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

AB-2000-12

Report of the Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland

Thailand, *Appellant*
Poland, *Appellee*
European Communities, *Third Participant*
Japan, *Third Participant*
United States, *Third Participant*

AB-2000-12

Present:

Ganesan, Presiding Member
Lacarte-Muró, Member
Taniguchi, Member

I. Introduction

1. Thailand appeals from certain issues of law and legal interpretations developed in the Panel Report, *Thailand – Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland* (the "Panel Report").[1] The Panel was established to consider a complaint relating to an anti-dumping action taken by Thailand with respect to imports of certain iron or non-alloy steel products from Poland.

2. The factual background to this dispute is set out in detail in the Panel Report.[2] On 21 June 1996, Siam Yamato Steel Co. Ltd., filed an application with Thailand's Ministry of Commerce for the imposition of anti-dumping duties on, *inter alia*, angles, shapes and sections of iron or non-alloy steel: H-beams ("H-beams") originating in Poland.[3] On 30 August 1996, the Thai investigating authorities published a notice of initiation of an anti-dumping investigation on H-beams originating in Poland, and forwarded a copy of that notice to the Polish Embassy in Bangkok, and to the two Polish firms under investigation, namely Huta Katowice and Stalexport.[4] On 1 May 1997, the Thai authorities sent copies of the proposed final determination of dumping and injury to the two Polish firms.[5] On 26 May 1997, the authorities published a notice of the application of a definitive anti-dumping duty on imports of H-beams originating in Poland. On 4 June 1997, the authorities

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II. Arguments of the Participants

A. *Claims of Error by Thailand – Appellant*

1. Article 6.2 of the DSU

9. Thailand submits that the Panel erred in failing to dismiss Poland's claims of violation of Articles 2, 3 and 5 of the *Anti-Dumping Agreement.* Thailand submits that the Panel should have dismissed these claims on the basis that the request for the establishment of a panel submitted by Poland does not meet the requirements of Article 6.2 of the DSU.

10. Thailand considers that the "standard of clarity" required under Article 6.2 of the DSU, as defined by the Appellate Body in *Korea –Definitive Safeguard Measure on Imports of Certain Dairy Products* ("*Korea – Dairy Safeguards*")[18] means the level of clarity that enables a panel, the defending party, and third parties to identify the precise "claims" composing the matter in dispute. This standard of clarity must be met at the time of the request for the establishment of a panel, and not at a later stage in the course of the panel proceedings. A panel must be able to establish definite terms of

interpretation. Thailand notes that the European Communities shared Thailand's view regarding the interpretation of Article 3.4 of the *Anti-Dumping Agreement*. Alternatively, if the Appellate Body decided to perform its own interpretation of Article 3.4, Thailand would refer the Appellate Body to

29. Poland believes that Thailand's main arguments may be properly characterized as follows: the Appellate Body should reject the case-by-case approach of *Korea – Dairy Safeguards* in favour of an absolute standard by which even minor pleading deficiencies cause *per se* dismissal of otherwise cognizable claims; a panel may not consider either the timing of a respondent's allegation of "prejudice" or a respondent's demonstrated specific knowledge and understanding of relevant matters in determining the existence of actual ecTw (otic 15 approacj -3h TD 2 7ableerr orunlesrs nt) Tj 0 -19.5

factual evidence was relied upon by the Thai authorities. Thus, the Panel's decision requires that the investigating authorities properly disclose their reliance upon such confidential information, not that they disclose the information itself.

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3. Article 3.4 of the

from a prior Appellate Body determination, the Panel then properly articulated the correct burden of proof applicable to its review in this case.

III. Arguments of the Third Participants

A. *Japan*

1. Articles 3.1 and 17.6 of the *Anti-Dumping Agreement*

44. Japan argues that the Panel correctly found that the factual basis for the anti-dumping measure must be apparent in those materials made available to the parties. Anti-dumping measures cannot be defended on the basis of facts hidden from the parties under the cloak of confidentiality.

45. Article 3.1 requires injury determinations to rest on "positive evidence" and "objective examination". The Panel carefully examined precisely what this means in the context of deciding which factual information can properly support the imposition of anti-dumping measures. At its most fundamental level, an objective examination requires the authorities to favour neither one side nor the other. Yet under Thailand's interpretation of Article 3.1, the authorities could collect facts from one side, hear arguments about those facts from one side, make no meaningful disclosure of those facts to the other side, and yet still make a determination. Such a process is by definition not objective – such a process favours one side over the other.

46. The Panel noted that Article 17.6(i) of the *Anti-Dumping Agreement* requires panels to determine whether "the establishment of the facts was proper and the evaluation was unbiased and objective". Here again, the text of the *Anti-Dumping Agreement* enshrines the basic concept of

Panel did not consider, let alone make any finding, on whether the Polish request for the establishment of a panel was sufficient to inform the third parties of the legal basis of the complaint.

2. Articles 3.1 and 17.6 of the *Anti-Dumping Agreement*

52. The European Communities is of the view that, as submitted by Thailand, the Panel erred in finding that it could only examine the matter based on the evidence that was disclosed to Polish firms (and/or their legal counsel) at the time of the final determination.

53. According to the European Communities, Article 17.6(i) of the *Anti-Dumping Agreement*

is an explicit reference to "Section III.C.5 of the Thailand Submission". Thailand also stated that certain arguments made in the brief showed a level of knowledge of Thailand's arguments that "goes beyond what could be divined in the Notice of Appeal". Thailand stated that there was no plausible explanation for CITAC, a United States private sector association, to have learned the precise format of Thailand's appellant's submission, other than that Poland or a third participant in this appeal had failed to treat Thailand's submission as confidential and had disclosed it to CITAC, in violation of Articles 17.10 and 18.2 of the DSU.

65. Thailand also stated that it understood that Hogan & Hartson L.L.P., the law firm retained by Poland in this dispute, was also counsel for CITAC. Thailand stated there appeared to be "a very close link among CITAC, Hogan & Hartson L.L.P. and Poland". Thailand asserted that this apparent linkage suggested that Hogan & Hartson L.L.P. had disclosed the contents of Thailand's appellant's submission to CITAC, in violation of Articles 17.10 and 18.2 of the DSU.

66. In order to clarify whether or not a breach of the confidentiality obligations in the DSU had occurred, Thailand requested that the Division in the appeal inquire whether officials or other representatives of Poland had provided a copy of Thailand's appellant's submission, or had otherwise disclosed or communicated the contents of this submission, to CITAC, or to any person who was not a participant or a third participant in these proceedings. Thailand asked that we also make similar inquiries of the third participants in this appeal.

67. Thailand also requested that we take such action as we deemed appropriate, if we established that a participant or a third participant in these proceedings had breached its obligations under Articles 17.10 and 18.2 of the DSU. Thailand suggested that such action could include the rejection of the written brief submitted by CITAC; the disqualification from further participation in this appeal of any attorney or law firm which had disclosed the contents of Thailand's submission; the undertaking by such attorneys or law firm that they had destroyed or returned to the Appellate Body all copies of Thailand's written submission, or all written materials that were based on or referred to this submission; the undertaking by CITAC that it had destroyed or returned to the Appellate Body all copies of Thailand's appellant's submission or any written materials that were based on or referred to the submission; and the requirement that the attorneys for Poland or the third parties submit to the Appellate Body a written report setting out in detail all disclosures made by such attorneys to any party not involved in this appeal, including any memoranda they had prepared for, or discussions they had with, clients or potential clients in any way referring to the contents of Thailand's appellant's submission.

68. On 7 December 2000, we addressed a letter to Poland concerning Thailand's allegations. We stated that if the statements of fact made by Thailand were true, we believed that there might be a *prima facie* case that the confidentiality obligations in Articles 17.10 and 18.2 of the DSU had been violated. We emphasized that Members of the WTO who were participants and third participants in this appeal were fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants.

69. In our letter, we requested Poland to indicate whether any of its officials or other representatives, counsel or consultants, had provided a copy, or disclosed or otherwise communicated, the contents of Thailand's appellant's submission to any person who was not a participant or a third participant in these proceedings, including CITAC. In particular, we requested Poland to respond to the questions raised by Thailand with respect to the law firm Hogan & Hartson L.L.P.

70. We also addressed a letter to each of the third participants in this appeal. In that letter, we requested them to indicate whether any of their officials, representatives, counsel or consultants had provided a copy of Thailand's appellant's submission to any person who was not a participant or a third participant in these proceedings, or had disclosed or otherwise communicated the contents of Thailand's appellant's submission to any such person.

71. On 12 December 2000, we received the responses of Poland and the third participants to our inquiries. In its response, Poland informed us that a representative of Hogan & Hartson L.L.P. had acted as legal counsel to Poland in the proceedings before the Panel, as well as in this appeal, and that this representative had received a copy of Thailand's appellant's submission. Poland also stated that a different representative of the same law firm "has been a corporate lawyer" for CITAC. Poland stated, further, that Hogan & Hartson L.L.P. had made a written statement in which it explained that no member, associate or representative of that law firm had assisted in the preparation of the written brief submitted by CITAC. Poland also added that no assistance had been provided to CITAC by the Polish administration. Poland stated further that no official or other representative of Poland had provided a copy, disclosed any of the contents or otherwise communicated the contents of Thailand's submission to any person other than the participants in this appeal. Poland added that it could not "explain who has assisted in the preparation of the written brief submitted to the Appellate Body by CITAC", and that neither it, nor Hogan & Hartson L.L.P., could explain how the reference to "Section III.C.5 of the Thailand Submission" came to be made in paragraph 2 of the written brief submitted by CITAC.

72. Poland also explained that it had put into place "substantial internal confidentiality procedures", and that access to all documents was limited to two persons in the relevant Polish

Ministry, and two persons employed in the Geneva Mission of Poland. Finally, Poland informed us that, although it considered that there had been no proof of wrongdoing on the part of Hogan & Hartson L.L.P., Poland had decided to accept that law firm's proposal to withdraw as its legal counsel in this appeal.

73. The responses of the third participants were as follows. The European Communities stated that it had no reason to suspect that any of the officials in receipt of the submissions filed in this appeal had breached their confidentiality obligations. Japan stated that it had not violated the confidentiality obligations under Articles 17.10 and 18.2 of the DSU. The United States informed us that, while it had made its own submission public at the time of filing pursuant to its usual practice, it had not taken any of the actions described in our letter. The United States added that this issue exemplified the need for enhanced transparency in WTO dispute settlement. In the view of the United States, the practice of claiming confidential treatment for submissions that did not contain confidential business information corroded public support for the WTO dispute settlement system and inhibited the ability of Members to represent fully the interests of their stakeholders.

74. In our preliminary ruling of 14 December 2000, we stated:

> The terms of Article 17.10 of the DSU are clear and unequivocal: "[t]he proceedings of the Appellate Body shall be confidential". Like all obligations under the DSU, this is an obligation that all Members of the WTO, as well as the Appellate Body and its staff, must respect. WTO Members who are participants and third participants in an appeal are fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants. We emphasized this in *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 145, where we stated that:
>
> > … the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, *those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.* (emphasis added)

V. Issues Raised in this Appeal

79. The following issues are raised in this appeal:

(a) whether the Panel erred in finding that the request for the establishment of a panel

With respect to Poland's claims under Article 5 of the *Anti-Dumping Agreement*, the Panel stated:

> First, we note that the totality of the facts and circumstances underlying the panel request, including the nature of the underlying AD investigation that led to the imposition of the challenged measure, make certain paragraphs of Article 5 logically and necessarily inapplicable or irrelevant in this dispute: for example, because this dispute involves a domestic industry consisting of one producer, Article 5.4 would not apply; and because the dispute was initiated on the basis of a petition, Article 5.6 would not apply.[28]
>
> Second, we note that, as will often be the case in WTO anti-dumping

> The request for the establishment of a panel shall be made in writing. It shall indicate whether consultations were held, identify the specific measures at issue and provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly.

84. In our Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas* ("*European Communities – Bananas*"), we stated that there are two important reasons for insisting on precision in the request for a panel:

> It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.[30]

85. In our Report in *Brazil –Measures Affecting Desiccated Coconut*, we discussed the matter as follows:

> A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective -- they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.[31]

86. In *European Communities – Bananas*, we further emphasized that, in view of the automaticity of the process by which panels are established by the DSB, it is important for panels to scrutinize closely the request for the establishment of a panel. In that respect, we stated:

> We recognize that a panel request will usually be approved automatically at the DSB meeting following the meeting at which the request first appears on the DSB's agenda. As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.[32]

87. In our ruling in *Korea – Dairy Safeguards*, we considered whether the listing of articles of an agreement was always sufficient to meet the standard of Article 6.2. In that regard, we stated:

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[30]Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, para. 142.

[31]Appellate Boy Report, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:1, 167, at 186.

[32]Appellate Body Report, *supra*, footnote 30, para. 142.

> Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. Infy themc Tj 0 -12 TD -0.17167resen

> Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement.
>
> Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement.
>
> Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement.[37]

90.

affected Polish exporters requested certain information from Thailand which the latter considered to be confidential, and did not disclose to the exporters.[41] The information requested by Poland related to the confidential facts on which the Thai investigating authorities based their determination of injury. Thailand submitted this information to the Panel on 2 March 2000, four months *after* Poland had submitted its request for the establishment of a panel.[42] We are of the view that the lack of access to this information may have affected the precision with which Poland set out the claims in its panel request.

92. In the facts and circumstances of this case, therefore, we consider that the reference in Poland's panel request to the "[calculation of] an alleged dumping margin" was sufficient to bring Poland's claims under Article 2 within the panel's terms of reference, and to inform Thailand of the nature of Poland's claims. Thus, with respect to the claims relating to Article 2 of the *Anti-Dumping Agreement*, Poland's panel request was sufficient to meet the requirements of Article 6.2 of the DSU.[43]

93. With respect to Article 5, Poland stated that "Thai authorities initiated and conducted this investigation in violation of the procedural . . . requirements of Article VI of GATT 1994 and Article 5 . . . of the Antidumping Agreement". Article 5 sets out various but closely related procedural steps that investigating authorities must comply with in initiating and conducting an anti-dumping investigation. In view of the interlinked nature of the obligations in Article 5, we are of the view that, in the facts and circumstances of this case, Poland's reference to "the procedural . . . requirements" of Article 5 was sufficient to meet the minimum requirements of Article 6.2 of the DSU.[44]

94. In assessing the sufficiency of Poland's panel request with respect to the claims relating to Articles 2 and 5, the Panel put considerable emphasis on the fact that the dispute involved "several issues that were raised before the Thai investigating authorities".[45] The Panel's reasoning seems to assume that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the S856 O5.25 TD The

[41]See Poland's first written submission, para. 33, Panel Report, p. 84. This information was provided to

settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. Furthermore, although the defending party will be aware of the issues raised in an underlying investigation, other parties may not. Thus, the underlying investigation cannot normally, in and of itself, be determinative in assessing the sufficiency of the claims made in a request for the establishment of a panel. We, therefore, are of the view that, in this case, the Panel erred to the extent that it relied mainly on issues raised in the underlying anti-dumping investigation in assessing the sufficiency of Poland's panel request under Articles 2 and 5.

95. Thailand argues that it was prejudiced by the lack of clarity of Poland's panel request. The fundamental issue in assessing claims of prejudice is whether a defending party was made aware of the claims presented by the complaining party, sufficient to allow it to defend itself. In assessing Thailand's claims of prejudice, we consider it relevant that, although Thailand asked the Panel for a preliminary ruling on the sufficiency of Poland's panel request with respect to Articles 5 and 6 of the *Anti-Dumping Agreement* at the time of filing of its first written submission, it did not do so at that time with respect to Poland's claims under Articles 2 and 3 of that Agreement. We must, therefore, conclude that Thailand did not feel at that time that it required additional clarity with respect to these claims, particularly as we note that Poland had further clarified its claims in its first written submission. This is a strong indication to us that Thailand did not suffer any prejudice on account of any lack of clarity in the panel request.

96. We, therefore, uphold the Panel's finding that, with respect to the claims relating to Articles 2, 3 and 5 of the *Anti-Dumping Agreement*, Poland's request for the establishment of a panel was sufficient to meet the minimum requirements of Article 6.2 of the DSU.

97. In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". As we have previously stated, the "procedural rules of WTO dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".[46]

[46]Appellate Body Report, *United States – Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, para. 166.

VII. Articles 3.1 and 17.6 of the *Anti-Dumping Agreement*

98. Thailand appeals the Panel's interpretation of Articles 3.1 and 17.6 of the *Anti-Dumping Agreement*.[47] The specific legal issue which the Panel set out to examine was:

> … whether the Panel may properly review the Thai injury determination with reference to considerations and data in the confidential record of the investigation in, *inter alia*, Exhibit Thailand-44 that were not discernible in the final determination or the disclosures (including non-confidential summaries) or communications pertaining to the final determination to which the Polish firms had access in the course of the investigation.[48]

The Panel noted that its view on this issue would be based on an examination of the wording of Article 3 "read in the light of" the standard of review in Article 17.6.[49] *0.196a28 ys77 TD t its view on thisa Memb*

100. The Panel then proceeded to apply its interpretation of Article 3.1 to a *panel's* obligations "in reviewing the final determination of injury".[53] With respect to the reasoning and analysis of the investigating authority, on which it should base its review, the Panel said:

> We are therefore of the view that in reviewing the final determination of injury, we as a panel should base our review on the reasoning and analysis reflected in the final determination and in communications and disclosures to which the Polish firms had access in the course of the investigation or at the time of the final determination.[54]

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> … In addition, in order to ascertain whether the evaluation of the facts was unbiased and objective we must examine the analysis and reasoning in those documents to ascertain the connection between the disclosed factual basis and the findings. We must examine whether the determination was reached on the basis of an unbiased and objective evaluation, and an objective examination, of the *disclosed factual basis* of the determination.[57] (emphasis added)

102. The Panel sought contextual support for its interpretation of Articles 3.1 and 17.6 in other provisions of the *Anti-Dumping Agreement* . It pointed to provisions in Article 6 which set forth the rights of parties, during the anti-dumping proceedings, to have "a full opportunity for the defence of their interests", and to be informed of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures".[58] The Panel also referred to provisions in Article 12 which require a final determination to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".[59]

103. Based on the above reasoning, the Panel concluded:

> … [W]e decline to base our review on confidential reasoning or analysis that may have formed part of the record of the Thai AD investig1seB1,abovi6s omcolisionirms5 and/tunity Twlegathe unselis adde or[60]orth th27 Tj -3Tj 0 -12-36 TD /F1 11.25 T

of the *Anti-Dumping Agreement*, notably the obligation to protect confidential information under Article 6.5[63], and to give public notice of final determinations under Article 12.2.2.[64]

105. We begin our analysis of the issue by examining the text of Article 3.1 of the *Anti-Dumping Agreement*, which states:

> *Article 3*
>
> *Determination of Injury*
>
> 3.1 A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products.

106. 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), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfill in making an injury determination.

107. We recall that the legal issue before us is whether the terms "positive evidence" and "objective examination" in Article 3.1 require that "the reasoning supporting the determination be 'formally 0.1ilr,ulicit 0.57eein74Artid of of rlserms Armination.

feelings, opinions, or personal bias; disinterested".[67] Even if we accept that the ordinary meaning of these terms is reflected in the dictionary definitions cited by the Panel, in our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the *totality* of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information.

108. Contextual support for this interpretation of Article 3.1 can be found in Article 3.7, which states that a threat of material injury must be "based on facts and not merely on allegation, conjecture or remote possibility". This choice of words shows that, as in Article 3.1, which overarches and informs it, it is the *nature* of the evidence that is being addressed in Article 3.7. A similar requirement for an investigating authority can be found in Article 5.2, which requires that an application for initiation of an anti-dumping investigation may not be based on "[s]imple assertion, unsubstantiated by relevant evidence". Article 5.3 requires an investigating authority to "examine the accuracy and adequacy" of the evidence provided in such an application.

109. Further contextual support for this reading of Article 3.1 is provided by other provisions of the *Anti-Dumping Agreement*. Article 6 (entitled "Evidence") establishes a framework of procedural and due process obligations which, amongst other matters, requires investigating authorities to disclose certain evidence, during the investigation, to the interested parties. Article 6.2 requires that parties to an investigation "shall have a full opportunity for the defence of their interests". Article 6.9 requires that, before a final determination is made, authorities shall "inform all interested parties of the essential facts under consideration which form the basis for the decision". There is no justification for reading these obligations, which appear in Article 6, into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination by the Thai authorities in this case necessarily met the requirements of Article 6. As the Panel found that Poland's claim under Article 6 did not meet the requirements of Article 6.2 of the DSU, the issue was not considered by the Panel.

110. Article 12 (entitled "Public Notice and Explanation of Determinations") also provides contextual support for our interpretation of the meaning of "positive evidence" and "objective examination" in Article 3.1. In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination.

[67] Panel Report, para. 7.143.

Article 12.2.2 requires, in particular, that a final determination contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", and "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not

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

117. There is a clear connection between Articles 17.6(i) and 17.5(ii). The facts of the matter referred to in Article 17.6(i) are "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" under Article 17.5(ii). Such facts do not exclude confidential facts made available to the authorities of the importing Member. Rather, Article 6.5 explicitly recognizes the submission of confidential information to investigating authorities and its treatment and protection by those authorities. Article 12, in paragraphs 2.1, 2.2 and 2.3, also recognizes the use, treatment and protection of confidential information by investigating authorities. The "facts" referred to in Articles 17.5(ii) and 17.6(i) thus embrace "all facts confidential and non-confidential", made available to the authorities of the importing Member in conformity with the domestic procedures of that Member. Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from "second-guessing" a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective. Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of *procedure* and *due process.* These matters are very important, but they are comprehensively dealt with in other provisions, notably Articles 6 and 12 of the *Anti-Dumping Agreement.*

118. 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.

119. We, therefore, reverse the Panel's interpretation that, in reviewing an injury determination under Article 3.1, a panel is required under Article 17.6(i), in assessing whether the *establishment of facts* is proper, to ascertain whether the "factual basis" of the determination is "discernible" from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in assessing whether the *evaluation of the facts* is unbiased and objective, to examine the "analysis and reasoning" in only those documents "to ascertain the connection between the disclosed factual basis and the findings."[72]

120. Thailand requests the Appellate Body to reverse "the Panel's interpretations of Article 3.1 and 17.6 of the Anti-Dumping Agreement and its consequent finding that it was only to consider certain non-confidential documents disclosed to Polish firms (and/or their legal counsel) at the time of the final determination in reviewing the matter in dispute."[73] Thailand's appeal is therefore limited to the Panel's interpretation of Articles 3.1 and 17.6, specifically with respect to the standard of review

[72]Panel Report, para. 7.145.

[73]Thailand's appellant's submission, para. 237.

125. In determining whether *all* the factors mentioned in Article 3.4 have to be considered in each case, the Panel began its interpretation in accordance with the customary rules of interpretation of public international law as required by Article 17.6(ii), first sentence, by examining at length the meaning and context of the wording of Article 3.4, and by contrasting it with the wording of Article 3.5. The Panel also examined, with respect to this issue, the interpretation by a previous panel of Article 3.4[76], and an earlier interpretation given by us of an analogous provision, Article 4.2(a) of the *Agreement on Safeguards*.[77] 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 …".[78] 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.*

126. Thailand claims, however, that:

> … the Panel never referred nor alluded to the standard of review under Article 17.6(ii) or to any aspect of the standard. It did not refer to or rely upon customary rules of interpretation of public international law. It did not determine whether Article 3.4 admits of more than one permissible interpretation. It did not determine whether Thailand's measure rests upon a permissible interpretation. Instead, the Panel found on its own accord that the text of Article 3.4 was mandatory and consisted of fifteen factors.[79]

127. We note that, contrary to what Thailand argues, the Panel did state that it was "mindful of the standard of review in Article 17.6(ii)", even though this statement was made in the section of the Panel Report in which the Panel discussed the standard of review under Article 17.6.[80] We also note that the Panel, by means of a thorough textual and contextual analysis, clearly applied the customary rules of interpretation of public international law. Further, the Panel's interpretation that Article 3.4 requires a mandatory evaluation of all the individual factors listed in that Article clearly left no room for a "permissible" interpretation that all individual factors need *not* be considered.

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[76]Panel Report, *Mexico – Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, para. 7.128.

[77]Appellate Body Report, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, para. 129.

[78]Panel Report, para. 7.231.

[79]Thailand's appellant's submission, para. 222.

[80]Panel Report, para. 7.54.

128. We conclude that the Panel was correct in its interpretation that Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision, and that, therefore, the Panel did not

> We find no provision in the DSU or in the *Agreement on Safeguards* that requires a panel to make an explicit ruling on whether the complainant has established a *prima facie* case of violation before a panel may proceed to examine the respondent's defence and evidence.[86]

133. Moreover, in our ruling in *India – Quantitative Restrictions on Imports of Agricultural Textile and Industrial Products*, we stated that:

> … we do not consider that a panel is required to state *expressly* which party bears the burden of proof in respect of every claim made.[87]

134. Thailand does not suggest that the Panel erred in its allocation and application of the burden

understanding of the role of Poland as the complaining party in this dispute.[92] Thus, the Panel did not err to the extent that it asked questions of the parties that it deemed necessary "in order to clarify and distil the legal arguments".[93]

137. With respect to the Panel's application of the standard of review, we note that Thailand argues that "it is not the task of the Panel itself to examine whether the facts were properly established, and the Panel's belief regarding the basis of a determination is not relevant".[94] We have already stated that the obligations in Article 3.1 and those in Article 17.6(i) are distinct.[95] Article 3.1 imposes an obligation on a Member to base an injury determination on "positive evidence". Article 17.6(i) requires a panel, in its assessment of the facts, to determine "whether the authorities establishment of the facts was proper " and to determine "whether their evaluation of those facts was unbiased and objective". Article 17.6(i) does *not* prevent a panel from examining whether a Member has complied with its obligations under Article 3.1. In evaluating whether a Member has complied with this obligation, a panel must examine whether the injury determination was based on positive evidence, and whether the injury determination involved an objective evaluation. Thus, to the extent that the Panel examined the facts in assessing whether Thailand's injury determination was consistent with Article 3.1, we are of the view that the Panel correctly conducted its examination consistently with the applicable standard of review under Article 17.6(i) of the *Anti-Dumping Agreement.*

138. For the reasons set out above, we conclude that the Panel did not err in its application of the burden of proof, and in its application of the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement.*

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[92]In this respect, the Panel stated:

> We are conscious that, in our assessment of the facts of the matter, we may not relieve Poland of its task of establishing the inconsistency of Thailand's AD investigation and resulting measure with the relevant provisions of the AD Agreement. In particular, we are aware that, in our questions posed to the parties, we must not "overstep the bounds of legitimate management or guidance of the proceedings … in the interest of efficiency and dispatch."

See Panel Report, para. 7.50.

[93]*Ibid*., para. 7.50.

[94]Thailand's appellant's submission, para. 203.

[95]See *supra*, para. 114.

X. Findings and Conclusions

139. For the reasons set out in this Report, the Appellate Body:

(a) upholds the Panel's finding that the panel request submitted by Poland with respect to claims relating to Articles 2, 3 and 5 of the *Anti-Dumping Agreement* was sufficient to meet the requirements of Article 6.2 of the DSU;

(b) reverses the Panel's interpretation that Article 3.1 of the *Anti-Dumping Agreement* requires that 'the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the AD investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination"[96]; and that "the factual basis relied upon by the authorities must be discernible from those documents"[97];

(c) reverses the Panel's interpretation that Article 17.6(i) requires a Panel reviewing an injury determination under Article 3.1, in its assessment of whether the *establishment* of the facts is proper, to ascertain whether the "factual basis" of the determination is "discernible" from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in its assessment of whether the *evaluation* of the facts is unbiased and objective, to examine the analysis and reasoning in only those

(f) concludes that the Panel did not err in its application of the burden of proof, and in the application of the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement.*

140. The Appellate Body *recommends* that the DSB request that Thailand bring its anti-dumping measure found, in this Report and in the Panel Report as modified by this Report, to be inconsistent with the *Anti-Dumping Agreement*, into conformity with its obligations under that Agreement.

Signed in the original at Geneva this 12th day of February 2001 by:

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A.V. Ganesan
Presiding Member

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Julio Lacarte-Muró
Member

Yasuhei Taniguchi
Member