

**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*



I.	Introduction.....	1
II.	Arguments of the Participants.....	4
A.	<i>Claims of Error by Thailand – Appellant</i> .....	4
1.	Article 6.2 of the DSU.....	4
2.	Articles 3.1 and 17.6 of the <i>Anti-Dumping Agreement</i> .....	6
3.	Article 3.4 of the <i>Anti-Dumping Agreement</i> .....	7
4.	Burden of Proof and Standard of Review.....	8
B.	<i>Arguments of Poland – Appellee</i> .....	8
1.	Article 6.2 of the DSU.....	8
2.	Articles 3.1 and 17.6 of the <i>Anti-Dumping Agreement</i> .....	10
3.	Article 3.4 of the <i>Anti-Dumping Agreement</i> .....	12
4.	Burden of Proof and Standard of Review.....	12
III.	Arguments of the Third Participants.....	13
A.	<i>Japan</i> .....	13
1.	Articles 3.1 and 17.6 of the <i>Anti-Dumping Agreement</i> .....	13
2.	Article 3.4 of the <i>Anti-Dumping Agreement</i> .....	14
B.	<i>The European Communities</i> .....	14
1.	Article 6.2 of the DSU.....	14
2.	Articles 3.1 and 17.6 of the <i>Anti-Dumping Agreement</i> . ....	15
C.	<i>The United States</i> .....	16
1.	Article 6.2 of the DSU.....	16
2.	Articles 3.1 and 17.6 of the <i>Anti-Dumping Agreement</i> .....	16
3.	Article 3.4 of the <i>Anti-Dumping Agreement</i> .....	17
IV.	Preliminary Procedural Matter and Ruling .....	17
V.	Issues Raised in this Appeal .....	22
VI.	Article 6.2 of the DSU .....	23
VII.	Articles 3.1 and 17.6 of the <i>Anti-Dumping Agreement</i> .....	30
VIII.	Article 3.4 of the <i>Anti-Dumping Agreement</i> .....	38
IX.	Burden of Proof and Standard of Review .....	40
X.	Findings and Conclusions .....	43



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").<sup>1</sup> 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.<sup>2</sup> 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.<sup>3</sup> 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.<sup>4</sup> On 1 May 1997, the Thai authorities sent copies of the proposed final determination of dumping and injury to the two Polish firms.<sup>5</sup> 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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<sup>1</sup>WT/DS122/R, 28 September 2000.

<sup>2</sup>Panel Report, paras. 2.1-2.8.

<sup>3</sup>*Ibid.*, para. 2.2.

<sup>4</sup>*Ibid.*, para. 2.3.

<sup>5</sup>*Ibid.*, para. 2.7.

transmitted this notice, along with a notice, dated 30 May 1997, of the final determination of dumping and injury to Poland.<sup>6</sup>

3. On 6 April 1998, Poland requested consultations with Thailand pursuant to Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "*Anti-Dumping Agreement*"), and Article 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), in respect of Thailand's imposition of final anti-dumping duties on imports of H-beams originating in Poland. As the consultations held on 29 May 1998 did not lead to a mutually satisfactory solution of the matter, on 13 October 1999, Poland requested the establishment of a panel. On 19 November 1999, the Dispute Settlement Body (the "DSB") established a panel to consider Poland's claims. Before the Panel, Poland claimed that, in imposing the final anti-dumping duty at issue, Thailand had violated Articles 2, 3, 5 and 6 of the *Anti-Dumping Agreement*, as read with Article IV of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

4. In its Report circulated to Members of the World Trade Organization (the "WTO") on 28 September 2000, the Panel concluded that Thailand's imposition of the definitive anti-dumping measure on imports of H-beams originating in Poland was inconsistent with the requirements of Article 3 of the *Anti-Dumping Agreement*. The Panel found that:

- (a) inconsistently with the second sentence of Article 3.2 and Article 3.1, the Thai authorities did not consider, on the basis of an "objective examination" of "positive evidence" in the disclosed factual basis, the price effects of dumped imports;
- (b) inconsistently with Articles 3.4 and 3.1, the Thai investigating authorities failed to consider certain factors listed in Article 3.4, and failed to provide an adequate explanation of how the determination of injury could be reached on the basis of an "unbiased or objective evaluation" or an "objective examination" of "positive evidence" in the disclosed factual basis; and
- (c) inconsistently with Articles 3.5 and 3.1, the Thai authorities made a determination of a causal relationship between dumped imports and any possible injury on the basis of (i) their findings concerning the price effects of dumped imports, which we had already found to be inconsistent with the second sentence of Article 3.2 and Article 3.1; and (ii) their findings concerning injury, which we had already found to be inconsistent with Article 3.4 and 3.1.<sup>7</sup>

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<sup>6</sup>Panel Report, para. 2.8.

<sup>7</sup>*Ibid.*, para. 8.3.

5. The Panel also concluded that Poland had failed to establish that Thailand's initiation of the anti-dumping investigation on imports of H-beams from Poland was inconsistent with the requirements of Articles 5.2, 5.3 and 5.5 of the *Anti-Dumping Agreement* or Article VI of the GATT 1994<sup>8</sup>; and that Poland had also failed to establish that Thailand had acted inconsistently with its obligations under Article 2 of the *Anti-Dumping Agreement* or Article VI of the GATT 1994.<sup>9</sup> The Panel also found that, in its request for the establishment of a panel, Poland had not sufficiently identified its claims of violation of Article 6 of the *Anti-Dumping Agreement*, and accordingly, did not examine those claims.<sup>10</sup>

6. The Panel recommended that the DSB request Thailand to bring its measure into conformity with its obligations under the *Anti-Dumping Agreement*.<sup>11</sup>

7. On 23 October 2000, pursuant to Article 16.4 of the DSU, Thailand notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal with the Appellate Body.<sup>12</sup> On 16 November 2000, Thailand filed an appellant's submission.<sup>13</sup> Poland filed appellee's submissions on 1 December 2000.<sup>14</sup> On the same day, the European Communities, Japan and the United States each filed separate third participant's submissions.<sup>15</sup> On 20 December 2000, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in light of the agreement of the participants in this appeal, the Appellate Body Report in the appeal would be circulated to Members of the WTO no later than 12 March 2001.<sup>16</sup>

8. The oral hearing in the appeal was held on 19 January 2000.<sup>17</sup> The participants and the third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

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<sup>8</sup>Panel Report, para. 8.1.

<sup>9</sup>*Ibid.*, para. 8.2.

<sup>10</sup>*Ibid.*, para. 7.286.

<sup>11</sup>*Ibid.*, para. 8.5.

<sup>12</sup>WT/DS122/4, 23 October 2000, pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").

<sup>13</sup>Pursuant to Rule 21 (1) of the *Working Procedures*.

<sup>14</sup>Pursuant to Rule 22 (1) of the *Working Procedures*.

<sup>15</sup>Pursuant to Rule 24 of the *Working Procedures*.

<sup>16</sup>WT/DS122/5, 20 December 2000.

<sup>17</sup>Pursuant to Rule 27 of the *Working Procedures*.

## 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*")<sup>18</sup> 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 reference, and the defending party and third parties must be able to inform themselves of the legal basis of the complaint "*from the time of the request for establishment of a panel*".<sup>19</sup>

11. Thailand submits that, in concluding that Poland's panel satisfied the "standard of clarity" under Article 6.2 of DSU, with respect to the claims of violation of Articles 2 and 5 of the *Anti-Dumping Agreement*, the Panel erred in relying solely on the information and issues raised before the investigating authorities during the underlying anti-dumping investigation. Thailand notes that a domestic anti-dumping investigation involves a multitude of issues, and that, if a panel's terms of reference are defined by the issues raised during the underlying investigation, or the facts known to the defending Member, the terms of reference "could cover a virtually limitless number of claims under any of the distinct obligations contained in Articles 2, 3 and 5".<sup>20</sup> The defending Member would be put to the unnecessary burden of preparing a defence with respect to all of these potential claims. Thailand submits further that by relying on "facts known and in the possession of the Thai government", the Panel ignored the rights of the third parties who had no knowledge of the underlying investigation. In this respect, Thailand also argues that the Panel erred in failing to make a finding as to whether Poland's request for the establishment of a panel was sufficient to inform third parties of the legal basis of the complaint.

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<sup>18</sup>Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000.

<sup>19</sup>Thailand's appellant's submission, para. 14.

<sup>20</sup>*Ibid.*, para. 22.



12. Thailand also argues that the Panel erred in its conclusion that it could examine whether Poland's allegations were apparent from the time of the first written submission, or whether such claims remained generally consistent throughout the Panel proceeding. The Panel erred because the standard of clarity must be met at the time of the request for the establishment of a panel, and cannot be cured or remedied at a later stage in the panel proceedings.

13. Thailand submits further that, in its consideration of the sufficiency of Poland's claims under Article 3 of the *Anti-Dumping Agreement*, the Panel erred in finding that it was sufficient for Poland to simply repeat the language of Article 3.1 because that language "*relates to*" the text of Articles 3.2, 3.4 and 3.5 of the Agreement. The Panel erred in not requiring more than the mere recitation of language from Article 3.1 of the *Anti-Dumping Agreement* to meet the minimum requirements of Article 6.2 of the DSU. Poland's panel request provided absolutely no indication of the "claims" of violation under the various subparagraphs of Article 3. Poland simply rearranged and recited the language from Article 3.1, without identifying the precise obligations allegedly violated under Articles 3.2, 3.4 or 3.5, and without providing any facts or circumstances on which any of its alleged violations of the *Anti-Dumping Agreement* are based. Thailand argues, therefore, that the Panel was in error in finding that the text of Poland's panel request went beyond a "mere listing" of the provisions of Article 3 of the *Anti-Dumping Agreement*.

14. Thailand also argues that the Panel erred in failing to establish the appropriate standard for determining how a defending party may demonstrate prejudice as a result of the complaining party's failure to comply with its obligations under Article 6.2 of the DSU. The Panel erred in failing to consider evidence provided by Thailand regarding why Thailand's ability to defend itself had been prejudiced. The prejudice to Thailand's case was caused, *inter alia*, by the uncertainties that flowed directly from Poland's approach of merely listing Article VI of the GATT 1994 and Articles 2 and 3 of the *Anti-Dumping Agreement*. This prejudice was particularly pronounced in the case of a developing country like Thailand which has scarce resources that it is able to allocate to prepare its defence. Moreover, anti-dumping disputes are complex, and it is particularly important that defending parties are given adequate time and opportunity to respond to any claims.

15. Finally, Thailand submits that the Panel erred in inferring that Thailand's capable participation in certain parts of the Panel proceeding, or up to a certain point in the proceedings, is conclusive evidence that Thailand was not prejudiced during the course of the Panel proceedings. The Panel's approach means that a Member can either refuse to participate, and thus damage its substantive defence, or can respond, and effectively waive its procedural objections. The Panel also failed to recognize that Thailand would have presented a more factually detailed and more persuasive defence, had Poland presented its claims with the standard of clarity required by Article 6.2 of the DSU.

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

16. Thailand submits that the Panel erred in interpreting Article 3.1 of the *Anti-Dumping Agreement* in conjunction with Article 17.6 of the *Anti-Dumping Agreement* to require the Panel to consider only the facts, evidence, or reasoning that were disclosed to Polish firms (and/or their legal counsel) at the time of the final determination of the anti-dumping measure.

17. According to Thailand, the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement* requires that a panel examine the "facts of the matter", including whether the authorities' establishment of the "facts" was proper and whether their evaluation of those "facts" was unbiased and objective. Article 17.6(i) must be read in conjunction with Article 17.5(ii) of the *Anti-Dumping Agreement*, which requires that a panel must examine the matter based upon the "facts" made available to the investigating authorities in accordance with appropriate domestic procedures. In this dispute, the "facts" collected and evaluated by the Thai authorities in accordance with Thai domestic procedures were set forth in both confidential and non-confidential documents. All those "facts" represented the "positive evidence" and the evaluation of such "facts" constituted the "objective examination" to form the basis of the Thai authorities' determinations under Article 3.1 of the *Anti-Dumping Agreement*.

18. Thailand submits that in anti-dumping investigations, both confidential and non-confidential documents constitute the record of the "facts" and the evaluation of those "facts" form the basis of the final determinations. Thus, the Panel's decision not to examine the facts of the matter based on both the confidential and non-confidential documents undermined Thailand's rights under, *inter alia*, the applicable standard of review under the *Anti-Dumping Agreement*.

19. Thailand argues that the Panel misinterpreted the standard of review under Article 17.6 of the *Anti-Dumping Agreement* to mean that its "examination of the matter" is limited to the disclosed factual basis of the determination contained in certain specified non-confidential documents. This means that in determining whether the "facts" were properly assessed and were properly evaluated, the Panel limited itself only to the disclosed "facts", and excluded the confidential "facts" on the record of the investigating authorities.

20. Thailand agrees with the Panel that Article 3.1 requires that the reasoning and factual basis must be "formally or explicitly stated" in documents in the record of the anti-dumping investigation. Thailand, however, cannot accept the Panel's finding that Article 3.1 of the *Anti-Dumping Agreement* requires that these documents can only be those to which interested parties (and/or their legal counsel) have access at least from the time of the final determination.

21. Thailand considers that the Panel's flawed finding is primarily based on its incorrect definition and interpretation of the term "positive evidence" in Article 3.1 of the *Anti-Dumping Agreement*. Thailand submits that the Panel's reliance on the *Concise Oxford Dictionary* for the definition of "positive" distorted its analysis of the meaning of the term "positive evidence" as used in the specific context of the *Anti-Dumping Agreement*. Thailand submits that a correct definition of "positive evidence" is reflected in *Black's Law Dictionary*, and this definition does not require evidence to be "formally or explicitly stated", and in no way lends support to the Panel's conclusion that reasoning supporting the determination be "formally or explicitly stated" in documents disclosed to interested parties.

22. In Thailand's view, it is illogical for the Panel to expect to "discern" from the relevant documents "factual evidence" that Thailand's WTO obligations precluded it from disclosing in those documents. Thailand's obligation under Article 6.5 of the *Anti-Dumping Agreement* prohibited the Thai authorities from disclosing any confidential information submitted by the interested parties. This obligation to protect confidential information from disclosure necessarily implied that the Thai authorities could not also disclose any reasoning through which such confidential information could "be discerned".

23. Thailand argues that the Panel erred in attempting to attribute to Articles 3.1 and 17.6 obligations that were directly and expressly covered under other articles of the *Anti-Dumping Agreement*. The Panel's terms of reference did not cover claims under these other articles, and the Panel should have presumed that Thailand's authorities acted consistently with them. The Panel was wrong to limit the scope of its review of Thailand's compliance with Article 3 on the basis of whether the obligations (or the underlying object and purpose) of those other articles were or were not complied with.

3. Article 3.4 of the *Anti-Dumping Agreement*

24. Thailand also appeals the Panel's conclusion under Article 3.4 of the *Anti-Dumping Agreement*. Thailand submits that in interpreting this provision, the Panel neither referred nor alluded to the standard of review under Article 17.6(ii) or to any aspect of the customary rules of interpretation of public international law. The Panel failed to determine whether Article 3.4 admits of more than one permissible interpretation, or 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 that it required an evaluation of all fifteen factors.

25. Thailand argues that Article 3.4 of the *Anti-Dumping Agreement* admits of more than one permissible interpretation and that Thailand's anti-dumping measure rests on a permissible

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 all of its arguments before the Panel.

4. Burden of Proof and Standard of Review

26. Thailand also submits that the Panel erred in its application of the standard of review. Under Article 17.6(i) of the *Anti-Dumping Agreement*, a panel may only find that the defending Member has acted inconsistently with an obligation under the Agreement with respect to a factual matter if it determines that the complaining Member has established a *prima facie* case – that the defending Member's authorities improperly established the facts, or evaluated the facts in a biased and subjective manner, and that the defending Member has failed to provide an effective refutation of the *prima facie* case. It is not the task of the Panel itself to examine whether the facts were properly established. Rather, the Panel's role is to determine under the applicable standard of review whether Poland had presented a *prima facie* case that the Thai authorities failed to base their determination on positive evidence or an objective examination. The Panel was not called upon to examine each and every step of the investigation and the final determinations of dumping, injury and causal link as a whole.

27. In addition to its failure to apply the correct standard of review, Thailand submits that the Panel also erred in its application of the burden of proof. The Panel overstepped its role in asking questions and requesting information in order to identify Poland's claims. Instead of requiring Poland to set out its claims under Article 3 of the *Anti-Dumping Agreement*, the Panel determined that it had the authority to ask questions and request information about potential violations of any of the multitude of distinct obligations under Article 3. In Thailand's view, this approach undermined and significantly diminished Thailand's due process rights. Thailand also considers that the Panel failed to make, either expressly or implicitly, the required findings regarding whether Poland had indeed presented a *prima facie* case and whether Thailand had effectively refuted it.

B. *Arguments of Poland – Appellee*

1. Article 6.2 of the DSU

28. Poland submits that the Panel correctly determined that Poland's request for the establishment of a panel meets the requirements of Article 6.2 of the DSU. According to Poland, Thailand's contentions amount to nothing more than its disagreement with the well-established standards set forth by the Appellate Body, its objection to the Panel's careful application of those standards, and its dissatisfaction with the result of the Panel's objective assessment of the matter before it.

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 prejudice; a panel commits reversible error unless it expressly opines on every factual assertion before it in assessing the existence or absence of "prejudice"; and a panel may not find that quotation of text is sufficient in light of attendant circumstances to provide notice of specific sub-paragraphs of an Article in a request for the establishment.

30. According to Poland, the Panel in this dispute performed precisely the case-by-case examination required under the Appellate Body ruling in *Korea – Dairy Safeguards*. The Panel first found that the text of Poland's panel request concerning Article 3 went beyond a "mere listing" of applicable provisions. It next examined a series of "attendant circumstances", including undisputed facts known to and in the possession of the Thai government and actions taken by (or not taken by) the parties, and determined that these circumstances confirmed the legal sufficiency of Poland's panel request. Contrary to the claims now made by Thailand on appeal, the Panel did not pronounce that one or another of various facts was determinative in its conclusion. Rather, the Panel correctly made an objective evaluation of the totality of circumstances, in accordance with established precedent.

31. Poland contends that the Appellate Body has made plain in *Korea – Dairy Safeguards* that respondents bear the burden of demonstrating the existence of prejudice, and that to carry this burden a respondent must do more than simply assert that it had sustained prejudice; it must instead offer supporting particulars demonstrating the actual existence of such prejudice. Poland agrees with the Panel's finding that Thailand had suffered no prejudice in its ability to defend its interests with respect to the claims.

32. Poland notes Thailand's argument that its vigorous and quite specific intervention in response to Poland's claims as well as its detailed responses to the Panel's questions may not be considered by the Panel in assessing the existence or absence of prejudice. However, Poland argues, Thailand offers no rational basis for denying a panel the power to give weight to only certain of the relevant facts and circumstances before it. Poland submits that it was the Panel's judgement that Thailand's claim of prejudice was objectively not credible.

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

33. Poland submits that the Panel properly interpreted Article 3.1 of the *Anti-Dumping Agreement*, in conjunction with Article 17.6 of that Agreement, to require that the reasoning supporting an anti-dumping determination must be stated in documents to which the parties have access, and that the factual basis relied upon by the authorities must be discernible from those documents.

34. Poland submits that Thailand's arguments are founded upon a fundamental misstatement of the Panel's decision. Contrary to Thailand's assertions, the Panel's interpretation of Article 17.6 does not even require that all the "facts" themselves be disclosed to the parties, or that all the facts themselves be discernible from the disclosed documents. A plain reading of the Panel's decision makes this clear. Thailand has not, and could not, point to a single passage in the Panel's decision in which the Panel requires all the "facts" to be disclosed in, or discernible from, the documents disclosed to the parties. Rather, the Panel's determination limits its review to the "*factual basis*" of the Thai determination that is discernible from the disclosed documents. Poland submits that Thailand has erroneously equated the Panel's use of the term "*factual basis*" with the term "*facts*".

35. Poland notes Thailand's arguments that the Panel erred in interpreting Article 3.1 of the *Anti-Dumping Agreement* without due regard to Thailand's obligations under Article 6.5 of the *Anti-Dumping Agreement*. In particular, Poland notes Thailand's argument that the Panel "relied on the wording of Article 3.1 of the *Anti-Dumping Agreement* to support its finding that it would limit itself to reviewing the disclosed facts and reasoning." Poland submits, however, that these arguments are founded upon a fundamental misstatement of the Panel's decision with respect to the requirements of Article 3.1. Contrary to Thailand's arguments, the Panel did not require that all facts be disclosed to the parties in order to be reviewable by the Panel. Rather, the Panel required that the reasoning and analysis be explicitly disclosed, and that the factual basis for the determination be discernible. This is not only within the parameters of the *Anti-Dumping Agreement* – it is essential.

36. Poland also notes Thailand's arguments that it is totally illogical for the Panel to expect to 'discern' from the relevant documents 'factual evidence' that Thailand's WTO obligations precluded it from disclosing in those documents and that any obligation to protect confidential information from disclosure necessarily meant that the Thai authorities could also not disclose any reasoning through which such confidential information could be discerned. Poland submits that these arguments also represent a significant misstatement of the Panel's language and findings. The Panel does not require that the "factual evidence" or "confidential information" be discernible from the disclosed documents; rather, the Panel requires that it be discernible from the disclosed documents whether and how that

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.

37. Given what Poland considers to be Thailand's misstatement of the Panel's understanding of the requirements under Article 3.1, Poland submits that the arguments of Thailand constitute nothing more than a series of misplaced hypothetical questions. Properly construed, the Panel's decision to review the disclosed factual basis for the final determination of the investigating authorities is fully consistent with a Member's obligations under Article 6.5 not to disclose confidential information.

38. Poland asserts that Thailand incorrectly claims that the Panel erred in attempting to attribute to Articles 3.1 and 17.6 obligations that were directly and expressly covered under other articles of the *Anti-Dumping Agreement*. In arguing that the Panel's determination regarding the scope of its review was not "justifiably based" on interpretations of Articles 3.1 and 17.6 of the *Anti-Dumping Agreement*, but on other provisions (Articles 6 and 12) of the *Anti-Dumping Agreement*, Thailand concludes that the Panel "deliberately" developed a "faulty basis" for its decision regarding Thailand's compliance with Article 3 in order to "remedy the defects in complainant's case."<sup>21</sup> Thailand offers no basis for this serious allegation. Instead, Thailand offers only its own assessment of what it believes the Panel "apparently" did or "seemed to do" in making its decision.

39. Poland submits that the Panel's understanding of the investigating authorities' obligations under Article 3.1 is fully consistent with, and supported by, the previous determinations of two GATT panel reports, while Thailand's interpretation finds no support in GATT or WTO jurisprudence and practice.<sup>22</sup> Like the panels in those two disputes, the Panel simply found that the investigating authority in this case was required to disclose its reasoning and analysis to the parties and that the factual basis supporting that reasoning be discernible from the disclosed documents. The Panel did not require the disclosure of any confidential information protected under Article 6 of the *Anti-Dumping Agreement*. Accordingly, the Panel's interpretation of the obligations under Article 3.1 was proper and fully consistent with other provisions of the *Anti-Dumping Agreement*, including Article 6.

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<sup>21</sup>Poland's appellee's submission, para. 74.

<sup>22</sup>Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 and Corr. 1, adopted 27 April 1993, BISD 40S/205; Panel Report, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted 27 April 1994, BISD 41S/229.

3. Article 3.4 of the *Anti-Dumping Agreement*

40. Poland notes Thailand's argument that the Panel did not apply the correct standard of review in interpreting Article 3.4 of the *Anti-Dumping Agreement*, and in not adopting Thailand's own interpretation of that Article. Poland submits, however, that Thailand's argument is based on the erroneous premise that the Panel applied an incorrect standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement*. This premise is flawed because it is based on Thailand's misunderstanding of Article 17.6(ii) and the Panel's authority to interpret the provisions of the *Anti-Dumping Agreement*.

41. Poland submits that Article 17.6(ii) requires the Panel to interpret the relevant provision "in accordance with customary rules of interpretation of public international law" as set forth in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties*. It is clear from the Panel's findings that the Panel properly exercised its authority under Article 17.6(ii) in interpreting Article 3.4.

4. Burden of Proof and Standard of Review

42. Poland argues that the Panel properly examined Article 3.1 in light of the standard of review set forth in Article 17.6 of the *Anti-Dumping Agreement*. The Panel further examined both confidential and non-confidential data, correctly concluding that the disclosed facts cannot be considered to be 'properly established' if they are inaccurate. Contrary to Thailand's claims, the Panel also demonstrated a detailed and correct understanding of the relationship between Articles 17.5 and 17.6 of the *Anti-Dumping Agreement*. The Panel properly understood its role under Article 17.6 of the *Anti-Dumping Agreement*, and properly conducted its inquiry, consistent with the applicable standard of review. In Poland's view, Thailand's suggestion that the standard of review should be considerably narrowed should be rejected, because it requires a degree of deference that would allow parties to choose what questions a panel may ask and which facts may be deemed relevant to the Article 17.6(i) examination.

43. Poland considers that Thailand's arguments on burden of proof amount to a claim that the Panel somehow exceeded its authority by asking questions which Thailand found uncomfortable and too probing. WTO dispute settlement panels have broad legal authority to control the process by which they inform themselves of the relevant facts of the dispute and the legal principles applicable to such facts. Poland submits that the Panel properly applied the appropriate burden of proof in considering Thailand's compliance with Article 3.1 of the *Anti-Dumping Agreement*. First, the Panel properly acknowledged that the burden of proof rests with the party, whether complaining or defending, that asserts the affirmative of a particular claim or defence. Citing appropriate authority



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 "unbiased and objective" assessment of the facts. Moreover, the standard of review calls on a Panel to evaluate whether the investigating authorities made an "objective" decision *at the time* of the decision. The issue is not the authorities' current rationale, but rather the authorities' evaluation – both the stated rationale and the underlying facts – *at the time* of its determinations.

47. Japan submits that, contrary to Thailand's argument, Articles 6 and 12 provide useful context that supports the Panel's interpretation of Article 3.1. The obligation of Article 3.1 calling for an "objective examination" should be read in the light of the requirements for Article 6 to ensure adequate opportunities for the defending parties, and the obligations of Article 12 to explain what the authorities have finally decided. These other articles reinforce the importance of the need for authorities to provide an "objective examination" by disclosure of the factual basis to interested parties.

2. Article 3.4 of the *Anti-Dumping Agreement*

48. In Japan's view, Article 3.4 represents the very heart of the obligations set forth in the *Anti-Dumping Agreement* to ensure that material injury investigations are based on an "objective examination" of "positive evidence". To prevent authorities from arbitrarily examining only those relevant economic factors that support an affirmative injury or threat of injury determination, Article 3.4 enumerates a non-exhaustive list of mandatory relevant economic factors essential to any fair and objective consideration of the impact of dumped imports on domestic industry. Thailand has failed to establish that its interpretation of Article 3.4 is a permissible one under the customary rules of interpretation of public international law.

49. Japan submits that the Panel's interpretation of Article 3.4 is by no means novel; every panel that has previously interpreted Article 3.4, and its analogue in the *Agreement on Safeguards*, has reached the same conclusion. Given the unanimity of these interpretations, the ordinary meaning of Article 3.4 is beyond dispute.

B. *The European Communities*

1. Article 6.2 of the DSU

50. The European Communities believes that the Panel's interpretation of the requirements of Article 6.2 of the DSU is flawed, and is based on a misreading of the Appellate Body report in *Korea – Dairy Safeguards*. The phrase "in light of attendant circumstances", used by the Appellate Body, is not relevant in the context of the present dispute, because the present dispute involves Articles that contain multiple obligations. Most importantly, this phrase cannot be used to nullify the letter and the spirit of Article 6.2 of the DSU, by accepting, as substitutes for or complements to a request for the establishment of a panel, any other sources of information, especially ones extraneous to the WTO proceeding such as concerns presented in front of national authorities.

51. The Appellate Body has clearly stated that, under Article 6.2 of the DSU, a panel request needs to be "sufficiently precise" to inform also the third parties of the legal basis of the complaint. In denying Thailand's request to dismiss Poland's claims under Articles 2, 3, and 5 of the *Anti-Dumping Agreement*, the Panel did not take into account the procedural rights of the third parties that are guaranteed under Article 10 of the DSU. Third parties are not always aware of what issues were raised before national investigating authorities. In the present case, the European Communities had clearly submitted to the Panel that the European Communities, as a third party, was not able to know the legal basis of the complaint until it had received the First Submission by Poland. However, the

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* draws no distinction between "disclosed" and "undisclosed" facts. It applies equally with respect to all "the facts of the matter" referred to in paragraph 5 of Article 17. That paragraph, in turn, includes all the facts "made available in conformity with appropriate domestic procedures to the authorities of the importing Member". Thus, no distinction is made between "disclosed" and "undisclosed" facts in Article 17. Article 17.6(ii) is concerned exclusively with the "establishment" of facts and their "evaluation", and not with the "disclosure" of those facts to the interested parties. The two issues are clearly separate and independent from each other. The establishment of a given fact by the investigating authorities may be "proper", and its evaluation "objective", even if that fact is not disclosed to the exporters or other interested parties.

54. The European Communities argues that Article 3.1 lays down a substantive standard of evidence, and not a procedural safeguard for interested parties. The word "positive" in Article 3.1 refers to the nature and quality of the evidence under examination and not to whether that evidence is disclosed or not disclosed to all interested parties. The disclosure of evidence to interested parties is specifically addressed in other provisions of the *Anti-Dumping Agreement*, including in particular Articles 6.3, 6.5 and 6.9. By reading new procedural safeguards for interested parties into Article 3.1, the Panel's interpretation would duplicate, and indeed render redundant, those other provisions.

55. Following the Panel's interpretation, the only way in which a Member could reconcile the requirements of Articles 6.8 and 6.5 is by disclosing all the confidential evidence to the legal counsel of the other interested parties under a protective order. While that system of disclosure is applied by a certain Member, which is one of the major users of anti-dumping measures, the *Anti-Dumping Agreement* does not require other Members to adopt such a system. The Panel appears to have recognized this conflict and made an attempt to avoid it by introducing the qualification that it would consider undisclosed confidential information to the extent that it may be discerned from disclosed information. However, that qualification is still insufficient to resolve the conflict. The Panel overlooked that, as acknowledged in Article 6.5, some confidential information may not be capable of summarization, and therefore may never be "discernible" from the disclosed information.

C. *The United States*

1. Article 6.2 of the DSU

56. The United States disagrees with the Panel's statement that the "attendant circumstances" can include the consideration of issues raised in an underlying anti-dumping investigation. In the view of the United States, the term "in light of the attendant circumstances" means, in general terms, that the factual context surrounding the request for the establishment of a panel, including any record of the consultations or other communications between the parties, or the circumstances of the measure being reviewed, may mean that a relatively abbreviated description of the legal claim may be sufficient to satisfy the requirement of Article 6.2 of the DSU concerning "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The attendant circumstances will not, however, normally include the underlying anti-dumping investigation itself.

57. The Panel's view of "attendant circumstances" fails to take into account the interests of third parties, as required by Article 10.1 of the DSU, or of the Panel itself. It is entirely possible that third parties may not have been involved in the investigation before the national authorities (as was the case here with respect to the United States), and it is certain that the Panel will not have been. In such a situation, neither the third parties nor the Panel itself will be able to interpret the meaning of a panel request in the light of communications that took place during the investigation.

58. The United States agrees with Thailand that the Panel should not have dismissed Thailand's claims of prejudice simply because Thailand mounted an effective advocacy in response to Poland's arguments. The Panel's approach to this issue places a party facing an inadequate panel request in the untenable position of having to choose between (1) refusing to respond to a request that it believes deprived it of its rights under the DSU, with the enhanced risk of an unfavourable decision on the merits; or (2) responding fully to the extent possible, but at the cost of effectively waiving its objections to the inadequate request.

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

59. The United States generally agrees with the Panel's interpretation of the standard of review under Article 17.6 of the *Anti-Dumping Agreement*. However, the United States agrees with Thailand that the Panel misinterpreted Article 17.6(i) of the *Anti-Dumping Agreement* when it concluded that it should not consider confidential information in the administrative record of the investigating authorities in determining whether the Thai authorities' injury determination complied with the text of Article 3.1 of the *Anti-Dumping Agreement*.

60. The United States submits that the standard of review set out in Article 17.6(i) of the *Anti-Dumping Agreement* requires a panel to "determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In order for a panel to properly determine whether the investigating authorities' establishment of the facts was proper, it must evaluate all of the facts made available to it by the defending party; these may include confidential facts that were part of the administrative record.

3. Article 3.4 of the *Anti-Dumping Agreement*

61. In the view of the United States, the Panel was correct in determining that the language of Article 3.4 is mandatory, making it clear that all of the listed factors in Article 3.4 must be evaluated in all cases. The text of Article 3.4 makes each of the 15 individual factors listed in Article 3.4 *prima facie* relevant to an injury determination. Accordingly, all factors must be evaluated by the investigating authorities. The Panel also correctly stated that the requirements imposed by Article 3.1 of "positive evidence" and "objective examination" do not amount to a mere checklist approach to the evaluation of the Article 3.4 factors. To this end, the United States agrees with the Panel's finding that the importance of certain factors may vary significantly from case to case, and that in certain circumstances other non-listed factors may be deemed relevant.

**IV. Preliminary Procedural Matter and Ruling**

62. On 1 December 2000, the Appellate Body received a written brief from the Consuming Industries Trade Action Coalition ("CITAC"), a coalition of United States companies and trade associations. In its brief, CITAC addressed some of the legal issues raised in this appeal. On the same day, CITAC sent copies of its brief to Thailand and Poland, the participants in this appeal, as well as to the European Communities, Japan and the United States, the third participants in this appeal.

63. On 6 December 2000, Thailand wrote to us requesting that we reject this brief, as well as any other such briefs that might be submitted in this appeal. Thailand said it considered that the Appellate Body lacked the authority to consider *amicus curiae* briefs in this dispute. Thailand added that aside from the acceptance of such briefs by the Appellate Body, a potentially more serious issue had arisen with respect to the brief submitted by CITAC.

64. Thailand stated that it appeared on the face of the CITAC brief that this organization had had access to the appellant's submission in this appeal. Thailand stated that, in the CITAC brief, certain references to the specific arguments of Thailand use the format set out in Thailand's appellant's submission. In particular, Thailand noted that in paragraph 2 of the brief submitted by CITAC, there

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)



We note that Poland has made substantial efforts to investigate this matter, and to gather information from its legal counsel, Hogan & Hartson L.L.P. We note as well the responses from the third participants, the European Communities, Japan and the United States. Furthermore, Poland has accepted the proposal made by Hogan & Hartson L.L.P. to withdraw as Poland's legal counsel in this appeal. On the basis of the responses we have received from Poland and from the third participants, and on the basis of our own examination of the facts on the record in this appeal, we believe that there is *prima facie* evidence that CITAC received, or had access to, Thailand's appellant's submission in this appeal.

We see no reason to accept the written brief submitted by CITAC in this appeal. Accordingly, we have returned this brief to CITAC.

75. On 20 December 2000, Thailand sent us a letter in response to this ruling. In this letter, Thailand stated that Poland had not provided any explanation of how the breach came to occur, and requested that we take further action in this connection. Thailand suggested that we ask CITAC how it came to be in possession of the information in its brief. Thailand also asked that we consider what further steps we should take to deter violations by WTO Members in future cases. Thailand also asked that we clarify the meaning of Poland's explanation that it had accepted the proposal made by Hogan & Hartson L.L.P. to withdraw as Poland's legal counsel in this appeal. Thailand also requested that we clarify our reasons for rejecting the written brief submitted by CITAC. Finally, Thailand asked that we reflect a full record of this issue in our Report in this appeal.

76. As we indicated in our ruling of 14 December 2000, we have noted Thailand's concerns with respect to the confidentiality of these proceedings. Accordingly, we have, as we indicated in our ruling, provided a full account of all the aspects pertaining to this issue. We also noted these concerns at the oral hearing in this appeal. We believe that we have done all that is possible within our mandate under the DSU to address Thailand's concerns. With respect to Thailand's suggestion that we seek an explanation from CITAC, we note that we have rejected the written brief filed by this organization. Under these circumstances, it would not be appropriate for the Appellate Body to communicate with this organization.

77. With respect to Thailand's request that we ascertain that Hogan & Hartson L.L.P. is no longer acting for Poland, at the beginning of the oral hearing in this appeal, and in response to questioning from the Division, Poland confirmed that this was the case, and further confirmed that all confidential documents pertaining to this appeal that were in the possession of Hogan & Hartson L.L.P. had been returned to Poland.

78. With respect to a clarification of the reasons for rejecting the brief from CITAC, we would only add that we did not find the brief filed by CITAC to be relevant to our task.

**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 submitted by Poland was sufficient to meet the requirements of Article 6.2 of the DSU, with respect to claims relating to Articles 2, 3 and 5 of the *Anti-dumping Agreement*;
- (b) whether the Panel erred in finding that:
  - (i) 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"<sup>23</sup>; and that "the factual basis relied upon by the authorities must be discernible from those documents"<sup>24</sup>; and that
  - (ii) 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 only in those documents to ascertain the connection between the "disclosed factual basis" and the findings<sup>25</sup>; and
- (c) whether the Panel erred in its interpretation and application of Article 3.4 of the *Anti-Dumping Agreement*, in particular, in its application of the standard of review set forth in Article 17.6(ii) of that Agreement; and

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<sup>23</sup>Panel Report, para. 7.143.

<sup>24</sup>*Ibid.*, para. 7.143.

<sup>25</sup>*Ibid.*, para. 7.145.

- (d) whether, in its examination of the consistency of the final determination of the Thai investigating authorities with Article 3 of the *Anti-Dumping Agreement*, the Panel erred in its application of the burden of proof and the standard of review set forth in Article 17.6(i) of that Agreement.

## VI. Article 6.2 of the DSU

80. Thailand appeals from the Panel's finding that the request for the establishment of a panel submitted by Poland was sufficient to meet the requirements of Article 6.2 of the DSU, with respect to Poland's claims relating to Articles 2, 3 and 5 of the *Anti-Dumping Agreement*.

81. With respect to Poland's claims under Article 2 of the *Anti-Dumping Agreement*, the Panel stated:

We consider that the panel request performs the functional equivalent of merely listing the Article. Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin. . . . [We] note that documentary evidence before us, which was in Thailand's possession from the time of the underlying AD investigation, indicates that the Polish firms persistently raised during the course of the investigation the precise issue which Poland raises in this dispute under Article 2.2 i.e. the use of a "reasonable" amount for profit in the calculation of constructed normal value. We consider that this constitutes an attendant circumstance that confirms the sufficiency of the panel request with respect to Article 2.<sup>26</sup>

With respect to Poland's claims under Article 3 of the *Anti-Dumping Agreement*, the Panel stated:

. . . we consider that the text of the panel request goes beyond a "mere listing" of the provisions. Poland refers explicitly to specific language in the text of Article 3 and identifies specific factors that, in its view, the Thai authorities failed to consider in reaching their determination of injury and causation. The panel request refers to Poland's view that the determination was made in the absence of "positive evidence" and an "objective examination" (both terms explicitly referred to in Article 3.1) and refers also to certain "enumerated factors" (import volume, price effects, and the consequent impact of such imports on the domestic industry). In the context of a case of material injury, this specific language relates to the text of Articles 3.1, 3.2, 3.4 and 3.5. While it may have been preferable for Poland to have also explicitly listed the specific sub-paragraphs of paragraph 3 to which it was referring, we consider that the text of the panel request is sufficiently clear to meet the minimum requirements of Article 6.2 DSU with respect to Poland's claim of violation of Article 3.<sup>27</sup>

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<sup>26</sup>Panel Report, para. 7.35.

<sup>27</sup>*Ibid.*, para. 7.36.

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.<sup>28</sup>

Second, we note that, as will often be the case in WTO anti-dumping disputes, this dispute involves several issues that were raised before the Thai investigating authorities in the actual course of the underlying anti-dumping investigation. Thailand argues that this consideration is irrelevant in an examination under Article 6.2 DSU. We disagree. We consider that the fact that an issue was raised during the underlying investigation means that it involves considerations of which the government of the defending Member would be aware, and would involve evidence in the possession of that government. With respect to Article 5, the record before us indicates that the issue of notification under Article 5.5 AD had been raised in the course of the Thai AD investigation, both directly with the Thai investigating authorities and with Thailand at the WTO . . . We consider that these circumstances confirm the sufficiency of the panel request with respect to Article 5.<sup>29</sup>

82. Thailand appeals these findings of the Panel. According to Thailand, the Panel should have dismissed Poland's claims relating to Articles 2, 3 and 5 because each of these articles of the *Anti-Dumping Agreement* contains numerous, distinct obligations, and the request for the establishment of a panel submitted by Poland did not meet the standard of clarity demanded by Article 6.2 of the DSU with respect to the precise claims of Poland under these Articles. In particular, Thailand argues that in assessing the sufficiency of Poland's panel request, the Panel was wrong to take into account issues raised before the national investigating authorities. Thailand argues further that the Panel erroneously concluded that the mere repetition of the language of an article is sufficient to satisfy the standard of clarity required under Article 6.2. Thailand also argues that the Panel failed to consider evidence of the prejudice suffered by Thailand because of the lack of clarity in the panel request, and that the Panel failed to establish the appropriate standard to determine whether Thailand had been prejudiced.

83. We start our analysis of the Panel's rulings by examining the text of Article 6.2 of the DSU, which states, in relevant part:

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<sup>28</sup>Panel Report, para. 7.21.

<sup>29</sup>*Ibid.*, para. 7.22.

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.<sup>30</sup>

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.<sup>31</sup>

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.<sup>32</sup>

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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<sup>30</sup>Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, para. 142.

<sup>31</sup>Appellate Body Report, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:1, 167, at 186.

<sup>32</sup>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. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.<sup>33</sup>

In our ruling in that appeal, we also emphasized that the sufficiency of a panel request must be assessed on a case-by-case basis. We stated that:

. . . whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated.<sup>34</sup>

88. Article 6.2 of the DSU calls for sufficient clarity with respect to the legal basis of the complaint, that is, with respect to the "claims" that are being asserted by the complaining party.<sup>35</sup> A defending party is entitled to know what case it has to answer, and what violations have been alleged so that it can begin preparing its defence.<sup>36</sup> Likewise, those Members of the WTO who intend to participate as third parties in panel proceedings must be informed of the legal basis of the complaint. This requirement of due process is fundamental to ensuring a fair and orderly conduct of dispute settlement proceedings.

89. The panel request submitted by Poland in this dispute states, in pertinent part:

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<sup>33</sup>See Appellate Body Report, *supra*, footnote 18, para. 124.

<sup>34</sup>*Ibid.*, para. 127.

<sup>35</sup>*Ibid.*, para. 123.

<sup>36</sup>While arguments will be further clarified in the first written submission, and in subsequent documents, there is, as we said in *European Communities – Bananas*, a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims. See Appellate Body Report, *supra*, footnote 30, para. 142.

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.<sup>37</sup>

90. We begin first with Article 3 of the *Anti-Dumping Agreement*. With respect to Article 3, the Panel was of the view that the panel request went beyond a "mere listing" of Article 3. The Panel stated that Poland has referred explicitly to the specific language of Article 3, and has identified the specific factors that, in Poland's view, the Thai authorities failed to consider in reaching the determination of injury and causation. The Panel also stated that Poland has referred to certain "enumerated factors" which, in the context of a case of material injury, "relate to" the requirements of Articles 3.1, 3.2, 3.4 and 3.5. We accept the Panel's view. Article 3.1, which requires that an injury determination be based on positive evidence, and that it involve an objective examination of the relevant injury factors, is a fundamental and substantial obligation that functions as a chapeau, and informs the rest of Article 3.<sup>38</sup> Thus, in citing the language of Article 3.1 and in referring to certain key factors enumerated in Article 3, Poland has sufficiently provided a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU.<sup>39</sup>

91. With respect to Article 2, in its request for the establishment of a Panel, Poland stated that "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 ". We note that, with respect to its claims under Article 2, Poland submitted before the Panel that it was "unfairly limited in its ability to detail Polish claims relating to the final determination of the Thai authorities in this matter" and that "this limitation is a result of the incomplete data furnished by the Thai authorities".<sup>40</sup> The panel record in this case shows that on 20 June 1997, and 23 June 1997, the

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<sup>37</sup>WT/DS122/2, 15 October 1999.

<sup>38</sup>See also *infra*, para. 106.

<sup>39</sup>In reply to a question by the Panel, Thailand stated that : "The only more detailed reference of any kind is a repetition of the 'enumerated factors' in paragraph 1 of Article 3. Thus, at a minimum, Poland may arguably have identified the precise obligations under paragraph 1 of Article 3." See Panel Report, p. 271.

<sup>40</sup>See Poland's first written submission, para. 77, Panel Report, p. 95.

affected Polish exporters requested certain information from Thailand which the latter considered to be confidential, and did not disclose to the exporters.<sup>41</sup> 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.<sup>42</sup> 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.<sup>43</sup>

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.<sup>44</sup>

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".<sup>45</sup> 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 WTO. This is not necessarily the case. The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute

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<sup>41</sup>See Poland's first written submission, para. 33, Panel Report, p. 84. This information was provided to the Panel by Thailand in Exhibits 37, 44 and 46.

<sup>42</sup>Panel Report, paras. 5.1, 5.2 and 5.4.

<sup>43</sup>We note that the Panel dismissed Poland's claim under Article 2. See *supra*, para. 5.

<sup>44</sup>See also Appellate Body Report, *United States – Import Measures on Certain Products from the European Communities*, WT/DS165/AB/R, adopted 10 January 2001, para. 111.

<sup>45</sup>Panel Report, para. 7.22.



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".<sup>46</sup>

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<sup>46</sup>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*.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup>

99. The Panel began its analysis with an examination of a Member's obligation under Article 3.1 that an injury determination be based on "positive evidence", and involve an "objective examination".<sup>50</sup> Drawing on dictionary definitions, the Panel found:

... We are of the view that the textual reference to "positive evidence" and the requirement of an "objective examination" in Article 3.1 requires that the *reasoning* supporting the determination be "formally or explicitly stated" in documents in the record of the AD investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination. Moreover, we consider that the *factual basis* relied upon by the authorities must be *discernible* from those documents.<sup>51</sup> (emphasis added)

The Panel justified this finding by noting that it would provide interested parties in an anti-dumping investigation a "meaningful opportunity to defend their interests" during an investigation, and would enable Members "to assess whether bringing a WTO dispute settlement complaint relating to the determination would be fruitful."<sup>52</sup>

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<sup>47</sup>Thailand's appellant's submission, paras. 142-189.

<sup>48</sup>Panel Report, para. 7.140.

<sup>49</sup>*Ibid.*, para. 7.141.

<sup>50</sup>*Ibid.*, para. 7.143.

<sup>51</sup>*Ibid.*, para. 7.143.

<sup>52</sup>*Ibid.*, para. 7.143.

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".<sup>53</sup> 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.<sup>54</sup>

With respect to facts that it should take into account, the Panel said:

... We also consider that we may take into account -- *to the extent that it can be discerned from the foregoing documents whether and how it was relied upon by the Thai investigating authorities* in reaching their determination -- all of the factual evidence submitted to the Thai investigating authorities in the course of the Thai AD investigation to the extent that it forms part of the Panel record. This includes information that was treated as confidential by the Thai investigating authorities pursuant to Article 6.5 of the AD Agreement.<sup>55</sup> (emphasis added)

101. The Panel then continued its examination of the obligations of a panel reviewing a final determination of injury, referring specifically to the wording of Article 17.6(i). With respect to whether the establishment of the facts was proper, the Panel stated that its:

... examination of whether the establishment of the facts is proper under Article 17.6(i) would include ascertaining 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 whether those documents reflect the actual underlying data.<sup>56</sup> (emphasis added)

With respect to whether the evaluation of the facts was unbiased and objective, the Panel said:

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<sup>53</sup>Panel Report, para. 7.144.

<sup>54</sup>*Ibid.*, para. 7.144.

<sup>55</sup>*Ibid.*, para. 7.144.

<sup>56</sup>*Ibid.*, para. 7.145.

... 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.<sup>57</sup> (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".<sup>58</sup> 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".<sup>59</sup>

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 investigation, but to which the Polish firms (and/or their legal counsel) did not have access at the time of the final determination. This would include any reasoning or analysis contained exclusively in Exhibit Thailand-44.<sup>60</sup>

104. On appeal, Thailand requests the Appellate Body to

[r]everse 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.<sup>61</sup>

Thailand argues that the Panel has wrongly interpreted Articles 3.1 and 17.6 by misreading the term "positive evidence"<sup>62</sup>, and by neglecting to consider properly the context provided by other provisions

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<sup>57</sup>Panel Report, para. 7.145.

<sup>58</sup>*Ibid.*, para. 7.150, citing Articles 6.2 and 6.9 of the *Anti-Dumping Agreement*.

<sup>59</sup>*Ibid.*, para. 7.151, citing Article 12.2.2 of the *Anti-Dumping Agreement*.

<sup>60</sup>*Ibid.*, para. 7.147.

<sup>61</sup>Thailand's appellant's submission, para. 237.

<sup>62</sup>*Ibid.*, paras. 154-156.

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

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 or explicitly stated' in documents in the record of the investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination", and, further, that "the factual basis relied upon by the authorities must be discernible from those documents".<sup>65</sup> We note that the Panel stated that the dictionary meaning of the term "positive" suggests that "positive evidence" is "formally or explicitly stated; definite, unquestionable (*positive proof*)".<sup>66</sup> Likewise, the Panel reasoned that the dictionary meaning of "objective" suggests that an "objective examination" is "concerned with outward things or events; presenting facts uncoloured by

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<sup>63</sup>Thailand's appellant's submission, paras. 144-151.

<sup>64</sup>*Ibid.*, paras. 173-189.

<sup>65</sup>Panel Report, para. 7.143.

<sup>66</sup>*Ibid.*, para. 7.143.

feelings, opinions, or personal bias; disinterested".<sup>67</sup> 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.

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<sup>67</sup>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 considered by the Panel, since Poland did not make a claim under this provision.

111. We consider, therefore, that 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.

112. We, therefore, conclude that the Panel erred in finding that Article 3.1 of the *Anti-Dumping Agreement*, "requires that the reasoning supporting the determination [must 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"<sup>68</sup>; and that "the factual basis relied upon by the authorities must be discernible from those documents".<sup>69</sup>

113. We next consider the extent of a *panel's* obligations under Article 17.6 to *review* the investigating authority's final determination. Article 17.6 states:

In examining the matter referred to in paragraph 5:

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; (emphasis added)

Article 17.5, with which Article 17.6 should be read, states:

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<sup>68</sup>Panel Report, para. 7.143.

<sup>69</sup>*Ibid.*, para. 7.143.

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

the *facts made available* in conformity with appropriate domestic procedures to the authorities of the importing Member. (emphasis added)

114. Articles 17.5 and 17.6 clarify the powers of review of a panel established under the *Anti-Dumping Agreement*. These provisions place limiting obligations on a panel, with respect to the review of the establishment and evaluation of facts by the investigating authority. Unlike Article 3.1, these provisions do not place obligations on WTO Members. Further, while the obligations in Article 3.1 apply to *all* injury determinations undertaken by Members, those in Articles 17.5 and 17.6 apply only when an injury determination is examined by a WTO panel. The obligations in Articles 17.5 and 17.6 are distinct from those in Article 3.1.

115. Article 17.5 specifies that a panel's examination must be based upon the "facts made available" to the domestic authorities. Anti-dumping investigations frequently involve both confidential and non-confidential information. The wording of Article 17.5 does not specifically exclude from panel examination facts made available to domestic authorities, but not disclosed or discernible to interested parties by the time of the final determination. Based on the wording of Article 17.5, we can conclude that a panel must examine the facts before it, whether in confidential documents or non-confidential documents.

116. Article 17.6(i) requires a panel, in its assessment of the facts of the matter, to determine whether the authorities' "establishment of the facts" was "proper". The ordinary meaning of "establishment" suggests an action to "place beyond dispute; ascertain, demonstrate, prove"<sup>70</sup>; the ordinary meaning of "proper" suggests "accurate" or "correct".<sup>71</sup> Based on the ordinary meaning of these words, the proper establishment of the facts appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation prior to the final determination. Article 17.6(i) requires a panel also to examine whether the evaluation of those facts was "unbiased and objective". The ordinary meaning of the words "unbiased" and "objective" also appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation at the time of the final determination.

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<sup>70</sup>See the definition of "to establish" in *The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. I, pp. 852-853.]

<sup>71</sup>*The New Shorter Oxford English Dictionary* (Clarendon Press, 1993), Vol. II, p. 2379.



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."<sup>72</sup>

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."<sup>73</sup> 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

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<sup>72</sup>Panel Report, para. 7.145.

<sup>73</sup>Thailand's appellant's submission, para. 237.

adopted by the Panel in respect of these two provisions, and its findings on whether the Panel was entitled only to consider certain types of documents. Thailand does not ask us to reverse the Panel's findings, contained in paragraph 8.3 of its Report, that Thailand's anti-dumping measure is inconsistent with Articles 3.2, 3.4, and 3.5, together with Article 3.1. We, therefore, leave undisturbed the Panel's findings in paragraph 8.3 of the Panel Report.

#### **VIII. Article 3.4 of the *Anti-Dumping Agreement***

121. The Panel found, on the basis of evidence that was disclosed or discernible in the non-confidential documents, that Thailand had violated Article 3.4 of the *Anti-Dumping Agreement*. In arriving at its finding, the Panel concluded that it is mandatory that *all* of the listed factors in Article 3.4 be considered by an investigating authority.<sup>74</sup>

122. Thailand appeals specifically from this ruling. According to Thailand, the Panel failed to apply the rule of interpretation in Article 17.6(ii) that directs a panel to accept a Member's interpretation if it constitutes a "permissible" interpretation.<sup>75</sup> For Thailand, its interpretation of Article 3.4 was a "permissible" interpretation.

123. Article 3.4 of the *Anti-Dumping Agreement* sets forth a list of factors to be examined in order to assess the impact of dumped imports on the domestic industry. The provision states:

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

124. Article 17.6(ii) states that, in examining a dispute brought under the *Anti-Dumping Agreement*:

... 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. (emphasis added)

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<sup>74</sup>Panel Report, para. 7.229.

<sup>75</sup>Thailand's appellant's submission, paras. 219-236.

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<sup>76</sup>, and an earlier interpretation given by us of an analogous provision, Article 4.2(a) of the *Agreement on Safeguards*.<sup>77</sup> 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 ...".<sup>78</sup> 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.<sup>79</sup>

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.<sup>80</sup> 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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<sup>76</sup>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.

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

<sup>78</sup>Panel Report, para. 7.231.

<sup>79</sup>Thailand's appellant's submission, para. 222.

<sup>80</sup>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 err in its application of the standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement*.

#### **IX. Burden of Proof and Standard of Review**

129. We now turn to the procedural aspects raised by Thailand under the heading "burden of proof and standard of review". Thailand requests that we "reverse the Panel's findings in applying the standard of review and burden of proof with respect to Poland's claim(s)" under Article 3 of the *Anti-Dumping Agreement*.

130. Thailand's arguments relating to the burden of proof focus on specific procedural aspects of the Panel's approach to the burden of proof. In particular, Thailand argues that the Panel "failed to articulate clearly the roles of the Parties (and itself) under the burden of proof".<sup>81</sup> According to Thailand, "the Panel failed to make, either expressly or implicitly, the required findings regarding whether Poland had indeed presented a *prima facie*, case and whether Thailand had effectively refuted such case".<sup>82</sup> Thailand also argues that, because the claims of Poland were not sufficiently clear, the Panel through its questioning of the parties improperly assumed the burden of making Poland's case, thus improperly "substituting itself as prosecutor".<sup>83</sup>

131. With respect to the standard of review, Thailand considers that the Panel misinterpreted its role under the specific standard of review established by Article 17.6(i) of the *Anti-Dumping Agreement*. Thailand argues that "the Panel significantly broadened its examination to include an assessment of all of the facts leading to Thailand's determinations of dumping, injury, and causal link".<sup>84</sup> Thailand submits 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".<sup>85</sup>

132. We first examine the specific procedural aspects raised by Thailand under the heading of "burden of proof". With respect to the first of these procedural aspects, we note that, in our ruling in *Korea – Dairy Safeguards*, we stated that:

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<sup>81</sup>Thailand's appellant's submission, para. 190.

<sup>82</sup>*Ibid.*, para. 198.

<sup>83</sup>*Ibid.*, para. 197.

<sup>84</sup>*Ibid.*, para. 211.

<sup>85</sup>*Ibid.*, para. 203.

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.<sup>86</sup>

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.<sup>87</sup>

134. Thailand does not suggest that the Panel erred in its allocation and application of the burden of proof; it merely argues that the Panel did not make specific and explicit findings at every stage of its examination of Poland's claims under Article 3. In our view, a panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case. Thus, the Panel did not err to the extent that it made no specific findings on whether Poland had met its burden of proof.<sup>88</sup>

135. With respect to Thailand's argument that the claims of Poland were not sufficiently clear, and that the Panel, therefore, overstepped the limits of its authority in asking questions of the parties, we note that we have previously stated that panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them. In our Report in *Canada – Measures Affecting the Export of Civilian Aircraft*, we dismissed the view that a panel has no authority to ask a question relating to claims for which the complaining party had not first established a *prima facie* case, and stated that such an argument was "bereft of any textual or logical basis".<sup>89</sup>

136. In this case, Poland set out its claims with sufficient clarity in its request for the establishment of a panel<sup>90</sup>, so that it was within the Panel's mandate to ask questions related to those claims. We are not convinced by Thailand's argument that the Panel improperly made Poland's case for it.<sup>91</sup> We note that the Panel itself showed a clear appreciation of the limitations of its authority, as well as its

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<sup>86</sup>*Supra*, footnote 18, para. 145.

<sup>87</sup>Appellate Body Report, WT/DS90/AB/R, adopted 22 September 1999, para. 137.

<sup>88</sup>Appellate Body Report, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, para. 74.

<sup>89</sup>Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, para. 185.

<sup>90</sup>See *supra*, paras. 90-96.

<sup>91</sup>See Appellate Body Report, *Japan – Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, where we ruled that the panel in that case made the case for the complainant with respect to a claim of violation of Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

understanding of the role of Poland as the complaining party in this dispute.<sup>92</sup> 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".<sup>93</sup>

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".<sup>94</sup> We have already stated that the obligations in Article 3.1 and those in Article 17.6(i) are distinct.<sup>95</sup> 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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<sup>92</sup>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.

<sup>93</sup>*Ibid.*, para. 7.50.

<sup>94</sup>Thailand's appellant's submission, para. 203.

<sup>95</sup>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"<sup>96</sup>; and that "the factual basis relied upon by the authorities must be discernible from those documents"<sup>97</sup>;
- (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 documents to ascertain the connection between the "disclosed factual basis" and the findings<sup>98</sup>;
- (d) upholds the Panel's 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 err in its application of the standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement*;
- (e) leaves undisturbed the Panel's findings of violation under Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*; and

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<sup>96</sup>Panel Report, para. 7.143.

<sup>97</sup>*Ibid.*, para. 7.143.

<sup>98</sup>*Ibid.*, para. 7.145.

- (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

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Yasuhei Taniguchi  
Member