providing sufficient 'justification' for a measure and, as we will explain, should also provide a benchmark against which the permissible extent of the measure should be determined.[199]

Whether this is actually true remains to be seen. In fact, it would most probably be true if the investigating authority would undertake what the Appellate Body called steps 3 and 4 in the non-attribution analysis, that is, to exclude the

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198 As we discuss elsewhere, according to the Panel in *US – Steel Safeguards*, this difference has an impact on the Panel's standard of review. The review of the Panel can be more intrusive in the case where the Panel is examining the application of the measure compared to when it examines the authority's determination of the existence of the right to impose a measure. Panel Report, *US – Steel Safeguards*, paras 10.25–27.

199 Appellate Body Report, *US – Line Pipe*, para. 236.

effects of other factors and determine which part of the injury is caused by increased imports alone. But as we indicated earlier, the Appellate Body considers that these two steps are not required by the non-attribution requirement of Article 4.2(b).[200]

(b) Quota allocation and quota modulation

When safeguard measures are imposed in the form of QRs, quotas, by virtue of Art. 5.2(a) SG, shall be allocated to supplying members by reference to their *share* in the import market *during a previous representative period*.[201] Article 5.2(a) does not specify (contrary to what is the case in Article 5.1) that this representative period consist of the last three years. Any representative period will do, so it seems.[202] Essentially, although the idea is often expressed that safeguards must be imposed on a non-discriminatory manner, what happens through the imposition of a safeguard in the form of a quota is that *historic* market shares are being *maintained* throughout the period when the safeguard is in place.

On the other hand, WTO Members can depart from the obligation to respect historic market shares in their import market, and target the relatively more efficient sources of supply by allocating them quotas which are less than their market share as observed during the investigation period. This will be the case if certain WTO Members have increased their market share in the market of the Member imposing a safeguard in *disproportionate* quantities. This is what *quota modulation* under 5.2(b) SG amounts to.

Article 5.2(b) SG allows such quota modulation, in case a *clear demonstration* has been given to the Committee on Safeguards that: (*i*) imports from certain Members have increased in disproportionate percentage in relation to the total increase of imports of the product concerned in the representative period; *(ii*) the reasons for the departure from the historic patterns are justified; and *(iii*) the conditions of such departure are equitable to all suppliers of the product concerned.[203]

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200 Appellate Body Report, *US – Wheat Gluten*, para. 79.

201 Actually, Article 5.2(a) first provides that the Member imposing the safeguard measure may seek agreement with respect to quota allocation with all other Members having a substantial interest in supplying the product concerned. It is, when this method is not reasonably practicable that the Member imposing the Safeguards measure 'shall allot . . . shares based upon the proportions supplied by such members during a previous representative period . . . due account being taken of any special factors which may have affected . . . the trade in the product'. Article 5.2(a) SG.

202 Article 5.2(a) of the SG Agreement does specify that an authority is to take 'due account . . . of any special factors which may have affected . . . the trade in the product'. This could be interpreted to use a 'representative' period which does not include the most recent period of increased imports.

203 The duration of any such measure shall not be extended beyond the initial

It is noteworthy that the Agreement does not provide that the Committee has to *authorize* such a departure from historical patterns, but who can decide whether a clear demonstration has been given to the Committee: a Panel or the Committee itself? This is unclear.

(c) Measures other than quantitative restrictions

It seems that the obligations discussed above (of allowing a certain minimum amount of imports to enter the country and of respecting historical patterns) only apply in case the safeguard measure takes the form of a quantitative restriction. So they do not apply in case of safeguard measures in the form of tariff increases. In *US – Line Pipe*, the Panel rejected the argument by Korea that tariff quotas are a form of quotas/quantitative restrictions:

> Tariff quotas do not necessarily reduce the volume of imports below any predetermined level, since they do not impose any limit on the total amount of permitted imports (whether globally or from a specific country). Tariff quotas merely provide that imports in excess of a certain level shall be subject to a higher rate of duty. Thus, it would appear that tariff quotas are not the sort of measure envisaged by the reference in the second sentence of Article 5.1 to 'quantitative restriction[s] [that] reduce the quantity of imports below [a certain] level'.[204]

The only obligation in such cases is the one discussed earlier, of ensuring that the level of the tariff increase is not higher than the amount of injury caused by increased imports alone.

3 Provisional Safeguards

Provisional measures can be imposed in accordance with Art. 6 SG: (i) in cases where delay would cause damage difficult to repair, (ii) a preliminary determination has been made that there is clear evidence that increased imports have caused or are threatening to cause serious injury, (iii) for a period of no more than 200 days, (iv) in the form of tariff increases.

The period of application of such provisional safeguard measures shall be counted as part of the period of application of the final measures. In other words, a provisional safeguard of six months may only be followed by a final measure of three years and six months to comply with the requirement of Article 7 that the period of application shall not exceed four years.

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period of four years. Such targeted safeguard measures may only be used in case of a finding of current serious injury and not in the case of a threat of serious injury. Article 5.2(b) SG Agreement.

[204] Panel Report, *US – Line Pipe*, para. 7.69.

Unlike the AD/CVD context, the Safeguards Agreement does not contain any minimum period of time between initiation of the investigation and imposition of provisional measures.

4 The Need 'to Pay' for Safeguards: Maintaining an Equivalent Level of Concessions

Art. 8 SG is there to ensure that the overall *level of concessions* will not be altered as a result of a safeguard measure. It relevantly provides that *before* imposing safeguard measures, the WTO Member will enter into negotiations with the affected Members the object of which is to compensate through concessions in another product market for loss of market shares in the product market where a safeguard is being taken (Art. 8.1 SG).[205] In other words, a Member imposing safeguard measures has to 'pay' for offering this protection to its domestic industry. Such an obligation to compensate does not exist in other contingent protection instruments (neither in anti-dumping, nor in countervailing).

Assuming that there is no agreement within 30 days between the *affected* WTO Member(s) and the Member proposing to impose the safeguard, the *affected* Member(s) can withdraw *substantially equivalent concessions or other obligations under GATT 1994*, unless if the CTG disapproves of such action.[206] It is highly unlikely however, that the CTG will disapprove such action since, the *affected* Members will, in all likelihood, be blocking a consensus to this effect.[207]

The term *affected parties* is not specified any further in the SG Agreement. There is however, a link between Art. 8.1 SG and Art. 12.3 SG which refers to consultations 'with those Members having a substantial interests as exporters of the product concerned'. The Panel, and the AB Report on *US – Wheat*

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[205] Hence the importance of the notification requirement under Article 12.3 SG which will form the basis for any meaningful consultations under Article 8.1. See Panel Report, *US – Wheat Gluten*, para. 8.206.

[206] Article 8.2 SG. This provision further states that a Member should do this at the latest 90 days following imposition of the measure. It must give the CTG 30 days to disapprove the proposed suspension. So it seems that a Member has to announce its suspension at the latest 60 days following application of the safeguard measure.

[207] This might give the *affected* Members the incentive to over-shoot their injury. The tables will now be turned and this time the Member imposing the safeguard will feel affected by the amount of countermeasures imposed against it. In such a case, it can only initiate dispute settlement proceedings against the Member(s) imposing countermeasures. Assuming that over-shooting takes place, it might provide the Member imposing the safeguard with a disincentive to do so. Art. 8.1 SG seems to have been drafted in a sloppy manner since it can be abused in both directions.

Gluten, pointed explicitly to the link between the two provisions.[208] In light of their approach on this issue, it seems safe to conclude that the term *affected parties*, appearing in Art. 8.1 SG, should be understood as equivalent to the term *Members having a substantial interest as exporters of the product*, appearing in Art. 12.3 SG. Consequently, only a sub-set of the WTO Membership will be entitled to suspend concessions in case of disagreement as to the adequate means of trade compensation to be paid.[209]

In fact, the obligation to compensate can be avoided if the WTO Member concerned proposes a safeguard action the maximum duration of which will not exceed three years. This is so because Article 8.3 provides that the right of suspension of equivalent level of concessions by the affected members shall not be exercised for the first three years that a safeguard measure is in effect. The condition is (i) that the measure has been taken as a result of an absolute increase in imports and (ii) that the measure was taken in conformity with the provisions of the Agreement (Art. 8.3 SG).

The obvious next question is of course who will determine whether the measure conforms with the provisions of the Safeguards Agreement. In other words, can an affected Member suspend an equivalent level of concessions effective from the moment of imposition of the measure, unilaterally determining that the measure does not conform with the provisions of the Safeguards Agreement? This would in effect force the Member taking the safeguards action to establish before a WTO Panel that its measure conforms with the Safeguards Agreement and thus that the suspension of concessions during the first three years was illegitimate. The other possibility, and the one followed in practice, is that an affected Member first suspends an equivalent level of concessions to then suspend its suspension, while bringing a case before the WTO to establish the lack of conformity of the safeguard measure with the Safeguards Agreement. Once a finding of inconsistency could be obtained from the WTO, the affected Member would reactivate the suspension of an equivalent level of concessions. This is what happened for example in the *US – Steel Safeguards* case.[210] In this case, however,

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[208] See Appellate Body Report, *US – Wheat Gluten*, para. 146; Panel Report, *US – Wheat Gluten*, para. 8.206. Also see Appellate Body Report, *US – Line Pipe*, para. 119.

[209] The term *substantial interest* is not defined any further. One could, of course, seek inspiration in the term *principal supplying interest* appearing in Art. XXVIII GATT. Such a construction of the term substantial interest however, has not as yet been condoned by the AB.

[210] Actually, the EC first published a list of product on which additional duties were going to be levied as of the third birthday of the US Safeguard Measure, or the fifth day following the date of a decision by the WTO Dispute Settlement Body that the measure is incompatible with the WTO Agreement, if that is earlier. Council regulation (EC) No.131/2002 of 13 June 2002.

the US repealed the steel safeguard shortly after the Appellate Body issued its ruling, and even before the DSB had had a chance to adopt the report.[211] The announced EC countermeasures were abandoned shortly thereafter.

The AB, in its report on *US – Line Pipe*, made it clear that a violation of the duty to notify a proposed safeguard measure and provide adequate time for consultations to affected parties (under Article 12 SG) *ipso facto* amounts to a violation of the obligation laid down in Art. 8.1 SG, that is, to 'endeavour to maintain a substantially equivalent level of concessions'. It thus read Arts. 8.1 and 12.3 SG Agreement together:

> The Panel agreed with Korea, and found that: . . . the United States, by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions and other obligations.
>
> The United States argues on appeal that the sole basis for the Panel's finding of inconsistency with Article 8.1 is its erroneous finding with respect to Article 12.3. Accordingly, the United States asks us to conclude that the Article 8.1 finding is equally flawed, and to reverse the Panel's finding on this ground.
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> In coming to its conclusion on this matter, the Panel relied on our Report in *US – Wheat Gluten*, where we said:
>
> > In view of [the] explicit link between Articles 8.1 and 12.3 of the *Agreement on Safeguards*, a Member cannot, in our view, 'endeavour to maintain' an adequate balance of concessions unless it has, as a first step, provided an adequate opportunity for prior consultations on a proposed measure.
>
> In our view, our reasoning in *US – Wheat Gluten* is also applicable in this case. Therefore, we agree with the Panel that the United States, 'by failing to comply with its obligations under Article 12.3, has also acted inconsistently with its obligations under Article 8.1 to endeavour to maintain a substantially equivalent level of concessions'. We, therefore, uphold the Panel's finding that the United States acted inconsistently with its obligations under Article 8.1 of the *Agreement on Safeguards*'.[212] (Italics in the original)

5 The Duration of Safeguards

A safeguard measure can be imposed for an initial period of up to four years (Art. 7.1 SG Agreement). It can be extended for a maximum four years more, in case it has been determined (i) that the safeguard measure continues to be

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[211] The measures were repealed on 4 December 2003, while the reports were adopted by the DSB on 10 December 2003 only. The EC repealed its planned countermeasures on 12 December 2003. See Council Regulation (EC) 2168/2003 of 12 December 2003.

[212] Appellate Body Report, *US – Line Pipe*, paras 116–19.

necessary to prevent or remedy serious injury and (ii) that there is evidence that the industry is adjusting. Such an extended measure may not be more restrictive than it was at the end of the initial period.[213] In general, eight years is the maximum period for a safeguard measure (Art. 7.3 SG), an exception being made for developing countries. A safeguard measure imposed by a developing country is allowed to stay in place for a maximum period of ten years.[214]

During the safeguard measure, the measure is to be progressively liberalized at regular intervals.[215] The Agreement provides for a mandatory review of any safeguard measure of more than three years, at the latest before the mid-term of this measure. If appropriate, the measure is to be withdrawn or the pace of liberalization increased. So, for any measure of more than three years there is a mandatory half-time review, as well as a sort of sunset review after four years.

Following the imposition of a safeguard measure for any amount of years, the WTO Member concerned, immediately after the expiry of the said period, cannot impose a safeguard measure on the same product for the equal number of years (Art. 7.5 SG): for example, if country A takes safeguard action in the area of cars for eight years, it has to desist from a safeguard action with respect to cars for a period of eight years following the expiry of the original safeguard measure. This obligation not to impose safeguards on the same product for a period equivalent to the period of imposition is often referred to as a *peace clause* or *grace period*.[216] This grace period shall in any case not be shorter than two years, even if the measure itself was applied for a shorter period of time.[217]

One might find it counter-intuitive that safeguard measures will be imposed for a period longer than three years: in practice, no compensation is due when

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213 Article 7.4 *in fine*.

214 Article 9.2 SG.

215 Article 7.4. SG. The exception is a safeguard measure of less than one year, which does not have to be liberalized.

216 When developing countries impose safeguard measures, this grace period is only half of the time of application of the measure. In our example, a developing country Member would have to wait only four years before being allowed to impose safeguards on cars again. Article 9.2 SG.

217 Art. 7.6 SG allows for a limited exception for very short safeguard measures of less than six months (up to 180 days) to this rule, provided that its substantive conditions have been met. Bagwell and Staiger (2005) note that the peace clause provides WTO Members with the incentive to strategically choose the sectors where they will take protective action. Their point is well taken and would have its maximum value if safeguards provided the only means of contingent protection. In practice, however, it could be (and has been) the case that a WTO Member, during the peace clause, imposes anti-dumping duties on the products that were previously protected by safeguards.

safeguards do not extend past a three year period, and there is no need for a review of the measure. This contrasts with the situation in case of a safeguard measure of more than three years. In other words, the Member imposing a maximum three year-safeguard does not impose costs on other producers' interests,[218] since no compensation will be paid. This is all the more relevant given the fact that the WTO Member imposing a safeguard cannot choose the area where it will be paying compensation: *affected* WTO Members might suspend concessions in fields of *their* interest; all they have to ensure is substantial equivalence between damage and concessions withdrawn.[219] Still, going by the notifications of safeguard measures to the Committee on Safeguards, we notice that, in fact, quite a number of safeguard measures are imposed for a period exceeding three years.[220]

6 Standard of Review

In the absence of any special provision concerning dispute settlement in general and standard of review in particular, the generally applicable standard of review of Article 11 DSU also applies to disputes under the Safeguards Agreement. The AB in its report on *US – Cotton Yarn* summarized how the 'general' standard of review, as reflected in Art. 11 DSU, has been applied in litigation concerning the application of the SG Agreement:

> Our Reports in these disputes under the *Agreement on Safeguards* spell out key elements of a panel's standard of review under Article 11 of the DSU in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarized as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assessed whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data.[221] (Italics in the original, footnotes omitted)

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[218] Consumer welfare will of course be negatively affected, since consumers will now have to pay a higher price for the good on which a safeguard has been in place. The relative importance of consumers' interests, however, has been weighed before the decision to take safeguards was taken (and obviously, set aside).

[219] Art. 22 DSU is legally irrelevant here, since there is no dispute between the parties. The *affected* Members are free to choose the sectors where they will impose counter-measures.

[220] See, for example, WTO Docs G/SG/N/8/EEC/2, G/SG/N/10/EEC/2, and G/SG/N/11/EEC/2/Suppl. 1 of 16 March 2004.

[221] Appellate Body Report, *US – Cotton Yarn*, para. 74. Also see Panel Report, *US – Steel Safeguards*, para. 10.24.

More concretely, the AB in its report on *US – Lamb* explained that, in order to make an objective assessment of the matter before it, a Panel must satisfy itself that an investigating authority evaluated all relevant facts before it and provided an adequate and reasoned conclusion for its overall findings (paras 103–7):

> Thus, an 'objective assessment' of a claim under Article 4.2(a) of the *Agreement on Safeguards* has, in principle, two elements. First, a panel must review whether competent authorities have evaluated all relevant factors, and, second, a panel must review whether the authorities have provided a reasoned and adequate explanation of how the facts support their determination. Thus, the panel's objective assessment involves a formal aspect and a substantive aspect. The formal aspect is whether the competent authorities have evaluated 'all relevant factors'. The substantive aspect is whether the competent authorities have given a reasoned and adequate explanation for their determination.
>
> This dual character of a panel's review is mandated by the nature of the specific obligations that Article 4.2 of the *Agreement on Safeguards* imposes on competent authorities. Under Article 4.2(a), competent authorities must, as a formal matter, evaluate 'all relevant factors'. However, that evaluation is not simply a matter of form, and the list of relevant factors to be evaluated is not a mere 'check list'. Under Article 4.2(a), competent authorities must conduct a substantive evaluation of 'the "bearing", or the "*influence*" or "*effect*" or "*impact*" that the relevant factors have on the "situation of [the] domestic industry" (emphasis added). By conducting such a substantive evaluation of the relevant factors, competent authorities are able to make a proper overall determination, *inter alia*, as to whether the domestic industry is seriously injured or is threatened with such injury as defined in the *Agreement*.
>
> It follows that the precise nature of the examination to be conducted by a panel, in reviewing a claim under Article 4.2 of the *Agreement on Safeguards*, stems, in part, from the panel's obligation to make an 'objective assessment of the matter' under Article 11 of the *DSU* and, in part, from the obligations imposed by Article 4.2, to the extent that those obligations are part of the claim. Thus, as with any claim under the provisions of a covered agreement, panels are required to examine, in accordance with Article 11 of the DSU, whether the Member has complied with the obligations imposed by the particular provisions identified in the claim. By examining whether the explanation given by the competent authorities in their published report is reasoned and adequate, panels can determine whether those authorities have acted consistently with the obligations imposed by Article 4.2 of the *Agreement on Safeguards*.
>
> We wish to emphasize that, although panels are not entitled to conduct a *de novo* review of the evidence, or 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. To the contrary, in our view, in examining a claim under Article 4.2(a), a panel can assess whether the competent authorities' explanation for its determination is reasoned and adequate only if the panel critically examines that explanation, in depth, and in the light of the facts before the panel. Panels must, therefore, review whether the competent authorities' explanation fully addresses the nature, and, especially, the complexities, of the data, and responds to other plausible interpretations of those data. A panel must find, in particular, that an explanation is not reasoned, or is not adequate, if some alternative explanation of the facts is plau-

> sible, and if the competent authorities' explanation does not seem adequate in the light of that alternative explanation. Thus, in making an 'objective assessment' of a claim under Article 4.2(a), panels must be open to the possibility that the explanation given by the competent authorities is not reasoned or adequate.
>
> In this respect, the phrase 'de novo review' should not be used loosely. If a panel concludes that the competent authorities, in a particular case, have not provided a reasoned or adequate explanation for their determination, that panel has not, thereby, engaged in a de novo review. Nor has that panel substituted its own conclusions for those of the competent authorities. Rather, the panel has, consistent with its obligations under the *DSU*, simply reached a conclusion that the determination made by the competent authorities is inconsistent with the specific requirements of Article 4.2 of the *Agreement on Safeguards*.[222] (Emphasis in the original, footnotes omitted)

In its report on *US – Cotton Yarn*, the AB added that Panels cannot base their determination on evidence which did not exist when the investigation took place. If they do, they violate Art. 11 DSU.[223]

The Panel on *US – Steel Safeguards* draws a distinction between the standard of review to be applied by Panels when evaluating the *right* to apply a safeguard measure, and the standard to be applied when evaluating the *application as such* of the measure itself. In its view, in the latter case, a Panel's examination can be more *intrusive* than in the former (paras 10.25–27):

> The Panel is of the view that the standard of review applicable in the present dispute must be seen in light of the distinction between the first and second enquiry that the Panel must perform when assessing a Member's compliance with the requirements of the Agreement on Safeguards and Article XIX of GATT 1994. When assessing a Member's compliance with its obligations pursuant to Articles 2, 3 and 4 of the Agreement on Safeguards and Article XIX of GATT, the Panel is *not* the initial fact finder. Rather, the role of the Panel is to 'review' determinations and demonstrations made and reported by an investigating authority.
>
> The situation is different in the context of the second enquiry when assessing whether the measures were applied only to the extent necessary to prevent the serious injury caused by increased imports. In that situation, it is before the Panel, during the WTO dispute settlement process, that the importing Member is forced for the first time to respond to allegations relating to the level and extent of its safeguard measures. For us, this is clear from the following statement of the Appellate Body in *US – Line Pipe*:
>
> > [I]t is clear, therefore, that [. . .] Article 5.1, including the first sentence, does not oblige a Member to justify, at the time of application, that the safeguard measure at issue is applied 'only to the extent necessary'.
> >
> > Article 5.1 does not establish a general procedural obligation to demonstrate compliance with Article 5.1, first sentence, at the time a measure is applied.

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222 Appellate Body Report, *US – Lamb*, paras 103–7.

223 Appellate Body Report, *US – Cotton Yarn*, para. 78.

> In that second enquiry, the Panel is thus reviewing whether the measures 'as applied' comply with the requirements of Articles 5, 7, 8 and 9 of the Agreement on Safeguards on the basis of the evidence and arguments put forward by the parties during the WTO dispute settlement process.[224] (Italics and emphasis in the original, footnotes omitted).

7 Special Safeguard Regime with Respect to China

The accession of China to the WTO introduced a special country-specific safeguards regime for imports of Chinese products. In fact, three types of 'safeguards' measures may be imposed on products from China:

- first, a normal MFN safeguard measure taken under the Safeguards Agreement may be imposed on imports from *inter alia* China (an 'ordinary safeguard'). The rules of the SG Agreement apply.
- second, a special China-specific transitional safeguard measure may be imposed on any product from China (a 'transitional safeguard'). The provisions governing such a transitional safeguard are set forth in China's Accession Protocol[225] and the Report of the Working Party on the Accession of China.[226]
- third, a textile specific safeguard measure may be applied to textile products from China (a 'textile safeguard'). The rules governing such textile safeguards are set forth in the Report of the Working Party on the Accession of China.[227]

WTO Members are not allowed to impose a textile safeguards at the same time as a transitional safeguard.[228] On the other hand, to have an ordinary safeguard in place at the same time as a specific or transitional safeguard does not seem to be prohibited.[229] We will briefly deal with the basic conditions and disciplines that apply to the special transitional safeguards and the textile safeguards. As far as the ordinary safeguards are concerned, we refer to our earlier discussion on the Safeguards Agreement.

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224 Panel Report, *US – Steel Safeguards*, paras 10.25–10.27.

225 China's Accession Protocol, WT/L/432 (hereinafter, the 'Accession Protocol'), p. 9, section 16, paras 1–9.

226 Report of the Working Party on the Accession of China, WT/MIN (01)/3, section 13, paras 245–50 (hereinafter, 'Working Party Report').

227 Working Party Report, section 11, paras 241–2.

228 Working Party Report, para. 242 (g).

229 The EC notified the initiation of such a double China specific and ordinary safeguard investigation on mandarins from China. In the end, only an ordinary safeguard was imposed, with a China-specific quota. See G/SG/N/6/EEC/2 and G/SG/N/8/EEC/Suppl.1.

(a) China-specific transitional safeguards

The 'transitional' period during which this regime is applicable is 12 years, that is, until 10 December 2013.[230] The transitional safeguard measure is not imposed on an MFN basis, but targets only Chinese products.

A transitional safeguard may be imposed 'in cases where products of Chinese origin are being imported into the territory of any WTO Member in such increased quantities or under such conditions as to cause or threaten to cause market disruption to the domestic producers of like or directly competitive products'.[231] The conditions of increased imports, market disruption, causation and domestic producers of like or directly competitive products are very similar to those set forth in Article 2 SGA. At first sight, it appears that the important difference is the use of the term 'market disruption' instead of 'serious injury'. However, the Accession Protocol seems to equate market disruption with 'material injury' which can be demonstrated by examining the volume of imports, their price effects and the effect on the state of the domestic industry:

> Market disruption shall exist whenever imports of an article, like or directly competitive with an article produced by the domestic industry, are increasing rapidly, either absolutely or relatively, so as to be a significant cause of material injury, or threat of material injury to the domestic industry. In determining if market disruption exists, the affected WTO Member shall consider objective factors, including the volume of imports, the effect of imports on prices for like or directly competitive articles, and the effect of such imports on the domestic industry producing like or directly competitive products.[232]

As we noted earlier, in practical terms there seems to be little if any difference between the material injury test as we know it from AD/CVD proceedings and the supposedly more demanding serious injury test in the SGA.

Transitional safeguards may only be imposed for such period of time as may be necessary to prevent or remedy the market disruption, but no maximum time period is provided for.[233] Similarly, the measure may be applied only to the extent necessary to prevent or remedy such market disruption.[234] But none of the specific disciplines concerning quantitative restrictions as set forth in Article 5 SGA are explicitly mentioned. The Working Party's report adds that, except for good cause, a grace period of one year has to be respected following the completion of a previous investigation.[235] As the rule does not

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230 Accession Protocol, section 16, para. 9.
231 Accession Protocol, section 16, para. 1.
232 Accession Protocol, section 16, para. 4.
233 Accession Protocol, section 16, para. 6.
234 Accession Protocol, section 16, para. 3.
235 Working Party Report, para. 246 (g).

relate to the term of the measure but rather to the completion of the investigation, it appears that this rule does not prohibit the initiation of a new investigation at the time of expiration of the measure.

Provisional measures may be applied in critical circumstances, where delay would cause damage which it would be difficult to repair and following a preliminary determination of increased imports, market disruption and a causal link. The maximum period of time for the application of provisional measures is 200 days.[236]

As is the case for ordinary safeguards, a member imposing a transitional safeguard will have to pay for it in the form of allowing China to suspend an equivalent level of concessions. But China is not entitled to exercise that right during the first two years of the measure, in case of a relative increase of imports, and during the first three years in case of an absolute increase in imports.[237] There is no requirement that the measure has to have been taken in a WTO consistent manner in order to be able to enjoy a free ride for three years, as was the case in the SGA. Moreover, under the SGA, a relative increase would not have sufficed to escape payment, as only in case of an absolute increase and a measure taken in conformity with the provisions of the SGA was the right to compensation suspended for three years.

From a procedural point of view, there is an important consultation phase which is to precede the taking of measures. It may lead to a bilateral agreement that China will exercise self-restraint and will take 'such action as to prevent or remedy the market disruption'.[238] If such bilateral consultations do not lead to an agreement within 60 days, a member may withdraw concessions or limit imports of the Chinese product in question. The Committee on Safeguards has to be notified of any request for consultations and of the decision to impose measures. More importantly, before taking action, a Member has to conduct an investigation pursuant to procedures previously established and made available to the public.[239] Basic due process rights, such as public notice and an adequate opportunity for interested parties to submit their views and evidence, including through a public hearing, are to be respected. Moreover, a written notice setting forth the reasons for the measure and its scope and duration has to be provided by the WTO Member taking the measure.[240]

An interesting second type of transitional safeguard is the safeguard against

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236 Accession Protocol, section 16, para. 7.
237 Accession Protocol, section 16, para. 6.
238 Accession Protocol, section 16, para. 2.
239 Working Party Report, para. 246 (a).
240 Accession Protocol, section 16, para. 5. Working Party Report, para. 246.

the effects of another Member's safeguards action against China.[241] In other words, in case of significant trade diversion caused by the imposition of a transitional safeguard by a WTO Member on a particular type of product from China, a third WTO Member may withdraw concessions or otherwise limit imports from China as well. This only to the extent necessary to prevent or remedy such diversions.[242] The Report of the Working Party on China's Accession clarifies which 'objective criteria' would have to be examined in order to determine such significant trade diversion caused by another member's transitional safeguard. Such factors concern *inter alia* the increase in market share of imports from China, the nature or extent of the action taken or proposed, the increase in volume of imports from China due to the action taken, conditions of demand and supply in the importing Member for the products at issue and the extent of exports from China to the Member imposing the original transitional safeguard.[243]

The trade diversion safeguard is closely linked to the original transitional safeguard as it has to be reviewed in case of a change to the original transitional safeguard and is to be terminated at the latest 30 days following expiration of the original transitional safeguard.[244] There is no obligation to 'pay' through some form of compensation for the imposition of this trade diversion safeguard.

(b) Textile-specific safeguards

With respect to textile and apparel products from China, a third type of safeguard mechanism has been put in place at the time of China's accession to the WTO. This is a product-specific and country-specific type of safeguard, only textile products and only from China. The Working Party Report contains the rules governing this type of safeguard.[245] The textile safeguard regime remains applicable until 31 December 2008. The products covered, textiles and apparel products, are essentially the same as were previously covered by the defunct ATC.

The textile safeguards mechanism is a two-stage process and combines a sort of voluntary export restraint by China with a possibility of imposing a safeguard in case China does not comply with this restraint.

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241 As we stated earlier, such action may also be a commitment by China itself to honour a bilateral agreement concluded between China and the member requesting safeguards consultations.

242 Accession Protocol, section 16, para. 8.

243 Working Party Report, para. 248.

244 Working Party Report, paras 249–50.

245 Working Party Report, para. 242. The Accession Protocol does not mention this type of textile safeguards.

A Member may request consultations with China if it believes that Chinese textile imports were threatening to impede the orderly development of trade due to market disruption. What this member would need to provide China with is a detailed factual statement of reasons and justifications supported by current data of (1) the existence or threat of market disruption; and (2) the role of products of Chinese origin in that disruption. Consultations should be held within 30 days, and a mutually satisfactory solution should be reached within 90 days following the request.

What is important is the fact that, immediately following the request for consultations, China is required to hold its shipments of the textile products in question to that Member to a level no greater than 7.5 per cent (6 per cent for wool product categories) above the amount entered during the first 12 months of the most recent 14 months preceding the month in which the request for consultations was made. So the request for consultations triggers a self-imposed restraint on exports.

If the consultations do not lead to a solution after 90 days, the voluntary restraint may be turned into a safeguard measure of the importing Member limiting imports of the Chinese textile products in question to the same level (7.5 per cent). This safeguard measure can stay in place for a maximum period of one year,[246] but there are no rules prohibiting the re-application of a 'new' measure on the same products at the end of this period.

No 'investigation' seems required, nor is there any obligation to notify any WTO body of these textile safeguards.

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246 Working Party Report, paras 242(e) and (f). To be more precise, the term of such a measure begins on the date of the request for consultations and is to end on 31 December of the year in which consultations were requested, or, where three or fewer months remained in the year at the time of the request for consultations, may run for a period ending 12 months after the request for consultations.

16. Conclusions

In this section on safeguards, we provided an overview of the provisions of the Safeguards Agreement and their interpretation by WTO Panels and the Appellate Body. As noted on a couple of occasions, this Agreement has certain shortcomings. The Appellate Body's jurisprudence has not contributed much to rectifying these shortcomings. To the contrary, on certain occasions it has confused matters even further.

First, the Agreement sets forth the conditions for a lawful imposition of a safeguard measure but does not address two elements that were clearly present in Article XIX GATT (that is, unforeseen developments and tariff concessions) as pre-conditions for the imposition of safeguard measures. This is not to say that the Appellate Body was right in re-introducing these conditions. The Appellate Body actually only contributed to the problem by adding 'unforeseen developments' to the list of conditions of Article 2, but then failing to explain what those developments could be, or by whom and at what time they had to be unforeseen. Nevertheless, it is an important oversight of the Agreement. This is all the more so because these 'forgotten conditions' may have an important role to play in solving what has been exposed as another problem of this Agreement, the need to demonstrate that increased imports are causing serious injury. As argued convincingly in the economics literature, imports can never be the ultimate cause of injury as they are a mere reaction to the forces of supply and demand. They can perhaps constitute the proximate cause, the ultimate cause being the granting of a tariff concession or some other, unforeseen, exogenous variable.

Second, the Agreement does not contain many of the important due process provisions of other trade remedies instruments as the AD Agreement or the SCM Agreement. These procedural obligations play a very important role in the AD and CVD context in ensuring an investigation which is as transparent, objective and fair as possible. The Appellate Body intervened to give more body to this Agreement and showed a great willingness to conclude a lot from very little, incorporating almost all of the procedural safeguards of the AD/SCM Agreement into the one paragraph of the Safeguards Agreement dealing with the investigation. Its contribution in this respect was welcome.

Third, the Agreement fails to explain in a satisfactory manner what a situation of serious injury is and in which way it differs from the material injury

standard in the AD/CVD context. While the Appellate Body emphasized the exceptional emergency nature of these measures, it has unfortunately failed to give specific meaning to these terms.

Fourth, the Appellate Body has turned one of the more innocent provisions of this Agreement into a very important limitation on the level of any safeguard measure by limiting the level of the safeguard to that part of the injury caused by increased imports in isolation from other factors. It is noteworthy that the Appellate Body, in the context of a causation and non-attribution analysis, had been very lenient requiring the authority merely to separate and distinguish the injury caused by other factors to examine whether imports contributed to the situation of serious injury. However when dealing with the question of the application of the measures, the Appellate Body, unexpectedly, became very demanding. In other words, the Appellate Body seemed willing to take a more deferential approach when it came to the question of whether a right to impose a measure existed, while being more demanding with respect to the lawful application of such a measure. One may wonder whether this is the correct approach. The explanation offered by the Appellate Body, and its erroneous reading of the AD/CVD parallel provisions, are hardly convincing.

In sum, given these shortcomings, and in light of the controversial Appellate Body jurisprudence in the safeguards area, it is a pity that the Safeguards Agreement does not form part of the Doha mandate, and that we will have to live with this Agreement for many years to come. It remains to be seen whether the result of all this may not be a return of the 'grey area measures' of the 1970s and the 1980s.

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Index