Article 6.8 and Annex II of the WTO Agreement on Antidumping

Dimitri Persoz

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Florence, 09 July 2019

European University Institute
Department of Law

Article 6.8 and Annex II of the WTO Agreement on Antidumping

Dimitri Persoz

Thesis submitted for assessment with a view to obtaining
the degree of Doctor of Laws of the European University Institute

Examining Board

Prof. Petros C. Mavroidis, European University Institute, Columbia Law School, University of Neuchâtel, World Trade Organization
Prof. Giorgio Monti, European University Institute
Prof. Edwin Vermulst, World Trade Institute, University of Barcelona, VVGB Law
Prof. Gabrielle Marceau, World Trade Organization, University of Geneva

Researcher declaration to accompany the submission of written work
Department of Law – LL.M. and Ph.D. Programmes

I Dimitri Persoz certify that I am the author of the work Article 6.8 and Annex II of the WTO Agreement on Antidumping I have presented for examination for the Ph.D. at the European University Institute. I also certify that this is solely my own original work, other than where I have clearly indicated, in this declaration and in the thesis, that it is the work of others.

I warrant that I have obtained all the permissions required for using any material from other copyrighted publications.

I certify that this work complies with the Code of Ethics in Academic Research issued by the European University Institute (IUE 332/2/10 (CA 297).

I declare that this work consists of 67'171 words.

Statement of language correction:

This thesis has been corrected for linguistic and stylistic errors.

I certify that I have checked and approved all language corrections, and that these have not affected the content of this work.

Signature and date:

15 March 2019

Acknowledgements

I would like to thank my supervisor Professor Petros C. Mavroidis for his extraordinary support and advice, precious comments, availability and patience for the whole research process.

I would like to thank Professor Giorgio Monti for his precious comments and support on previous papers that helped me to grow many ideas presented in this thesis.

I would like to thank all the Professors and my fellow researchers at the EUI for their helpful comments and discussions.

I would like to thank Jessica Bate for her careful advice during the language editing process.

I would like to thank all the administrative and logistic staff of the EUI.

This project would have been impossible without the support of the Swiss State Secretariat for Education, Research and Innovation (SERI) scholarship.

Finally, I would like to thank my family for its support.

Abstract

Article 6.8 of the Antidumping Agreement (AD) allows domestic investigating authorities to make determinations on the basis of the best information available (BIA) when any interested party does not cooperate during an antidumping investigation under the discipline of Annex II of the AD.

Since its introduction, this provision has been the source of extensive and never-ending litigation in front of both domestic investigating authorities and the Dispute Settlement Body.

In this thesis, we research to what extent the findings of the Panels and the Appellate Body regarding Article 6.8 AD are consistent with the mandate set out in Articles 3.2, 11 DSU and 17.6 AD and to what extent they are reasonable from an economic perspective.

To answer the first question, we first discuss Articles 3.2, 11 DSU and 17.6 AD to establish what is the mandate of the Panels and the Appellate Body under the Dispute Settlement Body. We then examine the findings of the Panels and the Appellate Body in the interpretation of the seven terms of Article 6.8 AD under the previously established mandate.

To answer the second question, we summarize the latest developments in the economic theory of adjudication and litigation. We then discuss the findings of the Panels and the Appellate Body using this economic standard.

In the conclusion, we compare the results of our analysis with current negotiations on Article 6.8 AD in the Doha Round framework and further discuss the opportunity to create a single united international investigating authority.

"*There can be economy only where there is efficiency.*"

Benjamin Disraeli[1]

[1] Benjamin Disraeli (21 December 1804 – 19 April 1881) was a British statesman and novelist who twice served as Prime Minister of the United Kingdom.

"*We observe, however, that both parties accept that any punitive use of facts available is inconsistent with the disciplines on facts available. They also share the view that duty rates for non-cooperating exporters —based on facts available- may serve to encourage cooperation and prevent antidumping duty circumvention. We do not disagree. There may be a fine line between, on the one hand, incentivizing cooperation and preventing circumvention and, on the other hand, punishing non-cooperating exporters*."

Panel Report, *Canada — Welded Pipe*, WT/DS482/R, §7.143

1. Introduction 11
1.1 Research questions and hypotheses 11
1.2 Methodology 12
1.3 Article 6.8 AD and Annex II 12
1.3.1 Rationale 12
1.3.2 Function 13
1.3.3 Conditions for application 14
1.3.4 A short history 20

2. Are the findings of the Panels and the AB on Article 6.8 AD consistent with the mandate set out in Articles 3.2, 11 DSU and 17.6 AD? 23
2.1 The benchmark for evaluating 23
2.1.1 The general mandate of Article 3.2 DSU 23
2.1.2 Standard of review of Articles 11 DSU and 17.6 AD 36
2.1.3 Summary 69
2.2 Findings of the Panels and the AB on Article 6.8 AD and consistency with the legal mandate 71
2.2.1 Object and purpose of the provision 71
2.2.2 Necessary information 83
2.2.3 Time 89
2.2.4 Verifiable character 96
2.2.5 Appropriately submitted so that it can be used in the investigation without undue difficulties 103
2.2.6 Cooperation 110
2.2.7 The best of its ability 117
2.2.8 With special circumspection 123

3. Are the findings of the Panels and the AB reasonable from an economic perspective? 129
3.1 Economic theory of adjudication and litigation 131
3.1.1 Margin of discretion 131
3.1.2 Burden of proof 141
3.1.3 Litigation 154
3.2 Economic efficiency and the findings of the Panels and the AB 164
3.2.1 Information 165
3.2.2 Time 184
3.2.3 Verifiable character 186
3.2.4 Appropriately submitted so that it can be used in the investigation without undue difficulties 188
3.2.5 Cooperation 190
3.2.6 The best of its ability 191
3.2.7 With special circumspection 193

4. Conclusions 195
4.1 Results of the research 195
4.1.1 Are the findings of the Panels and the AB on Article 6.8 AD consistent with the mandate set out in Articles 3.2, 11 DSU and 17.6 AD? 195
4.1.2 Are the findings of the Panels and the AB reasonable from an economic perspective? 196
4.2 On future changes and the negotiations of the Doha Round 200
4.3 Beyond Article 6.8 AD: on the opportunity for a single united international IA 207

Bibliography 213
Papers and books 213

Official documents (by order of appearance) 222
Panels and Appellate Body Reports 224

Annexes 229

Article 6.8 AD and Annex II 229
Draft proposal by the Chairman of the Negociating Group on Rules 233

1. Introduction

1.1 Research questions and hypotheses

Article 6.8 of the Antidumping Agreement (AD) [2] allows domestic investigating authorities (IAs) to make determinations on the basis of the best information available (BIA) when any interested party does not cooperate during an antidumping investigation under the discipline of Annex II of the AD.

Since its introduction[3], this provision has been the source of extensive and never-ending litigation in front of both domestic IAs and the Dispute Settlement Body (DSB)[4].

In this thesis, we will research the following question:

Are the findings of the Panels and the Appellate Body (AB) on Article 6.8 AD consistent with the mandate set out in Articles 3.2, 11 DSU[5] and 17.6 AD and are they reasonable from an economic perspective?

Our hypotheses are the following.

The findings of the Panels and the AB are mainly within the scope of the legal mandate. Some slight inconsistencies persist.

In light of economic theory regarding adjudication and litigation, these slight inconsistencies in the findings may undermine the economic efficiency of Article 6.8 AD.

[2] Officially the "Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994"
[3] *Cf. infra* 1.3.4 A short history
[4] *Cf. infra* 2.2 Findings of the Panels and the AB on Article 6.8 AD and consistency with the legal mandate; see too the numerous Panels and AB reports on this topic and VERMULST Edwin, The WTO Anti-Dumping Agreement: A Commentary, Oxford University Press 2005, p. 147
[5] The Dispute Settlement Understanding or officially the "Understanding on rules and procedures governing the settlement of disputes"

A higher degree of consistency in the findings following the principles developed in the present thesis may enhance the economic efficiency of Article 6.8 AD.

1.2 Methodology

We will first briefly present Article 6.8 AD and Annex II (1).

Discussing Article 3.2, 11 DSU and 17.6 AD, we will establish what is the mandate of the Panels and the AB under the DSB (2.1).

We will then discuss the findings of the Panels and the AB regarding the seven terms of Article 6.8 AD so far interpreted under this legal mandate (2.2).

We will summarize the latest developments in the economic theory of adjudication and litigation (3.1).

The findings of the Panels and the AB will then be discussed using this economic standard (3.2).

In the conclusion, we will compare the results of our analysis with current negotiations on Article 6.8 AD in the Doha Round framework and further discuss the opportunity to create a single united international IA (4).

1.3 Article 6.8 AD and Annex II

1.3.1 Rationale

According to Article 6.8 AD, in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

In *Mexico — Anti-Dumping Measures on Rice*, the AB found that: “we understand that an investigating authority in an anti-dumping investigation may rely on the facts

available to calculate margins for a respondent that failed to provide some or all of the necessary information requested by the agency"[6].

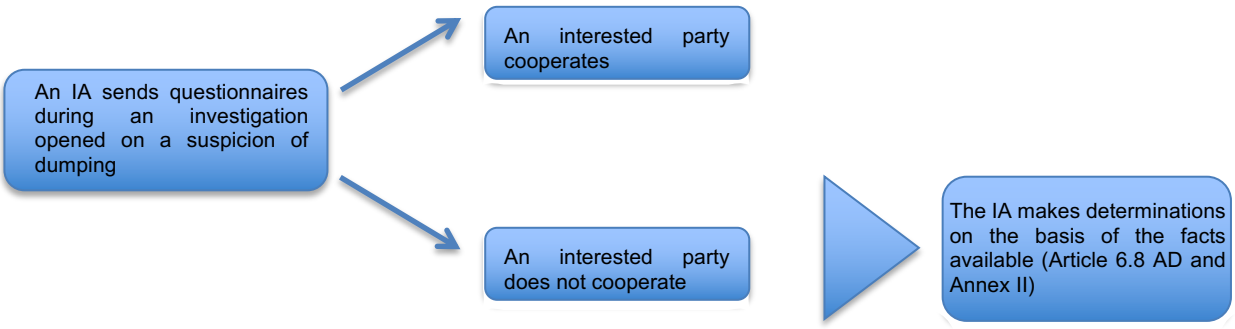
Therefore, both the legal text and the AB's finding shows that the rationale for Article 6.8 AD is to enable the IA to rely on the facts available in its determinations, which includes the calculation of the margins of dumping when a respondent fails, on purpose or not, to provide some or all of the "necessary information" requested by the agency.

1.3.2 Function

Contextually, an IA can open an investigation on an application or on a suspicion of dumping[7]. The IA then sends questionnaires to the interested parties to gather the "necessary information" to determine the margin of dumping[8]. The IA is entitled to expect a very significant degree of effort —to the "best of their abilities"[9]- from investigated exporters[10]. However, the IA might face a dilemma: if the "necessary information" is not submitted, the IA cannot base its calculations of the normal value and the export price on any data[11]. Article 6.8 AD identifies the circumstances under which the IA may overcome this lack of "necessary information" by relying on facts which are otherwise available to the IA[12].

[6] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/AB/R, §288
[7] Article 5 AD
[8] Article 6 AD
[9] §5 Annex II
[10] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §102; further cited in many DSB Reports, for instance Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.3
[10] *Ibid.,* §7.55
[11] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.146
[12] *Idem*

Schematically:



Article 6.8 AD therefore ensures that the IA will be able to complete the investigation and make determinations on the basis of the facts available, even in the event that an interested party is unable or unwilling to provide the "necessary information"[13]. Indeed, when the IA is unable to obtain the "first-best" information, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts[14].

1.3.3 Conditions for application

1.3.3.1 The first sentence of Article 6.8 AD

According to the first sentence of Article 6.8 AD, in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

In *Guatemala — Cement* II, the Panel explained: "Article 6.8 therefore permits the use of "best information available" if an interested party (1) refuses access to necessary information, (2) otherwise does not provide necessary information, or (3) significantly impedes the investigation"[15].

[13] Panel Report, *US — Hot-Rolled Steel*, WT/DS184/R, §7.51
[14] *Ibid*., §7.55
[15] Panel Report, *Guatemala — Cement II*, WT/DS156/R, §8.244

Both semantics of the legal text and the finding of the Panel show that Article 6.8 AD allows preliminary and final determinations, affirmative or negative, on the basis of the facts available when any interested party fulfills one, or more, of the following three conditions:

- an interested party refuses access to "necessary information" or;
- otherwise does not provide "necessary information" within a reasonable period or;
- significantly impedes the investigation.

1.3.3.2 The second sentence of Article 6.8 AD and Annex II

According to the second sentence of Article 6.8 AD, the provisions of Annex II shall be observed in the application of this paragraph.

In *Mexico — Anti-Dumping Measures on Rice*, the AB found that Article 6.8 AD is: "subject to the conditions set out in Annex II, entitled 'Best Information Available in Terms of Paragraph 8 of Article 6'"[16].

Both the second sentence of the legal text and the AB's quote show that, in addition to the three conditions mentioned above, the application of Article 6.8 AD is subject to the conditions set out in Annex II[17].

Annex II is divided into seven paragraphs. Each paragraph contains various conditions, sub-conditions[18], and comments, which complete Article 6.8 AD.

For instance, according to the first paragraph of Annex II, as soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that

[16] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice*, WT/DS295/AB/R, §287
[17] See too QIAN Wenjie, The Dilemma of China as Respondent to Anti-Subsidy Proceedings: A Study of the First EU Anti-Subsidy Investigation against China, Journal of World Trade, Vol. 46 (4) 2012, p. 974
[18] That is to say a conditional condition

information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

This paragraph (§1) is quite straightforward. Basically, it contains two conditions:

- IAs should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response;
- IAs should ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available.

Some paragraphs refer to conditions and sub-conditions. For instance, according to the second paragraph, the authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

This paragraph (§2) contains various conditions and sub-conditions:

- If IAs request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language:
  - IAs should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and;
  - IAs should not request that the party use a computer system other than that used by the party in its response.
    - If the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble:
      - IAs should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.
    - If the interested party does not maintain its computerized accounts in such a medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble:
      - IAs should not maintain a request for a response in a particular medium or computer language.

Some paragraphs adopt a combination of conditions, and references to other paragraphs. For instance, according to the third paragraph:

When determinations are made, IAs should take into account information:

- which is verifiable;

- which is appropriately submitted so that it can be used in the investigation without undue difficulties;
- which is supplied in a timely fashion; and
- where applicable, which is supplied in a medium or computer language requested by the authorities.
    - If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in the second paragraph have been satisfied:
        - the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

This paragraph (§3) shows a complex pattern of conditions and sub-conditions by references to other paragraphs.

Paragraphs four, five, six and the first sentence of the seventh paragraph all deal with sub-conditions which could be schematized as:

- (§4) If provided in a particular medium (e.g. computer tape), and
    - if the authorities do not have the ability to process the information:
        - the information should be supplied in the form of written material or any other form acceptable to the authorities.

- (§5) If the information provided may not be ideal in all respects:
    - this should not justify that the information be disregarded by the authotities, provided the interested party has acted to the best of its ability.

- (§6) If evidence or information is not accepted:
    - the supplying party should be informed forthwith of the reasons thereof, and the supplying party should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time limits of the investigation.

        - If the explanations are considered unsatisfactory by the authorities:
            - the reasons for the rejection of such evidence or information should be given in all published determinations.

- (The first sentence of §7) If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation:
    - they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation.

Finally, according to the second sentence of the seventh paragraph, it is clear that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

This text is not a condition. It is a comment on the consequences that may result from the application of Article 6.8 AD if an interested party does not cooperate and if the relevant information, which may ensure a more favourable outcome, is withheld from the IA.

This discussion shows that Annex II is of a discursive nature and addresses some aspects of the use of the BIA without adopting a very formal division among its paragraphs.

One of the reasons is probably that the content of Annex II was mostly developed in a 1984 Recommendation concerning the Best information available in terms of Article 6:8, on practical problems encountered after thirty-seven years of GATT practice[19].

In *US — Steel Plate*, the Panel clearly showed that the elements of an AD investigation are interconnected in practice and therefore difficult to categorize: "[w]e consider in addition that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls. For instance, a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade, and further unable to calculate a constructed normal value. Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. Moreover, without considering any particular "categories" of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II"[20].

1.3.4 A short history

Although negotiators introduced a provision regulating antidumping in the early GATT[21], resorting to the BIA in case of non-cooperation was first regulated in the Anti-dumping code of 1968 following the Kennedy Round.

Indeed, according to Article 6 (i) of the 1968 text: "[t]he provisions of this Article shall not preclude the authorities from reaching preliminary determinations, affirmative or negative, or from applying provisional measures expeditiously. In cases in which any interested party withholds the necessary information, a final finding, affirmative or negative, may be made on the basis of the facts available"[22].

[19] *Cf. infra* 1.3.4 A short history
[20] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.60
[21] Article VI: Anti-dumping and Countervailing Duties GATT 1947
[22] Article 6 (i) Anti-dumping code of 1968

During the Tokyo Round, substantial changes were introduced in a new agreement regulating antidumping. According to Article 6 (8) of the 1980 Anti-dumping code: "[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final findings, affirmative or negative, may be made on the basis of the facts available"[23]. We note here that, except for the use of the word "finding" instead of "determinations"[24] and the absence of any reference to Annex II, the text is perfectly identical to the current Article 6.8 AD.

Following the Anti-dumping Code of 1980, the Ad-Hoc Group on the Implementation of the Anti-Dumping Code, part of the Committee on Anti-Dumping Practices, started to draft a recommendation which would later become Annex II. After five revisions[25], the "Recommendation concerning best information available in term of Article 6:8" was finally adopt by the Committee on 8 May 1984[26].

This recommendation is divided in two sections.

The first contains the following preambular language: "[t]he authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available during the investigation from whatever source, even where evidence has been supplied by the interested party. The Anti-Dumping Code recognizes the right of the importing country to base findings on the facts available when any interested party refuses access to or does not provide the necessary information within a reasonable period, or significantly impedes the investigation (Article 6:8). However, all reasonable steps should be taken by the authorities of the importing countries to avoid the use of information from unreliable sources"[27]. This preambular section was later abandoned by the drafters of Annex II.

[23] Article 6 (8) Anti-dumping code of 1980
[24] A footnote in the legal text specifies: "[b]ecause of different terms used under different systems in various countries the term "finding" is hereinafter used to mean a formal decision or determination"
[25] ADP/W/59/Rev.1, 2,3,4 and 5
[26] Recommendation concerning best information available in terms of Article 6:8, ADP/21
[27] *Ibid.,* §I

The second section is divided into seven paragraphs, which except for minor language differences, corresponds to the content of Annex II.

The AD —formally the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994- took its current form during the Uruguay Round which concluded in 1994 with the Agreement Establishing the World Trade Organization in 1994.

As explained *supra*, except for one minor language change and an added reference to Annex II, the content of Article 6.8 AD is similar to Article 6:8 of the 1980 Anti-dumping code.

Similarly, the text of Annex II corresponds to the second section of the "Recommendation concerning best information available in terms of Article 6:8" from 1984. It is formally part of the AD.

2. Are the findings of the Panels and the AB on Article 6.8 AD consistent with the mandate set out in Articles 3.2, 11 DSU and 17.6 AD?

2.1 The benchmark for evaluating

2.1.1 The general mandate of Article 3.2 DSU

2.1.1.1 Ensuring the security and predictability of the multilateral trading system

According to the first sentence of Article 3.2 DSU, the dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system.

In *EC — Computer Equipment*, the AB found that: "the security and predictability of the 'reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other trade barriers to trade' is an object and purpose of the WTO Agreement, generally, as well as of the GATT 1994"[28].

In *US — Section 301 Trade Act*, the Panel further developed this view, finding that: "[p]roviding security and predictability to the multilateral trading system is another central object and purpose of the system which could be instrumental to achieving the broad objectives of the Preamble. Of all WTO disciplines, the DSU is one of the most important instruments to protect the security and predictability of the multilateral trading system and through it that of the market-place and its different operators. DSU provisions must, thus, be interpreted in the light of this object and purpose and in a manner which would most effectively enhance it. In this respect we are referring not only to preambular language but also to positive law provisions in the DSU itself"[29].

[28] Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R, §82
[29] Panel Report, *US — Section 301 Trade Act*, WT/DS152/R, §7.75; see too DOWNES Chris, The Post-Brexit Management of EU Agricultural Tariff Rate Quotas, Journal of World Trade, Vol. 51 (4) 2017, p. 757; STEINBACH Armin, EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists, Journal of World Trade, Vol. 43 (5) 2009, pp. 1063-1064

Therefore, according to these findings, the security and predictability is an object and purpose of the WTO Agreement generally. Moreover, the DSU provisions must be interpreted in light of this object and purpose in a manner which would most effectively enhance it.

In *US — Corrosion-Resistant Steel Sunset Review*, the AB found that: "[i]n addition, in GATT and WTO dispute settlement practice, panels have frequently examined measures consisting not only of particular acts applied only to a specific situation, but also of acts setting forth rules or norms that are intended to have general and prospective application. In other words, instruments of a Member containing rules or norms could constitute a "measure", irrespective of how or whether those rules or norms are applied in a particular instance. This is so because the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. This objective would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel once they have been adopted and irrespective of any particular instance of application of such rules or norms. It would also lead to a multiplicity of litigation if instruments embodying rules or norms could not be challenged as such, but only in the instances of their application. Thus, allowing claims against measures, as such, serves the purpose of preventing future disputes by allowing the root of WTO-inconsistent behaviour to be eliminated"[30].

This finding shows that the mandate to ensure the security and predictability of the multilateral trading system is achieved by reviewing:

- particular acts applied only to a specific situation;
- the acts setting out rules or norms, for instance the national Member's legislations, which are intended to have general and prospective application, irrespective of how or whether those rules or norms are applied in a particular instance.

[30] Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R, §82

The reason is that it clarifies that the DSB has no legislative power and can interpret WTO law only following the customary principles of interpretation[31].

Indeed, in *US — Stainless Steel (Mexico)*, according to the AB: "[d]ispute settlement practice demonstrates that WTO Members attach significance to reasoning provided in previous panel and Appellate Body reports. Adopted panel and Appellate Body reports are often cited by parties in support of legal arguments in dispute settlement proceedings, and are relied upon by panels and the Appellate Body in subsequent disputes. In addition, when enacting or modifying laws and national regulations pertaining to international trade matters, WTO Members take into account the legal interpretation of the covered agreements developed in adopted panel and Appellate Body reports. Thus, the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system. Ensuring 'security and predictability' in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case" [32].

According to this finding, the mandate to ensure the security and predictability of the multilateral trading system implies that, unless there are convincing reasons to do otherwise, the same legal question must be resolved in the same way as in similar precedent cases, that is to say by embodying the *acquis* of the WTO dispute settlement system. Although there is no binding precedent effect, there is a *de facto* precedent effect.

In *Japan — Alcoholic Beverages II*, the AB found that: "adopted panel reports are an important part of the GATT *acquis*. They are often considered by subsequent panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to

[31] *Cf. infra* 2.1.1.4 In accordance with customary rules of interpretation of public international law
[32] Appellate Body Report, *US — Stainless Steel (Mexico)*, WT/DS344/AB/R, §160

that dispute"[33]. The AB, in *US — Shrimp*, found that: "this reasoning applies to adopted Appellate Body Reports as well"[34].

These findings show that although the DSB will resolve the same legal question in the same way as similar precedent cases, that is to say embodying the *acquis* of the WTO dispute settlement system, there is only a *de facto* precedent effect and no binding effect of precedent. The DSB may, therefore, resolve the same legal question differently, provided there are convincing reasons. These findings have been abundantly quoted in the literature[35].

In *Japan — Alcoholic Beverages II*, the AB added that: "WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgements in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the 'security and predictability' sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system"[36].

According to this finding, the DSB shall interpret the WTO rules, which are flexible by nature, according to the specific circumstances of the case in order to best serve the security and predictability of the multilateral trading system.

[33] Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 14; see too GAO Henry, Dictum on Dicta: Obiter Dicta in WTO Disputes, World Trade Review, Vol. 17 (3) 2018, pp. 524-525
[34] Appellate Body Report, *US — Shrimp*, WT/DS58/AB/RW, §109
[35] KENNEDY Matthew, Blurred Lines: Reading TRIPS with GATT Glasses, Journal of World Trade, Vol. 49 (5) 2015, p. 736; LUANRATANA Woraboon / ROMANO Alessandro, Stare Decisis in the WTO: Myth, Dream, or a Siren's Song?, Journal of World Trade, Vol. 48 (4) 2014, p. 778; MITCHELL D. / SALONIDIS Constantine, David's Sling: Cross-Agreement Retaliation in International Trade Disputes, Journal of World Trade, Vol. 45 (2) 2011, p. 465; CHO Sungjoon, How the world trade community operates: norms and discourse, World Trade Review, Vol. 13 (4) 2014, pp. 694-695; CONDON Bradly J., Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA, Journal of World Trade, Vol. 52 (4) 2018, p. 544; GUAN Wenwei, How General Should the GATT General Exceptions Be?: A Critique of the 'Common Intention' Approach of Treaty Interpretation, Journal of World Trade, Vol. 48 (2) 2014, p. 241
[36] Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 31

Therefore, we can conclude that according to the first sentence of Article 3.2 DSU, the legal mandate is to ensure the security and predictability of the multilateral trading system, interpreting WTO Agreements and the DSU in light of this object and purpose, in a flexible manner which will most effectively enhance it. The DSB will resolve, according to specific circumstances, unless there are convinving reasons to do otherwise, the same legal question in the same way as similar precedent cases, that is to say by embodying the *acquis* of the WTO dispute settlement system, and reviewing:

- particular acts applied only to a specific situation;
- the acts setting out rules or norms, for instance the national Member's legislations, that are intended to have general and prospective application, irrespective of how or whether those rules or norms are applied in a particular instance.

2.1.1.2 Preserving the rights and obligations provided in the covered agreements and prohibition to add to or diminish them

According to the second sentence of Article 3.2 DSU, *prima parte*, the dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements. The final sentence of Article 3.2 DSU adds that recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements.

In *Chile — Alcoholic Beverages*, the AB found that: "Chile claims that the Panel's findings on the issues of 'not similarly taxed' and 'so as to afford protection' compromise the 'security and predictability' of the multilateral trading system, provided for in Article 3.2 of the DSU, and 'add to … the rights and obligations of Members' under Article III:2, second sentence, of the GATT 1994, in contravention of Articles 3.2 and 19.2 of the DSU. In this dispute, while we have rejected certain of the factors relied upon by the Panel, we have found that the Panel's legal conclusions are not tainted by any reversible error of law. In these circumstances, we do not consider that the Panel has added to the rights or obligations of any Member of the WTO. Moreover, we have difficulty in envisaging circumstances in which a panel could add to the rights and

obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreements. Chile's appeal under Articles 3.2 and 19.2 of the DSU must, therefore, be denied"[37].

According to this quote, the AB rejected the Chile's argument that the Panel had added to the rights and obligations of Members under the WTO Agreement, which would be contrary to Article 3.2 DSU. Therefore, the AB simply confirmed the obligation as read in the legal text.

In *Mexico — Taxes on Soft Drinks*, the AB found that: "a decision by a panel to decline to exercise validly established jurisdiction would seem to 'diminish' the right of a complaining Member to 'seek the redress of a violation of obligations' within the meaning of Article 23 of the DSU, and to bring a dispute pursuant to Article 3.3 of the DSU. This would not be consistent with a panel's obligations under Articles 3.2 and 19.2 of the DSU. We see no reason, therefore, to disagree with the Panel's statement that a WTO panel 'would seem … not to be in a position to choose freely whether or not to exercise its jurisdiction'"[38]

Here, according to the AB, if the Panel, following Mexico's arguments, had declined to exercise its jurisdiction, it would have been contrary to Articles 3.2 DSU. Therefore, the AB simply confirmed the obligation as read in the legal text.

Therefore, we can conclude that according to the second sentence of Article 3.2 DSU, *prima parte*, and according to the final sentence of this provision, the mandate of the DSB is to preserve the rights and obligations of Members under the covered agreements without adding to or diminishing them.

[37] Appellate Body Report, *Chile — Alcoholic Beverages*, WT/DS87/AB/R, §79; see too O'BRIEN Julia, The Equity of Levelling the Playing Field in the Climate Change Context, Journal of World Trade, Vol. 43 (5) 2009, pp. 1098-1099
[38] Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R, §53

2.1.1.3 Preserving the rights and obligations of Members under the covered agreements, and clarifying the existing provisions of the covered agreements

According to the second sentence of Article 3.2 DSU, *seconda parte*, the Members recognize that the dispute settlement system serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of the covered agreements.

In *US — Wool Shirts and Blouses*, the AB found that: "given the explicit aim of dispute settlement that permeates the DSU, we do not consider that Article 3.2 of the DSU is meant to encourage either panels or the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. A panel need only address those claims which must be addressed in order to resolve the matter in issue in the dispute"[39].

The DSB shall only make findings on claims that must be addressed in order to resolve a particular case. This does not include all the legal claims that interested parties may raise in front of the Panel or the AB.

In *US — Stainless Steel (Mexico)*, the AB found that: "clarification, as envisaged in Article 3.2 of the DSU, elucidates the scope and meaning of the provisions of the covered agreements in accordance with customary rules of interpretation of public international law. While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarification contained in adopted Appellate Body reports is not limited to the application of a particular provision in a specific case"[40].

This finding on what it means to clarify the existing provisions of the covered agreements does not bring anything new to the foregoing discussion on the precedent effect of the reports adopted by the DSB.

[39] Appellate Body Report, *US — Wool Shirts and Blouses*, WT/DS33/AB/R, p.19; see too GUAN Wenwei, *op. cit.* 2014, p. 242-243; DAWAR Kamala, Government Procurement in the WTO: A Case for Greater Integration, World Trade Review, Vol. 15 (4) 2016, p. 666
[40] Appellate Body Report, *US — Stainless Steel (Mexico)*, WT/DS344/AB/R, §161

Therefore, we can conclude that according to the second sentence of Article 3.2 DSU, *seconda parte*, the mandate of the DSB is to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements, only by making findings on the claims that must be addressed in order to resolve the case.

2.1.1.4 In accordance with customary rules of interpretation of public international law

According to the second sentence of Article 3.2 DSU, *in fine*, the dispute settlement system serves to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law.

In *US — Gasoline*, the AB quoted Article 31 of the Vienna Convention on the law of treaties (VCLT)[41] and found: "the 'general rule of interpretation' set out above has been relied upon by all of the participants and third participants, although not always in relation to the same issue. That general rule of interpretation has attained the status of a rule of customary or general international law.[42] As such, it forms part of the 'customary rules of interpretation of public international law' which the Appellate Body has been directed, by Article 3(2) of the DSU, to apply in seeking to clarify the provisions of the General Agreement and the other 'covered agreements' of the Marrakesh Agreement Establishing the World Trade Organization (the WTO Agreement). That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law"[43].

[41] Vienna Convention on the law of treaties of 1969
[42] Original footnote: "See, *e.g.*, *Territorial Dispute Case (Libyan Arab Jamahiriya v. Chad)*, (1994), I.C.J. Reports p.6 (International Court of Justice); *Golder v. United Kingdom* , ECHR, Series A, (1995) no. 18 (European Court of Human Rights); *Restrictions to the Death Penalty Cases* , (1986) 70 International Law Reports 449 (Inter-American Court of Human Rights); Jiménez de Aréchaga, "International Law in the Past Third of a Century" (1978-I) 159 Recueil des Cours 1, p. 42; D. Carreau, Droit International (3è ed., 1991) p. 140; Oppenheim's International Law (9th ed., Jennings and Watts, eds. 1992) Vol. 1, pp. 1271-1275"
[43] Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, pp.16-17

According to this early AB ruling, the general rules of treaty interpretation as enounced in Article 31 VCLT have attained the status of customary or general international law. The literature has frequently referred to this key finding[44].

In *Japan — Alcoholic Beverages II*, the AB made a similar statement regarding Article 32 VCLT: "Article 3.2 of the DSU directs the Appellate Body to clarify the provisions of GATT 1994 and the other 'covered agreements' of the WTO Agreement 'in accordance with customary rules of interpretation of public international law'. Following this mandate, in *United States — Standards for Reformulated and Conventional Gasoline*, we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the Vienna Convention. We stressed there that this general rule of interpretation 'has attained the status of a rule of customary or general international law'. There can be no doubt that Article 32 of the

[44] SCHAFFER Gregory / WINTERS Alan. L., FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law, World Trade Review, Vol. 16 (2) 2017, p. 324; JUNG Haneul / SUH Jeongmeen, Preventing Systematic Circumvention of the SCM Agreement: Beyond the Mandatory/Discretionary Distinctio, World Trade Review, Vol. 15 (3) 2016, footnote 53 p. 489; ZHOU Weihuan / PENG Delei, *EU – Price Comparison Methodologies* (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol, Journal of Workd Trade, Vol. 52 (3) 2018, p. 511; HEGEDUS-GASPAR Máté, Data Exclusivity for Biological Pharmaceuticals: Is New Zealand in Breach of World Trade Organization Law? Journal of World Trade, Vol. 50 (5) 2016, p. 917; LESTER Simon, Domestic Tobacco Regulation and International Law: The Interaction of Trade Agreements and the Framework Convention on Tobacco Control, Journal of World Trade, Vol. 49 (1) 2015, p. 36; XIONG Ping, Patents in TRIPS-Plus Provisions and the Approaches to Interpretation of Free Trade Agreements and TRIPS: Do They Affect Public Health? Journal of World Trade, Vol 46 (1) 2012, p. 159; HERTEL Michael, Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities, Journal of World Trade, Vol. 45 (3) 2011, p. 659; BISMUTH Régis, Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law, Journal of World Trade, Vol. 44 (2), p. 498; YA QIN Julia, The Challenge of Interpreting 'WTO-PLUS' Provisions, Journal of World Trade, Vol. 44 (1) 2010, p. 136; O'BRIEN, *op. cit.* 2009, p. 1097; WANG Heng, The Interpretation of GATS Disciplines on Economic Integration: GATS Commitments as a Threshold?, Journal of World Trade, Vol. 46 (2) 2012, p. 422; WOUTERS Jan / DE MEESTER BART, The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law, Journal of World Trade, Vol. 42 (1) 2008, p. 232; BRINK Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres, Journal of World Trade, Vol. 44 (4) 2010, p. 825; MCGRADY Benn, Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EC—Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, Journal of World Trade, Vol. 42 (4) 2008, p. 598; HRBATA Veronika, No International Organization is an Island... the WTO's Relationship with the WIPO: A Model for the Governance of Trade Linkage Areas?, Journal of World Trade, Vol. 44 (1) 2010, p. 29; MARCEAU Gabrielle / IZAGUERRI Arnau / LANOVOY Vladyslav, The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation, Journal of World Trade, Vol. 47 (3) 2013, p. 507; GUAN, *op. cit*. 2014, p. 236

Vienna Convention, dealing with the role of supplementary means of interpretation, has also attained the same status[45]"[46].

Therefore, the AB has confirmed that Article 32 VCLT has also attained the status of a rule of customary or general international law. This finding has been widely confirmed by the literature as well[47].

According to CHI: "although reading of DSB reports would clearly show that, in almost all disputes, panels and the AB have consistently followed the VCLT rules when interpreting WTO agreements, though the DSU does not expressly authorize or oblige them to apply these rules"[48].

The question of whether the DSB may recourse to principles and concepts of general international law other than customary rules of interpretation has been discussed in two DSB reports.

In *Korea — Procurement*, the Panel found that: "we take note that Article 3.2 of the DSU requires that we seek within the context of a particular dispute to clarify the existing provisions of the WTO agreements in accordance with customary rules of interpretation of public international law. However, the relationship of the WTO Agreements to customary international law is broader than this. Customary international law applies generally to the economic relations between the WTO Members. Such international law applies to the extent that the WTO treaty agreements

[45] Original footnote: "See e.g.: Jimenez de Arechaga, "International Law in the Past Third of a Century" (1978-1) 159 Recueil des Cours p. 1 at 42; Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment, (1994), I.C.J. Reports, p. 6 at 20; Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Jurisdiction and Admissibility, Judgment, (1995), I.C.J. Reports, p. 6 at 18; Interpretation of the Convention of 1919 Concerning Employment of Women during the Night (1932), P.C.I.J., Series A/B, No. 50, p. 365 at 380; cf. the Serbian and Brazilian Loans Cases (1929), P.C.I.J., Series A, Nos. 20-21, p. 5 at 30; Constitution of the Maritime Safety Committee of the IMCO (1960), I.C.J. Reports, p. 150 at 161; Air Transport Services Agreement Arbitration (United States of America v. France) (1963), International Law Reports, 38, p. 182 at 235-43"

[46] Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 10

[47] HEGEDUS-GASPAR, *op. cit.* 2016, p. 917; XIONG Ping, *op. cit.* 2012, p. 159; YA QIN, *op. cit.* 2010, p. 136; WANG, *op. cit.* 2012, p. 422; BRINK, *op. cit.* 2010, p. 825; GUAN, *op. cit.* 2014, p. 236

[48] CHI Manjiao, Exhaustible Natural Resource' in WTO Law: GATT Article XX (g) Disputes and Their Implications, Journal of World Trade, Vol. 48 (5) 2014, p. 950 and references quoted

do not 'contract out' from it. To put it another way, to the extent there is no conflict or inconsistency, or an expression in a covered WTO agreement that implies differently, we are of the view that the customary rules of international law apply to the WTO treaties and to the process of treaty formation under the WTO"[49].

In a footnote referring to this paragraph, the Panel specified: "we should also note that we can see no basis here for an *a contrario* implication that rules of international law other than rules of interpretation do not apply. The language of 3.2 in this regard applies to a specific problem that had arisen under the GATT to the effect that, among other things, reliance on negotiating history was being utilized in a manner arguably inconsistent with the requirements of the rules of treaty interpretation of customary international law"[50].

According to these findings, the WTO jurisprudence should not be viewed in isolation from general principles of customary international law[51]. Therefore, the customary rules of international law apply both to the WTO treaties and to the process of treaty formation under the WTO.

However, according to the Panel in *EC and certain member States — Large Civil Aircraft*: "the principle of non-retroactivity embodied in Article 28 of the VCLT has been recognized by the Appellate Body to be a 'general principle of international law' relevant to the interpretation of obligations contained in the WTO Agreements in many disputes. The United States' comment appears to have given rise to a disagreement between the parties as to the basis on which Article 28 of the VCLT may be applied by the Panel. The United States maintains that Article 28 can only be given effect as a rule of interpretation through Article 31.3(c) of the VCLT, while the European Communities appears to consider this approach too narrow and suggests that Article

[49] Panel Report, *Korea — Procurement*, WT/DS163/R, §7.96; see too HERTEL *op. cit.* 2011, p. 660; SHI Jingxia / CHEN Weidong, The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations: Reflecting on 'China – Publications and Audiovisual Products', Journal of World Trade, Vol. 45 (1) 2011, p. 166
[50] Panel Report, *Korea — Procurement*, WT/DS163/R, footnote 753
[51] LI Fenghua, The Driving Forces of the Convergence of WTO Dispute Settlement Mechanism and International Investment Arbitration, Journal of World Trade, Vol. 52 (3) 2018, p. 492; SHAHANI Garima, The Sequencing Dilemma: Will the European Union Succeed against Indonesia?, Journal of World Trade, Vol. 49 (3) 2015, p. 534

28 of the VCLT may be given effect as a general principle of international law, independently of Article 31.3(c) of the VCLT. In our view, it is unnecessary to engage in this debate, as neither party disputes that the interpretation of Article 5 of the SCM Agreement should be consistent with the principle of non-retroactivity embodied in Article 28 of the VCLT. We therefore have made revisions […] to clarify that we interpret Article 5 of the SCM Agreement consistently with the principle of non-retroactivity embodied in Article 28 of the VCLT, in accordance with the approach taken by the Appellate Body in prior disputes"[52].

Here the Panel found it unnecessary to respond the question whether the principle of non-retroactivity reflected in Article 28 VCLT can only be given effect as a rule of interpretation through Article 31.3 (c), or whether it may be applied as a general principle of international law independently of Article 31.3(c) VCLT. One may ask if the Panel deliberately avoided referring to the previous finding from *Korea — Procurement*. We are of the view that the Panel only applied judicial economy. Indeed, as we discussed *supra*, in *US — Wool Shirts and Blouses*, the AB found that the DSB shall only make findings on claims that must be addressed in order to resolve the case[53]. It does not include all the legal claims that interested parties may raise in front of the Panel or the AB. Moreover, we note that:

- the report *EC and certain member States — Large Civil Aircraft* is largely subsequent to the *Korea — Procurement*;
- there is no argument against the finding that customary rules of international law apply both to the WTO treaties and to the process of treaty formation under the WTO. Therefore, this finding seems to be an *acquis* in WTO jurisprudence.

For these reasons, we can conclude that the customary rules of international law apply both to the WTO treaties and to the process of treaty formation under the WTO.

[52] Panel Report, *EC and certain member States — Large Civil Aircraft*, WT/DS316/R, §6.22
[53] *Cf. supra,* 2.1.1.3 Preserving the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements

Finally, in *China — Publications and Audiovisual Products*, the AB made the following findings regarding the use of the assumption *arguendo* technique when clarifying the existing provisions of the covered greements in accordance with customary rules of interpretation of public international law: “we observe that reliance upon an assumption arguendo is a legal technique that an adjudicator may use in order to enhance simplicity and efficiency in decision-making. Although panels and the Appellate Body may choose to employ this technique in particular circumstances, it may not always provide a solid foundation upon which to rest legal conclusions. Use of the technique may detract from a clear enunciation of the relevant WTO law and create difficulties for implementation. Recourse to this technique may also be problematic for certain types of legal issues, for example, issues that go to the jurisdiction of a panel or preliminary questions on which the substance of a subsequent analysis depends. The purpose of WTO dispute settlement is to resolve disputes in a manner that preserves the rights and obligations of WTO Members and clarifies existing provisions of the covered agreements in accordance with the customary rules of interpretation of public international law. In doing so, panels and the Appellate Body are not bound to favour the most expedient approach or that suggested by one or more of the parties to the dispute. Rather, panels and the Appellate Body must adopt an analytical methodology or structure appropriate for resolution of the matters before them, and which enables them to make an objective assessment of the relevant matters and make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements”[54].

According to this finding, the DSB may choose to use assumption *arguendo* in its decision-making in particular circumstances. However, this method can be problematic in the resolution of some legal issues. Indeed, the mandate of the DSB is to adopt an analytical methodology or structure appropriate for the resolution of the matters before it, which enable it to make findings through an objective assessment of the relevant matters.

[54] Appellate Body Report, *China — Publications and Audiovisual Products*, WT/DS363/AB/R, §213

We can therefore conclude that according to the second sentence of Article 3.2 DSU, *in fine*, the mandate of the DSB is:

- to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law, that is to say Articles 31 and 32 VCLT, and with other customary rules of international law;
- to adopt an analytical methodology or structure appropriate for the resolution of the matters in front of it in order to make findings through an objective assessment of the relevant matters, using assumption *arguendo* only when it is appropriates.

2.1.2 Standard of review of Articles 11 DSU and 17.6 AD

2.1.2.1 Articles 11 DSU and 17.6 AD

According to Article 11 DSU, *in parte*, a Panel should make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.

According to Article 17.6 AD in examining a matter:

- (i) In its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the Panel might have reached a different conclusion, the evaluation shall not be overturned;
- (ii) The Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the Panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The AB has twice confirmed that the word "should" of Article 11 DSU here expresses an obligation[55].

In *Mexico — Corn Syrup*, the AB found that: "the requirements of the standard of review provided for in Article 17.6(i) and 17.6(ii) are cumulative. In other words, a panel must find a determination made by the investigating authorities to be consistent with relevant provisions of the Anti-Dumping Agreement if it finds that those investigating authorities have properly established the facts and evaluated those facts in an unbiased and objective manner, and that the determination rests upon a 'permissible' interpretation of the relevant provisions"[56].

Therefore, according to this finding, the requirements set out in Article 17.6 AD (i) and (ii) are complementary: (i) deals with the assessment of the establishment and evaluation of the facts, (ii) aims to find if the authorities' determination rests upon a permissible interpretation of the AD.

2.1.2.2 The relationship between Articles 11 DSU and 17.6 AD

In *US — Hot Rolled Steel*, the AB found that: "the second threshold aspect follows from the first and concerns the relationship between Article 17.6 of the Anti-Dumping Agreement and Article 11 of the DSU. Article 17.6 lays down rules relating to a panel's examination of 'matters' arising under one, and only one, covered agreement, the Anti-Dumping Agreement. In contrast, Article 11 of the DSU provides rules which apply to a panel's examination of 'matters' arising under any of the covered agreements"[57].

Therefore, while Article 11 DSU applies to all covered agreements, Article 17.6 AD covers only the AD.

[55] Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R, §51; Appellate Body Report, *Canada — Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R §187; see too IYNEDJIAN Marc, The Case for Incorporating Scientists and Technicians into WTO Panels, Journal of World Trade, Vol. 42 (2) 2008, p. 281
[56] Appellate Body Report, *Mexico — Corn Syrup*, WT/DS132/AB/R, §130; see too MITCHELL / SALONIDIS, *op. cit.* 2011, p. 472
[57] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §53

In the same report, the AB found that: “Article 11 of the DSU imposes upon panels a comprehensive obligation to make an ‘objective assessment of the matter’, an obligation which embraces all aspects of a panel's examination of the ‘matter’, both factual and legal. Thus, panels make an ‘objective assessment of the facts’, of the ‘applicability’ of the covered agreements, and of the ‘conformity’ of the measure at stake with those covered agreements. Article 17.6 is divided into two separate sub-paragraphs, each applying to different aspects of the panel's examination of the matter. The first sub-paragraph covers the panel's ‘assessment of the facts of the matter’, whereas the second covers its 'interpret[ation of] the relevant provisions’. (emphasis added) The structure of Article 17.6, therefore, involves a clear distinction between a panel's assessment of the facts and its legal interpretation of the Anti-Dumping Agreement”[58].

Therefore, Article 17.6 AD specifies that the objective assessment of the matter includes both the facts and the applicable relevant provisions. We note that Article 17.6 AD gives additional details:

- Ii the authorities’ establishment of the fact 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;
- if a relevant provision of the AD 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;
- relevant provisions of the Agreement shall be interpreted in accordance with customary rules of interpretation of public international law.

In *US — Softwood Lumber VI*, the Panel considered whether Article 11 DSU and 17.6 AD could lead to a different outcome if applied separately: “under the Article 17.6 standard, with respect to claims involving questions of fact, Panels have concluded that whether the measures at issue are consistent with relevant provisions of the AD Agreement depends on whether the investigating authority properly established the

[58] *Ibid*., §54

facts, and evaluated the facts in an unbiased and objective manner. This latter has been defined as assessing whether an unbiased and objective decision maker, taking into account the facts that were before the investigating authority, and in light of the explanations given, could have reached the conclusions that were reached. A panel's task is not to carry out a *de novo review* of the information and evidence on the record of the underlying investigation. Nor may a panel substitute its judgment for that of the investigating authorities, even though the Panel might have arrived at a different determination were it considering the record evidence for itself.

Similarly, the Appellate Body has explained that, under Article 11 of the DSU, a Panel's role is not to substitute its analysis for that of the investigating authority.[59] The Appellate Body has stated:

'We wish to emphasize that, although panels are not entitled to conduct a de novo review of the evidence, nor to substitute their own conclusions for those of the competent authorities, this does not mean that panels must simply accept the conclusions of the competent authorities.'[60]

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

We consider this result appropriate in view of the guidance in the Declaration of Ministers relating to Dispute Settlement under the AD and SCM Agreements. While the Appellate Body has clearly stated that the Ministerial Declaration does not require the application of the Article 17.6 standard of review in countervailing duty

[59] Original footnote: "Appellate Body Report, *United States — Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan* ('*US — Cotton Yarn*'), WT/DS192/AB/R, adopted 5 November 2001, para. 74; Appellate Body Report, *United States — Safeguard Measures on Imports of Fresh, Chilled or Frozen Lamb Meat from New Zealand and Australia* ('*US — Lamb*'), WT/DS177/AB/R, WT/DS178/AB/R, adopted 16 May 2001, para. 106"
[60] Original footnote: "Appellate Body Report*, US — Cotton Yarn*, para. 69, n.42, citing Appellate Body Report, *US — Lamb*, para. 106"

investigations,[61] it nonetheless seems to us that in a case such as this one, involving a single injury determination with respect to both subsidized and dumped imports, and where most of Canada's claims involve identical or almost identical provisions of the AD and SCM Agreements, we should seek to avoid inconsistent conclusions"[62].

Therefore, according to these findings, the Panel is not entitled to conduct a *de novo* review of the evidence. Instead, the Panel shall, in the limits of Article 17.6 AD, review whether the authorities' establishment of facts was proper and if the evaluation was unbiased and objective. Therefore, in this particular case, the Panel considered it unnecessary and inappropriate to conduct separate analyses of the issue under the DSU and the AD.

The DSB has equally discussed the relationship between Article 11 DSU and Article 17.6 (i) and (ii) separately.

In *US — Hot-Rolled Steel*, the AB further considered the difference between Article 11 DSU and Article 17.6(i) AD and found that: "under Article 17.6(i), the task of panels is simply to review the investigating authorities' 'establishment' and 'evaluation' of the facts. To that end, Article 17.6(i) requires panels to make an 'assessment of the facts'. The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an 'objective assessment of the facts'. Thus, the text of both provisions requires panels to 'assess' the facts and this, in our view, clearly necessitates an active review or examination of the pertinent facts. Article 17.6(i) of the Anti-Dumping Agreement does not expressly state that panels are obliged to make an assessment of the facts which is 'objective'. However, it is inconceivable that Article 17.6(i) should require anything other than that panels make an objective 'assessment of the facts of the matter'. In this respect, we see no 'conflict' between Article 17.6(i) of the Anti-Dumping Agreement and Article 11 of the DSU"[63].

[61] Original footnote: "Appellate Body Report, *United States — Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom* ('*US — Lead and Bismuth II*'), WT/DS138/AB/R, adopted 7 June 2000, DSR 2000:V, 2601 at para 49"
[62] Panel Report, *US — Softwood Lumber VI*, WT/DSS277/R, §§7.15-7.18
[63] Appellate Body Report, *US — Hot Rolled Steel*, WT/DS184/AB/R, §55

According to this finding, Articles 11 DSU and 17.6(i) AD are complementing each other and are consistent with each other.

The foregoing not prevented India, in *US — Steel Plate*, to request that the Panel conduct an "active review" of the facts before the United States IA pursuant to both Article 11 of the DSU and Article 17.6(i). In its report, the Panel found that: "we do not consider that India's reference to Article 11 of the DSU constitutes an argument that we apply some other or different standard of review in considering the factual aspects of this dispute than that set out in Article 17.6 of the AD Agreement, which India recognizes is applicable in all anti-dumping disputes. That standard requires us to assess the facts to determine whether the investigating authorities' own establishment of facts was proper, and to assess the investigating authorities' own evaluation of those facts to determine if it was unbiased and objective. What is clear from this is that we are precluded from establishing facts and evaluating them for ourselves — that is, we may not engage in *de novo review*. However, this does not limit our examination of the matters in dispute, but only the manner in which we conduct that examination. In this regard, we keep in mind that Article 17.5(ii) of the AD Agreement establishes that we are to examine the matter based upon 'the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member'"[64].

According to this finding, the Panel confirmed that Article 11 DSU and 17.6(i) AD constitute one standard, that is to assess the facts to determine whether the IAs' own establishment of facts was proper, and to assess the IAs' own evaluation of those facts to determine if it was unbiased and objective, precluding a *de novo review*.

On the relationship between Article 11 DSU and Article 17.6(ii) AD, the AB wrote in *US — Hot-Rolled Steel*: "although the second sentence of Article 17.6(ii) of the Anti-Dumping Agreement imposes obligations on panels which are not found in the DSU, we see Article 17.6(ii) as supplementing, rather than replacing, the DSU, and Article 11 in particular. Article 11 requires panels to make an 'objective assessment of the matter' as a whole. Thus, under the DSU, in examining claims, panels must make an

[64] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.6

'objective assessment' of the legal provisions at issue, their 'applicability' to the dispute, and the 'conformity' of the measures at issue with the covered agreements. Nothing in Article 17.6(ii) of the Anti-Dumping Agreement suggests that panels examining claims under that Agreement should not conduct an 'objective assessment' of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6(ii) simply adds that a panel shall find that a measure is in conformity with the Anti-Dumping Agreement if it rests upon one permissible interpretation of that Agreement"[65].

According to this finding, Article 11 DSU and 17.6(ii) AD are of complementary nature. Indeed, Article 11 DSU requires that the Panel make an objective assessment of the matter and check the applicability of and conformity of the matter with the relevant covered agreements. Article 17.6(ii) DSU specifies that the measure is conform with the AD if it relies on one permissible interpretation of this agreement, that is to say if it is in accordance with customary rules of interpretation of public international law. We note that the AB therefore reaches the same conclusion both regarding Article 11 DSU and Article 17.6(ii) and regarding Article 17.6(i) in the same report[66].

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

[65] Appellate Body Report, *US — Hot-Rolled Steel,* WT/DS184/R, §62
[66] *Cf. supra,* 2.1.1.4 In accordance with customary rules of interpretation of public international law

whether there was more than one permissible interpretation of the text of the relevant Agreements"[67].

Here, according to the Panel, the standard of review according Articles 3.2 and 11 DSU, taken separately from Article 17.6(ii) AD, might well in some cases lead to a different conclusion than when taken together. Although the Panel reasons cautiously without providing a definitive answer, it clearly shows that Article 17.6(ii) AD supplements the standard of review under the DSU with additional details.

This view was confirmed by the Panel in *EC — Salmon (Norway)*: "thus, it is clear that under the AD Agreement, we are to follow the same rules of treaty interpretation as a panel in any other dispute. The difference is that if, after following those rules, we find more than one permissible interpretation of a provision of the AD Agreement, we may uphold a measure that rests on one of those interpretations"[68].

Therefore, we can conclude from this discussion that:

- while Article 11 DSU applies to all covered agreements, Article 17.6 AD covers only the AD;
- Article 17.6 AD specifies that the objective assessment of a matter, according to Article 11 DSU, includes both the facts and the applicable relevant provision;
- Article 11 DSU and 17.6(i) AD constitute one standard, which is to assess the facts to determine whether the IAs' establishment of facts was proper, and to assess the IAs' evaluation of facts to determine if it was unbiased and objective;
- the Panel is not entitled to conduct a *de novo* review of the evidence. Instead the Panel shall, in the limits of Article 17.6 AD, review if the authorities' establishment of the fact was proper and if the evaluation was unbiased and objective;
- Article 11 DSU and 17.6(ii) AD constitute one standard as well, which is to assess if the measure is in conformity with the AD, *i.e.* if it relies upon one

[67] Panel Report, *US — Softwood Lumber IV,* WT/DS257/R, §7.22
[68] Panel Report, *EC — Salmon (Norway)*, WT/DS337/R, §7.11

permissible interpretation of the AD, that is to say in accordance with customary rules of interpretation of public international law.

We note that VERMULST does not share our conclusion. Indeed, according to this author: "Article 17.6 contains the unique[69] standard of review applicable to anti-dumping disputes"[70].

According to VERMULST this view is supported by the following finding of the AB in *US — Lead and Bismuth II*: "[f]urthermore, the Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the 'Decision') provides:

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

This Decision provides for review of the standard of review in Article 17.6 of the Anti-Dumping Agreement to determine if it is 'capable of general application' to other covered agreements, including the SCM Agreement. By implication, this Decision supports our conclusion that the Article 17.6 standard applies only to disputes arising under the Anti-Dumping Agreement, and not to disputes arising under other covered agreements, such as the SCM Agreement. To date, the DSB has not conducted the review contemplated in this Decision"[71].

According to this finding, Article 17.6 AD does not apply to dispute arising under other covered agreement than the AD, in particular the SCM Agreement.

[69] Original footnote: "Compare *United States — Lead and bismuth steel from EC*, AB, para 50."
[70] VERMULST, *op. cit.* 2005, p. 224
[71] Appellate Body Report, *US — Lead and Bismuth II*, WT/DS138/AB/R, §50

Indeed, in *US — Lead and Bismuth II*, the AB determined the standard of review in disputes arising under the SCM Agreement[72].

In this context, the AB started its reasoning with Article 1 DSU emphasizing that: "[t]he rules and procedures of this Understanding shall apply subject to such special or additional rules and procedures on dispute settlement contained in the covered agreements as are identified in Appendix 2 to this Understanding"[73].

According to the Appendix 2 of the DSU, Article 17.6 AD is part of the "special or additional rules and procedures contained in the covered agreements".

We note that, at this stage of the reasoning, Article 17.6 AD may be an additional rule not precluding Article 11 DSU to apply.

However, the AB, always in *US — Lead and Bismuth II*, made the following statement: "[m]ore recently, in our Report in *Argentina – Footwear Safeguards*, which involved a dispute under the Agreement on Safeguards, we observed that: 'We have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels[74]'"[75].

Indeed, the reference is here made to the following words of the AB in *Argentina — Footwear (EC)*: "[w]e have stated, on more than one occasion, that, for all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.[76] The only exception is the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, in which a specific provision,

[72] *Ibid*., §§ 44-45
[73] *Ibid*., §45
[74] Original footnote: "Supra, footnote 24 [Appellate Body Report, *Argentina — Footwear (EC)*, WT/DS121/AB/R], para. 118."
[75] Appellate Body Report, *US — Lead and Bismuth II*, WT/DS138/AB/R, §46
[76] Original footnote: "See e.g., Appellate Body Report, *EC Measures Concerning Meat and Meat Products* ('*European Communities — Hormones*'), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, paras. 114-119; *Australia — Salmon*, supra, footnote 26 [Appellate Body Report, *Australia — Salmon*, WT/DS18/AB/R], para. 2.67."

Article 17.6, sets out a special standard of review for disputes arising under that Agreement"[77].

This finding seems to support the view that Article 17.6 AD is the unique standard of review in antidumping disputes.

However, following the footnote of this quote, this finding is based on two reports of the AB in *EC — Hormones* and *Australia — Salmon*. Curiously none of these two reports support the view that Article 17.6 AD is the unique standard of review in antidumping disputes.

Indeed, in *EC — Hormones*, the AB found that: "[o]nly Article 17.6(i) of *the Anti-Dumping Agreement* has language on the standard of review to be employed by panels engaged in the 'assessment of the facts of the matter'. We find no indication in the *SPS Agreement* of an intent on the part of the Members to adopt or incorporate into that Agreement the standard set out in Article 17.6(i) of the *Anti-Dumping Agreement.* Textually, Article 17.6(i) is specific to the *Anti-Dumping Agreement*"[78]. In the same, report, the AB further found that: "[i]t may be noted that the European Communities refrained from suggesting that Article 17.6 of the *Anti-Dumping Agreement* in its entirety was applicable to the present case"[79] and that: "[h]ere, however, we uphold the findings of the Panel appealed by the European Communities upon the ground of failure to apply either a 'deferential reasonableness standard' or the standard of review set out in Article 17.6(i) of the *Anti-Dumping Agreement*"[80].

According to this quote Article 17.6 AD applies only to antidumping disputes. However, we see here no indication that Article 17.6 AD precludes Article 11 DSU to apply as well in antidumping disputes.

[77] Appellate Body Report, *Argentina — Footwear (EC)*, WT/DS121/AB/R, §118
[78] Appellate Body Report, *EC — Hormones*, WT/DS26/AB/R, WT/DS48/AB/R, §114
[79] *Ibid*., §118
[80] *Ibid*., §119

The second reference to the report of the AB in *Australia — Salmon* is dubious. Indeed, there is no "para. 2.67" in this report. Instead at paragraphs 257-267, the AB discuss several aspects of Article 17.6 AD and Article 11 DSU regarding the burden of proof and the objective assessment of the matter. However, these paragraphs contain no indication that Article 17.6 AD is the unique standard of review in antidumping disputes or precludes Article 11 DSU to apply[81].

In sum, the view expressed by literature fourteen years ago according to "Article 17.6 contains the unique standard of review applicable to anti-dumping disputes"[82] is supported only by a chain of references that ends with two reports that do not support this opinion.

Since then, as we have shown above, numerous subsequent reports of the Panels and the AB have confirmed that Article 11 DSU and 17.6(i) AD constitute one standard.

Therefore, our conclusions exposed *supra* regarding the relationship between Articles 17.6 AD and 11 DSU as constituting one standard of review in antidumping disputes fully apply.

2.1.2.3 Article 17.6(i) AD

2.1.2.3.1 General standard of review

In *Guatemala — Cement II*, the Panel found that: "we consider that it is not our role to perform a *de novo review* of the evidence which was before the investigating authority in this case. Rather, Article 17 makes it clear that our task is to review the determination of the investigating authorities. Specifically, we must determine whether its establishment of the facts was proper and the evaluation of those facts was unbiased and objective.[83] In other words, we must determine whether an unbiased and objective investigating authority evaluating the evidence before it at the time of the investigation could properly have made the determinations made by Guatemala in this case. In our review of the investigating authorities' evaluation of the facts, we will first need to

[81] Appellate Body Report, *Australia — Salmon*, WT/DS18/AB/R, §§257-267
[82] VERMULST, *op. cit.* 2005, p. 224
[83] Original footnote omitted

examine evidence considered by the investigating authority, and second, this examination is limited by Article 17.5(ii) to the facts before the investigating authority. That is, we are not to examine any new evidence that was not part of the record of the investigation[84]"[85].

In *Thailand — H-Beams*, the AB found that: "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"[86].

According to these findings, the general standard of review set out in Article 17.6(i) AD is to assess whether an unbiased and objective IA, evaluating the evidence before it at the time of the investigation, could properly have made the determination by:

- examining the evidence considered by the IA;
- examining only the evidence that was part of the record of the investigation;
- avoiding any *de novo review*.

This general standard of review is probably best illustrated in *EC — Tube or Pipe Fittings*. According to Brazil, the Panel failed to assess if the IA's fact establishment was proper according to Article 17.6(i) AD by accepting an exhibit submitted by EC in the form of an internal note, which was not disclosed to parties during the investigation[87]. In its report, the AB found that the Panel did actually ask the EC to indicate the sources of the information and the methodology on which the exhibit was based, as well to confirm and substantiate that the exhibit had been written during the time period of investigation[88]. All this information was appropriately submitted by the EC[89]. The AB rejected Brazil's claim and found that the Panel took the EC's responses

[84] Original footnote omitted
[85] Panel Report, *Guatemala — Cement II*, WT/DS156/R, §8.19; see also Panel Report, *US — Stainless Steel*, WT/DS344/R, §6.18; Panel Report, *Argentina — Ceramic Tiles*, WT/DS189/R, §§6.2-6.3; and Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §§7.8-7.14
[86] Appellate Body Report, *Thailand — H-Beams*, WT/DS122/AB/R, §117
[87] Appellate Body Report, *EC — Tube or Pipe Fittings*, WT/DS219/AB/R, §125
[88] *Ibid.,* §126
[89] *Id*.

into account in its findings, not relying exclusively on the presumption of good faith, but assuring itself of the validity of the exhibit and the fact that it had been written during the time period of investigation[90].

2.1.2.3.2 Proper establishment of the facts

According to the first sentence of Article 17.6(i), in its assessment of the facts of the matter, the Panel shall determine whether the authorities' establishment of the facts was proper.

In *Guatemala — Cement I*, the Panel: "scrutinized all the information which was on the record before the Ministry at the time of initiation in examining whether an unbiased and objective investigating authority could properly have made the determination that was reached by the Ministry"[91].

According to this finding, to assess whether the IA's establishment of the fact was proper, the Panel shall base its review on the evidence before the authority at the time of the determination. This finding was most notably applied by the Panels in their reports *EC — Bed Linen*[92]*, US — Stainless Steel (Korea)*[93]*, Guatemala — Cement II*[94], and *Thailand — H-Beams*[95].

In *Thailand — H-Beams*, the AB found that: "the ordinary meaning of 'establishment' suggests an action to 'place beyond dispute; ascertain, demonstrate, prove'; the ordinary meaning of 'proper' suggests 'accurate' or 'correct'. Based on the ordinary meaning of these words, the proper establishment of the facts appears to have no logical link to whether those facts are disclosed to, or discernible by, the parties to an anti-dumping investigation prior to the final determination"[96]. This view is developed one paragraph later: "the facts of the matter referred to in Article 17.6(i) […] do not exclude confidential facts made available to the authorities of the importing Member.

[90] *Ibid.,* §127
[91] Panel Report, *Guatemala — Cement I*, WT/DS60/R, §7.60
[92] Panel Report, *EC — Bed Linen*, WT/DS141/R, §6.45.
[93] Panel Report, *US — Stainless Steel (Korea)*, WT/DS179/R, §6.3
[94] Panel Report, *Guatemala — Cement II*, WT/DS156/R, §8.19
[95] Panel Report, *Thailand — H-Beams*, WT/DS122/R, §7.51
[96] Appellate Body Report, *Thailand — H-Beams*, WT/DS122/AB/R, §116

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. […] 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"[97].

According to these findings, the proper establishment of facts does not require an IA to disclose these facts to the interested parties before the final determination[98].

2.1.2.3.3 Unbiased and objective evaluation of the facts

According to the first sentence, *seconda parte*, of Article 17.6(i), in its assessment of the facts of the matter, the panel shall determine whether the authorities' evaluation of the facts was unbiased and objective.

In *US — Stainless Steel (Korea),* the Panel found that: "the Panel must check not merely whether the national authorities have properly established the relevant facts but also the value or weight attached to those facts and whether this was done in an unbiased and objective manner. This concerns the according of a certain weight to the facts in their relation to each other; it is not a legal evaluation"[99].

According to this finding, the Panel's assessment of the unbiased and objective evaluation of the fact shall refer to the weight and value of the facts as well to their respective relationship.

[97] *Ibid.,* §117
[98] *Cf. supra*, 2.1.2.3.1 General standard of review; Appellate Body Report, *EC — Tube or Pipe Fittings*, WT/DS219/AB/R, §§125-127 for an applied example
[99] Panel Report, *US — Stainless Steel (Korea),* WT/DS179/R, §6.18

In *Thailand — H-Beams*, the AB found that: "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"[100].

This finding is similar to the one in the same report regarding the words "proper establishment of facts" which does not require an IA to disclose these facts to the interested parties before the final determination[101].

2.1.2.3.4 The roles of the Panels and of the IAs

In *US — Hot-Rolled Steel*, the AB found that: "although the text of Article 17.6(i) is couched in terms of an obligation on panels — panels 'shall' make these determinations — the provision, at the same time, in effect defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their 'establishment' and 'evaluation' of the relevant facts. In other words, Article 17.6(i) sets forth the appropriate standard to be applied by panels in examining the WTO consistency of the investigating authorities' establishment and evaluation of the facts under other provisions of the Anti-Dumping Agreement. Thus, panels must assess if the establishment of the facts by the investigating authorities was proper and if the evaluation of those facts by those authorities was unbiased and objective. If these broad standards have not been met, a panel must hold the investigating authorities' establishment or evaluation of the facts to be inconsistent with the Anti-Dumping Agreement"[102].

According to this finding, the role of the Panel is to review whether the establishment of the facts by the IA was proper and whether the evaluation of those facts was unbiased and objective, according to the AD.

[100] Appellate Body Report, *Thailand — H-Beams*, WT/DS122/AB/R, §116
[101] *Cf. supra*, 2.1.2.3.2 Proper establishment of the facts; Appellate Body Report, *Thailand — H-Beams*, WT/DS122/AB/R, §116
[102] Appellate Body Report, *US — Hot Rolled Steel*, WT/DS184/AB/R, §56

2.1.2.3.5 Interdiction of *ex-post facto rationalization*

In *Argentina — Ceramic Tiles*, the Panel found that: "under Article 17.6 of the AD Agreement we are to determine whether the DCD established the facts properly and whether the evaluation performed by the DCD was unbiased and objective. In other words, we are asked to review the evaluation of the DCD made at the time of the determination as set forth in a public notice or in any other document of a public or confidential nature. We do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that did not form part of the evaluation process of the investigating authority, but instead are ex post facto justifications which were not provided at the time the determination was made"[103].

According to this finding, under Article 17.6(i) AD, the Panel, in its assessment, shall take into consideration only the arguments and reasons that formed part of the evaluation process of the IA, excluding *ex post facto* justification, that is to say not provided during the IA's investigation and determination.

In *Argentina — Poultry Anti-Dumping Duties*, the Panel agreed with the view expressed in *Argentina — Ceramic Tiles*: "we agree with the approach followed by that panel. Thus, we do not believe that, as a panel reviewing the evaluation of the investigating authority, we are to take into consideration any arguments and reasons that are not demonstrated to have formed part of the evaluation process of the investigating authority"[104].

Therefore, there is a consensus on the exclusion of *ex post* rationalization in the Panel's task.

[103] Panel Report, *Argentina — Ceramic Tiles*, WT/DS189/R, §6.27
[104] Panel Report, *Argentina — Poultry Anti-Dumping Duties,* WT/DS241/R, §7.46

2.1.2.4 Article 17.6(ii) AD

2.1.2.4.1 In accordance with customary rules of interpretation of public international law

According to the first sentence of Article 17.6(ii) AD, in examining the matter, the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law.

In *US — Hot-Rolled Steel*, the AB found that: "we turn now to Article 17.6(ii) of the. *Anti-Dumping Agreement*. The *first* sentence of Article 17.6(ii), echoing closely Article 3.2 of the DSU, states that *panels* 'shall' interpret the provisions of the *Anti-Dumping Agreement* 'in accordance with customary rules of interpretation of public international law.' Such customary rules are embodied in Articles 31 and 32 of the *Vienna Convention on the Law of Treaties* ('*Vienna Convention'*)[105]. Clearly, this aspect of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the *Anti-Dumping Agreement*"[106].

According to this finding, the requirement pursuing Article 17.6(ii) AD that the Panel shall interpret the relevant provisions of the AD in accordance with customary rules of interpretation of public international law is similar to the content of Article 3.2 DSU. Therefore, the findings and comments relating to Article 3.2 DSU are applicable to Article 17.6(ii) AD *mutatis mutandis*[107].

We remind readers that the AB has confirmed that Articles 31-32 VCLT have attained the status of rules of customary or general international law[108].

[105] Original footnote omitted
[106] Appellate Body Report, *US — Hot Rolled Steel*, WT/DS184/AB/R, §57
[107] *Cf. supra,* 2.1.1 The general mandate of Article 3.2 DSU
[108] Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, pp. 16-17; Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 10

According to Article 31 VCLT titled General Rules of Interpretation:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
   (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
   (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:
   (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
   (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
   (c) Any relevant rules of international law applicable in the relations between the parties.
4. A special meaning shall be given to a term if it is established that the parties so intended.

According to Article 32 VCLT titled Supplementary Means of Interpretation:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) Leaves the meaning ambiguous or obscure; or
(b) Leads to a result which is manifestly absurd or unreasonable.

We further note that Article 33 VCLT addresses the interpretation of treaties authenticated in two or more languages. However, there is no DSB finding regarding language issues surrounding Article 6.8 AD and Annex II. Therefore, this provision is not quoted here.

According to the AB in *US — Gasoline*: "one of the corollaries of the 'general rule of interpretation' in the Vienna Convention is that interpretation must give meaning and effect to all the terms of a treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility"[109].

This finding was quoted by the AB in *Japan — Alcoholic Beverages II*[110] and further confirmed in the literature[111].

According to the International Law Commission (ILC): "some give great weight to the object and purpose of the treaty and are in consequence more ready, especially in the case of general multilateral treaties, to admit teleological interpretations of the text which go beyond, or even diverge from, the original intentions of the parties as expressed in the text. The majority, however, emphasizes the primacy of the text as the basis for the interpretation of a treaty, while at the same time giving a certain place to extrinsic evidence of the intentions of the parties and to the objects and purposes of the treaty as means of interpretation"[112].

However, "the Commission, by heading the article 'General rule of interpretation' in the singular and by underlining the connexion between paragraphs 1 and 2 and again between paragraph 3 and the two previous paragraphs, intended to indicate that the application of the means of interpretation in the article would be a single combined

[109] Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, p. 23; see too ROVNOV Yury, The Relationship between the MFN Principle and Anti-Dumping Norms of the WTO Law Revisited, Journal of World Trade Vol 49 (1) 2015, p. 180
[110] Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, pp. 16-17; Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 12
[111] HERWIG Alexia, Too much Zeal on Seals? Animal Welfare, Public Morals, and Consumer Ethics at the Bar of the WTO, World Trade Review, Vol. 15 (1) 2016, p. 116; MOSSNER Louise Eva, The WTO and Regional Trade: a family business? The WTO compatibility of regional trade agreements with non-WTO-members, World Trade Review, Vol. 13 (4) 2014, pp. 636-637; WANG, *op. cit.* 2012, p. 422
[112] International Law Commission, Yearbook of the International Law Commission, Vol. II 1966, p. 218 §2

operation. All the various elements, as they were present in any given case, would be thrown into the crucible, and their interaction would give the legally relevant interpretation. Thus, article 27 is entitled 'General rule of interpretation' in the singular, not 'General rules' in the plural, because the Commission desired to emphasize that the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule. In the same way the word 'context' in the opening phrase of paragraph 2 is designed to link all the elements of interpretation mentioned in this paragraph to the word 'context' in the first paragraph and thereby incorporate them in the provision contained in that paragraph. Equally, the opening phrase of paragraph 3 'There shall be taken into account together with the context' is designed to incorporate in paragraph 1 the elements of interpretation set out in paragraph 3. If the provision in paragraph 4 (article 71 of the 1964 draft) is of a different character, the word 'special' serves to indicate its relation to the rule in paragraph 1"[113].

Considering this statement in a footnote, the Panel in *US — Section 301 Trade Act* found that: "[t]ext, context and object-and-purpose correspond to well established textual, systemic and teleological methodologies of treaty interpretation, all of which typically come into play when interpreting complex provisions in multilateral treaties. For pragmatic reasons the normal usage, and we will follow this usage, is to start the interpretation from the ordinary meaning of the 'raw' text of the relevant treaty provisions and then seek to construe it in its context and in the light of the treaty's object and purpose. However, the elements referred to in Article 31 – text, context and object-and-purpose as well as good faith – are to be viewed as one holistic rule of interpretation rather than a sequence of separate tests to be applied in a hierarchical order. Context and object-and-purpose may often appear simply to confirm an interpretation seemingly derived from the 'raw' text. In reality it is always some context, even if unstated, that determines which meaning is to be taken as 'ordinary' and frequently it is impossible to give meaning, even 'ordinary meaning', without looking also at object-and-purpose"[114].

[113] *Ibid*., p. 218-219 §8
[114] Panel Report, *US — Section 301 Trade Act*, WT/DS152/R, § 7.22 and footnote 638; see too BIGOS J. Bradley, Contemplating GATS Article XVIII on Additional Commitments, Journal of World Trade, Vol. 42 (4) 2008, p. 748; MUNRO James, Pushing the Boundaries of 'Products' and 'Goods'

However, IRWIN and WEILER note that: "it has become obvious over the years, and *Gambling* is but the latest instance, that the Appellate Body has difficulties in treating the provisions of Article 31 of the Vienna Convention on Treaty Interpretation as a single, closely integrated rule. It privileges the textual and the contextual (the 'ordinary meaning' of terms 32) and grudgingly and sparingly analyzes the teleological, as if engaging in serious object and purpose analysis (other than a perfunctory textual citation of phrases from this or that preamble) which is somehow itself a supplementary means of interpretation"[115]. This view is further quoted and shared by TIJMES[116].

2.1.2.4.2 A relevant provision of the Agreement admits of more than one permissible interpretation

According to the second sentence of Article 17.6(ii) AD, where the Panel finds that a relevant provision of the AD 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.

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

It follows that, under Article 17.6(ii) of the Anti-Dumping Agreement, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Anti-Dumping Agreement which is permissible under the rules of treaty

under GATT 1994: An Analysis of the Coverage of New and Unorthodox Articles of Commerce, Journal of World Trade, Vol. 47 (6) 2013, p. 1327

[115] IRWIN Douglas A. / WEILER Joseph, Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285), World Trade Review, Vol. 7 (1) 2008, p. 90

[116] TIJMES Jaime, Jurisprudential developments on the purpose of WTO suspension of obligations, World Trade Review, Vol. 13 (1) 2014, pp. 3-5

interpretation in Articles 31 and 32 of the Vienna Convention[117]. In other words, a permissible interpretation is one which is found to be appropriate *after* application of the pertinent rules of the *Vienna Convention*. We observe that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* apply to *any* treaty, in *any* field of public international law, and not just to the WTO agreements. These rules of treaty interpretation impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned[118]"[119].

According to this finding, in its assessment the Panel shall find whether a measure rests upon an interpretation of the relevant provisions of the AD which is permissible under the rules of treaty interpretation in Articles 31 and 32 VCLT[120].

Various references and findings regarding the second sentence of Article17.6(ii) have been made in the context of the zeroing practice. The zeroing practice is a particular calculation method of the margins of dumping based on an interpretation of Article 2.4 AD. It consists of assigning a value of zero to all exports with a so-called negative margin of dumping, that is to say the export sold at a price higher than the normal domestic market value. This practice enables IAs to avoid compensating the positive margin of dumping of other exports, thus artificially inflating the margin of dumping[121].

In *US — Softwood Lumber V,* the AB found that: "Article 2.4.2 does not admit an interpretation that would allow the use of zeroing under the transaction-to-transaction comparison methodology. Therefore, the contrary view is not a permissible

[117] Original footnote omitted
[118] Original footnote: "[i]t might be possible for the parties to a treaty expressly to agree that the rules of treaty interpretation in Articles 31 and 32 of the *Vienna Convention* do not apply, either in whole or in part, to the interpretation of a particular treaty. Likewise, the parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from the rules of interpretation in Articles 31 and 32 of the *Vienna Convention*. But this is not the case here."
[119] Appellate Body Report, *US — Hot Rolled Steel*, WT/DS184/AB/R, §§59-60
[120] Original footnote omitted
[121] See CONDON, *op. cit.* 2018, pp. 545-546 and references for detailed literature on zeroing practice and disputes

interpretation of Article 2.4.2 within the meaning of Article 17.6(ii) of the Anti-Dumping Agreement[122]"[123].

In *US — Zeroing (Japan)*, the AB did not consider that: "Articles 2.4, 2.4.2, 9.3, 9.5, and 11.3 of the Anti-Dumping Agreement and Articles VI:1 and VI:2 of the GATT 1994, when interpreted in accordance with customary rules of interpretation of public international law, as required by the first sentence of Article 17.6 (ii), … [permit] … another interpretation of these provisions as far as the issue of zeroing before us is concerned"[124].

According to these findings, the zeroing practice did not rest on a permissible interpretation under Articles 31 and 32 VCLT, and was therefore contrary to the AD.

In *US — Stainless Steel (Mexico)*, the AB found that: "in our analysis, we have been mindful of the standard of review provided in Article 17.6(ii) of the Anti-Dumping Agreement. However, we consider that Article VI:2 of the GATT 1994 and Article 9.3 of the Anti-Dumping Agreement, when interpreted in accordance with the customary rules of interpretation of public international law as required by the first sentence of Article 17.6(ii) of the Anti-Dumping Agreement, do not admit of another interpretation as far as the issue of zeroing raised in this appeal is concerned"[125].

Therefore, we can see from these different findings that the DSB's assessment rests on whether a measure is based on an interpretation of the relevant provisions of the AD which is permissible under the rules of treaty interpretation as set out in Articles 31 and 32 VCLT, pursuant to the second sentence of Article 17.6(ii) AD.

In *US — Continued Zeroing*, the AB found that: "Article 17.6(ii) consists of two sentences. The first sentence clarifies that panels are charged with the obligation to

[122] Originale footnote: "[t]he Appellate Body has explained that 'a permissible interpretation is one which is found to be appropriate after application' of the customary rules of interpretation reflected in Articles 31 and 32 of the Vienna Convention. (Appellate Body Report, *US — Hot-Rolled Steel*, para. 60.)"
[123] Appellate Body Report, *US — Softwood Lumber V,* WT/DS264/AB/R, §123
[124] Appellate Body Report, *US — Zeroing (Japan)*, WT/DS322/AB/R, §189
[125] Appellate Body Report, *US — Stainless Steel (Mexico),* WT/DS344/AB/R, §136

interpret the provisions of the Anti-Dumping Agreement 'in accordance with customary rules of interpretation of public international law'. The same language is found in Article 3.2 of the DSU.[126] Panels examining claims under the Anti-Dumping Agreement are therefore required to apply the customary rules of treaty interpretation codified in Articles 31 and 32 of the Vienna Convention. […] The customary rules of treaty interpretation apply to any treaty, in any field of public international law, and not just to the WTO agreements. As the Appellate Body has said, they 'impose certain common disciplines upon treaty interpreters, irrespective of the content of the treaty provision being examined and irrespective of the field of international law concerned.'[127]

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

[126] Original footnote: "[c]learly, the first sentence of Article 17.6(ii) involves no 'conflict' with the DSU but, rather, confirms that the usual rules of treaty interpretation under the DSU also apply to the Anti-Dumping Agreement"
[127] Original footnote: "Appellate Body Report, *US — Hot-Rolled Steel*, para. 60. The parties to a particular treaty might agree upon rules of interpretation for that treaty which differ from the rules of interpretation in Articles 31 and 32 of the Vienna Convention. (Ibid., footnote 40) But this is not the case here."

The second sentence of Article 17.6(ii) imposes an obligation on panels that is not found elsewhere in the covered agreements. It stipulates that:

Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

The Appellate Body has reasoned that the second sentence of Article 17.6(ii) presupposes 'that application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Anti-Dumping Agreement, which, under that Convention, would both be 'permissible interpretations'.'[128] Where that is the case, a measure is deemed to be in conformity with the Anti-Dumping Agreement 'if it rests upon one of those permissible interpretations.' As the Appellate Body has said, '[i]t follows that, under Article 17.6(ii) of the Anti-Dumping Agreement, panels are obliged to determine whether a measure rests upon an interpretation of the relevant provisions of the Anti-Dumping Agreement which is permissible under the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention.'[129]

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

[128] Original footnote: "Appellate Body Report, *US — Hot-Rolled Steel*, para. 59"
[129] Original footnote: "Appellate Body Report, *US — Hot-Rolled Steel*, para. 60 (original emphasis) (referring to Appellate Body Report, *EC — Bed Linen*, footnote 36 to paras. 63-65; and Appellate Body Report, *Thailand — H-Beams*, footnote 36 to para. 127)."

Secondly, the proper interpretation of the second sentence of Article 17.6(ii) must itself be consistent with the rules and principles set out in the Vienna Convention. This means that it cannot be interpreted in a way that would render it redundant, or that derogates from the customary rules of interpretation of public international law. However, the second sentence allows for the possibility that the application of the rules of the Vienna Convention may give rise to an interpretative range and, if it does, an interpretation falling within that range is permissible and must be given effect by holding the measure to be in conformity with the covered agreement. The function of the second sentence is thus to give effect to the interpretative range rather than to require the interpreter to pursue further the interpretative exercise to the point where only one interpretation within that range may prevail.

We further note that the rules and principles of the Vienna Convention cannot contemplate interpretations with mutually contradictory results. Instead, the enterprise of interpretation is intended to ascertain the proper meaning of a provision; one that fits harmoniously with the terms, context, and object and purpose of the treaty.[130] The purpose of such an exercise is therefore to narrow the range of interpretations, not to generate conflicting, competing interpretations. Interpretative tools cannot be applied selectively or in isolation from one another. It would be a subversion of the interpretative disciplines of the Vienna Convention if application of those disciplines yielded contradiction instead of coherence and harmony among, and effect to, all relevant treaty provisions. Moreover, a permissible interpretation for purposes of the second sentence of Article 17.6 (ii) is not the result of an inquiry that asks whether a provision of domestic law is 'necessarily excluded' by the application of the Vienna Convention. Such an approach subverts the hierarchy between the treaty and municipal law. It is the proper interpretation of a covered agreement that is the enterprise with which Article 17.6(ii) is engaged, not whether the treaty can be interpreted consistently with a particular Member's municipal law or with municipal laws of Members as they existed at the time of the conclusion of the relevant treaty"[131].

[130] Original footnote: "[r]ecourse to supplementary means may also be had under Article 32 of the Vienna Convention."
[131] Appellate Body Report, *US — Continued Zeroing*, WT/DS350/AB/R, §§267-273

According to these long and enlightening findings:

- the second sentence of Article 17.6(ii) AD must be read and applied in light of the first sentence;
- first the Panel shall apply the customary rules of interpretation, including those codified in the VCLT, to see what the result of the application of these rules is;
- then the Panel shall be able to determine whether the second sentence of Article 17.6(ii) AD applies. That is to say, if a relevant provision of the AD admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the AD if it rests upon one of the permissible interpretations;
- the structure and logic of Article 17.6(ii) AD do not permit a Panel to determine first, whether an interpretation is permissible under the second sentence, and then, to seek validation of that permissibility by recourse to the first sentence;
- the interpretation is intended to ascertain the proper meaning of a provision that fits harmoniously with the terms, context, object and purpose of the treaty, and which is coherent and harmonious with all relevant treaty provisions;
- the principles expressed in the VCLT cannot contemplate interpretations with mutually contradictory, conflicting or competing results;
- interpretative tools cannot be applied selectively or in isolation from one another;
- hierarchically, Article 17.6(ii) AD aims to assess the proper interpretation of the AD and not to determine if the treaty can be interpreted consistently with a domestic legal provision.

In *US — Continued Zeroing*, the AB found that: "variability, contradiction, and uncertainty stalk the interpretative enterprise, but they are the hallmarks of its failure, not its success. Just as the interpreter of a treaty strives for coherence, there is an inevitable recognition that a treaty bears the imprint of many hands. And what is left behind is a text, sometimes negotiated to a point where an agreement to regulate a matter could only be reached on the basis of constructive ambiguity, carrying both the hopes and fears of the parties. Interpretation is an endeavour to discern order,

notwithstanding these infirmities, without adding to or diminishing the rights and obligations of the parties."[132]

This finding emphasizes that the aim of interpretation is to find an outcome that is coherent and harmonious with all relevant treaty provisions.

Applying the above-mentioned findings, the AB found in *US — Continued Zeroing* that: "holding that zeroing is also consistent with Article 9.3 would be flatly contradictory. Such contradiction would be repugnant to the customary rules of treaty interpretation referred to in the first sentence of Article 17.6(ii). Consequently, it is not a permissible interpretation within the meaning of Article 17.6(ii), second sentence"[133].

The AB therefore concluded the zeroing issue: "the Appellate Body exists to clarify the meaning of the covered agreements. On the question of zeroing it has spoken definitively. Its decisions have been adopted by the DSB. The membership of the WTO is entitled to rely upon these outcomes. Whatever the difficulty of interpreting the meaning of 'dumping', it cannot bear a meaning that is both exporter-specific and transaction-specific. We have sought to elucidate the notion of permissibility in the second sentence of Article 17(6)(ii). The range of meanings that may constitute a permissible interpretation does not encompass meanings of such wide variability, and even contradiction, so as to accommodate the two rival interpretations. One must prevail. The Appellate Body has decided the matter. At a point in every debate, there comes a time when it is more important for the system of dispute resolution to have a definitive outcome, than further to pick over the entrails of battles past. With respect to zeroing, that time has come"[134].

We note that in *US — Orange Juice (Brazil)*, the Panel adopted a similar position[135].

[132] *Ibid.,* §306
[133] *Ibid.,* §317
[134] *Ibid.*, §312
[135] Panel Report, *US — Orange Juice (Brazil)*, WT/DS382/R, §§7.135-7.136

According to CROLEY and JACKSON, Article 17.6(ii) and the standard of review in international disputes are a touchstone between the DSB's deference to the sovereignty of states and their agencies and the common interest to provide effectiveness to the WTO Agreements[136].

Indeed, different Panels under the early GATT, especially in antidumping disputes, have been criticized regarding the difficult distinction between the question of law and other questions (in particular the facts)[137].

During the negotiations of the Uruguay Round, some delegations supported the inclusion of a provision under the model of the administrative law jurisprudence of the United States[138].

Indeed, confronted with similar issues —that is, the administrative courts' deference to government agencies and the need to review their decisions- the administrative law jurisprudence of the United States adopted the so-called *Chevron* doctrine.

Basically, the *Chevron* doctrine divided the issue in two steps:

- first, the court shall find if the Congress has spoken directly to the specific question at issue or if the statute interpreted by the agency is silent or ambiguous. If yes, this is the end of the case[139];
- secondly, if the court finds that the statute is silent or ambiguous, the court shall find if the agency's interpretation of the statute is reasonable or permissible. If yes, the court will defer to the agency's interpretation. If no, the court will supply one[140].

[136] CROLEY Steven P. / JACKSON John H., WTO Dispute Procedures, Standard of Review, and Deference to National Governments, The American Journal of International Law, Vol. 90 (2) 1996, p. 194, see too KUIJPER Pieter Jan, John Jackson and the standard of review, World Trade Review, Vol. 15 (3) 2016, pp. 398–400
[137] CROLEY / JACKSON, *op. cit.* 1996, pp. 195-198
[138] *Ibid.,* p. 199
[139] *Ibid.*, pp. 202-203; Chevron, 467 U.S. at 842
[140] CROLEY / JACKSON, *op. cit.* 1996, pp. 202-203; Chevron, 467 U.S. at 843

The proposition to include similar reasoning for the standard of review under the new AD provoked serious opposition among the negotiators[141]:

- first, according to several delegations, such reasoning would over constrain the Panels and allow the Members to develop different practices under the AD, undermining the reciprocity and predictability of the Agreement[142];
- secondly, some delegations argued the word "reasonable" would make it difficult to successfully challenge an interpretation that may be inconsistent with various WTO rules[143].

The final compromise includes three major changes to the first proposal[144]:

- the word "permissible" instead of "reasonable", reducing the scope of the interpretations;
- the introduction of a first sentence, specifying that the Panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law, further reducing the scope of the interpretations;
- the introduction of this provision to the AD only, where the question first arose, and not to the overall WTO Agreements.

Although the new Article 17.6(ii) seemed quite straightforward, some delegations and early commentators were conscious of the potential implications of this provision. Indeed, it was unclear at the time how the Panels and the AB would interpret the reference to the customary rules of interpretation of public international law, and most notably the relationship between Articles 31 and 32 VCLT[145].

[141] VERMULST, *op. cit.* 2005 p. 224
[142] CROLEY / JACKSON, *op. cit.* 1996 p. 199
[143] *Id.*
[144] *Ibid.,* pp. 199-200
[145] *Ibid.,* p. 204; KUIJPER, *op. cit.* 2016, pp. 398–400

Indeed, the degree of deference of the Panels and the AB to Members' agencies would directly affect the shift of power between the Members' sovereignty and the reciprocity and predictability of the AD.

However, as we pointed out *supra*, early reports of the Panels and the AB have rapidly confirmed Articles 31 and 32 VCLT[146] as the customary rules of interpretation of public international law and the inclusion of both of these provisions in the test of Article 17.6(ii)[147].

Hence, contrary to some fears —or hopes for the Members supportive of the *Chevron* doctrine- the deference of the Panels and the AB to the Members' authorities is quite limited, enabling better reciprocity and predictability of the AD.

We note that the United States still expressed its disagreement during a DSB meeting regarding the findings of the Panel and the AB in *US — Hot Rolled Steel* applying Article 17.6(ii) AD and Articles 31 and 32 VCLT.

Indeed, according to the United States: "[w]hile the Appellate Body acknowledged in paragraph 59 of its Report that the second sentence of Article 17.6(ii) 'presupposes' that application of the customary rules of treaty interpretation embodied in Articles 31 and 32 of the Vienna Convention on the Law of Treaties could give rise to at least two interpretations of some of the provisions of the Agreement, it then seemed to diminish the importance of this text. Furthermore, the Appellate Body had stated that Article 17.6 only departed from the general review provided for in Article 11 of the DSU by allowing a panel to find a measure in conformity when it rested upon one of the permissible interpretations. This distinction in the standard of review should not be minimized, and any suggestion that the rule provided for in Article 17.6 was not materially different from that generally provided for in the DSU ignored the identification of Article 17.6 as a 'special or additional rule and procedure' in Article 1.2 of the DSU.

[146] *Cf. supra,* 2.1.1.4 In accordance with customary rules of interpretation of public international law; Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R, pp.16-17; Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, p. 10
[147] *Cf. supra*, 2.1.2.4.2 A relevant provision of the Agreement admits of more than one permissible interpretation; Appellate Body Report, *US — Hot Rolled Steel*, WT/DS184/AB/R, §§59-60

The specific and unique provisions in Article 17.6 had been deliberately included to provide a special standard of review in anti-dumping investigations, intended to prevent panels from second-guessing the factual and legal determinations made by national authorities, and were an important part of the balance of rights and obligations assumed by the Members in agreeing to the Anti-Dumping Agreement. They could not be minimized or eliminated by dispute settlement reports. In this connection, the Appellate Body had aptly observed in its report in the case on 'Hormones'[148] that to adopt a standard of review that was not clearly rooted in the text of a specific Agreement may well amount to changing the finely drawn balance in the competencies conceded by Members and those jurisdictional competencies retained by Members for themselves. As stated by the Appellate Body, neither a panel or the Appellate Body was authorized to do that. Moreover, any such result, was proscribed by Article 3.2 of the DSU which provided that '… recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements'"[149].

Despite disagreement by the United States, further practice shows that the findings of the Panels and the AB may be regarded as an *acquis* of the WTO dispute settlement system.

[148] Original footnote: "*European Communities – Measures Concerning Meat and Meat Products (Hormones)*; WT/DS26; WT/DS48"
[149] Minutes of meeting held on 23 August 2001, Dispute Settlement Body, 2 October 2001, WT/DSB/M/108, §§69-70

2.1.3 Summary

According to the discussion *supra*, the general mandate of the DSB according to Article 3.2 DSU is:

- to provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- to resolve, according to the specific circumstances, except for convincing reasons, the same legal question in the same way as precedent similar cases, that is to say, embodying the *acquis* of the WTO dispute settlement system by reviewing (the first sentence of Article 3.2 DSU):
    - particular acts applied only to a specific situation;
    - the acts setting rules or norms, for instance the national Members' legislations that are intended to have general and prospective application, irrespective of how or whether those rules or norms are applied in a particular instance;
- to preserve the rights and obligations of Members under the covered agreements without adding or diminishing them (the second sentence, *prima parte,* and final sentence of Article 3.2 DSU);
- to clarify the existing provisions of the covered agreements only by making findings on claims that must be addressed in order to resolve the case (the second sentence, *seconda parte*, of Article 3.2 DSU*);*
- to clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law, that is to say Articles 31 and 32 VCLT, and with others customary rules of international law (the second sentence, *in fine*, of Article 3.2 DSU*);*
- to adopt an analytical methodology or structure appropriate for the resolution of the matters in order to make findings through an objective assessment of the relevant matter, using *assumption arguendo* only when it is appropriate to the circumstances (the second sentence, *in fine*, of Article 3.2 DSU).

Moreover, we have seen that Articles 11 DSU and 17.6 AD apply both in antidumping disputes and that Articles 11 DSU and 17.6(i) AD, and as well Articles 11 DSU and 17.6(ii) AD, respectively constitute one standard. Therefore, the mandate of the DSB according Articles 11 DSU and 17.6 AD is:

- to objectively assess whether the IA's establishment of the fact was proper according to the AD (Article 11 DSU and the first sentence, *prima parte*, of Article 17.6(i) AD):
    - examining the evidence considered by the IA;
    - examining only the evidence that was part of the record of the investigation, which is before the IA at the time of the determination;
    - avoiding any *de novo review*;
    - choosing to or not to disclose the facts to the interested parties before the final determination;
- to objectively assess whether the IA's evaluation of the facts was unbiased and objective, in terms of weight and value of the facts, as well their respective relationship, according to the AD (Article 11 DSU and the first sentence, *seconda parte*, of Article 17.6(i));
- to avoid *ex post* rationalization, that is to say *ex post facto* justification not provided during the IA investigation and determination (Articles 11 DSU and 17.6(i));
- to interpret the relevant provisions of the AD in accordance with customary rules of interpretation of public international law, findings and comments relating to Article 3.2 DSU being applicable to Article 17.6(ii) AD *mutatis mutandis*[150] (Article 11 DSU and the first sentence of Article 17.6(ii) AD);
- to find whether a relevant provision of the AD admits of more than one permissible interpretation under the rules of treaty interpretation in Articles 31 and 32 VCLT, and to find the IA's measure to be in conformity with the AD if it rests upon one of the permissible interpretations (Article 11 DSU and the second sentence of Article 17.6(ii) AD) by:

[150] *Cf. supra*, 2.1.2 Standard of review of Articles 11 DSU and 17.6 AD

- first applying the customary rules of interpretation, including those codified in the VCLT, to see what the result of the application of these rules is;
- then determining whether the second sentence of Article 17.6(ii) AD applies, that is to say, if a relevant provision of the AD admits of more than one permissible interpretation, the Panel shall find the authorities' measure to be in conformity with the AD if it rests upon one of those permissible interpretations;
- the structure and logic of Article 17.6(ii) do not permit a Panel to determine first whether an interpretation is permissible under the second sentence and then to seek validation of that permissibility by recourse to the first sentence;
- ascertaining the proper meaning of a provision that fits harmoniously with the terms, context, object and purpose of the treaty, that is to say coherent and harmonious with all relevant treaty provisions;
- avoiding interpretations with mutually contradictory, conflicting or competing results;
- avoiding applying interpretative tools selectively or in isolation;
- assessing the proper interpretation of the AD and not determining if the treaty can be interpreted consistently with a domestic legal provision.

2.2 Findings of the Panels and the AB on Article 6.8 AD and consistency with the legal mandate

2.2.1 Object and purpose of the provision

The most authoritative understanding of the object and purpose of Article 6.8 AD can probably be found in the AB report *Mexico — Anti-Dumping Measures on Rice*[151]. Before quoting the findings of the AB (2.1.1.3) and explaining why it can be regarded as the most authoritative understanding of the object and purpose of the best information available (2.1.1.4), we will first explain the background of the dispute (2.1.1.1), then take a closer look to the discussion regarding Article 64 of Mexico's

[151] MAVROIDIS Petros C. The Regulation of International Trade — The WTO Agreements on Trade in Goods, Vol. 2, MIT Press, 2016, p. 155

Foreign Trade Act and Article 6.8 AD where the findings regarding the object and purpose emerged (2.1.1.2).

2.2.1.1 Background of the dispute Mexico — Anti-Dumping Measures on Rice

Mexico — Anti-Dumping Measures on Rice was a dispute involving the United States as complainant and Mexico as defendant regarding the Mexican definitive anti-dumping measures on beef and long grain white rice.

On 16 June 2003, the United States requested a consultation regarding four main claims[152]:

- Mexico's definitive antidumping measures were inconsistent with different provisions under the AD, among them Article 6 and Annex II[153];
- certain provisions of Mexico's Foreign Trade Act were inconsistent with the AD and SCM agreements, in particular Article 64 of the Act[154];
- Mexico's Federal Code of Civil Procedure, in conjunction with Article 68 of the Foreign Trade Act, appeared to be inconsistent with various provisions under the AD and SCM agreements[155];
- Mexico's measures appeared to nullify or impair benefits that the United States should have accrued directly or indirectly under the cited agreements[156].

According to the United States, the consultation provided helpful clarifications but unfortunately did not resolve the dispute[157]. The United States therefore requested the establishment of a Panel on 19 September 2003. In its request, the United States further developed the arguments presented in the consultation request.

[152] Request for Consultations by the United States, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/1
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] Request for the Establishment of a Panel by the United States, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/2

Regarding Article 6.8 AD and Annex II, the complainant argued that[158]:

- Mexico's measures were inconsistent with Article 6.8 AD, and paragraphs 1, 3, 5, 6, and 7 of Annex II:
    - by improperly rejecting information submitted by US exporters and applying the facts available in the evaluation of injury[159];
    - by applying the facts available to a US respondent rice exporter that was investigated and found to have no shipments during the period of investigation[160]; and
    - by applying the facts available in establishing the antidumping margins that it assigned to US exporters which were not individually investigated, and by doing so in an improper manner[161];
- Article 64 of Mexico's Foreign Trade Act codified the "facts available" approach that Mexico applied in the rice investigation. According to the complainant, this provision is inconsistent with Articles 6.8 AD, and paragraphs 1, 3, 5, 6, and 7 of Annex II to the extent that it requires the application of facts available rates to exporters with no shipments during the period of investigation[162].

Following the request of the United States, the DSB established a Panel. China, the European Communities and Turkey reserved their third-party rights[163]. After two extended deadlines due to the complexity of the matter[164], the Panel report was finally circulated on 6 June 2005[165].

In its report, the Panel upheld all the claims made by the United States concerning both the injury and the dumping margin determination of the Mexican IA as well most

[158] *Id.*
[159] *Ibid.*, §1(d)
[160] *Ibid.*, §1(f)
[161] *Ibid.*, §1(g)
[162] *Ibid.*, §2(b)
[163] Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/3
[164] Communication from the Chairman of the Panel, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/4 and WT/DS295/5
[165] Panel Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/R

of the claims regarding the consistency of Mexico's Foreign Trade Act with the AD and SCM agreements[166].

More specifically, regarding Article 6.8 AD and Annex II, the Panel found:

- that Mexico acted inconsistently with Article 6.8 and paragraph 7 of Annex II of the AD in its application of a dumping margin based on facts available to the non-shipping exporter, Producers Rice[167];
- that Mexico acted inconsistently with Articles 6.8 AD, paragraph 1 of Annex II, in its application of a dumping margin based on facts available to the producers and exporters of the United States that it did not investigate[168];
- that Article 64 of Mexico's Foreign Trade Act was inconsistent as such with Articles 6.8 AD and paragraphs 1, 3, 5 and 7 of Annex II[169].

However, the Panel did not rule on some the United States' claims applying judicial economy[170]. Indeed, no findings were made regarding the Mexican failure to conduct an objective examination based on positive evidence of the price effects and the volume of dumped imports as part of its injury analysis[171]. Moreover, no findings were made with §7 of Annex II regarding Mexico's application of a dumping margin based on facts available to the United States producers and exporters that it did not investigate [172].

Last but not least, the Panel rejected the complainant's claim regarding the inconsistency of Mexico's Federal Code of Civil Procedure under the AD (and the SCM Agreements)[173].

[166] *Ibid.,* §8.1 (c) and §8
[167] *Ibid.,* §8.3 (b)
[168] *Ibid.,* §8.3 (c)
[169] *Ibid.,* §8.5 (b)
[170] *Ibid.,* in particular §8.4
[171] *Ibid.,* §8.1 (c)
[172] *Ibid.,* §8.3 (c)
[173] *Ibid.,* in particular §8.5(f)

Mexico submitted a notification of appeal on 20 July 2005[174]. Translation issues extended the deadline once more[175]. The AB report was finally circulated on 29 November 2005[176].

In its report, the AB upheld all the Panel's findings, regarding, *inter alia*, Article 6.8 AD and Annex II[177], except one finding —with respect to the exporters that the Mexican IA did not investigate, the AB found that Mexico acted inconsistently with Articles 6.1, 6.10, and 12.1 AD[178].

At its meeting on 20 December 2005, the DSB adopted the AB report and the Panel report, as modified by the AB report, specifying that the Panel report should be read in conjunction with the AB report[179].

2.2.1.2 Article 64 of Mexico's Foreign Trade Act and Article 6.8 AD

2.2.1.2.1 Article 64 of Mexico's Foreign Trade Act

Article 64 of Mexico's Foreign Trade Act provided the use of the highest margin (emphasis added) based on the facts available with regard to producers that:

- (i) fail to appear (Article 64.I of the Act); or
- (ii) fail to provide the information in a proper and timely fashion (Article 64.II of the Act); or
- (iii) significantly impede the investigation (Article 64.II of the Act); or
- (iv) supply information or evidence that is incomplete, incorrect or does not derive from their accounts (Article 64.II of the Act); or
- (v) that did not export the subject product during the period of investigation (Article 64.III of the Act).

[174] Notification of an Appeal by Mexico, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/6
[175] Communication from the Appellate Body, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/7
[176] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/AB/R
[177] *Ibid.,* §350
[178] *Ibid.,* §350(c)(iii)
[179] Action by the Dispute Settlement Body, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/9

2.2.1.2.2 Claims and arguments of the United States

According to the United States, Article 64 of Mexico's Foreign Trade Act was inconsistent with Article 6.8 AD and §§1, 3, 5, and 7 of Annex II —and Article 12.7 SCM Agreement replicating Article 6.8 AD text[180]- for the following reasons:

- §1 of Annex II requires that the IA should specify in detail the information required from any interested party and that it ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available. However, Article 64 required that the Mexican IA apply the highest fact available-based margin in all cases, even if the authority failed to provide the notice required by §1 of Annex II[181].
- §3 of Annex II provides that all information which is verifiable should be taken into account when determinations are made. However, Article 64 required that the Mexican IA apply the highest facts available-based margin to firms that did not appear in the investigation or did not export the subject merchandise during the period of investigation. Hence, even if these firms submitted verifiable information, the Mexican IA may not take it into account unless it results in the highest facts available-based margin[182].
- §5 of Annex II provides that even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability. However, Article 64 entitled an IA to reject information that was not ideal in at least one respect preventing such authority from considering whether a party has acted to the best of its ability[183].
- §7 of Annex II provides that if the authorities have to base their findings on information from a secondary source, they should do so with special circumspection. However, Article 64 required the Mexican IA to apply the

[180] Indeed, Article 12.7 SCM provides: in cases in which any interested Member or interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.
[181] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/AB/R, §104
[182] *Ibid.,* §102
[183] *Ibid.,* §103

highest facts available-based margin in all cases, thereby preventing Mexican investigating authority from exercising special circumspection[184].

Hence, the United States concluded that, for all these reasons, Article 64 of Mexico's Foreign Trade Act was inconsistent with Article 6.8 AD and §§1, 3, 5, and 7 of Annex II[185].

2.2.1.2.3 Mexico's claims and arguments

A contrario, according to Mexico, Article 64 was consistent with Article 6.8 AD and §§1, 3, 5, and 7 of Annex II —and Article 12.7 SCM Agreement- for the following reasons:

- §1 of Annex II allows IAs to make determinations on the basis of the facts available including those contained in the application for the initiation of the investigation by the domestic industry[186].
- §3 of Annex II establishes the obligation to take into account all verifiable information. However, if an exporter does not provide the "necessary information", there is no verifiable information to be taken into account, and, thus, recourse to the facts available in the absence of such information is not inconsistent with the stated obligation[187].
- §5 of Annex II provides that even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability. Hence, in order for such information to be considered, it must be ideal in at least one respect. If an exporter does not provide the information needed to determine its dumping margin, the information cannot be said to be ideal in at least one respect because the information is totally lacking[188].
- §7 of Annex II provides that it is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the

[184] *Ibid.,* §104
[185] *Ibid.,* §105
[186] *Ibid.,* §57
[187] *Ibid.,* §55
[188] *Ibid.*, §56

party than if the party did cooperate. The option of applying the highest margin calculated, as in Article 64, fell under the category of the less favourable results that may be applied in case of non-cooperation explicitly worded in §7 of Annex II[189].

- Moreover, if an interested party did not appear in the investigation or did not export during the period of investigation, this means that the exporter in question did not provide the information necessary for determining whether there is a margin of dumping[190].

Thus, for all these reasons Mexico concluded that Article 64 of Mexico's Foreign Trade Act were fully consistent with Article 6.8 AD and §§1, 3, 5, and 7 of Annex II.

2.2.1.2.4 Findings of the Panel and the AB

In its report, the Panel found that Article 64 required the Mexican IA to assign the highest margin calculated from the facts available to producers that do not appear or that did not export the subject merchandise during the period of investigation without consideration of whether other evidence on record might prove more accurate[191]. Therefore, the Panel concluded that Article 64 is inconsistent with Article 6.8 AD and §§1, 3, 5, and 7 of Annex II[192].

In its report, the AB began by reviewing the relevant provisions of the AD governing the use of facts available —Article 6.8 AD and §§1,3,5 and 7 of Annex II[193]. The AB subsequently developed its understanding of the legal discipline regarding the use of the fact available finding that the agency's discretion is not unlimited: first, the facts to be employed are expected to be the "best information available" and secondly when culling "necessary information" from secondary sources, the authority shall do it with "special circumspection"[194]. On this basis, the AB, referring itself to the Panel's findings, concluded that in all situations of incomplete information —including those of

[189] *Ibid.,* §57
[190] *Ibid.,* §54
[191] Panel Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/R, §§7.236-7.242 and §8.5 (b)
[192] *Id.*
[193] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/AB/R, §287
[194] *Ibid.,* §288 f.

producers not appearing in the investigation and producers not exporting the subject merchandise during the period of investigation- Article 64 prevented the Mexican IA from engaging in the reasoned and selective use of the facts available directed by Article 6.8 AD and Annex II[195].

The AB upheld the Panel's findings regarding the inconsistency of Article 64 of Mexico's Foreign Trade Act with Article 6.8 AD and §§1, 3, 5, and 7 of Annex II.[196]

2.2.1.3 Findings of the Panel and the AB on the object and purpose of Article 6.8 AD

The AB, quoting the Panel, has made the following key findings regarding Article 6.8 AD object and purpose:

"From these obligations, we understand that an investigating authority in an anti-dumping investigation may rely on the facts available to calculate margins for a respondent that failed to provide some or all of the necessary information requested by the agency. In so doing, however, the agency must first have made the respondent aware that it may be subject to a margin calculated on the basis of the facts available because of the respondent's failure to provide necessary information. Furthermore, assuming a respondent acted to the best of its ability, an agency must generally use, in the first instance, the information the respondent did provide, if any.

With respect to the facts that an agency may use when faced with missing information, the agency's discretion is not unlimited. First, the facts to be employed are expected to be the 'best information available'. In this respect, we agree with the Panel's explanation:

The use of the term '*best* information' means that information has to be not simply correct or useful *per se*, but the most fitting or 'most appropriate' information available in the case at hand. Determining that something is 'best' inevitably requires, in our view, an evaluative, comparative assessment as the term 'best' can only be properly applied

[195] *Ibid.,* §297
[196] *Ibid.,* §298 and §350(d) (iv)

where an unambiguously superlative status obtains. It means that, for the conditions of Article 6.8 of the AD Agreement and Annex II to be complied with, there can be no better information available to be used in the particular circumstances. Clearly, an investigating authority can only be in a position to make that judgment correctly if it has made an inherently comparative evaluation of the 'evidence available'.[197] (original emphasis; footnote omitted)

Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection'"[198].

According to the Panel and the AB in these findings, the object and purpose of Article 6.8 AD is to enable an IA to rely on the facts available to calculate the margins for a respondent that failed to provide some or all of the "necessary information" requested by the agency.

According to the same findings, Article 6.8 AD shall ensure that the agency's discretion is not unlimited:

- first, the information has to be the "*best* information" available, that is to say, not simply correct or useful *per se*, but the most fitting or "most appropriate": the result of an inherently comparative evaluation of the "evidence available";
- secondly, the agency should ascertain for itself the reliability and accuracy of "necessary information" from secondary sources by checking it against information contained in other independent sources at its disposal and to treat data obtained from secondary sources "with special circumspection".

[197] Original footnote: "Panel Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/R, §7.166"
[198] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/AB/R, §288 f.

2.2.1.4 Why the Panel and the AB findings can be regarded as the most authoritative understanding of the object and purpose of Article 6.8 AD

The above-mentioned findings of the Panel and the AB can be regarded as the most authoritative understanding of the object and purpose of Article 6.8 AD for the following reasons.

First, the findings of the AB and the Panel in *Mexico — Anti-Dumping Measures on Rice* are the most comprehensive understanding of the object and purpose of Article 6.8 AD. It is the first time that the Panels and the AB point out the object and purpose succinctly:

- Article 6.8 AD allows IAs to resort to BIA in case of non-cooperation;
- Article 6.8 AD and Annex II ensure that the agency's discretion is not unlimited.

Indeed, previous findings of the Panels and the AB focus only on the first finding.

For instance, in *Egypt — Steel Rebar*, the Panel found that: "Article 6.8 therefore addresses the dilemma in which investigating authorities might find themselves –they must base their calculations of normal value and export price on some data, but the necessary information may not have been submitted. Article 6.8 identifies the circumstances in which an IA may overcome this lack of necessary information by relying on facts which are otherwise available to the investigating authority"[199].

This approach illustrates perfectly the Panels' and the AB's understanding of Article 6.8 AD prevailing until *Mexico — Anti-Dumping Measures on Rice*[200]. The object and purpose of Article 6.8 AD are explained, and it is specified that resorting to BIA is submitted to conditions. However, the second finding above-mentioned regarding the object purpose of Article 6.8 AD and Annex II, that is to ensure that the agency's discretion is not unlimited, is absent of the reports.

[199] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.146
[200] *Cf. supra*, 2.2.1.3 Findings of the Panel and the AB on the object and purpose of Article 6.8 AD

Sometimes the findings seem to get closer to this last idea. In *US — Hot-Rolled Steel* the Panel found that the goal of Article 6.8 and Annex II is to ensure: "that even where the investigating authority is unable to obtain the 'first-best' information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps 'second-best' facts"[201]. In *Mexico — Steel Pipes and Tubes* as well, the Panel, referring itself to the Panel in *Egypt – Steel Rebar*[202] stated: "the provisions of Annex II have to do with ensuring the reliability of the information used by the investigating authority"[203].

In these quotes, the Panel seems to get closer to the second finding regarding the object and purpose of Article 6.8 AD as found in *Mexico — Anti-Dumping Measures on Rice*. However, the words "perhaps" and "reliability of the information" show that, according to the Panels, the goal of Article 6.8 AD is more to ensure the accuracy of the decision than to limit the agency's discretion *per se*.

Therefore, the findings of the AB and the Panel in *Mexico — Anti-Dumping Measures on Rice* are the first to offer a comprehensive understanding of the object and purpose of Article 6.8 AD, introducing the idea that the aim of Article 6.8 AD is to ensure that the agency's discretion is not unlimited.

Secondly, there are no Panel or AB reports subsequent to *Mexico — Anti-Dumping Measures on Rice* adding details regarding the object and purpose of Article 6.8 AD. Instead, in subsequent reports like *China — Broiler Products*, the Panel quotes substantial parts of the AB findings of *Mexico — Anti-Dumping Measures on Rice* regarding the object and purpose of Article 6.8 AD[204]. We note these references are part of a more general trend of the parties and Panels involved in recent disputes related to Article 6.8 AD to refer themselves systematically in their arguments to the more general findings of the reports *Mexico — Anti-Dumping Measures on Rice*[205].

[201] Panel Report, *US — Hot-Rolled Steel*, WT/DS184/R, §7.55
[202] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.154
[203] Panel Report, *Mexico — Steel Pipes and Tubes*, WT/DS331/R, §7.197
[204] Panel Report, *China — Broiler Products*, WT/DS427/R, §7.310
[205] See for instance Panel Report, *China — GOES*, WT/DS414/R §§388-392; Panel Report, *China — Autos (US)*, WT/DS/440/R, arguments of United States §7.132, arguments of European Union §7.114, Panel reasoning in connection with Article 12.7 SCM Agreement §7.172; Panel Report, *US — Shrimp II (Viet Nam)*, WT/DS429/R arguments of European Union §7.229; Panel Report, *China — HP-SSST*, WT/DS454/R arguments of European Union and Japan §7.207

Finally, the literature seems to share this view, directly, by confirming that this passage is the most authoritative understanding of the rationale for Article 6.8 AD[206], or indirectly, by referring often to the reports *Mexico — Anti-Dumping Measures on Rice*[207].

Therefore, we conclude that the AB's findings in *Mexico — Anti-Dumping Measures on Rice* can be regarded as the most authoritative understanding of the object and purpose of Article 6.8 AD which are:

- Article 6.8 AD allows IAs to resort to BIA in case of non-cooperation;
- Article 6.8 AD and Annex II ensure that the agency's discretion is not unlimited.

2.2.2 Necessary information

According to Article 6.8 AD, *in parte*, in cases in which any interested party refuses access to, or otherwise does not provide, necessary information […] determinations, […], may be made on the basis of the facts available[208].

Six of the seven paragraphs of Annex II refer to "necessary information" using simply the word "information"[209].

2.2.2.1 Findings of the Panels and the AB

In *US — Steel Plate*, the Panel interpreted "necessary information" according to the ordinary meaning to be given to the terms of the treaty. Indeed, referring to the New Short Oxford English Dictionary, the Panel found: "we note that the word 'information' is defined as 'knowledge or facts communicated about a particular subject, event,

[206] MAVROIDIS, *op. cit.* 2016, p. 155
[207] MAVROIDIS Petros C., Trade in Goods, Oxford University Press, 2012, p. 518; MAVROIDIS Petros C. / MESSERLIN Patrick A. / WAUTERS Jasper M. / The Law and Economics of Contingent Protection in the WTO, Edward Elgar Publishing, 2010, p. 194 ff.; RAMANUJAN Adarsh / SHARMA Atul / SEETHARAMAN S., *US — Carbon Steel (India)*: A Major Leap in Trade Remedy Jurisprudence, in: DAS Abhijit / NEDUMPARA James J. (editors), WTO Dispute Settlement at Twenty – Insiders' Reflections on India's Participation, Springer, 2016, p. 243; VAN BAEL Ivo / BELLIS Jean-François, EU Anti-Dumping and Others Trade Instruments, Wolters Kluwer, 2011, p. 473; RAJU K. D., World Trade Organization Agreement on Anti-Dumping — A GATT/WTO and Indian Jurisprudence, Wolters Kluwer, 2008, p.192
[208] Article 6.8 AD
[209] §§ 1,3,4,5,6,7 Annex II

etc.'[210]. 'Necessary' is defined as 'That cannot be dispensed with or done without; requisite, essential, needful'.[211] Thus, Article 6.8 provides that if essential knowledge or facts, which cannot be done without, are not provided to the investigating authority by an interested party, the investigating authority may make preliminary or final determinations on the basis of facts available"[212].

Here the Panel:

- first, refers itself to an authoritative dictionary;
- secondly, gives the abstract definition of the word;
- finally, substitutes a summarized definition in the legal text to give its interpretation.

"Necessary information" has been interpreted in different reports using the context. A first set of interpretations refers to other terms of Article 6.8 AD and Annex II.

In *Egypt — Steel Rebar*, the Panel found that Annex II provides guidance with an explicit reference in Article 6.8 AD[213]. Indeed, §1 of Annex II uses the words "the information required". Article 6.8 AD specifies *in fine* that the provisions of Annex II shall be observed in the application of this paragraph.

Hence, reading Article 6.8 AD in conjunction with §1 Annex II, the Panel concluded that "necessary information": "is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to 'specify … the information required from any interested party'. This paragraph also sets forth rules to be followed by the authority, in particular that it must specify the required information 'in detail', 'as soon as possible after the initiation of

[210] Original footnote: "New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993"
[211] Original footnote: "New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993"
[212] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.53
[213] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.151

the investigation' […]. Thus, there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party"[214].

The Panel reiterated this view one paragraph later: "it is left to the discretion of the investigating authority to specify what information is 'necessary' in the sense of Article 6.8"[215].

Here the Panel:

- explains that Article 6.8 AD provides a direct reference to Annex II;
- gives a first interpretation reading Article 6.8 AD in conjunction with one sentence of paragraph §1 of Annex II;
- uses a second sentence of Article §1 of Annex II to develop its understanding of obligations surrounding "necessary information".

This approach was used in *EC — Salmon (Norway)*, where the Panel, reading Article 6.8 AD and §1 of Annex II together found that: "language suggests that 'necessary information' refers to the specific information held by an interested party that is requested by an investigating authority for the purpose of making determinations"[216].

A second interpretation pattern refers to the context of antidumping investigations. In *Korea — Certain Paper*, the Panel found that: "the decision as to whether or not a given piece of information constitutes 'necessary information' within the meaning of Article 6.8 has to be made in light of the specific circumstances of each investigation, not in the abstract. A particular piece of information that may play a critical role in an investigation may not be equally relevant in another one"[217].

[214] *Ibid.*, §7.155; see too PRUSA Thomas J. / VERMULST Edwin, China – Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States: exporting US AD/CVD methodologies through WTO dispute settlement?, World Trade Review, Vol. 13 (2) 2014, p. 257
[215] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.156
[216] Panel Report, *EC — Salmon (Norway),* WT/DS337/R, §7.343
[217] Panel Report, *Korea — Certain Paper*, WT/DS312/R, §7.43

Here the Panel:

- states that “necessary information” has to be interpreted according circumstances of each investigation and not in abstract;
- explains that an information that is necessary in an investigation may not be in another case.

Therefore, the interpretations of “necessary information” by the Panels and the AB are:

- an essential knowledge or facts, which cannot be done without;
- held by an interested party and requested by an IA, at its discretion, in light of the specific circumstances of each investigation.

2.2.2.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted “necessary information” using the ordinary meaning to be given to the terms of the treaty and the context.

We suggest that some findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting “necessary information” as left to the IA’s discretion, in light of the specific circumstances of each investigation, may conflict with ensuring that the agency's discretion is not unlimited.

A closer look shows the following.

In *Korea — Certain Paper*, the Panel concluded that the “necessary information” for normal value determinations applied particularly to quantities and all aspects of prices of an investigated party’s sales to independent buyers, as well as information relevant to whether those sales were in the ordinary course of trade[218].

In *EC — Salmon (Norway),* the Panel concluded that the “necessary information” was, in the circumstances, specifically required by the IA for the purpose of determining an

[218] *Ibid.,* §7.44

investigated company' filleting costs in order to calculate the investigated company's constructed normal value[219].

In these two reports, the IAs used their discretion to interpret what information was necessary given the specific circumstances. However, a closer look at these examples shows that both cases deal with information that is obviously needed to calculate the normal and the normal constructed value, and that would almost be invariably equally needed in all similar cases.

Therefore, in these two examples, there is no inconsistency between the interpretations by the Panels and the AB and the object and purpose of Article 6.8 AD.

However, in *Egypt — Steel Rebar*, the Panel found that: "we recall that the parties have submitted extensive arguments regarding the validity of the IA's rationale for seeking the detailed cost information. Turkey claims that 'because the basis for initially questioning and then rejecting Turkish respondents' costs was unfounded, resort to facts available was unjustified under Article 6.8 of the Agreement'. On the other hand, we note that the IA justified its request for the cost data as necessary to enable it to determine whether the respondents had made sales of comparison merchandise in the home market at prices that were below the cost of production, in accordance with Article 34 of the Egyptian Regulations. This provision, which essentially mirrors the provisions of Article 2.2 and 2.2.1 of the Anti-Dumping Agreement, allows investigating authorities to construct a normal value if sales of the like product in the domestic market of the exporting country are below costs of production plus SG&A. Egypt argues that the IA was not in a position to make this determination because the required information to enable it to make the determination was not submitted by the respondents in their responses to the initial questionnaire. On its face, this justification for seeking the detailed cost information appears plausible to us, given, as noted, that a below-cost test is explicitly provided for in Articles 2.2 and 2.2.1 of the AD Agreement. Thus, the requested information would seem to be "necessary" in the sense of Article 6.8"[220].

[219] Panel Report, *EC — Salmon (Norway),* WT/DS337/R, §7.344
[220] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.217

Basically, the Panel found that it appeared plausible that the IA required data regarding the sales of comparison merchandise in the home market as "necessary information" on basis of the below-cost test provided in other provisions of the AD. The Panel made this finding although, according to the interested party, the IA was not in possession of the non-submitted information necessary to make this determination. We note that the Panel uses the words "appears plausible" and the conditional form "would seem to be necessary" reviewing the IA's determinations. Therefore, the Panel implies that "necessary information" could also be interpreted differently, but consistently with the legal text.

This finding does not show that the IA's discretion is unlimited. However, it constitutes a clear sign that there are some inconsistencies between the findings of the Panels and those of the AB.

We therefore find that the findings of the Panels and the AB on "necessary information":

- do not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose, in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- do not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine,* of Article 3.2 DSU, Article 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT, which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;
- deem the IA's measure to be in conformity with the AD resting upon one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6(ii) AD) although:
    - not ascertaining if the proper meaning of a provision fits harmoniously with the object and purpose of the treaty;
    - not avoiding interpretations with potentially mutually contradictory, conflicting or competing results;

- not avoiding the application of interpretative tools selectively or in isolation.

2.2.3 Time

According to Article 6.8 AD, *in parte*, in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period […], determinations […] may be made on the basis of the facts available[221].

Three paragraphs of Annex II refer to "reasonable period" with two of them using different wording[222].

According to the first paragraph, the authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available […][223].

According to the third paragraph, all information […] which is supplied in a timely fashion should be taken into account when determinations are made[224].

According paragraph 6 of Annex II, if evidence or formation is not accepted, the supplying party […] should have an opportunity to provide further explanations within a reasonable period […][225].

2.2.3.1 Findings of the Panels and the AB

In *US — Hot-Rolled Steel* the AB interpreted the words "in a timely fashion"[226], referring directly to the words "reasonable period"[227] or "reasonable time"[228] present in other provisions of the AD.

[221] Article 6.8 AD
[222] §§ 1,3,6 Annex II
[223] §1 Annex II
[224] §3 Annex II
[225] §6 Annex II
[226] §3 Annex II
[227] Article 6.8 AD
[228] §1 Annex II

Indeed, the AB found that: "the text of paragraph 3 of Annex II of the *Anti-Dumping Agreement* is silent as to the appropriate measure of 'timeliness' under that provision. In our view, 'timeliness' under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and 6.8, and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, 'upon cause shown', and if 'practicable', these time-limits are to be extended. Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.

That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, "in a timely fashion", in paragraph 3 of Annex II as a reference to a "reasonable period" or a "reasonable time". This reading of "timely" contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines "upon cause shown", if "practicable". In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information"[229].

[229] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §§82-83

Here the AB explains that:

- §3 of Annex II, Articles 6.1.1, 6.8 AD and Annex II taken together establish a coherent framework for the IA's treatment of information submitted by interested parties;
- the words "in a timely fashion" §3 of Annex II as a reference to a "reasonable period" in Article 6.8 AD or a "reasonable time" §1 of Annex II implies the same obligation;
- Article 6.1.1 AD confirming this obligation reinforces the coherence of this framework.

This enabled the AB to make the following finding three paragraphs later: "in determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits fixed by investigating authorities.[230] Instead, Article 6.1.1 and 6.8, and Annex II of the *Anti-Dumping Agreement,* must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account"[231].

Here the AB:

- gives a first reversed understanding of the words "reasonable period of time" using Article 6.8 AD and §1 of Annex II;
- explains that Article 6.8 AD and Article 6.1.1 AD must be read in conjunction;

[230] Original footnote: "[i]ndeed, as we have already noted, *supra*, §73, Article 6.14 of the Anti-Dumping Agreement, provides that: The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement."
[231] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §86

- gives its understanding of these two provisions read together.

In a set of reports, "reasonable period" has been interpreted referring to the general context of the AD investigations.

For instance, in *US — Hot-Rolled Steel*, the AB found: "the word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under Article 6.8 and Annex II of the Anti-Dumping Agreement, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation"[232].

Similarly, In *US — Steel Plate* the Panel found that: "what is a 'within a reasonable period' or 'in a timely fashion' will depend in each case on the facts and circumstances of that case"[233].

In *US — Hot-Rolled Steel*, the AB went further and provided some guidance on how to assess specific circumstances. Indeed, the AB found that: "in sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi)

[232] *Ibid.,* §84
[233] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.76

the numbers of days by which the investigated exporter missed the applicable time-limit"[234].

Here the AB lists which factors, *inter alia*, should be considered in the appreciation of specific circumstances. Although illustrative, these factors have been used in subsequent reports, notably the Panel reports *Korea — Certain Paper*[235] and *EC — Salmon (Norway)*[236], quoting both fully the above-mentioned passage.

In another set of reports, the Panels and the AB have referred to the general balance of the rights and obligations in antidumping investigations in order to interpret "reasonable period".

For instance, in *Egypt — Steel Rebar*, the Panel found that: "it makes clear that the obligation for an investigating authority to provide a reasonable period for the provision of further explanations [§ 6 of Annex II] is not open-ended or absolute. Rather, this obligation exists within the overall time constraints of the investigation. Thus, in determining a 'reasonable period' an investigating authority must balance the need to provide an adequate period for the provision of the explanations referred to against the time constraints applicable to the various phases of the investigation and to the investigation as a whole"[237].

Here the Panel:

- explains that a "reasonable period" is not open-ended or absolute;
- explains that the obligation takes place in the framework of the antidumping investigation;
- interprets "reasonable period" as a balance between the rights and obligations of the parties.

[234] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §85
[235] Panel Report, *Korea — Certain Paper*, WT/DS312/R, §7.49
[236] Panel Report, *EC — Salmon (Norway)*, WT/DS337/R, §7.369
[237] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.282

In *US — Steel Plate*, the Panel expressed a similar idea: "as a previous panel and the Appellate Body have recognized, anti-dumping investigations are subject to an overall time-limit, which necessitates that the investigating authority cannot be expected to continue to accept information indefinitely. […] It is clear, however, that investigating authorities may not arbitrarily stick to pre-established deadlines as the basis of rejecting information as untimely[238]"[239].

Although the Panel did not use the word "balance", the Panel interprets "within a reasonable period" as something between the obligation to close the investigation within a time-limit and the obligation not to stick arbitrarily to pre-established deadlines in order to reject the information.

Therefore, the findings of the Panels and the AB are:

- "reasonable period"[240], "reasonable time"[241] and "timely fashion"[242] refer to the same concept;
- "reasonable time" should be defined on a case-by-case basis, in light of the specific circumstances of each investigation;
- IAs should consider, in the context of a particular case, factors such as:
    - (i) the nature and quantity of the information submitted;
    - (ii) the difficulties encountered by an investigated exporter in obtaining the information;
    - (iii) the verifiability of the information and the ease with which it can be used by the IAs in making their determination;
    - (iv) whether other interested parties are likely to be prejudiced if the information is used;
    - (v) whether acceptance of the information would compromise the ability of the IAs to conduct the investigation expeditiously; and

[238] Original footnote: "Panel Report, *US – Hot-Rolled Steel*, §§7.54-7.55, Appellate Body Report, *US – Hot-Rolled Steel*, §§73-74"
[239] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.76
[240] Article 6.8 AD and §6 Annex II
[241] §1 Annex II
[242] §3 Annex II

- (vi) the numbers of days by which the investigated exporter missed the applicable time-limit;

- "reasonable period" is a balance between the rights of the IAs to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.

2.2.3.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted "reasonable time", "reasonable period" and "timely fashion" using the context.

It appears *prima facie* that the findings are consistent with the object and purpose of Article 6.8 AD. Indeed, the overall list of factors in the framework of the balance between the rights and interests of the parties seems to ensure that the agency's discretion is not unlimited.

A closer look shows the following.

In *Korea — Certain Paper*, the Panel carefully examined each of the six factors mentioned above before concluding that the respondent had not submitted the information within a reasonable period and that therefore the IA was entitled to disregard the respondent's financial statements and resort to facts available[243].

This is a fair example of previous findings used to ensure that the agency's discretion is not unlimited. Indeed, the Panel discusses the issue in the framework of the different factors enumerated by the AB.

Moreover, the Panel's reasoning is a model of clarity when it comes to appreciating the factors in light of the specific circumstances of a case. For instance, regarding the factors of verifiability, the Panel wrote: "we note that the facts at issue in these proceedings are quite different from the facts in *US — Hot-Rolled Steel.* In *US —Hot-Rolled Steel*, the IA requested the respondents to submit within a specific deadline certain information to be used in the IA's dumping margin calculations. Respondents

[243] Panel Report, *Korea — Certain Paper*, WT/DS312/R, §§7.49-7.55

provided the requested information after the deadline, but before verification. The IA considered the submissions to be late and did not verify the belatedly submitted information during verification.[244] In the case before us, the KTC stated that it would need CMI's financial statements during verification, but the Sinar Mas Group failed to provide them. This, in our view, makes this deadline different from an ordinary deadline for the submission of information to the IA. Verification is a critical stage in an anti-dumping investigation where the IA's main objective is to satisfy itself about the completeness and accuracy of the information on which it will later base its determinations. Thus, it would, in our view, be unfair to take the view that in a case such as this one, the KTC had to carry out a second verification visit to verify the belatedly submitted information"[245].

This example shows how specific circumstances are used to interpret the "reasonable period" within the framework of the list of factors, ensuring that the IA's discretion is not unlimited. Therefore, we can conclude that the interpretation of "reasonable period" is consistent with the purpose and object of Article 6.8 AD.

Therefore, we find that the findings of the Panels and the AB regarding "reasonable period", "reasonable time" and "timely fashion" are consistent with the legal mandate.

2.2.4 Verifiable character

According to the third paragraph of Annex II, *in parte*, all information which is verifiable […] should be taken into account when determinations are made[246].

2.2.4.1 Findings of the Panels and the AB

In a set of reports, the Panels and the AB have used the ordinary meaning of the words in their context.

In *US — Steel Plate*, the Panel found, referring itself to the New Shorter Oxford English Dictionary that: "'verifiable' is defined as 'able to be verified or proved to be true.'[247] To

[244] Original footnote: "See, Appellate Body Report, *US — Hot-Rolled Steel*, supra, note 94, paras. 64-69."
[245] Panel Report, *Korea — Certain Paper*, WT/DS312/R, §7.52
[246] §3 Annex II
[247] Original footnote: "New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993"

us, and the parties do not disagree, it seems clear that this entails that the accuracy and reliability of the information can be assessed by an objective process of examination"[248].

Here, the Panel goes further than simply substituting the summarized definition in the legal text to give its interpretation. With the words "by an objective process of examination" that are not part of the dictionary quotation, the Panel directly adds details. These details come from the context of an antidumping investigation. Indeed, sometimes the context has an important role to play supporting the research of the ordinary meaning of the words.

In *EC — Salmon (Norway)*, the Panel referred to the dictionary and directly used the above-mentioned finding of the Panel in *US — Steel Plate*[249].

In *US — Steel Plate*, the Panel answered the question if "verifiable character" should include the possibility of undertaking on-the-spot investigations. In a footnote, the Panel found that: "while the parties have addressed this concept in terms of the 'on the spot' verification process provided for in Article 6.7 and Annex I of the Agreement, we note that such verification is not in fact required by the AD Agreement. Thus, the use of the term in paragraph 3 of Annex II is somewhat unclear. However, Article 6.6 establishes a general requirement that, unless they are proceeding under Article 6.8 by relying on facts available, the authorities shall 'satisfy themselves as to the accuracy supplied by interested parties upon which their findings are based'. 'Verify' is defined as 'ascertain or test the accuracy or correctness of, esp. by examination of by comparison of data etc; check or establish by investigation'. New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993. Thus, even in the absence of on-the-spot verification, the authorities are, in a more general sense of assessing the accuracy of information relied upon, required to base their decisions on information which is 'verified'"[250].

[248] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.114
[249] Original footnote: "New Shorter Oxford English Dictionary, Clarendon Press, 1993"
[250] Panel Report, *US — Steel Plate*, WT/DS206/R, footnote 67

Here we can see how the Panel, starting from a specific question, uses the interpretative method of the ordinary meaning of the words in their context to define the content of the Agreement.

According to this finding, the definition of the word “verifiable” includes the possibility of undertaking on-the-spot investigations, which is not mandatory.

In *Egypt — Steel Rebar*, the Panel referred to different paragraphs of Annex II to interpret “verifiable character”. Indeed, according to the Panel: “as we have noted, paragraphs 3 and 5, in addition to some of the other provisions of Annex II, have to do with assessing whether the information submitted by interested parties must be used. Thus, paragraph 5 is a complement to paragraph 3 and the two must be read together in considering the IA’s obligations in respect of submitted information. In particular, we believe that under the pertinent phrases in these two paragraphs taken together, information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable”[251].

Here Panel explains that various provisions of Annex II deal with the use of the submitted information and, reading §5 and §3 together, the Panel gives its understanding of the word “verifiable”.

In *EC — Salmon (Norway)*, the Panel, using the context, refers to other provisions of the AD and then to specific circumstances. Indeed, the Panel found: “however, in our view, the possibility of undertaking on-the-spot investigations cannot alone be determinative of the question whether submitted information is ‘verifiable’. Because the AD Agreement envisages that there may be other ways to assess the accuracy and reliability of information, the mere fact that a piece of information may have been submitted after an on-the-spot investigation has taken place, does not mean that its accuracy and reliability cannot be objectively assessed through any other process of

[251] Panel Report, *Egypt — Steel Rebar*, WT/DS/211/R, §7.184

verification. This does not mean that all information submitted subsequent to an on-the-spot investigation will always be 'verifiable'. Ultimately, it may well be that information submitted after an on-the-spot investigation has been conducted is not 'verifiable'. However, in our view, this must be a conclusion reached on the basis of a case-by-case assessment of the particular facts at issue, including not only the nature of the information submitted but also the steps, if any, taken by the investigating authority to assess the accuracy and reliability of the information"[252].

Here the Panel gives its interpretation first by stating that other provisions of the AD propose many ways to assess the accuracy and reliability of information, referring to other provisions of the AD. Then, referring to specific circumstances, the Panel concludes that it must be appreciated on a case-by-case basis whether the words "verifiable" information requires an on-the-spot investigation.

Finally, in *Mexico — Steel Pipes and Tubes*, the Panel referred to previous disputes: "in this regard we take the same approach as the Panel in *Egypt – Steel Rebar* in considering that paragraphs 3 and 5 of Annex II together set forth the substantive elements for a justified decision to reject a party's information and resort to facts available.[253] We also note that the Appellate Body's ruling in *US – Hot-Rolled Steel* is consistent with that approach, in that the Appellate Body ruled that investigating authorities 'are not entitled to reject information submitted' if that information meets the conditions in paragraph 3 of being 'verifiable', 'appropriately submitted so that it can be used without undue difficulties', and 'supplied in a timely fashion'[254] . The Panel in *US — Steel Plate* considered that information is verifiable when 'the accuracy and reliability of the information can be assessed by an objective process of examination'[255]. That Panel also found that the term 'undue difficulties' are difficulties 'beyond what is otherwise the norm in an anti-dumping investigation', and that an investigating authority is required by paragraph 6 of Annex II 'to explain the basis of a conclusion

[252] Panel Report, *EC — Salmon (Norway)*, WT/DS337/R, §7.360
[253] Original footnote: "Panel Report, *Egypt — Steel Rebar* §7.159"
[254] Original footnote: "Appellate Body report, *US — Hot-Rolled Steel* at paragraph 81. As in the *Hot-Rolled Steel* case, the fourth condition listed in paragraph 3, that the information is supplied in a medium or computer language requested by the authorities, is not at issue in this dispute."
[255] Original footnote: "Panel Report, *US — Steel Plate*, at footnote 67"

that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties.'[256] Finally, we note in connection with this claim the Panel's characterization as a case-by-case question whether a conclusion that some information fails to satisfy the criteria of paragraph 3 and thus may be rejected can justify the rejection of other information that would, in isolation, have satisfied the criteria of paragraph 3[257], as we view this as an important element of Mexico's argument"[258].

Here the Panel refers to and quotes numerous findings of two other reports to interpret the words "verifiable" and "without undue difficulties". All the findings quoted come from interpretations using the context, except the statement that "undue difficulties" are difficulties "beyond what is otherwise the norm in an anti-dumping investigation", which come from and interpretation according to the ordinary meaning and the last sentence, which is of a mixed nature and difficult to categorize.

Therefore, the findings of the Panels and the AB regarding "verifiable character" are:

- entailing that the accuracy and reliability of the information can be assessed by an objective process of examination;
- including the possibility of undertaking on-the-spot investigations, which is not mandatory;
- information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to "the best of its ability". That is to say, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable;
- it must be appreciated on a case-by-case basis whether the words "verifiable" information requires an on-the-spot investigation.

[256] Original footnote: "*Ibid*., §§7.72 and 7.74"
[257] Original footnote: "Panel Report, *US — Steel Plate*, §7.62"
[258] Panel Report, *Mexico — Steel Pipes and Tubes*, WT/DS331/R, §7.164

2.2.4.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted "verifiable character" according to the ordinary meaning to be given to the terms of the treaty and the context.

We suggest that some findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed:

- interpreting "verifiable character" on a case-by-case basis does not seem *prima facie* to ensure that the IA's discretion is not unlimited; and
- "the best of its ability" test is —at least until further interpretation- equally left to the IA's discretion.

A closer look shows the following.

In *EC — Salmon (Norway)*, the Panel found that the IA was not entitled to reject the information submitted by the respondent more than two months after an on-the-spot investigation and eight days after receiving the information from a sub-contractor[259]. Indeed, according to the IA, the information had to be rejected because the respondent could not support the statements made at a later date during the on-the-spot investigation, although when receiving the information, the IA had indicated that the information submitted "may be re-examined during the definitive stage"[260]. On this issue the Panel found that: "given the absence of any attempt by the investigating authority to assess whether the information submitted by Grieg was 'verifiable', and in the light of the nature of the information submitted, as well as the fact that after receiving the information, the investigating authority had expressly indicated that the question of Grieg's filleting costs continued to be under active consideration, we do not believe there were sufficient grounds for the investigating authority to conclude, on an objective basis, that the information at issue was not 'verifiable'"[261].

[259] Panel Report, *EC — Salmon (Norway)*, WT/DS337/R, §7.361
[260] *Id.*
[261] *Ibid.,* §7.363

This quote shows well how the specific circumstances of one case can be complex. Although in this particular example, the Panel's reasoning seems appropriate and reasonable to us, we cannot deny the possibility that in other future cases, similar complex circumstances may allow many tenable reasonings. Hence, the specific circumstances finding would not concretely limit the IA's discretion.

In *Egypt — Steel Rebar*, the Panel found that an unbiased and objective IA could find that it was within the capacity of the respondents to submit the requested information (particularly the supporting documentation substantiating the reported costs, and the reconciliations of the costs to financial statements): "the information undeniably was at their disposal, and they never argued, or submitted, that it was not, or that for some other reason it would be impossible to provide it, or even that it would cause them some hardship to do so. The fact that other respondents provided most, if not all, of the requested information (particularly concerning scrap costs) also indicates that provision of such information was within the three respondents' ability"[262].

Here applying the best of ability test, the IA and the Panel rely on the fact that the respondents never argued, or submitted, that the information was not at their disposal, or that for some other reason it would be impossible to provide it. This argument seems convincing. However, we note that, arguing that the information is not at disposal, is neither a condition in the legal text nor a finding in a previous Panel or AB report. Therefore, the IA, later confirmed by the Panel, present *prima facie* a fair reasoning adding its own salt. This actually shows how wide the discretion of the IAs is and that, in another cases, a less reasonable newly imposed requirement, could lead to some less fair reasoning. Hence, we see "the best of its ability" test as not really ensuring that the IA's discretion is not unlimited.

[262] Panel Report, *Egypt — Steel Rebar*, WT/DS/211/R, §7.245

We therefore find that the findings of the Panels and the AB regarding "verifiable character":

- does not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- does not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine,* of Article 3.2 DSU, Article 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT, which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;
- find the IA's measure to be in conformity with the AD resting upon one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6 (ii) AD) although:
    - not ascertaining if the proper meaning of a provision fits harmoniously with the object and purpose of the treaty;
    - not avoiding interpretations with potentially mutually contradictory, conflicting or competing results;
    - not avoiding applying interpretative tools selectively or in isolation.

2.2.5 Appropriately submitted so that it can be used in the investigation without undue difficulties

According to the third paragraph of Annex II, *in parte*, all information which is […] appropriately submitted so that it can be used in the investigation without undue difficulties […] should be taken into account when determinations are made[263].

2.2.5.1 Findings of the Panels and the AB

In *US — Steel Plate*, the Panel found that: "the second criterion of paragraph 3 requires that the information be 'appropriately submitted so that it can be used in the investigation without undue difficulties.' In our view, 'appropriately in this context has

[263] §3 Annex II

the sense of 'suitable for, proper, fitting'.[264] That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be 'used without undue difficulties'. 'Undue' is defined as 'going beyond what is warranted or natural, excessive, disproportionate'.[265] Thus, 'undue difficulties' are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities. Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body in the *US — Hot-Rolled Steel* case"[266].

Here the Panel uses the ordinary meaning of the word to discuss what it implies for the parties' obligation to cooperate in the general framework of an antidumping investigation. Basically, the ordinary meaning interpretive method is used as a starting point to support the Panel's general understanding of the parties' obligations under the AD.

In *EC — Salmon (Norway)*[267], the Panel fully quoted the Panel's finding in *US — Steel Plate*[268].

[264] Original footnote: "New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993"
[265] Original footnote: "New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993"
[266] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.72
[267] Panel Report, *EC — Salmon (Norway),* WT/DS337/R, §7.364
[268] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.72

In *Argentina — Poultry Anti-Dumping Duties*, the Panel, uses the context of the other provisions of the AD by absence. The Panel found that: "we do not find any provision in the *AD Agreement* which expressly disallows an investigating authority from imposing basic procedural requirements such as accreditation. We observe that paragraph 3 of Annex II to the *AD Agreement* provides that '[a]ll information which is (…) appropriately submitted so that it can be used in the investigation without undue difficulties (…) should be taken into account when determinations are made.' We consider that the reference to the terms 'appropriately submitted' is designed to cover *inter alia* information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws. In our view, paragraph 3 of Annex II to the *AD Agreement* can be interpreted to mean that information not 'appropriately submitted' in accordance with relevant procedural provisions of WTO Members' domestic laws may be disregarded"[269].

In this example, the Panel, referring to other provisions of the AD explains that there is no provision adding rights or obligations to the content of §3 of Annex II, regarding the words "appropriately submitted […]". Here, we can see that the DSB gives importance to the context referring to other provisions of the AD both when other provisions can give details or when they are silent regarding the interpretation of certain words.

In *US — Steel Plate* the Panel gave its interpretation referring to specific circumstances. The Panel found that: "in our view, it is not possible to determine in the abstract what 'undue difficulties' might attach to an effort to use information submitted. We consider the question of whether information submitted can be used in the investigation 'without undue difficulties' is a highly fact-specific issue. Thus, we consider that it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties"[270].

[269] Panel Report, *Argentina — Poultry Anti-Dumping Duties*, WT/DS241/R, §7.191
[270] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.74

Here the Panel directly states that "without undue difficulties" cannot be determined in abstract and is a highly fact-specific issue without specifying that what constitutes "undue difficulties" in an investigation may not be "undue difficulties" in another case.

Finally, in *Mexico — Steel Pipes and Tubes*, the Panel referred to previous disputes in the same passage quoted above regarding "verifiable character": "in this regard we take the same approach as the Panel in *Egypt – Steel Rebar* in considering that paragraphs 3 and 5 of Annex II together set forth the substantive elements for a justified decision to reject a party's information and resort to facts available.[271] We also note that the Appellate Body's ruling in *US – Hot-Rolled Steel* is consistent with that approach, in that the Appellate Body ruled that investigating authorities 'are not entitled to reject information submitted' if that information meets the conditions in paragraph 3 of being 'verifiable', 'appropriately submitted so that it can be used without undue difficulties', and 'supplied in a timely fashion'[272]. The Panel in *US — Steel Plate* considered that information is verifiable when 'the accuracy and reliability of the information can be assessed by an objective process of examination'[273]. That Panel also found that the term 'undue difficulties' are difficulties 'beyond what is otherwise the norm in an anti-dumping investigation', and that an investigating authority is required by paragraph 6 of Annex II 'to explain the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties.'[274] Finally, we note in connection with this claim the Panel's characterization as a case-by-case question whether a conclusion that some information fails to satisfy the criteria of paragraph 3 and thus may be rejected can justify the rejection of other information that would, in isolation, have satisfied the criteria of paragraph 3[275], as we view this as an important element of Mexico's argument"[276].

[271] Original footnote: "Panel Report, *Egypt — Steel Rebar* §7.159"
[272] Original footnote: "Appellate Body report, *US — Hot-Rolled Steel* at paragraph 81. As in the *Hot-Rolled Steel* case, the fourth condition listed in paragraph 3, that the information is supplied in a medium or computer language requested by the authorities, is not at issue in this dispute."
[273] Original footnote: "Panel Report, *US — Steel Plate*, at footnote 67"
[274] Original footnote: "*Ibid*., §§7.72 and 7.74"
[275] Original footnote: "Panel Report, *US — Steel Plate*, §7.62"
[276] Panel Report, *Mexico — Steel Pipes and Tubes*, WT/DS331/R, §7.164

Here, the Panel refers to and quotes numerous findings of two other reports to interpret the words “verifiable” and “undue difficulties”. All the findings quoted are mentioned above.

Therefore, the findings of the Panels and the AB regarding “appropriately submitted so that it can be used in the investigation without undue difficulties” are:

- information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws;
- as a highly fact-specific issue;
- information which is suitable for the use of an IA in terms of its form, submitted to the correct authorities, etc.;
- without difficulties beyond what is otherwise the norm in an antidumping investigation.

2.2.5.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted “appropriately submitted […]” according the ordinary meaning to be given to the terms of the treaty and the context.

We suggest that some of the interpretations by the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting undue difficulties as a highly fact-specific issue does not seem to ensure that the IA is not unlimited.

A closer look shows the following.

Two of the DSB’s reports deals with the findings that “without undue difficulties” means without difficulties beyond what is otherwise the norm in an antidumping investigation, which depends on specific circumstances. In *US — Steel Plate*, the Panel noted it was undisputed that the information submitted by the respondent (India) to the IA (USDOC)

was not ideal[277]. The respondent suggested that the information submitted could have been corrected and sorted so as to make possible a determination of an export price and so as to allow an appropriate comparison of an export price so determined and normal value based on facts available (*i.e.,* the information in the application) "without undue difficulty"[278]. The IA argued in front of the Panel that it would have required undue efforts to make the necessary corrections[279]. However, the Panel found that the IA: "made absolutely no effort to try to use that information in making its determination of dumping margin. There is nothing in the record brought to our attention to suggest that USDOC even considered such a course of action. In the absence of any decision in this regard by USDOC, we consider it would be inappropriate for us to make our own judgement whether the methodologies proposed by India could have enabled USDOC to use the information submitted without undue difficulties in this investigation"[280].

We see in this report that the Panel avoided answering the delicate question of what is otherwise the norm in an antidumping investigation, which depends on specific circumstances.

In *Mexico — Steel Pipes and Tubes*, the Panel began by reviewing eight issues raised on the submitted data[281] and found the evidence record indicated that the submitted data was fully verified without any difficulties or questions[282]. The Panel then considered three more issues that were raised regarding:

- the constructed value, where the Panel found no recorded evidence of difficulties because the data was obtained and verified on the spot. The investigation report specifies that for at least one element, the IA would correct the database provided by the respondent with the data obtained and verified during the verification visit[283];

[277] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.75
[278] *Id.*
[279] *Id.*
[280] *Id.*
[281] Panel Report, *Mexico — Steel Pipes and Tubes*, WT/DS331/R, §7.165
[282] *Ibid.,* §7.166
[283] *Ibid.,* §7.167

- the freight charges for export sales to Mexico or to third countries, where the Panel also found that data was obtained during the verification and verified on the spot[284];
- the product scope of the data submitted, where the Panel noted that the respondent appropriately submitted data regarding two kinds of pipes because there was no recorded evidence that the IA requested information for anything other than these two products[285].

Finally, the Panel considered the question whether all these issues would undermine the credibility and reliability of the database as a whole as to render that database unusable. The Panel found that: "we do not consider that an unbiased and objective investigating authority could have concluded that the problems listed in […] the Final Determination, when evaluated in the light of the verification report, rendered the data base as a whole unreliable. In this regard, we recall that for a number of the problems referred to in these subparagraphs, we have found no record evidence whatsoever that the cited problems even existed. For the rest, it appears from the verification report that the errors were corrected on the spot without difficulty. […] Rather, in the light of the verification report, it appears to us that Economía applied an unacceptably demanding standard, namely that no error encountered in the data base provided by Tubac, no matter how small, could or would be corrected, even where correct data were obtained and verified during the verification visit"[286].

In this reasoning, the Panel uses the specific circumstances in appropriate manners, mostly by pointing out the absence of issues raised in the IA's verification report. The Panel then concludes that the IA set an unacceptably demanding standard. Basically, the errors encountered during the on-the-spot verification, which would be later corrected by the IA, were not beyond difficulties given what is otherwise the norm in an antidumping investigation. We note that the Panel does not refer to previous dispute to give an example of what would be the norm in antidumping investigation. We agree that in this particular case, the standard of no errors allowed set by the IA is obviously

[284] *Ibid.,* §7.168
[285] *Ibid.,* §7.169
[286] *Ibid.,* §7.171

the most radical one. However, it appears that in future cases, there may well be a wide range of possibilities between the norm and that extreme, which, without references to previous disputes, may well not substantially limit the IA's discretion.

We therefore find that the findings of the Panels and the AB regarding "appropriately submitted so that it can be used in the investigation without undue difficulties":

- does not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- does not fully resolve, according to the specific circumstances, except for convincing reason, the same legal question in the same way as precedent similar cases, that is to say embodying the *acquis* of the WTO dispute settlement system (the first sentence of Article 3.2 DSU);
- does not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine,* of Article 3.2 DSU, Article 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT, which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;
- finds the IA's measure to be in conformity with the AD resting upon one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6(ii) AD) although:
    - not ascertaining if the proper meaning of a provision fits harmoniously with and object and purpose of the treaty;
    - not avoiding interpretations with potentially mutually contradictory and conflicting or competing results;
    - not avoiding applying interpretative tools selectively or in isolation.

2.2.6 Cooperation

According to Article 6.8 AD, in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or

significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available.

Although the word "cooperation" is not mentioned, it underlies this whole provision. Basically, all the listed behaviours are of an uncooperative nature. This is confirmed by the seventh paragraph of Annex II.

According to the seventh paragraph, *in fine*, it is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate[287].

Other paragraphs of Annex II refer to behaviours of a cooperative or uncooperative nature in a similar manner to Article 6.8 AD[288].

2.2.6.1 Findings of the Panels and the AB

In *US — Hot-Rolled Steel*, the Panel and subsequently the AB interpreted "cooperation" according to the ordinary meaning to be given to the terms of the treaty. Indeed, the AB found: "we note that the Panel referred to the following dictionary meaning of 'cooperate': to 'work together for the same purpose or in the same task.'[289] This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal"[290].

Here, the AB refers to the dictionary and quotes the Panel's finding, adding its own understanding on the base of the quoted findings.

In *US — Hot-Rolled Steel*, the AB interpreted "cooperation" using its context and referring to other terms of Article 6.8 AD and Annex II. Indeed, the AB found:

[287] §7 Annex II
[288] For instance: "[…] the interested party has acted to the best of its ability" §5 Annex II; "[i]f a party does not respond in the preferred medium or computer language […]" §3 Annex II
[289] Original footnote: "*The New Shorter Oxford English Dictionary*, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 506; Panel Report, §7.73"
[290] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §99; QIAN, *op. cit.* 2012, pp. 966-967

"paragraph 7 of Annex II does not indicate what *degree* of 'cooperation' investigating authorities are entitled to expect from an interested party in order to preclude the possibility of such a 'less favourable' outcome"[291].

Here the AB, using the context of §7 of Annex II, starts by stating that it does not define the degree of "cooperation" that an interested party can expect.

The AB added: "in that respect, we note that parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*"[292].

Here the AB continues its reasoning in the abstract and uses the semantics of §7 of Annex II to give a first interpretation on the expected degree of "cooperation". From there, the AB discusses the question in the context of other paragraphs of Annex II.

Indeed, according to the AB, §5 of Annex II prevents the agency from disregarding provided information which may not be ideal in all respects if the interested party has acted to "the best of its ability"[293].

The AB further considered that according to §2 of Annex II the agency should not maintain a request for a computerized response if it would result in an unreasonable extra burden on the interested party, *e.g.* it would entail unreasonable additional cost and trouble[294].

[291] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §100; QIAN, *op. cit.* 2012, pp. 966-967
[292] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §99
[293] *Ibid.,* §100
[294] *Ibid.,* §101

According to the AB, this provision is a "detailed expression of the principle of good faith"[295] which "restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable"[296].

Thus, the AB found that: "we, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort –to the 'best of their abilities'– from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters"[297].

This interpretation is consecrated by the AB two paragraphs later: "if the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation"[298].

In this whole example, the AB interprets the word "cooperation" using §7 Annex II negatively, and through semantic reasoning, moves to §2 and §5 of Annex II, and reading them together, draws its conclusion. This shows a complex use of the interpretative method of the context, referring to other terms of Article 6.8 AD and Annex II.

These finding were quoted by the Panel in *Egypt — Steel Rebar*. Indeed, according to the Panel: "we recall that the Appellate Body, in *US — Hot-Rolled Steel*, recognized this principle (although in a slightly different context), stating that 'parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not

[295] *Id.;* QIAN, *op. cit.* 2012, pp. 966-967
[296] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §101
[297] *Ibid.*, §102
[298] *Ibid.*, §104

obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation'[299]"[300].

Later in the same report, the Panel further recalled: "that the Appellate Body stated that the phrase 'to the best of its ability' suggests a high degree of cooperation by interested parties[301], and we agree"[302].

In *US — Hot-Rolled Steel*, the AB referred to other provisions of the AD to interpret "cooperation". According to the AB: "Article 6.13 thus underscores that 'cooperation' is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation"[303].

Here the AB does not explain why Article 6.8 AD and Annex II should be read in conjunction with Article 6.13 AD. Instead, it directly gives its understanding of these two provisions read together on the basis of its comments on Article 6.13 AD.

Therefore, the findings of the Panels and the AB regarding "cooperation" are:

- a process involving joint effort whereby parties work together towards a common goal;
- depending on the specific circumstances and reflecting a careful balance between the interests of IAs and exporters;
- a two-way process involving joint effort.

[299] Original footnote: "Appellate Body Report, *US — Hot-Rolled Steel*, §99"
[300] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.265
[301] Original footnote: "Appellate Body Report, *US – Hot-Rolled Steel*, §100. The Appellate Body further noted in this paragraph that "investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters""
[302] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.243
[303] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §104

2.2.6.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted "cooperation" using the ordinary meaning to be given to the terms of the treaty and the context.

We suggest that some findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting "cooperation" as depending on specific circumstances and reflecting a careful balance between the interests of IAs and exporters does not seem to ensure that the IA is not unlimited.

A closer look shows the following.

In *US — Hot-Rolled Steel*, the AB found that the requested information regarding the cost of one of the respondent's affiliate company was not in possession of the respondent because it resulted from the affiliate's own operations[304]. The respondent made several attempts to request the information from its affiliate and reported the difficulties to the IA. However, the IA did nothing to assist the respondent in overcoming these difficulties, nor did it make allowances for the resulting deficiencies in the information supplied, nor did it request the information to be sent directly to the affiliated and even refused a meeting to discuss this issue[305]. Although in its initial response to the respondent, the affiliate indicated it would provide certain assistance, it finally refused providing any information at the deadline of the questionnaire and further urged the IA, among various petitioners, not to excuse the respondent of the missing information[306]. In its final determination, the IA found that the respondent was not fully cooperative and had not made every effort to obtain and provide the information requested[307]. According to the AB: "against this background, the Panel found that the interpretation of 'cooperate' applied by USDOC [the IA] 'went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II.'[308] The Panel stated that, in 'the absence of a justified conclusion that there was a lack of cooperation', there was no basis, pursuant to that provision, for a result

[304] *Ibid.*, §105
[305] *Ibid.,* §106
[306] *Ibid.,* §107
[307] *Ibid.,* §108
[308] Original footnote: "Panel Report, para. 7.73"

'less favourable' than would have been the case had KSC [the respondent] cooperated.[309] In effect, the Panel held that USDOC's conclusion that KSC failed to 'cooperate' in the investigation did not rest on a permissible interpretation of that word. In light of our own interpretation of the word 'cooperate', and taking account of the circumstances of this case, we agree with the Panel's finding on this issue"[310]. The AB therefore upheld the Panel findings[311].

This example shows how "cooperation" has been interpreted according to specific circumstances, reflecting a balance between the interests of IAs and exporters. Indeed, the AB has performed the balance test in light of the absence of any reaction from the IA toward the respondent raised issue of the impossibility of obtaining the requested information from its affiliate. Then, the AB has confirmed the Panel's findings that the IA did not rest on a permissible interpretation of "cooperation". We note both the reasoning and the outcome appears fair to us. Indeed, given the blocked attitude of the IA, it does not appear another outcome could be sustainable. We do not deny that in future cases, less extreme behaviour on the part of the parties may leave space for different interpretations. However, the balance test between the interests of the IA and exporters seems to ensure that the IA's discretion is not unlimited.

We therefore find that the findings of the Panels and the AB regarding "cooperation":

- may not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- may potentially not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine,* of Article 3.2 DSU, Article 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT,

[309] Original footnote: "*Ibid."*
[310] Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §109
[311] *Ibid.,* §110

which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;

- may potentially find the IA's measure to be in conformity with the AD resting upon one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6(ii) AD) although:
    - not ascertaining if the proper meaning of a provision fits harmoniously with and object and purpose of the treaty;
    - not avoiding interpretations with potentially mutually contradictory, conflicting or competing results;
    - not avoiding to apply interpretative tools selectively or in isolation.

2.2.7 The best of its ability

According to the fifth paragraph of Annex II, even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability[312].

2.2.7.1 Findings of the Panels and the AB

In *Egypt — Steel Rebar*, the Panel interpreted "the best of its ability" using the ordinary meaning of the word and referring to the context. The Panel found that: "considering in more detail the concrete meaning of the phrase to the 'best' of an interested party's ability, we note that the Concise Oxford Dictionary defines the expression "to the best of one's ability" as 'to the highest level of one's capacity to do something'[313] (emphasis added). In similar vein, the Shorter Oxford Dictionary defines this phrase as 'to the furthest extent of one's ability; so far as one can do'. We note that in a legal context, the concept of 'best endeavours' is often juxtaposed with the concept of 'reasonable endeavours' in defining the degree of effort a party is expected to exert. In that context, 'best endeavours' connotes efforts going beyond those that would be considered 'reasonable' in the circumstances. We are of the opinion that the phrase the 'best' of a party's ability in paragraph 5 connotes a similarly high level of effort[314]"[315].

[312] §5 Annex II
[313] Original footnote: "Pages 3 and 128 of The Concise Oxford Dictionary (10th ed)"
[314] Original footnote: "Black's Law Dictionary, Revised 4th Edition, defines "best" as, inter alia: "of the highest quality", and states further that "[w]here one covenants to use his "best endeavours," there is no breach if he is prevented by causes wholly beyond his control and without any default on his part [reference omitted]". "Reasonable" is defined, inter alia, as "ordinary or usual"."
[315] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.244

Here the Panel starts from two dictionary definitions and uses the general legal context to give its understanding of "the best of its ability". We note that although context plays a prominent role in the interpretation process, context is not used independently and is there to support the ordinary meaning interpretative method.

In *Egypt — Steel Rebar*, the Panel interpreted "the best of its ability" using the context and referring to other terms of Article 6.8 AD and Annex II. Quoting paragraphs 3 and 5 of Annex II, the Panel found that: "these two paragraphs together thus provide key elements of the substantive basis for an IA to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead, it must rely on the information submitted by respondents 'when determinations are made'. Some of the elements referred to in these paragraphs have to do with the inherent quality of the information itself, and some have to do with the nature and quality of the interested party's participation in the IA's information-gathering process"[316].

In the same report, the Panel found that: "we believe that under the pertinent phrases in these two paragraphs taken together, information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable"[317].

In *US — Steel Plate*, the Panel referred to a previous report to give its interpretation in a wider context. According to the Panel: "paragraph 5 establishes that information provided which is not ideal is not to be disregarded if the party submitting it has acted to the best of its ability. As the Appellate Body found in *US – Hot-Rolled Steel*, the degree of effort demanded of interested parties by this provision is significant.[318] We are somewhat troubled by the implications of India's view of this provision, which might

[316] *Ibid.,* §7.159
[317] *Ibid.,* WT/DS/211/R, §7.184
[318] Original footnote: "Appellate Body Report, *US — Hot-Rolled Steel*, §102"

be understood to require that information which fails to satisfy the criteria of paragraph 3, and therefore need not be taken into account when determinations are made, must nonetheless 'not be disregarded' if the party submitting it has acted to the best of its ability. We find it difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction"[319].

Later in its report, the Panel quoted the AB again to support its interpretation: "in discussing the obligation on interested parties to cooperate in the information gathering aspect of the investigation, the Appellate Body in *US – Hot-Rolled Steel*, noted that cooperation is a process, commenting that paragraphs 2 and 5 of Annex II of the AD Agreement reflect 'a careful balance between the interest of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters.' However, the Appellate Body further commented that 'cooperation is indeed a two-way process involving joint effort.'[320] Thus, it seems clear to us that investigating authorities must undertake a degree of effort – some degree of 'difficulty' – if needed to be able to use information submitted by an interested party. However, the investigating authorities are not required to undertake extreme measures –that is 'undue' difficulties- in order to use information submitted, any more than the interested parties are required to undertake extreme measures to provide requested information"[321].

Here, the Panel develops its interpretation on the basis of the findings of a previous AB report using the interpretative method of the context.

[319] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.64
[320] Original footnote: "Appellate Body Report, *US — Hot-Rolled Steel*, §§102 and 104"
[321] Panel Report, *US — Steel Plate*, WT/DS206/R, §7.73

Therefore, the findings of the Panels and the AB on “the best of its ability” are:

- efforts going beyond those that would be considered reasonable in the circumstances;
- having to do with the nature and quality of the interested party's participation in the IA's information-gathering process;
- a very significant degree of effort;
- so long as the level of good faith in cooperation by the interested party is high;
- not requiring the interested parties to undertake extreme measures to provide requested information.

2.2.7.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted “the best of its ability” using the ordinary meaning to be given to the terms of the treaty and the context.

We suggest that some of the findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting “the best of its ability” as efforts going beyond those that would be considered reasonable in the circumstances seems *prima facie* to ensure a high degree of discretion.

A closer look shows the following.

In *Egypt — Steel Rebar*, the Panel found that the respondents had not acted to “the best of their abilities” on the following grounds:

- the information undeniably was at their disposal, and they never argued or submitted that it was not, or that for some other reason, it would be impossible to provide it, or even that it would cause them some hardship to do so[322];
- the fact that other respondents provided most, if not all, of the requested information (particularly concerning scrap costs) also indicates that submitting such information was within the three respondents' ability[323];

[322] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §§7.245-7.246
[323] *Id.*

- none of the three respondents attempted to rectify the deficiencies identified by the IA in a second request to gather the "necessary information"[324].

For all these reasons the Panel found that an unbiased IA could have found that the respondents failed to provide the "necessary information" according Article 6.8 AD.

Here, the Panel appreciates the behaviour of the respondents in order to find which high level of effort would be considered reasonable in the circumstances. We note that the behaviour of the respondents, that is to say the absence of raising any issue or rectifying the IA's request, is quite clear and does not really allow more than one sustainable outcome. Therefore, the interpretation of "the best of its ability" according the level of effort which would be considered reasonable in the circumstances seems appropriate in this case. However, we do not deny that in future cases, a less extreme behaviour of the parties may leave space to different interpretations. A comparison with the level of effort which would be considered reasonable in the circumstances would then potentially not always ensure that the IA's discretion is unlimited.

A contrario, other findings of the Panels and the AB on "the best of its ability" seem compatible with the object and purpose of Article 6.8 AD.

Indeed, in *Egypt — Steel Rebar*, the Panel reviewed the behaviour of two categories of respondents. Regarding the first category, the complete reasoning is exposed *supra*[325]. Regarding the second category, the respondents submitted complementary information after a second request by the IA stating the problems with the originally-submitted cost data and establishing the standard for verifiability[326]. A follow-up request showed that the complementary information submitted was largely complete. The final pieces of information were then submitted within the deadline. The IA did not request further information, nor did it complain about the information submitted. However, in its final determination, the IA rejected the submitted cost information on the grounds that the IA was still not convinced that the cost data reflected hyperinflation.

[324] *Ibid.,* §7.247
[325] *Ibid.*, §§7.245-7.247
[326] For all § Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.265

The Panel found: "that here is no indication whatsoever that the IA considered either of these companies to have failed to act to the best of its ability. Nevertheless, the IA rejected the submitted cost information on the grounds that the IA still was not convinced that the cost data reflected hyperinflation – that is, in effect, it simply did not believe the costs reported by these companies, although the information they submitted complied fully with what the IA itself had defined as necessary to verify those costs. The IA failed to inform these companies that it was rejecting the information submitted in response to the 19 August and 23 September requests, and failed to give them an opportunity to provide further explanations"[327].

The Panel applies here the findings that "the best of its ability" has to do with the nature and quality of the interested party's participation in the IA's information-gathering process, that means so long as the level of good faith in cooperation by the interested party is high. Moreover, the reasonings of the Panel regarding the two categories of respondents show that there is not really any other tenable outcome. Therefore, we see these two findings as consistent with the purpose of Article 6.8 AD, that is to say ensuring that the IA's discretion is not unlimited.

We therefore find that the findings of the Panels and the AB regarding "the best of its ability":

- may not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- may potentially not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine*, of Article 3.2 DSU, Articles 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT, which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;

[327] *Id.*

- may potentially find the IA's measure to be in conformity with the AD resting on one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6(ii) AD) although:
    - not ascertaining if the proper meaning of a provision fits harmoniously with and object and purpose of the treaty;
    - not avoiding interpretations with potentially mutually contradictory, conflicting or competing results;
    - not avoiding to apply interpretative tools selectively or in isolation.

2.2.8 With special circumspection

According to the seventh paragraph of Annex II, if the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation[328].

2.2.8.1 Findings of the Panels and the AB

In *Mexico — Anti-Dumping Measures on Rice,* the AB qualified the IAs' duty to check, where practicable, the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation, as an active approach[329].

In *Egypt — Steel Rebar*, the Panel interpreted "with special circumspection" using the context. The Panel reviewed the Egyptian IA's estimation of the five per cent monthly rate of inflation in Turkey during the investigation period. The Panel found that on the basis of the evidence of record, an objective and unbiased IA would have reached a similar conclusion. In this context the Panel added that: "in this regard, it should be emphasized that applying 'special circumspection' does not mean that only one

[328] §7 Annex II
[329] Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/AB/R, §289

outcome is possible on a given point in an investigation. Rather, even while using special circumspection, an investigating authority may have a number of equally credible options in respect of a given question. In our view, when no bias or lack of objectivity is identified in respect of the option selected by an investigating authority, the option preferred by the complaining Member cannot be preferred by a panel"[330].

Here, the Panel interprets "with special circumspection" using the context referring to the specific circumstances of a concrete case.

A similar reasoning can be found in the Panel report *Korea — Certain Paper.* Here the Panel, reviewing the Korean IA's decision to apply an interest rate calculated from a production company indistinctly to a trading company and without explanation found regarding the "special circumspection" requirement of §7 of Annex II, that: "we do not consider that there are strict rules that the investigating authorities have to follow in determining the financial expenses of different kinds of companies on the basis of facts available. […] [Therefore] the need for an explanation became, in our view, even more important in the circumstances of the proceedings at issue"[331].

Here, the Panel clearly starts from a specific case to interpret "with special circumspection" using the context and referring to the special circumstances. This example is, however, subtler than the previous one. Indeed, the Panel does not mention the words "special circumspection". Instead, reference is made directly to their content with the words "rules that the investigating authorities have to follow in determining […]".

Therefore, the findings regarding "with special circumspection" of the Panels and the AB are:

- an active approach;
- depending on the circumstances of the proceedings;

[330] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.305
[331] Panel Report, *Korea — Certain Paper,* WT/DS312/RW, §VI.47

- which can result in a number of equally credible options.

2.2.8.2 Consistency of the findings with the legal mandate

We therefore find that the Panels and the AB have interpreted "with special circumspection" using the context.

We propose that the findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting "with special circumspection" as depending on the circumstances of the proceedings, which can result in a number of equally credible options, does not seem *prima facie* to limit the IA's discretion.

In *Egypt — Steel* Rebar, the Panel reviewed the IA's estimation of the five per cent monthly inflation rate in the respondent's domestic economy during the investigation period. The Panel found that on the basis of the evidence of record, an objective and unbiased IA could have reached a similar conclusion. In this context the Panel added that: "in this regard, it should be emphasized that applying 'special circumspection' does not mean that only one outcome is possible on a given point in an investigation. Rather, even while using special circumspection, an investigating authority may have a number of equally credible options in respect of a given question. In our view, when no bias or lack of objectivity is identified in respect of the option selected by an investigating authority, the option preferred by the complaining Member cannot be preferred by a panel"[332].

This example clearly shows that the evidence of record can be appreciated in different ways to answer a given question. The IA does not have complete discretion in its appreciation of the evidence of record. The different options must be equally credible in order to be chosen.

However, according to §7 of Annex II, when culling necessary information from secondary sources, the authorities should, where practicable, check the information from other independent sources at their disposal such as published price lists, official import statistics and customs returns, and from the information obtained from other

[332] Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.305

interested parties during the investigation. Depending on how active the IA is in its approach, the outcome and the number of credible options may vary significantly. In such cases the IA could have relatively wide, although not unlimited, discretion to choose its preferred option.

For instance, in the foregoing example, estimating foreign domestic inflation is *per se* a complex task where the outcome may vary significantly according to the data at disposal. The outcome of the estimation of the inflation on the BIA basis will depend on how active the IA is in its approach when gathering comparable information from other independent sources at its disposal. Therefore, the aforementioned circumstances will ensure that the IA has relatively wide discretion.

We therefore find that the findings of the Panels and the AB regarding "with special circumspection":

- does not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- may not fully adopt an analytical methodology or structure appropriate for the resolution of the matters in order to make findings through an objective assessment of the relevant matters, (the second sentence, *in fine*, of Article 3.2 DSU*);*
- does not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine*, of Article 3.2 DSU, Article 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT, which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;
- does find the IA's measure to be in conformity with the AD resting on one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6(ii) AD) although:

- not ascertaining if the proper meaning of a provision fits harmoniously with and object and purpose of the treaty;
- not avoiding interpretations with potentially mutually contradictory, conflicting or competing results;
- not avoiding to apply interpretative tools selectively or in isolation.

3. Are the findings of the Panels and the AB reasonable from an economic perspective?

Economic analysis of law answers two basic questions about the legal rules[333]:

- What are the effects of legal rules on the behaviour of relevant actors?
- Are these effects socially desirable?

According to the classical conception, answering these questions is done using economic analysis[334]:

- the behaviour of economic actors is described assuming they are forward-looking and rational; and
- the social desirability is reviewed in the framework of welfare economics[335].

The rationale of the economic analysis of law is that: "social policies, notably, legal rules, should be selected entirely with regard to their effects on the well-being of individuals. Accordingly, notions of fairness, such as corrective and retributive justice, should receive no independent weight in policy assessment"[336].

Indeed:

- because fairness gives weight to factors other than individual's well-being, fairness will —at least in symmetric cases- reduces individual's welfare[337]. Indeed, if individual's well-being is superior under one policy and inferior in another, the former policy is deemed to be superior[338]. Therefore, in symmetric

[333] KAPLOW Louis / SHAVELL Steven, Economic Analysis of Law, NBER Working Paper Serie, Working Paper 6960, National Bureau of Economic Research, Cambridge 1999, p. 1
[334] *Id.*
[335] *Id.*
[336] KAPLOW Louis / SHAVELL Steven, Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice, NBER Working Paper Serie, Working Paper 9622, National Bureau of Economic Research, Cambridge 2003, p. 1; KAPLOW Louis / SHAVELL Steven, Fairness Versus Welfare, Harvard University Press 2002
[337] KAPLOW / SHAVELL, *op. cit.* 2003, pp. 3-4
[338] *Ibid.,* footnote 5, see too p. 5

settings [339], a policy shall be assessed exclusively under the welfarist approach[340];

- the notion of fairness lacks rationale. Indeed, according to KAPLOW and SHAVELL, moral philosophers and legal scholars rely on the need "to restore some sort of moral balance in the world" which is "more a conclusory metaphor than anything else", thus representing little economic value for individuals[341]. However, one can suggest that some notion of fairness may enhance social cohesion that in turn may lead to less violent societies;
- the notion of fairness adopts an *ex-post* perspective regarding facts and punishment. Doing so, the notion of fairness undervalues the possibility of false-positives and false-negatives as well as the general incentives effects of law on the behaviour of individuals. Hence, the notion of fairness can only lead to an incomplete policy assessment disregarding individual's well-being[342];
- most notions of fairness are non-consequentialist, that is to say they focus on the principle as an ideal and not on its results. Consequently, a policy may be deemed appropriate when the outcome is of little social value[343]. However, some notions of fairness may be consequentialist, as it is occasionally the case in tax law for instance;
- the intuitive appeal of the notion of fairness over the strictly welfarist approach can be explained as involving social norms[344]. Indeed, the notion of fairness generally reflects social norms like keeping promises or holding wrongdoers accountable. Since these social norms act as important guides in on our everyday life and opportunist choices, we tend to consider the notion of fairness as always socially desirable[345];

[339] "The reason, in brief, has to do with the need for impartiality: One could, for example, favor "might makes right" as a general rule if one was unusually mighty, but if one is forced to assume that just as often someone else will be mightier, one would reject such a rule." KAPLOW / SHAVELL, *op. cit.* 2003, p. 5
[340] KAPLOW / SHAVELL, *op. cit.* 2003, p. 5
[341] *Ibid.,* p. 6
[342] *Id.*
[343] *Ibid.*, p. 7
[344] *Id.*
[345] *Id.*

- however, distinction should be made between everyday life guides and efficiency of the legal system, the *raison d'être* of which is to repress and prevent harmful activities[346].

We will largely focus on the developments of economic theory of adjudication and litigation, that is to say the papers of KAPLOW, SHAVELL, POLINSTKY, SPIER, SANCHIRICO and RUBINFELD[347]. Although their writings are often influenced by POSNER[348], and to some extent BECKER[349], these two authors have mostly written at the social theory level[350], which cannot be compared to the systematic concrete writings of KAPLOW and SHAVELL in particular, regarding legal process.

We further note that there is an extensive myriad of other authors —time will tell which ones will be remembered- who present an economic analysis of various aspects of legal process. However, most of these authors lack something of the general and systematic approach found in the theories of the above-mentioned authors, which are needed to achieve a more grounded assessment.

3.1 Economic theory of adjudication and litigation

3.1.1 Margin of discretion

3.1.1.1 Rationale

One of the most common features of any rule-based system is that those who apply the rules —commonly referred as adjudicators-, enjoy some power of discretion to perform their task[351].

[346] *Ibid.*, p. 8
[347] *Cf. infra* for all these authors
[348] Mostly from POSNER Richard A., Economic analysis of law, Brown, first published in 1972 and subsequent papers on legal process for instance POSNER Richard A., An Economic Approach to the Laws of Evidence, Stanford Law Review 51 1999, especially pp. 1502-1515
[349] BECKER Gary S., Crime and Punishment: An Economic Approach, Journal of Political Economy, Vol. 76 (2) 1968, pp. 169-217
[350] POSNER Richard A., Gary Becker's Contributions to Law and Economics, The Journal of Legal Studies, Vol. 22 (2) 1993, p. 211; "Becker's greater significance for the law and economics movement lies elsewhere than in his "law and economics" papers. It lies in general economics, in economic methodology, and in personal influence and example" *Ibid.,* p. 211
[351] SHAVELL Steven, Optimal Discretion in the Application of Rules, Harvard Law School, Discussion Paper No. 509 03/2005, Cambridge 2005, p. 1; SHAVELL Steven, On Discretion in the Application of Rules, American Law & Economics Association Annual Meeting, Paper 50 2004, p. 1 (SHAVELL, *op. cit.* 2004a thereafter)

This feature seems to be axiomatic since Aristotle (or before): “not but that there are even now some particular magistrates invested with supreme power to decide, as judges, those things which the law cannot, as being one of those cases which comes not properly under its jurisdiction; for of those which can there is no doubt: since then laws comprehend some things, but not all, it is necessary to enquire and consider which of the two is preferable, that the best man or the best law should govern; for to reduce every subject which can come under the deliberation of man into a law is impossible”[352].

The common understanding of the rationale for granting discretion to adjudicators is quite straightforward. Basically, it enables them to use information which is not included in the rule to make a decision which would be desirable to reflect in society[353].

Indeed, it is generally assumed that the social welfare of a decision depends on two variables[354]:

- the included variable, which reflects what is in the rule, for instance if the defendant stole a car or not;
- the non-included variable, which reflects the margin of discretion left to the adjudicators. Typical examples of discretion include the appreciation of personal qualities in an interview or the appreciation of the degree of remorse shown by a criminal in front of the court.

Granting discretion to adjudicators allows them to make decisions which reflect the unincluded variable. Indeed, adjudicators are assumed to be able to observe this variable[355].

[352] ARISTOTLE, Politics, Book III, Chapter XVI
[353] SHAVELL, *op. cit.* 2005, p. 2
[354] *Ibid.,* pp. 1-2 and 5; SHAVELL, *op. cit.* 2004a, p. 7
[355] SHAVELL Steven, *op. cit.* 2005, pp. 1-2

However, we note that, although discretion is virtually present in almost all decisions, there may be some cases where the permissible scope of decisions is just one. In those cases, the adjudicators have no margin of discretion: their function is limited to verification[356]. *A contrario*, if adjudicators are able to make a choice, they are said to have a margin of discretion[357].

3.1.1.2 Effects and social desirability

We have just explained that discretion enables adjudicators to use additional information —the unincluded variable- to make decisions[358]. However, it is commonplace to say that additional information, or unincluded variable, may not influence decisions in a socially desirable way[359]. For instance, the goals of adjudicators may be different from those of a society[360].

The question therefore arises when it is socially desirable to allocate some margin of discretion to adjudicators and if so, how much.

We saw *supra* that the level of social welfare depends on two variables[361]:

- the included variable; that is, the content of the rule; and
- the unincluded variable; that is, the content of the margin of discretion.

The social welfare of a decision depends on these variables because of their effects on incentives[362].

To find whether the margin of discretion is socially desirable and, if so, to what extent, we must compare the expected welfare under the best-defined rule, that is, a rule excluding all discretion power, with the expected welfare under the best rule allowing some power of discretion[363]. In other words, some margin of discretion enhances social

[356] SHAVELL, *op. cit.* 2004a, p. 8
[357] *Ibid.,* pp. 1-2
[358] *Cf. supra*, 3.1.1.1 Rationale
[359] SHAVELL, op. cit. 2005, p. 6
[360] *Ibid.*, p. 1
[361] SHAVELL, *op. cit.* 2004a, p. 7; SHAVELL, *op. cit.* 2005, p. 5
[362] SHAVELL, *op. cit.* 2005, footnote 6
[363] SHAVELL, *op. cit*. 2004a, p. 9

welfare when its advantages outweigh its disadvantages. The desirable extent of the margin of discretion is given by the optimal ratio between the advantages and the inconveniences.[364]

The main advantage of some margin of discretion lies in allowing unincluded variables to be considered in the decision-making process[365]. Indeed, such variables may not be included in the rule for two reasons[366]:

- first, it is assumed that adjudicators may not be systematically able to observe and verify certain variables for cost and/or practicability reasons. For instance, on-the-spot verifications may be too time consuming to organize or costly to be the standard or it may not be practicable for an appeals authority to review the complete testimonies presented during the first adjudication in every appeal process[367];
- secondly, the drafters of the rules may not have had the time or imagination to foresee and describe all the possible content of the rule. For instance, consider a rule which limits maximum speed on a road, except in cases of emergency. The drafters may not have had the time or ability to describe in detail all the possible emergency circumstances included in the rule[368].

Considering the foregoing, it appears obvious that a substantial amount of information, which is not included in the rule, is nonetheless relevant to the decision process.

Hence, granting some margin of discretion to adjudicators represents a useful way to make decisions that potentially enhance social welfare[369].

[364] SHAVELL, *op. cit.* 2005, p. 2
[365] SHAVELL, *op. cit.* 2004a, p. 15
[366] *Id.*
[367] *Ibid.*, pp. 16-17
[368] *Id.*
[369] *Ibid.*, p. 19

The disadvantage of some margin of discretion is what one might call discretionary deviations, which happen when adjudicators use or ignore information of the unincluded variable to favor a different objective than social welfare[370].

Different reasons may motivate discretionary deviations:

- first, adjudicators are individuals who have the same characteristics as other individuals, including personal political views on what social welfare is;
- secondly, adjudicators may lack the necessary information to correctly identify what social welfare is;
- finally, adjudicators may favor personal interests over social well-being, for instance in cases of corruption[371].

Considering the foregoing, it appears that the ratio between the advantages and disadvantages, that is, the social desirability of some margin of discretion, depends on whether adjudicators use their margin of discretion to aim for social welfare.

Hence, the social desirability of some margin of discretion must be assessed in each case considering the particular circumstances.

3.1.1.3 Remedies

Consider now how some margin of discretion may be limited in achieving the desired ratio between advantages and inconveniences in order to maximize social desirability.

Discretionary deviation —that is when adjudicators use or ignore information of the unincluded variable to favor a different objective than social welfare[372]- may be limited in practice in different ways:

- limiting the scope of discretion;
- using standards instead of rules;

[370] SHAVELL, *op. cit.* 2005, p. 2; see too 3.1.1.3 Remedies, for how the power of discretion may be limited in order to achieve the desired ratio between advantages and inconveniences
[371] SHAVELL, *op. cit.* 2004a, p. 20
[372] *Cf. supra*, 3.1.1.2 Effects and social desirability

- through decision-based incentives;
- through monitoring;
- through the appeals process[373].

3.1.1.3.1 Limiting the scope of discretion

Basically, limiting the scope of discretion is achieved by specifying the set of permissible decisions which the adjudicators may make within the rule, that is to say, the included variable[374]. In other words, the rule will contain additional details regarding which decisions are possible and which are not.

The social desirability of limiting the scope of discretion depends on whether social welfare increases or decreases assuming adjudicators comply with the new rules[375].

Last but not least, it is worth noting that although limiting discretion may be useful to prevent discretionary deviation, the effect is sharp: the new scope may definitely exclude a set of possibly socially desirable decisions from adjudication[376].

3.1.2.3.2 Using rules instead of standards

A standard can be defined as a statement, principle or policy that is intended to guide discretion without constituting a rule.[377]

For instance, the words “in case of emergency” refer to a general concept aiming to guide discretion without having a clear meaning. Indeed, the meaning of “emergency” depends on the particular circumstances and which situations constitute a case of emergency is left to the discretion of adjudicators.

[373] SHAVELL, *op. cit*. 2004a, pp. 21-32
[374] *Ibid.*, p. 21
[375] *Id.*
[376] *Ibid.*, pp. 21-22
[377] *Ibid.*, p. 22

The distinction between rules and standards depends on whether the law is given content *ex ante* or *ex post* an individual's act[378]:

- in rules, the content of the law is given before an individual's act occurs; individuals and adjudicators know which conduct is permissible or not before the individual's activities, leaving the sole verification of factual issues to adjudicators[379]. The typical example is a rule prohibiting driving faster than a fixed speed on the road. Adjudicators will verify only if the individual has exceeded this speed or not;
- *a contrario*, in standards, the law is given content by the adjudicators in their decision after an individual act occurred. In such a case, individuals and adjudicators do not clearly know which conduct is permissible before the case happens, leaving both the verification of facts and legal details to the decision of the adjudicators[380]. The typical example is a rule prohibiting driving more than a fixed speed on the road except in cases of emergency. Adjudicators will verify the facts and decide what is an emergency or not in the particular circumstances.

The advantages of standards over rules include the following:

- standards are deemed to better capture the drafters' intent regarding what behaviour is allowed or prohibited, enhancing the social welfare. Indeed, law generally contains a lot of non-clearly defined terms, like reasonableness, balancing tests expressed in general terms and the like, which are better regarded as standards than rules[381];
- Some content of law simply cannot feasibly be promulgated as rules. For instance, a command forbidding construction that does not fit the aesthetic of

[378] *Ibid.*, p. 24; KAPLOW Louis, Information and the Aim of Adjudication: Truth or Consequences, Stanford Law Review, Vol. 67 (6) 2015, pp. 1308-1309
[379] KAPLOW / SHAVELL, *op. cit.* 1999, p. 62
[380] *Id.*
[381] SHAVELL, *op. cit.* 2004a, p. 25

the surrounding area would require hundreds of rules to approximates what standards make obvious in one sentence[382];

- moreover, standards are often more economical to promulgate than rules because the drafters do not need to foresee all the possible circumstances where the law applies. Indeed, as we have just explained, using standards, the law will typically contain an inferior degree of details than using rules[383];
- standards are deemed easier than rules to keep up-to-date[384]. Indeed, as individual's acts, desired behaviours and consequently the desired content of law changes over time, standards can more easily follow this evolution because they are given content accordingly *ex post* the individual's act.

Disadvantages of standards over rules typically include the following:

- under standards, individuals are generally uncertain about the content of the law implying greater cost to gather information before the individual act as well as after in front of the adjudicators[385]. We will analyze these effects and their desirability in details while reviewing the effects on potential parties' behaviours[386];
- Giving content to the law *ex post* the individual's act implies greater costs for adjudicators than under rules[387]. Indeed, defining what is the law typically requires time consuming reasoning, explanations, precedent cases and doctrinal researches which are less important when adjudicators simply verify factual circumstances under the rules.

Depending the strength of the precedent effect in a legal system, the differences between rules and standards tend to decrease with time, without disappearing[388].

[382] KAPLOW Louis, Rules versus Standards: An Economic Analysis, Duke Law Journal, Vol. 42 (3) 1992, p. 16
[383] SHAVELL, *op. cit.* 2005, p. 20; KAPLOW / SHAVELL, *op. cit.* 1999, p. 62
[384] KAPLOW, *op. cit.* 1992, p. 22
[385] *Ibid.,* p. 5
[386] *Cf. infra*, 3.1.3 Litigation
[387] KAPLOW, *op, cit.* 1992, p. 5
[388] *Ibid.,* p. 9

Indeed, precedent cases generally contain useful information for future decisions enhancing the predictability of the legal system[389].

The frequency to which individual's acts are brought into adjudication plays an important role in the desirability of rules over standards[390]. Indeed, promulgating a law through a standard, which is economical, can be especially appropriate when the individual's acts occur at a low frequency. In such case, the cost associated to giving content to the law by the adjudicators will occur at a low frequency as well.

Another important factor influencing the desirability of rules over standards is the appropriate level of details contained in both of them. The literature considers whether a complex standard is preferable to a simple rule and *vice versa*[391]. Indeed, where a simple rule is more appropriate than a simple standard, the opportunity to use a complex standard instead of a simple rule deserves consideration.

The social desirability of rules over standards depends on if the social welfare increases or decreases assuming adjudicators use the former over the latter taking into account all the foregoing factors[392].

Moreover, the level of social welfare under rules over standards depends on the probability that decisions under rules will be socially desirable and the importance of this and *vice versa*[393].

3.1.1.3.3 Through decision-based incentives

Another indirect way to limit the discretionary deviation is by giving adjudicators concrete incentives to make socially desirable decisions[394].

[389] SPIER Kathryne, Litigation, in POLINSKY A. Mitchell / SHAVELL Steven, Handbook of Law and Economics, vol. 1, Elsevier 2007, p. 298
[390] KAPLOW, *op. cit.* 1992, p. 9
[391] *Ibid.,* p. 12
[392] *Cf. supra* per analogy
[393] *Id.*
[394] SHAVELL, *op. cit.* 2004a, pp. 25-27

Incentives may, for instance, include promotional possibilities in case of socially desirable decisions or, *a contrario*, any disadvantages in case of socially undesirable ones.

We note that except for the fact that adjudicators may wish to please the reviewing authority for promotional possibilities, we do not know any legal system using systematically decision-based incentives to enhance efficiency of the legal system.

3.1.1.3.4 Through monitoring

Discretionary deviation may be limited through monitoring adjudicators, that is to say by random checks made by another authority[395]. Any discretionary deviation spotted may be the object of a sanction.

The main disadvantages of this method are:

- the costs implied by statistical monitoring[396];
- discretionary deviation can only be limited when spotted by the reviewing authority, except for the fact that in case of sanction, the prospect of liability may have an incentive effect on adjudicators[397].

We note that we do not know any legal system that systematically uses this method to enhance the efficiency of the legal system.

3.1.1.3.5 Through the appeals process[398]

Last but not least, the appeals process provides a useful way to prevent discretionary deviation. Indeed, the appeals process, that is to say when a disappointed litigant may submit the decision to a reviewing authority:

- can change or nullify the decision that is the object of discretionary deviation;

[395] *Ibid.,* p. 27
[396] *Ibid.,* p. 31
[397] *Id.*
[398] *Cf. infra*, 3.1.3.4 The appeals process, for a more complete economic theory of the appeals process

- may play as incentive for adjudicators to make a socially desirable decision[399].

The difference with monitoring is that the appeal is triggered by disappointed litigants at a random frequency[400]. Because disappointed litigants tend to spot potential discretionary deviations, the appeals process is generally more efficient than monitoring[401].

Therefore, the appeals process presents an economic method to limit discretionary deviation.

Similar to monitoring, the disadvantage of the appeals process is that discretionary deviation can only be corrected when submitted to the appeals authority, except for the fact that in case of sanction, the prospect of liability may have an incentive effect on adjudicators[402].

3.1.2 Burden of proof

3.1.2.1 Rationale and classical conception

The burden of proof is a central feature of adjudication[403]. Basically, notion of the burden of proof addresses two questions when adjudicators do not participate in the research of evidence[404]:

- which party is responsible —has the burden- for submitting evidence to adjudicators[405];
- what is the evidence threshold over which adjudicators will assign liability when assessed evidence exceeds the designated threshold[406].

[399] SHAVELL, op. cit. 2004a, pp. 28-29
[400] *Id.*
[401] *Id.*
[402] *Ibid.,* p. 31
[403] KAPLOW Louis, Burden of Proof, Yale Law Journal, Vol. 121 (4) 2012, p. 856 (KAPLOW, *op. cit.* 2012a hereafter)
[404] POSNER, *op. cit.* 1999, p. 1502
[405] *Id.*
[406] KAPLOW, *op. cit.* 2012a, p. 742; KAPLOW Louis, Optimal Design of Private Litigation, Journal of Public Economics, Vol. 155 2017, p. 70

The first question is generally quite straightforwardly answered by the rule itself or the general principles governing a legal system. For instance, in civil litigation, for obvious economic reasons, parties generally have to submit evidence showing that their claims are more likely true[407]. The burden of proof then shifts accordingly to the other parties. Note that, in case of doubt, a party can always submit evidence supporting its claims.

The second question, that is, the evidence threshold, is much more complex and a major feature in adjudicatory systems design[408].

Under the intuitive approach, it is almost unavoidable to consider the 50 percent requirement attractive. Indeed, other focal points between 0 percent and 100 percent seem to *a contrario* represent little intuitive self-justification[409].

Under the classical approach, adjudicators assigning liability to individuals when the likelihoods that the act in front of the court is of a harmful type exceeds 50 percent, is called the preponderance rule[410].

The preponderance rule governs the stringency of the burden of proof in many adjudication systems. For instance, under United States civil litigation, the plaintiff shall prove that the defendant's liability is more likely than not, that is beyond the 50 percent threshold[411].

According to the AB in *US — Wool Shirts and Blouses*: "it is a generally-accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other

[407] POSNER, *op. cit.* 1999, p. 1502
[408] KAPLOW Louis, Optimal Proof Burdens, Deterrence, and the Chilling of Desirable Behavior, The American Economic Review, Vol. 101 (3) 2011, p. 277
[409] KAPLOW, *op. cit.* 2012a, pp. 744-745
[410] *Ibid.,* pp. 744-782; SPIER, *op. cit.* 2007, p. 285; KAPLOW Louis, On the Optimal Burden of Proof, NBER Working Paper Serie, Working Paper 17765, National Bureau of Economic Research, Cambridge 2012, p. 13 (KAPLOW, *op. cit.* 2012b thereafter); for a discussion of the preponderance rule and probability see POSNER, *op. cit.* 1999, especially pp. 1502-1515
[411] KAPLOW, *op. cit.* 2012a, p. 742

party, who will fail unless it adduces sufficient evidence to rebut the presumption."[412] This finding is widely accepted in literature[413].

We note that in some systems, under the preponderance rule, the threshold may be higher than 50 percent. For instance, the so-called "beyond of doubt" requirement of most criminal legal systems, the threshold will tend to be 100 percent without reaching such value[414].

Until KAPLOW[415], prior literature largely discussed different issues under the classical burden of proof conception, including the resources devoted to the presentation of evidence and various economic effects[416]. However, none of these discussions present a systematic economic approach of the burden of proof at the level of incentives[417].

[412] Appellate Body Report, *US — Wool Shirts and Blouses*, WT/DS33/AB/R
[413] ROVNOV, *op. cit.* 2015, p. 184; COPPENS Dominic, WTO Disciplines on Export Credit Support for Agricultural Products in the Wake of the US – Upland Cotton Case and the Doha Round Negotiations, Journal of World Trade, Vol. 44 (2) 2010, p. 360; KANG Jing, The Presumption of Good Faith in the WTO 'As Such' Cases: A Reformulation of the Mandatory/Discretionary Distinction as an Analytical Tool, Journal of World Trade, Vol. 46 (4) 2012 , footnote 33 p. 907; WEBER Rolf H. / GROSZ Mirina, Governments' Interventions into the Real Economy under WTO Law Revisited: New Tendencies of Governmental Support of the Automobile Industry, Journal of World Trade, Vol. 43 (5) 2009, p. 1008; REYNOLDS Kara M. / RIGOD Boris, Russia–Tariff Treatment: Identifying Systematic Violations of WTO Law, World Trade Review, Vol. 17 (2) 2018, p. 304; see too VERMULST, *op.cit.* 2005, pp. 251-253
[414] According to POSNER: "[j]udges, when asked to express proof beyond a reasonable doubt as a probability of guilt, generally pick a number between 75 and 90 (depending on the judge), and jury quantifications are similar." POSNER, *op. cit.* 1999, especially p. 1506; note that because the lack a system enabling to concretely value the truth in term of unit, any adjudication outcome even when the information is widely available can at best be a proxy of the truth.
[415] *Cf. infra*, 3.1.2.2 Advanced economic conception
[416] Prior literature includes: SPIER, *op. cit.* 2007, pp. 285-287; RUBINFELD Daniel / SAPPINGTON David, Efficient awards and standards of proof in judicial proceedings, RAND Journal of Economics, Vol. 18 (2) 1987, pp. 308-315; SANCHIRICO Chris William, The burden of proof in civil litigation: A simple model of mechanism design, International Review of Law and Economics, Vol. 17 (3) 1997, pp. 431-447; HAY Bruce L. / SPIER Kathryne E., Burdens of proof in civil litigation: An economic perspective, Journal of Legal Studies, Vol. 26 (2) 1997, pp. 413-433; DEMOUGIN Dominique / FLUET Claude, Preponderance of evidence. European Economic Review, Vol. 50 (2) 2006, pp. 963–976; BERNARDO Antonio / TALLEY Eric / WELCH Ivo, A theory of legal presumptions, Journal of Law, Economics & Organization, Vol. 16 (1) 2000, pp. 1-49; ANDREONI James, Reasonable doubt and the optimal magnitude of fines: should the penalty fit the crime? RAND Journal of Economics, Vol. 22 (3) 1991, pp. 385-395; POSNER, *op. cit.* 1999, especially pp. 1502-1515; SANCHIRICO Chris William, A Primary-Activity Approach to Proof Burdens, Journal of Legal Studies, Vol. 37 (1) 2008, pp. 273-313; MICELI Thomas J., Optimal Prosecution of Defendants Whose Guilt Is Uncertain, Journal of Law, Economics, & Organization, Vol. 6 (1) 1990, pp. 189-201
[417] KAPLOW, *op. cit.* 2012b, p. 4; see too KAPLOW Louis, KAPLOW, op. cit. 2017, p. 65

3.1.2.2 Advanced economic conception

According to KAPLOW, the adjudication process involves two stages:

- first, some form of selection brings some individuals into the adjudicatory system because of observed committed acts;
- secondly, assessing the evidence, adjudicators decide whether or not to assign liability to the individuals in front of them[418].

Basically, this implies two types of individuals entering the systems:

- individuals who have committed harmful acts; that is to say acts which generate a benefit to the individual who committed it while producing external harm;
- individuals who have committed so-called benign acts, that is to say acts which generate a benefit to the individual who committed it —like harmful acts- while not producing external harm —unlike harmful acts[419].

The task of the adjudicators is to make a distinction between the two categories of individuals, ultimately finding only one of the individuals who committed harmful acts liable[420]. Indeed, at the first stage, distinction between the two types of individuals, by some form of selection, is at best approximate and depends on the method of selection[421].

3.1.2.3 Effects and social desirability

3.1.2.3.1 Incentive effects of decisions: basic principles

One of the main effects and aim of adjudicatory decisions is the creation of *ex ante* incentives[422].

[418] KAPLOW, *op. cit.* 2012a, p. 754
[419] *Id.*; KAPLOW, *op. cit.* 2017, p. 66
[420] KAPLOW, *op. cit.* 2012a, p. 755
[421] *Cf. infra*, 3.1.2.3 Effects and social desirability
[422] KAPLOW, *op. cit.* 2012b, p. 1

Indeed, individuals wishing to commit an act —harmful or benign- consider[423]:

- the likelihood that the act will be observed and sent to adjudication through the initial selection process;
- the likelihood that liability will be assigned on the individuals by adjudicators assessing evidence;
- the expected magnitude of the sanctions.

According to this setting, an individual's decision to commit an act —harmful or benign- depends on whether the private benefits of the act exceed the private costs resulting from an adjudication, including the expected sanctions[424].

Hence, the foregoing shows that, for each group of individuals, the prospect of liability plays a major role in the decision to commit an act or not[425].

The problem arises when a portion of benign acts are mistakenly confused with harmful ones by adjudicators and *vice versa*[426]. Indeed, when there is confusion, individuals committing benign acts may be assigned liability and individuals committing harmful acts may escape sanctions.

The effects are the following:

- for individuals about to commit harmful acts, the prospect of liability produces deterrence to commit such acts, whereas the possibility of mistaken absolution dilutes it;
- for individuals about to commit benign acts, the prospect of mistaken liability produces chilling effect to commit such acts, whereas the possibility of absolution encourages benign acts.

[423] KAPLOW, *op. cit.* 2012a, p. 755
[424] *Id.*; POLINSKY A. Mitchell / RUBINFELD Daniel L., A Note on Optimal Public Enforcement with Settlements and Litigation Cost, NBER Working Paper Serie, Working Paper 2114, National Bureau of Economic Research, Cambridge 1986, p. 2; KAPLOW, *op. cit.* 2017, p. 66
[425] KAPLOW, *op. cit.* 2012a, p. 755
[426] *Ibid.,* p. 756

Basically, deterrence and chilling effect describe the same phenomenon: that is, the dissuasion to adopt a behaviour[427]. Using two different terms enables to describe the two sides of this phenomenon:

- deterrence to commit harmful acts, which is a desirable effect of rules, decisions and legal systems;
- chilling effect to commit benign acts, which is an undesirable side-effect of deterrence[428].

3.1.2.3.2 Basic principles applied to the evidence threshold

Consider now the effects of the evidence threshold under these basics principles and their social desirability.

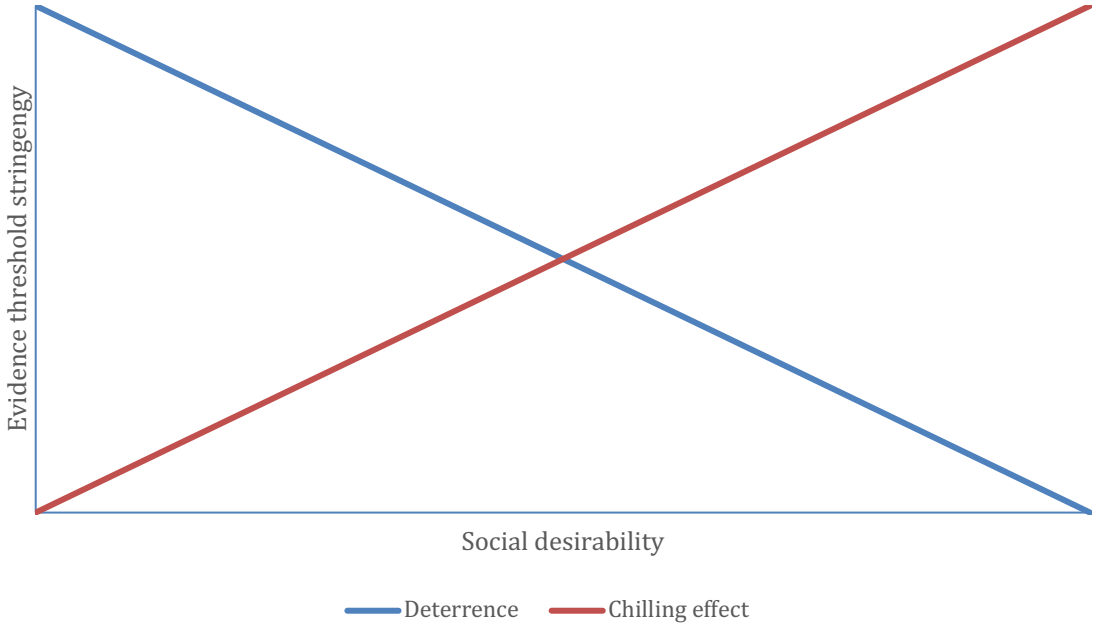
Basically, legal system designers face two options when defining the stringency of the burden of proof: raising the evidence threshold or lowering it. Both options can be achieved quantitatively or qualitatively.

The effects are the following[429]:

- a high evidence threshold lowers the prospect of liability. At the incentives level, it diminishes both deterrence to commit harmful acts, which is socially undesirable —as the objective of the law is to control harmful activities- and chilling effect to commit benign acts, which is socially desirable;
- a low evidence threshold raises the prospect of liability. At the incentives level, it raises both deterrence to commit harmful acts, which is socially desirable, and chilling effect to commit benign acts, which is socially undesirable.

[427] *Ibid.,* p. 755
[428] *Id.*
[429] KAPLOW, *op. cit.* 2012b, p. 1; KAPLOW, *op. cit.* 2012a, p. 747; SHAVELL Steven, Economic Analysis of the General Structure of the Law, NBER Working Paper Serie, Working Paper 9699, National Bureau of Economic Research, Cambridge 2003, p. 8 (SHAVELL *op. cit.* 2003a hereafter)

Hence, under this basic setting, the optimal burden of proof can be schematized linearly as follow[430]:



Hence, there is a tradeoff between deterrence and chilling effect.[431] The cross point gives the optimal evidence threshold to maximize social welfare.[432]

[430] As we can see, a higher evidence requirement has the effect to dilute deterrence, which is undesirable —as the objective of law is to control harmful behaviour- and *vice versa*. However, a higher evidence threshold presents the benefit to reduce chilling effect of desirable behaviour, and *vice versa*.
[431] KAPLOW, *op. cit.* 2012a, p. 856
[432] *Id.*

However, this basic setting presents important side-effects[433]:

- a high evidence threshold, while diminishing both deterrence to commit harmful acts and chilling effect to commit benign acts implies:
    - less false-positive but more false-negative outcomes in adjudication;
    - a greater number of individual acts —both harmful and benign- committed and entering into adjudication, which will further increase the number of false-positive and false-negative outcomes in adjudication;
    - because a greater number of individual acts —both harmful and benign- are committed, there will be a greater number of harmful acts which will never enter into adjudication because they will not be identified as potentially harmful during the preliminary selection in which individuals who will enter into adjudication are chosen;
- a low evidence threshold, while raising both deterrence to commit harmful acts and chilling effect to commit benign acts implies:
    - more false-positive but less false negative outcomes in adjudication;
    - a smaller number of individual acts —both harmful and benign- committed and entering into adjudication, which will further diminish the number of false-positive and, to some extent, false-negative outcomes in adjudication.

Indeed, as explained *supra*[434], these side effects are rooted in individual's prospect of liability, and the prospect of adjudicator's confusion over harmful and benign activity

[433] *Id.*; To illustrate some of these patterns, consider a typical example in the medical context: "the use of test results to determine whether to treat a patient —perhaps to administer a drug, perform surgery, or employ a more invasive follow-up diagnostic procedure. The test is an imperfect signal, higher scores indicating a greater likelihood that the disease in question is present. That is, individuals who truly have the ailment produce a range of test results, but their scores cluster toward the high end, whereas individuals who really are diseasefree also produce a range of results, but their scores cluster toward the low end. The problem is to choose a cutoff or threshold, above which treatment will be applied. A high cutoff will result in few false positives, which is to say that only a small portion of disease-free individuals will be mistakenly given the treatment; however, a high cutoff will also result in many false negatives, so a nontrivial fraction of diseased individuals will mistakenly fail to receive treatment. In determining the optimal threshold, these error costs will be traded off: if nontreatment of diseased individuals is serious and the treatment involves little cost to disease-free individuals, a low cutoff will be optimal, but if nontreatment is only moderately problematic whereas treatment is very costly to disease-free individuals, a high cutoff will be optimal." KAPLOW, *op. cit.* 2012a, p. 757

[434] *Cf. supra*, 3.1.2.3.1 Incentive effects of decisions: basic principles

which both act as incentives on individual's behaviour. Indeed, the decision to act depends on whether the expected private benefits exceed the expected sanction[435].

Hence, the social desirability of the evidence threshold and its optimal value is given as a tradeoff involving the foregoing effects and side effects[436].

We note that, considering the number of effects to be considered, the optimal evidence threshold may counterintuitively be very high or very low[437].

Moreover, the magnitudes of all these parameters will depend on specific contexts and may be difficult to quantify[438].

3.1.2.4 Advanced economic conception nullifying the classical burden of proof conception

We have seen that according to the classical conception, the burden of proof is generally approached under the preponderance rule[439], which may be understood in terms of Bayesian posterior probabilities[440], that is to say focusing on the *ex-post* likelihood that individuals in front of adjudicators have committed a harmful type of act[441].

[435] *Cf. supra*, 3.1.2.3.1 Incentive effects of decisions: basic principles
[436] KAPLOW, *op. cit.* 2012a, p. 757
[437] KAPLOW, *op. cit.* 2012a, p. 787
[438] KAPLOW, *op. cit.* 2012a, p. 856; For these reasons, representing the optimal evidence threshold on a graph would be a herculean task: curves will likely follow asymptotic patterns changing regularly directions in function of the evidence threshold.
[439] *Cf. supra*, 3.1.2.1 Rationale and classical conception
[440] KAPLOW, *op. cit.* 2012b, p. 3
[441] KAPLOW, *op. cit.* 2012a, p. 787

The main difference between the classical conception and the advanced economic approach is that the former only considers only:

- harmful acts and adjudicators' failures to recognize them, ignoring the fact that benign acts enter adjudication as well[442];
- one side of the effects, that is, deterrence to commit harmful acts, ignoring the other side of the effects, that is, chilling effect to commit benign acts[443].

Therefore, the classical conception considers only half of the issue[444]: the determinants of the classical conception are only a small part of the ones under the economic approach[445], which often lead to counter-intuitive outcomes[446].

Therefore, this suggests that, under the preponderance rule, the optimal evidence threshold may only be reached by chance and occasionally[447].

Last but not least, we note that the advanced economic approach developed by KAPLOW is still in an early stage of writing. Indeed, according to KAPLOW this conception is "inevitably incomplete, and other factors and settings remain to be examined"[448].

3.1.2.5 Interaction with other legal features and remedies

Consider now the interactions between the economic conception of the evidence threshold and other features of the legal system, which can often be used as remedies to the socially undesirable effects of any evidence threshold.

[442] KAPLOW, *op. cit.* 2012b, p. 15
[443] *Ibid.,* p. 32
[444] *Ibid.,* 2012b, p. 3
[445] KAPLOW, *op. cit.* 2012a, p. 858
[446] KAPLOW, *op. cit.* 2012b, p. 3; KAPLOW, *op. cit*. 2012a, p. 857
[447] KAPLOW, *op. cit.* 2011, p. 280
[448] KAPLOW, *op. cit.* 2012a, p. 860

According to the literature, these features are the following:

- enforcement efforts;
- the level of sanctions;
- accuracy;
- the enforcement method.

3.1.2.5.1 Enforcement efforts

Basically, the evidence threshold stringency and enforcement efforts have opposite effects[449]:

- raising the evidence threshold results primarily in reducing both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*;
- raising enforcement efforts results primarily in raising both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*.

Hence, adapting enforcement efforts to a move of the evidence threshold stringency can be used as a remedy to keep the effects constant[450].

The main disadvantage of raising enforcement efforts is the proportional rise of enforcement costs[451]. Indeed, both the supplementary enforcement efforts and the subsequent increase of acts entering adjudication consume resources.

Hence, the foregoing involves a tradeoff to be considered when designing the optimal system[452].

3.1.2.5.2 Level of sanction

Basically, the evidence threshold stringency and the level of sanction have opposite effects.

[449] *Ibid.,* p. 816
[450] *Id.*
[451] *Ibid.,* pp. 816-817
[452] *Ibid.,* pp. 819-820

Indeed, according to the so-called Becker argument: “for any given, nonmaximal level of sanctions, it tends to be optimal to raise sanctions and reduce enforcement effort”[453].

Consequently[454]:

- raising the evidence threshold results primarily in reducing both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*;
- raising the level of sanction results primarily in raising both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*.

Hence, adapting the level of sanction to a move of the evidence threshold stringency can be used as remedy to keep the effects constant[455].

3.1.2.5.3 Accuracy

There is a subtle distinction between the evidence threshold stringency and the accuracy of the legal system, which includes rules of procedures specifying the care with which information must be assessed[456].

Indeed, according to KAPLOW: “because the accuracy of the legal system determines the error rates associated with a given proof requirement, and these error rates are key determinants of the optimal evidence threshold, it is appropriate to inquire into the relationship between accuracy and the burden of proof”[457].

Consequently:

- raising the evidence threshold results primarily in reducing both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*;
- enhancing accuracy results primarily in raising deterrence to commit harmful acts and in decreasing chilling effect to commit benign acts and *vice versa*.

[453] *Ibid.,* p. 820
[454] KAPLOW, *op. cit.* 2012b, p. 4
[455] *Id.*
[456] KAPLOW, *op. cit.* 2012a, p. 826
[457] *Id.*

Hence, adapting the level of accuracy to a move of the evidence threshold can be used as remedy to improve deterrence and chilling effect.

3.1.2.5.4 Enforcement method

Three different enforcement methods may be used alternatively or complementary to each other[458]:

- monitoring, that is to say when monitors are posted —for instance a police officer on the road- to detect a fraction of acts —both harmful and benign- likely to be harmful which will enter into adjudication[459];
- auditing, that is to say when random inspections take place to detect a fraction of acts —both harmful and benign- likely to be harmful which will enter into adjudication[460];
- investigation, that is to say when a fraction of acts —both harmful and benign- likely to be harmful, are investigated to enter adjudication, upon triggering when harm is observed[461].

Under monitoring and auditing, compliance is often assessed independently of the occurrence of harm[462]. *A contrario*, investigation is triggered when there are strong suspicions of harmful activity generally because harm has been observed[463].

[458] *Ibid.*, p. 831
[459] *Id.*
[460] *Ibid.*, p. 832
[461] See generally KAPLOW, *op. cit.* 2012b
[462] SHAVELL Steven, A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation, NBER Working Paper Serie, Working Paper 18418, National Bureau of Economic Research, Cambridge 2012, p. 1 (SHAVELL, *op. cit.* 2012a thereafter)
[463] *Id.*

Basically, the evidence threshold stringency and enforcement efforts in the three methods have the same opposite effects as listed *supra*, that is to say[464]:

- raising the evidence threshold results primarily in reducing both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*;
- raising the enforcement effort results primarily in raising both deterrence to commit harmful acts and chilling effect to commit benign acts and *vice versa*.

The main difference regarding the three methods is the cost[465]:

- the monitoring cost is generally fixed, that is to say, independent of the number of harmful acts committed;
- the auditing cost depends on the number of acts audited, generally an increase of both benign and harmful activity requires more audits to be conduct and more costs;
- the investigating costs, under the negligence rule, occur when there is a strong suspicion of harmful activity, generally because harm has been observed. For this reason, investigating, especially under the negligence rule, is more economical than monitoring and auditing. Note that an important harmful activity generally implies an increase in investigations and costs.

Hence, the foregoing involves a tradeoff to be balanced when choosing the optimal enforcement method considering the evidence threshold.

3.1.3 Litigation

Consider now the basic economics of litigation:

- bringing a suit;
- settlement;
- trial and legal expenditures;
- the appeals process.

[464] KAPLOW, *op. cit.* 2012a, p. 816
[465] *Ibid.*, pp. 832-833

3.1.3.1 Bringing a suit

3.1.3.1.1 Basic principles

Bringing a suit can be defined as any costly initial step, like accessing information, hiring a lawyer, or filling a formal complaint of legal proceeding [466].

Basically, any harmful activity produces a signal[467]. According the strength of the signal, the prospective plaintiff —often with lawyers' advice- will estimate the following[468]:

- the likelihood of winning the suit according to the known facts —note that it includes the opportunity of a settlement as well-[469];
- the expected cost[470] and effort needed to reach the appropriate likelihood of winning the suit, that is to say *inter alia* legal advice and adjudication costs — note that some expenses will depend on the defendant's responses. Note as well that costs may include some immaterial considerations like the potential damage to the plaintiff's reputation[471];
- the expected benefits of winning the suit or reaching a settlement[472].

As a general principle, the plaintiff will sue when the expected benefits exceed the expected costs[473].

[466] SHAVELL Steven, Economic Analysis of Litigation and the Legal Process, NBER Working Paper Serie, Working Paper 9697, National Bureau of Economic Research, Cambridge 2003, p. 1 (SHAVELL, *op. cit.* 2003b thereafter); KAPLOW / SHAVELL, *op. cit.* 1999, p. 45
[467] KAPLOW Louis, KAPLOW, *op. cit.* 2017, pp. 64-65
[468] *Id.*
[469] SPIER, *op. cit.* 2007, pp. 264-265
[470] *Cf. infra*, 3.1.3.3 Legal expenditure and trial
[471] SPIER, *op. cit.* 2007, pp. 264-265
[472] SHAVELL, *op. cit.* 2003b, p. 1; KAPLOW / SHAVELL, *op. cit.* 1999, p. 45; KAPLOW, *op. cit.* 2017, p. 66
[473] SHAVELL, *op. cit.* 2003b, p. 1; KAPLOW / SHAVELL, *op. cit.* 1999, p. 45; KAPLOW, *op. cit.* 2017, p. 66; KAPLOW, *op. cit.* 2012a, p. 853; Note, that in cases of decoupled liability, the award to the plaintiff differs from the payment by the defendant.

As an additional principle, the prospect of errors affects the foregoing. Indeed, we have seen *supra* that, for a variety of reason adjudicators may commit two types of errors[474]:

- confusing benign acts with harmful ones, assigning mistakenly liability;
- confusing harmful acts with benign ones, enabling the defendant to escape liability.

Assuming that the plaintiff knows the probabilities of each type of error[475]:

- the first type of error, that is, when liability is mistakenly imposed on the defendant, acts as an incentive to bring suit. Indeed, this type of error raises the probability that the plaintiff will prevail[476];
- the second type of error, that is, when the defendant escapes liability, diminishes the incentive to bring suit. Indeed, this type of error lowers the likelihood that the plaintiff will prevail[477].

Note that both types of error diminish the incentive to obey the law because of a higher probability of being mistakenly assigned liability when complying to the rules and to escape liability when committing harmful acts[478].

3.1.3.1.2 Effects and social desirability

The effects of the foregoing principles are the following:

- the higher the probability of winning the suit, the higher the expected benefits and the lower the expected costs, the more suits are brought and *vice versa*;
- the higher the first type of error, that is, when liability is mistakenly imposed on the defendant, the more suits are brought and *vice versa*;

[474] *Cf. supra*, 3.1.2.3.1 Incentive effects of decisions: basic principles
[475] Note that corruption has the same incentive effects as errors, see POLINSKY A. Mitchell / SHAVELL Steven, Corruption and Optimal Law Enforcement, NBER Working Paper Serie, Working Paper 6945, National Bureau of Economic Research, Cambridge 1999
[476] POLINSKY A. Mitchell / SHAVELL Steven, Legal Error, Litigation, and the Incentive to Obey the Law, Journal of Law, Economics, & Organization, Vol. 5 (1) 1989, p. 99
[477] *Id.*
[478] *Ibid.,* p. 100

- the higher the second type of error, that is, when the defendant escapes liability, the less suits are brought and *vice versa*.

The socially desirable number of suits is given by the optimal ratio between the social benefits and the social costs[479].

However, there is a divergence between the private and the socially desirable number of suits for two reasons[480]:

- the private and social benefits of suits are different:
  - the plaintiff bringing a suit values his own gains;
  - social welfare values the effects of the suit —that is deterrence and chilling effect on future individual's acts;
- The private and social costs of a suit are different:
  - the plaintiff bringing a suit values his own costs;
  - social welfare values the costs for the plaintiff, the defendant and the state caused by the suit.

Note that SHAVELL has discussed to what extent individuals care about social welfare when deciding whether or not to comply with the law[481].

Hence, depending on the circumstances, plaintiffs will bring too much or not enough suits compared to the socially desirable number[482].

For this reason, SPIER has further qualified individual's decision to bring a suit as public good[483].

[479] *Cf. supra* per analogy
[480] SHAVELL, *op. cit.* 2003b, p. 2; KAPLOW / SHAVELL, op. cit. 1999, p. 45; SHAVELL Steven, The Optimal Structure of Law Enforcement, Journal of Law and Economics, Vol. 36 (1) 1993, p. 269
[481] SHAVELL Steven, When Is Compliance with the Law Socially Desirable?, The Journal of Legal Studies, Vol. 41 (1) 2012, pp. 1-36 (SHAVELL, *op. cit.* 2012b thereafter)
[482] SPIER, *op. cit.* 2007, pp. 265-266
[483] SPIER, *op. cit.* 2007, pp. 266-267

3.1.3.1.3 Remedies

The literature has suggested different policies to control the number of suits. Among them setting a fee to go on trial and fee-shifting —when losing parties pay the fees of winning parties fees- seems to be *prima facie* useful to control the number of suits[484].

However, socially desirable trial fees appear difficult to set because it is difficult for the state to ascertain costs to the parties as well as deterrence and chilling effect[485].

Moreover, fee shifting is not a suitable policy to control the number of suits because a victim will likely assume that the defendant will pay its litigation costs, increasing the incentive to bring a suit[486].

3.1.3.2 Settlement

3.1.3.2.1 Basic principle

Consider settlement, that is, any enforceable agreement, usually involving a payment from the defendant to the plaintiff, ending a suit.[487].

Basically, the plaintiff and the defendant will settle when respective offers exceed the respective expected benefits from the trial minus its costs[488].

For instance, assuming the plaintiff or the defendant believe it will benefit from an amount of 10,000 with a probability of 80 percent and that cost of the trial is 2,000, it will accept any offer equal or over 6,000 (indeed, 80% x 10,000 – 2,000= 6,000).

Hence, whenever the plaintiff's minimal threshold of settlement is lower than the defendant's maximal threshold, the parties can settle[489].

---

[484] SHAVELL, *op. cit.* 2003b, p. 7; KAPLOW / SHAVELL, *op. cit.* 1999, pp. 47-48
[485] SHAVELL, *op. cit.* 2003b, pp. 7-8
[486] *Id.*
[487] SHAVELL, *op. cit.* 2003b, p. 9; KAPLOW / SHAVELL, *op. cit.* 1999, p. 48; SPIER, *op. cit.* 2007, pp. 268-269
[488] SHAVELL, *op. cit.* 2003b, p. 9; KAPLOW / SHAVELL, *op. cit.* 1999, p. 48; For instance, if the plaintiff or the defendant believes it will prevail and benefit from an amount of 10,000 with a probability of 80 percent, and costs of the trial are 2,000, the plaintiff or the defendant will accept any offer equal or over 6,000 (indeed, 80% x 10,000 – 2,000= 6,000) SPIER, *op. cit*. 2007 pp. 268-269
[489] SHAVELL, *op. cit.* 2003b, p. 9; KAPLOW / SHAVELL, *op. cit.* 1999, p. 48; SPIER, *op. cit.* 2007, pp. 268-269

3.1.3.2.2 Effects and social desirability

The effects of the foregoing are that the higher the trial costs and the lower the probability of prevailing and receiving the expected benefits, the greater the probability of settling and *vice versa*[490].

Note that setting works under symmetric information, that is to say when parties possess the same information. In such cases, settlement is likely to happens when factual conditions are reunited[491].

However, under asymmetric information, that is to say when parties do not possess the same information[492], settlement tends to be less frequent[493]. Indeed, in such cases, the plaintiff may ask for more than the defendant is willing to pay. This may result in lengthy and costly negotiations or the absence of a settlement[494].

The socially desirable number of settlements is given by the optimal ratio between the social benefits and the social costs[495].

However, there is a divergence between the private and the socially desirable number of settlements for similar reasons than bringing suits[496]:

- the private and social benefits of settlement are different:
    - parties settling value their own gains;
    - social welfare values the effects of settlement —that is, deterrence and chilling effect on future individual's acts;
- the private and social costs of settlements are different:
    - parties settling value their own costs;

[490] SHAVELL, *op. cit.* 2003b, p. 12
[491] SPIER, *op. cit.* 2007, p. 272
[492] SHAVELL, *op. cit.* 2003b, p. 11; SPIER, *op. cit.* 2007, p. 271
[493] SHAVELL, *op. cit.* 2003b, p. 14; KAPLOW / SHAVELL, *op. cit.* 1999, pp. 49-50
[494] SPIER, *op. cit.* 2007, p. 272
[495] *Cf. supra* per analogy
[496] SHAVELL, *op. cit.* 2003b, p. 2; KAPLOW / SHAVELL, *op. cit.* 1999, p. 45; SHAVELL, *op. cit.* 1993, p. 269

- social welfare values the costs for the plaintiff, the defendant and the state caused by the trial when a settlement is not reached, in particular in case of asymmetrical information.

However, as POLINSKY and RUBINFELD point out: "when all of these factors are taken into account, it is not clear whether settlements and litigation costs will tend to increase or decrease the optimal probability of detection, or by how much"[497].

Yet, according to SHAVELL: "it may be said that an important justification for society's having established the legal apparatus for the holding of trials is, paradoxically, not actually to have trials occur. Rather, it is to provide victims with the threat necessary to induce settlements"[498].

Hence, depending on the circumstances, parties will settle too often or not often enough compared to the socially desirable number.

3.1.3.3 Legal expenditure and trial

3.1.3.3.1 Basic principle

As a basic principle, a party will spend on litigation as long expected benefits exceed the expected costs[499].

3.1.3.3.2 Effects and social desirability

The effects of the foregoing are that the more a party spends on legal expenditure, the higher the probability of prevailing and *vice versa*[500].

Indeed, devoting resources —including time- to produce, gather and submit both factual evidence and legal arguments —generally with the help of lawyers- increases the probability of convincing adjudicators.

[497] POLINSKY / RUBINFELD, *op. cit.*1986, p. 6
[498] SHAVELL, *op. cit.* 2003b, p. 18
[499] SHAVELL, *op. cit.* 2003b, p. 18; KAPLOW / SHAVELL, *op. cit.* 1999, p. 51
[500] *Id.*

Note that, when equal amounts of resources are devoted to support opposing claims, they tend to offset each other. This typically occurs when both parties produce expensive expert reports with offsetting conclusions[501].

The socially desirable level of legal expenditures is given by the optimal ratio between the social benefits and the social costs[502].

However, there is a divergence between the private and the socially desirable level of legal expenditures[503]:

- the private and social benefits of legal expenditures are different:
  - parties making legal expenditures value their own gains;
  - social welfare values the effects of legal expenditures —that is deterrence and chilling effect- on future individual's acts;
- the private and social costs of legal expenditures are different:
  - parties settling value their own costs;
  - social welfare values the costs for the plaintiff, the defendant and the state caused by legal expenditures, that, is the supplementary work devoted to finding the facts and legal reasonings[504].

Hence, depending on the circumstances, the legal expenditures of the parties will be too high or too low in comparison to the socially desirable level[505].

3.1.3.4 The appeals process

3.1.3.4.1 Rationale and basic principle

The appeals process is a typical feature of adjudicatory systems where disappointed litigants may request that higher authorities reconsider the outcome of below adjudicators' decisions[506].

[501] SHAVELL, *op. cit.* 2003b, pp. 18-19; KAPLOW / SHAVELL, *op. cit.* 1999, pp. 51-52
[502] *Cf. supra* per analogy
[503] SHAVELL, *op. cit.* 2003b, pp. 18-19; KAPLOW / SHAVELL, *op. cit.* 1999, pp. 51-52
[504] *Id.*
[505] *Cf. supra* per analogy
[506] SPIER, *op. cit.* 2007, p. 292

As a rationale, the appeals process presents an economic way to enhance the quality of legal process because it is triggered by litigants assuming they are the victims of errors in the decisions of adjudicators[507].

Basically, disappointed litigants, assuming they are the victims of errors, typically consider the following[508]:

- the likelihood that the appeals authority will correct assumed errors;
- the expected costs to reach the appropriate likelihood that errors will be corrected, that is, *inter alia* legal advices and appeals process costs;
- the expected benefits of the appeals process.

An important limiting factor to the foregoing is that, for a variety of reasons, a disappointed litigant may not be able to tell when errors have occurred[509].

As a general principle, a disappointed litigant will appeal when the expected benefits exceed the expected costs[510].

3.1.3.4.2 Effects and social desirability

The effects of the foregoing are:

- the higher the expected benefits and appeal costs and the lower the probability of prevailing, the greater the probability that a litigant will appeal and *vice versa*[511];
- a general threat to adjudicators who commit legal errors, thus enhancing the efficiency of the legal system[512].

[507] SHAVELL, *op. cit.* 2003b, p. 9; KAPLOW / SHAVELL, *op. cit.* 1999, p. 61; see too SPIER, *op. cit.* 2007, p. 293 citing a previous work of SHAVELL
[508] *Cf. supra* per analogy; see too SPIER, *op. cit.* 2007, p. 293
[509] SHAVELL, *op. cit.* 2003b, p. 12
[510] *Cf. supra* per analogy
[511] SHAVELL, *op. cit.* 2003b, pp. 9-10; *cf. supra* per analogy
[512] SHAVELL Steven, The Appeals Process and Adjudicator Incentives, NBER Working Paper Serie, Working Paper 10754, National Bureau of Economic Research, Cambridge 2004, p. 1 (SHAVELL, *op. cit.* 2004b thereafter); “Note, therefore, that if the errors were no more likely to be reversed than

Moreover, we have seen that for a variety of reasons, a disappointed litigant may not be able to tell when errors have occurred. In such cases, the likelihood that errors result in appeals is lower and the likelihood that correct decisions are appealed is higher[513].

The socially desirable number of appeals is given by the optimal ratio between the social benefits and the social costs[514].

There is a divergence between the private and the social desirable number of appeals[515]:

- the private and social benefits of the appeals process are different:
  - parties appealing value their own gains;
  - social welfare values the effects of the appeals process —that is deterrence and chilling effect- on future individual's acts as well as the general threat to adjudicators who commit legal errors. Regarding the later, according to SHAVELL: "the appeals process yields this benefit without absorbing resources, as the appeals process does not actually result in appeals"[516]. Further note, that, when adjudicators are uncertain about the probability of appeals, the threat of committing errors is lower, thus diminishing the efficiency of the legal system[517];
- the private and social costs of appeals process are different:
  - parties settling value their own costs;
  - social welfare values the costs for the plaintiff, the defendant and the state caused by the appeals process.

correct decisions, judges would have no incentive (on these grounds) to decide cases accurately; hence improving judges' incentives cannot alone justify the appeals process but is instead a byproduct of the error correction function of the appeals process." SHAVELL, *op. cit.* 2003b, p. 12

[513] SHAVELL, *op. cit.* 2003b, p. 12

[514] *Cf. supra* per analogy

[515] SHAVELL, *op. cit.* 2003b, pp. 9-10

[516] SHAVELL, *op. cit.* 2004b, pp. 2, 7-13

[517] *Ibid.,* pp. 4-5, 23-27

Hence, depending on the circumstances, disappointed litigants will appeal too often or not enough compared to the socially desirable number[518].

3.2 Economic efficiency and the findings of the Panels and the AB

We will now assess the economic efficiency of the findings of the Panels and the AB in light of the economic theory of adjudication and litigation exposed *supra*.

In the following pages, social desirability is understood as what is desirable for the WTO according to the goals of the organization under the AD.

According to the Marrakesh Declaration and the Agreement establishing the World Trade Organization, the following principles are common to all the Agreements[519]:

- opening trade between Member states, that is to say, mostly increasing the trade flow by reducing the trade barriers;
- achieving non-discrimination between Member states, that is to say, between their own and foreign products, services or nationals;
- enhancing predictability and transparency of the multi-lateral trade system;
- more competitiveness through discouraging “unfair” practices like dumping or export subsidies, assuming the WTO Agreements try to establish what is fair or unfair;
- more beneficial for less developed countries, that is to say, mostly by granting time, flexibility and special privileges during the transition adjusting to the WTO policies;
- protection of the environment.

Under the AD, the particularly relevant goals are opening trade, increasing the trade flow, achieving non-discrimination, enhancing predictability, transparency and competitiveness.

[518] *Cf. supra* per analogy
[519] See Marrakesh Declaration of 15 April 1994 and the Agreement establishing the World Trade Organization, in particular its foreword

These principles represent what is socially desirable for the WTO under the AD in the following pages.

3.2.1 Information

3.2.1.1 Findings of the Panels and AB

The findings of the Panels and the AB regarding "necessary information" are[520]:

- an essential knowledge or facts, which cannot be done without;
- held by an interested party and requested by an IA, at its discretion, in light of the specific circumstances of each investigation.

We have suggested that some findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting "necessary information" as left to the discretion of the IA in light of the specific circumstances of each investigation may conflict with ensuring that the agency's discretion is not unlimited.

In two reports, we have shown that the IAs have used their discretion to interpret what is "necessary information" in the specific circumstances[521].

Yet, a closer look has shown that both cases dealt with information that was obviously needed to calculate the normal value and the normal constructed value. Indeed, this information would almost always be necessary in all similar investigations[522].

However, in *Egypt — Steel Rebar*, we saw that the Panel found it appeared plausible that the IA required data regarding the sale of comparison merchandise in the home market as "necessary information" on the basis of the below-cost test provided in other provisions of the AD. We saw that the Panel made this finding although according to

[520] *Cf. supra*, 2.2.2.1 Findings of the Panels and the AB
[521] *Cf.* supra, 2.2.2.2 Consistency of the findings with the legal mandate; Panel Report, *Korea — Certain Paper*, WT/DS312/R, §7.44; Panel Report, *EC — Salmon (Norway),* WT/DS337/R, §7.344
[522] *Cf. supra*, 2.2.2.2 Consistency of the findings with the legal mandate

the interested party, the IA was not in possession of the non-submitted information necessary to make this determination[523].

We have noted that the Panel has used the words “appears plausible” and the conditional form “would seem to be necessary”[524].

Finally, we have concluded that the Panel implies here that “necessary information” could also be interpreted differently and consistently with the legal text[525].

Therefore, the findings of the Panels and the AB regarding “necessary information” grants some margin of discretion to IAs.

3.2.1.2 Margin of discretion

3.2.1.2.1 Effects and desirability for the WTO

The advantage of this margin of discretion is that it allows IAs to take the unincluded variable into account defining what constitutes “necessary information”.

Indeed, as shown in *Egypt — Steel Rebar*, “necessary information” to calculate the margin of dumping may sometimes include information not mentioned in the AD —in this case data regarding sales of comparison merchandise in the home market[526].

We have seen the reasons to grant some margin of discretion suggested by literature are the following:

- adjudicators may not be systematically able to observe and verify certain variables for cost and/or practicability reasons;
- drafters may not have had the time or imagination to foresee all the possibilities[527].

[523] *Cf.* supra, 2.2.2.2 Consistency of the findings with the legal mandate; Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.217
[524] *Id.*
[525] *Id.*
[526] *Id.*
[527] *Cf. supra*, 3.1.1.2 Effects and social desirability

The first reason may apply to the AD. Indeed, Member states may impose AD duties equal to the full margin of dumping or less[528].

Therefore, IAs naturally enjoy the margin of discretion to investigate or not some data which could inflate the margin of dumping.

The second reason mostly applies to domestic legal orders where drafters tend to write detailed rules to maximize social welfare.

A contratrio, the AD —and more generally any international law agreements- represents the common interests of the parties.

For this reason, using standards where the content to the law is given *ex post* the acts committed, is a common feature in international treaty making. Indeed, it enables parties to avoid endless negotiations and disagreements on what is the exact content of the rule[529]. This is the case of the WTO Agreements which are an incomplete contract.

Therefore, it seems unavoidable that the AD would leave a substantial margin of discretion to the Panels and the AB —and the IAs through the precedent effect- regarding the meaning of "necessary information".

The disadvantage of the foregoing is that IAs may use this margin of discretion to favor discretionary deviations. Basically, that means using or ignoring information of the unincluded variable to favor goals other than welfare of the WTO, for instance their domestic economy[530].

[528] Article 9.1 AD states *in parte*: "… the anti-dumping duty to be imposed shall be the full margin of dumping or less…"
[529] See for the instance the recent negotiations regarding the crime of aggression. Indeed, the 16th Assembly of States Parties to the Rome Statute of the International Criminal Court decided to activate the Court's jurisdiction over the crime of aggression on 14th December 2017. The activation being achieved, it is now up to the Court to determine the extent of its jurisdiction over acts of aggression committed by nationals or on the territory of non-ratifying State Parties.
[530] Note that IAs can favors other interests as well like private ones in case of corruption.

Indeed, IAs are state or multi-states organizations authorities and part of the domestic political economy[531].

IAs favoring the domestic economy may potentially have the following undesirable effects for the WTO:

- increasing trade barriers, decreasing the trade flow and further preventing the opening of trade between Member states;
- increasing discrimination between the Member states, that is to say, between their own and foreign products;
- decreasing predictability and transparency of the multi-lateral trade system;
- encouraging “unfair” practice, assuming the AD try to establish what is fair or unfair, thus limiting competitiveness.

We have seen that granting adjudicators some margin of discretion enhances social welfare when the advantages outweigh the disadvantages and that its desirable extent is given by the optimal ratio between advantages and disadvantages[532].

Considering the foregoing, granting some margin of discretion to IAs is unavoidable and desirable as it enables adjudicators to reflect on the unincluded variable in the decisions of IAs.

However, the extent of the margin of discretion granted by the findings of the Panels and the AB to IAs when used to favor discretionary deviation, in particular to favor domestic economy, undermines the global welfare under the AD following the goals of the WTO.

[531] For instance, the European Union where the European Commission acts as sole IA for its Members.
[532] *Cf. supra*, 3.1.1.2 Effects and social desirability

Hence, we suggest that the margin of discretion granted to IAs should be less extended to reach its optimal value and to better reflect the balance between:

- taking into account the “necessary information” really needed to calculate the margin of dumping in the specific circumstances;
- limiting discretionary deviations favoring domestic economies in particular over welfare following the goals of the WTO.

3.2.1.2.2 Remedies

Consider the remedies to achieve the optimal margin of discretion.

Both limiting the scope of discretion and monitoring methods cannot be used to counter discretionary deviations without amending the AD.

Indeed, the former requires additional specifications on the meaning of “necessary information” and the latter requires the creation of a monitoring system in the legal text.

The decision-based incentives remedy is mostly unusable.

Indeed, the AD —like all WTO Agreements- is based on the reciprocity principle which excludes fines or subsidies collected or given by the organization depending on how much an IA’s decision is desirable for the WTO[533].

The decision-based incentives remedy may *prima facie* be used as a promotional incentive where members of IAs and Panelists may eventually access to higher functions when their decisions are recurrently desirable for the WTO.

However, a closer look shows that the IAs’ margin of discretion comes directly from the findings of the Panels and the AB on “necessary information”.

Therefore, there is no real incentive to take decisions that are desirable for the WTO as less desirable decisions may be confirmed by the DSB as well.

[533] See the MFN clause and sanction equals to injury principle in the AD and other WTO Agreements.

The same reasoning applies to the appeals process, where the DSB may also confirm undesirable decisions reducing any incentive to take desirable decisions.

"Necessary information", as further interpreted by the Panels and the AB, constitutes a standard. Transforming this standard into a detailed rule would require amendments to the AD text.

Therefore, the best remedy is to give more specifications to the standard. Indeed, additional specifications in the reports of the Panels and the AB may, through their precedent effects, limit "the given content to the law *ex-post* effect" of the standard of "necessary information"[534].

Hence, this remedy would limit the IAs' discretion regarding the meaning of "necessary information" and enhance the welfare of the WTO.

3.2.1.3 Burden of proof

3.2.1.3.1 Effects and desirability for the WTO

According to the findings of the Panels and the AB regarding "necessary information", the evidence threshold in AD disputes is unclear.

Indeed, we have seen *supra*, that the findings of the Panels and the AB grant IAs some margin of discretion on what constitutes "necessary information".

Consequently, the evidence threshold in AD disputes depends on what is considered "necessary information" by IAs in each specific circumstances.

[534] *Cf. supra*, 3.1.1.3 Remedies

The effects are the following:

- foreign industries may not decide reasonably how much to export and at which price as they cannot accurately foresee the likelihood of being assigned liability for practicing dumping;
- foreign industries may not decide reasonably how much to export and at which price as they cannot accurately foresee the likelihood of errors, that is to say, confusion about dumping and correct behaviour by false-positives and false-negatives. Indeed, the unclear evidence threshold dilutes the distinction between the two types of acts;
- deterring the practice of dumping cannot be quantified because the prospect of liability is unclear;
- chilling effect on normal value exports cannot be quantified because the prospect of mistaken liability is unclear.

However, since facing different permissible interpretations, IAs are likely to use their margin of discretion to favor their domestic economy, these uncertainties will probably result in cautious behaviour by foreign industries.

Therefore, the effects of the findings of the Panels and the AB on “necessary information” would be to increase deterrence of the practice of dumping and chilling effect on normal value exports. In other words, this would mean a decrease the global volume of trade.

We have seen that the social desirability of the evidence threshold and its optimal value is a tradeoff involving deterrence and chilling effect[535].

According to the findings of the Panels and the AB regarding “necessary information”, the tradeoff representing the optimal evidence threshold is difficult to make because deterrence of the practice of dumping and chilling effect on normal value exports cannot be quantified accurately.

[535] *Cf. supra*, 3.1.2.3 Effects and social desirability

However, we note that deterrence of the practice of dumping and chilling effect on normal value exports, even if not quantified accurately, may have the following undesirable effects for the WTO:

- decreasing the trade flow and further preventing the opening of trade between Member states;
- decreasing predictability and transparency of the multi-lateral trade system.

Hence, we suggest that the evidence threshold should be better defined to reach its optimal value and to better reflect the balance between:

- deterrence of the practice of dumping;
- chilling effect on normal value exports.

3.2.1.3.2 Remedies

Consider the remedies to achieve the optimal evidence threshold.

The remedy of changing the enforcement method cannot be used to enhance the threshold effects without important modifications of the AD.

Adapting the level of sanction is mostly an unusable remedy. Indeed, the AD —like all WTO Agreements- is based on the reciprocity principle where the sanction can only be equal or inferior to the injury[536].

Raising the enforcement effort quantitatively can be achieved only by IAs monitoring the market and launching investigations non-triggered by domestic industries. We note that this remedy appears difficult to apply for two reasons:

- IAs have the discretion to launch AD investigations;
- monitoring the market is a costly activity.

[536] Article 9.1 AD states *in parte*: "… the anti-dumping duty to be imposed shall be the full margin of dumping or less…"

However, raising the enforcement effort qualitatively, that is, mostly by enhancing the accuracy of the decisions enables adjudicators:

- to clarify the evidence threshold and subsequently quantify the effects involved in the tradeoff of the optimal threshold;
- to counter the undesirable effect of an undesirable evidence threshold.

Indeed, additional details in the reports of the Panels and AB may, through their precedent effects, enhance the clarity of the evidence threshold closer to its optimal value.

3.2.1.4 Litigation

3.2.1.4.1 Bringing an AD investigation

We have seen that the findings of the Panels and the AB regarding “necessary information” grants some margin of discretion to IAs on what constitutes “necessary information”, which results in an unclear evidence threshold.

Effects on bringing an AD investigation are the following:

- the likelihood of prevailing in an AD dispute considering the known facts is higher for the plaintiff. Indeed, facing different permissible interpretations regarding what constitutes “necessary information”, IAs will assumingly choose the one favoring their domestic industries;
- for the same reason, the expected cost and effort needed to reach the appropriate likelihood of prevailing is lower for the plaintiff;
- for the same reason, the expected benefit, that is, the expected duty resulting from the AD investigation, is higher for the plaintiff.

Moreover, an unclear evidence threshold makes the prospect of errors, that, is the confusion between the practice of dumping and normal value exports and *vice versa*

difficult to foresee. Indeed, unclear evidence thresholds dilutes the distinction between the two types of acts.

However, whenever IAs commit errors, for the same reason as exposed *supra*, it is assumed they will favor their domestic economy.

We have seen that as a general principle, the plaintiff will sue when the expected benefits exceed the expected costs[537].

Therefore, the effects of the findings of the Panels and the AB on "necessary information" would be to raise the number of AD investigations brought by domestic industries.

We have seen that the socially desirable number of suits is given by the optimal ratio between the social benefits and the social costs and that there may be a divergence between the private and the socially desirable number of suits[538].

In *casu*, a high number of AD investigations subsequent to the interpretation by the Panels and the AB of "necessary information":

- raises deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, meaning a decrease in the global volume of trade, which is undesirable;
- lowers costs for the plaintiff, which is desirable, and raises the costs for the defendant and the state, which is undesirable.

Hence the foregoing has the following undesirable effects for the WTO:

- decreasing the trade flow and further preventing the opening of trade between Member states;

[537] *Cf. supra*, 3.1.3.1 Bringing a suit
[538] *Id.*

- decreasing predictability and transparency of the multi-lateral trade system.

Therefore, considering the important costs, in particular the decrease in the global volume of trade, the number of AD investigations is not optimal.

Hence, we suggest that the IAs' margin of discretion should be reduced, and the evidence threshold better defined to reach the optimal number of AD investigations and to better reflect the balance between:

- taking into account deterring the practice of dumping, and chilling effect on normal value exports, which reduces the global volume of trade;
- taking into account the costs for the parties, the IAs and the DSB subsequent to litigation.

3.2.1.4.2 Settlement before and during AD investigations

We have seen that the plaintiff and the defendant will settle if respective offers exceed the respective expected benefits from the trial minus its costs[539]. Indeed, whenever the plaintiff's minimal thresholds of settlement is lower than the defendant's maximal threshold, the parties can settle[540].

We have just seen that the findings of the Panels and the AB regarding "necessary information" act as a strong incentive to bring a suit because it enhances the plaintiff's likelihood of prevailing and the expected amount of AD duties and lowers the plaintiff's costs[541].

Hence, the plaintiff's minimum threshold of settlement will be high because the likelihood of prevailing and the expected benefits of an AD dispute are high, and the expected costs are low.

[539] *Cf. supra*, 3.1.3.2 Settlement
[540] *Id.*
[541] *Id.*

A *contrario*, the findings of the Panels and the AB oREGARDING "necessary information" have the following effects on the defendant:

- the likelihood of prevailing in an AD dispute considering the known facts are lower for the defendant. Indeed, facing different permissible interpretations regarding what constitutes "necessary information", IAs will assumingly choose the one favoring their domestic industries;
- for the same reason, the expected cost and effort needed to reach the appropriate likelihood of prevailing are higher for the defendant;
- for the same reason, the expected benefits, that is, the expected duty resulting from the AD investigation are lower for the defendant.

Hence, the defendant's maximal threshold of settlement will be high because the likelihood of prevailing and the expected benefits of an AD dispute are low, and its expected costs are high.

Considering the forgoing, the findings of the Panels and the AB regarding "necessary information" tend to increase the number of settlements.

Note that under asymmetric information, the number of settlements tends to be lower.

We have seen that the desirable number of settlements for the WTO is given by the optimal ratio between the social benefits and the social costs and that there may be a divergence between the private and the socially desirable number of settlements[542].

In *casu*, a high level of settlements:

- lowers deterrence of dumping, which is undesirable, and chilling effect on normal value exports, meaning an increase in the global volume of trade, which is desirable;
- lowers the costs for the plaintiff, the defendant and the state, which is desirable.

[542] *Id.*

It can be discussed if chilling effect on normal value exports and lowering the costs for the parties and the state, which are all desirable effects, outweigh lowering deterrence of the practice of dumping, which is an undesirable effect.

The number of AD investigations launched every year in all Member states tends to vary between two hundred and a little more than three hundred during the last decade, with a rise in the tendency over the past six years [543].

There is no accurate data regarding the practice of dumping in the Member states.

However, triggering an investigation requires a large consensus among domestic industries which generally occurs when the signal produced by the practice of dumping is significantly high.

It can therefore be assumed that the number of AD investigations represents only a small proportion of the suspicions of the practice of dumping.

Consequently, the extent of deterrence of the practice of dumping achieved by one investigation is proportionally low.

Hence the foregoing has the following undesirable effects for the WTO:

- decreasing predictability and transparency of the multi-lateral trade system;
- encouraging “unfair” practices, assuming the AD try to establish what is fair or unfair, limiting competitiveness.

Therefore, considering the significant costs, the number of settlements is not optimal.

[543] See WTO statistics on Anti-dumping Initiations: By Reporting Member 01/01/1995 - 31/12/2016, noting the data are taken from the semi-annual reports of WTO Members to the Committee on Anti-Dumping Practices and cover the period January 1995 — December 2016. The tables are based on information from Members having submitted semi-annual reports for the relevant periods, and are incomplete to the extent that Members have not submitted reports, or have submitted incomplete reports.

Hence, we suggest that the IAs margin of discretion should be reduced and the evidence threshold better defined to reach the optimal number of settlements and to better reflect the balance between:

- taking into account deterring the practice of dumping, which is desirable for the WTO and chilling effect on normal value exports, which reduces the global volume of trade;
- taking into account savings for the parties, the IAs and the DSB subsequent to settlement over litigation.

We further note that the above analysis concerns the number of settlements before and during the AD investigation until the interim review stage.

Indeed, according Article 15 DSU *in parte*, before issuing their final report, the Panels shall issue an interim report to the parties including both the descriptive sections and the Panel's findings and conclusions[544]. Within a period of time set by the Panel, a party may submit a written request for the Panel to review precise aspects of the interim report prior to circulation of the final report to the Members[545]. If no comments are received from any party within the comment period, the interim report shall be considered the final Panel report and circulated promptly to the Members[546].

This provision was initially introduced to favor settlement during the litigation process. However, practice has shown that this provision has little effect on the litigation process.

Indeed, we suggest that, in the case of “necessary information”, the uncertainty regarding the meaning of “necessary information” and the possibility to submit the Panel’s decision to the AB for review do not significantly act as incentives on parties’ behaviours as the Panel’s decision may be upheld or reversed by the AB.

[544] Article 15.2 DSU
[545] *Id.*
[546] *Id.*

Therefore, the above analysis can be used *mutatis mutandis* for the number of settlements before and during the AD's investigation including after the interim review stage.

3.2.1.4.3 Legal expenditure and cooperation in an AD investigation

We have seen that a party will spend on litigation as long expected benefits exceed expected costs because legal expenditures heighten the probability of prevailing in AD disputes[547].

The effect on legal expenditures and cooperation in an AD investigation are the following:

- the plaintiff will likely minimize expenditures and cooperate in front of the IA. Indeed, facing different permissible interpretations regarding what constitutes "necessary information", IAs will presumably choose the one favoring their domestic industries;
- for the same reason, the defendant will likely maximize expenditures and cooperate in front of the foreign IAs;
- note that, for the same reason, even in the cases in which an equal amount of resources is devoted to support opposing claims, claims would not tend to offset each other[548].

We have seen that the desirable level of legal expenditures for the WTO is given by the optimal ratio between the social benefits and the social costs and that there may be a divergence between the private and the socially desirable level of legal expenditures[549].

[547] *Cf. supra*, 3.1.3.3 Legal expenditure and trial
[548] *Id.*
[549] *Id.*

In *casu*, the plaintiff's low expenditures and level of cooperation and the defendant's high expenditures and level of cooperation in AD investigations:

- raises deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, meaning a decrease of the global volume of trade, which is undesirable;
- lowers the costs for the plaintiff, which is desirable, and raises the costs for the defendant and the state, which is undesirable.

Hence the foregoing has the following undesirable effects for the WTO:

- decreasing the trade flow and further preventing the opening of trade between Member states;
- decreasing predictability and transparency of the multi-lateral trade system.

Therefore, considering the significant costs, in particular the decrease of the global volume of trade, the level of legal expenditures and cooperation is not optimal.

Hence, we suggest that the IAs' margin of discretion should be reduced and the evidence threshold better defined to reach the optimal level of expenditures and cooperation in AD investigations and to better reflect the balance between:

- taking into account deterring the practice of dumping, which reduces the level of AD investigations, and chilling effect on normal value exports, which reduces the global volume of trade;
- taking into account the costs for the parties, the IAs and the DSB subsequent to litigation.

3.2.1.4.4 The IAs decisions reviewed by the Panels and AB

We have seen that a disappointed litigant will appeal when the expected benefits exceed the expected costs[550].

[550] *Cf. supra*, 3.1.3.4 The appeals process

Effects on submitting the IAs' decisions to the DSB are the following:

- the likelihood of prevailing for both parties considering the known facts cannot be accurately foreseen. Indeed, the Panels and the AB have complete discretion to choose one interpretation when precedent reports allow different permissible interpretations regarding what constitutes "necessary information";
- for the same reason, the expected cost and effort needed to reach the appropriate likelihood of prevailing cannot be predicted accurately by the parties;
- for the same reason, the expected benefits, that is the expected duty resulting from the appeals process, cannot be foreseen accurately by the parties.

Hence, the decision to bring an IA's decision in front of the DSB is proportionally blind. Indeed, the uncertainty regarding whether the expected benefits exceed the expected costs tends to be high.

For similar reasons, the threat to IAs to commit legal errors is lower, thus diminishing the efficiency of the legal system.

Moreover, because precedent reports allow different permissible interpretations regarding what constitutes "necessary information", both parties may not be able to tell if errors have occurred or if they belong to a permissible range of interpretation[551].

Considering the foregoing, the number of decisions brought in front of the DSB may be either high or low depending on the subjective perception of the parties.

We have seen that the socially desirable level of appeals is given by the optimal ratio between the social benefits and the social costs and that there may be a divergence between the private and the socially desirable level of appeals[552].

[551] *Cf. supra*, 2.2.2.2 Consistency of the findings with the legal mandate
[552] *Cf. supra*, 3.1.3.4 The appeals process

In *casu*, the random level of IAs' decisions brought in front of the DSB:

- randomly affects deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, meaning a decrease in the global volume of trade, which is undesirable;
- randomly affects the costs for the parties, the states and the DSB;
- randomly affects the threat that IAs might commit legal errors, thus diminishing the efficiency of the legal system.

Hence, the foregoing may potentially have the following undesirable effects for the WTO:

- increasing the trade barriers, decreasing trade flow and further preventing the opening of trade between Member states;
- increasing discrimination between Member states, that is to say, between their own and foreign products;
- decreasing predictability and transparency of the multi-lateral trade system;
- encouraging "unfair" practices, assuming the AD try to establish what is fair or unfair, limiting competitiveness.

Therefore, considering the random important costs, the level of IAs' decisions brought in front of the DSB is not optimal.

Hence, we suggest the IAs' margin of discretion should be reduced, and the evidence threshold better defined to reach the optimal level of IAs' decisions brought in front of the DSB. The extent of the new margin of discretion should be the optimal balance between:

- taking into account deterring the practice of dumping, which reduces the number of AD investigations, and chilling effect on normal value exports, which reduces the global volume of trade;

- taking into account the costs for the parties, the IAs and the DSB subsequent to litigation;
- taking into account the threat that IAs might commit legal errors, which enhances the efficiency of the legal system.

3.2.1.4.5 Remedies

The remedies regarding the parties' behaviours in litigation are the same than for the margin of discretion and the burden of proof because of the causal relationships of these features, that is to say:

- limiting the IA's margin of discretion by adding more details to the standard of "necessary information". Indeed, additional details in DSB decisions may, through their precedent effects, limit the "given content to the law *ex-post* effects" of the standard of "necessary information"[553];
- enhancing the clarity of the evidence threshold by raising the enforcement efforts qualitatively, that is to say, mostly by enhancing the accuracy of decisions. Indeed, additional details in DSB decisions may, through their precedent effects, enhance the clarity of the evidence threshold and subsequently help reach its optimal value[554].

Hence, refining the finding according to "necessary information" depends on the circumstances, which are left to the discretion of the IA[555], could be achieved in two ways:

- giving a list of information which is particularly relevant, or which seems to be prima *facie* excluded;
- providing additional factors to better assess which information can be considerate as necessary.

[553] *Cf. supra* 3.1.1.3 Remedies and 3.1.2.5 Interaction with other legal features and remedies
[554] *Id.*
[555] *Cf. supra*, 2.2.3 Time

The first solution seems a bit radical. Indeed, we have seen that the margin of discretion allows adjudicators to take the undefined variable into account which, for the reasons explained *supra*, is necessary in almost all adjudicatory systems.

Therefore, we suggest using the second solution. Indeed, providing additional factors to better assess which information can be considered necessary would:

- limit the IAs', and to some extent the Panels' and the AB's, margin of discretion through the precedent effect, making the evidence threshold clearer and closer to the optimal effects level;
- let the —in our opinion- unavoidable and necessary discretion to the IAs' to perform their tasks considering the variety of circumstances and the complexity of factors surrounding AD investigations.

3.2.2 Time

3.2.2.1 Findings of the Panels and the AB

The findings of the Panels and the AB are[556]:

- "reasonable period"[557], "reasonable time"[558] and "timely fashion"[559] refers to the same concept;
- "reasonable" time should be defined on a case-by-case basis, in light of specific circumstances of each investigation;
- IA should consider, in the context of a particular case, factors such as:
    - (i) the nature and quantity of the information submitted;
    - (ii) the difficulties encountered by an investigated exporter in obtaining the information;
    - (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination;

[556] *Cf. supra* 2.2.3.1 Findings of the Panels and the AB
[557] Article 6.8 AD and §6 Annex II
[558] §1 Annex II
[559] §3 Annex II

    - (iv) whether other interested parties are likely to be prejudiced if the information is used;
    - (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and
    - (vi) the numbers of days by which the investigated exporter missed the applicable time-limit;
- "reasonable period" is a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account.

We have shown that the findings are consistent with the object and purpose of Article 6.8 AD. Indeed, the overall list of factors in the framework of the balance between the rights and interests of the parties ensures that the agency's discretion is not unlimited.

Indeed, in *Korea — Certain Paper*, the Panel carefully examined each of the six factors mentioned above[560].

Moreover, in *US –— Hot-Rolled Steel*, we showed how the Panel used specific circumstances within the framework of the list of factors, ensuring that the IA's discretion was not unlimited[561].

Therefore, we find that the IAs have a margin of discretion which is appropriately limited by the overall list of factors in the framework of the balance between the rights and interests of the parties.

3.2.2.2 Economic analysis

The economic analysis shown for "necessary information" can be used *mutatis mutandis* for "reasonable period", "reasonable time" and "timely fashion".

[560] *Cf. supra*, 2.2.3.2 Consistency of the findings with the legal mandate; Panel Report, *Korea — Certain Paper*, WT/DS312/R, §§7.49-7.55
[561] *Cf. supra*, 2.2.3.2 Consistency of the findings with the legal mandate, Panel Report, *Korea — Certain Paper*, WT/DS312/R, §7.52

We have shown that the findings of the Panels and the AB regarding "necessary information" grants some margin of discretion to IAs. *A contrario*, the findings of the Panels and the AB regarding "reasonable period", "reasonable time" and "timely fashion" all limit appropriately the margin of discretion of IAs.

Therefore, the magnitude of the economic effects shown for "necessary information" will be optimally balanced following to the appropriate limitation of the IAs' margin of discretion.

3.2.3 Verifiable character

3.2.3.1 DSB interpretation

The findings of the Panels and the AB regarding "verifiable character" are[562]:

- entailing that the accuracy and reliability of the information can be assessed by an objective process of examination;
- including the possibility of undertaking on-the-spot investigations, which is not mandatory;
- information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of their ability. That is to say, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable;
- verifiable information as requiring an on-the-spot investigation has to be appreciated on a case-by-case basis.

[562] *Cf. supra*, 2.2.4.1 Findings of the Panels and the AB

We have shown that some findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed:

- interpreting "verifiable character" on a case-by-case basis[563] does not seem *prima facie* to ensure that the IA's discretion is not unlimited; and
- "the best of its ability"[564] test is —at least until further interpretation[565]- equally left to the IA's discretion.

Indeed, in one report, we saw that the Panel's reasoning seemed appropriate and reasonable in the particular case[566].

However, we have noted that specific circumstances of AD investigations can substantially vary, consequently enabling different interpretations[567].

Moreover, in *Egypt — Steel Rebar*, we saw that both the IA and the Panel, applying the best of ability test, based their decision on the fact that the investigated parties had never argued, or submitted, that the requested information was not at their disposal, or that for some other reason it would be impossible to provide[568].

We have noted that, the IA and the Panel's reasoning is neither a condition in the AD nor a finding of previous reports of the Panel or the AB[569].

Therefore, the findings of the Panels and the AB regarding "verifiable character" grants some margin of discretion to IAs.

[563] *Cf. supra*, 2.2.4.2 Consistency of the findings with the legal mandate; Panel Report, *EC — Salmon (Norway)*, WT/DS337/R, §VII.360
[564] *Cf. supra*, 2.2.4.2 Consistency of the findings with the legal mandate; Panel Report, *Egypt — Steel Rebar*, WT/DS/211/R, §7.160
[565] *Cf. supra*, 2.2.4.2 Consistency of the findings with the legal mandate
[566] *Cf. supra*, 2.2.4.2 Consistency of the findings with the legal mandate; Panel Report, *EC — Salmon (Norway)*, WT/DS337/R, §§VII.361-363
[567] *Id.*
[568] *Cf. supra*, 2.2.4.2 Consistency of the findings with the legal mandate; Panel Report, *Egypt — Steel Rebar*, WT/DS/211/R, §7.245
[569] *Id.*

3.2.3.2 Economic analysis

The economic analysis shown for "necessary information" can be used *mutatis mutandis* for "verifiable character". Indeed, in both cases the findings of the Panels and the AB grants some margin of discretion to IAs.

3.2.4 Appropriately submitted so that it can be used in the investigation without undue difficulties

3.2.4.1 Findings of the Panels and the AB

The findings of the Panels and the AB regarding "appropriately submitted so that it can be used in the investigation without undue difficulties" are[570]:

- information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws;
- as a highly fact-specific issue;
- information which is suitable for the use of the IA in terms of its form, is submitted to the correct authorities, etc.;
- without difficulties beyond what is otherwise the norm in an antidumping investigation.

We have shown that some of the interpretations by the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting undue difficulties as a highly fact-specific issue does not seems ensure that the IA is not unlimited.

Indeed, in one report, we saw that the Panel avoids answering the delicate question of what is otherwise the norm in an antidumping investigation, which depends on the specific circumstances[571].

[570] *Cf. supra*, 2.2.5.1 Findings of the Panels and the AB
[571] *Cf. supra*, 2.2.5.2 Consistency of the findings with the legal mandate; Panel Report, *US — Steel Plate*, WT/DS206/R, §7.75

In *Mexico — Steel Pipes and Tubes*, we saw that the Panel pointed out that the investigated party had not raised issue in the IA's verification report[572].

However, according to the Panel, the IA had set an unacceptably demanding standard. Indeed, the Panel found that errors encountered during on-the-spot verification, later corrected by the IA, were not beyond difficulty in terms of what is otherwise the norm in an antidumping investigation[573].

Although the standard of no errors allowed set by the IA is obviously the most extreme one, we have noted that the Panel has not referred to previous reports to give an example of what would be the norm in an antidumping investigation[574].

Hence, we have shown that in future cases, there may well be a wide range of other possibilities[575].

Therefore, the findings of the Panels and the AB regarding "appropriately submitted so that it can be used in the investigation without undue difficulties" grants a wide margin of discretion to IAs.

3.2.4.2 Economic analysis

The economic analysis shown for "necessary information" can be used *mutatis mutandis* for "appropriately submitted so that it can be used in the investigation without undue difficulties".

The difference between "necessary information" and "appropriately submitted so that it can be used in the investigation without undue difficulties" is the latter grants a wider margin of discretion to IAs.

[572] *Cf. supra*, 2.2.5.2 Consistency of the findings with the legal mandate; Panel Report, *Mexico — Steel Pipes and Tubes*, WT/DS331/R, §§7.165-171
[573] *Id.*
[574] *Id.*
[575] *Id.*

Therefore, the magnitude of the economic effects shown for “necessary information” will be amplified.

3.2.5 Cooperation

3.2.5.1 Findings of the Panels and the AB

The findings of the Panels and the AB regarding “cooperation” are[576]:

- a process, involving joint effort, whereby parties work together towards a common goal;
- depending on the specific circumstances and reflecting a careful balance between the interests of IAs and exporters;
- a two-way process involving joint effort.

We have shown that some findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting “cooperation” as depending on the specific circumstances and reflecting a careful balance between the interests of IAs and exporters does not seem to ensure that the IA is not unlimited.

Indeed, we have seen that in *US — Hot-Rolled Steel*, the AB performed the balance test in the following situation[577]:

- the investigated party raised issue regarding the impossibility to obtain the requested information from its affiliate;
- the IA had not reacted to investigated party’s argument and later argued the interested party had not cooperated.

The AB concluded that, given the specific circumstances, the IA did not rest on a permissible interpretation of non-cooperation, in this case [578].

[576] *Cf. supra*, 2.2.6.1 Findings of the Panels and the AB
[577] *Cf. supra*, 2.2.6.2 Consistency of the findings with the legal mandate; Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R, §§105-110
[578] *Id.*

We have noted that considering the absence of a reaction from the IA, no other outcome would be sustainable in the specific circumstances[579].

We have further noted that in future cases, less clear behaviour by parties may leave space for different interpretations[580].

However, we have shown that the balance test between the interests of IAs and exporters seems to ensure that the IA's discretion is not unlimited[581].

Therefore, the findings of the Panels and the AB regarding "cooperation" grants a small margin of discretion to IAs.

3.2.5.2 Economic analysis

The economic analysis shown for "necessary information" can be used *mutatis mutandis* for "cooperation".

The difference between "necessary information" and "cooperation" is the latter grants a smaller margin of discretion to IAs.

Therefore, the magnitude of the economic effects shown for "necessary information" will be less important.

3.2.6 The best of its ability

3.2.6.1 Findings of the Panels and the AB

The findings of the Panels and the AB regarding "the best of its ability" are[582]:

- efforts going beyond those that would be considered reasonable in the circumstances;
- having to do with the nature and quality of the interested party's participation in the IA's information-gathering process;

[579] *Id.*
[580] *Id.*
[581] *Id.*
[582] *Cf. supra*, 2.2.7.1 Findings of the Panels and the AB

- a very significant degree of effort;
- so long as the level of good faith cooperation by the interested party is high;
- without the interested parties are required to undertake extreme measures to provide requested information.

We have shown that some of the findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting "the best of its ability" as efforts going beyond those that would be considered reasonable in the circumstances seems *prima facie* to ensure the IA has a high level of discretion.

Indeed, we saw in *Egypt — Steel Rebar*, that the Panel reviewed the behaviour of the investigated party considering which high level of effort would be considered reasonable in the circumstances[583].

We have noted, that in the specific circumstances the investigated party did not raise any issue nor did it express a wish to rectify the IA's request, allowing only one sustainable outcome[584].

However, we have further noted that in future cases, behavior of parties that is less clear may leave space for different interpretations[585].

Hence, the findings of the Panels and the AB regarding "the best of its ability" grants some margin of discretion to IAs.

3.2.6.2 Economic analysis

The economic analysis shown for "necessary information" can be used *mutatis mutandis* for "the best of its ability". Indeed, in both case the findings of the Panels and the AB grants some margin of discretion to IAs.

[583] *Cf. supra*, 2.2.7.2 Consistency of the findings with the legal mandate, Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §§7.245-7.247
[584] *Id.*
[585] *Id.*

3.2.7 With special circumspection

3.2.7.1 Findings of the Panels and the AB

The findings of the Panels and the AB regarding "with special circumspection" are[586]:

- an active approach;
- depending on the circumstances of the proceedings;
- which can result in a number of equally credible options.

We have shown that the findings of the Panels and the AB may be inconsistent with the object and purpose of Article 6.8 AD. Indeed, interpreting "with special circumspection" as depending on the circumstances of the proceedings, which can result in a number of equally credible options does not seems *prima facie* to limit the IA's discretion.

Indeed, we have seen that, in *Egypt — Steel* Rebar, the Panel reviewed the IA's estimation of the five per cent monthly rate of inflation of the investigated party's domestic economy during the investigation period[587].

The Panel found that on the basis of the evidence of record, an objective and unbiased IA could have reached a similar conclusion[588].

The Panel further specified that it does not mean that only one outcome is possible, yet rather that IAs may have a number of equally credible options for a given question[589].

Moreover, we have shown that, read in conjunction with §7 of Annex II, the number of credible options may significantly vary according the degree of IAs' active approaches[590].

---

[586] *Cf. supra*, 2.2.8.1 Findings of the Panels and the AB
[587] *Cf. supra*, 2.2.8.2 Consistency of the findings with the legal mandate; Panel Report, *Egypt — Steel Rebar*, WT/DS211/R, §7.305
[588] *Id.*
[589] *Id.*
[590] *Id.*

Therefore, the findings of the Panels and the AB regarding “with special circumspection” grants a wide margin of discretion to IAs.

3.2.7.2 Economic analysis

The economic analysis shown for “necessary information” can be used *mutatis mutandis* for “with special circumspection”.

The difference between “necessary information” and “with special circumspection” is the latter grants a wider margin of discretion to IAs.

Therefore, the magnitude of the economic effects shown for “necessary information” will be amplified.

4. Conclusions

4.1 Results of the research

4.1.1 Are the findings of the Panels and the AB on Article 6.8 AD consistent with the mandate set out in Articles 3.2, 11 DSU and 17.6 AD?

The findings of the Panels and the AB regarding “reasonable period”, “reasonable time” and “timely fashion” fits in its interpretative mandate.

Some of the findings of the Panels and the AB regarding “necessary information”, “verifiable character”, “appropriately submitted so that it can be used in the investigation without undue difficulties”, “cooperation”, “the best of its ability” and “with special circumspection”, to various degree, sometimes potentially:

- do not fully provide security and predictability to the multilateral trading system interpreting the WTO Agreements and the DSU in light of this object and purpose, in a flexible manner of which would most effectively enhance the multilateral trading system (the first sentence of Article 3.2 DSU);
- do not fully clarify the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law (the second sentence, *in fine*, of Article 3.2 DSU, Article 11 DSU and the first sentence of Article 17.6(ii) AD*)*, in particular Article 31 VCLT, which provides that a treaty shall be interpreted *inter alia* in light of its object and purpose;
- find the IA’s measure to be in conformity with the AD resting upon one permissible interpretation (Article 11 DSU and the second sentence of Article 17.6(ii) AD) although:
    - not ascertaining if the proper meaning of a provision fits harmoniously with and object and purpose of the treaty;
    - not avoiding interpretations with potentially mutually contradictory, conflicting or competing results;
    - not avoiding to apply interpretative tools selectively or in isolation.

Moreover, some of the findings of the Panels and the AB regarding "appropriately submitted so that it can be used in the investigation without undue difficulties":

- do not fully resolve, according to the specific circumstances, except for convincing reason, the same legal question in the same way as similar precedent cases, that is to say, embodying the *acquis* of the WTO dispute settlement system (the first sentence of Article 3.2 DSU).

Finally, some of the findings of the Panels and the AB regarding "with special circumspection":

- may not fully adopt an analytical methodology or structure appropriate for resolution of the matters in order to make findings through an objective assessment of the relevant matters, (the second sentence, *in fine* of Article 3.2 DSU*).*

We conclude that most of the findings of the Panels and the AB on Article 6.8 AD are consistent with the legal mandate. However, some of the findings of the Panels and the AB present some slight inconsistencies with the legal mandate.

4.1.2 Are the findings of the Panels and the AB reasonable from an economic perspective?

The findings of the Panels and the AB regarding "reasonable period", "reasonable time" and "timely fashion" limit appropriately the IAs' margin of discretion. The economic effects are, in turn, optimally balanced. Therefore, these findings are economically efficient.

The findings of the Panels and the AB regarding "necessary information", "verifiable character", "appropriately submitted so that it can be used in the investigation without undue difficulties", "cooperation", "the best of its ability" and "with special circumspection", grant the IAs some variable margin of discretion. The economic effects are proportionally the following.

Regarding the margin of discretion:

- Granting some margin of discretion to IAs is almost unavoidable and desirable as it enables adjudicators to reflect the unincluded variable into IAs' decisions and for negotiating reasons as well.
- Using discretionary deviation IAs may favor domestic economies which is undesirable.

Regarding the burden of proof:

- Foreign industries may not decide reasonably how much to export and at which price as they cannot accurately foresee the likelihood of being assigned liability of the practice of dumping including the prospect of potential errors.
- Deterrence of the practice of dumping and chilling effect on normal value exports cannot therefore be quantified because the prospect of liability is unclear.
- Facing different permissible interpretations, IAs are likely to use their margin of discretion to favor their domestic economy.
- The foregoing may increase deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, which is undesirable.

Regarding litigation:

- Bringing an AD investigation:
    - The likelihood of prevailing, the expected benefits are higher, and the expected costs lower for the plaintiff, which may raise the number of AD investigations brought by plaintiffs.
    - A high level of AD investigation may:
        - raise deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, meaning a decrease of the global volume of trade, which is undesirable as it can potentially:

        - lower the costs for the plaintiff, which is desirable and raise the costs for the defendant and the state, which is undesirable;
- Settlement:
    - The plaintiff's minimal threshold of settlement will be high, and the defendant's maximal threshold of settlement will be high, which may increase the number of settlements.
    - A high level of settlements may:
        - lower deterrence of the practice of dumping, which is undesirable, and chilling effect on normal value exports, meaning an increase of the global volume of trade, which is desirable;
        - lower the costs for the plaintiff, the defendant and the state, which is desirable;
- Legal expenditures and cooperation in AD investigations:
    - The plaintiff will likely minimize expenditures and cooperation, and the defendant will likely maximize expenditures and cooperation in AD investigations.
    - Even when an equal amount of resources is devoted to supporting opposing claims, claims would not tend to offset one another.
    - Low expenditures and level of cooperation for the plaintiff and high expenditures and level of cooperation for the defendant in AD investigations may:
        - raise deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, meaning a decrease of the global volume of trade, which is undesirable;
        - lower the costs for the plaintiff, which is desirable and raise the costs for the defendant and the state, which is undesirable.
- Submission of the IAs' decisions to the DSB:
    - The likelihood of prevailing, the expected costs and efforts needed to reach the appropriate likelihood of prevailing and the expected benefits cannot be foreseen by both parties.
    - Similar reasons lower the threat to IAs who commit legal errors thus diminishing the efficiency of the legal system.
    - Both parties may not be able to tell when errors have occurred.

- Considering the foregoing, the number of decisions brought in front of the DSB may randomly be high or low depending on the subjective perception of the parties.
- The random level of IAs' decisions brought in front of the DSB may:
  - randomly affect deterrence of the practice of dumping, which is desirable, and chilling effect on normal value exports, meaning a decrease of the global volume of trade, which is undesirable;
  - randomly affect the costs for the parties, the state and the DSB;
  - lower the threat to IAs to commit legal errors, diminishing thus the efficiency of the legal system.

All the foregoing economic effects may have the following undesirable effects for the WTO:

- increasing the trade barriers, decreasing the trade flow and further preventing the opening of trade between Member states;
- decreasing predictability and transparency of the multi-lateral trade system;
- encouraging "unfair" practices, assuming the AD try to establish what is fair or unfair, limiting competitiveness;
- increasing discrimination between Member states, that is to say, between their own and foreign products.

Therefore, in light of the developments of the economic theory of adjudication and litigation, the slight inconsistencies found in the findings of the Panels and the AB in the first part, grant some margin of discretion to IAs. The undesirable extent of this margin of discretion may proportionally undermine the economic efficiency of Article 6.8 AD following the WTO goals under the AD.

We have shown that limiting the undesirable extent of the IAs' margin of discretion consistently with the legal mandate may help to enhance the economic efficiency of Article 6.8 AD following the WTO goals under the AD.

Indeed, limiting the undesirable extent of the IAs' margin of discretion would clarify the evidence threshold in AD investigations.

In turn this would allow to:

- better quantify the effects involved in the tradeoff of the optimal threshold;
- counter the undesirable effects subsequent of an undesirable evidence threshold.

Doing so the economic effects in litigation and adjudication would be closer to their optimal values enabling Article 6.8 AD to reach enhanced economic efficiency.

We have shown that this can be achieved by giving more specifications to the standards interpreted by the Panels and the AB.

Indeed, additional specifications in the reports of the Panels and the AB may, through their precedent effects, limit the undesirable extent of the IAs' margin of discretion consistently with the legal mandate. This would in turn clarify the evidence threshold in AD investigations. Consequently, the economic effects in litigation and adjudication would be closer to their optimal values.

Therefore, Article 6.8 AD could reach enhanced economic efficiency following the WTO goals under the AD.

4.2 On future changes and the negotiations of the Doha Round

According to paragraph 28 of the Ministerial declaration launching the Doha Round, the negotiators' mandate regarding the AD is: to clarify and improve, in the light of experience, disciplines under the AD, while preserving the basic concepts, principles and effectiveness of these Agreements and their instruments and objectives and taking into account the needs of developing and least-developed participants[591].

[591] §28 Doha WTO Ministerial declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1

The negotiations take place under the Rules Negotiating Group who discuss raised issue and proposal of its Members.

Among the Members, fifteen of them are part of an informal coalition, known as the Friends of Anti-dumping Negotiations (FANs) [592]. Seeking more disciplines, the coalition aims to counter what they consider to be an abuse of the way AD measures can be applied. The FANs have presented various proposal for tightening disciplines on the conduct of AD investigations[593].

Regarding Article 6.8 AD, the Communication from the Chairman of the Negotiating Group on Rules of 21 April 2011 summarized the state of the negotiations at that point[594].

The revised legal text presented by the Chairman include the following modifications to Article 6.8 AD:

- "Information requests to affiliate parties: 'Some delegations support the inclusion in the text of language to ensure that interested parties are not treated as non-cooperative if they fail to provide information from affiliates that they did not control. Other delegations are concerned that such language could encourage non-cooperation and cautioned about an inappropriately narrow concept of control in this context'" [595].

The Annex II would further be modified as followed[596]:

- all paragraphs, replacement of all instances of "should" by "shall";
- §1, replacement of "will be free to make determinations" by "may make determinations";

[592] Brazil, Chile, Colombia, Costa Rica, Hong Kong, China, Israel, Japan, Korea, Republic of, Mexico, Norway, Singapore, Switzerland, Chinese Taipei, Thailand, Turkey
[593] *Cf. infra*
[594] Communication from the Chairman of the 21 April 2011, Negociating Group on Rules, TN/RL/W/254
[595] *Cf. infra*, Annexes
[596] *Cf. infra*, Annexes

- §2, authority in the third sentence take the plural as authorities;
- §3, addition of a footnote to "[a]ll information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties" which will read as follow: "[s]ubmitted information cannot be used without undue difficulties if, *inter alia*, an assessment of the accuracy or relevance of that information is dependent upon other information that has not been supplied or cannot be verified";
- §6, replacement of "have an opportunity to provide further explanations, within a reasonable period, due account being taken of the time-limits of the investigation" by "have an opportunity to submit further evidence or information, or to provide further explanations, within a reasonable period, due account being taken of the time-limits of the investigation" with an additional footnote which will read as follow: "[p]rovided that the authorities need not consider any further evidence or information that is not submitted in time such that it can be verified during any on-site investigation conducted pursuant to Article 6.7." The end of the paragraph will be modified accordingly and will contain additional information: "[i]f the further evidence or information submitted, or the explanations provided, are considered by the authorities as not being satisfactory, the authorities shall inform the interested party concerned of the reasons for the rejection of the evidence or information and shall set forth such reasons in any published determinations";
- §7, addition to the sentence: "check the information from other independent sources at their disposal" of: "or reasonably available to them" and the addition of a footnote to the second sentence which will read as follows: "[t]he sources consulted shall be identified in the disclosure conducted pursuant to Article 6.9".

To summarize, apart from the major proposal regarding the "information requests to affiliated parties", which is controversial, all the modifications concern minor language corrections or additional practical clarifications.

Indeed, according to the Chairman: "this should not be understood to mean that I perceive significant signs of convergence on the major 'political' issues. To the contrary,

it is noticeable that the new text contains the same twelve bracketed issues as the 2008 Chair text [that is for Article 6.8 AD the proposal regarding the information requests to affiliated parties]. The 2008 Chair text on anti-dumping does however contain extensive un-bracketed language on a wide range of technical but nevertheless important issues, and our work over the past two plus years has pointed to a few areas where useful changes to that language might be warranted. In short, therefore, arguably a new text on anti-dumping can usefully reflect some limited progress, and in any event, it can serve to give a clear idea of where things stand"[597].

One of the key features in understanding the current state of the negotiations on rules, is their relationship to the core issues of the Doha Development Agenda (DDA) in the post-Bali context.

This was the object of a report of the Chairman who asked in consultation "how if at all the delegations see Rules issues fitting into the overall post-Bali context, with focus on the work programme to be considered for the completion of the DDA". The Chairman further "invited delegations to consider whether the Rules issues might be considered as issues to be given priority in a work programme in their own right, or whether consideration of a work programme in Rules should in their view depend on developments in the shaping of work programmes in Agriculture as well as NAMA and Services, which some describe as the 'core issues'"[598].

All delegations "noted the need to be realistic, to focus on what is doable, and to think creatively"[599] and most of them "considered that whatever the exact sequencing of the discussion, there needs to be serious horizontal reflection as to the overall scope and level of ambition of post-Bali activity, and that this should be the basis for a threshold determination of whether any or all of the Rules issues will be included in the next phase of our work, and if so, how"[600].

[597] Communication from the Chairman of the 21 April 2011, Negociating Group on Rules, TN/RL/W/254, Preliminary text
[598] Report by the Chairman of the 14 March 2011, Negociating Group on Rules, TN/RL/W/255, §1.2
[599] *Ibid.,* §1.3
[600] *Id.*

The majority of the delegations further expressed "openness to, rather than either insistence on or opposition to, including Rules in the work programme"[601]. Indeed, "many of these delegations considered that whether, and how, to include Rules in the work programme logically could only be addressed once a certain clarity has been achieved on the scope and level of ambition of work on agriculture, NAMA [NAMA refers to all products not covered by the Agreement on Agriculture] and services"[602].

It is in this context and following the Bali package as reconfirmed by the General Council on 28 November 2014, that the FANs submitted, on 1 April 2015, a proposal of recalibration of the negotiations on antidumping[603].

In this proposal, the FANs:

- recall their six broad objectives[604], among them: strengthening due process and enhancing the transparency of proceedings (3), reducing costs for authorities and respondents (4) and providing disciplines to improve and clarify substantive rules for dumping and injury (6) [605];
- state that: "while these objectives remain significant, after two decades of experience with the application of the current Anti-Dumping Agreement (ADA), it has also become increasingly more evident that many of the rules are unclear and need improvement. AD actions are no longer monopolized by small numbers of traditional users, and there is clear evidence that the ADA in many cases is misused for protectionist purposes to prevent legitimate competition in the marketplace. […] Clarified disciplines will ensure that procedural and substantive obligations are met, and will be a restraint on the abuse of AD actions."[606];

[601] *Ibid.,* §1.4
[602] *Id.*
[603] Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 1 April 2015, TN/RL/W/256
[604] "… repeatedly presented as our basis for the AD negotiations (initially in TN/RL/W/171)"
[605] Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 1 April 2015, TN/RL/W/256, §1 Backgraound
[606] *Id.*

- invite Members "to refocus and recalibrate their positions on AD in the development of a work program that contains the necessary deliverables for the completion of the DDA. In the words of the Director-General, the task is to identify and priorities the issues that are of the most substantive importance and target outcomes that are doable" [607];
- recalibrate their approach on what is "doable" on the 2011 Chairman text proposal, that is, starting a discussion on the un-bracketed issue (*i.e.* not including the information requests to affiliated parties for Article 6.8 AD) with a focus on due process and transparency. These "items would form core deliverables in the AD part of the work program together with other AD issues as appropriate (including the bracketed issues, unaddressed issues or other issues emerging from Members' deliberations) in view of the state of overall ambition and balance" [608].

Following their call to recalibrate the negotiation, the FANs, submitted a proposal based on the 2011 Chairman text on 15 June 2015[609]. Regarding the use of the facts available, the FANs made the following proposal: "various panel and Appellate Body reports have clarified the types of secondary information that the authorities may use as the facts available, and procedures that the authorities should follow to decide on the source of the facts available. It would benefit both authorities and interested parties to embody these clarifications in the AD Agreement"[610].

Basically, the proposal of the FANs is to include the findings of the Panels and the AB on Article 6.8 AD in the legal text.

[607] *Id.*
[608] *Ibid.,* §2 Our point of departure for "recalibration"
[609] Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 15 June 2015, TN/RL/W/257
[610] *Ibid.,* §4.4

The FANs submitted one more proposal on 14 July 2015, regarding the elements to be considered in the work program and to be recalibrated[611]. According to this proposal:

- improvements regarding transparency and due process would reduce litigation, and would benefit both interested parties and IAs [612];
- the predictability of duties imposed by WTO Members is the key element for the legitimate development of international trade free of distortions [613];
- an exporter should be able to predict what kind of pricing behaviour may give rise to the initiation of an AD proceeding and the imposition of AD duties [614];
- the Negotiating Group on Rules should also consider enhancing predictability of the AD measures in order to reduce the burden on IAs to prevent unintended distortions to international trade, and to protect the legitimate interests of parties involved in international trade [615].

The Russian Federation welcomed the FANs' proposal[616].

On 16 July 2015, the EU submitted the following in a communication: "increase in AD activity is not accompanied by sufficient transparency with regard to the procedures and practices followed"[617] and "increased transparency is certainly beneficial to all as such"[618]. Other Members generally welcomed the EU suggestions on transparency[619].

Since then some Members have submitted various proposals regarding the AD not directly related to Article 6.8 AD[620].

---

[611] Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 14 July 2015, TN/RL/W/259
[612] *Ibid.,* §1
[613] *Ibid.,* §2
[614] *Id.*
[615] *Ibid.,* §1
[616] Transparency in anti-dumping and countervailing duty proceedings: the issue of confidentiality, Paper from the Russian Federation of the 16 October 2015, TN/RL/W/262
[617] Communication from European Union of 16 July 2015, TN/RL/W/260, §2
[618] *Id.*
[619] EU technical paper in follow-up of its transparency submission (TN/RL/W/260) of 16 July 2015, TN/RL/W/263
[620] For instance, Follow up paper on the issues of transparency and due process, Communication from Japan of 22 October 2015, TN/RL/W/265

Regarding the various proposals presented to the Rules Negotiating Group, we suggest that:

- the 2011 Chairman text proposal focus essentially on language formulations and adds a few details. These details may enhance the clarity of the AD investigations. However, these details take little from the findings of the Panels and the AB on Article 6.8 AD;
- the FANs' proposal of recalibrating the negotiations is in line with the findings of the present research. Indeed, strengthening due process and enhancing the transparency of proceedings, reducing costs for authorities and respondents and providing disciplines to improve and clarify substantive rules for dumping and injury would benefit both the interested parties and the IAs, and enhance the predictability of AD duties and investigations. This could potentially reduce litigation and prevent unintended distortions to international trade according the WTO goals. However, the extent of change is limited to what is considered doable by the Members following the DDA in the post-Bali context;
- the FANs' proposal to embody these clarifications according the findings of the Panels and the AB on Article 6.8 AD would indeed benefit both IAs and interested parties. However, many issues pointed out in the present paper may stay unsolved. Indeed, as we have seen, the findings of the Panels and the AB on Article 6.8 AD leave some space to reach complete economic efficiency of this provision following the goals of the WTO;
- the Communication from the EU calling for an increase in transparency, which will benefit all, is fully in line with the present research.

4.3 Beyond Article 6.8 AD: on the opportunity for a single united international IA

Article 16 AD establishes a Committee on Anti-Dumping Practices composed of representatives from each of the Members. This Committee carries out responsibilities as assigned to it under the AD or the Members. It affords Members the opportunity to

consult on any matters relating to the operation of the AD or the furtherance of its objectives[621].

One of the first decision of the Committee was the creation of the Working Group on Implementation in October 1996[622]. The Working Group serves as a forum for the exchange of information on Members' practices. Indeed, the tasks of the Working Group is to prepare recommendations for the Committee on issues where agreement seems possible, and to consider other issues regarding implementation on which Members believe discussion would be helpful[623].

In the framework of the Doha Round, the Communication from the Chairman of the Negotiating Group on Rules of 21 April 2011 above-mentioned[624] presented a new draft of the AD Agreement containing the following proposal.

An added third sentence to Article 18.6 AD would give to the Committee the additional mandate to review AD policy and practices of individual Members according to the schedule and procedures set forth in a new Annex III[625]. Indeed, according to the draft of this new Annex III[626]:

- the AD policy and practices of Members shall be subject to periodic review by the Committee[627];
- the purpose of the review is to contribute to the transparency and understanding of Members' policies and practices with respect to the AD[628];
- the review shall be conducted on the basis of a factual report of the Secretariat[629];

[621] Article 16.1 AD
[622] Minutes of the meeting held on 29 April 1996, Committee on Anti-Dumping Practices, 2 October 1996, G/ADP/M/7
[623] *Ibid.,* §53
[624] Communication from the Chairman of the 21 April 2011, Negociating Group on Rules, TN/RL/W/254
[625] *Ibid.*, Article 18.6 AD, *cf. infra*, Annexes
[626] *Cf. infra*, Annexes
[627] §1 Annex III
[628] §2 Annex III
[629] §3 Annex III

- the factual report of the Secretariat shall describe in detail the antidumping policy and practices of the Member under review including, *inter alia*, the use of facts available[630].

On 16 July 2015, the EU submitted the following in a Communication to the Negotiating Group on Rules:

- while the work of the Committee on AD Practices and of the Technical Group have gone some way in sharing knowledge of each other's practice, there remains room for improvements with regard to the monitoring of Members' actual AD policies and practices[631];
- increased transparency is certainly beneficial to all as such, but by fostering a better understanding of each other's practice, it might also contribute to a reduction of disputes which, as we all know, are also on an exponential increase[632];
- this was the reason behind the EU textual proposal to the Group Negotiation on Rules in 2006[633]. The proposal was to establish a factual review system of each Member's AD practices. Such a review, made on the basis of a factual report under the responsibility of an independent entity such as the WTO Secretariat, would include a description of actual policies and practices and organizational aspects of the Member subject to review[634];
- the EU continues to believe that the reasons which underpinned the 2006 proposal are more valid than ever[635];
- in the EU's view, the un-bracketed Chair's text of 2011 on a new Article 18.6 and Annex III could serve as a good starting point for further work[636].

This proposal of an added sentence to Article 18.6 AD and a new Annex III provide an alternative way to increased transparency and therefore predictability to the AD,

[630] §8 Annex III
[631] Communication from European Union of 16 July 2015, TN/RL/W/260, §2
[632] *Id.*
[633] TN/RL/GEN/110
[634] Communication from European Union of 16 July 2015, TN/RL/W/260, §2
[635] *Id.*
[636] *Id.*

without changing the core of the rules, to the extent to what is doable in post-Bali activity.

Indeed, as Article 6.8 AD shows:

- the AD is first interpreted by domestic authorities, that is the IAs;
- although the findings of the Panels and the AB provide some guidance regarding challenged interpretations, there is a variety of practices among its Members regarding the interpretation of the legal text;
- this variety of practice is a source of a lack of transparency and predictability for the Members.

The exchange of information regarding the practice of Members according to the new Article 18.6 AD and Annex III may increase transparency and predictability. However, as long various authorities interpret the AD, a part of the issues regarding their interpretation will continue to arise.

We suggest, at this point, that the creation of a single united international IA in charge of all the Member AD investigations would increase transparency and predictability by a uniform practice.

Indeed, a unique IA may present the following advantages:

- issues regarding the various practices by Members would disappear as there would only be one source of interpretation of the AD at IA level;
- issues regarding the national legislations of the Members would disappear as there would be a unique investigation process;
- transparency and predictability would be increased as information regarding the practice would be easily available;
- a single IA would be more economical for its Members;
- the single IA's decisions would still be reviewed by the DSB in the framework of its mandate:

- Article 6.8 AD would benefit from this proposal to the extent suggested above.

All the foregoing advantages may have the following desirable effects following the WTO goals under the AD:

- decreasing trade barriers, increasing trade flows and further opening of trade between Member states;
- increasing predictability and transparency of the multi-lateral trade system;
- discouraging “unfair” practices, assuming the AD try to establish what is fair or unfair, enhancing competitiveness;
- decreasing discrimination between Member states, that is to say, between their own and foreign products.

A single united international IA goes beyond the recalibrating the process of the current negotiations in the Doha Round framework.

However, the proposals regarding the new Article 18.6 AD and Annex III is a first step in responding to an increased need for of transparency and predictability in global trade, which may, in the future, lead to the creation of a single united international IA.

Bibliography

Papers and books

ANDREONI James, Reasonable doubt and the optimal magnitude of fines: should the penalty fit the crime? RAND Journal of Economics, Vol. 22 (3) 1991, pp. 385-395

ARISTOTLE, Politics, Book III, Chapter XVI

BECKER Gary S., Crime and Punishment: An Economic Approach, Journal of Political Economy, Vol. 76 (2) 1968, pp. 169-217

BERNARDO Antonio / TALLEY Eric / WELCH Ivo, A theory of legal presumptions, Journal of Law, Economics & Organization, Vol. 16 (1) 2000, pp. 1-49

BIGOS J. Bradley, Contemplating GATS Article XVIII on Additional Commitments, Journal of World Trade, Vol. 42 (4) 2008, pp. 723-782

BISMUTH Régis, Financial Sector Regulation and Financial Services Liberalization at the Crossroads: The Relevance of International Financial Standards in WTO Law, Journal of World Trade, Vol. 44 (2) 2010, pp. 489-514

BRINK Tegan, Which WTO Rules Can a PTA Lawfully Breach? Completing the Analysis in Brazil – Tyres, Journal of World Trade, Vol. 44 (4) 2010, pp. 813-846

CHI Manjiao, Exhaustible Natural Resource' in WTO Law: GATT Article XX (g) Disputes and Their Implications, Journal of World Trade, Vol. 48 (5) 2014, pp. 939-966

CHO Sungjoon, How the world trade community operates: norms and discourse, World Trade Review, Vol. 13 (4) 2014, pp. 685-711

CONDON Bradly J., Captain America and the Tarnishing of the Crown: The Feud Between the WTO Appellate Body and the USA, Journal of World Trade, Vol. 52 (4) 2018, pp. 535-556

COPPENS Dominic, WTO Disciplines on Export Credit Support for Agricultural Products in the Wake of the US — Upland Cotton Case and the Doha Round Negotiations, Journal of World Trade, Vol. 44 (2) 2010, pp. 349-384

CROLEY Steven P. / JACKSON John H., WTO Dispute Procedures, Standard of Review, and Deference to National Governments, The American Journal of International Law, Vol. 90 (2) 1996, pp. 193-213

DAWAR Kamala, Government Procurement in the WTO: A Case for Greater Integration, World Trade Review, Vol. 15 (4) 2016, pp. 645-670

DEMOUGIN Dominique / FLUET Claude, Preponderance of evidence, European Economic Review, Vol. 50 (2) 2006, pp. 963-976

DOWNES Chris, The Post-Brexit Management of EU Agricultural Tariff Rate Quotas, Journal of World Trade, Vol. 51 (4) 2017, pp. 741-762

GAO Henry, Dictum on Dicta: Obiter Dicta in WTO Disputes, World Trade Review, Vol. 17 (3) 2018, pp. 509-533

GUAN Wenwei, How General Should the GATT General Exceptions Be?: A Critique of the 'Common Intention' Approach of Treaty Interpretation, Journal of World Trade, Vol. 48 (2) 2014, pp. 219-258

HAY Bruce L. / SPIER Kathryne E., Burdens of proof in civil litigation: An economic perspective, Journal of Legal Studies, Vol 26 (2) 1997, pp. 413-433

HEGEDUS-GASPAR Máté, Data Exclusivity for Biological Pharmaceuticals: Is New Zealand in Breach of World Trade Organization Law? Journal of World Trade, Vol. 50 (5) 2016, pp. 909-934

HERTEL Michael, Climate-Change-Related Trade Measures and Article XX: Defining Discrimination in Light of the Principle of Common but Differentiated Responsibilities, Journal of World Trade, Vol. 45 (3) 2011, pp. 653-678

HERWIG Alexia, Too much Zeal on Seals? Animal Welfare, Public Morals, and Consumer Ethics at the Bar of the WTO, World Trade Review, Vol. 15 (1) 2016, pp. 109-137

HRBATA Veronika, No International Organization is an Island… the WTO's Relationship with the WIPO: A Model for the Governance of Trade Linkage Areas?, Journal of World Trade, Vol. 44 (1) 2010, pp. 1-47

International Law Commission, Yearbook of the International Law Commission, Vol. II 1966

IRWIN Douglas A. / WEILER Joseph, Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285), World Trade Review, Vol. 7 (1) 2008, pp. 71-113

JUNG Haneul / SUH Jeongmeen, Preventing Systematic Circumvention of the SCM Agreement: Beyond the Mandatory/Discretionary Distinctio, World Trade Review, Vol. 15 (3) 2016, pp. 475-493

KANG Jing, The Presumption of Good Faith in the WTO 'As Such' Cases: A Reformulation of the Mandatory/Discretionary Distinction as an Analytical Tool, Journal of World Trade, Vol. 46 (4) 2012, pp. 879-911

KAPLOW Louis, Burden of Proof, Yale Law Journal, Vol. 121 (4) 2012, p. 738-859

KAPLOW Louis, Information and the Aim of Adjudication: Truth or Consequences, Stanford Law Review, Vol. 67 (6) 2015, pp. 1303-1371

KAPLOW Louis, Optimal Design of Private Litigation, Journal of Public Economics, Vol. 155 2017, pp. 64-73

KAPLOW Louis, Optimal Proof Burdens, Deterrence, and the Chilling of Desirable Behavior, The American Economic Review, Vol. 101 (3) 2011, pp. 277-280

KAPLOW Louis, On the Optimal Burden of Proof, NBER Working Paper Serie, Working Paper 17765, National Bureau of Economic Research, Cambridge 2012

KAPLOW Louis, Rules versus Standards: An Economic Analysis, Duke Law Journal, Vol. 42 (3) 1992, pp. 557-629

KAPLOW Louis / SHAVELL Steven, Economic Analysis of Law, NBER Working Paper Serie, Working Paper 6960, National Bureau of Economic Research, Cambridge 1999

KAPLOW Louis / SHAVELL Steven, Fairness Versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice, NBER Working Paper Serie, Working Paper 9622, National Bureau of Economic Research, Cambridge 2003

KAPLOW Louis / SHAVELL Steven, Fairness Versus Welfare, Harvard University Press 2002

KENNEDY Matthew, Blurred Lines: Reading TRIPS with GATT Glasses, Journal of World Trade, Vol. 49 (5) 2015, pp. 735-755

KUIJPER Pieter Jan, John Jackson and the standard of review, World Trade Review, Vol. 15 (3) 2016, pp. 398-400

LESTER Simon, Domestic Tobacco Regulation and International Law: The Interaction of Trade Agreements and the Framework Convention on Tobacco Control, Journal of World Trade, Vol. 49 (1) 2015, pp. 19-47

LI Fenghua, The Driving Forces of the Convergence of WTO Dispute Settlement Mechanism and International Investment Arbitration, Journal of World Trade, Vol. 52 (3) 2018, pp. 479-503

LUANRATANA Woraboon / ROMANO Alessandro, Stare Decisis in the WTO: Myth, Dream, or a Siren's Song?, Journal of World Trade, Vol. 48 (4) 2014, pp. 773-794

MARCEAU Gabrielle / IZAGUERRI Arnau / LANOVOY Vladyslav, The WTO's Influence on Other Dispute Settlement Mechanisms: A Lighthouse in the Storm of Fragmentation, Journal of World Trade, Vol. 47 (3) 2013, pp. 481-574

MAVROIDIS Petros C. The Regulation of International Trade — The WTO Agreements on Trade in Goods, Vol. 2, MIT Press 2016

MAVROIDIS Petros C., Trade in Goods, Oxford University Press 2012

MAVROIDIS Petros C. / MESSERLIN Patrick A. / WAUTERS Jasper M. / The Law and Economics of Contingent Protection in the WTO, Edward Elgar Publishing 2010

MCGRADY Benn, Fragmentation of International Law or "Systemic Integration" of Treaty Regimes: EC—Biotech Products and the Proper Interpretation of Article 31(3)(c) of the Vienna Convention on the Law of Treaties, Journal of World Trade, Vol. 42 (4) 2008, pp. 589-618

MICELI Thomas J., Optimal Prosecution of Defendants Whose Guilt Is Uncertain, Journal of Law, Economics, & Organization, Vol 6 (1) 1990, pp. 189-201

MITCHELL D. / SALONIDIS Constantine, David's Sling: Cross-Agreement Retaliation in International Trade Disputes, Journal of World Trade, Vol. 45 (2) 2011, pp. 457-488

MOSSNER Louise Eva, The WTO and Regional Trade: a family business? The WTO compatibility of regional trade agreements with non-WTO-members, World Trade Review, Vol. 13 (4) 2014, pp. 633-649

MUNRO James, Pushing the Boundaries of 'Products' and 'Goods' under GATT 1994: An Analysis of the Coverage of New and Unorthodox Articles of Commerce, Journal of World Trade, Vol. 47 (6) 2013, pp. 1323-1348

O'BRIEN Julia, The Equity of Levelling the Playing Field in the Climate Change Context, Journal of World Trade, Vol. 43 (5) 2009, pp. 1093-1114

POLINSKY A. Mitchell / RUBINFELD Daniel L., A Note on Optimal Public Enforcement with Settlements and Litigation Cost, NBER Working Paper Serie, Working Paper 2114, National Bureau of Economic Research, Cambridge 1986

POLINSKY A. Mitchell / SHAVELL Steven, Corruption and Optimal Law Enforcement, NBER Working Paper Serie, Working Paper 6945, National Bureau of Economic Research, Cambridge 1999

POLINSKY A. Mitchell / SHAVELL Steven, Legal Error, Litigation, and the Incentive to Obey the Law, Journal of Law, Economics, & Organization, Vol. 5 (1) 1989, pp. 99-108

POSNER Richard A., An Economic Approach to the Laws of Evidence, Stanford Law Review 51 1999, pp. 1477-1546

POSNER Richard A., Economic analysis of law, Brown, first published in 1972

POSNER Richard A., Gary Becker's Contributions to Law and Economics, The Journal of Legal Studies, Vol. 22 (2) 1993, pp. 211-215

PRUSA Thomas J. / VERMULST Edwin, A One-Two Punch on Zeroing: US — Zeroing (EC) and US — Zeroing (Japan) United States – Laws, Regulations and Methodology for Calculating Dumping Margins (Zeroing) and United States – Measures Relating to Zeroing and Sunset Reviews, World Trade Review, Vol. 8 (1) 2009, pp. 187-241

PRUSA Thomas J. / VERMULST Edwin, China — Countervailing and Anti-dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States: exporting US AD/CVD methodologies through WTO dispute settlement?, World Trade Review, Vol. 13 (2) 2014, pp. 229-266

QIAN Wenjie, The Dilemma of China as Respondent to Anti-Subsidy Proceedings: A Study of the First EU Anti-Subsidy Investigation against China, Journal of World Trade, Vol. 46 (4) 2012, pp. 961-977

RAJU K. D., World Trade Organization Agreement on Anti-Dumping — A GATT/WTO and Indian Jurisprudence, Wolters Kluwer 2008

RAMANUJAN Adarsh / SHARMA Atul / SEETHARAMAN S., *US — Carbon Steel (India)*: A Major Leap in Trade Remedy Jurisprudence, in: DAS Abhijit / NEDUMPARA James J. (editors), WTO Dispute Settlement at Twenty – Insiders' Reflections on India's Participation, Springer, 2016, pp. 233-246

REYNOLDS Kara M. / RIGOD Boris, Russia–Tariff Treatment: Identifying Systematic Violations of WTO Law, World Trade Review, Vol. 17 (2) 2018, pp. 291-312

ROVNOV Yury, The Relationship between the MFN Principle and Anti-Dumping Norms of the WTO Law Revisited, Journal of World Trade, Vol. 49 (1) 2015, pp. 173-197

RUBINFELD Daniel / SAPPINGTON David, Efficient awards and standards of proof in judicial proceedings, RAND Journal of Economics, Vol. 18 (2) 1987, pp. 308-315

SANCHIRICO Chris William, A Primary-Activity Approach to Proof Burdens, Journal of Legal Studies, Vol. 37 (1) 2008, pp. 273-313

SANCHIRICO Chris William, The burden of proof in civil litigation: A simple model of mechanism design, International Review of Law and Economics, Vol. 17 (3) 1997, pp. 431-447

SCHAFFER Gregory / WINTERS Alan. L., FTA Law in WTO Dispute Settlement: Peru–Additional Duty and the Fragmentation of Trade Law, World Trade Review, Vol. 16 (2) 2017, pp. 303-326

SHAHANI Garima, The Sequencing Dilemma: Will the European Union Succeed against Indonesia?, Journal of World Trade, Vol. 49 (3) 2015, pp. 517-537

SHAVELL Steven, A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation, NBER Working Paper Serie, Working Paper 18418, National Bureau of Economic Research, Cambridge 2012

SHAVELL Steven, Economic Analysis of the General Structure of the Law, NBER Working Paper Serie, Working Paper 9699, National Bureau of Economic Research, Cambridge 2003

SHAVELL Steven, Economic Analysis of Litigation and the Legal Process, NBER Working Paper Serie, Working Paper 9697, National Bureau of Economic Research, Cambridge 2003, chapters 17 and 19

SHAVELL Steven, On Discretion in the Application of Rules, American Law & Economics Association Annual Meeting, Paper 50 2004

SHAVELL Steven, Optimal Discretion in the Application of Rules, Harvard Law School, Discussion Paper No. 509 03/2005, Cambridge 2005

SHAVELL Steven, The Appeals Process and Adjudicator Incentives, NBER Working Paper Serie, Working Paper 10754, National Bureau of Economic Research, Cambridge 2004

SHAVELL Steven, The Optimal Structure of Law Enforcement, Journal of Law and Economics, Vol. 36 (1) 1993, pp. 255-287

SHAVELL Steven, When Is Compliance with the Law Socially Desirable?, The Journal of Legal Studies, Vol. 41 (1) 2012, pp. 1-36

SHI Jingxia / CHEN Weidong, The 'Specificity' of Cultural Products versus the 'Generality' of Trade Obligations: Reflecting on 'China — Publications and Audiovisual Products', Journal of World Trade, Vol. 45 (1) 2011, pp. 159-186

SPIER Kathryne, Litigation, in POLINSKY A. Mitchell / SHAVELL Steven, Handbook of Law and Economics, Vol. 1, Elsevier 2007, pp. 259-342

STEINBACH Armin, EC Liability for Non-compliance with Decisions of the WTO DSB: The Lack of Judicial Protection Persists, Journal of World Trade, Vol. 43 (5) 2009, pp. 1047-1069

TIJMES Jaime, Jurisprudential developments on the purpose of WTO suspension of obligations, World Trade Review, Vol. 13 (1) 2014, pp. 1-38

VAN BAEL Ivo / BELLIS Jean-François, EU Anti-Dumping and Others Trade Instruments, Wolters Kluwer 2011

VERMULST Edwin, The WTO Anti-Dumping Agreement: A Commentary, Oxford University Press 2005

WANG Heng, The Interpretation of GATS Disciplines on Economic Integration: GATS Commitments as a Threshold?, Journal of World Trade, Vol. 46 (2) 2012, pp. 397-438

WEBER Rolf H. / GROSZ Mirina, Governments' Interventions into the Real Economy under WTO Law Revisited: New Tendencies of Governmental Support of the Automobile Industry, Journal of World Trade, Vol. 43 (5) 2009, pp. 969-1012

WOUTERS Jan / DE MEESTER BART, The UNESCO Convention on Cultural Diversity and WTO Law: A Case Study in Fragmentation of International Law, Journal of World Trade, Vol. 42 (1) 2008, pp. 205-240

XIONG Ping, Patents in TRIPS-Plus Provisions and the Approaches to Interpretation of Free Trade Agreements and TRIPS: Do They Affect Public Health? Journal of World Trade, Vol. 46 (1) 2012, pp. 155-186

YA QIN Julia, The Challenge of Interpreting 'WTO-PLUS' Provisions, Journal of World Trade, Vol. 44 (1) 2010, pp. 127-172

IYNEDJIAN Marc, The Case for Incorporating Scientists and Technicians into WTO Panels, Journal of World Trade, Vol. 42 (2) 2008, pp. 279-297

ZHOU Weihuan / PENG Delei, *EU – Price Comparison Methodologies* (DS516): Challenging the Non-Market Economy Methodology in Light of the Negotiating History of Article 15 of China's WTO Accession Protocol, Journal of World Trade, Vol. 52 (3) 2018, pp. 505-533

Official documents (by order of appearance)

Recommendation concerning best information available in term of Article 6:8 ADP/21

GATT 1947

Anti-dumping code of 1968

Anti-dumping code of 1980

ADP/W/59/Rev.1, 2,3,4 and 5

Minutes of meeting held on 23 August 2001, Dispute Settlement Body, 2 October 2001, WT/DSB/M/108

Request for Consultations by the United States, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/1

Request for the Establishment of a Panel by the United States, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/2

Constitution of the Panel Established at the Request of the United States, Note by the Secretariat, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/3

Communication from the Chairman of the Panel, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/4 and WT/DS295/5

Notification of an Appeal by Mexico, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/6

Communication from the Appellate Body, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/7

Action by the Dispute Settlement Body, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/9

Marrakesh Declaration of 15 April 1994 and the Agreement establishing the World Trade Organization

WTO statistics on Anti-dumping Initiations: By Reporting Member 01/01/1995 - 31/12/2016, noting the data are taken from the semi-annual reports of WTO

Doha WTO Ministerial declaration adopted on 14 November 2001, WT/MIN(01)/DEC/1

Communication from the Chairman of the 21 April 2011, Negociating Group on Rules, TN/RL/W/254

Report by the Chairman of the 14 March 2011, Negociating Group on Rules, TN/RL/W/255

Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 1 April 2015, TN/RL/W/256

Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 15 June 2015, TN/RL/W/257

Communication from Chile; Colombia; Costa Rica; Hong Kong, China; Israel; Japan; Korea, Rep. of; Norway; Singapore; Switzerland; the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu; and Thailand of 14 July 2015, TN/RL/W/259

Transparency in anti-dumping and countervailing duty proceedings: the issue of confidentiality, Paper from the Russian Federation of the 16 October 2015, TN/RL/W/262

Communication from European Union of 16 July 2015, TN/RL/W/260

EU technical paper in follow-up of its transparency submission (TN/RL/W/260) of 16 July 2015, TN/RL/W/263

Follow up paper on the issues of transparency and due process, Communication from Japan of 22 October 2015, TN/RL/W/265

Minutes of the meeting held on 29 April 1996, Committee on Anti-Dumping Practices, 2 October 1996, G/ADP/M/7

Panels and Appellate Body Reports

Appellate Body Report, *US — Gasoline*, WT/DS2/AB/R

Panel Report, *Japan — Alcoholic Beverages II*, WT/DS8/R, WT/DS10/R, WT/DS11/R

Appellate Body Report, *Japan — Alcoholic Beverages II*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R

Appellate Body Report, *Australia — Salmon*, WT/DS18/AB/R

Appellate Body Report, *EC — Hormones*, WT/DS26/AB/R

Appellate Body Report, *US — Wool Shirts and Blouses*, WT/DS33/AB/R

Appellate Body Report, *EC — Hormones (Canada)*, WT/DS48/AB/R

Appellate Body Report, *US — Shrimp*, WT/DS58/AB/RW

Panel Report, *Guatemala — Cement I*, WT/DS60/R

Appellate Body Report, *EC — Computer Equipment*, WT/DS62/AB/R

Appellate Body Report, *Chile — Alcoholic Beverages*, WT/DS87/AB/R

Appellate Body Report, *Argentina — Footwear (EC)*, WT/DS121/AB/R

Panel Report, *Thailand — H-Beams*, WT/DS122/R

Appellate Body Report, *Thailand — H-Beams*, WT/DS122/AB/R

Appellate Body Report, *Mexico — Corn Syrup*, WT/DS132/AB/R

Appellate Body Report, *US — Lead and Bismuth II*, WT/DS138/AB/R

Panel Report, *EC — Bed Linen*, WT/DS141/R

Appellate Body Report, *EC — Bed Linen,* WT/DS141/AB/R

Panel Report, *US — Section 301 Trade Act*, WT/DS152/R

Panel Report, *Guatemala — Cement II*, WT/DS156/R

Panel Report, *Korea — Procurement*, WT/DS163/R

Appellate Body Report, *US — Lamb*, WT/DS177/AB/R, WT/DS178/AB/R

Panel Report, *US — Stainless Steel (Korea)*, WT/DS179/R

Panel Report, *US — Hot-Rolled Steel*, WT/DS184/R

Appellate Body Report, *US — Hot-Rolled Steel*, WT/DS184/AB/R

Argentina — Ceramic Tiles, WT/DS189/R

Appellate Body Report, *US — Cotton Yarn*, WT/DS192/AB/R

Panel Report, *US — Steel Plate*, WT/DS206/R

Panel Report, *Egypt — Steel Rebar*, WT/DS211/R

Appellate Body Report, *EC — Tube or Pipe Fittings*, WT/DS219/AB/R

Panel Report, *Argentina — Poultry Anti-Dumping Duties,* WT/DS241/R

Appellate Body Report, *US — Corrosion-Resistant Steel Sunset Review*, WT/DS244/AB/R

Panel Report, *US — Softwood Lumber IV,* WT/DS257/R

Appellate Body, *US — Softwood Lumber V*, WT/DS264/AB/R

Panel Report, *US — Softwood Lumber VI*, WT/DSS277/R

Panel Report, *Mexico — Anti-Dumping Measures on Rice,* WT/DS295/R

Appellate Body Report, *Mexico — Anti-Dumping Measures on Rice*, WT/DS295/AB/R

Appellate Body Report, *Mexico — Taxes on Soft Drinks*, WT/DS308/AB/R

Panel Report, *Korea — Certain Paper*, WT/DS312/R

Panel Report, *Korea — Certain Paper*, WT/DS312/RW

Panel Report, *EC and certain member States — Large Civil Aircraft*, WT/DS316/R

Appellate Body Report, *US — Zeroing (Japan)*, WT/DS322/AB/R

Panel Report, *Mexico — Steel Pipes and Tubes*, WT/DS331/R

Panel Report, *EC — Salmon (Norway),* WT/DS337/R

Panel Report, *US — Stainless Steel (Mexico),* WT/DS344/R

Appellate Body Report, *US — Stainless Steel (Mexico)*, WT/DS344/AB/R

Appellate Body Report, *US — Continued Zeroing*, WT/DS350/AB/R

Appellate Body Report, *China — Publications and Audiovisual Products*, WT/DS363/AB/R,

Panel Report, *US — Orange Juice (Brazil)*, WT/DS382/R

Panel Report, *China — GOES*, WT/DS414/R

Panel Report, *China — Broiler Products*, WT/DS427/R

Panel Report, *US — Shrimp II (Viet Nam)*, WT/DS429/R

Panel Report, *China — Autos (US)*, WT/DS/440/R

Panel Report, *China — HP-SSST*, WT/DS454/R

Panel Report, *Canada — Welded Pipe*, WT/DS482/R

Annexes

Article 6.8 AD and Annex II

Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

[...]

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

[...]

Annex II: Best Information Available in Terms of Paragraph 8 of Article 6

1. As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if

the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are considered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

Draft proposal by the Chairman of the Negociating Group on Rules

TN/RL/W/254
21 April 2011

Negotiating Group on Rules

COMMUNICATION FROM THE CHAIRMAN

[...]

6.8 In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.

[INFORMATION REQUESTS TO AFFILIATED PARTIES: Some delegations support the inclusion in the text of language to ensure that interested parties are not treated as non-cooperative if they fail to provide information from affiliates that they did not control. Other delegations are concerned that such language could encourage non-cooperation, and cautioned about an inappropriately narrow concept of control in this context.]

[...]

Annex II: Best Information Available in Terms of Paragraph 8 of Article 6

1. As soon as possible after the initiation of the investigation, the investigating authorities ~~should~~ shall specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities shall ~~should~~ also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities ~~will be free~~

~~to~~ may make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

2. The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities shall ~~should~~ consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and shall ~~should~~ not request the party to use for its response a computer system other than that used by the party. The authorit~~y~~ies ~~should~~ shall not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble. The authorities ~~should~~ shall not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

3. All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties[637], which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, ~~should~~ shall be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language ~~should~~ shall not be considered to significantly impede the investigation.

[637] Original footnote number 41, Submitted information cannot be used without undue difficulties if, *inter alia*, an assessment of the accuracy or relevance of that information is dependent upon other information that has not been supplied or cannot be verified.

4. Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information ~~should~~ shall be supplied in the form of written material or any other form acceptable to the authorities.

5. Even though the information provided may not be ideal in all respects, this ~~should~~ shall not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.

6. If evidence or information is not accepted, the supplying party ~~should~~ shall be informed forthwith of the reasons therefor, and ~~should~~ shall have an opportunity to submit further evidence or information, or to provide further explanations, within a reasonable period, due account being taken of the time-limits of the investigation[638]. If the further evidence or information submitted, or the explanations provided, are considered by the authorities as not being satisfactory, the authorities shall inform the interested party concerned of the reasons for the rejection of ~~such~~ the evidence or information and ~~should~~ shall set forth such reasons ~~be given~~ in any published determinations.

7. If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they ~~should~~ shall do so with special circumspection. In such cases, the authorities ~~should~~ shall, where practicable, check the information from other independent sources at their disposal or reasonably available to them, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation[639]. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

[638] Original footnote number 42, Provided that the authorities need not consider any further evidence or information that is not submitted in time such that it can be verified during any on-site investigation conducted pursuant to Article 6.7.
[639] Original footnote number 43, The sources consulted shall be identified in the disclosure conducted pursuant to Article 6.9.

[...]

18.6 The Committee shall review annually the implementation and operation of this Agreement taking into account the objectives thereof. The Committee shall inform annually the Council for Trade in Goods of developments during the period covered by such reviews. In addition, the Committee shall review the anti-dumping policy and practices of individual Members according to the schedule and procedures set forth in Annex III.

[...]

Annex III: Procedure for the Review of Members' Anti-Dumping policy and Practices Pursuant to Article 18.5

1. The anti-dumping policy and practices of Members shall be subject to periodic review by the Committee.

A. Objectives

2. The purpose of the review is to contribute to the transparency and understanding of Members' policies and practices in respect of anti-dumping. The review is not intended to serve as the basis for enforcement of specific obligations under this Agreement or for dispute settlement procedures, or to impose new policy commitments on Members.

B. Procedures for Review

3. The review shall be conducted on the basis of the following documentation:

(a) a factual report, to be drawn up by the Secretariat on its own responsibility; and

(b) if the Member under review so wishes, a report supplied by that Member.

4. The factual report by the Secretariat shall be based on the information available to it and that provided by the Member under review. The Secretariat should seek clarification from such Member regarding its anti-dumping policies and practices making use of the indicative checklist identified in paragraph 8 of this Annex. The Member under review shall provide the information requested for the preparation of the report, and shall be provided with an opportunity to comment on the draft report prior to its circulation.

5. The first cycle of reviews shall begin three years after the date of entry into force of the results of the Doha Development Agenda. During the ensuing five years, the Committee shall review the anti-dumping policies and practices of the 20 Members with the most anti-dumping measures in force as of the date of entry into force.[640]

6. The list of the Members to be reviewed during each subsequent five-year review period shall be established on the basis of the number of original investigations initiated during the most recent five-year period for which information is available. The list shall include the 20 Members that initiated the most investigations pursuant to Article 5 during that period, as well as any additional Members that have initiated five or more original investigations during that period; provided, that the Committee may adjust the list of Members to be reviewed and/or the cycle for review in light of subsequent developments and experience.

7. The Committee shall agree on the order of, and schedule for, the conduct of these reviews, taking into account the resource constraints of the Secretariat and of developing country Members.[641]

[640] Least-developed country Members shall be subject to review pursuant to this Annex on a voluntary basis only.
[641] In the event that the Committee fails to agree, the Director-General shall decide on the order of, and schedule for, the reviews.

8. The factual report of the Secretariat shall describe in detail the anti-dumping policy and practices of the Member under review including, where relevant and applicable, with respect to the following matters:

- institutional organization of the investigating authorities
- statistics on proceedings carried-out
- pre-initiation procedures and practices
- determination of export price and normal value (and adjustments thereto)
- details of comparison methods
- calculation of dumping margin
- details and methodology of analysis and determination of injury and causal link
- application of a lesser duty
- application of public interest considerations
- level of co-operation obtained
- use of facts available
- procedural requirements
- treatment of confidential information
- practice with regard to on-the-spot verifications
- duty collection and assessment system
- acceptance of undertakings
- review investigations (under Articles 9 and 11)
- anti-circumvention procedures
- judicial/administrative review

9. The report by the Secretariat and any report by the Member subject to review shall be circulated to the Members on an unrestricted basis, and shall be considered at a special meeting of the Committee convened for that purpose.

10. Members recognize the need to minimize the burden for governments that might arise from unnecessary duplication of work pursuant to this procedure and the Trade Policy Review Mechanism.

C. Developing Country Members

11. The Secretariat shall make technical assistance available, on request of a developing country Member, to facilitate that Member's effective participation in the review. The Secretariat shall also consult with the developing country Member subject to review and shall, where appropriate, include in its report to the Committee an assessment of that Member's broader technical assistance and resource needs with respect to anti-dumping.

D. Appraisal of the Mechanism

12. The Committee shall undertake an appraisal of the operation of these procedures upon completion of the first cycle of reviews. The Committee should seek to identify any changes which would enhance the operation of these procedures, and may, if appropriate, recommend that the Council for Trade in Goods submit to the Ministerial Conference any proposals for the amendment of these procedures necessary to effectuate such changes.

[...]