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

Report of the Appellate Body
WT/DS122/AB/R

Adopted by the Dispute Settlement Body on 5 April 2001

Thailand, <i>Appellant</i> Poland, <i>Appellee</i> European Communities, <i>Third Participant</i> Japan, <i>Third Participant</i> United States, <i>Third Participant</i>		Present: Ganesan, Presiding Member Lacarte-Muró, Member Taniguchi, Member
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I. INTRODUCTION

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

2. The factual background to this dispute is set out in detail in the Panel Report.² On 21 June 1996, Siam Yamato Steel Co. Ltd., filed an application with Thailand's Ministry of Commerce for the imposition of anti-dumping duties on, *inter alia*, angles, shapes and sections of iron or non-alloy steel: H-beams ("H-beams") originating in Poland.³ On 30 August 1996, the Thai investigating authorities published a notice of initiation of an anti-dumping investigation on H-beams originating in Poland, and forwarded a copy of that notice to the Polish Embassy in Bangkok, and to the two Polish firms under investigation, namely Huta Katowice and Stalexport.⁴ On 1 May 1997, the Thai authorities sent copies of the proposed final determination of dumping and injury to the two Polish firms.⁵ On 26 May 1997, the authorities published a notice of the application of a definitive anti-dumping duty on imports of H-beams originating in Poland. On 4 June 1997, the authorities transmitted this notice, along with a notice, dated 30 May 1997, of the final determination of dumping and injury to Poland.⁶

3. On 6 April 1998, Poland requested consultations with Thailand pursuant to Article 17.3 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), and Article

¹ WT/DS122/R, 28 September 2000, DSR 2001:VII, 2747.

² Panel Report, paras. 2.1-2.8.

³ *Ibid.*, para. 2.2.

⁴ *Ibid.*, para. 2.3.

⁵ *Ibid.*, para. 2.7.

⁶ Panel Report, para. 2.8.

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

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

- (a) inconsistently with the second sentence of Article 3.2 and Article 3.1, the Thai authorities did not consider, on the basis of an "objective examination" of "positive evidence" in the disclosed factual basis, the price effects of dumped imports;
- (b) inconsistently with Articles 3.4 and 3.1, the Thai investigating authorities failed to consider certain factors listed in Article 3.4, and failed to provide an adequate explanation of how the determination of injury could be reached on the basis of an "unbiased or objective evaluation" or an "objective examination" of "positive evidence" in the disclosed factual basis; and
- (c) inconsistently with Articles 3.5 and 3.1, the Thai authorities made a determination of a causal relationship between dumped imports and any possible injury on the basis of (i) their findings concerning the price effects of dumped imports, which we had already found to be inconsistent with the second sentence of Article 3.2 and Article 3.1; and (ii) their findings concerning injury, which we had already found to be inconsistent with Article 3.4 and 3.1.⁷

5. The Panel also concluded that Poland had failed to establish that Thailand's initiation of the anti-dumping investigation on imports of H-beams from Poland was inconsistent with the requirements of Articles 5.2, 5.3 and 5.5 of the *Anti-Dumping Agreement* or Article VI of the GATT 1994⁸; and that Poland had also failed to establish that Thailand had acted inconsistently with its obligations under Article 2 of the *Anti-Dumping Agreement* or Article VI of the GATT 1994.⁹ The Panel also found that, in its request for the establishment of a panel, Poland had not

⁷ Panel Report, para. 8.3.

⁸ *Ibid.*, para. 8.1.

⁹ *Ibid.*, para. 8.2.

sufficiently identified its claims of violation of Article 6 of the *Anti-Dumping Agreement*, and accordingly, did not examine those claims.¹⁰

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

7. On 23 October 2000, pursuant to Article 16.4 of the DSU, Thailand notified the DSB of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, and filed a Notice of Appeal with the Appellate Body.¹² On 16 November 2000, Thailand filed an appellant's submission.¹³ Poland filed appellee's submissions on 1 December 2000.¹⁴ On the same day, the European Communities, Japan and the United States each filed separate third participant's submissions.¹⁵ On 20 December 2000, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in light of the agreement of the participants in this appeal, the Appellate Body Report in the appeal would be circulated to Members of the WTO no later than 12 March 2001.¹⁶

8. The oral hearing in the appeal was held on 19 January 2000.¹⁷ The participants and the third participants presented oral arguments and responded to questions put to them by the Members of the Appellate Body Division hearing the appeal.

II. ARGUMENTS OF THE PARTICIPANTS

A. Claims of Error by Thailand - Appellant

1. Article 6.2 of the DSU

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

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

¹⁰ Panel Report, para. 7.286.

¹¹ *Ibid.*, para. 8.5.

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

¹³ Pursuant to Rule 21 (1) of the *Working Procedures*.

¹⁴ Pursuant to Rule 22 (1) of the *Working Procedures*.

¹⁵ Pursuant to Rule 24 of the *Working Procedures*.

¹⁶ WT/DS122/5, 20 December 2000.

¹⁷ Pursuant to Rule 27 of the *Working Procedures*.

¹⁸ Appellate Body Report, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 30.

terms of reference, and the defending party and third parties must be able to inform themselves of the legal basis of the complaint "*from the time of the request for establishment of a panel*".¹⁹

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

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

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

14. Thailand also argues that the Panel erred in failing to establish the appropriate standard for determining how a defending party may demonstrate prejudice as a result of the complaining party's failure to comply with its obligations under Article 6.2 of the DSU. The Panel erred in failing to consider evidence provided by Thailand

¹⁹ Thailand's appellant's submission, para. 14.

²⁰ *Ibid.*, para. 22.

regarding why Thailand's ability to defend itself had been prejudiced. The prejudice to Thailand's case was caused, *inter alia*, by the uncertainties that flowed directly from Poland's approach of merely listing Article VI of the GATT 1994 and Articles 2 and 3 of the *Anti-Dumping Agreement*. This prejudice was particularly pronounced in the case of a developing country like Thailand which has scarce resources that it is able to allocate to prepare its defence. Moreover, anti-dumping disputes are complex, and it is particularly important that defending parties are given adequate time and opportunity to respond to any claims.

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

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

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

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

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

19. Thailand argues that the Panel misinterpreted the standard of review under Article 17.6 of the *Anti-Dumping Agreement* to mean that its "examination of the matter" is limited to the disclosed factual basis of the determination contained in certain specified non-confidential documents. This means that in determining

whether the "facts" were properly assessed and were properly evaluated, the Panel limited itself only to the disclosed "facts", and excluded the confidential "facts" on the record of the investigating authorities.

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

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

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

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

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

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

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

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

4. *Burden of Proof and Standard of Review*

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

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

B. *Arguments of Poland - Appellee*

1. *Article 6.2 of the DSU*

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

29. Poland believes that Thailand's main arguments may be properly characterized as follows: the Appellate Body should reject the case-by-case approach of *Korea - Dairy Safeguards* in favour of an absolute standard by which even minor pleading deficiencies cause *per se* dismissal of otherwise cognizable claims; a panel may not consider either the timing of a respondent's allegation of "prejudice" or a respon-

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

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

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

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

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

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

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

ments. Poland submits that Thailand has erroneously equated the Panel's use of the term "*factual basis*" with the term "*facts*".

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

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

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

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

²¹ Poland's appellee's submission, para. 74.

only its own assessment of what it believes the Panel "apparently" did or "seemed to do" in making its decision.

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

3. Article 3.4 of the Anti-Dumping Agreement

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

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

4. Burden of Proof and Standard of Review

42. Poland argues that the Panel properly examined Article 3.1 in light of the standard of review set forth in Article 17.6 of the *Anti-Dumping Agreement*. The Panel further examined both confidential and non-confidential data, correctly concluding that the disclosed facts cannot be considered to be 'properly established' if they are inaccurate. Contrary to Thailand's claims, the Panel also demonstrated a detailed and correct understanding of the relationship between Articles 17.5 and 17.6 of the *Anti-Dumping Agreement*. The Panel properly understood its role under Article 17.6 of the *Anti-Dumping Agreement*, and properly conducted its inquiry, consistent with the applicable standard of review. In Poland's view, Thailand's suggestion that the standard of review should be considerably narrowed should be rejected, because

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

it requires a degree of deference that would allow parties to choose what questions a panel may ask and which facts may be deemed relevant to the Article 17.6(i) examination.

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

III. ARGUMENTS OF THE THIRD PARTICIPANTS

A. Japan

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

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

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

46. The Panel noted that Article 17.6(i) of the *Anti-Dumping Agreement* requires panels to determine whether "the establishment of the facts was proper and the evaluation was unbiased and objective". Here again, the text of the *Anti-Dumping Agreement* enshrines the basic concept of "unbiased and objective" assessment of the facts. Moreover, the standard of review calls on a Panel to evaluate whether the investigating authorities made an "objective" decision *at the time* of the decision. The issue is not the authorities' current rationale, but rather the authorities' evaluation - both the stated rationale and the underlying facts - *at the time* of its determinations.

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

These other articles reinforce the importance of the need for authorities to provide an "objective examination" by disclosure of the factual basis to interested parties.

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

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

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

B. *The European Communities*

1. *Article 6.2 of the DSU*

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

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

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

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

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

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

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

C. *The United States*

1. *Article 6.2 of the DSU*

56. The United States disagrees with the Panel's statement that the "attendant circumstances" can include the consideration of issues raised in an underlying anti-dumping investigation. In the view of the United States, the term "in light of the attendant circumstances" means, in general terms, that the factual context surrounding the request for the establishment of a panel, including any record of the consultations

or other communications between the parties, or the circumstances of the measure being reviewed, may mean that a relatively abbreviated description of the legal claim may be sufficient to satisfy the requirement of Article 6.2 of the DSU concerning "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The attendant circumstances will not, however, normally include the underlying anti-dumping investigation itself.

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

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

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

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

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

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

61. In the view of the United States, the Panel was correct in determining that the language of Article 3.4 is mandatory, making it clear that all of the listed factors in Article 3.4 must be evaluated in all cases. The text of Article 3.4 makes each of the 15 individual factors listed in Article 3.4 *prima facie* relevant to an injury determination. Accordingly, all factors must be evaluated by the investigating authorities. The Panel also correctly stated that the requirements imposed by Article 3.1 of "positive evidence" and "objective examination" do not amount to a mere checklist approach

to the evaluation of the Article 3.4 factors. To this end, the United States agrees with the Panel's finding that the importance of certain factors may vary significantly from case to case, and that in certain circumstances other non-listed factors may be deemed relevant.

IV. PRELIMINARY PROCEDURAL MATTER AND RULING

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

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

64. Thailand stated that it appeared on the face of the CITAC brief that this organization had had access to the appellant's submission in this appeal. Thailand stated that, in the CITAC brief, certain references to the specific arguments of Thailand use the format set out in Thailand's appellant's submission. In particular, Thailand noted that in paragraph 2 of the brief submitted by CITAC, there is an explicit reference to "Section III.C.5 of the Thailand Submission". Thailand also stated that certain arguments made in the brief showed a level of knowledge of Thailand's arguments that "goes beyond what could be divined in the Notice of Appeal". Thailand stated that there was no plausible explanation for CITAC, a United States private sector association, to have learned the precise format of Thailand's appellant's submission, other than that Poland or a third participant in this appeal had failed to treat Thailand's submission as confidential and had disclosed it to CITAC, in violation of Articles 17.10 and 18.2 of the DSU.

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

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

67. Thailand also requested that we take such action as we deemed appropriate, if we established that a participant or a third participant in these proceedings had

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

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

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

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

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

L.L.P., could explain how the reference to "Section III.C.5 of the Thailand Submission" came to be made in paragraph 2 of the written brief submitted by CITAC.

72. Poland also explained that it had put into place "substantial internal confidentiality procedures", and that access to all documents was limited to two persons in the relevant Polish Ministry, and two persons employed in the Geneva Mission of Poland. Finally, Poland informed us that, although it considered that there had been no proof of wrongdoing on the part of Hogan & Hartson L.L.P., Poland had decided to accept that law firm's proposal to withdraw as its legal counsel in this appeal.

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

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

The terms of Article 17.10 of the DSU are clear and unequivocal: "[t]he proceedings of the Appellate Body shall be confidential". Like all obligations under the DSU, this is an obligation that all Members of the WTO, as well as the Appellate Body and its staff, must respect. WTO Members who are participants and third participants in an appeal are fully responsible under the DSU and the other covered agreements for any acts of their officials as well as their representatives, counsel or consultants. We emphasized this in *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, para. 145, where we stated that:

... the provisions of Articles 17.10 and 18.2 apply to all Members of the WTO, and oblige them to maintain the confidentiality of any submissions or information submitted, or received, in an Appellate Body proceeding. Moreover, *those provisions oblige Members to ensure that such confidentiality is fully respected by any person that a Member selects to act as its representative, counsel or consultant.* (emphasis added)

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

evidence that CITAC received, or had access to, Thailand's appellant's submission in this appeal.

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

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

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

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

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

V. ISSUES RAISED IN THIS APPEAL

79. The following issues are raised in this appeal:

- (a) whether the Panel erred in finding that the request for the establishment of a panel submitted by Poland was sufficient to meet the requirements of Article 6.2 of the DSU, with respect to claims relating to Articles 2, 3 and 5 of the *Anti-dumping Agreement*;
- (b) whether the Panel erred in finding that:
 - (i) Article 3.1 of the *Anti-Dumping Agreement* "requires that the reasoning supporting the determination be 'formally or explic-

itly stated' in documents in the record of the AD investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination"²³; and that "the factual basis relied upon by the authorities must be discernible from those documents"²⁴; and that

- (ii) Article 17.6(i) requires a Panel reviewing an injury determination under Article 3.1, in its assessment of whether the *establishment* of the facts is proper, to ascertain whether the "factual basis" of the determination is "discernible" from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in its assessment of whether the *evaluation* of the facts is unbiased and objective, to examine the analysis and reasoning only in those documents to ascertain the connection between the "disclosed factual basis" and the findings²⁵; and
- (c) whether the Panel erred in its interpretation and application of Article 3.4 of the *Anti-Dumping Agreement*, in particular, in its application of the standard of review set forth in Article 17.6(ii) of that Agreement; and
- (d) whether, in its examination of the consistency of the final determination of the Thai investigating authorities with Article 3 of the *Anti-Dumping Agreement*, the Panel erred in its application of the burden of proof and the standard of review set forth in Article 17.6(i) of that Agreement.

VI. ARTICLE 6.2 OF THE DSU

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

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

We consider that the panel request performs the functional equivalent of merely listing the Article. Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin... . [We] note that documentary evidence before us, which was in Thailand's possession from the time of the underlying AD investigation, indicates that the Polish firms persistently raised during the

²³ Panel Report, *supra*, footnote 2, para. 7.143.

²⁴ *Ibid.*, para. 7.143.

²⁵ *Ibid.*, para. 7.145.

course of the investigation the precise issue which Poland raises in this dispute under Article 2.2 i.e. the use of a "reasonable" amount for profit in the calculation of constructed normal value. We consider that this constitutes an attendant circumstance that confirms the sufficiency of the panel request with respect to Article 2.²⁶

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

... we consider that the text of the panel request goes beyond a "mere listing" of the provisions. Poland refers explicitly to specific language in the text of Article 3 and identifies specific factors that, in its view, the Thai authorities failed to consider in reaching their determination of injury and causation. The panel request refers to Poland's view that the determination was made in the absence of "positive evidence" and an "objective examination" (both terms explicitly referred to in Article 3.1) and refers also to certain "enumerated factors" (import volume, price effects, and the consequent impact of such imports on the domestic industry). In the context of a case of material injury, this specific language relates to the text of Articles 3.1, 3.2, 3.4 and 3.5. While it may have been preferable for Poland to have also explicitly listed the specific sub-paragraphs of paragraph 3 to which it was referring, we consider that the text of the panel request is sufficiently clear to meet the minimum requirements of Article 6.2 DSU with respect to Poland's claim of violation of Article 3.²⁷

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

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

Second, we note that, as will often be the case in WTO anti-dumping disputes, this dispute involves several issues that were raised before the Thai investigating authorities in the actual course of the underlying anti-dumping investigation. Thailand argues that this consideration is irrelevant in an examination under Article 6.2 DSU. We disagree. We consider that the fact that an issue was raised during the underlying investigation means that it involves considerations of which the government of the defending Member would be aware, and would involve

²⁶ Panel Report, para. 7.35.

²⁷ *Ibid.*, para. 7.36.

²⁸ *Ibid.*, para. 7.21.

evidence in the possession of that government. With respect to Article 5, the record before us indicates that the issue of notification under Article 5.5 AD had been raised in the course of the Thai AD investigation, both directly with the Thai investigating authorities and with Thailand at the WTO ... We consider that these circumstances confirm the sufficiency of the panel request with respect to Article 5.²⁹

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

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

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

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

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

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

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

²⁹ Panel Report, para. 7.22.

³⁰ Appellate Body Report, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

tion of the panel by defining the precise claims at issue in the dispute.³¹

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

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

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

Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.³³

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

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

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

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

³³ See Appellate Body Report, *supra*, footnote 18, para. 124.

³⁴ *Ibid.*, para. 127.

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

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

Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement.

Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement.

Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement.³⁷

90. We begin first with Article 3 of the *Anti-Dumping Agreement*. With respect to Article 3, the Panel was of the view that the panel request went beyond a "mere listing" of Article 3. The Panel stated that Poland has referred explicitly to the specific language of Article 3, and has identified the specific factors that, in Poland's view, the Thai authorities failed to consider in reaching the determination of injury and causation. The Panel also stated that Poland has referred to certain "enumerated factors" which, in the context of a case of material injury, "relate to" the requirements of Articles 3.1, 3.2, 3.4 and 3.5. We accept the Panel's view. Article 3.1, which requires that an injury determination be based on positive evidence, and that it involve an objective examination of the relevant injury factors, is a fundamental and substantial obligation that functions as a chapeau, and informs the rest of Article 3.³⁸ Thus, in citing the language of Article 3.1 and in referring to certain key factors enumerated in Article 3, Poland has sufficiently provided a "brief summary of the legal basis of the

³⁵ See Appellate Body Report, *supra*, footnote 18, para. 123.

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

³⁷ WT/DS122/2, 15 October 1999.

³⁸ See also *infra*, para. 106.

complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU.³⁹

91. With respect to Article 2, in its request for the establishment of a Panel, Poland stated that "Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement". We note that, with respect to its claims under Article 2, Poland submitted before the Panel that it was "unfairly limited in its ability to detail Polish claims relating to the final determination of the Thai authorities in this matter" and that "this limitation is a result of the incomplete data furnished by the Thai authorities".⁴⁰ The panel record in this case shows that on 20 June 1997, and 23 June 1997, the affected Polish exporters requested certain information from Thailand which the latter considered to be confidential, and did not disclose to the exporters.⁴¹ The information requested by Poland related to the confidential facts on which the Thai investigating authorities based their determination of injury. Thailand submitted this information to the Panel on 2 March 2000, four months *after* Poland had submitted its request for the establishment of a panel.⁴² We are of the view that the lack of access to this information may have affected the precision with which Poland set out the claims in its panel request.

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

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

94. In assessing the sufficiency of Poland's panel request with respect to the claims relating to Articles 2 and 5, the Panel put considerable emphasis on the fact

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

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

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

⁴² Panel Report, *supra*, footnote 1, paras. 5.1, 5.2 and 5.4.

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

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

that the dispute involved "several issues that were raised before the Thai investigating authorities".⁴⁵ The Panel's reasoning seems to assume that there is always continuity between claims raised in an underlying anti-dumping investigation and claims raised by a complaining party in a related dispute brought before the WTO. This is not necessarily the case. The parties involved in an underlying anti-dumping investigation are generally exporters, importers and other commercial entities, while those involved in WTO dispute settlement are the Members of the WTO. Therefore, it cannot be assumed that the range of issues raised in an anti-dumping investigation will be the same as the claims that a Member chooses to bring before the WTO in a dispute. Furthermore, although the defending party will be aware of the issues raised in an underlying investigation, other parties may not. Thus, the underlying investigation cannot normally, in and of itself, be determinative in assessing the sufficiency of the claims made in a request for the establishment of a panel. We, therefore, are of the view that, in this case, the Panel erred to the extent that it relied mainly on issues raised in the underlying anti-dumping investigation in assessing the sufficiency of Poland's panel request under Articles 2 and 5.

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

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

97. In view of the importance of the request for the establishment of a panel, we encourage complaining parties to be precise in identifying the legal basis of the complaint. We also note that nothing in the DSU prevents a defending party from requesting further clarification on the claims raised in a panel request from the complaining party, even before the filing of the first written submission. In this regard, we point to Article 3.10 of the DSU which enjoins Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith in an effort to resolve the dispute". As we have previously stated, the "procedural rules of WTO

⁴⁵ Panel Report, *surpa*, footnote 1, para. 7.22.

dispute settlement are designed to promote, not the development of litigation techniques, but simply the fair, prompt and effective resolution of trade disputes".⁴⁶

VII. ARTICLES 3.1 AND 17.6 OF THE ANTI-DUMPING AGREEMENT

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

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

The Panel noted that its view on this issue would be based on an examination of the wording of Article 3 "read in the light of" the standard of review in Article 17.6.⁴⁹

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

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

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

100. The Panel then proceeded to apply its interpretation of Article 3.1 to a *panel's* obligations "in reviewing the final determination of injury".⁵³ With respect to the

⁴⁶ Appellate Body Report, *United States - Tax Treatment of "Foreign Sales Corporations"*, WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, para. 166.

⁴⁷ Thailand's appellant's submission, paras. 142-189.

⁴⁸ Panel Report, *supra*, footnote 1, para. 7.140.

⁴⁹ *Ibid.*, para. 7.141.

⁵⁰ *Ibid.*, para. 7.143.

⁵¹ *Ibid.*, para. 7.143.

⁵² *Ibid.*, para. 7.143.

⁵³ *Ibid.*, para. 7.144.

reasoning and analysis of the investigating authority, on which it should base its review, the Panel said:

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

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

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

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

... examination of whether the establishment of the facts is proper under Article 17.6(i) would include ascertaining whether the factual basis of the determination is *discernible* from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination, and whether those documents reflect the actual underlying data.⁵⁶ (emphasis added)

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

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

102. The Panel sought contextual support for its interpretation of Articles 3.1 and 17.6 in other provisions of the *Anti-Dumping Agreement*. It pointed to provisions in Article 6 which set forth the rights of parties, during the anti-dumping proceedings, to have "a full opportunity for the defence of their interests", and to be informed of

⁵⁴ Panel Report, para. 7.144.

⁵⁵ *Ibid.*, para. 7.144.

⁵⁶ *Ibid.*, para. 7.145.

⁵⁷ *Ibid.*, para. 7.145.

the "essential facts under consideration which form the basis for the decision whether to apply definitive measures".⁵⁸ The Panel also referred to provisions in Article 12 which require a final determination to contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures".⁵⁹

103. Based on the above reasoning, the Panel concluded:
 ... [W]e decline to base our review on confidential reasoning or analysis that may have formed part of the record of the Thai AD investigation, but to which the Polish firms (and/or their legal counsel) did not have access at the time of the final determination. This would include any reasoning or analysis contained exclusively in Exhibit Thailand-44.⁶⁰
104. On appeal, Thailand requests the Appellate Body to [r]everse the Panel's interpretations of Article 3.1 and 17.6 of the Anti-Dumping Agreement and its consequent finding that it was only to consider certain non-confidential documents disclosed to Polish firms (and/or their legal counsel) at the time of the final determination in reviewing the matter in dispute.⁶¹

Thailand argues that the Panel has wrongly interpreted Articles 3.1 and 17.6 by misreading the term "positive evidence"⁶², and by neglecting to consider properly the context provided by other provisions of the *Anti-Dumping Agreement*, notably the obligation to protect confidential information under Article 6.5⁶³, and to give public notice of final determinations under Article 12.2.2.⁶⁴

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

Article 3

Determination of Injury

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

106. Article 3 as a whole deals with obligations of Members with respect to the determination of injury. Article 3.1 is an overarching provision that sets forth a Member's fundamental, substantive obligation in this respect. Article 3.1 informs the

⁵⁸ Panel Report, para. 7.150, citing Articles 6.2 and 6.9 of the *Anti-Dumping Agreement*.

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

⁶⁰ *Ibid.*, para. 7.147.

⁶¹ Thailand's appellant's submission, para. 237.

⁶² *Ibid.*, paras. 154-156.

⁶³ Thailand's appellant's submission, paras. 144-151.

⁶⁴ *Ibid.*, paras. 173-189.

more detailed obligations in succeeding paragraphs. These obligations concern the determination of the volume of dumped imports, and their effect on prices (Article 3.2), investigations of imports from more than one country (Article 3.3), the impact of dumped imports on the domestic industry (Article 3.4), causality between dumped imports and injury (Article 3.5), the assessment of the domestic production of the like product (Article 3.6), and the determination of the threat of material injury (Articles 3.7 and 3.8). The focus of Article 3 is thus on *substantive* obligations that a Member must fulfill in making an injury determination.

107. We recall that the legal issue before us is whether the terms "positive evidence" and "objective examination" in Article 3.1 require that "the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination", and, further, that "the factual basis relied upon by the authorities must be discernible from those documents".⁶⁵ We note that the Panel stated that the dictionary meaning of the term "positive" suggests that "positive evidence" is "formally or explicitly stated; definite, unquestionable (*positive proof*)".⁶⁶ Likewise, the Panel reasoned that the dictionary meaning of "objective" suggests that an "objective examination" is "concerned with outward things or events; presenting facts uncoloured by feelings, opinions, or personal bias; disinterested".⁶⁷ Even if we accept that the ordinary meaning of these terms is reflected in the dictionary definitions cited by the Panel, in our view, the ordinary meaning of these terms does not suggest that an investigating authority is required to base an injury determination only upon evidence disclosed to, or discernible by, the parties to the investigation. An anti-dumping investigation involves the commercial behaviour of firms, and, under the provisions of the *Anti-Dumping Agreement*, involves the collection and assessment of *both* confidential and non-confidential information. An injury determination conducted pursuant to the provisions of Article 3 of the *Anti-Dumping Agreement* must be based on the *totality* of that evidence. We see nothing in Article 3.1 which limits an investigating authority to base an injury determination only upon non-confidential information.

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

109. Further contextual support for this reading of Article 3.1 is provided by other provisions of the *Anti-Dumping Agreement*. Article 6 (entitled "Evidence") estab-

⁶⁵ Panel Report, *supra*, footnote 1, para. 7.143.

⁶⁶ *Ibid.*, para. 7.143.

⁶⁷ *Ibid.*, para. 7.143.

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

110. Article 12 (entitled "Public Notice and Explanation of Determinations") also provides contextual support for our interpretation of the meaning of "positive evidence" and "objective examination" in Article 3.1. In a similar manner to Article 6, Article 12 establishes a framework of procedural and due process obligations concerning, notably, the contents of a final determination. Article 12.2.2 requires, in particular, that a final determination contain "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", and "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers". Article 12, like Article 6, sets forth important procedural and due process obligations. However, as in the case of Article 6, there is no justification for reading these obligations into the substantive provisions of Article 3.1. We do *not*, however, imply that the injury determination of the Thai authorities in this case necessarily met the requirements of Article 12. This issue was not considered by the Panel, since Poland did not make a claim under this provision.

111. We consider, therefore, that the requirement in Article 3.1 that an injury determination be based on "positive" evidence and involve an "objective" examination of the required elements of injury does *not* imply that the determination must be based only on reasoning or facts that were disclosed to, or discernible by, the parties to an anti-dumping investigation. Article 3.1, on the contrary, permits an investigating authority making an injury determination to base its determination on *all* relevant reasoning and facts before it.

112. We, therefore, conclude that the Panel erred in finding that Article 3.1 of the *Anti-Dumping Agreement*, "requires that the reasoning supporting the determination [must be] 'formally or explicitly stated' in documents in the record of the AD investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination"⁶⁸; and that "the factual basis relied upon by the authorities must be discernible from those documents".⁶⁹

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

In examining the matter referred to in paragraph 5:

⁶⁸ Panel Report, para. 7.143.

⁶⁹ *Ibid.*, para. 7.143.

in its assessment of the facts of the matter, the panel shall determine whether the authorities' *establishment of the facts was proper* and whether their *evaluation of those facts was unbiased and objective*. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned; (emphasis added)

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

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

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

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

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

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

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

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

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

118. Articles 17.5 and 17.6(i) require a panel to examine the facts made available to the investigating authority of the importing Member. These provisions do not prevent a panel from examining facts that were not disclosed to, or discernible by, the interested parties at the time of the final determination.

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

120. Thailand requests the Appellate Body to reverse "the Panel's interpretations of Article 3.1 and 17.6 of the Anti-Dumping Agreement and its consequent finding that it was only to consider certain non-confidential documents disclosed to Polish firms (and/or their legal counsel) at the time of the final determination in reviewing the matter in dispute."⁷³ Thailand's appeal is therefore limited to the Panel's interpretation of Articles 3.1 and 17.6, specifically with respect to the standard of review adopted by the Panel in respect of these two provisions, and its findings on whether the Panel was entitled only to consider certain types of documents. Thailand does not ask us to reverse the Panel's findings, contained in paragraph 8.3 of its Report, that Thailand's anti-dumping measure is inconsistent with Articles 3.2, 3.4, and 3.5, to-

⁷² Panel Report, *supra*, footnote 1, para. 7.145.

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

gether with Article 3.1. We, therefore, leave undisturbed the Panel's findings in paragraph 8.3 of the Panel Report.

VIII. ARTICLE 3.4 OF THE ANTI-DUMPING AGREEMENT

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

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

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

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

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

... the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the *panel finds* that a relevant provision of the Agreement *admits of more than one permissible interpretation*, the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. (emphasis added)

125. In determining whether *all* the factors mentioned in Article 3.4 have to be considered in each case, the Panel began its interpretation in accordance with the customary rules of interpretation of public international law as required by Article 17.6(ii), first sentence, by examining at length the meaning and context of the wording of Article 3.4, and by contrasting it with the wording of Article 3.5. The Panel also examined, with respect to this issue, the interpretation by a previous panel

⁷⁴ Panel Report, *supra*, footnote 1, para. 7.229.

⁷⁵ Thailand's appellant's submission, paras. 219-236.

of Article 3.4⁷⁶, and an earlier interpretation given by us of an analogous provision, Article 4.2(a) of the *Agreement on Safeguards*.⁷⁷ The Panel concluded its comprehensive analysis by stating that "each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities ...".⁷⁸ We agree with the Panel's analysis in its entirety, and with the Panel's interpretation of the mandatory nature of the factors mentioned in Article 3.4 of the *Anti-Dumping Agreement*.

126. Thailand claims, however, that:

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

127. We note that, contrary to what Thailand argues, the Panel did state that it was "mindful of the standard of review in Article 17.6(ii)", even though this statement was made in the section of the Panel Report in which the Panel discussed the standard of review under Article 17.6.⁸⁰ We also note that the Panel, by means of a thorough textual and contextual analysis, clearly applied the customary rules of interpretation of public international law. Further, the Panel's interpretation that Article 3.4 requires a mandatory evaluation of all the individual factors listed in that Article clearly left no room for a "permissible" interpretation that all individual factors need *not* be considered.

128. We conclude that the Panel was correct in its interpretation that Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision, and that, therefore, the Panel did not err in its application of the standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement*.

IX. BURDEN OF PROOF AND STANDARD OF REVIEW

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

130. Thailand's arguments relating to the burden of proof focus on specific procedural aspects of the Panel's approach to the burden of proof. In particular, Thailand argues that the Panel "failed to articulate clearly the roles of the Parties (and itself)

⁷⁶ Panel Report, *Mexico - Anti-dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.128.

⁷⁷ Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para. 129.

⁷⁸ Panel Report, para. 7.231.

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

⁸⁰ Panel Report, para. 7.54.

under the burden of proof".⁸¹ According to Thailand, "the Panel failed to make, either expressly or implicitly, the required findings regarding whether Poland had indeed presented a *prima facie*, case and whether Thailand had effectively refuted such case".⁸² Thailand also argues that, because the claims of Poland were not sufficiently clear, the Panel through its questioning of the parties improperly assumed the burden of making Poland's case, thus improperly "substituting itself as prosecutor".⁸³

131. With respect to the standard of review, Thailand considers that the Panel misinterpreted its role under the specific standard of review established by Article 17.6(i) of the *Anti-Dumping Agreement*. Thailand argues that "the Panel significantly broadened its examination to include an assessment of all of the facts leading to Thailand's determinations of dumping, injury, and causal link".⁸⁴ Thailand submits that "it is not the task of the Panel itself to examine whether the facts were properly established, and the Panel's belief regarding the basis of a determination is not relevant".⁸⁵

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

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

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

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

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

135. With respect to Thailand's argument that the claims of Poland were not sufficiently clear, and that the Panel, therefore, overstepped the limits of its authority in asking questions of the parties, we note that we have previously stated that panels are

⁸¹ Thailand's appellant's submission, para. 190.

⁸² *Ibid.*, para. 198.

⁸³ *Ibid.*, para. 197.

⁸⁴ *Ibid.*, para. 211.

⁸⁵ *Ibid.*, para. 203.

⁸⁶ *Supra*, footnote 18, para. 145.

⁸⁷ Appellate Body Report, WT/DS90/AB/R, adopted 22 September 1999, DSR 1999:IV, 1763, para. 137.

⁸⁸ Appellate Body Report, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, adopted 16 January 1998, DSR 1998:I, 9, para. 74.

entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them. In our Report in *Canada - Measures Affecting the Export of Civilian Aircraft*, we dismissed the view that a panel has no authority to ask a question relating to claims for which the complaining party had not first established a *prima facie* case, and stated that such an argument was "bereft of any textual or logical basis".⁸⁹

136. In this case, Poland set out its claims with sufficient clarity in its request for the establishment of a panel⁹⁰, so that it was within the Panel's mandate to ask questions related to those claims. We are not convinced by Thailand's argument that the Panel improperly made Poland's case for it.⁹¹ We note that the Panel itself showed a clear appreciation of the limitations of its authority, as well as its understanding of the role of Poland as the complaining party in this dispute.⁹² Thus, the Panel did not err to the extent that it asked questions of the parties that it deemed necessary "in order to clarify and distil the legal arguments".⁹³

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

⁸⁹ Appellate Body Report, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 185.

⁹⁰ See *supra*, paras. 90-96.

⁹¹ See Appellate Body Report, *Japan - Measures Affecting Agricultural Products*, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, where we ruled that the panel in that case made the case for the complainant with respect to a claim of violation of Article 5.6 of the *Agreement on the Application of Sanitary and Phytosanitary Measures*.

⁹² In this respect, the Panel stated:

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

See Panel Report, para. 7.50.

⁹³ *Ibid.*, para. 7.50.

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

⁹⁵ See *supra*, para. 114.

examination consistently with the applicable standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*.

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

X. FINDINGS AND CONCLUSIONS

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

- (a) upholds the Panel's finding that the panel request submitted by Poland with respect to claims relating to Articles 2, 3 and 5 of the *Anti-Dumping Agreement* was sufficient to meet the requirements of Article 6.2 of the DSU;
- (b) reverses the Panel's interpretation that Article 3.1 of the *Anti-Dumping Agreement* requires that "the reasoning supporting the determination be 'formally or explicitly stated' in documents in the record of the AD investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination"⁹⁶; and that "the factual basis relied upon by the authorities must be discernible from those documents"⁹⁷;
- (c) reverses the Panel's interpretation that Article 17.6(i) requires a Panel reviewing an injury determination under Article 3.1, in its assessment of whether the *establishment* of the facts is proper, to ascertain whether the "factual basis" of the determination is "discernible" from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination; and, in its assessment of whether the *evaluation* of the facts is unbiased and objective, to examine the analysis and reasoning in only those documents to ascertain the connection between the "disclosed factual basis" and the findings⁹⁸;
- (d) upholds the Panel's interpretation that Article 3.4 requires a mandatory evaluation of all of the factors listed in that provision, and that, therefore, the Panel did not err in its application of the standard of review under Article 17.6(ii) of the *Anti-Dumping Agreement*;
- (e) leaves undisturbed the Panel's findings of violation under Articles 3.1, 3.2, 3.4 and 3.5 of the *Anti-Dumping Agreement*; and
- (f) concludes that the Panel did not err in its application of the burden of proof, and in the application of the standard of review under Article 17.6(i) of the *Anti-Dumping Agreement*.

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

⁹⁶ Panel Report, para. 7.143.

⁹⁷ *Ibid.*, para. 7.143.

⁹⁸ *Ibid.*, para. 7.145.

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

Report of the Panel
WT/DS122/R

Adopted by the the Dispute Settlement Body on 5 April 2001

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LIST OF ABBREVIATIONS

AD:	Anti-dumping
AD Agreement:	"Anti-dumping Agreement", or Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ADP Committee:	Committee on Anti-dumping Practices of the WTO
DSU:	"Dispute Settlement Understanding", or Agreement on Rules and Procedures Governing the Settlement of Disputes
DSB:	Dispute Settlement Body
SYS:	Siam Yamato Steel Co. Ltd.
DBE:	Department of Business Economics of Thailand's Ministry of Commerce
DFT:	Department of Foreign Trade of Thailand's Ministry of Commerce
DIT:	Department of Internal Trade of Thailand Ministry of Commerce
HK:	Huta Katowice SA
JIS:	Japanese Institute of Standards
DIN:	Deutsche Industria Normen
CIF:	Cost plus insurance and freight
CPS Committee:	Thailand's Committee to Consider Procedures for the Imposition of Special Duty on Products which are Imported Into Thailand at Unfair Prices and for the Imposition of Special Duty on Products
CDS Committee:	Thailand's Committee on Dumping and Subsidies
HS:	Harmonized System of Tariff Nomenclature
B:	Thai Baht
PLN:	Polish Zlotys
X-Conf.:	Confidential information redacted

I. INTRODUCTION

1.1 On 6 April 1998, Poland requested consultations with Thailand pursuant to Article 17.3 of the Agreement on the Implementation of Article VI of GATT 1994 ("the AD Agreement") and Article 4 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("the DSU") regarding Thailand's imposition of final anti-dumping duties on imports of angles, shapes and sections of iron or non-alloy steel: H-beams ("H-beams") originating in Poland¹. Poland and Thailand held

¹ WT/DS122/1. The subject merchandise was defined in the notice of initiation as "Angles, shapes and sections of iron or non-alloy steel: H sections, classified under the HS. 7216.33.0055". Exhibit Poland-1.

consultations on 29 May 1998 but failed to reach a mutually satisfactory resolution of the matter.

1.2 On 13 October 1999, pursuant to Articles 4 and 6 of the DSU and Article 17 of the AD Agreement, Poland requested the establishment of a Panel to examine the matter².

1.3 At its meeting on 19 November 1999, the Dispute Settlement Body ("the DSB") established a Panel in accordance with Poland's request³. At that meeting, the parties to the dispute also agreed that the Panel should have standard terms of reference. The terms of reference therefore are the following:

"To examine, in the light of the relevant provisions of the covered agreements cited by Poland in document WT/DS122/2, the matter referred to the DSB by Poland in document WT/DS122/2, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in those agreements".

1.4 On 20 December 1999, the parties to the dispute agreed on the following composition of the Panel:

Chairman: Professor John H. Jackson

Members: Mr. Roberto Azevêdo

Mr. Gilles Gauthier

1.5 The European Communities, Japan and the United States reserved their rights to participate in the panel proceedings as third parties.

1.6 The Panel met with the parties on 7-8 March 2000 and 12 April 2000. It met with the third parties on 8 March 2000.

1.7 On 31 May 2000, the Panel provided its interim report to the parties. On 9 and 13 June 2000, respectively, Poland and Thailand submitted written requests for review by the Panel of precise aspects of the interim report. On 15 June 2000, the parties submitted written comments on one another's requests for interim review. Section VI, *infra*, describes the interim review requests and comments received, and the changes made to the report in response to those comments.

II. FACTUAL ASPECTS

2.1 This dispute concerns the imposition of definitive anti-dumping duties by Thailand on H-beams from Poland⁴.

2.2 On 21 June 1996, Siam Yamato Steel Co. Ltd. ("SYS"), the sole Thai producer of H-beams, filed an application with Thailand's Ministry of Commerce for the imposition of anti-dumping duties on, inter alia, H-beams originating in Poland.⁵ On

² WT/DS122/2.

³ W/DS122/3

⁴ See *supra* note 1 for the definition of the subject merchandise in the notice of initiation.

⁵ Three departments of the Ministry of Commerce acted as investigating authorities in the investigation. The role of the Department of Business Economics ("the DBE") was to evaluate the application and make a recommendation concerning initiation of the investigation. The Department of Foreign Trade ("DFT") conducted the preliminary and final dumping investigations. The Department of Internal Trade ("DIT") conducted the preliminary and final injury investigations. The Committee to

17 July 1996, a representative of the Government of Poland met with officials from the Department of Business Economics ("DBE").

2.3 On 30 August 1996, the DBE published a notice of initiation of an anti-dumping investigation on H-beams originating in Poland, and forwarded a copy of that notice to the Polish Embassy in Bangkok and to the Polish firms.⁶ The Department of Foreign Trade ("DFT") and the Department of Internal Trade ("DIT") established their respective periods of investigation as 1 July 1995 to 30 June 1996, and the DIT also collected certain information for 1994 to 1996.

2.4 On 18 October 1996, Poland requested consultations with Thailand under Article 17.2 of the AD Agreement.⁷ On 14 November 1996, Thailand replied to this request in writing, summarizing discussions that had taken place between the Governments of Poland and Thailand prior to the initiation of the investigation. In this letter, Thailand expressed the view, inter alia, that the 17 July 1996 meeting was a legitimate form of official notification to the Government of Poland⁸ pursuant to Article 5.5 of the AD Agreement.

2.5 The parties in the anti-dumping investigation filed questionnaire responses during October-December 1996. On 27 December 1996, Thailand imposed provisional anti-dumping duties on imports of H-beams originating in Poland, and published notices to that effect⁹. On 20 January 1997, Thailand forwarded to the Polish respondent companies - Huta Katowice ("HK") and Stalexport¹⁰ notifications concerning the preliminary determinations of dumping and injury, as well as the notice of provisional anti-dumping duties¹¹.

2.6 On 7 and 13 February 1997, the Polish respondent companies submitted comments on the preliminary determinations, and requested a hearing and disclosure of information¹². On 19 February 1997, the DFT replied to the Polish companies.¹³ On 20 and 27 February 1997, the DFT sent disclosure information concerning dumping and injury to the Polish respondent companies¹⁴. On 13 March, the DFT conducted a hearing for interested parties to present their views. Verification of ques-

Consider Procedures for the Imposition of Special Duty on Products which are Imported Into Thailand at Unfair Prices and for the Imposition of Special Duty on Products ("the CPS Committee") received the DBE's report and recommendations and made the decision concerning initiation. The Committee on Dumping and Subsidies ("the CDS Committee") received the DFT's and DIT's reports and recommendations, made the preliminary and final dumping determinations, and made the decisions concerning the application of preliminary and definitive anti-dumping duties.

⁶ Exhibits Thailand-2, -3, -5; Poland-1.

⁷ Exhibit Thailand-13.

⁸ Exhibits Thailand-14; Poland-4.

⁹ Exhibits Thailand-23, -24; Poland-5.

¹⁰ HK is the only Polish producer of H-beams, and is as well an exporter. Stalexport is a Polish steel exporter only. These were the only two Polish respondent companies in the investigation. Also named as respondents in the investigation were Duferco and General Steel Export, both of which are steel trading firms based in Liechtenstein.

¹¹ Exhibit Thailand-22.

¹² Exhibits Thailand-26, -27; Poland-6.

¹³ Exhibits Thailand-28; Poland-7.

¹⁴ Exhibits Thailand-29, -30, -31, -32, -33; Poland-7, -8.

tionnaire responses was conducted in Poland by Thai officials during 16-18 April 1997.

2.7 On 1 May 1997, the DFT sent to the Polish respondent companies and the Government of Poland copies of proposed final determinations of dumping and injury¹⁵. The DFT also transmitted to HK confidential disclosure of dumping findings¹⁶. On 13 May 1997, the Polish respondent companies (through their legal counsel) submitted comments on the proposed final determinations¹⁷ and on 19 May 1997, the DFT responded¹⁸.

2.8 On 26 May 1997, the DFT published a notice of the application of a definitive anti-dumping duty on imports of H-beams originating in Poland. On 4 June 1997, the DFT transmitted this notice along with its 30 May 1997 notice of the final determination of dumping and injury¹⁹ to the Government of Poland. On 20 and 23 June 1997, the Polish respondent companies sent letters to the DFT commenting on the final determination and requesting additional information²⁰. On 7 July 1997, the DFT responded to the Polish respondent companies²¹ indicating its view that the requested information had already been disclosed to the Polish respondent companies.

III. PARTIES' REQUESTS FOR FINDINGS AND RECOMMENDATIONS

A. *Poland*

3.1 Poland requests that the Panel find that by imposing anti-dumping duties on angles, shapes and sections of iron or non-alloy steel: H-beams imports from the Republic of Poland, Thailand has violated:

- AD Agreement Article 3, as read in conjunction with and Article VI of GATT 1994, by imposing anti-dumping duties where no material injury exists;
- AD Agreement Article 2, as read in conjunction with and Article VI of GATT 1994, by failing to make a proper determination of dumping and by calculating an unsupportable and unreasonable alleged dumping margin; and
- AD Agreement Articles 5 and 6, as read in conjunction with and Article VI of GATT 1994 and Article 12 AD Agreement, by unreasonably initiating and conducting its anti-dumping investigation of angles, shapes and sections of iron or non-alloy steel and H-beams imports from Poland in violation of the procedural and evidentiary requirements set forth in AD Agreement Articles 5 and 6.

¹⁵ Exhibits Thailand-37; Poland-10, -11.

¹⁶ Exhibits Thailand-38, -39.

¹⁷ Exhibit Thailand-40.

¹⁸ Exhibits Thailand-41, -42; Poland-12.

¹⁹ Exhibits Thailand-45, -46; Poland-13.

²⁰ Exhibits Thailand-47, -48; Poland-14, -15.

²¹ Exhibits Thailand-49, Poland 16.

3.2 Poland argues that in so doing, and in particular by applying its illegal conduct to the exports of angles, shapes and sections of iron or non-alloy steel and H-beams produced by Huta Katowice and Stalexport in Poland, Thailand has nullified and impaired benefits accruing to Poland under the WTO Agreements.

3.3 Poland further requests that the Panel recommend that Thailand immediately bring its measures into conformity with its WTO obligations.

B. Thailand

3.4 In its first submission, Thailand requests that the Panel issue a preliminary ruling dismissing Poland's purported claims under Articles 5 and 6 of the AD Agreement based on Poland's violation of its obligations under Article 6.2 of the DSU to identify the "claims" in its request for establishment of a panel with sufficient clarity to present the problem clearly by, in effect, merely listing Articles 5 and 6 without adding additional detail.

3.5 In its closing statement at the first substantive meeting of the Panel, Thailand further requests that the Panel determine whether Poland complied with Article 6.2 of the DSU with respect to purported claims under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement. Thailand requests that we also dismiss these claims.

3.6 Without prejudice to its requests for rulings to dismiss the entire case, Thailand also requests that the Panel find that Thailand acted consistently with its obligations under Article VI of GATT 1994 and the AD Agreement.

IV. ARGUMENTS OF THE PARTIES

A. Main Arguments of the Parties

4.1 With the agreement of the parties, the Panel has decided that in lieu of the traditional descriptive part of the Panel report setting forth the arguments of the parties, the parties' submissions will be annexed in full to the Panel's report. Accordingly, the parties' first and second written submissions and oral statements, along with their written answers to questions, are attached at **Annex 1** (Poland) and **Annex 2** (Thailand). The written submissions, oral statements and answers to questions of the third parties are attached at **Annex 3**.

B. Arguments Concerning Submission of Certain Confidential Information

4.2 As set forth in section V, *infra*, an issue arose concerning the submission by Thailand of certain confidential information. In this context, the Panel sought, and the parties and third parties submitted, written comments. These submissions are attached at **Annex 4**.

V. SUBMISSION OF CERTAIN CONFIDENTIAL INFORMATION BY THAILAND

5.1 In conjunction with its first submission, Thailand sought to submit to the Panel certain exhibits containing confidential information²², which Thailand indicated that it did not intend to provide to Poland or to the third parties²³. Some of the confidential information in these exhibits pertains to SYS and some pertains to HK and Stalexport. Thailand cited Article 17.7 of the AD Agreement as the basis for its view that such a submission to the Panel alone was permissible in this dispute²⁴. According to Thailand, this approach was necessary to balance its obligation to protect confidential information submitted during the anti-dumping investigation by both Thai and Polish companies with its right to defend itself in this dispute. Thailand also indicated that it would be willing to discuss the adoption of additional Panel working procedures that would allow parties access to the confidential exhibits under certain circumstances, provided that such procedures would guarantee the protection of the confidential information in all WTO proceedings, including any before the Appellate Body.

5.2 The Panel informed the parties that it wished to hear their views, particularly those of Poland, by 17 February 2000, before deciding whether it could accept the information on the basis suggested by Thailand. Third parties also were given an opportunity to comment. Poland, Thailand and the third parties submitted written comments (see Annex 4), and the Panel held a meeting with the parties to discuss possible supplemental procedures concerning confidential information, based on a proposal made by Thailand in its 17 February 2000 comments. On 1 March 2000, Poland indicated its acceptance of the procedures proposed. On 2 March 2000, on the basis of an agreement between the parties, the Panel adopted "Supplemental working procedures concerning certain confidential information". These supplemental working procedures are attached at **Annex 5**. On the basis of the adopted procedures, on 2 March 2000 Thailand submitted the confidential exhibits to the Panel and provided copies to Poland and to the third parties.

5.3 At its first and second substantive meetings, and at the third party session, the Panel emphasized the importance of maintaining the confidentiality of the confidential information. In particular, the Panel indicated its awareness of the sensitivity of the information, and reminded the parties of the supplemental working procedures that the Panel had adopted in connection with the submission of the information. These procedures were aimed at ensuring, as required under Article 18.2 of the DSU, that the confidentiality of the information was preserved. The Panel reminded the parties and third parties that they were responsible for all members of their delega-

²² Exhibits Thailand-11, -18, -20, -29, -31, -38, -42, -43, and -44.

²³ See Thailand's first written submission, Annex 2-1, at paras. 3-4.

²⁴ Article 17.7 provides that: "Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided".

tions, and thus needed to ensure that all members of their delegations maintained the confidentiality of the information.

5.4 In a letter dated 1 March 2000, and at the first substantive meeting of the Panel, Poland requested that the Panel exclude from the scope of that meeting any arguments concerning Poland's claims under Articles 2 and 3 of the Anti-dumping Agreement, due to the delay in the submission of the confidential information by Thailand. In a letter to the Panel dated 2 March 2000, the European Communities, as a third party, expressed its concern over not having as of that date yet received the confidential information, and requested that the Panel either postpone its first substantive meeting with the parties and third parties or schedule a second meeting at which parties and third parties could be heard by the Panel on issues pertaining to Articles 2 and 3 of the AD Agreement. At the first substantive meeting of the Panel, Thailand indicated its view that Poland's delay in accepting the procedures on confidential information was the cause of any delay in the submission of that information.

5.5 At its first substantive meeting with the parties, the Panel noted in respect of Poland's request to limit the scope of the debate that the dispute was still in its very early stages, in that the second round of submissions was not due for three more weeks, that there would be a second meeting of the Panel with the parties in five weeks time, and that there would be oral and written questions and answers in connection with both Panel meetings. Thus, in the Panel's view, there remained at that point ample time and opportunities for the parties to fully present their views, including with respect to the substance of the confidential information, and therefore it was not necessary to narrow the scope of the discussion at the first meeting. Poland, as any party, was free to determine the content of its own statements and submissions. At the third party session, in respect of the concern raised in the EC's 2 March letter, the Panel noted that the third parties had by then received the confidential information, and the Panel indicated that third parties could submit any comments on the confidential information no later than the due date for written answers to questions (29 March 2000).

5.6 On 25 April 2000, the Panel issued an addendum to the supplemental working procedures concerning confidential information, to extend the coverage of those procedures to seven additional confidential exhibits submitted by Thailand in connection with its second written submission²⁵. This addendum is attached at **Annex 5**.

VI. INTERIM REVIEW

6.1 On 9 and 13 June 2000, respectively, Poland and Thailand requested the Panel to review, in accordance with Article 15.2 of the DSU, precise aspects of the interim report issued on 31 May 2000. Neither party requested an additional meeting with the Panel. On 15 June 2000, the parties submitted written comments on one another's requests for interim review.

²⁵ Exhibits Thailand-52, -55, -64, -66, -67, -68, and -69.

A. Comments by Poland

6.2 Poland commented that the report inaccurately described Poland's argument that the Thai authorities failed to consider "all relevant factors" as required by AD Article 3.4, in particular by incorrectly stating that Poland had "altered" its identification of the factors that it asserted had not been "considered" by the Thai authorities. While not entirely accepting Poland's comments in this regard, we have refined the language in our description of Poland's arguments in paragraphs 7.46, 7.216 and 7.239.

6.3 In its written comments on Thailand's request for interim review, Poland objected to Thailand's request that the Panel add language to paragraph 2.3 concerning the period for which data were collected by the DIT.

B. Comments by Thailand

6.4 Thailand requested that, in footnote 5, we correct the full name of Thailand's "CDS Committee" and insert language to indicate that the CDS Committee made the preliminary and final dumping and injury determinations. Thailand also asked us to add language to paragraph 2.3 concerning the period for which data were collected by the DIT. Thailand asked us to change the word "admits" to "notes" in paragraph 7.201. On the basis of these comments, we have made certain amendments to the paragraphs and footnote identified by Thailand, including a slight refinement of paragraph 2.3 to reflect our view as to the parties' positions on this point.

6.5 In addition, Thailand identified certain typographical and clerical errors in paragraphs 7.92, 7.156 and 7.236, as well as in footnote 141. We have corrected these errors as well as typographical and clerical errors elsewhere in the report.

6.6 In its written comments on Poland's request for interim review, Thailand requested that the Panel reject Poland's comments concerning the Panel's description of Poland's arguments relating to the consideration of factors under Article 3.4 of the AD Agreement. Our view on this is mentioned in paragraph 6.2 above.

VII. REASONING AND FINDINGS

A. Preliminary Issues

1. Alleged Insufficiency of the Request for Establishment under Article 6.2 DSU

(a) Requests by Thailand Pursuant to Article 6.2 DSU

7.1 In its first written submission²⁶, Thailand requested that the Panel make a preliminary ruling dismissing Poland's claims under Articles 5 and 6 of the AD Agreement because Poland's request for establishment of the Panel, which identified Articles 5 and 6 of the AD Agreement, does not satisfy the standard of clarity in Article 6.2 DSU. At the first substantive meeting, we denied Thailand's request for an *immediate* preliminary ruling with respect to Articles 5 and 6, and indicated that we

²⁶ Annex 2-1, paras. 5-8.

would issue our ruling and supporting reasons in the Panel Report. Referring to the Appellate Body Report in *Korea-Dairy Safeguard*²⁷, we informed the parties that we would evaluate whether, given the actual course of the Panel proceedings, Thailand was prejudiced in its ability to defend itself by the alleged lack of specificity of the panel request.

7.2 In its closing statement at the first Panel meeting²⁸, Thailand requested that the Panel also determine whether Poland complied with Article 6.2 of the DSU with respect to its claims under Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994. Thailand asserted that Poland's request for establishment, which identified Articles 2 and 3 AD and Article VI of the GATT 1994, does not satisfy Article 6.2 DSU in respect of these provisions.

7.3 Together, these requests by Thailand relate to Poland's entire case. As we indicate below, we believe that the relative difference in timing of these two separate requests is relevant to our examination.

(b) Arguments of the Parties

(i) Thailand

7.4 In Thailand's view, the test as to whether a claim is set forth in the panel request sufficiently to present the problem clearly under Article 6.2 DSU is whether the complainant has identified: (i) the precise obligation allegedly violated; and (ii) the facts and circumstances on which the alleged violation is based. Thailand asserts that the Articles invoked by Poland each contain a multitude of obligations relating to the conduct of an anti-dumping investigation and to the determination of dumping and injury. Thailand argues that by "merely listing" the Articles, without adding any further detail, Poland has failed to comply with the standard set in Article 6.2 DSU. Thailand further argues that there are no "attendant circumstances" that would justify finding that the mere listing of Articles in an AD dispute was sufficient to satisfy the requirements of Article 6.2 DSU.

7.5 Thailand asserts that Poland has intentionally misled Thailand and that, due to the alleged insufficiency of Poland's panel request, Thailand has been prejudiced in its ability to defend itself. According to Thailand, prior to Poland's first written submission, Thailand could not identify and therefore could not understand the claims against it. As a result, Thailand asserts, "Thailand could not take any steps to prepare its defence, such as collecting sufficient factual information, making sufficient and precise translations given the significant volume of complex documents in the Thai language, and locating key individuals from the relevant authorities to assist in explaining decisions and methodologies."²⁹ Thailand suspects third parties and other potential third parties had similar problems.³⁰ Thailand further submits that, because

²⁷ *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000 ("*Korea-Dairy Safeguard*"), DSR 2000:I, 3, paras. 114-131.

²⁸ Annex 2-4, para. 8.

²⁹ Thailand's response to Panel Question 2(b), Annex 2-6.

³⁰ In respect of Thailand's request under Article 6.2 DSU relating to Articles 5 and 6 of the AD Agreement, third parties the European Communities submitted that their ability to participate in the proceedings had been prejudiced by the lack of specificity in the panel request (see EC third party

Poland made vague, sweeping and confusing allegations and arguments and provided no additional clarification of its precise claims throughout the Panel proceedings, Thailand had little basis to present its defence, other than in response to questions from the Panel. For Thailand, the phrase "given the actual course of the panel proceedings" used by the Appellate Body in *Korea-Dairy Safeguard* "would only authorise a panel to accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings."³¹ According to Thailand, "this would be the case only where (1) a panel found that the complainant had failed to present a *prima facie* case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request."³²

7.6 Thailand submits that the timing of its request under Article 6.2 of the DSU relating to Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994 - i.e. at the conclusion of the first Panel meeting - is "completely irrelevant to whether Poland did or did not violate its obligations under Article 6.2 of the DSU".³³

(ii) Poland

7.7 Poland argues that its claims are set forth with sufficient clarity to satisfy Article 6.2 DSU, particularly in light of the "attendant circumstances" including Thailand's actual notice of Poland's claims. Poland does not regard its panel request as "merely listing" the provisions with respect to its claims. Poland asserts that the claims are expanded upon in the request for consultations, and were known to Thailand as they had been repeatedly raised over the course of the Thai AD investigation. Moreover, Poland submits that the Appellate Body in *Korea-Dairy Safeguard* did not say that a "mere listing" would *necessarily* be insufficient under Article 6.2 DSU. Poland asserts that any lack of clarity has been cured by Poland's later actions and that Poland never intended to mislead Thailand.

7.8 Poland argues that the issue of the sufficiency of a panel request depends on whether the respondent, in view of "attendant circumstances", has been misled as to what claims were in fact being asserted against it in a manner actually prejudicing its ability to defend itself. For Poland, such prejudice must be determined in light of the totality of the circumstances, "given the actual course of the panel proceedings": a respondent must have experienced actual prejudice in its ability to defend its interests before a mere listing or provisions would be insufficient under Article 6.2 DSU. According to Poland, Thailand has not demonstrated, based on supporting particulars, that it has sustained any meaningful prejudice as a result of the alleged imprecision.

written submission, Annex 3-1, paras.7-8) . Japan was of the view that Poland's panel request "fails to fulfil the specificity requirement of Article 6.2", and only under exceptional circumstances should any remedy for the lack of specificity be made available to Poland (Response to Panel Question 1, Annex 3-8). The United States noted Thailand's argument that the lack of specificity in the request for establishment had denied Thailand its right to present an effective defence, and took this to suggest that the "attendant circumstances" were not such that a listing of the articles was sufficient (Response to Panel Question 1, Annex 3-9).

³¹ Thailand's response to Panel Questions 2(a) and 7(a), Annex 2-6.

³² *Ibid.*

³³ Thailand's response to Panel Question 5(b), Annex 2-6.

In Poland's view, a possibly insufficient panel request may be "remedied" by subsequent clarification in the course of the proceedings.

7.9 Poland asserts that Thailand's request under Article 6.2 DSU relating to Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994 is "untimely" and that the implication that somehow Poland's claims became objectively less clear to Thailand during the actual course of the Panel proceedings is without merit.³⁴

(c) Text of Poland's Request for Establishment

7.10 We recall that Poland's request for establishment of the Panel states, *inter alia*, the following:

"The factual background of the complaint is set forth in the request for consultations referred to above [WT/DS122/1]. More specifically, Thailand has imposed definitive antidumping duties on imports of H-beam steel products originating in Poland in contravention of the basic procedural and substantive requirements of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and of the Anti-dumping Agreement. The principal measures to which Poland objects are:

Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement;

Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement;

Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement.

The above summary is designed to describe briefly the legal basis of the complaint in a manner sufficient to present the problem clearly, but is not to be taken as restricting the arguments which Poland may develop before the panel."³⁵

³⁴ Poland's response to Panel Question 5(b), Annex 1-5.

³⁵ WT/DS122/2.

(d) Evaluation by the Panel

(i) Introduction

7.11 Article 6.2 DSU provides, in relevant part:

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

7.12 The issue before us is whether Poland's panel request provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" and therefore satisfies the standard set out in Article 6.2 DSU³⁶ with respect to Poland's claims under Articles 2, 3, 5 and 6 of the AD Agreement and Article VI of the GATT 1994.

7.13 We understand that we must examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU.³⁷ It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.

7.14 In examining the sufficiency of the panel request under Article 6.2 DSU, we first consider the text of the panel request itself, in light of the nature of the legal provisions in question and any attendant circumstances. Second, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by any alleged lack of specificity in the text of the panel request. We find support for this approach in the Appellate Body Report in *Korea-Dairy Safeguard*.³⁸ In that case, the Appellate Body stated:

"Identification of the treaty provisions claimed to have been violated by the respondent is always necessary both for purposes of defining the terms of reference of a panel and for informing the respondent and the third parties of the claims made by the complainant; such identification is a minimum prerequisite if the legal basis of the complaint is to be presented at all. But it may not always be enough. There may be situations where the simple listing of the articles of the agreement involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the com-

³⁶ We note that Article 6.2 DSU and Article 17.4 of the AD Agreement are complementary and should be applied together in disputes arising under the AD Agreement. See Appellate Body Report, *Guatemala - Anti-dumping Investigation Regarding Portland Cement from Mexico ("Guatemala - Cement")*, WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, 3767, para. 75. We note that Poland has identified a definitive dumping duty in its panel request as part of the matter referred to the DSB pursuant to Article 17.4 and Article 6.2. We further note that Thailand has made no allegation in this case under Article 17.5 of the AD Agreement with respect to the panel request.

³⁷ We find support for this approach in Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas ("European Communities - Bananas")*, WT/DS27/AB/R, adopted 25 September 1997, DSR 1997:II, 591, para. 142.

³⁸ Appellate Body Report, *Korea-Dairy Safeguard*, *supra.*, footnote 27.

plaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."³⁹

7.15 The Appellate Body also considered that:

"...whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."⁴⁰

7.16 We turn to a consideration of whether the panel request is sufficient for the purposes of Article 6.2 DSU, first, in respect of Articles 5 and 6 of the AD Agreement, and second, in respect of Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994.

- (ii) Alleged Insufficiency of the Request for Establishment under Article 6.2 DSU with Respect to Poland's Claims under Articles 5 and 6 of the AD Agreement

Article 5 of the AD Agreement

7.17 The text of the panel request states: "Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement".⁴¹ In its first written submission, Poland indicated that its claims of violation of Article 5 of the AD Agreement fell under Articles 5.2, 5.3 and 5.5.⁴²

7.18 With respect to Poland's claims under Article 5, we consider that the text of the panel request performs the functional equivalent of "merely listing" the article. Furthermore, Article 5, entitled "Initiation and Subsequent Investigation", contains ten paragraphs, which pertain to the content and standing requirements for an application to initiate an investigation and numerous other obligations with respect to the decision of the competent authorities on whether or not to initiate or continue an anti-dumping investigation. We consider that Article 5 establishes multiple obligations with respect to the initiation and certain subsequent steps in an anti-dumping investigation. We therefore consider that this is potentially a situation where the mere listing of the treaty article may fall short of the standard of Article 6.2.

³⁹ *Id.*, para. 124.

⁴⁰ *Id.*, para. 127. (footnote omitted, emphasis in original).

⁴¹ WT/DS122/2, cited *supra*, para. 7.10.

⁴² Poland's first written submission, Annex 1-1, paras. 86-90.

7.19 However, we recall that a "mere listing" may not necessarily be insufficient for the purposes of Article 6.2 DSU, and that "[t]here may be situations where the simple listing of the articles of the agreement or agreements involved may, *in the light of attendant circumstances*, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint".⁴³ (emphasis added)

7.20 We consider that, in this case, there are several "attendant circumstances", involving facts known and in the possession of the Thai government, that serve to confirm the sufficiency of Poland's panel request under Article 6.2 DSU with respect to Article 5 of the AD Agreement.

7.21 First, we note that the totality of the facts and circumstances underlying the panel request, including the nature of the underlying AD investigation that led to the imposition of the challenged measure, make certain paragraphs of Article 5 logically and necessarily inapplicable or irrelevant in this dispute: for example, because this dispute involves a domestic industry consisting of one producer, Article 5.4 would not apply; and because the dispute was initiated on the basis of a petition, Article 5.6 would not apply.

7.22 Second, we note that, as will often be the case in WTO anti-dumping disputes, this dispute involves several issues that were raised before the Thai investigating authorities in the actual course of the underlying anti-dumping investigation. Thailand argues that this consideration is irrelevant in an examination under Article 6.2 DSU. We disagree. We consider that the fact that an issue was raised during the underlying investigation means that it involves considerations of which the government of the defending Member would be aware, and would involve evidence in the possession of that government. With respect to Article 5, the record before us indicates that the issue of notification under Article 5.5 AD had been raised in the course of the Thai AD investigation, both directly with the Thai investigating authorities⁴⁴ and with Thailand at the WTO.⁴⁵ In addition, although the evidence referred to by Poland to indicate that the issues under Article 5.2 and 5.3 had been raised with the Thai government during the course of the investigation makes no explicit reference to Article 5.2 and 5.3, it refers to Poland's view that "no evidence of dumping and prospective injury to the Thai industry has been delivered"⁴⁶; that it has "no information about the basis of the initiation of the anti-dumping investigation"⁴⁷; and that "[t]here has been no data on the basis on which dumping is alleged in the application..."⁴⁸ We consider that these circumstances confirm the sufficiency of the panel request with respect to Article 5. In light of this, we do not believe it is necessary to

⁴³ Appellate Body Report, *Korea-Dairy Safeguard*, *supra*, footnote 27, para. 124.

⁴⁴ WT/DS122/2.

⁴⁵ Exhibit Thailand-14/Poland-4 demonstrates that Poland requested consultations provided for in Article 17.2 of the AD Agreement when it confronted difficulties in the Thai AD investigation (at least with respect to the notification issue under Article 5.5 AD).

⁴⁶ Exhibit Poland-17 (letter from the Polish government to the Thai government dated September 1996), p. 1.

⁴⁷ *Id.*, p. 2.

⁴⁸ Exhibit Poland-18 (talking points of the Polish government in connection with consultations with the Thai government dated "Geneva, 22 October 1996").

address whether the bilateral consultations⁴⁹ between the parties under the DSU and the AD Agreement that preceded the panel request might also serve as an additional attendant circumstance that would confirm the sufficiency of the panel request with respect to Article 5.

7.23 We are of the view that a complainant certainly takes a risk by not referring to the specific sub-paragraphs under which its claims of violation of an Article in a covered agreement fall. We note there are examples of more precise and informative panel requests.⁵⁰ We would certainly have preferred the panel request in this case to have been more detailed in its treatment of Article 5 by at the very least identifying the specific sub-paragraphs of that Article that Poland was alleging had been violated. Ideally, there might also have been some narrative summarizing the legal basis of the complaint. However, we find that the panel request, in light of attendant circumstances, is sufficient to meet the standard set in Article 6.2 DSU in respect of Poland's claims under Article 5 of the AD Agreement.

7.24 In any event, Thailand has failed to demonstrate to us that it was prejudiced in its ability to defend its interests in the course of the panel proceedings with respect to Poland's claims under Article 5. We recognize that a defending party is always entitled to its full measure of due process in the course of WTO dispute settlement.⁵¹ In the present case, one indication that such due process was not in any way impaired by the text of Poland's panel request relating to Article 5 of the AD Agreement was the developed nature of certain of Thailand's submissions and responses to questions from the Panel and from Poland.⁵²

7.25 Our view that Poland's panel request in respect of Article 5 provided a brief summary of the legal basis of the complaint sufficient to present the problem clearly was confirmed by our view that Poland's allegations under Articles 5.2, 5.3 and 5.5 of the AD Agreement, and the arguments made in support of these allegations, were apparent from the time of Poland's first written submission. Moreover, the legal basis and scope of the allegations fell within the parameters of the cited legal provisions and also remained generally consistent throughout the Panel proceedings.

⁴⁹ We note that Poland's request for consultations (WT/DS122/1) - which is incorporated by reference into the panel request - refers to Article 5. However, regardless of whether or not this could have supported the sufficiency of the panel request, it provides no further information or clarification with respect to Article 5 in any event.

⁵⁰ See, for example, *United States - Anti-dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*, WT/DS179/2. While we certainly make no pronouncement on whether this specific request would meet the standard of clarity set out in Article 6.2 DSU, we note that it is far more precise in identifying the specific sub-paras. of the Articles of the AD Agreement that are alleged to be violated, as well as providing a brief description of the contextual facts and circumstances.

⁵¹ See e.g., Appellate Body Report, *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States - Shrimp*"), WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 97, where the Appellate Body examined the issue of the sufficiency of a notice of appeal.

⁵² For example, with respect to Article 5.2 and 5.3, Thailand's responses to Panel Question 10, Annex 2-6 and Thailand's oral statement at the second meeting, Annex 2-9, paras. 72-81; with respect to Article 5.5, Thailand's responses to Panel Questions 18-20, Annex 2-6.

Article 6 of the AD Agreement

7.26 The text of the panel request states: "Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement". In its first written submission, Poland indicated that its claims of violation of Article 6 of the AD Agreement fell under Articles 6.4, 6.5.1 and 6.9.⁵³

7.27 With respect to Article 6, we consider that the text of the panel request performs the functional equivalent of "merely listing" the article. Furthermore, Article 6, entitled "Evidence", contains fourteen paragraphs. These address a range of issues relating to the informational and evidentiary aspects of an anti-dumping investigation. The article contains detailed requirements including with respect to due process and disclosure to the extent permitted given confidentiality considerations. We consider that Article 6 establishes multiple obligations with respect to the procedural and evidentiary requirements in an anti-dumping investigation.

7.28 Moreover, and in contrast to our view of the circumstances surrounding Article 5⁵⁴, we do not consider that, in this case, there are any "attendant circumstances", involving facts known and in the possession of the Thai government, that would serve to confirm the sufficiency of Poland's panel request under Article 6.2 DSU with respect to Article 6 of the AD Agreement. First, the totality of the facts and circumstances underlying the panel request, including the nature of the underlying AD investigation that led to the imposition of the challenged measure, would not necessarily make any of the fourteen paragraphs of Article 6 of the AD Agreement logically inapplicable or irrelevant in this dispute. Second, following the final determination, the Polish firms made requests for disclosure of the information used in the final determination, and the Thai authorities responded to these requests. However, the precise nature of the information sought in these requests and the specific legal basis for such requests remain unclear. In addition, Poland identified no evidence in the record before us indicating that the Polish firms made any direct reference to any sub-paragraphs of Article 6 of the AD Agreement that Poland invokes before us (i.e. Articles 6.4, 6.5.1 and 6.9) in corresponding with the Thai authorities in the course of, and following, the underlying AD investigation, nor that Poland raised these issues with the Thai government in any other context in relation to the final determination prior to its panel request.⁵⁵ Poland submits to us evidence in the form of a speaking note⁵⁶, which Poland argues it read out to Thai government officials in the bilateral consultations between the parties under the DSU and the AD Agreement preceding the panel request. However, this evidence submitted by Poland contains no reference to Article 6 of the AD Agreement. Therefore, we do not believe it is necessary for us to decide here whether what occurs during such consultations could ever serve

⁵³ Poland's first written submission, Annex 1-1, para. 92.

⁵⁴ See *supra*, paras. 7.20-7.22.

⁵⁵ Exhibits Poland-14, -15 and -16. Poland's request for consultations (incorporated by reference into the panel request) refers to Article 6 and to requests made by the Polish producer and exporter for "disclosure of findings from the Thai Ministry of Commerce". However, we do not consider that this provides any additional information or clarifies the nature of the claims under Article 6.

⁵⁶ Exhibit Poland-19.

as an "attendant circumstance" to support the sufficiency of a claim set out in a panel request.

7.29 Furthermore, we find that Thailand has demonstrated, with respect to Poland's claims under this Article, that its ability to defend itself was prejudiced in the course of the Panel proceedings. The prejudice to Thailand's ability to defend itself was a function of the fact that the precise nature and scope of the claims under Article 6 remained unclear and confusing to Thailand - and to us - even following Poland's first written submission.⁵⁷ Poland's allegations were not clearly tailored to, and did not clearly fall within, the parameters of the sub-paragraphs of Article 6 cited by Poland in its first written submission. For example, with respect to Article 6.4, Poland alleged that interested parties had been unable to see "relevant information"⁵⁸, but the precise information sought remained unclear. With respect to Article 6.5.1, Poland alleged that interested parties "were not provided with a proper non-confidential summary"⁵⁹, but it remained unclear whether the non-confidential summary referred to was furnished by the interested parties in the course of the AD investigation or was provided by the Thai investigating authorities to interested parties. With respect to Article 6.9, Poland alleged that "parties were not informed of all essential facts forming the basis of the decision to impose duties"⁶⁰, but the "essential facts" to which Poland referred were "a specification of all relevant economic factors used as a basis for the final injury determination" and "a basis for using overlapping 12-month time periods for comparison in the final determination".⁶¹ In our view, these are not "essential facts" within the scope of Article 6.9. Moreover, Poland appeared to seek disclosure of such "essential facts" *following* the final determination, whereas we understand Article 6.9 to relate to disclosure *prior* to the final determination.

7.30 In the light of all of these considerations, we dismiss Poland's claims under Article 6 of the AD Agreement.

7.31 For these reasons, we deny the request by Thailand under Article 6.2 DSU for us to dismiss Poland's claim of violation of Article 5 of the AD Agreement. However, we grant Thailand's request under Article 6.2 DSU for us to dismiss Poland's claims under Article 6 of the AD Agreement.

⁵⁷ We refer in this regard to the confusion indicated by Thailand in its response to Panel Question 2(b), Annex 2-6, with respect to the nature and scope of Poland's claims under Articles 6.4, 6.5.1 and 6.9.

⁵⁸ Poland's first written submission, para. 92.

⁵⁹ *Ibid.*

⁶⁰ *Ibid.*

⁶¹ *Ibid.*

(iii) Alleged Insufficiency of the Request for Establishment under Article 6.2 DSU with Respect to Poland's Claims under Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994

7.32 As already stated, in its closing statement at the first Panel meeting, Thailand requested that the Panel also determine whether Poland complied with Article 6.2 of the DSU with respect to its claims under Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994. Thailand asserted that Poland's request for establishment, which identified Articles 2 and 3 AD and Article VI of the GATT 1994, does not satisfy Article 6.2 DSU in respect of these provisions.

7.33 As outlined above⁶², in addressing this issue, we consider the text of the panel request and also take into account whether, given the actual course of the panel proceedings, Thailand's ability to defend itself was prejudiced by the treatment in the text of the panel request of the legal provisions claimed to have been violated. In this case, it was apparent to us that Poland's claims of violation under Article VI of the GATT 1994 were not independent from Poland's claims of violation of the AD Agreement. Rather, we understand that Poland's claims under Article VI were claims Poland considered arose from the specific language of the provisions of the AD Agreement. In the course of the proceedings, Poland made no arguments concerning an independent claim of violation of Article VI of the GATT 1994. We therefore consider that our examination and findings here with respect to Articles 2 and 3 of the AD Agreement will also be determinative of this issue with respect to Article VI of the GATT 1994. Accordingly, we do not make a separate examination or finding here with regard to Article VI of the GATT 1994.

Article 2 of the AD Agreement

7.34 With respect to Article 2, Poland's panel request states: "Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement;..."⁶³ In its first written submission, Poland indicated that its claim of violation of Article 2 fell under Article 2.2.⁶⁴

7.35 We consider that the panel request performs the functional equivalent of merely listing the Article. Article 2 contains multiple obligations relating to the various components that enter into the complex process of determining the existence of dumping and calculating the dumping margin. While this is potentially a situation where the mere listing of the treaty article may fall short of the standard of Article 6.2, and while the nature of the underlying AD investigation would not necessarily render any sub-paragraphs of Article 2 logically inapplicable in this dispute, we note that documentary evidence before us, which was in Thailand's possession from the time of the underlying AD investigation, indicates that the Polish firms persistently

⁶² *Supra*, para. 7.14.

⁶³ WT/DS122/2, also cited *supra*, para. 7.10.

⁶⁴ Poland's first written submission, Annex 1.1, para. 78. Poland also identified Article VI:1(b)(ii) of the GATT 1994 in this context.

raised during the course of the investigation the precise issue which Poland raises in this dispute under Article 2.2⁶⁵, i.e. the use of a "reasonable" amount for profit in the calculation of constructed normal value. We consider that this constitutes an attendant circumstance that confirms the sufficiency of the panel request with respect to Article 2. In light of this, we do not believe it is necessary to address whether the bilateral consultations⁶⁶ between the parties under the DSU and the AD Agreement that preceded the panel request might also serve as an additional attendant circumstance that would confirm the sufficiency of the panel request with respect to Article 2. In any event, we examine the issue of prejudice below, in conjunction with our examination of alleged prejudice relating to Article 3.⁶⁷

Article 3 of the AD Agreement

7.36 With respect to Article 3 of the AD Agreement, we consider that the text of the panel request goes beyond a "mere listing" of the provisions. Poland refers explicitly to specific language in the text of Article 3 and identifies specific factors that, in its view, the Thai authorities failed to consider in reaching their determination of injury and causation. The panel request refers to Poland's view that the determination was made in the absence of "positive evidence" and an "objective examination" (both terms explicitly referred to in Article 3.1) and refers also to certain "enumerated factors" (import volume, price effects, and the consequent impact of such imports on the domestic industry). In the context of a case of material injury⁶⁸, this specific language relates to the text of Articles 3.1, 3.2, 3.4 and 3.5. While it may have been preferable for Poland to have also explicitly listed the specific sub-paragraphs of paragraph 3 to which it was referring, we consider that the text of the panel request is sufficiently clear to meet the minimum requirements of Article 6.2 DSU with respect to Poland's claim of violation of Article 3.

⁶⁵ Exhibit Thailand-35, pp. 5-8; Exhibit Thailand-40, p. 5, Exhibit Thailand-36, para. 6.3; Exhibit Thailand-41, pp. 3-4. See Response by Poland to Panel question 9, Annex 1-5.

⁶⁶ We note that Poland's request for consultations (WT/DS122/1) - which is incorporated by reference into the panel request - refers to Article 2. However, regardless of whether or not this could have supported the sufficiency of the panel request, it provides no further information or clarification with respect to Article 2 in any event.

⁶⁷ *Infra*, para. 7.37.

⁶⁸ We note Poland pointed out that para. 2 of the final determination of injury referred to "threat" (Poland's first written submission, Annex 1-1, footnote 64) Thailand clarified before us that this was an incorrect translation of the Thai language version of the determination, and asserted that the term "threat" is not included in the final determination, as evidenced by the Thai language version included in Exhibit Thailand-44. In any event, Thailand, as the Member that conducted the investigation, would be aware that the basis for its determination was "material injury" and not "threat thereof".

Was Thailand's Ability to Defend Itself Prejudiced with Respect to Poland's Claims under Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994?

7.37 In any event, Thailand has failed to demonstrate to us that it experienced prejudice in its ability to defend itself in the course of the actual Panel proceedings with respect to Poland's claims under Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994. It was apparent to us from the capable participation by Thailand in certain parts of the Panel proceedings, including in its first written submission and in the first Panel meeting⁶⁹, that Thailand's ability to defend itself had not been prejudiced, *even prior to* Thailand making this request under Article 6.2 DSU with respect to the alleged insufficiency of the panel request in respect of Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994.

7.38 In this context, we disagree with Thailand's argument that the timing of this request by Thailand is irrelevant to whether Poland's panel request meets the threshold of Article 6.2 DSU with respect to Articles 2 and 3 AD and Article VI of the GATT 1994.⁷⁰ We believe that the timing of this second request by Thailand is indeed relevant, primarily because it was made a substantial amount of time *after* Thailand's first request under Article 6.2 DSU in respect of Articles 5 and 6 of the AD Agreement. We note that in this case, Thailand's allegation of an insufficiency of the panel request in respect of Articles 5 and 6 of the AD Agreement was included in its first written submission. However, Thailand made no contemporaneous allegation concerning any alleged insufficiency of the panel request with respect to Articles 2 and 3 of the AD Agreement or Article VI of the GATT 1994. Rather, it was not until the conclusion of the Panel's first substantive meeting with the parties that Thailand also alleged that the panel request was insufficient under Article 6.2 DSU with respect to Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994. At this point, the parties had both submitted their first written submissions, made their oral statements and responded orally to questioning from the other party and from the Panel at the first substantive meeting. It was apparent to us that Thailand had been able to participate fully and effectively in the proceedings in defence of its interests up to that point and understood the claims against it under Article 2 and 3. In our view, in alleging in its first written submission that the Panel request was insufficient with respect to certain Articles, but not with respect to others, Thailand implicitly indicated that, *at the time of its first written submission*, Thailand was of the view that the treatment of Articles 2 and 3 was sufficient. We do not believe that it was open to Thailand, once it had alleged an insufficiency in the panel request in respect of certain legal provisions, but not in respect of others, to allege at a later point in the proceedings that the panel request had subsequently *become less clear* in the course

⁶⁹ With respect to Article 2.2, Thailand's first written submission, Annex 2-1, paras. 61-74; Thailand's oral statement at the first Panel meeting, Annex 2-3, paras. 21-28; with respect to Article 3, Thailand's first written submission, paras. 75-115, Thailand's oral statement at the first Panel meeting, Annex 2-3, paras. 34-58.

⁷⁰ Thailand's response to Panel Question 5, Annex 2-6.

of the panel proceedings with respect to those provisions not initially alleged to be treated insufficiently in the panel request.

7.39 We are mindful of Thailand's argument that a finding by the Panel that a defending Member must raise objections under Article 6.2 DSU at the first opportunity "will send the clear message that defending Members should not take any good faith steps to identify the claims against it before immediately asserting a procedural objection". In Thailand's view, such a disincentive to engage in good faith efforts is inconsistent with the letter and spirit of Article 3 of the DSU.

7.40 We do not believe that our view in this case with respect to the relative timing of Thailand's Article 6.2 DSU request with respect to Poland's claims under Articles 2 and 3 AD and Article VI GATT 1994 (i.e. in relation to the initial request made under Article 6.2 with respect to Articles 5 and 6 of the AD Agreement) sends such a message or creates such a disincentive. We note that Article 3.10 of the DSU commits Members of the WTO, if a dispute arises, to engage in dispute settlement procedures "in good faith and in an effort to resolve the dispute". Thus, Members are *obligated* to participate in good faith in dispute settlement in order to ensure the prompt, fair and effective resolution of disputes arising under the covered agreements.

7.41 For these reasons, we deny the request by Thailand under Article 6.2 DSU for us to dismiss Poland's claims of violation of Articles 2 and 3 of the AD Agreement and Article VI of the GATT 1994.⁷¹

(iv) Additional Arguments of Thailand Concerning the Alleged Insufficiency of the Request for Establishment

7.42 We address two additional arguments made by Thailand, which Thailand links to the concept of the sufficiency of the panel request.⁷²

7.43 First, Thailand argues that "a panel may only accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings." According to Thailand, "this would be the case only where (1) a panel found that the complainant had failed to present a *prima facie* case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request."⁷³ We are concerned here that Thailand is blurring the distinction between, on the one hand, the sufficiency of the panel request and, on the other, the issue of whether or not the complaining party establishes a *prima facie* case of violation of an obligation imposed by the covered agreements. We recall that "there is a significant difference between the *claims* identified in the request for the establishment of a panel, which establish the panel's terms of reference under Article 7 of the

⁷¹ As explained above, para. 7.33, we consider that, in this case our findings with respect to Articles 2 and 3 of the AD Agreement will also be determinative of this issue with respect to Article VI of the GATT 1994. Accordingly, we do not here make a separate examination or finding with regard to Article VI of the GATT 1994.

⁷² Thailand's response to Panel Questions 2(a) and 7(a), Annex 2-6; Thailand's response to Panel Question 7(b), Annex 2-6.

⁷³ Thailand's response to Panel Questions 2(a) and 7(a), Annex 2-6.

DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties."⁷⁴ Article 6.2 DSU does not relate directly to the sufficiency of the subsequent written and oral submissions of the parties in the course of the proceedings, which may develop the arguments in support of the claims set out in the panel request. Nor does it determine whether or not the complaining party will manage to establish a *prima facie* case of violation of an obligation under a covered agreement in the actual course of the panel proceedings. To the extent that the requests by Thailand under Article 6.2 DSU relates to whether or not Poland established a *prima facie* case of violation of the relevant provisions, we examine this below.⁷⁵

7.44 Second, particularly in connection with our examination of the compliance by Thailand with its obligations under Article 3.4 of the AD Agreement, Thailand argues that the Panel "may be overstepping its authority by addressing certain issues that are outside the scope of the matter before it"⁷⁶ and objects to the Panel's admission of what it argues are "new claims" made by Poland at the rebuttal stage of the proceedings.⁷⁷ In our view, Thailand has confused here the concept of a "claim" with the concept of an "argument" in support of a "claim" of violation of Article 3, specifically of Article 3.4. While claims must be specified in the panel request, which establishes a panel's terms of reference, the arguments supporting those claims may be set out and progressively clarified in the parties' submissions over the course of the Panel proceedings.⁷⁸

7.45 Poland's panel request stated, in part: "Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement".⁷⁹ It is clear to us that Article 3 of the AD Agreement appears on the face of the panel request. Therefore, Poland's allegations under Article 3 clearly fall within the Panel's terms of reference. It is also clear to us that Poland's request for establishment alleges that the Thai investigating authorities had failed to consider certain enumerated factors under Article 3 in the course of the underlying AD investigation. Contrary to Thailand's argument, we do not believe that "Poland was obligated in its request for establishment of a panel to identify, at a minimum, Article 3.4 and identify specific factors that were not considered".⁸⁰ We have examined above⁸¹ the issue of sufficiency of the panel request with respect to the claim of violation of Article 3 in terms

⁷⁴ Appellate Body Report, *European Communities - Bananas*, *supra*, footnote 37, para. 141.

⁷⁵ *Infra*, Section C.

⁷⁶ Thailand's second written submission, Annex 2-5, para. 4.

⁷⁷ Thailand's oral statement at the second Panel meeting, Annex 2-9, paras. 21, 55.

⁷⁸ Appellate Body Report, *European-Communities-Bananas*, *supra*, footnote 37, para. 141.

⁷⁹ WT/DS122/2.

⁸⁰ Thailand's response to Panel Question 7(b), Annex 2-6.

⁸¹ *Supra*, paras. 7.36-7.41.

of clarity under Article 6.2 DSU, and found there that Poland's treatment of Article 3 satisfied the requirements of Article 6.2 DSU in respect of that Article.⁸²

7.46 In its first written submission, in connection with its argument that the Thai authorities had violated Article 3.4 *inter alia* by failing to examine all relevant economic factors, Poland stated that the Thai authorities "chose not to present evidence" concerning profits, losses, profitability and cash flow.⁸³ Poland subsequently argued that the Thai investigating authorities had failed to consider "actual and potential declines in productivity", "the magnitude of the margin of dumping", "actual and potential negative effects on wages", "actual and potential negative effects on ability to raise capital", and "actual and potential negative effects on investments", and had failed to evaluate adequately any of the factors listed in Article 3.4.⁸⁴ This apparent development in Poland's argument might have been prompted by questioning from the Panel.⁸⁵ We are of the view that the identification of these factors by Poland in the course of the Panel proceedings constituted additional and more developed *arguments* in support of its *claim* of violation of Article 3.4.⁸⁶ All of these arguments by Poland fell within the scope of its claim under Article 3.4 and went to the alleged insufficiency of the Thai AD investigation with respect to the factors enumerated in Article 3.4 concerning the impact of dumped imports on the domestic industry.

(e) Conclusion

7.47 In light of all the foregoing considerations, we deny Thailand's requests under Article 6.2 DSU to dismiss Poland's claims under Articles 2, 3 and 5 of the AD Agreement and Article VI of the GATT 1994. However, we grant Thailand's request under Article 6.2 DSU to dismiss Poland's claims under Article 6 of the AD Agreement.

⁸² *Supra*, para. 7.41.

⁸³ Poland's first written submission, Annex 1-1, para. 74.

⁸⁴ Poland's second written submission, Annex 1-4, paras. 67-68; Poland's response to Panel Question 38, Annex 1-5.

⁸⁵ Panel Question 38. In Poland's first oral statement, which preceded this question by the Panel, Poland argued that Article 3.4 "requires an evaluation of all relevant factors and indices having a bearing on the state of the industry"... and that "as the panel in *Mexico- High Fructose Corn Syrup* explained a few weeks ago, consideration of each of these [Article 3.4] factors must be apparent in the final determination of the investigating authority". Poland's oral statement at the first Panel meeting, Annex 1-2, paras. 41-42.

⁸⁶ This was a "claim" made concerning the Thai definitive anti-dumping measure challenged by Poland. See Appellate Body Report, *Guatemala - Cement*, *supra*, footnote 36, para. 73: "Taken together, the "measure" and the "claims" made concerning that measure constitute "the matter referred to the DSB", which forms the basis for a panel's terms of reference."

B. General Remarks

1. Burden of Proof

7.48 In WTO dispute settlement proceedings, the burden of proof rests with the party, whether complaining or defending, that asserts the affirmative of a particular claim or defence.⁸⁷

7.49 Thus, in the context of the present dispute, which is concerned with the assessment of the WTO compatibility of a definitive anti-dumping measure imposed by the investigating authorities of Thailand, we consider that it is for Poland to present a *prima facie* case of violation of the relevant Articles of the AD Agreement and Article VI of the GATT 1994, namely, to demonstrate that Thailand's definitive anti-dumping measure is not justified by reference to Articles 2, 3, and 5 of the AD Agreement and Article VI of the GATT 1994. In this regard, we recall that "... a *prima facie* case is one which, in the absence of *effective refutation* by the defending party, requires a panel, as a matter of law, to rule in favour of the complaining party presenting the *prima facie* case".⁸⁸ Thus, where Poland presents a *prima facie* case in respect of a claim, it is for Thailand to provide an "effective refutation" of Poland's evidence and arguments, by submitting its own evidence and arguments in support of its assertions that, in the course of the investigation and at the time of its determination, Thailand complied with the requirements of the AD Agreement and Article VI of the GATT 1994.⁸⁹ It is for the Panel to weigh and assess the evidence and arguments submitted by both parties in order to determine whether Poland has established that Thailand acted inconsistently with its obligations under the AD Agreement.

7.50 The burden of proof is "a procedural concept which speaks to the fair and orderly management and disposition of a dispute".⁹⁰ We consider that, pursuant to Articles 12 and 13 of the DSU and in order to conduct an objective assessment of the facts of the matter pursuant to Article 11 DSU and Article 17.6 of the AD Agreement, we as a panel have broad legal authority to control the process by which we inform ourselves of the relevant facts of the dispute and the legal principles applicable to such facts.⁹¹ We as a panel have the mandate and the duty to manage the Panel proceedings and the ability to pose questions to the parties in order to clarify and distil the legal arguments that are asserted by the parties in support of their claims. We are conscious that, in our assessment of the facts of the matter, we may not relieve Poland of its task of establishing the inconsistency of Thailand's AD in-

⁸⁷ Appellate Body Report, *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India* ("United States - Shirts and Blouses"), WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 335.

⁸⁸ Appellate Body Report *European Communities - Measures Concerning Meat and Meat Products* ("EC - Hormones"), adopted on 13 February 1998, WT/DS26 and 48/AB/R, DSR 1998:I, 135, para. 104.

⁸⁹ We note that this approach is similar to the one followed by the panel in *Korea-Dairy Safeguard*. The Appellate Body found no error in law in that panel's application of the burden of proof. Appellate Body Report, *Korea-Dairy Safeguard*, *supra*, note 27, paras 142-150.

⁹⁰ Appellate Body Report, *Canada - Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 198.

⁹¹ Appellate Body Report, *United States - Shrimp*, *supra*, footnote 51, para. 106, referring to Articles 11, 12 and 13 of the DSU.

vestigation and resulting measure with the relevant provisions of the AD Agreement. In particular, we are aware that, in our questions posed to the parties, we must not "overstep the bounds of legitimate management or guidance of the proceedings ... in the interest of efficiency and dispatch."⁹² However, the fact that it is for the party asserting the affirmative of a particular claim or defence to discharge the burden of proof does not mean that a panel is frozen into inactivity. We believe that just as the extensive discretionary authority of a panel to request information from any source (including a Member that is a party to the dispute) is not conditional upon a party having established, on a *prima facie* basis, a claim or defence⁹³, so also a panel's extensive authority to put questions to the parties in order to inform itself of the relevant facts of the dispute and the legal considerations applicable to such facts is not conditional in any way upon a party having established, on a *prima facie* basis, a claim or defence. We view this authority as essential in order to carry out our mandate and responsibility under the DSU and the AD Agreement.

2. *Standard of Review*

7.51 Article 17.6 AD sets out a special standard of review for disputes arising under the AD Agreement.⁹⁴ Pursuant to Article 17.6(i), our approach in this dispute will be to determine whether the establishment of the facts by the Thai investigating authorities was proper and whether their evaluation of those facts was unbiased and objective. We consider that, where the establishment of the facts is proper, we must examine whether the evidence before the Thai investigating authorities in the course of their investigation and at the time of their determinations was such that an unbiased and objective investigating authority evaluating that evidence could have determined dumping, injury and causal relationship.⁹⁵

7.52 In connection with our assessment of the facts of the matter under Article 17.6(i), we note that Article 17.5(ii) states that the DSB shall establish a panel to examine the matter based upon: "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member." In our view, this relates to all of the facts made available to the authorities of the importing Member, including any confidential information that the investigating authority would be

⁹² Appellate Body Report, *Korea-Dairy Safeguard*, *supra*, footnote 27, para. 149.

⁹³ Appellate Body Report, *Canada-Aircraft*, *supra*, footnote 90, para. 185.

⁹⁴ We find support for our view in Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para. 118; Appellate Body Report, *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WT/DS138/AB/R, circulated on 10 May 2000, para. 47.

⁹⁵ We recall that, in examining the decision by Mexico to initiate an anti-dumping investigation under Article 5.3 of the AD Agreement, the panel in *Mexico - Anti-dumping Investigation on High Fructose Corn Syrup (HFCS) from the United States*, stated: "Our approach in this dispute will ... be to examine whether the evidence before SECOFI at the time it initiated the investigation was such that an unbiased and objective investigating authority evaluating that evidence, could properly have determined that sufficient evidence of dumping, injury and causal link existed to justify initiation." WT/DS132/R, adopted 24 February 2000, DSR 2000:III, 1345, para. 7.95. We note that this panel report was not appealed to the Appellate Body.

prohibited from disclosing without permission pursuant to Article 6.5 of the AD Agreement (to the extent that these form part of the record before a panel). However, Article 17.6 does not expressly distinguish between the "facts" in the confidential and non-confidential record of the investigation. It does not expressly define which "facts" must be properly established. Nor does it expressly define where (i.e. in the confidential and non-confidential record) these "facts" must be properly established and evaluated in an unbiased and objective manner by the investigating authorities. We are therefore of the view that the "facts" upon which the determination is based must be properly established in both the confidential and non-confidential record of the investigation.

7.53 We discuss the importance of such considerations below⁹⁶, in our examination under Article 3.

7.54 We are also mindful of the standard of review in Article 17.6(ii), which states:

"(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."

3. *Confidential Information Submitted by Thailand*

7.55 As we have outlined above⁹⁷, in conjunction with its first submission, Thailand sought to submit to the Panel, on the basis of Article 17.7 of the AD Agreement, certain exhibits containing confidential information, which Thailand initially indicated that it did not intend to provide to Poland or to the third parties. However, Thailand also expressed its willingness to discuss the adoption of additional Panel working procedures that would allow parties access to the confidential exhibits under certain circumstances - provided that such procedures would guarantee the protection of the confidential information in all WTO proceedings, including any before the Appellate Body. Subsequently, on the basis of an agreement between the parties, we adopted "Supplemental working procedures concerning certain confidential information". On the basis of the adopted procedures, Thailand submitted confidential exhibits to the Panel and provided copies to Poland and to the third parties.

7.56 We note that the confidential exhibits submitted by Thailand embrace at least two kinds of "confidential" material. The first is confidential information submitted by interested parties in the course of the investigation that would fall under the protection of Article 6.5 of the AD Agreement. The second is internal Thai government reports and working documents. The latter contain some information that would be protected under Article 6.5 of the AD Agreement, as well as some analysis and reasoning that Thailand argues formed part of the government of Thailand's internal administrative process and that reflect factual evidence and reasoning based on that

⁹⁶ *Infra*, Section VII.C.3.

⁹⁷ *Supra*, Section V.

evidence that its government took into account in reaching the affirmative final determination of injury.

7.57 We note that the Polish firms (and/or their legal counsel), as interested parties in the Thai AD investigation, did not have access to the confidential information pertaining to SYS, nor to the internal reasoning of the Thai investigating authorities based on the evidence gathered in the investigation, except to the extent that these were disclosed to them by the Thai investigating authorities in the course of the investigation and in the final determination. Consequently, the non-confidential information disclosed by the Thai investigating authorities in the course of the investigation and in the final determination formed the entire basis for the Polish firms' perception of the Thai AD investigation.

7.58 We further note that Poland did not have access to the confidential exhibits until just prior to the first Panel meeting in these proceedings.

7.59 These factors have played an important role in our examination of the matter before us, especially in the context of Article 3 of the AD Agreement and our examination of the requirements imposed by Article 3.1.⁹⁸

C. *Evaluation of Claims*

1. *Article 5 of the AD Agreement: Initiation*

(a) Article 5.2 and 5.3: Alleged Insufficiency of the Application and of Evidence to Justify Initiation

(i) Arguments of the Parties

Poland

7.60 Poland alleges that the Thai authorities did not have sufficient evidence to justify initiation of the investigation under Articles 5.2 and 5.3 of the AD Agreement. Poland argues that the application was insufficient under the chapeau of Article 5.2 as it did not contain data, evidence or analysis regarding the existence of injury or a causal link between dumped imports and any injury. With respect to the content of the application pertaining to dumping, Poland alleges that the application contains nothing more than "simple assertion" in the form of raw numerical data, and does not contain "information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry", as required by Article 5.2(iv). Poland asserts that no investigating authority can meet its obligations under Article 5.3 where a petition lacks two of the three basic requirements for initiation and is wholly deficient with respect to the third.

7.61 In response to a Panel question, Poland asserted that the non-confidential version of the application was the only document relevant to the Panel's examination

⁹⁸ *Infra*, Section VII.C.3.a.

of Poland's claims concerning the contents of the petition and the sufficiency of evidence to justify the initiation of the investigation.⁹⁹

Thailand

7.62 Thailand states that it complied with both Articles 5.2 and 5.3 of the AD Agreement in initiating the investigation. According to Thailand, its investigating authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams. Thailand asserts that relevant evidence beyond simple assertion of injury and causal link are provided in the attachments to both the confidential and non-confidential versions of the application.¹⁰⁰ With respect to the content of the application pertaining to dumping, Thailand asserts that Poland never identified paragraph (iv) of Article 5.2 prior to the rebuttal stage of this Panel proceeding, and that, in any event, the required information relating to dumping is that information reasonably available to the applicant under paragraph (iii), rather than subparagraph (iv), of Article 5.2.

7.63 In response to a Panel question, Thailand indicates that it considers that the following documents are relevant to the Panel's examination of Poland's claims concerning the contents of the petition and the sufficiency of evidence to justify the initiation of the investigation¹⁰¹: the confidential and non-confidential versions of the application¹⁰², the letter from DBE to HK transmitting the public notice of initiation¹⁰³, the letter from DFT to HK transmitting the notice of initiation and questionnaire¹⁰⁴, a pre-application letter from SYS to the Thai Minister of Commerce¹⁰⁵, an internal DBE document providing a preliminary assessment of the application and requesting further information¹⁰⁶, and confidential tables submitted to the CPS Committee by DBE regarding pre-initiation allegations of injury and causation.¹⁰⁷

(ii) Evaluation by the Panel

Article 5.2

7.64 In examining Poland's claims under Articles 5.2 and 5.3 of the AD Agreement, we must first consider the requirements of Article 5.2 concerning the evidence and information that must be contained in the application for initiation of an AD investigation.

⁹⁹ Poland's response to Panel Question 10, Annex 1-5. This response preceded the submission by Thailand to the Panel of the confidential version of the application (Exhibit Thailand-52).

¹⁰⁰ Exhibits Thailand-1, -52, -53. See Thailand's oral statement at the second Panel meeting, Annex 2-9, at para. 73.

¹⁰¹ Thailand's response to Panel Question 10, Annex 2-6.

¹⁰² Exhibits Thailand-1, -52, -53.

¹⁰³ Exhibit Thailand-2.

¹⁰⁴ Exhibit Thailand-5.

¹⁰⁵ Exhibit Thailand-51.

¹⁰⁶ Exhibit Thailand-54.

¹⁰⁷ Exhibit Thailand-55.

7.65 We turn first to the text of Article 5.2 of the AD Agreement. It provides, in part:

"An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph. The application shall contain such information as is reasonably available to the applicant on the following:

...

(iv) information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry, as demonstrated by relevant factors and indices having a bearing on the state of the domestic industry, such as those listed in paragraphs 2 and 4 of Article 3".

7.66 Article 5.2 governs the contents of an application for initiation of an AD investigation. The chapeau of Article 5.2 requires that an application must include "evidence" of dumping, injury and a causal link. The subsequent paragraphs of Article 5.2 list certain specific information regarding a series of factors which must be included in the application.

7.67 In considering the contents of an application for the purposes of Article 5.2, a panel clearly may refer to the confidential version of the application. However, in light of the particular arguments of Poland in support of its allegation under Article 5.2¹⁰⁸, we consider that the non-confidential version of the application provides a sufficient basis for our examination under Article 5.2 of the AD Agreement in this case.¹⁰⁹

Contents of the Application with Respect to Causation and Injury

7.68 We turn to Poland's allegation that the application was insufficient under the first sentence of the chapeau of Article 5.2 AD as it did not contain data, evidence or analysis regarding the existence of injury or a causal link.

7.69 We note that SYS filled out a standard form "anti-dumping complainant application form" provided by the Thai investigating authorities. We observe that the non-confidential version of the application submitted by SYS on its face contains "evidence" pertaining to the issues of injury and causal link. The body of the non-

¹⁰⁸ Poland indicated that its argument was initially based on the non-confidential version of the petition and argued that it was in "no position to evaluate" the contents of the confidential petition unless and until Thailand submitted it to the Panel. Poland's response to Question 11 by the Panel (Annex 1-5). Thailand submitted the confidential version to the Panel in conjunction with its second written submission. (Exhibit Thailand-52).

¹⁰⁹ Exhibits Thailand-1, -53. Thailand also submitted to the Panel the confidential version of the application, Exhibit Thailand-52.

confidential application itself contains a section entitled "injury determination", which contains information on total production capacity, volume and value of actual production of the applicant (with some "volume" - but not "value"- data provided for "1995" and "1996 Jan-Apr"); carry-over stock (with some "volume" - but not "value"- data provided for "1995"); domestic and export sales (with some data provided for "1995" and "1996 Jan-Apr"); market share (no data provided in body of application); profits and losses (no data provided in body of application), number of workers (some data provided for "1994", "1995" and "1996 Apr"); levels of imports from other sources (no data provided in body of application); and other factors possibly causing injury (no data provided in body of application).

7.70 In addition, we note that the annexes to the non-confidential application contain, *inter alia*, data (including with respect to H-beams) on total imports from Poland compared with total consumption in Thailand; import quantity from Poland (1991-1996 (April)), import price from Poland (1991-1996 (April)), domestic and export sales volume of SYS (1995-1996 (Jan.-May)), domestic market quantity and market share by supplying country (1988-1995), domestic market quantity and market share by group of products (1994, 1995 and 1996 (Jan.-April)), quantity and import price from other countries, and total imports 1988-1996 (Jan.-April). In addition, there is a brief narrative containing certain information on SYS pertaining, *inter alia*, to H-beams, including domestic market conditions, import duties, import prices, average import prices from Poland and SYS inventories.¹¹⁰

7.71 The non-confidential version of the application submitted to the Panel by Thailand also contains: supplemental information on import prices and quantities (1991-1996 May) that was supplied by SYS to the Thai investigating authorities on 15 July 1996; supplemental information on SYS sales, production and inventory (1995, 1996 Jan.-June) that was supplied by SYS to the Thai investigating authorities on 17 July 1996; and additional price information (including credit terms offered on domestic and Polish sales) that was submitted by SYS to the Thai investigating authorities on 16 August 1996.¹¹¹ We note that Poland did not specifically contest before us having also received this supplemental information.

7.72 Thus, we are of the view that the application contains certain data, evidence and information that is relevant to the issues of injury and causal link, including with respect to certain of the factors mentioned in Articles 3.2 and 3.4 of the AD Agreement.

7.73 We therefore cannot agree with Poland's allegation that the application "failed ... in violation of the *chapeau* of Article 5.2, to contain data, evidence or analysis of any kind regarding (1) the existence of injury to SYS or (2) a causal link between alleged dumping by Polish firms and any such injury to SYS".¹¹² We note that Poland

¹¹⁰ See Exhibits Thailand-1 and Thailand-53 and Thailand's oral statement at the second Panel meeting, Annex 2-9, para. 73.

¹¹¹ Although this information relates to other steel products, it is not clear to us that this information relates to H-beams.

¹¹² Poland's second written submission, Annex 1-4, para. 116. In response to Panel questioning, Poland stated that its allegation was that the application "did not contain any information relevant to some of the required factors listed in Article 5.2, *i.e. injury or causation*" (Poland's response to Panel

invoked only the first sentence of the chapeau of Article 5.2 as the basis for its pleadings concerning the contents of the application pertaining to injury and causation.¹¹³ We emphasize that we do not understand Poland to have raised the issue of whether the application contains such "information as is reasonably available to the applicant" in respect of any specific sub-paragraph of Article 5.2 as it relates to injury or causation.

Contents of the Application with Respect to Dumping

7.74 We next consider Poland's allegation that, with respect to dumping, the application is insufficient under Article 5.2 as it contains nothing more than "simple assertion" in the form of raw numerical data, and does not contain "information on the evolution of the volume of the allegedly dumped imports, the effect of these imports on prices of the like product in the domestic market and the consequent impact of the imports on the domestic industry", as required by Article 5.2(iv).¹¹⁴

7.75 A review of the non-confidential version of the application indicates that the application contains, in Section II on "Dumping", information on the price of H-beams in the exporter's domestic market and the export price of H-beams sold into Thailand, as well as information on estimated expenses in importing the product into Thailand. In addition, the annexes to the application contain, *inter alia*, data relating to the quantity and price and sources of H-beams imported into Thailand from 1988-1996, as well as certain other data with respect to the price and quantity of H-beams. While there does not appear to be any explanation or analysis of much of this data in the application or its annexes pertaining to dumping, we recall that the panel in *Mexico - HFCS* was of the view that:

"...Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations. While we recognize that some analysis linking the information and the allegations would be helpful in assessing the merits of an application, we cannot read the text of Article 5.2 as requiring such an analysis in the application itself."¹¹⁵

7.76 We agree with this view of the requirements imposed by Article 5.2 with respect to evidence that must be contained in the application. In the present case, we would have preferred the application to have contained more explanation and a more robust analysis of the evidence pertaining to dumping. However, the fact that the application contains data that is relevant to dumping but does not contain explanation or analysis of much of this data does not, in and of itself, lead to a violation of Article 5.2 AD.

Question 11, Annex 1-5) and that it "contains no data, evidence or analysis of any kind regarding injury or causation" (Poland's response to Panel Question 13, Annex 1-5).

¹¹³ See, for example, Poland's second written submission, Annex 1-4, at para. 116; Poland's response to Panel Questions 3 and 10-13, Annex 1-5.

¹¹⁴ Poland's second written submission, Annex 1-4, para. 117.

¹¹⁵ Panel Report, *Mexico - HFCS*, *supra*, footnote 95, para. 7.76.

7.77 We note that the chapeau of Article 5.2 AD provides that "simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph". We consider that raw numerical data would constitute "relevant evidence" rather than merely a "simple assertion" within the meaning of this provision. Although Poland's argumentation on this point is somewhat unclear, we understand Poland also to invoke paragraph (iv) of Article 5.2 in order to imply that some sort of analysis of such data is required in the application.¹¹⁶ While paragraph (iv) of Article 5.2 requires the application to contain "information", in the sense of evidence, on certain identified factors, we do not read this provision as imposing any additional *requirement* that the application contain analysis of the data submitted in support of the application.

7.78 For these reasons - and in particular the narrow basis of Poland's pleadings concerning the alleged inconsistency of the application with the provisions of Article 5.2 - we find that Poland has not established a *prima facie* case that the contents of the application were insufficient to meet the requirements of the first and second sentences of the chapeau of Article 5.2 of the AD Agreement, nor paragraph (iv) of Article 5.2 of the AD Agreement. As Poland has made no arguments with respect to an independent violation of Article VI of the GATT 1994 in this context, we also find that Poland has not established a *prima facie* case of inconsistency with that provision.

Article 5.3

7.79 In this case, the sole basis for Poland's allegation that Thailand acted inconsistently with the requirement in Article 5.3 concerning the sufficiency of evidence to justify initiation of the investigation was the alleged insufficiency of the application under Article 5.2 AD.¹¹⁷ In light of our finding above concerning Article 5.2 AD, we consider that Poland has not established a *prima facie* case of inconsistency with Article 5.3 AD. As Poland has made no arguments with respect to an independent violation of Article VI of the GATT 1994 in this context, we also find that Poland has not established a *prima facie* case of inconsistency with that provision.

(b) Article 5.5: Alleged Insufficiency of Notification

(i) Arguments of the Parties

Poland

7.80 Poland argues that, in violation of Thailand's obligations under Article 5.5 AD read in conjunction with Article 12.1 AD, Thailand did not provide proper or timely notification to Poland regarding the filing of the application for initiation of the Thai anti-dumping investigation. Poland recognizes that this claim is based on a disagreement with Thailand as to the content of a discussion held on 17 July 1996 between government officials from Thailand and Poland. Poland believes that, due to

¹¹⁶ See Poland's second written submission, Annex 1-4, para. 117; and Poland's response to Panel Question 14, Annex 1-5.

¹¹⁷ Poland's second written submission, para. 119; Poland's oral statement at the second Panel meeting, Annex 1-6, at paras. 95-96; Poland's response to Panel Question 10, Annex 1-5.

the difficulty for a panel to rule on something that was communicated orally, Article 5.5 should be read to require written notice. Poland submits that no such written notice was provided in this case.

Thailand

7.81 Thailand argues that the meeting on 17 July 1996 between government officials from Thailand and Poland complied with the requirements of Article 5.5 AD with respect to the timing, form, and content of the notification. With respect to timing, Thailand submits that it notified Poland less than one month after the receipt of the application and six weeks before the decision to initiate the investigation. In Thailand's view, this satisfies Article 5.5 AD and falls within the "window" contemplated by the relevant Recommendation adopted by the WTO Anti-Dumping Committee.¹¹⁸ With respect to form, Thailand submits that the text of Article 5.5 AD does not specify whether notification should be written or oral.¹¹⁹ For Thailand, discussions on this issue in the Anti-Dumping Committee's Ad Hoc Group on Implementation also do not specify whether notice should be written or oral.¹²⁰ Thailand argues that its interpretation that notification under Article 5.5 AD may be written or oral is a permissible interpretation that the Panel should accept in accordance with Article 17.6(ii) of the AD Agreement. With respect to content, Thailand considers that the language of Article 5.5 AD is vague and gives no indication of what should be notified. Referring to the Thai government note summarizing the 17 July 1996 meeting¹²¹, Thailand states that Thailand indicated to Poland during the meeting that an application had been received and that the authorities were considering whether it contained sufficient information to justify initiation. In Thailand's view, the Panel should ignore Poland's reference to Article 12 of the AD Agreement in this context, as Article 12 is not within the Panel's terms of reference.

(ii) Evaluation by the Panel

7.82 Article 5.5 AD states:

¹¹⁸ Thailand refers to the "Recommendation concerning the timing of the notification under Article 5.5", adopted by the ADP Committee on 29 October 1998, G/ADP/5, 3 November 1998.

¹¹⁹ In their responses to Panel Question 3 (Annexes 3-7, 3-8 and 3-9), the third parties offered their views on the form of the notification required under Article 5.5. The European Communities was of the view that while the term "notify" "implies some degree of formality", this "did not necessarily exclude that a notification can be made orally in the course of an official meeting...". Japan noted that although the text of the provision does not specify that the notification should be in writing, other considerations "suggest that Article 5.5 requires written notification". The United States submitted that Article 5.5 is silent on this issue and that a meeting of government officials could satisfy this requirement, "provided that the objective of the meeting is specific and sufficiently documented to support a review on the record by a panel".

¹²⁰ The Ad Hoc Group is a subsidiary body of the ADP Committee established by decision of that Committee on 29 April 1996 to prepare recommendations on issues where agreement seems possible, and report to the Committee. In addition, the Ad Hoc Group could consider other issues regarding implementation on which Members believe discussion would be helpful. See G/ADP/M/7, paras. 53-54.

¹²¹ Exhibit Thailand-56.

"The authorities shall avoid, unless a decision has been made to initiate an investigation, any publicizing of the application for the initiation of an investigation. However, after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned."

7.83 In this case, the parties agree that there was a meeting in Bangkok between government officials of Thailand and Poland on 17 July 1996, and that the issues arising in this dispute under Article 5.5 AD are due to a difference of views between the parties as to the nature of the obligations imposed by Article 5.5 AD with respect to the timing, form and content of the notification.

7.84 Based on evidence on the Panel record submitted by Thailand that Poland has not specifically contested¹²², the Panel's understanding of the factual situation underlying this claim is as follows. On 21 June 1996, Thailand received an anti-dumping application from SYS. Some time prior to 17 July 1996, the Polish Commercial Counsellor in Bangkok, Mr. Byckowski, telephoned Ms. Chutima Bunyapraphasara (Director of the Multilateral Trade Division) to seek clarification regarding an article in a publication called "Metal Bulletin". The article apparently reported that SYS had requested the Thai government to investigate dumped steel products from Poland. A meeting was scheduled for 17 July 1996 between Mr. Byckowski and officials from DBE. Thailand submits that the meeting is summarized in an internal Thai government note written by Ms. Chutima to the Director-General of DBE dated 18 July 1996.¹²³ According to this note, DBE officials indicated in the course of the 17 July 1996 meeting "that the company had filed an application requesting the Thai Government to investigate the dumped steel products from Poland..." and that "the matter was under consideration whether the company had enough information for the Committee to initiate the investigation."¹²⁴ On 30 August 1996, Thailand initiated the anti-dumping investigation.

7.85 We turn to a consideration of whether this meeting that both parties agree occurred between their government officials on 17 July 1996 satisfied the notification requirements of Article 5.5 of the AD Agreement with respect to its timing, form and content.

7.86 With respect to the *timing* of the notification required under Article 5.5, the second sentence of Article 5.5 provides that "after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned." Footnote 1 of the AD Agreement defines the term "initiated" as follows: "The term "initiated" as used in this Agreement means the procedural action by which a Member formally commences an investigation as provided in Article 5." Together, these provisions make it clear that at a point in time between two specified events, the authorities of the importing Member must notify the exporting Member.

¹²² See, *inter alia*, response by Thailand to Question 18 by the Panel, Annex 2-6.

¹²³ Exhibit Thailand-56.

¹²⁴ Exhibit Thailand-56.

7.87 In the present case, the application was filed on 21 June 1996.¹²⁵ The investigation was initiated on 30 August 1996. Therefore, the 17 July 1996 meeting occurred (approximately one month) following receipt of the initial application¹²⁶ and (approximately six weeks) prior to the initiation of the investigation. We find that the 17 July 1996 meeting fell within the "window" of time envisaged by Article 5.5 and therefore satisfied the timing requirements imposed by Article 5.5.¹²⁷

7.88 We next turn to consider whether the 17 July 1996 meeting satisfied the requirements as to *form* under Article 5.5 of the AD Agreement.

7.89 Article 5.5 AD does not specify the form that the notification must take. The *Concise Oxford Dictionary* defines the term "notify" as: "inform or give notice to (a person)"; "make known, announce or report (a thing)". We consider that the form of the notification under Article 5.5 must be sufficient for the importing Member to "inform" or "make known" to the exporting Member certain facts. While a written notification might arguably best serve this goal and the promotion of transparency and certainty among Members, and might also provide a written record upon which an importing Member could rely in the event of a subsequent claim of inconsistency with Article 5.5 of the AD Agreement, the text of Article 5.5 does not expressly require that the notification be in writing.¹²⁸

7.90 We consider that a formal meeting between government officials could satisfy the notification requirement of Article 5.5, provided that the meeting is sufficiently documented to support meaningful review by a panel. For these reasons, we find that the fact that Thailand notified Poland under Article 5.5 orally in the course of a meeting between government officials, rather than in written form, does not render the notification inconsistent with Article 5.5.

7.91 We turn to a consideration of whether the 17 July 1996 meeting satisfied the requirements of Article 5.5 with respect to the *content* of the notification. The text of Article 5.5 does not specify the contents of the notification. It provides: "after receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member con-

¹²⁵ The Thai investigating authorities subsequently requested, and received, certain additional information from SYS. See Exhibits Thailand-1, Thailand-53.

¹²⁶ Thailand submits that at this meeting, the DBE notified Mr. Byckowski that a properly documented anti-dumping application had been received. Thailand's first written submission, Annex 2-1, para. 120.

¹²⁷ We note that a recommendation adopted by the WTO Committee on Anti-Dumping Practices states: "...the Committee recommends that the notification required by the second sentence of Article 5.5 should be made as soon as possible after the receipt by the investigating authorities of a properly documented application, and as early as possible before the decision is taken regarding the initiation of an investigation on the basis of that properly documented application". "Recommendation concerning the timing of the notification under Article 5.5", adopted by the Committee on 29 October 1998, G/ADP/5, 3 November 1998. We consider that this decision is a relevant but non-binding indication of the understanding of Members as to appropriate implementation practice regarding the obligations under Article 5.5 AD with respect to the timing of the notification. Moreover, we note that the language of the recommendation ("should...") is hortatory.

¹²⁸ While there have been discussions in the Ad Hoc Group on the issue of the form of the notification (See G/ADP/AHG/R/4, para. 19 (Exhibit Thailand-61); G/ADP/AHG/R/5, paras. 18-19 (Exhibit Thailand-59); G/ADP/AHG/R/2, para. 5 (Exhibit Thailand-60)), there has been no recommendation adopted by the ADP Committee on this issue.

cerned".¹²⁹ Because the text of the provision specifies that notification necessarily follows the receipt of a properly documented application, we consider that the fact of the receipt of a properly documented application would be an essential element of the contents of the notification.

7.92 We note that any notification provided in this case was provided orally in the course of a meeting between government officials. The only written evidence on the Panel record relating to the content of any such notification is an internal Thai government note¹³⁰ summarizing the meeting and several subsequent communications from the Thai government to the Polish government.¹³¹ The internal Thai government note states, *inter alia*, that the Thai government indicated in the course of the 17 July 1996 meeting "that the company had filed an application requesting the Thai Government to investigate the dumped steel products from Poland..." and that "the matter was under consideration whether the company had enough information for the Committee to initiate the investigation."¹³² Poland has not explicitly contested in these proceedings that this internal Thai government note accurately reflects the content of the oral communication between the parties' government officials at the meeting. We therefore consider that the meeting of 17 July 1996 was sufficient with respect to its content in that it served to inform the Polish government of the fact that the Thai government had received the SYS application and therefore constitutes sufficient notice under Article 5.5.

7.93 Poland has invoked Article 12 of the AD Agreement as "useful context" in connection with its Article 5.5 AD claim, but has not made a claim under Article 12 of the AD Agreement. We note that both Articles 5.5 and 12.1 contain a requirement to notify the government of the exporting Member concerned of certain events connected with the initiation of an investigation at a certain point in time. However, it is clear that the requirements as to the timing, form and content of these notifications is different. Article 5.5 makes it clear that the notification referred to in that provision must take place "after receipt of a properly documented application and before proceeding to initiate an investigation". By contrast, Article 12.1 of the AD Agreement concerns notification of initiation, as it requires notification to "the Member or Members the products of which are subject to such investigation...", "[w]hen the authorities are satisfied that there is sufficient evidence to justify the initiation of an anti-dumping investigation pursuant to Article 5 ..." and requires "public notice" of initiation. As Article 12.1 provides that such "public notice" must "contain, or otherwise make available through a separate report, adequate information....", the notice must presumably be in writing. Furthermore, Article 12 involves the notification of a decision to initiate, which a Member may not yet have taken at the time of an Article 5.5 notification. That Article 12 specifically enumerates certain requirements with respect to the contents and form of the notice it requires, and Article 5.5 does not,

¹²⁹ While there have been discussions in the Ad Hoc Group on the elements that certain Members consider relevant in this context (G/ADP/AHG/R/4, para. 18 (Exhibit Thailand-61), G/ADP/AHG/R/5, para. 17 (Exhibit Thailand-59)) there has been no recommendation adopted by the ADP Committee on this issue.

¹³⁰ Exhibit Thailand-56.

¹³¹ Exhibit Thailand-14/Poland-4 and Thailand-57.

¹³² Exhibit Thailand-56.

strongly suggests to us that the requirements of Article 12 do not apply to notification under Article 5.5, and in no way changes our interpretation of the requirements concerning the timing, form and content of the notification to be given under Article 5.5.

7.94 For these reasons, we find that Thailand did not act inconsistently with the respect to the timing, form and content of the notification under Article 5.5 of the AD Agreement in informing Poland orally in the course of the 17 July 1996 meeting between government officials of Thailand and Poland that Thailand had received an application from SYS for initiation of an anti-dumping investigation with respect to imports of H-beams from Poland. As Poland has not made any arguments concerning an independent violation of Article VI of the GATT 1994 in this context, we also find that Poland has not established a violation of that provision.

2. *Article 2.2 of the AD Agreement: Amount for Profit in Constructed Normal Value*

(a) *Factual Background*

7.95 During the anti-dumping investigation, the Thai authorities found that the Polish respondent companies produced and/or sold two types of H-beams, those produced to JIS specifications¹³³ ("JIS H-beams") and those produced to DIN specifications¹³⁴ ("DIN H-beams"). DIN H-beams accounted for the large majority of the respondent companies' H-beam sales in Poland, and JIS H-beams accounted for the large majority of these companies' H-beam sales in Thailand¹³⁵. The Polish respondent companies argued during the investigation that JIS and DIN H-beams were not like products due to physical and production process differences. The Thai authorities accepted this argument and on this basis found that HK's home market sales of the like product (JIS H-beams) accounted for less than five percent of its sales to Thailand. Thus, the authorities calculated the preliminary dumping margin for HK on the basis of a constructed normal value. In respect of the amount for profit, Thailand followed the methodology set forth in AD Article 2.2.2(i), with the "same general category of products" for which the amount for profit was determined defined as HK's total H-beam sales (JIS and DIN)¹³⁶.

7.96 The Thai authorities found at verification that the physical and production differences between JIS and DIN H-beams were less than had been argued by the Polish respondents, i.e., that H-beams were "broadly similar irrespective of standard" as substantiated by independent reports prepared by specialized engineering institutes, *inter alia*.¹³⁷ The authorities also found that there was no clear indication that the production lines for JIS and DIN H-beams were treated as separate for cost purposes, as the practice of HK was to average out all costs of H-beams irrespective of the production lines concerned and that the stock cards did not differentiate between

¹³³ JIS is an abbreviation for Japanese Institute of Standards.

¹³⁴ DIN is an abbreviation for Deutsche Industria Normen.

¹³⁵ See Thailand's first written submission, Annex 2-1, at para. 59.

¹³⁶ See Exhibit Thailand-37 at section 6, "Profitability".

¹³⁷ *Ibid.* at section C, "Like product comparisons".

the different product lines.¹³⁸ The Thai authorities nevertheless continued to use constructed normal value for the final dumping determination, again using HK's profits on sales of all H-beams (36.3 per cent) as the profit amount for the "same general category of products" in calculating the constructed normal value. In this context, the Thai authorities found that the profit margin for the like product (JIS H-beams) was almost identical to that for all H-beams as a whole.¹³⁹

(b) Arguments of the Parties

(i) Poland

7.97 Poland claims that Thailand violated Article 2.2 and Article VI:1(b)(ii) of GATT 1994 by including an unreasonable amount for profit in the constructed normal value calculation. In Poland's view, applying the methodologies set forth in Article 2.2.2 (i)-(iii) does not yield results that are *ipso facto* reasonable. Rather, while the *methodologies* set forth in Article 2.2.2 (i)-(iii) are by definition reasonable, at most there is a rebuttable presumption that the *results* generated by these methodologies are reasonable. According to Poland, the result of any calculation using any of these methodologies thus must be evaluated to determine whether it is "reasonable" in the sense of Article 2.2, on the basis of other evidence on the record of the investigation.¹⁴⁰ Poland argues that there were several other much lower profit figures on the record that could and should have been used by Thailand instead of the 36.3 per cent on HK's total H-beam sales. These were: 7 per cent, an amount identified by SYS in the petition in the context of injury as the "reasonable profit margin to maintain the industry"; 5-7 per cent, which Poland states was suggested by SYS in its own constructed normal value calculation in the petition; and 4.55 per cent, HK's company-wide profit margin.

7.98 Poland considers that the text of Article 2.2.2 supports its argument that Article 2.2 and Article 2.2.2 require a separate "reasonability" test. Poland notes that while the chapeau of the latter Article states that the methodologies therein are "for the purpose of paragraph 2" of Article 2 (i.e., the determination of a "reasonable amount" for, *inter alia*, profit), the second sentence of the chapeau states that the methodologies in subparagraphs (i)-(iii) "may" be used. If the use of such methodologies were required, this sentence, like the first sentence of the chapeau of Article 2.2.2, would have used the word "shall". Poland also cites Article 2.2.2 (iii) in support of its argument, noting that this provision states that "the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin", i.e., expressly providing that even reasonable methodologies may sometimes yield results that are not "fairly usable" or "reasonable". In Poland's view, the ceiling imposed by subparagraph (iii) "is arguably stricter than that of the

¹³⁸ *Ibid.* at section 7, "Allowances".

¹³⁹ *Ibid.* at section 6, "Profitability".

¹⁴⁰ Third party Japan takes a similar view (See, Japan's answer to Panel question 6, Annex 3-8). The EC and the United States disagree (see footnote 145, *infra*).

'reasonableness' standard which otherwise flows from Article 2.2 to each provision thereunder".¹⁴¹

7.99 Poland further argues that in applying subparagraph (i) of Article 2.2.2, Thailand violated the requirement to calculate profit amounts on "the same general category of products". In particular, Poland argues that the Thai authorities utilized the wrong sales and production data, that is, HK's data on H-beams only. According to Poland, Thailand had an obligation to use HK's production and sales data not just for H-beams, but more broadly for all products "of the same general category" - of which the narrowest grouping would be "Angles, shapes and sections of iron or non-alloy steel under HS 7216". Poland argues that, while not like products, JIS and DIN H-beams are both included in this "general category" but do not constitute the entirety of that category. According to Poland, Article 2.2.2 (i) would not allow for a narrower category than the "narrowest 'general category'" (i.e., HS 7216) because "small" market segments are more likely to be "unrepresentative" than larger ones. On the other hand, according to Poland, the most general category - all products of a company - would satisfy the requirement of Article 2.2.2 (i). Poland notes that there are no data on the record pertaining to profits for the category identified by Poland (HS 7216), and submits that in the absence of such data, the company-wide average profit margin for HK (4.55 per cent) is a "proper (if...imperfect) surrogate"¹⁴².

(ii) Thailand

7.100 Thailand submits that the profit margin used by the Thai investigating authority was "reasonable", as required by Article 2.2 AD, and was that actually realised on domestic sales of the "same general category of products", i.e., all H-beams.

7.101 Concerning the issue of a separate "reasonability" test, Thailand argues that no such test is required under Articles 2.2 and 2.2.2.¹⁴³ Rather, if one of the methodologies outlined in 2.2.2(i)-(iii) is used where the relevant conditions for doing so are met, i.e., when the preferred method of calculating profit (that in the chapeau of Art. 2.2.2) cannot be used, then the result is reasonable *per se*. Indeed, according to Thailand, when the conditions for using Article 2.2.2(i)-(iii) are met, there is no *permissible* way to measure profit *other than* one of these methodologies. In this connection, Thailand does not believe that the word "may" in any way links the term "reasonable" in Article 2.2 to the calculation methods of Article 2.2.2. Rather, "may" means "is permitted to", where the preferred methodology in the chapeau of Art. 2.2.2 (which normally "shall" be used) cannot be used.^{144,145}

¹⁴¹ Second written submission of Poland, Annex 1-4, para. 109.

¹⁴² See Poland's response to Panel Question 28, Annex 1-5.

¹⁴³ Or under GATT Article VI:1(b)(ii).

¹⁴⁴ In response to a question from the Panel (Question 35, Annex 2-6), Thailand also argues that the phrase "sales in the ordinary course of trade" in the chapeau of Article 2.2.2 is not relevant to the question of whether there is a reasonability test, as calculations must always be based on sales in the ordinary course of trade or they will not be *accurate*.

¹⁴⁵ Third parties the EC and the United States also take this view. (See EC and US responses to Panel Question 7, Annexes 3-7 and 3-9.) The US also argues that the negotiators focused on methodologies that would provide a means for calculating a "reasonable" profit, rather than trying to

7.102 Thailand argues that rather than constraining the level of constructed value and thus the level of the dumping margin (as Poland argues), the word "reasonable" plays a role in effecting the purpose of the AD Agreement, i.e., to neutralise the impact of dumped imports. Seen in this light, "reasonable" must mean "as close as possible to the actual dumping margin"¹⁴⁶. If under Article 2.2.2(i) an investigating authority used a lower profit amount than the actual one, this would mask rather than accurately represent the dumping that was actually occurring, and thus would be *unreasonable*, because it would not be accurate. Thailand further asserts that Poland has offered no method for determining whether a particular level of profit is "reasonable", and notes that HK's actual profit rate exceeded 35 percent on all H-beams and was virtually the same on JIS H-beams, but that Poland argues that this actual profit level is unreasonable.¹⁴⁷

7.103 Concerning the question of the "same general category of products", Thailand submits that Article 2.2.2(i) does not provide for any particular breadth of definition of "same general category of products", but leaves the decision to use a narrower general category rather than a broader general category to the reasonable discretion of the investigating authorities. Thailand argues that in a case where the investigating authority has information on both H-beams and "all products", it would make more sense to choose the narrower category as the "same general category of products", because broader and broader categories will encompass products less and less "like" the products for which a profit is sought to be calculated. As a result, the broader the general category definition, the greater the likelihood that the profit calculation will be inaccurate.

7.104 Thailand states that it is entirely consistent with the requirements of the AD Agreement to conclude that products are not comparable for purposes of Article 2.1, and also to conclude that the data for sales and production of such products do provide a proper basis for a profit calculation under Article 2.2, because such products belong to the "same general category of products" (in this case, *all* "iron or non-alloy steel H-sections, classified under the HS code 7216.33.0005", the product under investigation). For Thailand, all H-beams constitute an obvious, natural category, and the respondent must have the burden to show why there is a major discrepancy caused by using the methodology in Article 2.2.2(i), particularly when the respondent is costing all H-beams in a single accounting database and the investigating authorities find that profits on the like product in the home market are virtually identical to profits for the same general category of products, i.e., all H-beams. According to Thailand, given this "virtual identity" of profit levels, the profit level from one product within the same general category was *not* causing an unreasonably high profit level for the category that was then attributed to the like product. Moreover, Thailand argues, if a price-based comparison had been made using prices for all sales of H-

define the term "reasonable". (See US response to Panel question 6, Annex 3-9.) Japan disagrees (see footnote 140).

¹⁴⁶ Third party the EC makes a similar argument.

¹⁴⁷ Thailand notes that in response to a Panel question (question 29, Annex 1-5), Poland admits that the Thai authorities correctly calculated the amount of profit under the method provided for in subparagraph (i).

beams, the result would have been essentially the same as the final dumping margin established on the basis of constructed normal value^{148, 149}.

(c) Evaluation by the Panel

7.105 In assessing this claim, we are confronted by two issues which are purely matters of legal interpretation: first, whether Thailand has incorrectly applied Article 2.2.2 (i) by defining the "same general category of products" too narrowly, (i.e., as all H-beams), rather than as a broader "general category"; and second, whether an amount for profit calculated pursuant to Article 2.2.2 (i) is *ipso facto* reasonable (assuming that the methodology is applied correctly) or must be subjected to a separate reasonability test.

(i) Has Thailand Incorrectly Applied Article 2.2.2 (i) of the AD Agreement by Incorrectly Defining the "same general category of products"?

7.106 Turning to the first issue, whether Thailand has incorrectly applied Article 2.2.2 (i), namely by incorrectly defining the "same general category of products", we first consider the text of the relevant provisions, namely Article 2.2 and Article 2.2.2.

7.107 Article 2.2 provides that:

"2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation *or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison*, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with *the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*. (emphasis added, footnote deleted).

7.108 Article 2.2.2 provides:

"2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits *shall* be based on actual data pertaining to production and sales in the ordinary course of trade of the *like product* by the exporter or producer under investigation. *When such amounts cannot be determined on this basis*, the amounts may be determined on the basis of:

- (i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the

¹⁴⁸ Thailand's answer to Panel question 32, Annex 2-6.

¹⁴⁹ Thailand also notes that the Thai authorities found that "based on the price information submitted by Huta Katowice ... there is no significant difference between the weighted average price of profitable sales of JIS (989.22 PLN per tonne) and DIN (993.12 PLN per tonne) products sold on the Polish domestic market." (Thailand-62 at page 4, and Thailand's second oral statement, Annex 2-9, at para. 40).

- domestic market of the country of origin of the *same general category of products*;
- (ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
 - (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin". (emphasis added)

7.109 We note at the outset that there is no dispute between the parties concerning the facts as established by Thailand. That is, Poland has confirmed, in answer to a question from the Panel, that Thailand correctly calculated the actual profit margin (36.3 per cent) on HK's sales of all H-beams¹⁵⁰.

7.110 Rather, what Poland objects to is the narrowness of "the same general category of products" used by Thailand. In essence, Poland argues that the narrowest "same general category of products" that includes H-beams and thus that could have been used by Thailand is HS 7216, "Angles, shapes and sections of iron or non-alloy steel". For Poland, Thailand was obligated under Article 2.2.2 (i) to have used this category, and in any case not to have used any narrower category, as the "same general category" in determining the amount for profit to be used in the constructed value calculation.

7.111 In assessing this aspect of Poland's claim under Article 2 of the AD Agreement, we note that the text of Article 2.2.2 (i) simply refers without elaboration to "the same general category of products" produced by the producer or exporter under investigation. Thus, the text of this subparagraph provides no precise guidance as to the required breadth or narrowness of the product category, and therefore provides no support for Poland's argument that a broader rather than a narrower definition is *required*.

7.112 We do find a certain amount of guidance in other provisions of Article 2.2.2, in particular its chapeau and its overall structure, however. In particular, we note that, in general, Article 2.2 and Article 2.2.2 concern the establishment of an appropriate proxy for the price "of the like product in the ordinary course of trade in the domestic market of the exporting country" when that price cannot be used. As such, as the drafting of the provisions makes clear, the preferred methodology which is set forth in the chapeau is to use *actual* data of the exporter or producer under investigation for the *like product*. Where this is not possible, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e., the same general category of products produced by the producer or exporter in question) or as to the producer (i.e., other producers or exporters subject to investigation in respect of the like product), but not both. Again this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like

¹⁵⁰ Poland's answer to Panel Question 29, Annex 1-5.

product in the ordinary course of trade in the domestic market of the exporting country.

7.113 This context indicates to us that the use under subparagraph (i) of a *narrower* rather than a *broader* "same general category of products" certainly is permitted. Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.

7.114 Additional contextual support can be found in Article 3.6 (a provision related to data concerning injury), which provides that when available data on "criteria such as the production process, producers' sales and profits" do not permit the separate identification of production of the like product, "the effects of the dumped imports shall be assessed by the examination of the production of the *narrowest* group or range of products, which includes the like product, for which the necessary information can be provided" (emphasis supplied). Although this provision concerns information relevant to injury rather than dumping, and although we do not mean to suggest that use of the narrowest possible category including the like product is *required* under Article 2.2.2(i), in our view Article 3.6 provides contextual support for the conclusion that use of a narrow rather than a broader category is permitted.

7.115 We note Poland's argument that a broader category is more likely than a narrower one to yield "representative" results (by which we presume Poland to mean representative of the price of the like product in the ordinary course of trade in the domestic market of the exporting country), but we believe that as a matter of logic the opposite more often is likely to be true. The broader the category, the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product. We therefore disagree with Poland that Article 2.2.2(i) requires the use of broader rather than narrower categories, and believe to the contrary that the use even of the narrowest general category that includes the like product is permitted.

7.116 As to the specific category which Poland argues that Thailand was obligated to use (HS 7216), we note that Poland has offered no concrete justification for its identification of this particular category. Rather it has simply asserted that this is the *narrowest* "general category" to which H-beams belong. Given that nothing in the text of the AD Agreement or anywhere else mandates the use of HS categories in the context of Article 2.2.2 (i), we do not find that Thailand was "obligated" to use the HS category proposed by Poland. Poland's argument that given the absence of data on HS 7216, HK's company-wide profit rate on all products was a "proper...surrogate" is similarly unsupported and unpersuasive. Thailand states, and Poland does not dispute, that HK produces a very broad range of products other than H-beams. This certainly suggests that the company-wide data would *not* as accurately represent the like product as would data for a narrower category.

7.117 Finally, as to the specific "same general category" used by Thailand - all H-beams - we note that there was in the investigation and is in this dispute no disagreement between the parties regarding the treatment of JIS and DIN H-beams as not being like products, regarding Thailand's resort to constructed value, or regarding Thailand's use of the methodology in Article 2.2.2 (i). Nor was or is there any disagreement between the parties as to the availability of HK's data in respect of all H-

beams (as distinct from other products) or as to the accuracy of Thailand's calculation based on those data. Given this, we cannot conclude that Thailand committed an error in identifying all H-beams as "the same general category of products" in the sense of Article 2.2.2 (i). This appears to be the narrowest category including the like product for which separate profit data were available, and thus could be expected to yield results closely approximating those of the like product. Moreover, Thailand's finding (undisputed by Poland) that the profit margin on the like product was virtually identical to that for all H-beams confirms that this category yielded results that closely approximated those for the like product.

7.118 Therefore, we find that Thailand has not incorrectly applied Article 2.2.2 (i) by incorrectly defining the "same general category of products".

- (ii) Has Thailand Violated Article 2.2 of the AD Agreement and Article VI:1(b)(ii) GATT 1994 by not Applying a Separate Reasonability Test to the Results of its Calculation under Article 2.2.2(i)?

7.119 Having found that Thailand has not incorrectly applied Article 2.2.2(i), we turn to the second element of Poland's claim under Article 2.2/Article VI:1(b)(ii) of GATT 1994, namely whether the profit amount thus calculated by Thailand was "unreasonable" in violation of Article 2.2. To resolve this issue, we must consider the legal question of whether, as Poland argues, Article 2.2 and Article VI:1(b)(ii) of GATT 1994 impose an obligation to apply a separate reasonability test to the results of a correct calculation under Article 2.2.2 (i).

7.120 We note as an initial matter that Article VI:1(b)(ii) of GATT 1994 contains the underlying requirement that any amount for profit used in a constructed normal value be reasonable, and that Article 1 of the AD Agreement establishes that the ensuing provisions of the AD Agreement (including Article 2.2 and 2.2.2) govern the application of Article VI of GATT 1994 as to anti-dumping action. Thus, in resolving Poland's claim under Article 2.2 we will at the same time resolve its claim under Article VI:1(b)(ii) of GATT 1994. We thus focus in our analysis exclusively on Article 2.2 of the AD Agreement.

7.121 We recall that the text of Article 2.2 states that where a price comparison cannot be used to establish the dumping margin, a constructed normal value can be used, consisting of "the cost of production in the country of origin plus a *reasonable amount* for administrative, selling and general costs and for profits" (emphasis added). This text thus establishes the basic principle that when constructed value is used, it shall include, *inter alia*, a "reasonable amount" for profit. The text of the chapeau of Article 2.2.2 cross-references this provision, stating that "for the purpose of paragraph 2, the amounts for ... profits" shall be determined as set forth in that provision. This text thus establishes that the methodologies outlined in Article 2.2.2 are to be used "for the purpose of" determining the "reasonable amount" for profit (*inter alia*) to be used in a constructed normal value, as required under Article 2.2.

7.122 We note Poland's argument that the *methodologies* set forth in Article 2.2.2 are reasonable *per se*, but that the *results* of applying any of these methodologies are, at best, rebuttably presumed to be reasonable. We find no trace in the texts of the relevant provisions of such a rebuttable presumption, however. To the contrary, the

ordinary meaning of the text seems rather to indicate that, if one of the methodologies is applied, the result is by definition reasonable. First, as noted, the phrase "for the purpose of paragraph 2" is without qualification in the text. In our view, this phrase is straightforward and means that Article 2.2.2 gives the specific instructions as to how to fulfil the basic but unelaborated requirement in Article 2.2 to use no more than a "reasonable" amount for profit.

7.123 Second, we note that the chapeau of Article 2.2.2 provides that where the methodology in the chapeau "cannot" be used, one of the methodologies in subparagraphs (i), (ii) or (iii) "may" be used. Poland argues that the word "may" only provides for the possibility of using such methodologies and implies that any results derived thereby would be subject to a reasonability test arising under Article 2.2. We disagree, as in our view the word "may" constitutes authorization to use the methodologies in the subparagraphs where the methodology in the chapeau, which is the preferred methodology, "cannot" be used. We note that the text of Article 2.2.2 establishes no hierarchy among the subparagraphs and that there is no disagreement between the parties concerning this issue.

7.124 Another textual element confirming this interpretation is subparagraph (iii), which permits the use of "any *other* reasonable method", subject to a defined cap¹⁵¹. In our view, if application of the methodologies in (i) or (ii) by itself were not sufficient to satisfy the reasonability requirement of Article 2.2, the word "other" in subparagraph (iii) would be redundant. In this regard, we are not persuaded by Poland's argument that a reasonable methodology can yield an unreasonable result, and as noted above, we see nothing in the text to suggest this. This conclusion is reinforced by the presence of the cap in subparagraph (iii) and the absence of any cap in subparagraphs (i) and (ii). If the methodologies in subparagraphs (i) and (ii) did not yield *ipso facto* reasonable results, an explicit cap or some other constraint could have (and presumably would have) been built in, as was done in subparagraph (iii). Subparagraph (iii) makes clear that the drafters knew how to include such a constraint and were aware that it might be necessary in certain circumstances. The fact that they chose not to do so in the other subparagraphs of Article 2.2.2 to us demonstrates that no such separate constraint exists in respect of these subparagraphs.

7.125 We note also the requirement in the chapeau of Article 2.2.2 as well as in subparagraphs (i) and (ii) that *actual data* be used. In our view, the notion of a separate reasonability test is both illogical and superfluous where the Agreement requires the use of specific types of actual data. That is, where actual data are used and the other requirements of the relevant provision(s) are fulfilled (e.g., that the "same general category of products" is defined in a permissible way where 2.2.2(i) is applied), a *correct* or *accurate* result is obtained, and the requirement to use actual data *is itself* the mechanism that ensures reasonability in the sense of Article 2.2 of that (correct) result. By contrast, under subparagraph (iii) where no specific methodology or data source is required, and the use of "any other reasonable method" is permitted, the provision itself contains what is in effect a separate reasonability test, namely the cap on the profit amount based on the actual experience of other exporters or produc-

¹⁵¹ The cap is "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

ers. Thus, in our view, Article 2.2.2's requirement that actual data be used (and its establishment of a cap where this is not the case) are intended precisely to avoid the outcome that Poland seeks, namely subjective judgements by national authorities as to the "reasonability" of given amounts used in constructed value calculations.

7.126 Furthermore, Poland has offered no rationale, explanation or illustration of how, objectively, reasonability could be established or tested. That is, while Poland would have us decide that a separate reasonability test is required, it has provided no specifics as to what such a test should be or how it could operate in a way that was transparent and could be applied in all investigations. In essence, Poland has argued simply that reasonability should be judged on the basis of other record evidence; and in respect of this case Poland's argument appears in large part to be based on the implicit proposition that a lower profit margin is inherently more "reasonable" than a higher one. We disagree. As noted above, we view the requirement to use actual data (whatever the absolute figure that this yields in a particular case) as the mechanism by which the Agreement ensures that a reasonable result is obtained in the investigation (assuming the methodology is applied correctly). No further screening of that result is required. If a methodology using actual data yields a figure for profits the factual accuracy of which is uncontested, we fail to see the basis for a characterization of those results as "unreasonable".

7.127 Nor (assuming *arguendo* that a separate reasonability test were required) has Poland established that the profit amount used by Thailand in this case was unreasonable. We note, first, that in this case Thailand found no evidence of any significant differences between the two types of H-beams (in physical characteristics, production process, cost, profitability or prices), and Thailand's argument on this basis that all H-beams could have been deemed a single like product¹⁵². As Thailand notes, if all H-beams had been treated as a single like product, the margin of dumping based on price-to-price comparisons for the like product so defined would have been virtually the same as that based on constructed value, given the Thai authorities' finding that the Polish home market prices for JIS and DIN H-beams were very similar.¹⁵³ Thus, there is no evidence that Thailand's application of Article 2.2.2 (i) in any way distorted the outcome of the dumping investigation. In view of this, and given, as noted above, that the underlying goal of the constructed normal value rules is to ensure a result as close as possible to what would be obtained on the basis of a price-to-price comparison, there is no factual evidence that the profit figure used by Thailand was unreasonable.

7.128 For the foregoing reasons, we find that AD Article 2.2.2 (i), *when applied correctly*, necessarily yields reasonable amounts for profits, and that no separate reasonability test is required in respect of those amounts. As there is no requirement of a separate reasonability test, we find that Thailand has not violated AD Article 2.2 by not having applied such a test to the results that it obtained under AD Article 2.2.2 (i). Moreover, even if such a test were required, Poland has not demonstrated that the profit amount calculated is "unreasonable" nor how a correctly calculated profit amount could be characterized as unreasonable.

¹⁵² Thailand's first written submission, Annex 2-1, at footnote 26.

¹⁵³ See Thailand's response to Panel Question 32, Annex 2-6.

(iii) Conclusion

7.129 On the basis of all of the foregoing considerations, we find that Thailand has not violated Article 2.2 of the AD Agreement. Thailand therefore also has not violated Article VI:1(b)(ii) of GATT 1994.¹⁵⁴

3. Article 3 of the AD Agreement: Determination of Injury

(a) Article 3.1: Determination Based on "positive evidence" and Involving an "objective examination"

(i) Arguments of the Parties

Poland

7.130 Poland's claims under Article 3 raise multiple issues relating to the interpretation of several provisions of Article 3 AD - in particular, Articles 3.1, 3.2, 3.4 and 3.5 - and the interrelationships between these provisions. In general, Poland argues that Articles 3.1, 3.2 and 3.4 were violated because the determination was not based on "positive evidence" and did not involve an "objective examination" of the volume and effects on price of the Polish imports, and the impact of those imports on SYS. Poland argues that Thailand violates Article 3.5 by not demonstrating that the Polish imports are causing injury.

7.131 With respect to Article 3.1, Poland argues that contradictions in the investigation data show that the decision was not based on positive evidence and an objective examination of the facts. First, Poland questions discrepancies in the factual evidence in the non-confidential record, as well as the contradictions between this evidence and the evidence contained in the confidential record. For Poland, these discrepancies raise both due process concerns and concerns under Article 17.6(i). Second, Poland argues that the evidence and the consideration of that evidence by the Thai authorities do not support an injury finding.

7.132 According to Poland, the documents that should form the basis for our review are the draft final determination (Exhibit Thailand-37) and the final determination (Exhibit Thailand-46). Poland also suggested that the Panel could consider the confidential Thai government report to the CDS Committee by the DIT (Exhibit Thailand-44) to the extent that it indicated contradictions or inconsistencies with the public record. Poland objects to investigating authorities claiming "to base their determinations on documents outside the record that are not shared in any coherent form or manner with the parties to an investigation"¹⁵⁵ and argues that "the panel should not permit the use in panel proceedings of secret documents offered *post hoc* as evidence of the existence of the legal prerequisites for an anti-dumping determination."¹⁵⁶ For Poland, Exhibit Thailand-44 (and other similar documents submitted by Thailand to the Panel) recall the situations in *Korea - Anti-Dumping Duties on Imports of Polya-*

¹⁵⁴ See *supra*, para. 7.120 for our view of the relationship between Poland's claims under Article 2.2 of the AD Agreement and Article VI:1(b)(ii) of GATT 1994.

¹⁵⁵ Poland's second written submission, Annex 2-5, para. 51.

¹⁵⁶ *Ibid.*

*cetal Resins from the United States*¹⁵⁷ ("Korea-Resins") and other panel reports in which "the use of documents outside the record that are not shared with the parties to an investigation" was condemned.¹⁵⁸ According to Poland, in those cases, the panels "refused to take into account certain alleged "evidence" that authorities claimed was part of their administrative decision-making, but which was not part of the administrative record of an investigation."¹⁵⁹

Thailand

7.133 Thailand submits that Poland has provided no specific legal or factual basis to support its purported claim under Article 3.1. Thailand asserts that the Thai authorities' final determination of injury involved an objective examination of the impact of dumped imports from Poland on the Thai domestic industry consistent with Article 3.1 AD.

7.134 Thailand submits that Article 17.6 of the AD Agreement pertains to all facts made available in conformity with domestic AD procedures pursuant to Article 17.5 and that all confidential and non-confidential documents are pertinent to the Panel's examination. Thailand argues that because Poland has made no claim of violation of Article 12, we may use any such notices or reports on the record of the investigation to determine substantive compliance with Article 3 of the AD Agreement. Thailand considers that a significant amount of "positive" evidence on which the final injury determination is based is contained in the record of the investigation and is reported in the respective notices, letters, and disclosures provided to interested parties. However, Thailand states that "the confidential factual record on which the Thai authorities based its determination" "contains positive evidence that the Thai authorities objectively examined with respect to all of the factors listed in Article 3.1 of the Anti-Dumping Agreement."¹⁶⁰ In particular, Thailand considers that the confidential Thai government report to the CDS Committee by the DIT, Thailand-44¹⁶¹, "correctly summarises the basis for the Thai authorities' determination and demonstrates that such determination was entirely consistent with the Anti-Dumping Agreement"¹⁶², and that the confidential data in the report "is necessary to support the affirmative

¹⁵⁷ Panel Report, *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States*, ADP/92 and Corr. 1, adopted by the ADP Committee on 27 April 1993, BISD 40S/205.

¹⁵⁸ Poland's second written submission, Annex 1-4, para. 88.

¹⁵⁹ *Ibid.*

¹⁶⁰ Thailand's oral statement at the second panel meeting, Annex 2-9, para. 47.

¹⁶¹ Thailand states that Exhibit Thailand-44 "is the text of a report prepared by the DIT for the CDS Committee. The report is a summary of confidential and non-confidential evidence supplied by interested, co-operating parties during the course of the investigation, including the information obtained by the Thai authorities on their own initiative. This evidence includes, *inter alia*, SYS' and the Polish producers' questionnaire responses, material obtained during the on-site verification, Thai customs statistics, technical dossiers on specifications, etc. Moreover, the text of THAILAND-44, was based on multitudes of confidential working papers such as the table provided in THAILAND-66. These working papers summarize several hundred source documents that provided, for example, transaction-specific price information, production information, sales information, and other information considered relevant by the CDS Committee". See Response by Thailand to Poland Question 1, Annex 2-7.

¹⁶² Thailand's oral statement at the second panel meeting, Annex 2-9, para. 66.

final determination in the underlying anti-dumping investigation".¹⁶³ Thailand refers to Thailand-44, and other similar documents, in responding to certain of Poland's allegations of inconsistency with Article 3.¹⁶⁴

7.135 To the extent that Thailand admits that there are errors in data on the record, it identifies most of them as typographical or translation errors in the English translations, and as, in any case, not germane to the Panel's examination under Article 3.

(ii) Evaluation by the Panel

7.136 Article 3.1 AD provides:

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

7.137 We view Article 3.1 as setting out the general requirements for a determination of injury, and the succeeding sections of Article 3 as providing more specific guidance on the determination of injury.¹⁶⁵ The core of Poland's Article 3 claim in this dispute concerns the more specific provisions in Articles 3.2, 3.4 and 3.5. Article 3.2 sets forth factors to be considered with regard to the volume and price effects of imports which Article 3.1 requires to be examined. Article 3.4 sets forth factors to be considered in examining the impact of dumped imports on the domestic industry, as required by Article 3.1. Article 3.5 establishes requirements for the analysis of the causal relationship between the dumped imports and the injury to the domestic industry.

7.138 The allegations made by Poland variously under Article 3.1, 3.2, 3.4 and 3.5 all raise certain similar issues, relating to how the Thai investigating authorities treated, or allegedly failed to treat, certain factors in their examination of injury and causation. In addition, Poland's various allegations under Article 3.1, 3.2, 3.4 and 3.5 all raise similar issues pertaining to whether the Thai investigating authorities based their findings on positive evidence and carried out the objective examination of the factors required under Article 3 of the AD Agreement.

7.139 We thus commence our examination of Poland's claim under Article 3 of the AD Agreement by addressing Poland's arguments with respect to the requirements of "positive evidence" and "objective examination" in Article 3.1 as a basis for the affirmative determination of injury reached by the Thai investigating authorities. We consider that these arguments raise issues relating to the applicable standard of review that are inextricably linked with the question of which documents in the record of the Thai AD investigation may properly form the basis for our review of consistency of the Thai AD investigation and determination with the requirements of Article 3 of the AD Agreement.

¹⁶³ See Thailand's response to Question 4 from Poland, Annex 2-6.

¹⁶⁴ See, for example, paras. 85, 100 and 113 of Thailand's first written submission, Annex 2-1.

¹⁶⁵ We note that this is consistent with the approach of the panel in *Mexico-HFCS*, *supra*, footnote 95, paras. 7.118- 7.119.

7.140 The specific legal issue that arises is whether the Panel may properly review the Thai injury determination with reference to considerations and data in the confidential record of the investigation in, *inter alia*, Exhibit Thailand-44 that were not discernible in the final determination or the disclosures (including non-confidential summaries)¹⁶⁶ or communications pertaining to the final determination to which the Polish firms had access in the course of the investigation.

7.141 As we explain below¹⁶⁷, our view as to the documents that may in this case be considered in our review under Article 3 is based upon the textual elements of "positive evidence" and "objective examination" in that provision, read in light of the standard of review.

7.142 With respect to the standard of review, Article 17.6(i) makes it clear that in reviewing the consistency of the Thai AD investigation and determination with Thailand's obligations under the AD Agreement, our task is to ascertain "whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". According to the express terms of that provision:

"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."

7.143 We consider that the textual requirements in Article 3.1 that a determination of injury be based on "positive evidence" and involve an "objective examination", in light of this standard of review, places a considerable responsibility upon the investigating authorities to establish an adequate factual basis for the determination as well as to provide a reasoned explanation for the determination. We note that the term "positive" is defined in the *Concise Oxford Dictionary* as: "formally or explicitly stated; definite, unquestionable (*positive proof*)". In addition, we note that the term "objective" is defined as "... concerned with outward things or events; presenting facts uncoloured by feelings, opinions, or personal bias; disinterested."¹⁶⁸ We are of the view that the textual reference to "positive evidence" and the requirement of an "objective examination" in Article 3.1 requires that the reasoning supporting the determination be "formally or explicitly stated" in documents in the record of the AD investigation to which interested parties (and/or their legal counsel) have access at least from the time of the final determination. Moreover, we consider that the factual basis relied upon by the authorities must be discernible from those documents.¹⁶⁹ As

¹⁶⁶ See *infra*, paras. 7.208-7.209.

¹⁶⁷ See *infra*, paras. 7.142-7.151.

¹⁶⁸ *The New Shorter Oxford English Dictionary* (Oxford University Press, 1993).

¹⁶⁹ We note that the panels in *Korea-Resins* and *United States - Salmon* also considered the meaning of these requirements of an "objective examination" and "positive evidence". Although these panels both examined the provisions of Article 3 of the Tokyo Round AD Code, and that Code did not contain a provision analogous to Article 17.6 of the current Agreement (which sets out the standard of review applicable in this case), we nevertheless consider these panel reports helpful with respect to the factual basis and the reasoning and analysis susceptible to panel review with respect to Article 3 of the AD Agreement. See *Korea-Resins, supra*, footnote 157, in particular, paras. 208-213, 225-228; *United States - Imports of Anti-Dumping Duties on Imports of fresh and Chilled*

we discuss below¹⁷⁰, without timely access to relevant information in the course of the investigation and to the essential facts prior to the final determination, interested parties would be denied a meaningful opportunity to defend their interests during the investigation, and without access to the disclosed factual basis and reasoning supporting the determination at least from the time of the final determination, interested parties and WTO Members would be unable to assess whether bringing a WTO dispute settlement complaint relating to the determination would be fruitful.

7.144 We are therefore of the view that in reviewing the final determination¹⁷¹ of injury, we as a panel should base our review on the reasoning and analysis reflected in the final determination and in communications and disclosures to which the Polish firms had access in the course of the investigation or at the time of the final determination. We also consider that we may take into account - to the extent that it can be discerned from the foregoing documents whether and how it was relied upon by the Thai investigating authorities in reaching their determination - all of the factual evidence submitted to the Thai investigating authorities in the course of the Thai AD investigation to the extent that it forms part of the Panel record. This includes information that was treated as confidential by the Thai investigating authorities pursuant to Article 6.5 of the AD Agreement. In our view, such information falls within "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member" referred to in Article 17.5 of the AD Agreement. Among other things, we consider that we may refer to actual confidential data in order to verify the accuracy of the non-confidential data disclosed to the interested parties in the course of the investigation and at the time of the final determination.

7.145 In our view, our examination of whether the establishment of the facts is proper under Article 17.6(i) would include ascertaining whether the factual basis of the determination is discernible from the documents that were available to the interested parties and/or their legal counsel in the course of the investigation and at the time of the final determination, and whether those documents reflect the actual underlying data. In addition, in order to ascertain whether the evaluation of the facts was unbiased and objective we must examine the analysis and reasoning in those documents to ascertain the connection between the disclosed factual basis and the findings. We must examine whether the determination was reached on the basis of an unbiased and objective evaluation, and an objective examination, of the disclosed factual basis of the determination.

7.146 In the particular circumstances of this dispute¹⁷², and in light of the particular arguments of the parties, we will therefore consider in our review of the Thai AD investigation under Article 3 of the AD Agreement the final determination (Exhibit Thailand-46), as well as the draft final determination (Exhibit Thailand-37), which

Atlantic Salmon from Norway, adopted by the ADP Committee on 27 April 1994, BISD 41S/229, in particular, paras. 492-494.

¹⁷⁰ See *infra*, paras. 7.149-7.151.

¹⁷¹ We do not take into account the preliminary determination nor disclosures pertaining to that determination in our examination of the definitive measure imposed. Here, Poland is challenging the final measure, as identified in its panel request.

¹⁷² We note that Poland has made no claim of violation of Article 12 of the AD Agreement relating to the contents of the final determination in this case.

Thailand states includes the non-confidential "essential facts" that form the basis for the final determination.¹⁷³ Moreover, we note that there was an exchange of correspondence between the Thai authorities and the Polish respondents and/or their legal counsel in which the Polish firms commented on the draft final determination and the Thai authorities responded, providing some explanation of the reasoning that had formed the basis for the draft final determination. As all of this correspondence was fully known to both Thailand and to the Polish firms, we believe that we may also take it into account in our examination. Thus, we will also consider the disclosures and communications between the Thai investigating authorities and the Polish firms and/or their legal counsel which occurred in the period between the draft final determination and the final determination (Exhibits Thailand-40,-41).

7.147 However, we find compelling Poland's view that we should not permit the use by the defending party in panel proceedings of considerations that were not made available to the interested parties, or facts the existence of which was not discernible from the documents available to the interested parties. Therefore, we decline to base our review on confidential reasoning or analysis that may have formed part of the record of the Thai AD investigation, but to which the Polish firms (and/or their legal counsel) did not have access at the time of the final determination. This would include any reasoning or analysis contained exclusively in Exhibit Thailand-44.¹⁷⁴

7.148 We note Thailand's argument that Thailand-44 "correctly summarises the basis for the Thai authorities' determination and demonstrates that such determination was entirely consistent with the Anti-Dumping Agreement".¹⁷⁵ Although Poland has raised some concerns before us with respect to the factual accuracy of the confidential report, we have no reason to doubt the veracity of the report, nor to doubt that the CDS Committee took the considerations contained in the report into account in making its affirmative determination. Nevertheless, because the Polish firms (and/or their legal counsel) did not have access to the reasoning or analysis contained in this confidential document (and other such documents) in the course of the Thai AD investigation or at least from the time of the final determination, and because Poland did not have access to the reasoning in these documents prior to these WTO Panel proceedings, we do not consider that such the reasoning contained exclusively in these documents can be considered to constitute "positive evidence" or an indication of an "objective examination" within the meaning of Article 3.1 AD that can be taken

¹⁷³ Thailand submits that Exhibit Thailand-37 contains the Proposed Definitive Determination, and provides "(1) the essential facts under consideration which form the basis for the decision whether to apply definitive measures and (2) a small quantum of proposed analysis of such facts". According to Thailand, "[t]he Final Determination was based on the same essential facts as disclosed to interested parties in the Proposed Definitive Determination". According to Thailand, the proposed analysis in the Proposed Definitive Determination, however, was "finalised for the final determination, after considering comments from interested parties". See Response by Thailand to Question 9 from Poland, Annex 2-6.

¹⁷⁴ We note that the panel in *Korea-Resins* declined to take into account a confidential transcript of the investigating authority's voting session in reaching the affirmative AD determination as a further explanation of the reasons upon which the final determination was based. See *Korea-Resins, supra*, footnote 157, paras. 208-213.

¹⁷⁵ Thailand's oral statement at the second panel meeting, Annex 2-9, para. 66.

into account by us as an additional statement of the reasoning supporting the Thai affirmative determination.¹⁷⁶

7.149 As we have already indicated, our view as to the documents that will form the basis for our review is thus fundamentally affected by the fact that, pursuant to the DSU and Article 17 of the AD Agreement, compliance by a Member with the obligations in Article 3 of the AD Agreement is subject to review by a panel and the Appellate Body. Article 3.2 of the DSU recognizes that:

"The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system. The Members recognize that it serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law...."

In our view, access of interested parties to relevant information in the course of the investigation, in addition to access to the disclosed factual basis and reasoning supporting an affirmative determination at least from the time of the determination enables an interested WTO Member to "exercise its judgment as to whether action under [the DSU] procedures would be fruitful" under Article 3.7 DSU. This is of particular significance given the considerable costs associated with mounting a WTO dispute settlement challenge (and preparing a defence to such a challenge), particularly for developing country Members. Such disclosed factual basis and reasoning may also serve as the basis for panel review in the context of WTO dispute settlement. We view this as an essential aspect of the requirements concerning dispute settlement and meaningful panel review under the DSU and the AD Agreement.

7.150 Furthermore, we find contextual support for our views concerning the documents that will form the basis for our review in the provisions of Article 6 of the AD Agreement. In particular, Article 6.2 of the AD Agreement requires that, "[t]hroughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests." As indicated in other provisions of Article 6, this right is predicated on having timely access to relevant information. Article 6.9 requires that the authorities shall, "before a final determination is made", inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures". Such disclosure should take place "in sufficient time for the parties to defend their interests". Article 6.5 imposes an obligation on the investigating authorities not to disclose confidential information, and this obligation informs other provisions of Article 6. For example, Article 6.4 of the AD Agreement provides:

"The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and that is used by the authorities in an anti-dumping investigation, and to prepare presentations on the basis of this information."

¹⁷⁶ As above, note 174, see *Korea-Resins*, paras. 208-213.

7.151 Finally, Article 12 of the AD Agreement, entitled "Public Notice and Explanation of Determinations" governs the content of public notice of any preliminary or final determination, and requires that each such notice "shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Moreover, "all such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination ...and to other interested parties known to have an interest therein." Article 12.2.2 contains specific requirements for notices of final determinations. In particular, this provision requires the public notice to contain, or to otherwise make available in a separate report, "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures", as well as "the reasons for acceptance or rejection of relevant arguments or claims made by the exporters and importers...". While Poland has made no specific claim of violation of Article 12 of the AD Agreement in this case, we nevertheless believe that Article 12 provides important context for Article 3 in indicating the significance attached by Members to allowing interested parties access to information on fact and law relevant to the final determination. Among other things, such access allows them (through interested Members) to assess the fruitfulness of bringing a WTO dispute settlement complaint.

7.152 On this basis, we proceed to an examination of the consistency with the relevant provisions of Article 3 of the AD Agreement of Thailand's AD investigation and determination that resulted in the imposition of the definitive anti-dumping duties identified in Poland's panel request.¹⁷⁷

- (b) Article 3.2
 - (i) Volume of Dumped Imports

Arguments of the Parties

Poland

7.153 Poland submits that the first sentence of Article 3.2 requires that an investigating authority must "find" a "significant" increase in the volume of dumped imports. Poland argues that there was no statement or evidence that the Thai authorities "considered" whether there had been a significant increase in imports, and no finding that the increase in the volume of dumped imports was "significant". Poland asserts that the Thai law at the time of the AD investigation was inconsistent with the AD Agreement as it did not require any "finding" of "significance". Poland submits that the finding in the final determination that imports "continuously increased" was wrong. According to Poland, in fact, imports from Poland moved up and down through the period of investigation, and Poland had raised questions about the import statistics during the investigation. In Poland's view, the data in the record of the investigation pertaining to imports and market share are contradictory as are the state-

¹⁷⁷ In this case, Poland has made a claim of violation of Article VI of the GATT 1994 in conjunction with its Article 3 claims, but has made no arguments concerning an independent violation of GATT Article VI in this context.

ments in the final determination and other record documents about those data. According to Poland, Thailand's findings concerning import volume thus cannot be considered to be based on "positive evidence" that was objectively examined by the Thai authorities.

7.154 Thus, Poland argues, the Thai authorities' determination was not made on the basis of "positive evidence" and an "objective examination" of, *inter alia*, the increase in the subject imports.

Thailand

7.155 Thailand submits that it acted consistently with its obligation under the first sentence of Article 3.2 AD: the record of the investigation shows that the Thai investigating authorities considered whether there had been a significant increase in dumped imports in absolute terms. Concerning the statement in the final determination that the import volumes from Poland "increased continuously", Thailand cites to record evidence of annual import volumes from 1994 through the investigation period. Concerning inconsistent figures for domestic demand and the market share of Polish imports in the confidential record and in the non-confidential record, Thailand indicates that these are typographical errors in Thailand-37 and in the English translation of Thailand-44. Thailand indicates that correct figures for both total SYS domestic sales and total imports were provided in confidential documents to the CDS Committee.

Evaluation by the Panel

7.156 Article 3.2 provides in pertinent part:

"With regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member... No one or several of these factors can necessarily give decisive guidance."

7.157 Pursuant to the first sentence of Article 3.2, read in conjunction with Article 3.1, we must examine whether, with respect to the volume of dumped imports, the Thai investigating authorities considered whether there had been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in Thailand. In accordance with the standard of review, our task is to examine whether the Thai authorities properly established the facts concerning the existence of an increase in dumped imports and evaluated those facts in an unbiased and objective manner. In accordance with the approach to Article 3 of the AD Agreement that we have outlined above¹⁷⁸, we conduct this examination on the basis of the final determination and the other documents forming the basis for our review.¹⁷⁹

¹⁷⁸ *Supra*, paras. 7.139-7.151.

¹⁷⁹ *Supra*, para. 7.146.

Use by Thailand of Overlapping Time Periods in its Analysis

7.158 Before turning to Thailand's assessment of imports, we consider Poland's general argument in the context of its Article 3 claims that the use by Thailand of overlapping time periods in its analysis of the data concerning injury introduced a flaw into that analysis. We note in this regard that the investigation period used by the Thai authorities was 1 July 1995-30 June 1996, and that the authorities used figures for January-December 1995 as a basis for comparison with the data for the investigation period. Before us, Poland objects to the overlapping 6-month period of July-December 1995 in these two periods. According to Poland, an analysis under Article 3 concerns, *inter alia*, changes ("increases" and "decreases") in various indicia over time. In order for such movements to be meaningful, they require a meaningful baseline from which measurement may be made, which according to Poland is of particular importance given that SYS at that time had been in existence for only a few months. According to Poland, this methodology obscured the situation faced by SYS at the beginning of the investigation period.¹⁸⁰ Thailand responds that the use of such overlapping time periods may confirm the persistence of trends over time.

7.159 We consider that it is for the investigating authorities in the first instance to determine the analytical methodologies that will be applied in the course of an investigation, as Article 3 contains no requirements concerning the methodology to be used. While it could possibly be shown in a given case that a particular methodology has introduced a flaw in an authority's analysis, in this case Poland has not demonstrated any specific flaw that has resulted from the application of Thailand's methodology. Thus, we do not consider this issue further.

Is an Explicit "finding" of a "significant" Increase in Dumped Imports Required?

7.160 We first turn to Poland's argument that the Thai determination is inconsistent with the first sentence of Article 3.2 as it contains no statements, evidence or "finding" that the Thai investigating authorities considered whether the increase in dumped imports was "significant".

7.161 We examine the nature of the obligation in Article 3.2. We note that the text of Article 3.2 requires that the investigating authorities "consider whether there has been a significant increase in dumped imports". The *Concise Oxford Dictionary* defines "consider" as, *inter alia*: "contemplate mentally, especially in order to reach a conclusion"; "give attention to"; and "reckon with; take into account". We therefore do not read the textual term "consider" in Article 3.2 to require an explicit "finding" or "determination" by the investigating authorities as to whether the increase in dumped imports is "significant". While it would certainly be preferable for a Member explicitly to characterize whether any increase in imports as "significant", and to give a reasoned explanation of that characterization, we believe that the word "significant" does not necessarily need to appear in the text of the relevant document in order for the requirements of this provision to be fulfilled. Nevertheless, we consider that it

¹⁸⁰ See Response of Poland to Question 22 by the Panel, Annex 1-5.

must be apparent in the relevant documents in the record that the investigating authorities have given attention to and taken into account whether there has been a significant increase in dumped imports, in absolute or relative terms.¹⁸¹

7.162 For this reason, we do not consider that the absence of an explicit "finding" by the Thai authorities that the increase in dumped imports was "significant" is inconsistent with the requirements of the first sentence of Article 3.2.

Did Thailand Consider whether there had
been a Significant Increase in Dumped
Imports?

7.163 We next examine whether the Thai authorities considered whether there has been a significant increase in dumped imports in absolute terms within the meaning of the first sentence of Article 3.2. In this context, we note that the *Concise Oxford Dictionary* defines "significant" as, *inter alia*, "noteworthy, important, consequential".

7.164 With respect to the increase in dumped imports, the final determination¹⁸² states:

"2.1 *The import volume of the subject merchandise from Poland has continuously increased* when the total imports declined. When compared Polish imports with all other imports, Polish imports had increased from 31 per cent in 1994 to 48 per cent in 1995, to 57 per cent during the POI. Moreover, the market share of Polish imports had increased from 1994. It averages 24 per cent in 1995 and and [sic] 26 per cent during the POI." (emphasis added)

In addition, the draft final¹⁸³ determination states:

"4. During the period of investigation, Total H-beams imported to Thailand decreased at 8% from 1995 while imports from Poland increased by 10%. As a result, market share of H-beam from Poland increased by 1.1%; on the other hand, the market share of the total import decreased at 7%."

7.165 We note that Poland, in objecting to the substance of Thailand's consideration of the increase in the volume of imports from Poland, focuses exclusively on the statement in the final determination that the import volume from Poland had "continuously increased". Poland challenges the factual accuracy of this statement, arguing that in fact the data show that imports from Poland moved up and down through the period of investigation. As indicated by the above quotes, the relevant documents contain a number of statements and characterizations concerning the volume of imports. We believe that we must take all of these statements and characterizations into account in examining whether the Thai authorities "considered" whether there was a significant increase in the volume of the dumped imports from Poland.

¹⁸¹ We take note of Poland's argument that the Thai law at the time of the investigation was inconsistent with the AD Agreement as it did not require any "finding" of "significance". Pursuant to our terms of reference, the measure before us is the definitive AD measure imposed by the Thai authorities, rather than the Thai AD legislation itself.

¹⁸² Exhibit Thailand-46.

¹⁸³ Exhibit Thailand-37 at para. 4.

7.166 We consider first whether the record evidence supports the Thai authorities' characterization that imports from Poland "increased continuously". We note that Thailand responded to this argument of Poland by citing to annual data for the period 1994 through the investigation period, which show an increase in each of these periods. We note that the final determination, in describing the trend in import volumes, confirms the use of 1994 as the base year used by the Thai authorities in arriving at this conclusion. In addition, the indexed data in the non-confidential disclosure tables also show a 10 per cent increase in volume (from an index of "48" to an index of "53") from 1995 to the investigation period.¹⁸⁴ Thus, we find that there is factual support on the record for the Thai authorities' statement that the subject imports "increased continuously". The import data as presented in the final determination and the draft final determination are further confirmed in the confidential "information for final determination" (Exhibit Thailand-44).¹⁸⁵

7.167 Indeed, only on the basis of quarterly import data¹⁸⁶ for one of the twelve-month periods considered by the authorities (the investigation period, second quarter 1995-second quarter 1996) does Poland argue that the import volume "moved up and down" during the period considered. These quarterly data indicate that imports from Poland dropped during the third and fourth quarters of 1995 and the first quarter of 1996 (from an index of 159 to 102 to 80) and then rose (to an index of 227) in the second quarter of 1996. We note that in spite of the fluctuation within this period, the quarterly import volume at the end of the period was considerably higher than at the beginning.

7.168 In our view, it is clear on the face of Article 3.2 that a quarterly analysis of the trend in import volume is not required, and indeed that no particular analytical approach is required or even alluded to in Article 3.2. Given that on an annual basis over a multi-year period, imports from Poland increased in every period examined, we do not believe that quarter-to-quarter fluctuation in import volumes during one of the twelve-month periods examined invalidates the Thai authorities' finding that the import volume of the subject imports "increased continuously".

7.169 Having found no factual inaccuracy in the Thai authorities' statement that the volume of the subject imports "increased continuously", we now examine more generally, and on the basis of the authorities' various statements in the relevant documents concerning the import volume, whether the Thai authorities "considered" whether there had been a "significant" increase in those imports.

7.170 In our view, these statements indicate that the authorities did consider the "significance" of the increase in imports. We note in particular in this regard that the authorities went beyond a mere recitation of trends in the abstract and put the import figures into context. For example, the statement that "imports from Poland increased

¹⁸⁴ Exhibit Thailand-37, Table "Import Data of H-Beam from Poland".

¹⁸⁵ Exhibit Thailand-44, para. 1.8.2. Thailand indicates, in its response describing the basis for its finding that the subject imports "continuously increased" that the data on these annual import volumes are found in Exhibit Thailand-44. In this regard, we note that the import data are public, and that monthly data on Thai imports of H-beams by country of origin for the period 1988-April 1996 are contained in annexes to the non-confidential version of the petition (Exhibit Thailand-1). Thus, it is clear that Poland had full access to the import data before the Thai authorities.

¹⁸⁶ Exhibit Thailand-37, Table 2.

continuously" indicates that the increase had persisted over some period. In addition, the statements that the imports from Poland increased at a time when all other imports were decreasing, and that Poland's share of total Thai imports had therefore increased, also speak to the "significance" or importance of the increase. Thus, we find that Thailand did "consider" whether there had been a "significant" increase in the dumped imports. While we need not refer to confidential information to reach this finding, we nevertheless note that the confidential "information for final determination"¹⁸⁷ further confirms that Thailand considered whether there had been a "significant" increase in the volume of the dumped imports. In particular, the Thai authorities stated that the volume of imports "skyrocketed" during the investigation period¹⁸⁸, and that the Polish imports had risen "substantially".¹⁸⁹

7.171 We note that the first sentence of Article 3.2 requires that, with regard to the volume of the dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, *either* in absolute terms *or* relative to production *or* consumption in the importing Member. Thailand submits¹⁹⁰ that the Thai authorities considered whether there had been a significant increase in absolute terms. We consider that it is sufficient for the purposes of this provision for the investigating authorities to consider whether there has been a significant absolute increase, and that in this case it is clear from Thailand's analysis as set forth in the relevant documents that its consideration of the significance of the increase in imports focused on the absolute, rather than the relative, increase. We note as a matter of fact that Thailand also found that there had been an increase (albeit a small one) in Poland's share of the Thai H-beam market¹⁹¹. As Thailand has not argued that this relative increase was "significant", and in light of our findings above, we do not consider it necessary to examine whether the Thai investigating authorities also considered whether there was a significant increase in dumped imports relative to domestic production or consumption.

7.172 As Poland has made no arguments concerning an independent claim of violation of Article VI of the GATT 1994 in this context, we find that Poland has also not established that Thailand acted inconsistently with its obligations under that provision.

¹⁸⁷ Exhibit Thailand-44.

¹⁸⁸ Exhibit Thailand-44 at para. 1.8.2.

¹⁸⁹ Exhibit Thailand-44 at para. 4.2.

¹⁹⁰ Thailand's first written submission, Annex 2-1, at para. 87.

¹⁹¹ Poland alleged that there was a discrepancy concerning the magnitude of the increase in Poland's market share between the draft information used for the final determination (Exhibit Thailand-37) and the final determination (Exhibit Thailand-44), the former indicating a 2 percentage point increase, and the latter a 1.1 percentage point increase. Thailand concedes that an incorrect figure from the preliminary determination was inadvertently used in the final determination and that the correct figure is a 1.7 percentage point increase.

(ii) Effect of the Dumped Imports on Prices in the Domestic Market

Arguments of the Parties

Poland

7.173 Poland takes issue with Thailand's findings concerning the effect of the dumped imports on prices in the Thai market on two basic grounds: First, Poland argues (as it does under Article 3.1, first sentence) that Article 3.2, second sentence requires a *finding* of "significant" effects of the dumped imports on prices. According to Poland, the Thai authorities made no such finding and the Thai law at the time of the AD investigation was inconsistent with the AD Agreement as it did not require any "finding" of "significance". Second, Poland argues that the record data do not support Thailand's findings that Thai and Polish prices "move[d] in the same direction", that SYS reduced its prices to "match" the Polish prices, or that the influence of the Polish prices was confirmed by SYS's higher prices in its export markets compared to the Thai market.

7.174 In connection with this latter set of arguments, Poland argues that the confidential data that it received in connection with this dispute make clear that the non-confidential summaries of the price-related data disclosed to the Polish respondents during the investigation contained errors which were misleading as to the basis for Thailand's determination regarding the price effects of imports.

7.175 Thus, Poland argues, the Thai authorities' determination was not made on the basis of "positive evidence" and an "objective examination" of, *inter alia*, the price effects of the subject imports.

Thailand

7.176 Thailand submits that it acted consistently with its obligation under the second sentence of Article 3.2: Thailand argues that the Thai authorities did consider, based on confidential information on the record, whether the dumped Polish imports were significantly underselling the Thai products and/or whether the effect of dumped Polish imports was to cause price suppression or depression to a significant degree. Thailand in effect acknowledges that there were some discrepancies in certain price data and attributes these to incorrect references to the time periods involved (calendar year versus investigation period¹⁹²) or to inadvertent typographical errors in THAILAND-37 (the non-confidential disclosure document - the "Proposed Final Determination" - provided to Poland during the investigation).

Evaluation by the Panel

7.177 Article 3.2 provides, in pertinent part:

"... With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect

¹⁹² The investigation period was defined as July 1995-June 1996.

of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. No one or several of these factors can necessarily give decisive guidance."

Did Thailand Consider whether the Effect of the Dumped Imports on Prices was Significant?

7.178 Concerning the first issue raised by Poland, we examine whether the second sentence of Article 3.2 requires a "finding" of a "significant" effect of dumped imports on prices as set forth in that provision¹⁹³.

7.179 We recall in this context our discussion and finding above concerning the requirement in Article 3.2, first sentence, that the authorities "consider" whether there has been a "significant" increase in imports.¹⁹⁴ The same reasoning applies equally to the parallel requirement in the second sentence in Article 3.2. Thus, we do not read the textual term "consider" in Article 3.2, second sentence to require an explicit "finding" or "determination" by the investigating authorities that the price undercutting, price depression or price suppression is, in so many words, "significant". Nevertheless, we consider that it must be apparent from the documents forming the basis for our review that the investigating authorities have given attention to and taken into account whether there has been significant price undercutting by the dumped imports, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

7.180 For these reasons, we do not consider that the absence of an explicit "finding" in the final determination by the Thai authorities that the price undercutting, price suppression or price depression was "significant" would be inconsistent with the requirements of this provision. In any event, we note that the Thai authorities do describe the price undercutting involved as "significant" in their communications with the Polish firms and their legal counsel¹⁹⁵, and we recall that we consider these communications to form part of the basis of our review.

Did the Data Support the Thai Authorities' Findings as to the Effects of Imports on Prices in the Thai Market for H-Beams?

7.181 Concerning Poland's arguments that the data do not support the Thai authorities' findings regarding the effects of imports on prices in the Thai market for H-beams, we consider first the alleged discrepancies and errors in the data as disclosed to the Polish respondent companies by Thailand. We turn thereafter to the specific findings made by Thailand, namely that Thai and Polish prices "moved in the same

¹⁹³ I.e., significant price undercutting, significant price depression or prevention of price increases to a significant degree.

¹⁹⁴ *Supra*, paras. 7.160-7.162.

¹⁹⁵ Exhibit Thailand-41, p. 2.

direction", that SYS had to lower its prices to "match" those of the Polish H-beams, and that the influence of the Polish prices was confirmed by SYS's higher prices in its export markets compared to the Thai market.

Alleged data discrepancies

7.182 We note that the proposed final determination¹⁹⁶ in Thailand-37 contains a table (Table 1) of non-confidential quarterly price data that the Thai authorities provided to the Polish firms in conjunction with the proposed definitive determination. This table purports to set out, in indexed form, non-confidential data with respect to import prices from Poland and domestic prices for the four quarters of 1995 and the first two quarters of 1996, as follows:

Item	QTR. 1/95	QTR.2/95	QTR.3/95	QTR.4/95	QTR.1/96	QTR.2/96
Import Price from Poland	100	99	108	125	111	98
Complainant Price	100	113	123	121	111	118

7.183 Following the submission by Thailand of the confidential record, Poland submits that the confidential data contain internally inconsistent price data, and contradict the non-confidential pricing data in the draft final determination.

7.184 Thailand responds in the course of these Panel proceedings that this table contains a "typographical error". According to Thailand, the final figure for "complainant price" in QTR 2/96 should read 108 instead of 118. Thailand argues that in making its allegations with respect to price comparisons, Poland has confused the non-confidential version of Table 1 in Exhibit Thailand-37 with the actual confidential pricing data examined and taken into account by the Thai authorities during their investigation and in making their final determination concerning price effects. According to Thailand, the clarity of the public summary of confidential information and indeed the factual accuracy of data used in an investigation¹⁹⁷ is irrelevant to the viability of the injury determination made by the Thai investigating authority based on its examination of all relevant factors based on confidential information."

7.185 To us it seems reasonable to accept that the error in the above table was indeed inadvertent, as it is against Thailand's interest. In particular, the incorrect figure runs counter to the Thai authorities' finding concerning price movements (discussed in detail in paras. 7.193-7.214, below), as it shows a sizeable *increase* in SYS's price coinciding with a substantial *decrease* in Poland's price. Had the correct figure appeared in the table, the basis for Thailand's finding would have been much more apparent, as the correct figure would have shown both SYS's and Poland's prices declining during the second quarter of 1996, and prices of SYS declining consistently throughout the investigation period.

¹⁹⁶ Exhibit Thailand 37, Table 1.

¹⁹⁷ Thailand argues: "If the establishment of the facts is proper, it is irrelevant whether, in the end, the facts turn out to be different than established". See response by Thailand to Panel Question 50, Annex 2-6.

7.186 We consider that this error was material, in the context both of the anti-dumping investigation and of this dispute. In particular, this error called into question the factual basis for the Thai authorities' findings concerning price trends, which led Poland to believe that those authorities had erred in making those findings. As such, it may well have played a part in Poland's decision to bring this dispute.

7.187 In this regard, we note that it was not until the submission by Thailand in these proceedings of the confidential average quarterly prices in comparison with the non-confidential indexed price data¹⁹⁸ and Thailand's response to certain questions from Poland¹⁹⁹, that Poland was made aware of the typographical error. This error skewed the non-confidential price data, and thus fundamentally misled the Polish firms and Poland with respect to the actual underlying price data trends of SYS's products, and thus the basis for Thailand's finding in respect of price movements/price depression. We also note that in its comments concerning the draft final determination, Poland relied upon the erroneous figure for the second quarter of 1996 in support of one of its arguments, and that Thailand did not avail itself of this opportunity to correct Poland's misapprehension, to us suggesting that Thailand itself may not have been aware of and did not take note of this error at that time.²⁰⁰

7.188 We disagree with Thailand that the clarity and accuracy of the information disclosed publicly concerning an investigation are irrelevant to the viability of that investigation. We do consider that there is an important difference between the substance of an investigation, i.e., what was actually done, and its more formal aspect, i.e., how this substance is disclosed in relevant documents summarizing the investigation. Nevertheless, in our view the information made public, and referred to as the basis for the published determination, must accurately reflect the underlying data of record, as it is the published information and analysis that constitute an authority's communication of its findings and the factual basis thereof to the general public, including to interested parties. As discussed above²⁰¹, we are led to this conclusion by the requirements of Article 3 read in light of the standard of review, which does not allow us to come to our own conclusions based on the underlying data of record, but rather limits us to considering whether the authority's establishment of the facts was proper and its evaluation of those facts was objective and unbiased. In our view, the disclosed facts cannot be considered to be "properly established" if they are inaccurate.

7.189 These considerations are particularly important in a case such as this one, where virtually all of the data of record are confidential and must not be disclosed by

¹⁹⁸ Exhibit Thailand-67

¹⁹⁹ See Thailand's responses to additional questions of Poland, Annex 2-7.

²⁰⁰ We note that in their comments on the draft final determination with respect to the impact of Polish imports on price, the Polish firms indicated to the Thai authorities that they were under the impression that SYS prices had risen in the last quarter of the IP. Exhibit Thailand 40: "Average H-Beam prices at the end of the POI (i.e. second quarter 1996) were at or above those at the beginning of the investigation period..." ; "In each of those 2 quarters [i.e. 3rd quarter 1995 and 2nd quarter 1996] SYS sharply raised its prices from previous levels, and not surprisingly, faced market resistance." However, there is no indication that the Thai authorities took steps to remedy any misperception that existed on the part of the Polish exporter on the basis of the non-confidential information made available to them.

²⁰¹ See *supra*, paras 7.139-7.151.

the administering authority, and therefore are not capable of independent verification by interested parties. In such a case, the responsibility of an authority to ensure the accuracy and clarity of the public summaries of data and statements of reasoning made available to the interested parties in the investigation is particularly significant. In Table 1, the error admitted by Thailand, while inadvertent, was clearly material - it significantly mischaracterized the price depression effect and the trends that the table purported to illustrate and introduced considerable uncertainty as to the factual basis for the conclusions based thereon contained in the final determination.

7.190 Poland alleges a further inaccuracy in the data as compiled by Thailand. In particular, Poland submits that there is a discrepancy between the data in the table entitled "Price Data of H-Beam" in Exhibit Thailand-37, set forth below, and other record evidence, notably Table 1, above. Poland argues that the two tables are contradictory in that Table 1 shows that Poland's price *increased* during the investigation period compared with 1995 as a whole, while the table below shows that Poland's price *decreased* between these periods. Poland also notes that on the basis of the table below, the Thai authorities made a finding that the Polish import prices during the investigation period were below their 1995 level.

Price Data of H-Beam			
			Unit: baht/ton
Items	1994	1995	IP
Import Price (Average c.i.f.)			
- All countries	8,951.84	9,936.11	8,754.43
- Poland	7,792.45	8,408.82	7,975.00
Sale Price of Siam Yamato	-	[]	[]

7.191 In these Panel proceedings, Thailand explains that the "IP" column in the above table was mislabelled, as it reflects data for calendar 1996, rather than for the investigation period. Thailand argues that this error is not material in that it "has no effect on the ability of interested parties to compare CIF prices from all countries and from Poland and to comment accordingly".²⁰²

7.192 We find significant that here again, it was not until this dispute that Thailand clarified this error. While the import data from which the average c.i.f. prices were derived are public data, and thus were susceptible of independent verification by Poland, in our view the discrepancy between the above table and Table 1 may have contributed to Poland's confusion as to the factual basis for Thailand's findings. In this regard, we note that Poland's letter to the Thai authorities commenting on the draft final determination relied on the data in the above table, "Price data of H-beam", in its characterization of the trend in Polish import prices.²⁰³

²⁰² See response of Thailand to Question 6 from Poland, Annex 2-6.

²⁰³ Exhibit Thailand-40 at footnote 1. (The Polish respondents commented, on the basis of this table, that Polish import prices and overall import prices followed the general trend in H-beam prices, i.e., "returned to pre-existing levels" by mid-1996, following the Kobe earthquake.)

Thailand's Findings in the Final
Determination as to the Effect of Dumped
Imports on Prices

7.193 Poland takes issue with Thailand's findings that Thai and Polish prices "moved in the same direction", that SYS had to lower its prices to "match" those of the Polish H-beams, and that the influence of the Polish prices was confirmed by SYS's higher prices in its export markets compared to the Thai market. In particular, Poland argues that the data in the record of the investigation do not support these conclusions.

7.194 With respect to the effect of dumped imports on prices, the final determination (Exhibit Thailand-46) states:

"2.2 Average CIF import price from Poland and the average price of Siam Yamato *move in the same direction*. Price of Polish imports has always been lower than that of Siam Yamato and lower than the average import price from all other countries.

2.3 The situation as described in 2.1 and 2.2 demonstrates the influence of Polish imports upon the Thai domestic market, therefore, the domestic industry has no choice but *to decrease its price to the level of Polish imports*. This has resulted in price undercutting and price suppression including the fact that the Thai domestic industry is unable to increase its price to recover its costs in a reasonable period of time. This, in turn, has effected its cash flow." (emphasis added)

7.195 The final determination also states that, in order to preserve and expand market share, SYS decreased its prices to "match" those of the Polish imports, resulting in the fact that the "price then became lower than it should have been".²⁰⁴

7.196 In the draft final determination, Exhibit Thailand-37, the DIT referred to Table 1 (discussed above) in support of its finding of price undercutting, price depression and price suppression.²⁰⁵ Objecting to this finding on price undercutting, price suppression and price depression in the draft final determination, legal counsel for the Polish firms stated in written comments on the draft determination that "the DFT has presented no evidence that Polish imports have caused a decline in Thai prices or the Respondents have undersold SYS. To the contrary, Table 1 shows that SYS was the price leader."²⁰⁶ In their response to these comments, the Thai authorities referred to the draft final determination and stated: "In summary, the Thai investigating Authorities re-iterate that imports from Poland increased during the IP, significant price undercutting was established resulting in price depression and price suppression during the period of investigation...."²⁰⁷

7.197 In these Panel proceedings, Poland argues that neither the non-confidential data in Table 1 (discussed above) nor the confidential data support the statement in the final determination that prices of Polish imports and of SYS products "move in the same direction". Poland argues that these data indicate that prices move in the

²⁰⁴ Exhibit Thailand-46, para. 2.5.

²⁰⁵ Exhibit Thailand-37, para. 7.

²⁰⁶ Exhibit Thailand-40, p. 3.

²⁰⁷ Exhibit Thailand-41, p.2.

same direction less than half the time (in 3rd Quarter 1995 and 1st Quarter 1996). Poland also submits that neither the non-confidential nor the confidential data support the statement in the final determination that SYS decreased its prices to "match" those of the Polish imports²⁰⁸, or that SYS "has no choice but to decrease its price to the level of Polish imports".²⁰⁹ In particular Poland states that Table 1 does not support any finding by the Thai authorities of price leadership by Polish firms, as it indicates that SYS precipitated the first price decline during the IP.

7.198 Thailand responds that the statement in the final determination that the relevant prices "move in the same direction" is based on the fact that the Polish respondent offered a price further in advance of delivery, than did SYS.²¹⁰ Thailand explained to us that as a result, in for example Quarter 1, SYS was competing with prices that were reflected in Polish price data for Quarter 2. Thailand then presented us with a comparison of quarterly price movements in which the data for SYS were lagged by one quarter²¹¹ based on confidential price data from the investigation that Thailand had submitted to the Panel.²¹²

7.199 We do not find any indication in the documents forming the basis of our review of such a lagged analysis of relative prices, nor do we see any reference in these documents even to the fact that there was such a difference in the timing of price offers by SYS and the Polish respondents. We do not doubt that as a factual matter such a difference existed, as we note the reference in the confidential "information for final determination" to the existence of such a lag and the conclusion that "[t]hus, it is likely that the Polish imports are indeed the price leader in the Thai market".²¹³ However, in the documents forming the basis of our review, there is no hint even of the existence of a difference in the timing of price offers, let alone an indication that the prices of Polish and SYS prices should be compared on a lagged basis for an accurate picture of the coincidence of price trends. To the contrary, the only evidence made available to the Polish respondents in support of the finding that the Polish and SYS prices moved in the same direction, i.e., the price information in Table 1, is presented on a non-lagged basis, and is not accompanied by any statement referring to the need to look at the data on a lagged basis.

7.200 Concerning the finding of price undercutting, Poland argues that, as there is no evidence of the relative starting point of the "100" for indexing Polish and Thai prices, one could only speculate as to how or if Polish prices may have affected Thai prices. Poland also questions whether the Thai investigating authorities made neces-

²⁰⁸ Thailand submits that a more accurate translation of this would be "by reducing its selling price to the level close to the Poland import price". See Thailand's response to question 10 from Poland, Annex 2-6.

²⁰⁹ Thailand submits that a more accurate translation of this would be "the company has no other way but to reduce its price following that of import from Poland". *Ibid.*

²¹⁰ Responses by Thailand to Question 10 from Poland and Question 48 from the Panel, Annex 2-6.

²¹¹ *Ibid.*

²¹² Exhibit Thailand-67.

²¹³ Exhibit Thailand-44 at para. 4.3.

sary adjustments to the CIF import prices and the average SYS prices included in this table and referred to in the final determination.²¹⁴

7.201 Thailand notes in response to the criticism of Table 1 that "one cannot determine from the public version of [Table 1] alone which products were undersold", but that "when read in light of other statements appearing elsewhere in the record ... a reader can readily grasp the pattern of underselling by the dumped Polish imports".²¹⁵ Thailand responds concerning price adjustments that the Thai investigating authorities considered "all relevant information regarding the level of price undercutting" and that for the purpose of disclosure to Poland, "price undercutting was illustrated as a comparison between CIF import prices and SYS factory prices, i.e., "landed prices".²¹⁶ Referring to an invoice it submitted to the Panel²¹⁷, Thailand further states "the Thai authorities were made aware that quantities of Polish H-beams were being offered at CIF prices with credit terms of [X-Conf.] days." According to Thailand, "Poland, and even the Polish respondent, may not be aware of this because Polish sales were on an FOB basis, and it was the traders that offered these terms. However, this affected the level of price undercutting, given that offering such terms is the equivalent of unloading product on the market at any price."²¹⁸

7.202 Here again, there is no evidence in the documents forming the basis for our review whether and if such adjustments were made to the prices in Thailand's analysis and finding of price undercutting. Nor, as Thailand admits, can even the existence (let alone the magnitude) of price undercutting, or the nature of the data used as the basis for the finding that there was price undercutting, be discerned from the indexed data contained in Table 1. Rather, there is the simple statement that there was "consistent price undercutting".

7.203 Poland itself admits in this dispute (as part of its argument that SYS did not "match" Poland's prices) that "Thai prices during the IP were *thousands of Baht more* per metric ton than Polish prices" (emphasis in original), thus appearing to concede the existence of consistent underselling.²¹⁹ Poland was able to make this statement only because it had access in this dispute to the confidential data on SYS prices, to which it did not have access during the investigation. This concession before us by Poland cannot cure the inadequacy of the Thai authorities' explanation, at the time of the determination, of the finding that there was "consistent underselling".

7.204 Poland also argues that Thailand purported to demonstrate the influence of Polish imports by comparison of the Thai market with SYS export markets²²⁰ because, as stated in the draft final determination "SYS can sell [its] exports at the price

²¹⁴ Poland refers to para. 2.2 of the final determination. Poland's argument on this point is found predominantly in its first written submission, Annex 1-1, at para. 27, and second written submission, Annex 1-4, at para. 81. Poland also posed Question 13 to Thailand relating to this issue (See Annex 2-6).

²¹⁵ Thailand's first written submission, Annex 2-1, para. 95.

²¹⁶ Response of Thailand to Question 13 by Poland, Annex 2-6.

²¹⁷ Exhibit Thailand-69.

²¹⁸ Response of Thailand to Question 13 by Poland, Annex 2-6.

²¹⁹ Second written submission of Poland, Annex 1-4, at para. 79.

²²⁰ Poland refers to Exhibit Thailand-46, para. 2.4.

higher than in the domestic market".²²¹ According to Poland, this finding is contradicted by a statement in the confidential record (Exhibit Thailand-44).

7.205 Thailand responds that there is no contradiction in the non-confidential information or between the confidential and non-confidential information referred to by Poland, in the sense that SYS *was able to* sell its exports at higher prices abroad than on the domestic market, and did on occasion sell on export markets above domestic prices on a transaction basis, especially in the fourth quarter of the IP.²²²

7.206 While Thailand's drafting on this point could have been clearer, in our view the first statement does appear to relate to the *ability* of SYS to export at prices higher than in the domestic market, rather than to the *fact* that this had occurred during a particular time-period within the investigation period. This is confirmed by a statement in Thailand-41, in which the Thai investigating authorities explained to the legal counsel for the Polish firms that: "...the increase in these industry indicators is also attributable to export markets, which accounted for more than [X-Conf]% of sales. Furthermore, it is to be noted that the complainant *was able to* command higher prices on the export markets as a result of the dumping practices of Poland on the Thai domestic market." (emphasis supplied.)

Assessment

7.207 Pursuant to the first sentence of Article 3.2, read in conjunction with Article 3.1, and in accordance with the standard of review, our task under Article 3.2, second sentence is to examine whether the Thai authorities properly established the facts pertaining to the price effects of the dumped imports and evaluated those facts in an unbiased and objective manner in reaching its conclusions concerning the effects of the dumped imports on price. As discussed above²²³, we make this assessment taking into account only the final determination and the other documents forming the basis for our review.²²⁴

7.208 Turning first to the proper establishment of the facts, we note as an initial matter the pervasive effect of the confidentiality of most of the data pertaining to SYS, and the difficulties that this posed for the Thai authorities. While we acknowledge that this significantly constrained the authorities in what *data* they could publish, in our view it also imposed a particular requirement of accuracy on them concerning the non-confidential summaries and characterizations of the data. That is, because the interested parties had no ability to refer to the data themselves to verify those characterizations, it was particularly critical that the information provided to interested parties be completely accurate. As discussed above this was not the case, and errors in the data as disclosed to Poland clearly caused Poland confusion.

7.209 Moreover, as also discussed, the analysis supporting certain factual determinations (e.g., that the prices moved in the same direction on the basis of a one-quarter lag, that there was consistent underselling and that the undercutting analysis took into account certain price adjustments and differences in credit terms) is not discernible in

²²¹ Exhibit Thailand 37, para. 10.

²²² Response by Thailand to additional question 8 of Poland, Annex 2-7.

²²³ *Supra*, paras. 7.139-7.151.

²²⁴ *Supra*, para. 7.146.

the documents forming the basis for our review. Here again, while we recognize the difficulties imposed by the need to protect confidential information, in our view where this is the case there is a particular need for the investigating authority to provide complete and informative qualitative and descriptive information on the analysis of the data used in evaluating a fact in a particular context, as well as concerning trends and comparisons, sufficient to give a reasonable understanding of the data without revealing the confidential particulars²²⁵. Only in this way can a judgement can be rendered on the basis of the information as disclosed as to whether the facts have been properly established, and evaluated in an unbiased and objective manner.

7.210 In this context, we underscore that our review is limited to the documents concerning the final determination that were available to interested parties, including the public notices, and we must conclude that those documents do not demonstrate that the facts concerning the effects of dumped imports on prices were properly established on the basis of positive evidence. The combination of the materially misleading errors in the data as set forth in those documents and the lack of sufficient explanation as to the price effects of the dumped imports, lead us to this conclusion. In particular, the conclusory findings of price suppression or price depression were not supported by the facts as disclosed. Due to these factual flaws, it cannot be discerned from the relevant documents that the authorities relied on positive evidence or that they could have reached these conclusions through an objective examination of those facts.

7.211 Notwithstanding our finding on the basis of the documents available to Poland, we take note of the fact that the confidential documents, particularly Exhibit Thailand-44, do contain a considerable amount of further detail concerning the analysis and evaluation of the facts. There is no evidence of material errors in the confidential documents²²⁶, and it was those documents, rather than the non-confidential summaries disclosed to Poland, that formed the basis for the Thai authorities' analysis and determination. Moreover, the explanations and analysis in the confidential documents are more detailed, and provide more informative statements as to the authorities' reasoning and the factual basis therefor, than the conclusory statements found in the documents forming the basis of our review. Thus, we cannot say what our findings on this point would have been if we had been able to base our review also on the reasoning in the confidential documents.

7.212 We recall that Article 3.2 AD, read in conjunction with Article 3.1 AD, requires that an injury determination shall involve an "objective examination" on the basis of "positive evidence" of *inter alia* the effect of the dumped imports on prices

²²⁵ As an example, in the context of price undercutting, an authority might state that monthly or quarterly import prices on a CIF basis obtained from a particular source such as the importers' questionnaires were compared with domestic prices on an ex-factory basis, that certain adjustments had had to be made (or were unnecessary) and why, and that undercutting was found in a certain number of the quarters compared and ranged from x to y percent.

²²⁶ As indicated in its responses to additional questions from Poland (Annex 2-7), Thailand admits that the English translation of Exhibit Thailand-44 contains several errors, but states that these are not found in the original Thai language version. Thailand indicates in this context (in its answer to question 4) that one data error that did appear in the Thai language version of Thailand-44 was corrected via a separate table (Exhibit Thailand-66) provided to the CDS Committee.

in the domestic market, i.e., whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree. We further recall that Article 17.6(i) AD requires us to limit our consideration of factual questions to whether the facts have been "properly established".

7.213 As the foregoing discussion indicates, we consider that the issues that Poland has raised concerning the Thai authorities' findings of price undercutting and price depression are in the first instance factual issues. As discussed, we consider that due to certain errors in the data as disclosed to Poland, as well as the conclusory nature of the statements in the documents disclosed to Poland concerning the existence of underselling and the coincidence in the trends of the Polish and Thai companies' prices for H-beams (i.e., price depression), those documents do not demonstrate that the facts were properly established on the basis of positive evidence or that the authorities could have reached their conclusions through an objective examination of those facts.

7.214 For these reasons, we find that Thailand has acted inconsistently with its obligation in the second sentence of Article 3.2 and Article 3.1 to consider, on the basis of positive evidence, whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

7.215 In light of this finding, we do not consider that it is necessary to examine whether Thailand has also acted inconsistently with its obligations under Article VI of the GATT 1994.

(c) Article 3.4: Examination of the Impact of the Dumped Imports on the Domestic Industry

(i) Arguments of the Parties

Poland

7.216 Poland argues that all of the factors in Article 3.4 must be considered in all cases, and that consideration of them must be apparent in the final determination of the investigating authority.²²⁷ Poland argues that Thailand fails to even mention several factors that it was obligated to evaluate under Article 3.4. In its first submission, Poland argues that all of the factors examined by Thailand unambiguously support a finding of no injury, that the Thai authorities chose not to present evidence regarding profits, losses, profitability or cash flow, and that the "imperative" of preserving and expanding SYS's market share and total sales is not among the factors specified in Article 3.²²⁸ In its second submission and in response to a question from the Panel as

²²⁷ Poland cites the panel report in *Mexico - HFCS*, *supra*, footnote 95, para. 7.128 for this proposition. See Poland's oral statement at the first Panel meeting, Annex 1-2, paras. 41-42.

²²⁸ First written submission of Poland, Annex 1-1, para. 74.

to which factors Poland asserts that Thailand failed to "consider", Poland argues that Thailand failed to consider several factors mandated by Article 3.4, including "actual and potential declines in productivity", "the magnitude of the margin of dumping", "actual and potential negative effects on wages", "actual and potential negative effects on ability to raise capital", and "actual and potential negative effects on investments", while acknowledging that profits and losses, profitability and cash flow *were* considered (but not adequately or appropriately evaluated)²²⁹.

7.217 Poland also argues that those factors that are mentioned are only addressed in a conclusory way without supporting evidence. Poland further argues that those facts that Thailand did consider point "inescapably" to the lack of injury, as SYS's production, capacity, capacity utilization, employment, domestic sales volume, overseas sales volume, and market share all increased during the investigation period. For Poland, the Thai government's reliance on the "imperative" of preserving and expanding SYS's market share and total sales is not among the factors specified in Article 3 AD as a basis for a legal finding of injury.

7.218 Poland argues that the Thai authorities' determination was not made on the basis of "positive evidence" and an "objective examination". Poland asserts that, in many cases the confidential data on the investigation record contradict the public data disclosed to and relied upon by the parties in the investigation. For Poland, these factual discrepancies raise both due process concerns and concerns under Article 17.6(i) with respect to the proper establishment of the facts. According to Poland, Thailand failed to establish the material facts (as some contradict one another), failed to evaluate the facts in an unbiased and objective manner (as several factors were ignored) and failed to meet the legal standard of Article 3.4 requiring evaluation of all relevant economic factors and indices.

Thailand

7.219 According to Thailand, the record of the investigation demonstrates that the Thai authorities complied with Article 3.4 by evaluating all relevant factors, including profits, losses, profitability and cash flow. Thailand objects to the Panel's approach of requesting a table concerning the evaluation of *all* Article 3.4 factors by the Thai investigating authorities²³⁰, and asserts that the Panel's review of the consistency of Thailand's investigation should be limited to those factors originally identified by Poland in its first written submission - i.e. including profits, losses, profitability and cash flow.²³¹ Moreover, Thailand submits that Poland has failed to satisfy its burden of proof to present *prima facie* evidence that the Thai authorities were biased or subjective in their evaluation of all relevant factors.

7.220 Thailand states that Poland simply disputes the weight accorded by the Thai authorities to each of the factors that it evaluated during the investigation. To Thailand, in concentrating on the factors that the Thai authorities accorded less weight in the balance of their investigation, Poland seems to argue that *all* factors would have

²²⁹ Second written submission of Poland, Annex 1-4, para. 67-68; Poland's response to Panel Question 38, Annex 1-5.

²³⁰ Panel Questions 38 and 39, Annex 1-5 and 2-6.

²³¹ See Thailand's response to Panel Questions 7(b) and 39, Annex 2-6.

to indicate injury in order for an injury finding to be sustainable. Thailand submits that this is false, as the AD Agreement only requires investigating authorities to *consider* all relevant factors. According to Thailand, when significant volumes of dumped imports are introduced into a market, an authority could reasonably find that such imports were causing material injury to the domestic industry because of price undercutting and consequent price suppression and depression.

7.221 For Thailand, it is all *relevant* factors, rather than all factors listed, that must be considered under Article 3.4. Furthermore, Thailand argues that, in the absence of a claim by Poland under Article 12 concerning Thailand's public notices and/or reports, an assessment of whether Thailand complied with Article 3.4 must be based on the facts made available to the authority (as specified in Article 17.5(ii)) and the analysis of the facts in the record.

(ii) Evaluation by the Panel

7.222 Article 3.4 provides:

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

7.223 The views of the parties and third parties diverge on the nature of the obligation imposed by Article 3.4. We therefore turn first to consider the nature and scope of the obligation imposed by Article 3.4. In particular, we must consider: whether the list of factors in that provision is illustrative or mandatory; if it is mandatory, whether there are only four groups of "factors" represented by the subgroups separated by semi-colons that must be evaluated, or whether each individual factor listed must be evaluated; and the extent to which the final determination (or other documents forming the basis for our review) must reflect the required evaluation of all "relevant" factors. Following this consideration of the nature and scope of the obligation imposed by Article 3.4, we examine whether the Thai investigating authorities complied with the obligations imposed by Article 3.4.

Is the List of Factors in Article 3.4
Mandatory?

7.224 We are of the view that the text of Article 3.4 is mandatory. The text of Article 3.4 explicitly mandates that:

"The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including...**" (emphasis added)

7.225 We note Thailand's argument that the list of factors in Article 3.4 is illustrative only, and that no change in meaning was intended in the change in drafting from

the "such as" that appeared in the corresponding provision in the Tokyo Round Anti-dumping Code to the "including" that now appears in Article 3.4 of the AD Agreement.²³² The term "such as" is defined as "[o]f the kind, degree, category being or about to be specified" ... "for example".²³³ By contrast, the verb "include" is defined to mean "enclose"; "contain as part of a whole or as a subordinate element; contain by implication, involve"; or "place in a class or category; treat or regard as part of a whole".²³⁴ We thus read the Article 3.4 phrase "shall include an evaluation of all relevant factors and indices having a bearing on the state of the industry, including..." as introducing a mandatory list of relevant factors which must be evaluated in every case. We are of the view that the change that occurred in the wording of the relevant provision during the Uruguay Round (from "such as" to "including") was made for a reason and that it supports an interpretation of the current text of Article 3.4 as setting forth a list that is not merely indicative or illustrative, but, rather, mandatory.²³⁵ Furthermore, we recall that the second sentence of Article 3.4 states: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance." Thus, in a given case, certain factors may be more relevant than others, and the weight to be attributed to any given factor may vary from case to case. Moreover, there may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required.

What are the Factors in the List in Article 3.4 to be Evaluated?

7.226 Having established on the basis of the text of Article 3.4 that the list of factors in Article 3.4 is mandatory in nature, we next consider whether there are only four "factors" represented by the subgroups separated by semi-colons that must be evaluated, or whether each individual factor listed in Article 3.4 must be evaluated. This part of our examination of the text of Article 3.4 focuses upon the semi-colons which separate certain groups of factors, as well as on the two "ors" which appear in the first and fourth "groups" of factors listed in the provision.

²³² As a third party, the European Communities was also of the view that the list in Article 3.4 was illustrative despite the change in language from "such as" in the relevant Tokyo Round Code provision to "including" in current Article 3.4. See EC third party submission, Annex 3-1, para. 41 and EC Response to Panel Question 13, Annex 3-7. Japan submitted that the change in terminology indicated that each factor listed in Article 3.4 must be evaluated. See Response of Japan to Panel Question 13, Annex 3-8. The United States was of the view that the change in terminology "clarified the need for the authority to evaluate each and every listed factor that is relevant to the state of the industry". See US Response to Panel Question 13, Annex 3-9.

²³³ *The New Shorter Oxford English Dictionary* (Oxford University Press, 1993).

²³⁴ *Ibid.*

²³⁵ Article 3.2 DSU directs panels to clarify the provisions of the covered agreements "in accordance with customary rules of interpretation of public international law", which are set out in Articles 31 and 32 of the Vienna Convention on the Law of Treaties. See e.g. *Japan-Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97, at 108, pp.10-12. Here, we look to negotiating history pursuant to Article 32 of the *Vienna Convention* in order to confirm the meaning resulting from the application of the general rule of interpretation in Article 31 of the *Vienna Convention*.

7.227 Poland argues in answer to a Panel question²³⁶ that the use of the word "or" in two instances in Article 3.4 must be viewed in light of the term "including" that precedes the list. For Poland the use of the word "or" in two places in the list of factors in Article 3.4 is "perplexing" as it makes less than ideal sense in the context in which it is used. Poland believes that it is a remnant from the Tokyo Round Code, and that the fact that it only appears within and not between subgroups of factors which are separated by semi-colons eliminates the possibility that the different subgroups are merely illustrative.

7.228 Thailand argues that Article 3.4 contains four basic factors, represented by the four groups within semi-colons, and that it is sufficient for an investigating authority to consider at least one of the listed indices in each group. Moreover, for Thailand, only the first and fourth groups, which deal with "declines" or "negative effects" in respect of the listed indices, involve an evaluation of such actual and potential declines or negative effects. Thailand characterizes the second and third groups (margin of dumping and factors affecting domestic prices) as "somewhat vague" and posits that the authority "has wide discretion regarding how to evaluate them".²³⁷

7.229 We are of the view that the language in Article 3.4 makes it clear that all of the listed factors in Article 3.4 must be considered in all cases. The provision is specific and mandatory in this regard. We do not consider that the presence of semi-colons separating certain groups of factors in the text of Article 3.4, nor the presence of the word "or" within the first and fourth of these groups serve to render the mandatory list in Article 3.4 a list of only four "factors". We note that the two "ors" appear within - rather than between - the groups of factors separated by semi-colons. The first "or" in Article 3.4 appears at the end of a group of factors that may indicate declines in the domestic industry (i.e. "actual and potential decline in sales, profits, output, market share, productivity, return on investments, *or* utilization of capacity" (emphasis added)). In our view, the use of the word "or" here is textually linked to the phrase "actual and potential decline", and may indicate that such "declines" need not occur in respect of each and every one of the factors listed in this group in order to support a finding of injury. Thus, we do not consider that the use of the term "or" here detracts from the textual requirement that "all relevant economic factors" be evaluated. Moreover, we note that this first group of factors in Article 3.4 contains factors that all relate to, and are indicative of, the state of the industry.²³⁸

²³⁶ See response of Poland to Panel Question 43, Annex 1-5. Third party the United States supported the view that the use of the word "or" within the semi-colons did not detract from the requirement that "all relevant factors" be evaluated. See US Response to Question 13 of the Panel, Annex 3-9.

²³⁷ See response of Thailand to Panel Question 39, Annex 2-6. According to Thailand, Poland has only claimed that Thailand failed to "consider" the first and fourth factors, and not that Thailand failed to "evaluate" them. On the basis of this characterization of the Article 3.4 factors, Thailand presents a table demonstrating that it considered factors 1 and 4 (the only ones, according to Thailand, that Poland includes in its "claim" under Article 3.4) by virtue of having considered profits/losses and profitability (included in factor 1) and cash flow (included in factor 4).

²³⁸ We note that Article 4.2(a) of the Agreement on Safeguards, which contains a requirement that the investigating authorities "shall evaluate all relevant factors...having a bearing on the situation of that industry, in particular, ... changes in the level of sales, production, productivity, capacity utilization, profits and losses, and employment" has been interpreted to require an evaluation of each of

7.230 With respect to the second "or," we note that it appears in the phrase "ability to raise capital or investments". In our view, this "or" indicates that the factor that an investigating authority must examine is "ability to raise capital" or "ability to raise investments", or both.

7.231 On the basis of this textual analysis of Article 3.4, we are therefore of the view that each of the fifteen individual factors listed in the mandatory list of factors in Article 3.4 must be evaluated by the investigating authorities. We note that our view concerning the mandatory nature of the list in Article 3.4 contrasts with our view of Article 3.5 of the AD Agreement, where the word "may" is used. As we discuss below, the list of factors in that provision is preceded by the phrase "Factors which *may* be relevant in this respect include..." (emphasis added), and we therefore view that the text of that provision indicates that the list of factors in that provision is illustrative.²³⁹

7.232 We further note that the panel in *Mexico-HFCS* reached a conclusion similar to ours with respect to the mandatory nature of the list of factors in Article 3.4. That panel stated²⁴⁰:

"The text of Article 3.4 is mandatory:

"The examination of the impact of the dumped imports on the domestic industry concerned **shall include** an evaluation of **all relevant economic factors** and indices having a bearing on the state of the industry, **including**..." (emphasis added).

In our view, this language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.⁶⁰"

these listed factors having a bearing on the state of the industry. See Appellate Body Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, DSR 2000:I, 515, para. 136 and Panel Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, DSR 2000:II, 575, para. 8.123. While the standard for injury in safeguards cases ("serious injury") is different from that applied to injury determinations in the anti-dumping context ("material injury"), the same type of analysis is provided for in the respective covered agreements, i.e. evaluation or examination of a listed series of factors in order to determine whether the requisite injury exists.

²³⁹ See *infra*, para. 7.274.

²⁴⁰ Panel Report, *Mexico-HFCS*, *supra*, note 95, para. 7.128. While that panel was examining a case involving "threat of material injury", we consider that its views on Article 3.4 are also relevant in this case, dealing with material injury.

⁶⁰ In this regard, we note the text of Article 12.2.2, which provides:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures...".

Evaluation of all "relevant" Factors

7.233 We next turn to examine the requirements of Article 3.4 with respect to the extent to which the required evaluation of all "relevant" factors must be reflected in the text of the final determination and other documents forming the basis for our review.²⁴¹

7.234 For Poland, an evaluation of all relevant factors must be apparent in the final determination. Only when all factors listed in Article 3.4 are considered, weighed and discussed would facts be "properly established" and "objectively" evaluated. Poland argues that a factor is "relevant" whether or not it supports an affirmative finding of injury. Factors are relevant when "they have a bearing on the state of the industry" and that "authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors". For Poland, the omission or disregard of factors listed in Article 3.4 (because they are required to be considered) is a *prima facie* case of bias in an evaluation. If a factor is not considered, there is no "objective" means by which to judge its relevance. All listed factors are presumed relevant, meaning that if a given factor is deemed not relevant in a particular case, the authorities have an obligation to explain why.

7.235 Thailand submits that under the applicable standard of review, the Panel should first consider whether there was an "evaluation" of all relevant factors, and if so whether the evaluation supports an affirmative injury determination. In any case, Thailand argues that the interpretation of Article 3.4 is not relevant to this dispute as Poland had the obligation to present and prove its claim that a particular factor was or was not evaluated, and Poland has failed to do so. Thailand considers that the relevance of a given factor is for the administering authority to determine and that such consideration is not subject to a panel's review. For Thailand, it is all relevant factors, rather than all factors listed, that must be considered in an investigation.²⁴²

7.236 We are of the view that the "evaluation of all relevant factors" required under Article 3.4 must be read in conjunction with the overarching requirements imposed by Article 3.1 of "positive evidence" and "objective examination" in determining the existence of injury. Therefore, in determining that Article 3.4 contains a mandatory list of fifteen factors to be looked at, we do not mean to establish a mere "checklist approach" that would consist of a mechanical exercise of merely ensuring that each listed factor is in some way referred to by the investigating authority. It may well be

²⁴¹ With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146.

²⁴² We note that the third parties had helpful submissions and responses on this issue. See Third party submissions of the EC and US, Annexes 3-1 and 3-2 and Responses by EC, the United States and Japan to Panel Questions 10-13, Annexes 3-7, 3-8 and 3-9.

in the circumstances of a particular case that certain factors enumerated in Article 3.4 are not relevant, that their relative importance or weight can vary significantly from case to case, or that some other non-listed factors could be deemed relevant. Rather, we are of the view that Article 3.4 requires the authorities properly to establish whether a factual basis exists to support a well-reasoned and meaningful analysis of the state of the industry and a finding of injury. This analysis does not derive from a mere characterization of the degree of "relevance or irrelevance" of each and every individual factor, but rather must be based on a thorough evaluation of the state of the industry and, in light of the last sentence of Article 3.4²⁴³, must contain a persuasive explanation as to how the evaluation of relevant factors led to the determination of injury.

7.237 Consistent with our approach outlined above²⁴⁴, we are of the view that the evaluation of the mandatory factors must be apparent in the documents forming the basis of our review. Furthermore, as more fully discussed below²⁴⁵, the substance of the analysis of the state of the industry presented in the relevant documents in support of the finding of injury, both in terms of the criteria of "objective examination" and "positive evidence", is also determinative of the consistency of this determination with Article 3.4.

Did the Thai Authorities Consider all Relevant Factors?

7.238 We now turn to examine whether the determination of material injury by the Thai investigating authorities involved "an evaluation of all relevant factors and indices having a bearing on the state of the industry" as provided for in Article 3.4. We first examine whether the Thai investigating authorities have failed to consider the factors listed in Article 3.4 identified by Poland.

7.239 We observe that, in the context of its claim with respect to the failure by the Thai authorities to consider or evaluate certain "enumerated factors" in Article 3.4, Poland initially argued that the Thai authorities had "chose[n] not to present evidence" on profits, losses, profitability and cash flow. Poland subsequently acknowledged that profits, losses, profitability and cash flow had been considered, although in Poland's view not adequately evaluated, and identified as factors that had not been considered "actual and potential declines in productivity", "the magnitude of the margin of dumping", "actual and potential negative effects on wages", "actual and

²⁴³ This sentence reads: "This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

²⁴⁴ With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146. We note Poland's argument, on the basis of the panel report in *Mexico-HFCS*, *supra*, footnote 95, that the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority (see e.g. Poland's oral statement at the first Panel meeting, Annex 1-2, paras. 41-42). However, in light of the particular circumstances of this case, including the fact that Poland has made no claim of violation of Article 12 of the AD Agreement, we do not consider the text of Thailand's final determination as alone determinative of Thailand's compliance with Article 3.4, nor do we see a need to make a specific finding as to the adequacy of the text of Thailand's final determination.

²⁴⁵ *Infra*, paras. 7.245-7.256.

potential negative effects on the ability to raise capital", and "actual and potential negative effects on investments". We note that this apparent development in Poland's argument might have been prompted by questioning from the Panel seeking clarification of an argument introduced by Poland²⁴⁶ and that Thailand expressed concern that the Panel was overstepping its authority.²⁴⁷ We have discussed above Thailand's arguments made in this context with respect to the alleged insufficiency of the panel request²⁴⁸ and the burden of proof.²⁴⁹ We have given due consideration to Thailand's objections to having to identify where in the record it has considered and evaluated each factor listed in Article 3.4. However, we believe that we must examine whether and how the Thai investigating authorities evaluated all the relevant factors having a bearing on the state of the industry under Article 3.4. In our view, such an examination is necessitated by Poland's arguments in this case concerning the nature of the obligation imposed upon the Thai investigating authorities under Article 3.4, in light of the requirements of "positive evidence" and an "objective examination" in Article 3.1, and in conjunction with our duty to conduct an assessment of the facts of the matter, pursuant to Article 17.6(i). We believe that questioning from a panel may prompt development of the parties' arguments in order to distil the parties' positions. In this context, we recall our earlier statement that the fact that the complaining party bears the burden of establishing a violation of a provision of a covered agreement does not "freeze" a panel into inaction.²⁵⁰

7.240 We therefore examine whether the Thai investigating authorities considered productivity, the magnitude of the margin of dumping; actual and potential negative effects on wages; and actual and potential negative effects on the ability to raise capital or investments.

7.241 We turn first to examine whether the Thai investigating authorities considered "productivity". We note the statement in the final determination that "it is possible that economy of scale is yet to be reached".²⁵¹ While we would certainly have preferred a more robust evaluation of productivity, we believe this statement in the final determination makes the consideration of "productivity" by the Thai investigating authorities apparent in the documents forming the basis of our review. Other information on the Panel record²⁵² further confirms our view that the Thai investigating authorities used "economy of scale" as a proxy for considering productivity in the particular circumstances of this case. We therefore find that the Thai investigating authorities did not fail to consider "productivity".

7.242 We next examine whether the Thai investigating authorities considered the "magnitude of the margin of dumping". Before us, Thailand submits that, "the Thai authorities obviously did not know the magnitude of the final margin until after the final dumping determination. Thus, its evaluation of the magnitude of the margin

²⁴⁶ Poland's response to Question 38, Annex 1-5. See also Poland's oral statement at the first Panel meeting, Annex 1-2, paras. 41-42, which preceded this Question by the Panel.

²⁴⁷ Thailand's second written submission, Annex 2-5, para. 4.

²⁴⁸ *Supra*, paras. 7.44-7.46.

²⁴⁹ *Supra*, para. 7.50.

²⁵⁰ *Ibid.*

²⁵¹ Exhibit Thailand-46, para. 2.5.

²⁵² Exhibit Thailand-44, para. 4.8.

was based on the significantly lower price that Poland was able to offer to take sales in Thailand as a result of its dumping and the impact that such low prices have on the domestic industry.²⁵³ Thailand argues that the evaluation of this factor is reflected in, among other places, confidential Exhibit Thailand-44.²⁵⁴ Thailand has not indicated to us where in the text of the final determination or in the other documents forming the basis for our review, and we see no indication in these documents, the Thai authorities considered the magnitude of the margin of dumping. For this reason, we find that the Thai investigating authorities failed to consider the magnitude of the margin of dumping.

7.243 We next examine whether the Thai investigating authorities considered actual and potential negative effects on wages and actual and potential negative effects on the ability to raise capital or investments. Before us, Thailand refers to confidential Exhibit Thailand-67 in support of its argument that the Thai authorities evaluated actual and potential negative effects on wages.²⁵⁵ Thailand points out that in respect of this factor, it relied on cost information that SYS had not authorized Thailand to disclose, and submits that Exhibit Thailand-67 shows that SYS submitted labour cost information to the Thai investigating authorities. In addition, before us, Thailand refers to confidential Exhibit Thailand-44 in support of its argument that the Thai authorities evaluated actual and potential negative effects on the ability to raise capital or investments.²⁵⁶ Thailand has not indicated to us where in the text of the final determination or in the other documents forming the basis for our review, and we see no indication in these documents, the Thai authorities considered this factor. For this reason, we find that the Thai investigating authorities failed to consider actual and potential negative effects on wages and actual and potential negative effects on the ability to raise capital or investments.

7.244 We therefore find that Thailand has failed to consider the magnitude of the margin of dumping, actual and potential negative effects on wages, and actual and potential negative effects on the ability to raise capital or investments as required by Article 3.4 of the AD Agreement. Although consideration of certain of these Article 3.4 factors may be apparent in certain of the confidential documents submitted by Thailand to the Panel, consistent with our approach outlined above²⁵⁷, we decline to base our review of the consistency of the determination with Article 3.4 on such documents.

Did the Thai Authorities Adequately Evaluate the Remaining Article 3.4 Factors?

7.245 We next consider Poland's allegations that the factors that the Thai authorities considered were not evaluated adequately for the purposes of Article 3.4. Poland argues that virtually all factors that were considered by the Thai investigating au-

²⁵³ Thailand's second oral statement, Annex 2-9, para. 61.

²⁵⁴ *Ibid.*

²⁵⁵ *Id.*, para. 64.

²⁵⁶ *Id.*, para. 59.

²⁵⁷ With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146.

thorities unequivocally point to no material injury, and that SYS simply had unrealistic market expectations given its recent market entry.

7.246 Thailand responds that factors other than those focused on by Poland show injury, that Poland merely disputes the weight given to those factors by the Thai investigating authorities and that Thailand's evaluation was unbiased and objective.

7.247 We examine the factual basis and the reasoning relied upon by the Thai investigating authorities to support its affirmative determination of injury. We recall that the final determination contains the following statements pertaining to injury:

"2.5 The mere fact that the production and sales of the domestic industry has increased cannot be the sole indicators that the domestic industry has suffered no injury from Polish imports. In this early stage, it is possible that economy of scale is yet to be reached. Therefore, it is imperative that the domestic industry's market share be preserved and expanded to attain the sale level in keeping with its production at a level that it can continue to be in business. This was done by decreasing its prices to match that of Polish imports, resulting [sic] in the fact that the price level then became lower than it should have been. As a result, timely cost recovery has not been attained."²⁵⁸

7.248 Moreover, Exhibit Thailand-37 contains or refers to non-confidential data in indexed form pertaining to SYS, including: capacity; production capacity; capacity utilization; sale quantity (including domestic and export sales); market share; inventory, net profit/loss, return on investment and employment. This factual evidence before the Thai investigating authorities indicated that from 1995 to the IP, SYS' capacity remained constant while numerous factors indicative of the state of the industry moved positively, including production, capacity utilization, sales (both domestic and export sales), market share, inventories and employment.²⁵⁹

7.249 While we do not consider that such positive trends in a number of factors during the IP would necessarily preclude the investigating authorities from making an affirmative determination of injury, we are of the view that that such positive movements in a number of factors would require a compelling explanation of why and how, in light of such apparent positive trends, the domestic industry was, or remained, injured within the meaning of the Agreement. In particular, we consider that such a situation would require a thorough and persuasive explanation as to whether and how such positive movements were outweighed by any other factors and indices which might be moving in a negative direction during the IP.

7.250 The Thai investigating authorities acknowledge that there are positive trends in several factors (including listed factors of sales and capacity utilization, and the additional factor, "production").²⁶⁰ In their view, however, such positive trends "cannot provide decisive guidance" for injury purposes²⁶¹ and "cannot be the sole indica-

²⁵⁸ Exhibit Thailand-46, para. 2.5.

²⁵⁹ We also observe that some additional explanation of the reasoning of the Thai investigating authorities is reflected in Exhibit Thailand-41, including their view that improvement in the state of the domestic industry, as reflected in positive trends in certain injury indicators, was also attributable to export markets.

²⁶⁰ Exhibit Thailand-46, Exhibit Thailand-37.

²⁶¹ Exhibit Thailand-37.

tors that the domestic industry has suffered no injury from Polish imports".²⁶² The Thai investigating authorities then invoke three factors that they apparently perceived as relevant "counterpoint" to certain positive injury trends and to which they apparently attributed considerable weight in reaching their determination of injury: (i) inability to attain "timely cost recovery"; (ii) "economy of scale"; and (iii) the "preservation and expansion of SYS' "market share".

7.251 In examining the evaluation by the Thai authorities of these three "factors", we first observe that the statements made with respect to these factors are somewhat conclusory. However, our concern with these statements is not limited to this.

7.252 First, with respect to SYS's stated inability to attain "timely cost recovery", we note that in the view of the Thai authorities²⁶³ this finding is interlinked with and predicated upon their findings concerning the price effects of imports (that is, that SYS's cash flow problems stem from SYS having decreased its prices to "match" those of imports from Poland). We recall, however, that we have found²⁶⁴ that the disclosed facts do not provide positive evidence in support of those latter findings, and that the authorities could not have reached their conclusions through an objective examination of those facts. Thus, to the extent that the Thai authorities' finding concerning cost recovery depends on their findings concerning price effects, it also is not properly supported on the basis of positive evidence by the disclosed facts. Nor do we find in the relevant documents any other analytical or factual support for the Thai authorities' finding concerning SYS's stated inability to attain "timely cost recovery".

7.253 Second, we turn to "economy of scale". According to the final determination, "*it is possible* that economy of scale is yet to be reached".²⁶⁵ In making this statement, the Thai investigating authorities appear uncertain as to whether or not "economy of scale" has indeed been achieved. We do not believe that, in the light of positive trends in so many factors, an explanation of injury is adequate when there is no definitive position taken by the authorities as to one of the few factors deemed by the investigating authorities to be relevant in establishing injury.

7.254 The third "counterpoint" relied upon by the Thai investigating authorities to support the affirmative injury determination was the perceived "imperative that that the domestic industry's market share be preserved and expanded to attain the sale level in keeping with its production at a level that it can continue to be in business."²⁶⁶ We note that Article 3.4 lists "market share" as a relevant factor having a bearing on the state of the industry that we have found must be evaluated by the investigating authorities. Where, as here, the domestic industry consists of one producer, the market share of imports relative to the domestic industry will necessarily be inversely proportional to the market share of that one producer. Thus, we do not find that an evaluation of the market share of a domestic producer, in and of itself, indicates a biased or unobjective evaluation, particularly if this is but one of the factors duly evaluated and weighed among the totality of factors by the investigating

²⁶² Exhibit Thailand-46.

²⁶³ Exhibit Thailand-46, para. 2.5.

²⁶⁴ *Supra*, para. 7.214.

²⁶⁵ Thailand-46.

²⁶⁶ Exhibit Thailand-46.

authorities under Article 3.4. However, we do not find the explanation here that "it is imperative that the domestic industry's market share be preserved and expanded..." to be adequate. Particularly in light of the fact that the factual evidence before the Thai investigating authorities showed that SYS's market share *increased* from approximately 50% in 1995 to 56% in the IP²⁶⁷, the documents forming the basis for our review do not provide us with a sufficiently compelling explanation of why, in the face of positive trends in so many injury factors, it was imperative that the domestic industry's market share be preserved and expanded.

7.255 In the absence of even a minimally satisfactory explanation of how the factors relied upon by the Thai authorities support their affirmative injury determination, we find that the documents forming the basis for our review do not provide us with a sufficiently thorough or compelling explanation of why, in the face of positive trends in so many injury factors, the Thai investigating authorities nonetheless concluded that the domestic industry was injured. Although a more comprehensive factual basis and a more robust evaluation of certain Article 3.4 factors may be apparent in the confidential documents submitted by Thailand to the Panel, consistent with our approach outlined above²⁶⁸, we decline to base our review of the consistency of the determination with Article 3.4 on those documents.

Conclusion

7.256 Thus, based on the documents forming the basis for our review, we find first, that the Thai investigating authorities failed to consider certain listed factors²⁶⁹, and, second, that the Thai investigating authorities failed adequately to evaluate the factors they did consider under Article 3.4 in that they did not provide an adequate explanation, in terms of the factors that *were* evaluated, of how and why, in light of the positive trends in so many injury factors, they nonetheless concluded that the domestic industry was injured.²⁷⁰ In particular, we do not believe that the determination of injury could be reached on the basis of an "unbiased or objective evaluation" or an "objective examination" of the disclosed factual basis. Therefore, the Thai investigating authorities' determination of injury is inconsistent with Thailand's obligations under Article 3.4 and 3.1 of the AD Agreement.

7.257 In light of this finding, we do not consider that it is necessary to examine whether Thailand has also acted inconsistently with its obligations under Article VI of the GATT 1994.

²⁶⁷ Thailand has identified the error concerning SYS market share in Exhibit Thailand-37 as a transcription error in the English translation of the document. See Thailand's response to Question 5 by Poland, Annex 2-6.

²⁶⁸ With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146.

²⁶⁹ *Supra*, para. 7.244.

²⁷⁰ *Supra*, para. 7.255.

(d) Article 3.5: Causal Relationship

(i) Arguments of the Parties

Poland

7.258 Poland challenges Thailand's determination of causation in two main respects. First, Poland alleges that the evidence relied upon by Thailand fails to establish any causal connection between Polish imports and any alleged injury to the Thai domestic industry. Second, Poland asserts that Thailand failed to consider other factors besides Polish imports that may have contributed to the condition of the Thai industry. For Poland, the determination was thus not based on "positive evidence" or an "objective examination" of the causal relationship between dumped imports and injury.

Thailand

7.259 Thailand questions the lack of legal and factual basis for Poland's claim and states that Poland has failed to establish a *prima facie* case of violation of Article 3.5. In any case, Thailand asserts, the record of the investigation complies with Article 3.5 by demonstrating the causal link between dumped Polish imports and injury. Thailand argues that Poland disagrees with the weight attributed to various factors by the Thai authorities. According to Thailand, its investigating authorities complied with Article 3.5 AD by examining known factors other than dumped imports that may have caused injury to the domestic industry and found, in each case, that they were not causing injury to the domestic industry.

(ii) Evaluation by the Panel

7.260 We have already found that the Thai injury determination is inconsistent with Article 3.2 and 3.4.²⁷¹ We also have concerns with respect to the consistency of the determination with Article 3.5. Article 3.5 AD provides:

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

²⁷¹ *Supra*, paras. 7.214, 7.256.

7.261 The general issue before us is whether the Thai authorities "demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury", as required by Article 3.5 AD.²⁷²

7.262 This issue can be separated into two principal sub-issues: (i) the determination that a causal relationship exists between dumped imports and any injury; and, (ii) the treatment of other possible causal factors. We examine each of these in turn.

Causal Relationship between Dumped Imports and any Possible Injury

7.263 We turn first to Poland's allegation that the Thai determination of a causal relationship between dumped imports and injury is inconsistent with the requirements of Article 3.5, as the evidence relied upon by the Thai authorities does not support such a determination.

7.264 We recall that in the final determination, the Thai investigating authorities found that dumped imports increased (para. 2.1) and that there was sustained underselling (para. 2.2), and that these factors "demonstrate[] the influence of Polish imports upon the Thai domestic market" and resulted in price undercutting and price suppression (para. 2.3). We note that this finding pertaining to the influence of Polish imports on the Thai market was fundamental to the determination by the Thai investigating authorities of the causal relationship between the dumped imports and the state of its domestic industry (para. 2.5). Indeed, it is the only discernable basis for the finding by the Thai authorities of the causal relationship between dumped imports and any possible injury. We refer to our examination above with respect to Poland's allegations concerning the inconsistency of the Thai investigating authorities' determination pertaining to the influence of prices of Polish imports on SYS prices with Article 3.2, second sentence.²⁷³ We consider that, in the absence of supported findings on price effects in this case, there is no basis for this finding by the Thai investigating authorities with respect to the causal relationship.

7.265 Furthermore, we recall our finding above²⁷⁴ with respect to the inconsistency of the Thai determination with Article 3.4 of the AD Agreement.

7.266 We consider that due to these inconsistencies we have found with Articles 3.2, second sentence, 3.4 and 3.1 the determination of the causal relationship between dumped imports and any injury is also inconsistent with Article 3.5.

²⁷² We note that Poland has alleged that the Final Injury Determination is "inadequate on its face" (Poland's second written submission, Annex 1-4, para. 95) as it showed no examination of certain other causal factors and no examination of why these factors were outweighed by other factors elsewhere in the record. However, as we have already stated, Poland has not made a claim of violation under Article 12 of the AD Agreement. In the absence of such a claim, we do not consider that the final injury determination alone is determinative of the consistency of Thailand's finding of a causal relationship between the injury and the dumped imports with Article 3.5 AD.

²⁷³ See *supra*, para. 7.214.

²⁷⁴ *Supra*, para. 7.256.

Treatment of Other Possible Causal Factors

7.267 We turn to examine Poland's allegation that the Thai investigating authorities' treatment of factors other than the allegedly dumped imports from Poland as possible causes of injury was inconsistent with Article 3.5 of the AD Agreement.

7.268 Poland argues that Thailand failed to consider whether any injury to the Thai industry was caused by factors other than Polish imports. Specifically, Poland alleges that there was no examination in the final determination of the influence of non-Polish imports, the level of demand of the local construction industry, the highly aggressive nature of SYS' entry into the H-beam market, domestic industry productivity and cost structure, technology developments, market realities in SYS export markets, or the Kobe earthquake, and no explanation of why these factors were outweighed by any other factors elsewhere in the record. Poland asserts that the final injury determination was thus inadequate on its face. Poland also alleges²⁷⁵ both that factors other than Polish imports were not examined and that the evaluation of these factors was not adequate, particularly in light of certain confidential evidence concerning *inter alia* prices in export markets.

7.269 Thailand submits that it complied with Article 3.5 AD by examining known factors other than dumped imports that may have caused injury to the domestic industry and found in each case that they were not causing injury to the domestic industry.

7.270 We note that the parties (and third parties)²⁷⁶ presented us with diverging views as to the nature of the legal obligation imposed by Article 3.5 with respect to the examination of other possible causes of injury.

7.271 In examining this issue, we turn to the text of Article 3.5. It reads, in pertinent part:

"...The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."

7.272 We note Poland's argument that in order for an evaluation to be objective and based upon positive evidence, an investigating authority has the affirmative responsibility to seek all available information concerning the potential effects of "known" factors other than dumped imports that might be causing injury. In Poland's view, this obligation extends beyond those factors raised by the responding party in an in-

²⁷⁵ Poland's first written submission, Annex 1-1, para. 75.

²⁷⁶ See responses by the third parties to Question 14 by the Panel, Annexes 3-7, 3-8 and 3-9.

vestigation.²⁷⁷ Poland therefore alleges that, in violation of Article 3.5, "Thailand failed to consider numerous other factors other than Polish imports in reaching its causation determination"²⁷⁸ of which Thailand "was aware".

7.273 The text of Article 3.5 refers to "known" factors other than the dumped imports which at the same time are injuring the domestic industry but does not make clear how factors are "known" or are to become "known" to the investigating authorities. We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation. We are of the view that there is no express requirement in Article 3.5 AD that investigating authorities seek out and examine in each case *on their own initiative* the effects of *all* possible factors other than imports that may be causing injury to the domestic industry under investigation.²⁷⁹ Of course, they would certainly not be precluded from doing so if they chose to. We note that there may be cases where, at the time of the investigation, a certain factor may be "known" to the investigating authorities without being known to the interested parties. In such a case, an issue might arise as to whether the authorities would be compelled to examine such a known factor that is affecting the state of the domestic industry. However, it has not been argued that such factors are present in this case.

7.274 We note Poland's argument that the final determination shows "no examination of all relevant evidence before the authorities, including no examination of why the factors enumerated in Article 3.5 Anti-Dumping Agreement were or were not themselves relevant".²⁸⁰ We do not agree with the apparent view of Poland that the factors enumerated in Article 3.5 AD constitute a mandatory list of factors that must necessarily be examined by the investigating authorities in every case. Consequently, we do not view it as necessary for the relevant documents to reflect that each and every factor enumerated in Article 3.5 was examined. In our view, the language of the text of Article 3.5 ("factors which *may* be relevant... include...") is in stark contrast to the specific and mandatory language we have addressed above in the context of Article 3.4.²⁸¹ The text of Article 3.5 indicates that the list of other possible causal factors enumerated in that provision is illustrative. Thus, while the listed factors in Article 3.5 might be relevant in many cases, and the list contains useful guidance as to the kinds of factors other than imports that might cause injury to the domestic industry, the specific list in Article 3.5 is not itself mandatory.

7.275 Article 3.5 therefore mandates the investigating authorities to examine other known factors and gives an illustrative list of such factors. In addition, it mandates

²⁷⁷ Poland second oral submission, Annex 1-6, para. 77 and response to Panel Question 49, Annex 1-5.

²⁷⁸ Poland second oral submission, Annex 1-6, para. 77.

²⁷⁹ The panel in *United States - Salmon*, *supra*, footnote 169, para. 550 stated: "there is no express requirement that investigating authorities examine in each case on their own initiative the effects of all other possible factors other than imports under investigation." That panel was examining Article 3.4 of the Tokyo Round Anti-Dumping Code, which contained different language than Article 3.5 of the WTO AD Agreement.

²⁸⁰ Poland second written submission, Annex 1-4, para. 95.

²⁸¹ See our discussion of the mandatory nature of the factors listed in Article 3.4 *supra*, paras. 7.224-7.231.

the authority not to attribute to dumped imports injury caused by such other factors. In accordance with our approach outlined above²⁸², we consider that the examination of such other factors must be apparent in the documents forming the basis for our review.

7.276 We turn to Poland's allegation that there was no examination in the final determination of the influence of non-Polish imports, the level of demand of the local construction industry, the nature of SYS' entry into the H-beam market, domestic industry productivity and cost structure, technology developments or market realities in SYS export markets. Poland has not indicated to us on what basis these factors were "known" to the Thai investigating authorities, and has not directed us to where in the record of the Thai AD investigation it raised these factors and made them "known" to the Thai investigating authorities.

7.277 Nevertheless, in light of the disclosed factual basis and the analysis contained in the relevant documents²⁸³, we find that Thailand has not "failed to examine" certain possible causes of injury other than Polish imports identified by Poland, including: world-wide demand for H-beams (including export markets)²⁸⁴, consumption patterns (including the general economic environment and local demand)²⁸⁵, potential trade restrictive practices of and competition between domestic and foreign producers²⁸⁶, the influence of non-Polish imports²⁸⁷, the nature of SYS' entry into the H-beam market²⁸⁸ and technology developments.²⁸⁹ Furthermore, we refer to our finding above that the Thai investigating authorities did not fail to consider "productivity"²⁹⁰, and are of the view that this finding is also valid in the context of Article 3.5. The Thai authorities examined these factors and concluded that they were not causing injury to the domestic market. We therefore find no support for Poland's argument that the Thai authorities attributed to Polish imports any injury allegedly caused by such other possible factors.

7.278 Poland argues that, even if the Thai authorities are only obligated to consider those factors that are clearly brought to their attention by interested parties, the Thai authorities failed to consider certain such factors. In this context, Poland specifically identifies the Kobe earthquake and the resulting effect on world prices.²⁹¹ Poland states that it raised the "Kobe earthquake" and the resulting effect on world prices in the course of the investigation.²⁹² Poland also seems to be of the view that "Thai-

²⁸² *Supra*, paras 7.139-7.151.

²⁸³ The confidential record in Exhibit Thailand-44 may also indicate that the Thai authorities considered certain other causal factors (see, e.g., the reference to this in paras. 78-79 of Poland's second oral statement, Annex 1-6). However, in accordance with our approach outlined above, we do not take this into account in assessing the consistency of the Thai determination with the obligations of Thailand under the AD Agreement.

²⁸⁴ Exhibit Thailand-46, para. 2.4.

²⁸⁵ See Exhibit Thailand-41.

²⁸⁶ *Ibid.*

²⁸⁷ *Ibid.*

²⁸⁸ *Ibid.*

²⁸⁹ *Ibid.*

²⁹⁰ See *supra*, para. 7.241.

²⁹¹ See Poland's response to Panel Question 49, Annex 1-5.

²⁹² See Poland's second written submission, Annex 1-4, para. 95.

land's "secret data" indicates that its authorities were clearly aware of the impact of changes in the global steel market on its domestic industry²⁹³, and remarks that "given this obvious awareness of the impact of global market conditions, it is not clear why Thai authorities failed to consider this issue in the final determination".²⁹⁴

7.279 Before us, Thailand submits that the Thai authorities were aware at the time of the investigation of global market conditions and their effect on prices. Thailand considers that, to the extent relevant to conditions in the global market for H-beams, the Kobe earthquake contributed to these conditions and was therefore addressed by the authorities during the investigation. Thailand submits that the final determination²⁹⁵ discusses the examination of the Thai investigating authorities of global demand (on which the Kobe earthquake would have an effect).²⁹⁶

7.280 We consider that the "Kobe earthquake" and the resulting effect on world prices constitutes a factor relating to global prices and demand that was raised before the Thai authorities during the investigation. We have found above that Article 3.5 requires that the investigating authorities examine all other "known" factors, including those raised before them, and that such examination be apparent in the text of the relevant documents. We therefore examine whether the Thai investigating authorities examined this factor and whether this examination is apparent in the relevant documents.

7.281 We note that the final determination contains the following statement with respect to other possible causes of material injury:

"2.4 Siam Yamato Steel has entered the market when the global and domestic demand were high. Later, the global demand had contracted but domestic demand still expanded. Together with the fact that during the POI, over 40 per cent of sales were from export, therefore, the global demand for H-beams cannot be a cause of injury to the company during the POI."²⁹⁷

7.282 While we would certainly have preferred a more robust examination of global demand in the documents forming the basis for our review, including an explicit evaluation of the Kobe earthquake and its effect on world prices and demand as a possible other causal factor of injury, we do not consider that Article 3.5 requires that the documents forming the basis for our review expressly use the *precise terminology* with which a given factor was raised during the investigation, nor an express indication that the investigating authorities have examined all underlying or contributory causal elements which may comprise or influence a given causal factor (in this case, global demand). We therefore find that this statement in the final determination relating to global demand makes the consideration of global demand (on which the Kobe earthquake would have an effect) by the Thai authorities of this factor under Article

²⁹³ Poland's second oral statement, Annex 1-6, para. 79. Poland refers in this context to Exhibit Thailand-44.

²⁹⁴ *Ibid.*

²⁹⁵ Thailand refers to Exhibit Thailand-46, para. 2.4, cited *infra*, para. 7.281.

²⁹⁶ Thailand's first written submission, Annex 2-1, para. 114.

²⁹⁷ Exhibit Thailand-46, para. 2-4.

3.5 apparent in the text of the final determination. We find further confirmation for our view in confidential Exhibit Thailand-44.²⁹⁸

7.283 For these reasons, we find that the Thai investigating authorities did not act inconsistently with Article 3.5 in their treatment of factors other than dumped imports as possible causes of injury under Article 3.5.

Conclusion

7.284 Because the finding by the Thai authorities of the causal relationship between dumped imports and any possible injury was based upon (i) their findings concerning the price effects of dumped imports which we have already found are inconsistent with Article 3.2, second sentence and Article 3.1²⁹⁹; and (ii) their findings concerning injury, which we have already found to be inconsistent with Articles 3.4 and 3.1³⁰⁰, we find that the determination of the causal relationship between dumped imports and injury is inconsistent with Thailand's obligations under Article 3.5 and 3.1.

7.285 In light of this finding, we do not consider that it is necessary to examine whether Thailand has also acted inconsistently with its obligations under Article VI of the GATT 1994.

D. Article 6 AD

7.286 In accordance with our finding above that Poland's panel request did not identify Poland's claims under Article 6 with sufficient clarity³⁰¹, we do not examine Poland's claims under Article 6.

VIII. CONCLUSIONS AND RECOMMENDATION

8.1 In light of the findings above, we conclude that Poland failed to establish that Thailand's initiation of the anti-dumping investigation on imports of H-beams from Poland was inconsistent with the requirements of Articles 5.2, 5.3 and 5.5 of the AD Agreement or Article VI of the GATT 1994.

8.2 In light of the findings above, we conclude that Poland failed to establish that Thailand has acted inconsistently with its obligations under Article 2 of the AD Agreement or Article VI of the GATT 1994 in the calculation of the amount for profit in constructing normal value.

8.3 In light of the findings above, and based on the documents forming the basis for our review³⁰², we conclude that Thailand's imposition of the definitive anti-dumping measure on imports of H-beams from Poland is inconsistent with the requirements of Article 3 AD Agreement in that:

- (a) inconsistently with the second sentence of Article 3.2 and Article 3.1, the Thai authorities did not consider, on the basis of an "objective ex-

²⁹⁸ Exhibit Thailand-44.

²⁹⁹ *Supra*, para. 7.214.

³⁰⁰ *Supra*, para. 7.256.

³⁰¹ *Supra*, paras. 7.27-7.31, 7.47.

³⁰² With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146.

- amination" of "positive evidence" in the disclosed factual basis, the price effects of dumped imports;
- (b) inconsistently with Articles 3.4 and 3.1, the Thai investigating authorities failed to consider certain factors listed in Article 3.4, and failed to provide an adequate explanation of how the determination of injury could be reached on the basis of an "unbiased or objective evaluation" or an "objective examination" of "positive evidence" in the disclosed factual basis; and
 - (c) inconsistently with Articles 3.5 and 3.1, the Thai authorities made a determination of a causal relationship between dumped imports and any possible injury on the basis of (i) their findings concerning the price effects of dumped imports, which we had already found to be inconsistent with the second sentence of Article 3.2 and Article 3.1; and (ii) their findings concerning injury, which we had already found to be inconsistent with Article 3.4 and 3.1.

8.4 Under Article 3.8 of the DSU, in cases where there is infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment of benefits under that agreement. Accordingly, we conclude that to the extent Thailand has acted inconsistently with the provisions of the AD Agreement, it has nullified or impaired benefits accruing to Poland under that Agreement.

8.5 We recommend that the Dispute Settlement Body request Thailand to bring its measure into conformity with its obligations under the AD Agreement.

ANNEX 1-1

FIRST WRITTEN SUBMISSION OF POLAND
(24 January 2000)

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INTRODUCTION

1. This dispute arises under Article VI of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") and Articles 2, 3, 5, and 6 of the WTO Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (the "Anti-Dumping Agreement"). The dispute concerns Thailand's imposition of definitive anti-dumping duties on imports of angles, shapes, and sections of iron or non-alloy steel and H-Beams (collectively "H-Beam steel products") originating from the Republic of Poland ("Poland"). Such anti-dumping duties have been imposed by the authorities of the Kingdom of Thailand ("Thailand") in contravention of the basic procedural and substantive requirements of Article VI GATT 1994 and of the Anti-Dumping Agreement.

2. Under the Anti-Dumping Agreement, WTO Members have agreed that anti-dumping measures may be applied "only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of [the Anti-Dumping] Agreement."¹ Anti-dumping duties may be imposed only "where all requirements for the imposition have been fulfilled."² Such duties may not be imposed simply to assure economies of scale to domestic producers or to punish foreign producers or exporters for their efforts to supply domestic purchasers. In this instance, however, Thailand has taken such steps to nurture Siam Yamato Steel Co., Ltd. ("SYS"), the sole Thai domestic producer of H-Beam steel products. SYS began domestic production of such products in March 1995, only three months before the start of the investigation period ("IP") herein at issue. As will be detailed further below, the actions of the Thai authorities, in Poland's view, were transparent efforts to protect this new producer so as to guarantee, as the Thai authorities repeatedly stated in the investigation, the ability of SYS to "recover costs" and achieve "suitable level of production" from the moment it began

¹ Article 1, Anti-Dumping Agreement.

² Article 9.1, Anti-Dumping Agreement.

production.³ In furtherance of this desire, Poland submits, the Thai authorities found a dumping margin where none exists and determined the existence of material injury when, as stated in the final injury notice, "most evidence[] of domestic injury indicate a positive performance of the company."⁴ Poland respectfully asserts, in fact, that there is *no* evidence of injury and that the alleged 'data' upon which Thailand claimed to rely are factually inaccurate and internally inconsistent. Moreover, Thailand relied on some unusual forms of data that were simply invalid on their face: First, Thailand relied not on actual data, but rather on relative trends over time which were restricted to preclude accurate comparisons between Polish and Thai producer prices. Second, Thailand claimed to draw its conclusions by comparisons of trends between (i) the 1995 calendar year and (ii) an overlapping 12-month period that included either three or six months of 1995 in every circumstance.

3. Beginning in March 1995, SYS aggressively - and quite successfully - entered the Thai steel market. It is undisputed that, during the investigation period, SYS *tripled* its share of the Thai domestic market to over 55 per cent of the entire market, its production and sales increased strongly, its inventories fell to cover this surge in demand, and its capacity utilization and employment surged. It is further undisputed that average prices at the end of the investigation period were at or above prices at the beginning of that period.⁵ By imposing anti-dumping duties in the face of such undisputed "positive evidence", Thailand has chosen an approach that is fundamentally at odds with the rules-based trading system of the WTO.⁶ Instead, Thailand has imposed anti-dumping duties to shield a new market entrant, the nation's sole domestic producer in a key "target industry" of the Thai Government. The Anti-Dumping Agreement allows for no such trade-foreclosing measures.

4. This submission is divided into four sections. Section I sets forth the factual background to Thailand's 26 May 1997 imposition of final anti-dumping duties on H-Beam steel products of Polish origin. Section II details the procedures between Poland and Thailand with respect to this dispute. Section III sets forth the legal arguments as to why the challenged determinations violate Thailand's obligations to Poland pursuant to the Anti-Dumping Agreement and GATT 1994. Section IV contains Poland's conclusion.

³ Draft Information Used for the Final Injury Determination by the Department of Internal Trade on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Sections from The Republic of Poland, 1 May 1997, at page 3, para. 16. Exhibits POL-10, 11. *Unofficial Translation*. ["Final Injury Information Notice"]; Final Injury Determination Made By the Department of Internal Trade On Siam Yamato Steel Co., Ltd.'s Anti-Dumping Petition Against Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Sections from The Republic of Poland, 4 June 1997, Exhibit POL-13; *Unofficial Translation*, ["Final Injury Determination"]. All "unofficial translations" cited herein were supplied by the Government of Thailand.

⁴ Final Injury Information Notice, at page 3, para. 16. Exhibits POL-10, 11.

⁵ See Para. 25, below.

⁶ Article 3.1, Anti-Dumping Agreement. Pursuant to this same provision, Thailand's actions fail to constitute an "objective examination" of the relevant facts.

I. FACTUAL BACKGROUND

5. On 30 August 1996, the Thai Department of Business Economics, Ministry of Commerce initiated an anti-dumping investigation regarding the imports of Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Beams under Customs Code 7216.33.0005 originating in the Republic of Poland.⁷ This notice of initiation is attached as Exhibit POL-1. The request to initiate this anti-dumping investigation was filed by SYS, the sole manufacturer of subject merchandise in Thailand.

6. By letter dated 12 September 1996, the Polish Ministry of Foreign Economic Relations informed the Thai Ministry of Commerce that it had not been notified of Thailand's intent to initiate the investigation prior to the publication of the initiation notice of 30 August 1996 and that, in any event, the petition filed by SYS lacked sufficient evidence regarding the existence of injurious dumping by Polish producers.⁸ By letter dated 17 September 1996, the Department of Foreign Trade ("DFT") of the Thai Ministry of Commerce informed the Republic of Poland about the initiation of the investigation. The letter is attached as Exhibit POL-3.

7. The Department of Foreign Trade of the Thai Ministry of Commerce is responsible for investigating allegations of dumping, while the Department of Internal Trade of the Thai Ministry of Commerce ("DIT") investigates allegations that dumping has caused injury to a Thai domestic industry. The period of investigation was established as running from 1 July 1995 to 30 June 1996. The subject merchandise was defined in the notice of initiation as "Angles, shapes, and sections of iron or non-alloy steel: H sections, classified under the HS. 7216.33.0005".⁹

8. Upon opening of the investigations, questionnaires were transmitted, on 17 September 1996, to the following companies: Huta Katowice S.A. ("Huta Katowice"), the only producer of subject merchandise in Poland; Stalexport S.A. ("Stalexport"), a Polish steel exporter; and Duferco and General Steel Export, which are steel trading firms based in Liechtenstein. Huta Katowice and Stalexport (collectively referred to as the "Polish respondents") voluntarily responded to the Thai authorities.

9. Stalexport submitted its questionnaire response to Thai authorities on 21 October 1996. Stalexport was issued a supplemental questionnaire, which it submitted on 8 November 1996. Huta Katowice submitted its questionnaire response on 8 November 1996. Verification of questionnaire responses was conducted in Poland by Thai government officials during 16-18 April 1997.

Provisional Dumping and Injury Determinations

10. On 27 December 1996, the Thai Ministry of Commerce issued a series of notices stating that Thai authorities had preliminarily determined that H-Beam steel

⁷ The investigation was initiated by the "Committee to consider procedures for the imposition of special duty on products which are imported into Thailand at unfair prices and for the imposition of special duty on products which are subsidised and imported into Thailand".

⁸ Thailand's response thereto is submitted as Exhibit POL-4.

⁹ Exhibit POL-1.

from Poland had been dumped on the Thai market during the investigation period and that such dumped merchandise had caused material injury to SYS.¹⁰ By virtue of these notices, Thailand thus imposed provisional anti-dumping duties of 25.90 per cent of the c.i.f. value for merchandise "produced/exported" by Huta Katowice; 29.81 per cent of the c.i.f. value for merchandise "produced/exported" by Stalexport; and 51.99 per cent of the c.i.f. value for merchandise "produced/exported" by other firms.¹¹ These provisional anti-dumping duties were imposed for a period of four months. Without explanation, such duties were imposed on all items classified under HS tariff category 7216.33, a different category of products than was specified by the anti-dumping notice of initiation regarding H-beam steel products (HS. 7216.33.0005).¹²

11. Certain details of these decisions were provided in preliminary dumping and injury notifications from Thailand dated 20 January 1997. As regards dumping, the Thai DFT explained that it had utilized a constructed value formula to determine "normal value" and that it had done so because the H-Beam steel product lines sold in Poland (DIN specifications) were not properly comparable to those sold in Thailand (JIS specifications), leading DFT to conclude that Polish prices could not be meaningfully compared to Thai domestic prices.¹³

12. On 20 January 1997, the DIT also issued its preliminary injury notification.¹⁴ The DIT preliminary determined that Thai producers had been materially injured by reason of Polish imports. The DIT explained that Polish imports had increased during the IP as a result of "price tactics", of which two were identified - "the continuously decreased" c.i.f. price of Polish imports *vis-à-vis* SYS' domestic prices and "extended credit" of up to 360 days. According to DIT, the result of such "tactics" was that "the market share of the Polish product had clearly increased in 1995 which corresponds to the period when Siam Yamato Steel Co. Ltd. (SYS) started the production." (As will be shown below, neither of these claims of harm is valid. Indeed, even later evidence relied on by the Thai authorities expressly demonstrates that Polish import prices were not "continuously decreasing" and that Polish market share rose only a bit more than one per cent. Further, Polish respondents simply did not offer such "extended credit" to potential Thai customers, and there was absolutely no evidence

¹⁰ The Ministry of Commerce Notification Regarding Imports (No. 118) B.E. 2539 of 27 December 1996. [*Unofficial Translation.*] Exhibit POL-5.

¹¹ Ministry of Commerce Notification Regarding Anti-Dumping Duty Levied On Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Sections Originating in or Exported from The Republic of Poland B.E. 2539 of 27 December 1996. *Unofficial Translation.* Exhibit POL-5.

¹² As a general matter, HS 7216.33 includes angles, shapes, sections, and beams, arguably the same general category of product. HS 7216.33.0005 includes the subset of H-Beams only. It is 7216.33.0005 that was covered by the notice of initiation provided to the Polish respondents. Exhibit POL-1.

¹³ The Department of Foreign Trade Notification Regarding the Preliminary Dumping Determination on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Beams Originating in or Exported from the Republic of Poland (No. 1) B.E. 2540 (1997) of 20 January 1997. *Unofficial Translation*["Preliminary Dumping Determination"]. Exhibit POL-5.

¹⁴ The Department of Internal Trade's Preliminary Injury Determination on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Sections From the Republic of Poland, *Unofficial Translation*["Preliminary Injury Determination"]. Exhibit POL-5.

on the record to support such a determination. Finally, it is misleading to compare c.i.f. import prices with prices for products already available on the domestic market, as discussed below.)

13. In this preliminary injury determination, DIT explained that SYS, as a "new producer", was entitled to "increase its price to enable it to recover [its] costs in a reasonable period of time." The Thai authorities further explained, "because of the fact that SYS is a new producer, its survival depends on a suitable level for production to maintain economy of scale[] and thus [SYS] had to maintain its market share."

Preliminary Dumping Calculations and Injury Determination: Disclosure

14. On 13 February 1997, the Polish respondents requested disclosure with respect to the factual information on which the Thai preliminary determinations imposing substantial anti-dumping duties on their products were based. Disclosure documents as regards the preliminary dumping calculations were issued by the DFT on 19 February 1997.¹⁵ Disclosure documents as regards the injury determination were issued by the DIT on 27 February 1997.¹⁶

15. The preliminary disclosure documents revealed that, in its constructed value calculation, the DFT had assumed a 37.7 per cent profit margin for Huta Katowice.¹⁷ This assumption was more than *five times* the maximum "reasonable" amount of profit (7 per cent) that had been *alleged* by SYS in its anti-dumping petition and was more than *eight times* the profit margin (4.55 per cent) for Huta Katowice *shown* in the company's most recent annual income statement that was before the DFT.¹⁸ Both of these figures were ignored by the DFT. Using either of those figures, Huta Katowice's normal value would have been *below* its weighted average export price and thus the company would not have been found to engage in dumping. The use of this clearly exorbitant figure is especially untenable given that it allegedly was derived by analysis of questionnaire response data on Polish and Thai domestic sales which, for price comparison purposes, the DFT admitted were not properly comparable and not within the 'same general category of products'.

16. The disclosure documents showed a number of other items of note. For example, as regards Stalexport, the DFT made a number of adverse inferences and resorted to use of "best information available", based on the false assumption that Stalexport was a producer (as opposed to an exporter) of subject goods and that Stalexport was somehow related to or otherwise exercised control over a non-cooperating firm, General Steel Export of Liechtenstein. Transportation cost calculations were based on an improper estimate further inflating the preliminary margin

¹⁵ The documents are attached as Exhibit POL-7.

¹⁶ The documents are attached as Exhibit POL-8.

¹⁷ The documents are attached as Exhibit POL-7.

¹⁸ In its application for relief (at page 12, point 27), SYS informed the DFT that the "reasonable profit rate" in the steel industry was between five and seven per cent. SYS then used a six per cent profit figure when calculating normal value in its application. Huta Katowice's 1995 income statement, which was also properly before the DFT, shows that the company's 1995 profit margin was 4.55 per cent.

calculation. The calculations of the preliminary margins also contained a number of ministerial errors. Polish respondents noted each of the above errors in writing to the Thai authorities and respectfully requested at the time that they be corrected.

17. On 27 February 1997, the DIT supplied the data underlying its injury determination. Those data are reproduced herein. Inexplicably, the data utilized an investigation period (*i.e.*, 1 October 1995 - 30 September 1996) that is different from that established in the notice of initiation (*i.e.*, 1 July 1995 - 30 June 1996), and the DIT relied upon trends comparing two overlapping 12-month periods (*i.e.*, the 1995 calendar year and 1 October 1995 - 30 September 1996). Even leaving those irregularities aside, the data painted a uniform picture of SYS as an aggressive and vibrant new entrant into the Thai domestic steel market. The SYS data officially reported by the Thai authorities were as follows:

Marketing Information "H-Beam" of Siam Yamato Co., Ltd.			
	<i>1994</i>	<i>1995</i>	<i>IP</i> <i>(1 Oct.'95-30 Sept.'96)</i>
1. Capacity	-	100	100
2. Production	-	100	113
3. Percentage of production (%)	-	64.6	72.9
4. Volume of Sales	-	100	133
- Domestic	-	59	69
- Export	-	41	64
5. Market Share	-	19.8 ¹⁹	55.8
6. Inventory	-	100	81
7. Net Profit (Loss)	-	[]	[]
8. Return on Investment	-	(18-41)	(18-26)
9. Labour	-	100	110

18. The DIT data presented a clear picture. SYS's production volume, percentage of production (capacity utilization), sales volumes (both domestic and foreign), market share, and employment all strongly rose during the IP. SYS's share of the Thai domestic market rose, in fact, three-fold, a staggering achievement for a new and untested market entrant. SYS' inventory fell, as domestic demand more than absorbed the company's increasing production. And, not surprisingly, the company's declared return on investment continued to show improvement.²⁰

19. At the same time that SYS was aggressively establishing itself as the dominant force on the expanding Thai market, Polish imports were, according to the DIT's data, relatively stable. Polish market share was up 1.1 per cent overall, a tiny fraction of the 36 per cent market share increase of SYS in the same time period. Polish import volume was reportedly up somewhat. Once again, *actual* figures were not given,

¹⁹ The DFT issued different market share figures at different stages of the proceeding. For purposes of clarity, we employ the final figure issued by the DFT. Initially, DFT claimed that SYS' Thai market share was 49.8 per cent in 1995. But this figure was apparently simply an inadvertent typographical error.

²⁰ Although the company's return on investment remained negative during this period, such results are hardly surprising for a start-up venture in a capital-intensive industry like steel production.

and, as a result, parties were offered no basis for verifying or contesting the DIT's conclusions. By letter dated 13 February 1997, Polish respondents specifically requested that the Thai authorities provide actual data to allow a fair and unbiased analysis of all results, but this request was not granted.²¹ Any conclusions based on the supplied trend data were, in any event, simply unreliable. First, the DIT was seeking to compare price trends in overlapping time periods. More fundamentally, as with the prior chart, because so many items were set to 100 for 1995, respondents were left simply guessing as to the relationships between such items as production, sales, demand, and imports. There was further no necessary relation between numbers on one row and numbers elsewhere in the "disclosure". And 1995 market share data would, in any event, be a dubious basis for evaluation, given that SYS sold H-Beams during less than ten months of the calendar year.

Marketing Information "H-Beam" Imported from Poland			
	<i>1994</i>	<i>1995</i>	<i>IP</i> <i>(1 Oct. '95-30 Sept. '96)</i>
1. Demand of Thailand	-	100	104
2. VOLUME OF IMPORT	-	100	92
- Poland	-	48	53
- Others	-	52	39
3. Market Share			
- Poland	-	24.2	25.3
- Others	-	25.9	18.9

20. On 13 March 1997, the Polish respondents and SYS participated in a public hearing to discuss these anomalies. The Polish respondents forcefully raised these points with the Thai authorities, both in a detailed written submission and in oral argument. The arguments put forward by the Polish respondents and SYS are partly reproduced in a hearing summary, which is attached as Exhibit POL-9.

Determination of Final Anti-Dumping Duties

21. On 1 May 1997, the DFT issued a proposed definitive (final) determination regarding dumping²², and the DIT issued a proposed definitive (final) determination regarding the existence of material injury.²³ The final determination regarding dumping covered products imported under HS 7216.33. Concerning the dumping margin calculation, the DFT maintained its earlier position in regards to the vital issue of profitability, this time using the profit figure of 36.3 per cent. DFT then chose to disallow or reduce a number of allowances affecting cost of manufacturing and discounts for volume and freight that had been granted to the Polish respondents in the preliminary determination. The DFT chose also to apply a single dumping rate to all

²¹ Exhibit POL-6.

²² Proposed Final Determination for H-Beams from Poland, 1 May 1997. *Unofficial Translation* ["Proposed Final Dumping Determination"]. Exhibits POL-10, 11.

²³ Final Injury Information Notice. Exhibits POL-10, 11. *Unofficial Translation*

Polish exports and, based on the above-mentioned and other changes, determined that the single dumping margin for Polish H-Beam steel products was 27.78 per cent.

22. The DIT proposed final injury determination repeated much of the data set forth in the preliminary injury determination. DIT concluded on the basis of such data that "most evidence[] of domestic injury indicate a positive performance of the company."²⁴ More precisely, the proposed final injury determination again evidenced that production, capacity utilization, sales, employment, market share all rose strikingly for SYS during the IP. These data also showed that SYS's inventory was down and the company's return on investment improved during the IP. While these data were unchanged from the preliminary determination, the DIT now reported that they actually covered the period 1 July 1995 through 30 June 1996 rather than 1 October 1995 through 30 September 1996. Thus, trends were now to be determined comparing 12-month periods in which *six* of those months (July through December 1995) overlapped, rendering the comparison, if anything, even less meaningful. Again, no explanation was provided.

23. The proposed final determinations included additional tables with 'data' on pricing, consumption, production, sales and imports from Poland. These data again obscured more than they clarified.

24. First, the proposed final determination contained the following "average quarterly price" table, which the DIT claimed demonstrated price undercutting and price suppression.

Average Quarterly Price						
Item	QTR. 1/95	QTR.2/95	QTR.3/95	QTR.4/95	QTR.1/96	QTR.2/96
Import Price from Poland	100	99	108	125	111	98
Complanmant [sic]Price	100	113	123	121	111	118

But the table did not show actual prices or compare Polish and Thai products on the domestic market. Rather, the table purported to show price trends of each nation's product in relation to *itself*. That is to say, there was no evidence of the relative starting point of the "100" for each nation's prices. It was thus a matter of mere speculation unsupported by any record evidence concerning how or if Polish prices may have affected Thai prices, let alone whether such an effect might have caused any material injury to the Thai producer. Moreover, Thai authorities provided no explanation of how using first quarter 1995 prices as a baseline for SYS was appropriate or reasonable given that the company only began operation in March of 1995; first quarter 1995 data therefore covered less than *one* month.

25. Rather than demonstrating any "price undercutting" these 'data' provided by Thailand showed that, for every reported quarter, SYS's prices remained well above the price at which the company entered the market in March 1995. The data further

²⁴ Final Injury Information Notice, at page 3, para. 16. Exhibits POL-10, 11. *Unofficial Translation*. The fact that SYS had a 19.8 Thai market share in 1995 was clear in this document.

demonstrated that it was SYS that precipitated the first decline in average prices during the IP (fourth quarter 1995), when Polish prices were still rising. They seem to show that average H-Beam prices at the end of the IP (*i.e.* second quarter of 1996) were at or above those at the beginning of the period of investigation (*i.e.* second/third quarter of 1995).²⁵

26. The huge gap between the record data and the conclusions drawn from that data by Thai authorities was not cured by the second chart provided by the Thai authorities. The second table purported to show actual H-Beam prices of imports over time, again as evidence of price undercutting or price suppression.

Price Data of H-Beam			Unit: baht/ton
Items	1994	1995	IP
Import Price (Average c.i.f.)			
- All countries	8,951.84	9,936.11	8,754.43
- Poland	7,792.45	8,408.82	7,975.00
Sale Price of Siam Yamato	-	[]	[]

27. The chart, however, provided no information on SYS' prices during 1995 or the overlapping IP. (In this instance, IP was not specified.) Second, the statistics provided did not attempt to account for the many cost factors (port fees, regular duty, commissions to local agents, inland transportation costs) that must be included for a proper comparison of domestic prices with c.i.f. import prices. More fundamentally, the data appeared directly inconsistent with the average price data set forth previously in the investigation by Thai authorities. According to their prior chart, Polish average import prices in the IP were *above* those in 1995.²⁶ According to this alleged "actual price" chart, however, Thai authorities claimed Polish import prices in the IP were *below* Polish import prices for 1995 as a whole. Finally, of course, this chart continues to require a comparison of "1995" versus the "IP", when for six months they were the same overlapping period.

28. Completely absent from the record was any consideration of the important external market factors affecting steel prices across Asia during this time period. Polish respondents had supplied such information to the Thai authorities in writing during the course of the investigation. Of particular relevance, the Kobe earthquake had severely disrupted traditional supplies of steel products throughout Asia, and Asian steel prices generally rose during the latter half of 1995 as a result. Prices had generally returned to previous levels by mid-1996, consistent with global pricing trends. Thai market prices followed this same pattern.

²⁵ The Thai data indicate that SYS' prices were "113" in the second quarter of 1995, rising to "123" in the following quarter. Consistent with this trend line, the price would logically have been approximately "118" on 1 July 1995. "118" is the exact average price for SYS for the second quarter of 1996, according to the DIT. No data is provided by DIT on the third quarter of 1996.

²⁶ A straight-line average of SYS' "average quarterly prices" shows that SYS' 1995 "average quarterly prices" in the IP were above those of SYS for 1995. This differential would surely be accentuated by a weight-averaging of such prices, since, according to the Thai authorities, SYS' quarterly sales were much higher in the IP than in 1995.

29. Thai authorities provided a third and final new table in the draft final injury determination. The table concerned domestic consumption, domestic production, domestic sales, and imports from Poland. Once again, this table did not use any actual figures, but rather used relative proportional figures over time for each category, thus precluding any proper comparison between or among categories. (For example, domestic sales plus Polish imports appear to "exceed" total consumption, even without accepting for imports from other sources.) Unlike every other prior instance, certain figures (consumption and imports) are set equal to "100" beginning earlier than the first quarter of 1995, further precluding any comparisons or verification of the simple consistency of the alleged data. (No explanation of use of 1994 data has ever been provided by the DIT.) And again, first quarter figures for SYS' production and sales were used as a baseline for showing relative trends, when the company was operating during less than one month in that calendar quarter.

Item	July-Sept. 1994	Oct.-Dec. 1994	Jan.-Mar. 1995	Apr.-June 1995	July-Sept. 1995	Oct.-Dec. 1995	Jan.-March 1996	Apr.-June 1996
Consumption in Thailand	100	133	182	191	184	167	189	245
Domestic Production	-	-	100	159	167	208	203	157
Domestic Sales	-	-	100	112	63	89	124	151
Import from Poland	100	172	141	89	159	102	80	227

30. In purporting to evaluate these data, the DIT concluded that "the increase in Polish imports during July-September 1995 led to a decrease in sales of the complainant and the increase in imports during April - June 1996 resulted [in] the decline in output of the complainant."²⁷ There was, however, no explanation of how either of these "increases" (the existence of which was, in any event, disputed by Poland) "caused" either of those events at issue or how such imports would affect sales in one circumstance and output in another, for example.²⁸ (We would note that in the calen-

²⁷ Final Injury Information Notice, at page 2, para. 8 (citations omitted). Exhibits POL-10, 11.. *Unofficial Translation.*

²⁸ Moreover, Poland explained that, even for the limited purposes for which this table may in fact be valid, the chart would need to set all first quarter 1995 figures equal to 100 to present a more accurate portrait.

Item	Jan.-March 1995	Apr.-Jun. 1995	Jul.-Sep. 1995	Oct.-Dec. 1995	Jan.-Mar. 1996	Apr.-Jun. 1996
Consumption in Thailand	100	105	101	92	104	135
Domestic Production	100	159	167	206	203	157
Domestic Sales	100	112	63	89	124	151
Import from Poland	100	63	113	72	57	161

dar quarter in which sales were "affected" output in fact rose, and in the calendar quarter in which output was "affected", sales in fact rose.) More generally, we respectfully note once again that there exists no necessary relationship between the numbers in one row and those in another row, although the chart falsely gives the surface appearance of some such relationship.

31. Polish respondents raised the above-stated points in a detailed brief to the DFT on 13 May 1997. On 19 May 1997, the DFT stated that there were "no new elements introduced in the [13 May] statement that would require modification of the proposed final determination." This statement is attached as Exhibit POL-12.

32. On 26 May 1997, the Thai Minister of Commerce issued final anti-dumping and final injury notifications on all products covered by HS 7216.33, imposing a final country-wide anti-dumping rate of 27.78 per cent.²⁹ These notifications were transmitted to affected parties on 4 June 1997. While the final anti-dumping determination did not contain significant new information, the final injury determination contained a number of important new statements. While explaining that the steel sector was a "target industry" for the Royal Thai Government, the DIT articulated its view that "injury" could be equated with "timely cost recovery". As the DIT explained (at paragraph 2.5): "In this early stage, it is possible that economy of scale is yet to be reached. Therefore, it is imperative that the domestic industry's market share be preserved and expanded to attain the sale level in keeping with its production at a level that it can continue to be in business."

33. On 20 June 1997 and 23 June 1997, the Polish respondents requested the disclosure of all findings from the Thai Ministry of Commerce, given what the Polish respondents viewed as serious and substantial factual irregularities in the 'disclosure documents' previously supplied by the Thai authorities. These requests are supplied as Exhibit POL-14 and Exhibit POL-15. On 7 July 1997, the Thai Ministry of Commerce stated that no further disclosure would follow.³⁰ Thus, the Polish respondents were denied essential facts, including any final actual data underlying the injury and causation analyses of the DIT.

II. PROCEDURES

34. As a result of the continuing application by Thailand of anti-dumping measures in contravention of the obligations of the WTO Anti-Dumping Agreement, on 6 April 1998, Poland requested consultations with Thailand. This request was circulated in WTO document WT/DS122/1 of 15 April 1998.

35. The Consultations were held on 29 May 1998 in Geneva, but did not lead to a satisfactory resolution of the matter. Accordingly, Poland requested the establishment of a Panel on 13 October 1999 in a letter to the Chairman of the Dispute Settlement

²⁹ Ministry of Commerce Notification Regarding Anti-Dumping Duty Levied on Angles, Shapes and Section of Iron or Non-Alloy Steel: H-Beams Originating in the Republic of Poland (No. 4), B.E. 2540, 26 May 1997. *Unofficial Translation*["Final Anti-Dumping Determination"]. Exhibit POL-13.

³⁰ Exhibit POL-16.

Body. This request was circulated in WTO Document WT/DS122/2 of 15 October 1999.

36. At its meeting on 19 November 1999, the Dispute Settlement Body established the present Panel. The terms of reference, which were circulated in WTO Document WT/DS122/3 of 23 December 1999, are the following:

To examine, in light of the relevant provisions of the covered agreements cited by Poland in document WT/DS122/2, the matter referred to the DSB by Poland in document WT/DS122/2, and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for by those agreements.³¹

37. The European Communities, Japan, and the United States have reserved their rights as third parties to the dispute.

III. LEGAL ARGUMENT

38. After briefly discussing the applicable standard of review, below Poland establishes several distinct violations of Article VI of GATT 1994 and the Anti-Dumping Agreement by Thailand. First, the determination of the Thai authorities that Polish imports caused injury to the Thai domestic industry, in the complete absence of, *inter alia*, positive evidence to support such a finding and without the required "objective examination" of the factors enumerated for purposes of such an examination was in direct contravention of Article VI of GATT 1994 and Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement. Thailand violated these provisions of Article 3 by making an injury determination contrary to any permissible interpretation of such criteria.

39. Second, the Thai authorities' determination of alleged dumping by the Polish respondents, as well as the calculation and application of an alleged dumping margin, violate any permissible interpretation of Article VI of GATT 1994 and Article 2 of the Anti-Dumping Agreement. In order to impose substantial dumping duties and to preclude lawful and legitimate competition for Thailand's newly established producer of the like product, Thai authorities regrettably ignored the Article 2 requirements for a fair comparison of normal value and export price, failing to include only a "reasonable amount" of profit in their normal value calculation. The result was to create "dumping" where it did not otherwise exist.

40. Lastly, both the initiation and subsequent conduct of the Thai investigation of Polish H-Beam steel imports was pursued by the Thai authorities with an unfortunate unwillingness to obey even the most basic procedural and evidentiary requirements set forth in Article VI of GATT 1994 and Articles 5 and 6 of the Anti-Dumping Agreement. These requirements are designed to ensure transparency and fairness to all Members in the conduct of anti-dumping investigations. Yet, the Thai determinations were unambiguously and directly contradicted by record evidence, and essential

³¹ Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland, Constitution of the Panel Established at the Request of Poland, Note by the Secretariat, WT/DS122/3, 23 December 1999.

reports and facts requested by respondents were not provided by Thai authorities. Remarkably, Thai authorities refused to provide to Polish respondents the actual data underlying the alleged final injury analysis or to confirm the accuracy of the final dumping calculations. While such Thai actions were effective in precluding Polish sales in Thailand of the merchandise under investigation, they were not consistent with the obligations of a WTO Member. In sum, while anti-dumping measures are allowed in circumstances set forth in the Anti-Dumping Agreement, they are not permissible under the facts and in the circumstances before this Panel.

41. In the next section, the Republic of Poland examines the standard of review applicable to this dispute.

A. *Article 3 DSU and Article 17.6 of the Anti-Dumping Agreement Provide the Proper Standard of Review for this Dispute*

42. The standard of review applicable to this dispute may be found in Article 3 of the Dispute Settlement Understanding (DSU) and Article 17.6 of the Anti-Dumping Agreement. Under the terms of Article 3 of the DSU, the Panel must determine "whether there is an infringement of obligations assumed under a covered agreement"³², "in accordance with customary rules of interpretation of public international law."³³ The rules of treaty interpretation set forth in Articles 31 and 32 of the Vienna Convention on the Law of Treaties (the "Vienna Convention") have achieved the status of a rule of customary international law and are therefore applicable to this dispute.³⁴

43. Article 17.6 of the Anti-Dumping Agreement further provides that obligations under the Anti-Dumping Agreement will be interpreted as follows:

In examining the matter referred to in paragraph 5:

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

³² Article 3.8 DSU.

³³ Article 3.2 DSU.

³⁴ See, e.g. *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or Above from Korea*, WT/DS99/R, 29 January 1999, DSR 1999:II, 521, at para. 6.21 ("*United States - DRAMs from Korea*").

44. Under this standard, with respect to factual questions, the Panel must determine whether Thai authorities properly established the material facts.³⁵ The Panel must then determine, in light of all available evidence, whether the Thai authorities' evaluation of the facts at issue was *unbiased* and *objective*. With respect to interpreting the extent of a Member's obligations under the Anti-Dumping Agreement and the consistency of a practice being challenged with those obligations, the Panel should turn to the customary rules of interpretation of public international law, including the Vienna Convention. The Panel must determine whether, consistent with those interpretive rules, a provision of the Anti-Dumping Agreement is properly susceptible to more than one correct interpretation. If not, the Panel should base its ruling on the consistency of the Thai practice being challenged with the sole proper interpretation. If an Anti-Dumping Agreement provision has multiple "permissible" interpretations, the Panel is instructed to defer to permissible interpretations consistent with the text of the Anti-Dumping Agreement.

45. Article 17.6 (ii) does not entitle a Member to an unwarranted measure of deference for actions that the Member may deem "permissible", but which in fact, violate the obligations of a Member under the Agreement.³⁶ In particular, Article 17.6 (ii) should afford no deference to the practices of the Thai authorities in this dispute. Some measure of deference would be appropriate only if Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement, once interpreted in accordance with the customary rules of interpretation of public international law, admit "of more than one permissible interpretation" on the issues in dispute. This is not the case. The Anti-Dumping Agreement does not allow a Member to find that another Member's imports caused material injury to the first nation's domestic industry in the absence of any positive evidence to support such a finding and in contradiction to the actual facts on the record regarding import volumes, market shares, price effects, and the consequent impact of imports on the domestic industry. Nor is it permissible for a Member to ignore the fundamental standards set forth regarding making accurate dumping calculations, as well as the evidentiary and procedural requirements of the Anti-Dumping

³⁵ See Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico, WT/DS60/R, 19 June 1998, DSR 1998:IX, 3797, at paras. 7.54 - 7.57, for a persuasive explanation of the proper standard for assessing factual matters. The Panel's findings that led it to conclude that the dispute was properly before it were later reversed by the Appellate Body. WT/DS60/AB/R, 2 November 1998, DSR 1998:IX, 3767.

³⁶ See United States - DRAMs from Korea, *supra*, footnote 35, at footnote 499; see also Steven P. Croley & John H. Jackson, WTO Dispute Procedures, Standard of Review, and Deference to National Governments, 90 Am. J. Int'l L. 193 (1996). Based on a detailed review of Article 17 AD Agreement and the Vienna Convention, Professors Croley and Jackson note that one purpose of the Vienna Convention is to help resolve any ambiguities in the text. The range of "permissible" interpretations advanced by a Member will often not be relevant because there usually will not be "more than one permissible interpretation" under Article 17.6. None of the rationales for deference to administrative agencies that apply in legal proceedings on a national level carry the same degree of relevance in the context of WTO panel reviews. No WTO Member has any greater expertise relative to other WTO Members regarding the interpretation and application of provisions of the Agreement - they are "interested parties whose own interests may not always sustain a necessary fidelity to the terms of international agreements." *Ibid.* at 209.

Agreement designed to provide fairness and due process for companies involved in investigations and/or reviews.

46. In sum, the Panel should apply the DSU and Article 17.6 Anti-Dumping Agreement, including the customary rules of interpretation of public international law.

B. Anti-Dumping Measures and Duties may only be Imposed in Limited Circumstances which are Consistent with Article VI of GATT 1994 and the Anti-Dumping Agreement

47. The general rules for interpretation of international treaty obligations are set forth in Article 31 of the Vienna Convention. Article 31.1 thereof provides, in relevant part, that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in the light of its object and purpose."

48. Under the WTO Anti-Dumping Agreement, Members have agreed that anti-dumping measures may be applied "only under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of [the Anti-Dumping] Agreement."³⁷ Anti-dumping duties may be imposed only "where all requirements for the imposition have been fulfilled," including a proper determination of both dumping and injury.³⁸ Anti-dumping duties further "shall remain in force only as long as and to the extent necessary to counteract dumping which is causing injury."³⁹ In sum, anti-dumping duties are an exception to the otherwise applicable freedom to trade between WTO Members. They may be levied only "in order to offset or prevent dumping."⁴⁰

49. By the ordinary meaning of the above provisions, anti-dumping measures and duties, while appropriate in defined circumstances, are not otherwise permissible. In particular, no where does Article VI GATT 1994 or the Anti-Dumping Agreement authorize the imposition of an anti-dumping duty simply as a means to assure market share or higher prices to a domestic producer, to guarantee "timely cost recovery" to a domestic firm, or to punish foreign producers or exporters for their efforts to supply domestic purchasers. Yet, as the positive evidence set forth below demonstrates, in the present case anti-dumping duties have been imposed on Polish producers for such *express* reasons and in the absence of either any dumping or any material injury to the Thai producer caused by dumping. Thailand openly conceded that it imposed anti-dumping duties because "it is imperative that the domestic industry's market share be preserved and expanded".⁴¹ Thai authorities apparently view the assignment of dumping duties as an appropriate means to ensure increased market share and

³⁷ Article 1, Anti-Dumping Agreement (emphasis added).

³⁸ Articles 2, 3, 9.1, Anti-Dumping Agreement (emphasis added); Article VI:1, VI:6 GATT 1994.

³⁹ Article 11.1, Anti-Dumping Agreement.

⁴⁰ Article VI:2 GATT 1994.

⁴¹ Final Injury Determination, at page 2, para. 2.5. Likewise, in the Final Injury Information Notice (at page 3, para. 16), the Thai authorities wrote that SYS "must maintain and increase its market share." (emphasis added).

protect a new entrant to the market from foreign competition in a key "target industry". The Anti-Dumping Agreement allows for no such trade-foreclosing measures.

C. *In Violation of Article VI GATT 1994 and Article 3 Anti-Dumping Agreement, Thai Authorities Imposed Anti-Dumping Duties on Polish Imports While Making Absolutely No Proper Showing of Material Injury*

1. *Article VI GATT 1994 and Article 3 Anti-Dumping Agreement Set Forth Several Required Principles for Properly Determining Injury, Including the Fundamental Principle that an Injury Determination shall Include an Evaluation of all Factors*

50. Under Article VI GATT 1994 and the Anti-Dumping Agreement, WTO Members may impose anti-dumping measures, if, after an investigation in accordance with the Agreement, a determination is made that the domestic industry producing the like product in the importing country is suffering material injury. GATT Article VI:6 (a), in part, sets forth:

No contracting party shall levy any anti-dumping or countervailing duty on the importation of any product of the territory of another contracting party unless it determines that the effect of the dumping or subsidisation, as the case may be, is such as *to cause or threaten material injury to an established domestic industry*, or is such as to retard materially the establishment of a domestic industry.⁴²

51. The question of how a Member may properly determine the existence or absence of injury, as well as which factors must be taken into account is set forth in greater detail by provisions in Article 3 of the Anti-Dumping Agreement. Article 3.1 Anti-Dumping Agreement provides:

A determination of injury for purposes of Article VI of GATT 1994 *shall be based on positive evidence* and involve *an objective examination* of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.⁴³

According to the plain meaning of the text, Article 3.1 therefore requires that proper injury determinations *must* be based on positive evidence and an objective examination of the facts, including both the volume of dumped imports and their effect on prices for the domestic like product, as well as the impact of the imports on the domestic industry.

52. Article 3.2 Anti-Dumping Agreement provides guidance with regard to a national authority's consideration of the volume of (allegedly) dumped imports and their effect on prices, noting that they *shall* consider whether there has been a sig-

⁴² Emphasis added.

⁴³ Emphasis added.

nificant increase in dumped imports ..." and whether price depression or other factors have occurred "to a significant degree."⁴⁴

53. Article 3.4 provides guidance with regard to the proper determination of how "significant" an impact imports have on domestic industry, stating, in part, that the evaluation by the investigating authorities: "*shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.*"⁴⁵

54. Article 3.5 Anti-Dumping Agreement sets forth a causation requirement, providing, in relevant part, that in determining injury:

It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. (Emphasis added).

55. Article 3.7 Anti-Dumping Agreement provides additional contextual support for the fundamental Article 3 requirement that injury and causation be *demonstrated* rather than assumed, providing that determinations regarding threat of material injury "shall be based on facts and not merely on allegation, conjecture or remote possibility."⁴⁶

56. In addition to the ordinary meaning of the terms set forth in the above-referenced provisions of Article 3 Anti-Dumping Agreement, several adopted GATT Panel decisions provide additional insight into the parameters of a Member's obligations concerning a proper injury determination under Article VI GATT 1994 and

⁴⁴ Emphasis added. In apparent contradiction to Article 3.2 of the Anti-Dumping Agreement, Article 7.2 of the Thai anti-dumping law in effect for the Thai investigation of Polish H-Beam steel products did not require the Thai national authority to consider whether any increases in volume of the imported products were "significant," whether any price undercutting was "significant," whether prices were depressed to a "significant" degree, or whether imports prevented price increases to a "significant" degree. Notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements, Thailand, Notification of the Ministry of Commerce on the Imposition of Anti-Dumping and Countervailing Duties B.E. 2539, WTO document G/ADP/N/1/THA/3, 13 January 1997.

⁴⁵ Emphasis added.

⁴⁶ Para. 2 of the Final Injury Determination by the Thai DIT refers explicitly to a "threat of material injury" to the domestic Thai industry. The reference is confusing, as the next sentence speaks of "material injury" being "found." See Exhibit POL-13. No investigation was initiated regarding threat of material injury, and there was absolutely no legal (or factual) basis for this apparent threat finding.

Article 3 Anti-Dumping Agreement. These decisions are relevant to the work of the Panel in this dispute, as the text of Article XVI:1 of the Agreement Establishing the World Trade Organization provides:

Except as otherwise provided under this Agreement or the Multilateral Trade Agreements, the WTO shall be guided by the decisions, procedures and customary practices followed by the CONTRACTING PARTIES to GATT 1947 and the bodies established in the frame-work of GATT 1947.

57. Consistent, therefore, with the text of the Agreement and previous GATT panel rulings, it is appropriate for the Panel hearing this dispute to review whether the Thai government authorities correctly identified the appropriate facts in their injury determination regarding Polish imports, as well as whether the stated Thai DIT factual basis reasonably supported the DIT's findings. In *New Zealand - Imports of Electrical Transformers from Finland* ("New Zealand Transformers"), the panel made clear that a party is under the obligation to establish the relevant facts leading to the injury determination when its findings are in dispute.⁴⁷ Those findings are further subject to a close review by the applicable panel. Explaining what constitutes proper review of an "injury determination," the Panel concluded:

[T]he Panel could not share the view that such a [injury] determination could not be scrutinized if it were challenged by another contracting party. On the contrary, the Panel believed that if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, under the relevant GATT provisions, in particular Article XXIII, that its representations be given sympathetic consideration and that eventually, if no satisfactory adjustment was effected, it might refer the matter to the CONTRACTING PARTIES, as had been done by Finland in the present case. *To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT.* The Panel in this connection noted that a similar point had been raised, and rejected, in the report of the Panel on Complaints relating to Swedish anti-dumping duties (BISD 3S/81). The Panel fully shared the view expressed by that panel when it stated that "it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, *it would*

⁴⁷ *New Zealand - Imports of Electrical Transformers from Finland*, Report by the Panel adopted on 18 July 1985 (L/5814 - 32S/55), at para. 4.4 (citing *Swedish Anti-dumping Duties*, Report by the Panel adopted on 26 February 1955 (L/328 - 3S/81), at para. 15.).

be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged."⁴⁸

58. Given the Art. 3.1 requirement for a proper injury determination to be based on "positive evidence" and an "objective evaluation," as well as the Article 3.4 requirement that the national authority examine "all relevant" factors, the Panel should further consider whether the Thai investigating authorities examined all relevant facts before them (including the facts which may preclude or detract from an affirmative injury determination) and whether a "reasonable" explanation has been provided of how the facts as a whole support the determination made by the Thai investigating authority.⁴⁹ As the US-Atlantic Salmon from Norway Panel explained:

Article 3:3 required the investigating authorities to include in their examination of the impact of the imports on the domestic industry "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry" and contained an illustrative list of those "factors and indices". The Panel noted that Article 3:4, which required a demonstration of a causal relationship between the allegedly dumped imports and material injury to a domestic industry, explicitly referred to the factors set forth in Articles 3:2 and 3:3 Note: equivalent to Article 3:4 of the current Anti-Dumping Agreement. Therefore an essential element of a review of whether a determination of material injury was in conformity with Article 3 was an examination of whether the factors set forth in Articles 3:2 and 3:3 had been properly considered by the investigating authorities.⁵⁰

[T]he Panel observed that Article 3:1 required that determinations of material injury be based on "positive evidence". A review of whether in a given case this requirement was met involved an examination of the stated factual basis of the findings made by the investigating authorities in order to determine whether the authorities had correctly identified the appropriate facts, and whether the stated factual basis reasonably supported the findings of the authorities.⁵¹

59. A proper finding of injury must not be based on incorrect facts, as such a finding does not constitute a sufficient basis to satisfy the "positive evidence" requirement:

The Panel considered that if a finding of injury was based on incorrect facts it would not be based on "positive evidence". The phrase "positive evidence" required at least that the evidence upon which a finding of injury was based must not be incorrect..⁵²

⁴⁸ *Ibid.* (emphasis added).

⁴⁹ See United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon From Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994 (ADP/87), at para. 492 ("US-Atlantic Salmon from Norway")

⁵⁰ *Ibid.* at para. 493 (emphasis added).

⁵¹ *Ibid.* at para. 494.

⁵² *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn From Brazil*, Report adopted 4 July 1995, at para. 512

60. Rather, when evaluating whether all relevant Article 3.4 factors were properly considered, panels should closely examine the specified relevant factors and the support in the record for rational consideration of those factors. As the panel in *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins From the United States*⁵³ explained:

While the relative weight to be accorded to each of these factors depended upon the circumstances of each particular case, the overall context of an analysis of the specific factors mentioned in Article 3:3 Note: the equivalent of Article 3:4 of the current Antidumping Agreement was that of "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The wording of Article 3:3 did not support the view that factors which were beyond the industry's control were, by definition, not "relevant economic factors and indices having a bearing on the state of the industry". The Panel therefore considered that insofar as the [investigating authority] decision not to take account of factors such as declining costs of materials was based on the ground that such factors were beyond the domestic industry's control, the [investigating authority] had failed to evaluate relevant economic factors and indices having a bearing on the state of the industry. In this respect, the [investigating authority's] examination of the "projected performance" of the domestic industry was inconsistent with Korea's obligations under Article 3:3 of the Agreement.⁵⁴

61. Notably, the Panel in *Korea - Resins from the US* carefully examined a claim of material injury based on an inadequate and unclear public record, finding that Korea's determination of material injury to its domestic industry was (1) not based on positive evidence as required by Article 3.1 insofar as its finding was based on the industry's sales revenue and net profits, *because the Panel could not ascertain from the text of the determination on what factual basis* Korea had found lost sales revenues or that the level of net profit was insufficient to enable the industry to maintain normal operations and development; and (2) inconsistent with Article 3.4 insofar as it was based on the industry's inventories, because, again, Korea's determination *failed to explain the role of the imports under investigation as a cause* for the accumulation of inventory.⁵⁵

62. In sum, the clear position expressed by panels that have considered the injury issue and meaning of the Article 3 provisions is that the government investigating authority must produce all facts that reasonably support its determination and those facts must reasonably and rationally support a finding of material injury. The evaluation must not be based on one factor only. Rather, the determination of injury must take into account all relevant economic factors at the time of the investigation. Prior

⁵³ *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins From the United States*, Report of the Panel (ADP/92, and Corr.1*), Report 2 April 1993 (the "Korea - Resins from the US Panel").

⁵⁴ *Ibid.* at para. 276.

⁵⁵ *Ibid.* at paras. 242, 254, 261, 262.

panels have enforced this principle by scrutinizing the facts claimed to be established and relied upon by the relevant investigating authority.

63. The meaning of these Article 3 provisions in the context of the present dispute and the task of the current panel is also clear. Under Article VI GATT 1994 and the Anti-Dumping Agreement, Thailand was required to demonstrate that its domestic industry had suffered the requisite injury that must be established under Article 3, and that any material harm shown to be suffered by that industry was the result of (or "caused" by) the Polish imports of merchandise subject to the Thai investigation. In any other circumstances, the imposition of anti-dumping duties by Thai authorities on Polish H-beam steel products entering Thailand is improper, serving only to nullify and impair benefits otherwise accruing to Poland under the WTO Agreements. As demonstrated in the next section, these relevant Article 3 standards were not properly addressed by Thailand in this case.

2. *The Thai Determination of Injury was not Based on any Rational Reading of Positive Evidence, did not Involve an Objective Evaluation and was Flatly Inconsistent with the Standards Set Forth in Article VI GATT 1994 and Articles 3.1, 3.2, 3.4 and 3.5 Anti-Dumping Agreement*

64. The Republic of Poland recognizes that dumping injury determinations by national authorities may involve complex facts and a multitude of factors whose impact may be read in conflicting ways. We respectfully submit, however, no such situation faced the Thai authorities in the present case. There was no close call, no administrative record filled with complex or contradictory data, and no contrary indications provided by conflicting data. Indeed, as the Thai authorities acknowledge in the final determination, "most evidence[] of domestic injury indicate a positive performance of the [sole Thai] company."⁵⁶ Poland respectfully submits that even this acknowledgement was an understatement. It should be plain to any objective observer from all the data on the record of the Thai investigation that SYS did not experience *any* material injury during the period of investigation. Undisputed evidence on the record demonstrates that SYS's production, capacity utilization, employment, sales (both domestic and overseas), and market share *all* increased in the IP. Indeed, SYS was so healthy that its Thai market share tripled during the investigation period and the company claimed over 55 per cent of the domestic market within less than 16 months of selling its first H-Beam.⁵⁷ SYS inventories fell even as production was rising. Furthermore, the Thai DFT's price information speaks for itself. Average H-Beam prices at the end of the IP (*i.e.* second quarter 1996) were *at or above* those at the beginning of the investigation (*i.e.* the second quarter of 1995).⁵⁸

⁵⁶ Final Injury Information Notice, at page 3, para. 16. Exhibits POL-10, 11. *Unofficial Translation*

⁵⁷ As reported previously, SYS had a 55.8 per cent share of the Thai market for the year ending 30 June 1996. See, *e.g.*, para. 17, above.

⁵⁸ As the Polish respondents explained to the Thai authorities during the investigation, prices generally rose in Asian markets during the latter half of 1995 due to the massive earthquake in Kobe, Japan. Asian steel prices then generally returned to pre-existing levels by mid-1996, consistent with

65. In the face of this overwhelming and uncontested evidence, the Thai DFT nonetheless claimed to find injury on the basis of two alleged factors: (i) a decline in Thai domestic prices, including price undercutting and price suppression, allegedly caused by Polish prices and accompanying "credit terms", and (ii) a 1.1 per cent increase in the market share allegedly held by Polish imports. These allegations of harm have no merit and, contrary to its obligations under Article 3, Thailand has never provided any objective support for them on the record of its investigation.

66. Thai authorities cite Table 1 attached to their draft final injury determination as the support for their claim that Polish imports caused a decline in Thai prices and that Polish respondents in the investigation undersold SYS. Yet, Table 1 establishes nothing even remotely comparable to these assertions. First, the price levels provided are only *relative* levels (*e.g.* between Quarter 1 1995 and Quarter 1 1996 both Thai and Polish producer prices rose 11 per cent). They are also relative *only* for the producer listed in a particular row. Thus, one cannot even compare any actual prices, and the relative figures provided are not even comparable between the Polish respondents and the Thai producer. The DFT thus presented no evidence that Polish imports caused a decline in Thai prices or that Respondents undersold SYS.

67. To the degree that Table 1 of the Draft Thai Injury Determination establishes any fact, it shows that the Thai SYS was the price leader. As Poland has stated above at paragraph 25, SYS precipitated the first decline in average prices during the IP (*i.e.* fourth quarter of 1995), while Polish import prices were still rising. This decline, as the DFT admits, was a strategic decision by the company with the aim of "maintaining and expanding the market share, so that the volume of sale will be efficient for the factory production and to achieve economy of scale."⁵⁹ As a result, it is plain from the Thai data provided that any alleged injury to SYS caused by a drop in Thai prices was self-inflicted.

68. The DFT also attempts to claim that injury to SYS may be shown by the quantity of imports from Poland. The DFT inexplicably bases its conclusion (at paragraph 8 of the Final Injury Information Notice) on examination of only two quarters of the IP, during which Thailand claims that Polish imports led to either decreased sales or decreased output by SYS. There are several obvious problems with this conclusion. First, Thai authorities fail to explain their own record evidence directly contradicting their conclusion regarding decreased sales or output. At the same time that one of their charts purports to show decreased sales and output, Thai authorities also acknowledge that SYS market share *tripled* and that production quantity *rose* over 10 per cent (while inventories decreased). In addition, the other two quarters not referenced by Thailand - and the IP as a whole - tell a very different story. But even the two quarters examined do not support this claim: In each of those two quarters, SYS

global pricing trends. It is clear from the DFT's own data that both Polish import prices and overall import prices followed that same general trend. *See, e.g.*, the table entitled "Price Data for H-Beam" attached to Draft Injury Determination. *See* para. 26, above. It is self-evident that Polish respondents bore no responsibility for either this price increase nor the normal re-settling of prices from artificially high levels.

⁵⁹ Final Injury Information Notice, Exhibits POL-10, 11, at para. 7.

sharply raised its prices from previous levels, and not surprisingly, faced market resistance.⁶⁰

69. It is the Republic of Poland's view that the Thai DFT's determinations regarding injury are regrettably best understood from the record evidence as an attempt to protect Thai industry from fair competitive forces. SYS was a new entrant in the steel market in 1995 and Thai authorities candidly confessed their intent that "the company must maintain and increase its market share"⁶¹ and that "it is imperative that the domestic industry's market share be preserved and expanded."⁶² But even as a new firm and the sole Thai producer of subject goods, SYS was not and is not currently entitled to immunity from fair competition. It has no guaranteed right to recover expenses in a given period of time, no right to "maintain and increase its market share", and no right to a closed domestic market to ensure its profitability. Thai authorities violate their WTO obligations by finding injury in such circumstances.

70. In sum, Thailand's determination of material injury by reason of Polish imports was in violation of Articles 3.1, 3.2, 3.4 and 3.5 Anti-Dumping Agreement.

71. Articles 3.1, 3.2 and 3.4 were violated because the determination was not based on positive evidence and did not involve an objective examination of the volume and effects on price of the Polish imports, and the impact of those imports on SYS, which by all objective measures presented, was thriving. Indeed, the data on which DIT claimed to rely contradict its own conclusions. Inconsistent with Article 3.1, there was no positive evidence presented that imports from Poland in any manner affected prices on the Thai domestic market. There was further no positive evidence presented or objective examination of the impact of Polish imports on SYS.

72. Inconsistent with Article 3.2, the Thai authorities gave no consideration to whether there was a "significant" increase in imports, or "significant" price undercutting, or a depression of prices (or restraint of a price increase) to a "significant" degree. Indeed, the Thai authorities provided no actual comparison data between Polish and Thai produced goods at all, preferring instead to merely allege that Poland's Thai market share had increased about one per cent.

73. In violation of Articles 3.1, 3.2, 3.4 and 3.5, and just as in *Korea - Resins from the US*, one cannot ascertain from the text of the Thai determination or supporting documentation provided by Thailand, on what factual basis the Thai injury determination was made. As such, there was no adequate basis under the Anti-Dumping Agreement for such a finding.

74. In violation of Article 3.4, all relevant economic factors and indices were not examined and injury was, with certainty, not proved. Every Article 3.4 factor examined by Thailand and on which the Thai authorities claimed to rely unambiguously supports a finding of no injury. The Thai authorities chose not to present evidence regarding profits, losses, profitability or cash flow. The Thai government's reliance on the "imperative" of preserving and expanding SYS's market share and total sales

⁶⁰ See table entitled "Average Quarterly Price" attached to Final Injury Information Notice, Exhibits POL-10, 11.

⁶¹ Final Injury Information Notice, Exhibits POL-10, 11, at page 3, para. 16 (emphasis added).

⁶² Final Injury Determination, Exhibit POL-13, at page 2, para. 2.5.

is not among the factors specified in Article 3 Anti-Dumping Agreement as a basis for a legal finding of injury.

75. Thailand violates Article 3.5 by not *demonstrating* that the Polish imports are causing injury. Factors other than Polish imports were not examined, in particular, the pricing conduct of SYS, technology developments, export performance, domestic industry productivity - or the Kobe earthquake. Claimed factors regarding Polish imports were not established on the basis of positive evidence - indeed, they were flatly contradicted by record evidence.

76. Most unfortunately, Thai authorities fail to live up to their plain obligations under Article 3 of the Anti-Dumping Agreement when they claim that despite the undeniable health of the new Thai producer, this "cannot" be the indicator that "the domestic industry has suffered *no* injury from Polish imports."⁶³ This impermissibly reverses the standard of causation set forth in Article 3.5, as well as the positive evidence requirement in Article 3.⁶⁴

D. In Violation of Article VI GATT 1994 and Article 2 Anti-Dumping Agreement, Thai Authorities Failed Make a Proper Dumping Determination or Correctly Calculate an Alleged Dumping Margin Thereby Impermissibly Finding Dumping where none Existed

77. As a threshold matter, Poland respectfully notes that it is unfairly limited in its ability to detail Polish claims relating to the final determination of the Thai authorities in this matter. This limitation is a result of the incomplete data furnished by the Thai authorities. As noted above in paragraph 33, Thailand has refused Polish requests to provide underlying data on which Thai authorities apparently relied. While this refusal itself constitutes a violation of the Anti-Dumping Agreement (see below), it further serves to limit the ability of Poland to address the case record and applicable evidence relevant to a proper determination.

1. Thai Authorities Impermissibly Used an Unreasonable Amount of Profit in their Calculation and Determination of Normal Value, Thereby Finding Dumping where none Existed

78. Article VI GATT 1994 and Article 2 Anti-Dumping Agreement set forth several essential criteria for lawful consideration of whether dumping exists, and, if so, the correct calculation of a dumping margin. First, in the absence of domestic sales and prices of a suitable like product for dumping price comparisons, investigating

⁶³ Final Injury Determination, Exhibit POL-13, at page 2, para. 2.5 (emphasis added).

⁶⁴ The DIT's Final Injury Determination includes an apparent finding of threat of material injury by reason of Polish imports. Exhibit POL-13, at para. 2. This was the sole indication to Polish respondents that they were facing a "threat" case. If the Thai authorities did in fact make such a finding, it would violate Article 3.7 of the Anti-Dumping Agreement as being based solely on "allegation, conjecture, or mere speculation". There is no evidence on the record of such a threat and no such evidence was ever requested from any party, to the best of our information.

authorities may permissibly use for price comparison purposes "the cost of production of the product in the country of origin plus a *reasonable* addition for selling cost and *profit*."⁶⁵ Similarly, Article 2.2 Anti-Dumping Agreement provides:

When there are *no sales* of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales *do not permit a proper comparison*, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or *with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits*.⁶⁶

79 The ordinary meaning of the above provisions is clear: using a constructed value calculation for normal value is the exception to the otherwise applicable rule: a comparison of domestic and export prices for the like product. It is to be utilized only when there are "no sales" of the like product in the ordinary course of trade or when "such sales do not permit a proper comparison."⁶⁷ When normal value is calculated based on the cost of production and other expenses, only a "reasonable" amount may be added for profit in the calculation. Adding an unreasonable amount of profit in any such calculation necessarily violates a Member's obligations under Article VI GATT 1994 and the Anti-Dumping Agreement.

80. Article 2.2.2 (iii) further provides that in calculating profit reasonably, "the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin the profit." Calculation of reasonable profits should thus involve fair and similar comparisons.

81. The Thai investigating authorities properly determined that DIN specification Polish sales were *not* comparable to Thai sales of JIS standard products. The differences were so great that Thai authorities did not consider that a proper comparison of prices between like products could take place between the DIN and JIS materials. Thus, foregoing the otherwise applicable normal value calculation, Thai authorities proceeded to calculate pricing comparisons to be made by using a constructed value calculation. When this decision was made, Thailand incurred an obligation, consistent with Article VI GATT 1994 and Article 2 Anti-Dumping Agreement, to calculate profit reasonably.

82. Thailand did not fulfill its obligation to calculate profit reasonably. Polish respondents respectfully presented Thai authorities with three reasonable options regarding profit: the typical JIS product profit claimed in the Thai petition, the actual verified Huta Katowice company profit rate, or the profit rates from Huta Katowice sales of truly *like products* in third countries.⁶⁸ It is undisputed that, using any of

⁶⁵ Article VI:1(b)(ii) GATT 1994 (emphasis added).

⁶⁶ Emphasis added and footnote omitted.

⁶⁷ Article 2.2 Anti-Dumping Agreement.

⁶⁸ See Proposed Final Determination, Exhibits POL-10, 11, at para. 1.3.

three reasonable and accurate profit rates, Polish respondent's normal value would have been *below* its weighted average export price and thus the company would not have been found to engage in dumping. All three were summarily rejected by the DFT.

83. Instead, a profit rate of 36.3 per cent was used in the final calculations. This assumption was more than *five times* the maximum "reasonable" amount of profit (7 per cent) that had been *alleged* by SYS in its anti-dumping petition and was more than *eight times* the profit margin (4.55 per cent) for Huta Katowice *shown* in the company's most recent annual income statement that was before the DFT.⁶⁹ In arriving at a profit rate of 36.3 per cent, Thai authorities claimed to be using the alleged profits from the sales in Poland of DIN products - the very sales that Thai authorities had conclusively rejected for purposes of a normal value comparison of *like* products. Thus, calculations were made on the basis of constructed value because these sales were rejected, at the same time that the alleged profit margin from these very sales was used to create dumping where none otherwise existed. By earlier rejecting the sales in favor of constructed value, DFT admitted that the products were not properly comparable. Yet DFT utilized an exorbitant profit figure that DFT arrived at by comparing two non-comparable product lines with different manufacturing costs and uses (DIN vs. JIS specifications). There is no basis for considering items as outside or within "the same general category of products" only when it yields a result sought by national authorities.⁷⁰ Such Thai conduct is unreasonable and violates both Article VI GATT 1994 and Article 2.

84. By failing to comply with its Anti-Dumping Agreement obligations in the foregoing respects, Thailand has done precisely what a WTO Member may not - it has imposed duties on the basis of a patently unreasonable calculation of profits, resulting in an unfair and inaccurate comparison between export price and normal value. The result has been to penalize the Polish firms impermissibly and distort international trade unfairly, while insulating Thai domestic industry from fair competition.

E. Thai Authorities Initiated and Conducted their Investigation of H-Beams from Poland in Violation of Several Fundamental Procedural and Evidentiary Requirements in Article VI GATT 1994 and Articles 5 and 6 of the Anti-Dumping Agreement

85. In both the initiation and subsequent conduct of their investigation of Polish H-Beam steel imports, Thai authorities ignored the most basic and fundamental re-

⁶⁹ In its application for relief (at page 12, point 27), SYS informed the DFT that the "reasonable profit rate" in the steel industry was between five and seven per cent. SYS then used a six per cent profit figure when calculating normal value in its application. Huta Katowice's 1995 income statement, which was also properly before the DFT, shows that the company's 1995 profit margin was 4.55 per cent.

⁷⁰ SYS had earlier informed DFT that "general accounting principles dictate that cost should be averaged out at the company level," (Proposed Final Determination at para. B.4.2). If the DFT agreed with SYS, then it would seem clear to any reasonable observer that profits should be averaged out at the company level (4.55 per cent) as well.

quirements of procedural and evidentiary fairness. These requirements are designed to ensure transparency and fairness to all Members in the conduct of anti-dumping investigations and are essential in ensuring that anti-dumping duties are not imposed in the absence of dumping and material injury. By initiating an investigation on an inadequate petition, making determinations unsupported by fact and contradicted by record evidence, refusing to supply respondents with supporting data or to disclose essential facts, Thailand has prevented Polish respondents from fairly defending their interests, and Thailand has violated its obligations to Poland under the Anti-Dumping Agreement and Article VI GATT 1994.

1. *Thai Authorities did not have Sufficient Evidence to Justify Initiation of the Investigation under Article 5 of the Anti-Dumping Agreement*

86. Article 5.2 Anti-Dumping Agreement provides, in part, that:

An application under paragraph 1 shall include evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury. Simple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements of this paragraph.

87. Article 5.3 Anti-Dumping Agreement further requires:

The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation.

88. Therefore, by the ordinary meaning of Articles 5.2 and 5.3 there must exist sufficient evidence to properly initiate an anti-dumping investigation. Simple assertion, without evidence is, according to the plain text of the Agreement, not sufficient for initiation.

89. The record of the Thai investigation demonstrates that the initiation application of the petitioner, Siam Yamato Steel Co, Ltd., did not contain sufficient evidence to justify initiation. First, contrary to Articles 5.2 and 5.3, the application contained no *evidence* of injury. Second, the application completely failed to offer any reasonable factors explaining how the condition of SYS, the domestic producer, had worsened. Lastly, no causal link between allegedly dumped imports and alleged injury was provided.

90. Thailand had a further responsibility under Article 5.5 of the Anti-Dumping Agreement, as read in conjunction with Article 12.1 thereof, to notify Poland regarding filing of the petition in this investigation. In violation of Thailand's obligations, such notice was not properly or timely provided.

2. *The Thai Authorities Subsequent Conduct Violated the Procedural and Evidentiary Requirements of Articles 6 of the Anti-Dumping Agreement.*

91. The concern of the Republic of Poland regarding the existence and fair review of evidence is fundamental. A party has no opportunity to properly defend itself if it does not have access to the proof and evidence by which a foreign government proposes to foreclose future sales in its territory. Transparency is lost, and respondents appropriately believe that conclusions were pre-ordained, regardless of actual evidence. Such was the situation in the investigation before the Panel, as Thai authorities refused requests for the independently verifiable actual data that formed the alleged basis for their conclusions, as well as many essential facts.

92. The Thai investigating body's reluctance to disclose information used for its final determination, in particular the data underpinning the final injury analysis, was unfortunate. These actions were inconsistent with: (1) Article 6.4, as interested parties could not see the relevant information, (2) Article 6.5.1, as parties were not provided with a proper non-confidential summary, and (3) Article 6.9, as parties were not informed of all essential facts forming the basis of the decision to impose duties. At no point during the investigation did the Thai authorities provide the respondents, *inter alia*, a specification of all relevant economic factors used as the basis for the final injury determination by the Thai Department of International Trade or a basis for using overlapping 12-month periods for comparison in the final determination. In fact, after the Thai Ministry of Commerce imposed a final anti-dumping duty, the respondents requested the disclosure of essential facts and actual data findings from the Thai Ministry of Commerce on 20 and 23 June 20 1997. On 7 July 1997, the Ministry of Commerce simply informed the respondents that no further disclosure would follow.⁷¹ This information was not confidential by any rational definition, and the Thai authority never classified the information as such. Basic procedural fairness requires that the respondents should have been given access to these data, so they could present their defence or request correction of any errors by the investigating authority.

93. The provisions of Articles 5 and 6 should be read in conjunction with the provisions of Article 12. Article 12.2 of the Anti-Dumping Agreement provides:

Public notice shall be given of any preliminary or final determination, whether affirmative or negative, of any decision to accept an undertaking pursuant to Article 8, of the termination of such an undertaking, and of the termination of a definitive anti-dumping duty. *Each such notice shall set forth*, or otherwise make available through a separate report, *in sufficient detail the findings* and conclusions reached on all issues of fact and law considered material by the investigating authorities. All such notices and reports shall be forwarded to the Member or Members the products of which are subject to such determination or undertaking and to other interested parties known to have an interest therein. (emphasis added)

⁷¹ Exhibits POL-14, 15, and 16.

94. Article 12.2.2 of the Anti-Dumping Agreement further provides that a public notice *shall* be provided in the case of the imposition of a definitive duty, including "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ... the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers."

95. In violation of Article 6 read in conjunction with the Article 12 "notice and explanation of determination " requirements, this information was not made available to the respondents in "sufficient time". The information that was made available, as detailed above, did not support the decision. As a result, the Polish respondents were unable to counter-evidence regarding the essential facts before or after the final determination, severely undermining their ability to defend their interests in the investigation. As a matter of fundamental fairness, such procedures should not be allowed to stand.

IV. CONCLUSION

96. For the foregoing reasons, the Republic of Poland respectfully requests that the Panel find that by imposing anti-dumping duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams imports from the Republic of Poland, the Kingdom of Thailand has violated:

- Anti-Dumping Agreement Article 3, as read in conjunction with and Article VI of GATT 1994, by imposing anti-dumping duties where no material injury exists;
- Anti-Dumping Agreement Article 2, as read in conjunction with and Article VI of GATT 1994, by failing to make a proper determination of dumping and by calculating an unsupportable and unreasonable alleged dumping margin; and
- Anti-Dumping Agreement Articles 5 and 6, as read in conjunction with and Article VI of GATT 1994 and Article 12 Anti-Dumping Agreement, by unreasonably initiating and conducting its anti-dumping investigation of Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams imports from Poland in violation of the procedural and evidentiary requirements set forth in Anti-Dumping Agreement Articles 5 and 6.

97. In so doing, and in particular by applying its illegal conduct to the exports of Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams produced by Huta Katowice and Stalexport in Poland, the Kingdom of Thailand has nullified and impaired benefits accruing to the Poland under the WTO Agreements.

98. The Republic of Poland further requests that the Panel recommend that the Kingdom of Thailand immediately bring its measures into conformity with its WTO obligations.

ANNEX 1-2

ORAL STATEMENT OF POLAND (1ST MEETING)
(7 March 2000)

INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel. The Republic of Poland wishes to thank you for taking on this task. It also wishes to thank the WTO Secretariat Staff.
2. Poland's statement will briefly highlight the main points that were made in our First Written Submission. However, Poland would also like to take this opportunity to offer some preliminary remarks regarding Thailand's First Written Submission and those of the third parties, while reserving the right to provide more detailed comments in Poland's Second Written Submission.
3. Poland will not repeat in detail the arguments which it has already made in writing. If the Panel has questions on the content of these arguments, Poland would be pleased to respond to those questions either orally today, or otherwise - as soon as possible - in writing.
4. Poland's presentation today will be structured as follows:
5. First, Poland will discuss the issues raised by the quite recent submission by Thailand of "*confidential information*". We are deeply concerned that our ability to participate fully in this hearing has been prejudiced by the submission of that data only three working days ago. We have had no opportunity to properly evaluate and structure the arguments we had planned to make today in light of the new information just supplied to us - 17 days after the filing of Thailand's First Written Submission. Without corrective measures, this would appear to give Poland one fewer opportunity than Thailand to discuss in full the issues of dumping and injury with the Panel.
6. Second, Poland will discuss Thailand's request for a *preliminary ruling* on the inadmissibility of Poland's claims under Articles 5 and 6 of the Anti-Dumping Agreement. We believe that our claims are properly admissible and that Thailand has, in any event, experienced no prejudice in this regard.
7. Then - turning to Thailand's legal argumentation - Poland had wished to address in full five selected serious flaws in Thailand's First Written Submission. Because of the untimely filing of the new Thai data, we shall address only three of those items *in full* today. We shall address in a restricted way the issues of dumping and injury and reserve all rights in this regard. Our presentation will therefore proceed as follows:
8. First, the relevant *standard of review* for this dispute. We do not believe that Article 17.6 is properly read to mandate the standard of extreme deference suggested by Thailand.
9. Second, the *initiation of an anti-dumping investigation without substantiation* by "relevant evidence" of either injury or causation, as required by Articles 5.2 and 5.3 and without proper advance notice to the Government of Poland, under Article 5.5.

10. Third, the failure of the Thai authorities to provide the Polish respondents with the *fundamental information* underlying the final determinations, which we submit, is contrary to both the letter of Article 6.4 and the spirit of Article 6 as a whole. The current unwillingness to supply data to all Parties and Third Parties in a timely manner is sadly reminiscent of the Thai national proceedings here at issue, when requests for information and explanation were met only with (and I quote) "surprise" by Thai authorities.

11. Fourth, we would wish to touch in the subject of injury and look forward to a full opportunity to discuss this issue with the Panel. We submit, that in violation of Article 3, Thailand's determination of *injury* was not based on "positive evidence" or on "an objective evaluation" of all relevant economic factors. Rather the Thai authorities relied on a series of opaque, internally contradictory conclusory statements without substantive merit, which, even on their face, do not rise to the level of "significant" effects needed to support an injury determination. And while we appreciate that new so-called "confidential facts" have been supplied regarding the final determination, those new facts cannot rescue the Thai final determination, which, on its face, fails to meet the requirements of Article 3.

12. Finally, the proper calculation of a "*reasonable*" profit under Article 2, which does not allow for the use of a profit figure that is clearly unreasonable on its face. We note that, but for the use of a plainly inflated profit figure, the Polish companies would not have been found to be dumping, under the Thai authorities' own calculations.

13. We now address these issues *seriatim*.

Hearing Claims Relating to the New Thai Data Risks Serious Prejudice to Poland in this Matter

14. Since 14 February Thailand has been on the verge of submitting confidential data to the Panel (after initially attempting an *ex parte* communication). Because this new data allegedly underpins the two critical issues in this dispute - dumping and injury - we remain concerned that our ability to present our case is being unfairly hampered by the Thai authorities' action. How can we effectively present our case on dumping and injury in this circumstance, with one Party able to fully use one set of data, while the other Party and Third Parties have only just received it. Our concern is particularly relevant given that this meeting may well be one of only two substantive meetings of the Panel. Is the Panel thus poised to allow Poland and third parties one fewer opportunity than Thailand to present their case to the Panel? Absent appropriate actions by the Panel, what is the lesson that Members will derive from successful use of a procedure so obviously disadvantageous to other Members as this one?

15. Therefore, we would ask the Panel to agree that Poland may have, should we believe it necessary, a separate Panel meeting in which Poland alone would be allowed to do what it cannot do today - make a full oral presentation on all data presented by Thailand on issues of dumping and injury. Furthermore, we would note that our own ability to pose and respond to questions regarding these issues is similarly limited today. We would thus request that such questions be postponed until Poland has had a period of at least three weeks from today for review of the new data and that the timeline for further proceedings in this dispute be adjusted to reflect that

reality. We respectfully reserve all rights as concerns what to us is a most fundamental due process issue.

Poland's Due Process Claims Are Properly Before the Panel

16. We would now like to address Thailand's allegation that Poland's claims under Articles 5 and 6 of the Anti-Dumping Agreement are not properly before the Panel. We find this allegation incorrect and misplaced, given Poland's long-standing complaints about the opaque nature of the Thai proceedings, and because of the fact that the alleged briefing requirements on which Thailand relies and claims to be set forth in *Korea-Dairy Products*¹ were issued by the Appellate Body two months after the Request for Establishment of a Panel was submitted by Poland. Furthermore, since as in *Korea-Dairy Products*, no prejudice has resulted from this alleged imprecision, we submit there is no basis, even under a new, more stringent pleading standard, for dismissal of Poland's Article 5 or Article 6 claims.

17. Until *Korea-Dairy Products* was issued by the Appellate Body on 14 December 1999, the basic standard for the sufficiency of a complaint was set forth by the Appellate Body decision in *European Communities - Bananas*.² There, the Appellate Body stated that it was sufficient for complainants "to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which aspects of the measures at issue relate to which specific provisions of those agreements."³ We submit, that is precisely what Poland has done.

18. As Thailand has noted, the *Korea-Dairy Products* case expands pleading requirements to include a listing of the sub-provisions within articles where those articles contain more than one distinct obligation. It is hard to see, as a matter of procedural due process, how such a new rule, imposing heightened obligations on complainants, may fairly be applied to a Request filed by a Member before this new rule was established or explained. Indeed, in Poland's view, the results in the *Korea-Dairy Products* case speak for themselves, for the pleading in question was deemed sufficient due to the lack of prejudice to the respondent. Thus, the Appellate Body either (i) was seeking to establish what one might call a "transition rule" until its new, stricter requirements become fairly known or (ii) was establishing an "actual prejudice" standard that respondents would have to meet in future cases. Under either reading of the Appellate Body decision, Poland's Article 5 and 6 claims are properly admissible in this proceeding.

Article 17.6 Anti-Dumping Agreement Provides the Standard of Review for This Dispute and Does Not Support the Near Total Deference Requested by Thailand

19. We turn now to the applicable standard of review. In their First Written Submissions, the Parties agree that the standard of review set forth in Article 17.6 of the Anti-Dumping Agreement governs this dispute. The Republic of Poland respectfully

¹ Report by the Appellate Body on Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, 14 December 1999, DSR 2000I, 3.

² Report by the Appellate Body on European Communities - Regime for the Importation, Sale and Distribution of Bananas, AB-1997-3, WT/DS27/AB/R, 9 September 1997, DSR 1997:II, 591.

³ *Ibid.* at para. 41.

disagrees, however, with the meaning and application of that standard as set forth by Thailand in its First Written Submission.

20. In its First Written Submission, Poland set forth its understanding of Article 17.6 succinctly. With respect to factual questions, under Article 17.6(i) the Panel must determine whether Thai authorities *properly established the material facts*. The Panel must then determine, in light of all available evidence, whether the Thai authorities' evaluation of the facts at issue was *unbiased* and *objective*. As a recent WTO Panel noted with respect to degree of factual evidence justifying initiation, "we are to examine whether the evidence relied on by the [authorities] was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence *could properly have determined* that sufficient evidence [of the matter at issue] existed."⁴

21. With respect to Article 17.6(ii) - interpreting the extent of a Member's obligations under the Anti-Dumping Agreement and the consistency of a practice being challenged with those obligations - Poland requested that the Panel turn to the customary rules of interpretation of public international law, including the Vienna Convention. The Panel must then determine whether, consistent with those interpretive rules, a provision of the Anti-Dumping Agreement is properly susceptible to more than one correct interpretation. If not, the Panel should base its ruling on the consistency of the Thai practice being challenged with the sole proper interpretation. If, *and only if*, a Panel determines that an Anti-Dumping Agreement provision has multiple "permissible" interpretations in light of the practice or action being challenged, then the Panel is instructed to defer to permissible interpretations consistent with the text of the Anti-Dumping Agreement. Poland has noted that Article 17.6(ii) does not entitle a Member to deference for actions that the Member may deem "permissible", but which the Panel determines violate the obligations of a Member under the Agreement. In particular, the application of Article 17.6(ii) cannot afford deference to the practices of the Thai authorities in this dispute absent a determination of the Panel to this effect.

22. Not surprisingly given its authorities' actions in this case, Thailand urges a near total deference on the part of the Panel to *any and all actions* of the Thai authorities. First, Thailand demands that the Panel not conduct a *de novo* review of the Thai authorities' "factual determinations", citing a series of WTO cases utilizing the Article 11 DSU standard of review.⁵ Thailand neglects to note that the same cases it cites also explain that under Article 11 DSU, "the applicable standard is neither *de novo* review as such, *nor 'total deference.'*"⁶ Using Thailand's professed logic, this balancing principle also applies *a fortiori* under Article 17.6.

⁴ Report by the Panel on *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, DSR 2000:III, 1345, at para. 7.57 (emphasis added) (footnote omitted).

⁵ First Written Submission of Thailand at para. 40.

⁶ Report by the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, DSR 1998:I, 135, at para. 117 (emphasis added).

23. Thailand next advances a remarkable proposition in apparent pursuit of total deference: that "whether Thailand has fulfilled its obligations under the specific provisions [of the Anti-Dumping Agreement] is *not* before the Panel."⁷ In Thailand's (apparent) view, WTO dispute settlement is not to determine whether a Member has or has not fulfilled its international obligations under the specific Articles of a covered Agreement. Rather, those obligations mean nothing in international dispute settlement, but may only be viewed "*as defined, or modified, by Article 17.6.*" *Id.* Thus, Thailand seems to assert that Members have two independent sets of "obligations": (1) those substantive obligations actually defined in Articles 2, 3, 5, and 6 of the Anti-Dumping Agreement (which are apparently meaningless in Thailand's view), and (2) those obligations, "*as defined, or modified, by Article 17.6.*" Thailand badly misconstrues both its substantive obligations and Article 17.6. Poland objects to the Thai notion that a Member's obligations under the Anti-Dumping Agreement are "defined" or "modified" by Article 17.6, and we would respectfully note that Thailand offers *not one* citation in support of this radical proposition.

24. The remainder of the Thai argument regarding the standard of review consists largely of several pleas by Thailand that it is "clear" its authorities acted properly (thereby applying a standard it has not yet finished defining), and a brief attempt by Thailand to dismiss Article 17.6(ii) as of any import, given the Thai view that there are several permissible interpretations of the relevant AD Agreement Articles which should be given deference. Indeed, Thailand seems to treat Article 17.6(ii) almost as an afterthought, quickly dismissing the notion that the legal obligations of Articles 2, 3, 5, and 6, *as applied to Thai practices in this case*, require anything of Thailand. While Poland will respond to these Thai assertions more fully in its Second Written Submission, for now, we would respectfully note that Thailand offers no substantive response to Poland's proper interpretation of Article 17.6(ii) and the fact that there will seldom be more than one permissible interpretation of a Member's obligations.

25. In sum, the Thai authorities are not due the deference they demand in this case merely because Thailand deems its own authorities' actions "permissible", when that is a decision for the Panel, not Thailand, to make.

The Record Offers No Support for Thailand's Injury Determination

26. We would now wish to turn our attention briefly to the issue of Thailand's June 4 Final Injury Determination and whether that determination meets the requirements of Article 3 of the Anti-Dumping Agreement. Our discussion of this issue is, as stated previously, hampered by the fact that Thailand has only three business days ago provided "confidential information" on which we cannot fairly comment at this hearing and which we will not comment at this juncture. While Poland feels it necessary to reserve all rights concerning this new submission and places its trust in the Panel to ensure that the unusual procedure invoked by Thailand does not serve to prejudice the interests of Poland and third parties in this case, we would like to make a series of preliminary remarks at this juncture, dealing with the legal issues concerned.

⁷ First Written Submission of Thailand at para. 43.

27. It is plain under Article VI:6 (a) of GATT 1994 that anti-dumping duties may be imposed in this case only if the effect of dumped imports is to cause material injury to an established domestic industry.

28. Under Article 3.1, a proper determination of injury *must* be based on "positive evidence" and "an objective examination" of the facts, including both the volume of dumped imports and their effect on prices for the domestic like product, as well as the impact of the imports on the domestic industry.

29. Under Article 3.2, to find injury, a national authority must find "a *significant* increase in dumped imports" and whether price depression or price suppression have occurred "to a *significant* degree."⁸

30. Article 3.4 then requires that in determining whether any such impact is "significant", the investigating authorities: "*shall ... evaluat[e] ... all relevant economic factors and indices* having a bearing on the state of the industry, *including*" (but not limited to) 15 indicia set forth in the Agreement.⁹

31. And, finally, under Article 3.5, the authority must determine the existence of a "causal relationship between the dumped imports and the injury to the domestic industry ... based on an examination of *all relevant evidence* before the authorities." This must include an "examin[ation of] *any known factors* other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports."

32. Keeping in mind these most fundamental of requirements, let us now recall the facts of Thailand's Final Injury Determination. This is a case in which it is undisputed that, at a minimum, as the Thais have stated, "most evidence[] of domestic injury indicate a positive performance of the [sole Thai] company."¹⁰ Even this acknowledgement was an understatement. Without commenting on the new Thai data that has now been presented, we note that the record is undisputed that SYS's production, capacity, capacity utilization, employment, domestic sales volume, overseas sales volume, and market share *all* increased in the IP. Indeed, although Thailand now says that its market share figures were typographical errors, the record of the investigation shows that SYS was so healthy that the company claimed over 55 per cent of the domestic market within less than 16 months of selling its first H-Beam.¹¹ SYS inventories fell even as production was rising. We note also that all claims regarding profitability must be viewed in light of two facts. First, there are no meaningful cost of production data on the record of the investigation, and Thailand has failed to submit such data to the Panel. Second, SYS had been selling steel for only a matter of months during the time period at issue. We note that there are obvious factors such as a lack of track record that affect all untested market entrants. We further note

⁸ Emphasis added.

⁹ Emphasis added.

¹⁰ Final Injury Information Notice, at page 3, para. 16. Exhibits POL-10, 11. *Unofficial Translation*

¹¹ As reported previously, SYS had a 55.8 per cent share of the Thai market for the year ending 30 June 1996. See, e.g., para. 17, above. See Footnote 31 of Thailand's First Submission, which now claims that SYS had a 49.8 per cent market share in 1995. The record does not show a figure for a market share for any relevant period before the IP.

that it is exceedingly unlikely that any new entrant in any capital-intensive industry in the world would be immediately profitable in its first few months of operation. Simply put, to blame imports for SYS' failure to recover fully allocated costs in such a short period of time is to deny marketplace realities and to contravene the other evidence actually on the record.

33. The Final Injury Determination shows no evidence of consideration or evaluation of these factors or why they were outweighed by any other factors elsewhere in the record. Now, we are not in a position today to comment regarding new data, but we would like to make a few preliminary remarks. First, we note that the non-confidential summaries provided by Thailand to the Panel were not part of the Final Determination. Second, according to the Final Injury Determination, the Thai authorities claimed to find injury on the basis of two factors.

34. First, the Final Determination states that Polish import volume had "continuously increased", giving Poland a share of the Thai market equal to 24 per cent in 1995 and 26 per cent in the IP. Again, these figures are set forth in the Final Injury Determination without any substantiation and are contradicted by other facts found in the record.

35. Poland cannot be certain, but apparently these claims are based on Tables attached to the Draft Injury Notice. Those data surely do not support any finding that the Polish imports "continuously increased" because figures for "Import from Poland" move up and move down throughout the period in question. Second, in contrast to the Final Injury Determination, the Table here labeled "Import Data of H-Beam From Poland" states that the Polish market share was 24.2 per cent in 1995 and 25.3 per cent in the Investigation Period. Thus, rather than a two-per cent market share increase, the actual figure in the record was 1.1 per cent. More fundamentally, we wish to emphasize that this examination of supposed market share increase was based on overlapping time periods (*i.e.* 1995 versus an IP of July 1995-June 1996). We suggest that no meaningful examination of market share can be made in this way - which effectively compares the last two quarters of the investigation period ("IP") with the two quarters immediately preceding the IP. And, even if such a comparison were meaningful, we submit that an increase of 1.1 per cent of market share by Poland can hardly be said to be "significant" in its own right in the context of the overwhelming indicia of the absence of injury clearly present here and the remarkable successes of SYS as a new market entrant.

36. Second, the Final Injury Determination contains a series of statements regarding so-called "price suppression" and "price depression". While we are not in a position to address these claims in full today and look forward to the opportunity to do so, we wish to note the following. These claims are unsubstantiated in the Final Injury Determination. They appear to be based on Table 1 attached to their draft final injury notice.¹² Yet, Table 1 establishes nothing even remotely comparable to these assertions, and we urge the Panel to scrutinize this Table carefully - because it is the only evidence on these issues presented by Thailand until last week. Table 1 does not show price suppression or price depression. It does not allow for the comparisons

¹² See e.g. Para. 7, on page 2.

made by the Thai authorities. It does not even support the most basic of assertions, made in the Final Determination, that Polish import prices "move in the same direction" as SYS' prices; indeed, most of the time, at least according to these data, the opposite is true.¹³

37. To the degree that Table 1 establishes any fact, it appears to show that SYS was the price leader. It is SYS that precipitated the first decline in average prices during the IP (*i.e.* fourth quarter of 1995), while Polish import prices were still rising. This decline, as the DFT admits, was a strategic decision by the company with the aim of "maintaining and expanding the market share, so that the volume of sale will be efficient for the factory production and to achieve economy of scale".¹⁴ To achieve this strategic purpose, the company chose to lower prices in order to be able to increase sales. It was the Thai authorities' obligation to examine whether SYS lowered its prices for these strategic reasons or due to Polish import price levels. Having chosen not to, the Thai authorities showed lack of objectivity. Finally, Table 1 lends no support to the conclusion that SYS "decrease[d] its prices *to the level of that Polish imports*". We refer the Panel also to the statement in Paragraph 95 of Thailand's First Submission to the Panel that "Poland correctly observes that one cannot determine from the public version of this chart alone which products were undersold." Of course, Thailand now says that any lack of clarity will be cleared up by the new data, never-before-revealed to the Polish side, even in non-confidential form. But the insufficiency of the Final Injury Determination will not be altered by such revelations.

38. It is the Republic of Poland's view that the Thai DIT's determinations regarding injury are regrettably best understood as an attempt to protect Thai industry from fair competitive forces. SYS was a new entrant in the steel market in 1995 and Thai authorities candidly confessed their intent that "the company must maintain and increase its market share"¹⁵ and that "it is imperative that the domestic industry's market share be preserved and expanded."¹⁶ They are to be commended for their honesty. But even as a new firm and the sole Thai producer of subject goods, SYS was not and is not currently entitled to immunity from competition. It has no guaranteed right to recover costs or be profitable in a given period of time, no right to "maintain and increase its market share", and no right to a closed domestic market to ensure its profitability. Thai authorities violate their WTO obligations by finding injury in such circumstances. There are no exceptions to Article 3 for new companies.

39. We thus submit that Thailand's Final Injury Determination was not based on "positive evidence" or an "objective examination" of the record in this proceeding. Indeed, positive evidence was overwhelmingly that no material injury existed by reason of Polish imports. Moreover, the 'evidence' set forth in the Final Determination was, we believe, unsupported by the record or otherwise meaningless given the methods of comparison employed. Finally, any injury that may have existed was not

¹³ They move in the same direction in 3Q 1995 and 1Q 1996, but in opposite directions in 2Q 1995, 4Q 1995, and 2Q 1996.

¹⁴ Final Injury Notice at para. 7.

¹⁵ Final Injury Information Notice, Exhibits POL-10, 11, at page 3, para. 16 (emphasis added).

¹⁶ Final Injury Determination, Exhibit POL-13, at page 2, para. 2.5.

"significant" as required by the Agreement and thus not "material" as required by the Agreement. Failure to examine external factors, in this case, in particular, the massive Kobe earthquake that disrupted steel supplies throughout Asia in this period, should likewise be noted¹⁷ This external factor appears nowhere in Thailand's analysis.

40. We note further, that in apparent contradiction to Article 3.2 of the Anti-Dumping Agreement, Article 7.2 of the Thai anti-dumping law in effect for the Thai investigation of Polish H-Beam steel products did not require the Thai national authority to consider whether any increases in volume of the imported products were "significant," whether any price undercutting was "significant," whether prices were depressed to a "significant" degree, or whether imports prevented price increases to a "significant" degree. It is hard to understand how Thailand can claim to support this Determination in such circumstances.¹⁸

41. Before leaving this issue, we would like to return for a moment to the issue of whether Thailand met its obligations under Article 3.4 AD Agreement, which we recall requires an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments." As the panel in *Mexico—High Fructose Corn Syrup* explained a few weeks ago, consideration of each of these factors must be apparent in the final determination of the investigating authority, and "while the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors."¹⁹ As that panel concluded, we submit that a long line of cases, including *United States-Wool Shirts*²⁰ and *Korea-Dairy Products*²¹ interpreting similar provisions, support this recognition of the plain meaning of the language of Article 3.4.

¹⁷ As the Polish respondents explained to the Thai authorities during the investigation, prices generally rose in Asian markets during the latter half of 1995 due to the massive earthquake in Kobe, Japan. Asian steel prices then generally returned to pre-existing levels by mid-1996, consistent with global pricing trends. It is clear from the DFT's own data that both Polish import prices and overall import prices followed that same general trend. See, e.g., the table entitled "Price Data for H-Beam" attached to Draft Injury Determination. See para. 26, above. It is self-evident that Polish respondents bore no responsibility for either this price increase nor the normal re-settling of prices from artificially high levels.

¹⁸ Notification of Laws and Regulations Under Articles 18.5 and 32.6 of the Agreements, Thailand, Notification of the Ministry of Commerce on the Imposition of Anti-Dumping and Countervailing Duties B.E. 2539, WTO document G/ADP/N/1/THA/3, 13 January 1997.

¹⁹ *Mexico - Anti-Dumping Investigations of High Fructose Corn Syrup (HFCS) from the United States*. WT/DS132/R, 28 January 2000, *supra*, footnote 4, at para. 7.128 (citing also Article 12.2.2).

²⁰ United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (United States - Shirts and Blouses), WT/DS33/R (United States - Shirts and Blouses Panel Report), WT/DS33/ABR (United States - Shirts and Blouses AB Report), adopted 23 May 1997, DSR 1997:I, 343, para. 7.25.

42. No objective reader could consider the Thai final determination to be a proper explanation of the Thai authority's weighing of these mandatory factors. Indeed, as the US notes in its Third Party Submission (at para. 7), the US "shares Poland's concern about the adequacy of Thailand's findings not only because of the lack of discussion of a number of the enumerated factors, but also because Thailand's specific findings on the factors it addressed do not in any way elucidate why it did not give weight to the factors it did not discuss." Instead, the final determination is an admission that most of these factors point to a finding of no injury, with no explanation of why these factors "lack relevance or significance"²² Let us recall here again the Thai authorities admission in the Draft Injury Notice that "most evidence of domestic injury indicates a positive performance" of SYS.²³ The Final Determination, in fact, makes not a mention of most of the 15 factors that under Article 3.4 must be considered and explained. Surely, the Thai authorities never explained how these factors were - or could be - deemed to support an injury finding. As such, the Final Determination violates Thailand's Anti-Dumping Agreement obligations on its face.

In Constructing Value, Members May Include Only a Reasonable Rate of Profit

43. We wish to turn now to the issue of the calculation of the dumping margin in this case. Poland submits that Thailand's calculation of its anti-Dumping margin did not comply with the requirements of Article 2 of the Anti-Dumping Agreement. Indeed, Poland finds that Thailand's calculation was inconsistent with the plain language of the Anti-Dumping Agreement. We further note also that if an objectively reasonable figure for profit had been used by the Thai authorities, the Polish respondents would not have been found to be dumping, based on Thai's own calculations.

44. Our argument today regarding the calculation of dumping again does not have the benefit of the new information that Thailand submitted on this issue. Thus, we feel at a disadvantage in addressing this issue. We reserve all rights in this regard and wish therefore to make preliminary remarks only.

45. As a threshold matter, Poland notes that it does not contest, as some may be suggesting, the right of a Member to include profit in a calculation of normal value based on the cost of production. Indeed, it is the Polish producers who noted in their submissions to the Thai authorities that such an approach could be appropriate given that domestic sales of JIS-specification H-beams were of small quantity and that DIN H-beams are not "like" JIS H-beams.

46. Rather, we submit that the amount of profit must be "reasonable" and may not be greater. We note that Article VI:1(b)(ii) of GATT 1994 provides that investigating authorities may construct normal value by using "the cost of production of the product in the country of origin plus a *reasonable* addition for selling cost and *profit*."

²¹ *Korea-Definitive Safeguard Measure on Imports of Certain Dairy Products (Korea-Dairy Safeguard)*, WT/DS98/R (*Korea-Dairy Safeguard Panel Report*), 14 December 1999, DSR 2000:I, 49, para. 7.55. See also *Argentina-Safeguard Measures on Imports of Footwear (Argentina-Footwear Safeguard)*, WT/DS121/R (*Argentina-Footwear Safeguard Panel Report*), para. 8.123.

²² See also *Mexico-HFCS* Panel Report, *supra*, footnote 4, at footnote 610.

²³ Draft Injury Notice at 3.

47. Similarly, Article 2.2 Anti-Dumping Agreement provides that normal value may be constructed by use of "the cost of production in the country of origin plus a *reasonable amount* for administrative, selling and general costs and *for profits*".

48. Pursuant to what we read as a fundamental requirement that any amount for profit used in such a calculation be objectively "reasonable", we note that Article 2.2.2 sets forth a series of methods for calculating profit. We emphasise that this provision speaks only to the availability of appropriate methods. Two acceptable methods are expressed in sub-paragraphs (i) and (ii). In addition, in subparagraph (iii), the Agreement explains that other methods may be used so long as they are "reasonable" and their result does not "exceed the profit normally realised by others or producers" similarly situated. We view those requirements in paragraph (iii) as restating the Article 2.2 requirements.

49. Under the reading of these provisions given by Thailand, any methodology meeting the requirements of Article 2.2.2 meets the requirements of Article 2.2 under a *per se* rule. We view this approach as confusing substantive and procedural obligations. The Thai interpretation reads out of the Agreement the substantive requirements of Article 2 and of Article VI of GATT 1994 that only a "reasonable amount ... for profit " may be included in constructing normal value. We believe that while there may be a valid presumption that such methodologies yield reasonable margins, we do not believe that an investigating authority may "put its head in the sand" and irrefutably presume that such margins are *per se* reasonable when the record contains overwhelming evidence - indeed an admission by the petitioners - that the margin at issue here was wildly incorrect. Thus, while these provisions may well evidence a presumption in favour of a rule that the Article 2.2.2 methodologies yield "reasonable" profit margins, we believe that presumption to be rebuttable - and clearly rebutted by the facts and evidence in this case.

50. As explained in our First Written Submission, Polish respondents presented the Thai authorities with three reasonable options regarding profit: the typical JIS product profit claimed in the Thai petition, the actual verified Huta Katowice company profit rate, or the profit rates from Huta Katowice sales of truly *like products* in third countries. Instead, the Thai authorities used a profit rate of 36.3 per cent in the final calculations, a figure that more than *five times* the maximum "reasonable" amount of profit (7 per cent) that had been *alleged* by SYS in its anti-dumping petition and was more than *eight times* the profit margin (4.55 per cent) for Huta Katowice *shown* in the company's most recent annual income statement that was before the DFT.²⁴

51. In such a circumstance, and because we find no basis in the Agreement for the *per se* rule advanced by Thailand, we believe that the calculation of profit and thus of dumping by the Thai authorities violated Article 2 of the Anti-Dumping

²⁴ In its application for relief (at page 12, point 27), SYS informed the DFT that the "reasonable profit rate" in the steel industry was between five and seven per cent. SYS then used a six per cent profit figure when calculating normal value in its application. Huta Katowice's 1995 income statement, which was also properly before the DFT, shows that the company's 1995 profit margin was 4.55 per cent.

Agreement. Again, we shall have more to say on this subject when we, like Thailand, have the benefit of the full record in this matter.

Initiating an Investigation Without Rational Basis and Without Required Notice Violates Article 5 of the Anti-Dumping Agreement

52. We would like now to turn to Poland's claims under Article 5 relating to the initiation of this anti-dumping investigation by Thailand.

53. Article 5.2 Anti-Dumping Agreement provides, in part, that an anti-dumping petition must include evidence of dumping, injury, and causation and that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements" for initiating an investigation.

54. Similarly, Article 5.3 Anti-Dumping Agreement further requires that "authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."

55. These requirements are plain. There must exist sufficient, relevant evidence to initiate an anti-dumping investigation. Such relevant evidence must be presented concerning dumping, injury, and causation. Simple assertions on any of these three points renders a petition insufficient for purposes of initiation. Authorities have an obligation to conduct an objective examination of the "accuracy and adequacy" of evidence presented before they may initiate an investigation.

56. The record of the Thai investigation demonstrates that the initiation application of the petitioner, Siam Yamato Steel Co, Ltd., did not contain the requisite evidence of injury or causation needed to justify initiation. First, the application appears to contain *no evidence of injury*. Second, *no causal link* is provided between allegedly dumped imports of respondents and the alleged injury suffered by SYS, the domestic producer. We submit that conclusory statements in a notice of initiation are no substitute for the basic requirement that a petition contain requisite evidence supporting initiation. We invite the Panel to examine the petition of SYS (Thailand Exhibit 1) for evidence of injury and causation. If deemed insufficient on either point, then Thailand violated Articles 5.2 and 5.3 of the ADA.

57. We wish to discuss one further claim in this regard. Thailand had a responsibility under Article 5.5 of the Anti-Dumping Agreement, as read in conjunction with Article 12.1 thereof, to notify Poland regarding filing of the petition in this investigation. In violation of Thailand's obligations, such notice was not properly or timely provided. We recognise that this claim is based on a disagreement with the Thai authorities as to the content of discussions held on the 17th of July 1996 between the DFT and our Government's Commercial Counsellor in Bangkok. For this very reason, we believe that Article 5.5 is meant to require *written "notice"* to the government of the exporting country concerned, and no such written notice, it must be agreed, was ever provided. Nor does the notice of initiation itself or a letter months after the fact (Thailand Exhibit 14) provide evidence that proper notice was in fact provided.

Denying Fundamental Information to a Member Violates Article 6

58. In its First Submission, the Republic of Poland detailed the Thai authorities' violation of Article 6 by their denial to Polish firms of the opportunities mandated under Article 6 for fair review of evidence. As Polish respondents stated in the investigation, "a party has no opportunity to properly defend itself if it does not have access to the proof and evidence by which a foreign government proposes to foreclose future sales in its territory. Transparency is lost, and respondents appropriately believe that conclusions were pre-ordained, regardless of actual evidence." Such was the situation in this case.

59. Poland has raised its Article 6 claim as regards the Thai preliminary, draft final, and final determinations. As discussed above, none offers Poland the required explanation of the basis for the conclusions reached by the Thai authorities. By failing to evaluate factors, to explain why certain purported facts outweighed the authorities' own recognition that "most evidence" showed the absence of injury, and then by "expressing surprise" rather than offering meaningful disclosure, Thailand has violated Article 6 in at least three regards.

60. First, it has failed to offer Poland "meaningful opportunities ... to see all information that is relevant to the presentation of their case" so as to be allowed to make their "presentations on the basis of this information", as required by Article 6.4. We submit that it would indeed have been "practicable" for Thailand to do so, either as regards the apparently forthcoming information to the extent it may be inappropriately deemed "confidential" or, at the very least, as regards coherent non-confidential summaries thereof.

61. As a related matter, Poland submits that the internally inconsistent, conclusory, and opaque nature of the non-confidential summaries that were provided do not meet the requirements of Article 6.5.1. We note that summaries that are provided must be "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." That has not been the case here. Tossing out labels such as "price suppression" and "price undercutting" - especially when contradicted by the very evidence on which such conclusions are said to be based - cannot be said to meet this requirement.

62. Finally, Poland submits, that Thailand has violated Article 6.9, because before the Final Injury Determination, Thailand failed to inform Polish firms of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures" and that such disclosure did not "take place in sufficient time for the parties to defend their interests". In this regard, we would emphasize that at no point during the investigation did the Thai authorities provide the respondents, *inter alia*, a specification of, or a proper weighing of, all relevant economic factors used as the basis for the final injury determination by the Thai Department of Internal Trade. This would include, for example, any rational basis for using overlapping 12-month periods for comparison in the final determination.

63. These Article 6 claims must be read in the context of the requirements of Article 12.2, which, of course, required the Thai final determination to "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Under Article 12.2.2, this includes, "all relevant information on the matters of fact and law and reasons which have led to the imposition of final

measures" including "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers."

64. This, quite plainly, never happened. Indeed, when the Polish respondents asked for such a disclosure on 20 June and again on 23 June 1997, they were informed by the Thai Ministry of Commerce that no disclosure would follow.²⁵ Rather, the Thai authorities expressed "surprise" at this request, suggesting the Polish firms should be content with what had been supplied previously, and referring Polish respondents back to *preliminary* or *draft* materials in the administrative files in this case. No reasons were given for the rejection of relevant arguments made by the Polish firms. Basic procedural fairness requires that the respondents should have been given timely access to any relevant data or analysis, so they could present their defense or request correction of any errors by the investigating authority. Rather, they were off-handedly referred back to *preliminary* or *draft* statements in the record, as detailed above, which did not support the decision that was taken.

65. Poland's claims in this regard are essentially the procedural side of the substantive claims made above. But they are fundamental in their own right. We would commend the recent *Mexico-High Fructose Corn Syrup* case to the Panel's attention on these matters. Let us quote from that report as regards quite similar claims by the Mexican administration.

There is some information concerning some of these elements reflected in the determination. However, the mere recitation of data does not constitute explanation, or findings and conclusions, sufficient to satisfy the requirements of Article 12.2 of the AD Agreement. Mexico also pointed to certain working papers in the administrative file which contain information on certain of the Article 3.4 factors. However, unless consideration of a factor is reflected in the final determination, we do not take cognizance of underlying evidence in the record. See *Korea-Resins Panel Report*, paras. 210, 212, *Argentina-Footwear Safeguard Panel Report*, para. 8.²⁶

CONCLUSION

66. In conclusion, the Republic of Poland respectfully requests that the Panel find that by imposing anti-dumping duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Beams imports from the Republic of Poland, the Kingdom of Thailand has violated:

67. Anti-Dumping Agreement Article 3, as read in conjunction with Article VI of GATT 1994, by imposing anti-dumping duties where no material injury exists;

68. Anti-Dumping Agreement Article 2, as read in conjunction with Article VI of GATT 1994, by failing to make a proper determination of dumping and by calculating an unsupportable and unreasonable alleged dumping margin; and

²⁵ Exhibits POL-14, 15, and 16.

²⁶ Footnote 610.

69. Anti-Dumping Agreement Articles 5 and 6, as read in conjunction with Article VI of GATT 1994 and Article 12 Anti-Dumping Agreement, by unreasonably initiating and conducting its anti-dumping investigation of such products in violation of the procedural and evidentiary requirements set forth in Anti-Dumping Agreement Articles 5 and 6.

70. In so doing, the Republic of Poland respectfully requests that the Panel also find that the Kingdom of Thailand has nullified and impaired benefits accruing to Poland under the WTO Agreements. The Republic of Poland further requests that the Panel recommend that the Kingdom of Thailand immediately bring its measures into conformity with its WTO obligations.

71. On behalf of my Government, I thank you for your attention.

ANNEX 1-3

CONCLUDING STATEMENT OF THE REPUBLIC OF POLAND DURING THE
FIRST SUBSTANTIVE MEETING WITH THE PANEL

(8 March 2000)

Mr. Chairman, distinguished Members of the Panel. The Republic of Poland would like to present brief concluding remarks. However, before doing so Poland wishes to thank you for the professional way in which you have handled the proceedings over the last two days, which has allowed the parties and third parties to engage in an interesting and quite helpful debate. We are looking forward to receiving your further questions in writing. Poland would like to make the following concluding points.

First, Poland would like to touch upon the question of the appropriate *standard of review* for this case. Thailand (and the United States) have proposed that the Panel should afford what we consider to be undue deference to the interpretations and decisions of the Thai national authorities in this matter. Poland has already strongly rejected this idea in its opening statement, for the following reason - it runs contrary to the requirements of Article 17.6 and impermissibly seeks to substitute the views of national administrators for those of the Panel itself. While we understand *why* national authorities desire such deference, we find it is inconsistent with the requirements set forth in Article 17.6 of the ADA.

Second, we wish to highlight the issue of inclusion of a "reasonable amount" of profit in a calculation of constructed value. As we have informed the Panel, we believe that whatever presumption there may be that specified methodologies will lead to "reasonable" results, we do not believe those results *per se* meet the requirements of Article 2.2. In our view, such a presumption must be rebuttable - and we believe that other evidence in this record - indeed, the petitioner's own admission - shows that any presumption of reasonableness is rebutted in this case.

Third, on the issue of injury, we would simply add the following - in our view, the Thai DIT never conducted an objective examination of the record in this proceeding and the Final Injury Determination was not based on positive evidence. Moreover, the Thai Determination was conclusory and opaque, at best, and any injury that may have existed was not "significant" and thus not "material" as required by the Agreement. We view the DIT determination as wholly outcome determinative.

Fourth, we submit that the petition in this case did not meet the requirements of Article 5, as it contained no evidence of injury or of causation and thus was not sufficient under Articles 5.2 and 5.3. In addition, required pre-initiation notice was not provided, in violation of Article 5.5.

Finally, we have argued that the Thai authorities have failed to provide Polish respondents with the fundamental information underlying the final determinations, which we submit, is contrary to both the letter of Article 6.4 and the spirit of Article 6 as a whole. It is a sad fact that the Thai authorities have never made plain exactly what facts they relied upon in reaching their conclusions.

Again, on behalf of my Government, I wish to thank you for the highly professional manner in which you have conducted these proceedings.

ANNEX 1-4

SECOND WRITTEN SUBMISSION OF THE REPUBLIC OF POLAND
(29 March 2000)

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INTRODUCTION

1. As documented at length in the record before the Panel, the course of the Thai anti-dumping investigation of H-Beam steel products from the Republic of Poland was marred by a striking number of procedural and substantive irregularities. Indeed, from its flawed initiation through the imposition of definitive anti-dumping duties on Polish imports, the Thai investigation proceeded unwaveringly toward an apparently predetermined outcome.

2. Throughout the Thai investigation, Polish respondents were never afforded the opportunity to review significant portions of the alleged "evidence", much less to correct obvious substantive errors therein. The reticence of the Thai authorities to explain their actions or to allow Polish respondents any meaningful opportunity to defend themselves extended even to "findings" alleged to have been made with *Polish* data - these were withheld under the guise that they were secret or "confidential".

3. The repeated reluctance of the Thai authorities to provide essential documents and data, and to explain or justify their actions, regrettably extends to the current proceeding. With its actions appropriately challenged in this proceeding, Thailand first attempted to provide the Panel with a series of secret documents, adamantly insisting it was entitled to withhold those documents from any scrutiny by the Republic of Poland and Third Parties. Were it not for the refusal of the Panel to accept the attempted Thai ex parte communication, the Government of Poland would today find itself in much the same position as Polish steel companies did during the Thai proceedings - with neither access to, nor ability to respond to, crucial data. Fortunately, this has not been the case. As the substantive discussion below makes clear, Poland's ability to respond to the secret Thai data has proven to be very important.

4. Unable to withhold its alleged secret data from scrutiny by Poland and others, Thailand further informed the Panel of its remarkable view that the question of "whether Thailand has fulfilled its obligations under the specific provisions is *not* before the Panel", as Thailand apparently views its substantive obligations as meaningless until they are "*defined or modified*" by Article 17.6 ADA. Not surprisingly, Thailand then explains to all concerned that Article 17.6 requires a near total deference to any Thai action, obviating any need for close examination by the Panel.

5. Thailand's attempts to circumvent required procedural fairness and its eagerness to avoid any scrutiny of its practices at issue are understandable in light of compelling evidence: that Thailand has repeatedly violated the most basic substantive requirements of Article VI GATT 1994 and of Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement. As Poland has previously detailed and explains further below, the Thai authorities failed properly to initiate and conduct their investigation, failed properly to determine dumping margins, and failed properly to determine the exis-

tence of injury or causation by reason of imports. As a result, Thailand imposed definitive anti-dumping duties in violation of the Anti-Dumping Agreement.

6. This submission is divided into the following sections. First, Poland addresses the Thai request for a preliminary ruling, concluding it should be denied. Second, Poland addresses several flaws in Thailand's legal arguments, including:

- the false Thai claim that Article 17.6 ADA mandates the near total deference preferred by the Thai authorities;
- the inconsistency of the Thai injury determination with the plain standards and requirements set forth in, inter alia, Articles 3.1, 3.2, 3.4 and 3.5 ADA;
- the Thai authorities' use of a profit figure in calculating dumping that was clearly unreasonable, in violation of Article 2.2 ADA;
- the Thai initiation of an anti-dumping investigation without substantiation by "relevant evidence" of either injury or causation, as required by Articles 5.2 and 5.3, and without proper advance notice to the Government of Poland, under Article 5.5; and
- the Thai authorities' refusal to respect the basic due process requirements set forth in Article 6 ADA.

We now address these issues seriatim.

I. THAILAND HAS EXPERIENCED NO PREJUDICE FROM ANY ALLEGEDLY IMPRECISE CLAIMS BY POLAND AND THAILAND'S REQUEST FOR A PRELIMINARY RULING DISMISSING POLAND'S CLAIMS SHOULD BE DENIED

7. As a preliminary matter, Thailand has argued that Poland's Request for the Establishment of a Panel (the "Request") failed to meet the requirements of Article 6.2 of the Dispute Settlement Understanding (the "DSU"). Thailand's claim misconstrues Article 6.2 DSU and the teachings of the Appellate Body in *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*.¹ It is plain that Thailand has long had actual knowledge of the exact nature of Poland's claims and has in no respect been prejudiced in "its ability to defend itself in the course of Panel proceedings."²

8. Article 6.2 of the DSU reads as follows:

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

¹ Report by the Appellate Body on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 ("Korea - Dairy Products"), DSR 2001:I, 3.

² *Ibid.* at para. 131.

terms of reference, the written request shall include the proposed text of special terms of reference.

9. The issue before the Panel, therefore, is whether Poland's Request provided "a brief summary of the legal basis of the complaint sufficient to present the problem clearly." Thailand appears to argue that Poland has merely listed Articles of the Anti-Dumping Agreement without identifying relevant subparagraphs, and that such a mere listing of articles is never sufficient for meeting the Article 6.2 DSU standard for due process.

10. Thailand does not properly interpret the holding in *Korea - Dairy Products* in the context of, and given the realities of, this proceeding. First, the Appellate Body has never held that an express listing of all sub-provisions of a particular article of a covered agreement is a sine qua non for a proper request for establishment of a panel under Article 6.2 DSU. Rather, the Appellate Body has made plain that the sufficiency of a Request shall be viewed "in light of the attendant circumstances", taking into account "whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings ..."³

11. In this regard, the Appellate Body has established an objective test - whether the respondent, in view of such attendant circumstances, has "been misled as to what claims were in fact being asserted against it as respondent".

12. Poland respectfully wishes to focus the Panel's attention on the precise language of the Appellate Body. First, because prejudice, if any, is to be judged on a "case-by-case basis"⁴ in light of "actual" circumstances, it shall be judged objectively. A respondent's subjective claims, regardless of the intensity of that party's rhetoric, shall not be given weight.

13. Second, as prejudice shall be viewed in light of "attendant circumstances" as they exist "in the course of the Panel's proceedings", any lack of precision is susceptible to prospective cure by a complainant. This consideration of attendant circumstances and the opportunity to cure any imprecision would logically appear to be even more compelling at the early stages of a proceeding, when the prospect of actual "prejudice" is all the more remote.

14. Third, an examination of "prejudice" should include an examination of intent - whether a complainant has sought to "mislead" another party - which, in turn, requires one to examine the clarity of any now-applicable requirements at the time the Request was originally submitted.

15. Finally, the Article 6.2 DSU requirements must be read in the context of dispute settlement as a whole, inter alia, "to secure a positive solution to a dispute" (Article 3.7 DSU) so as to provide "predictability" in the multilateral trading system and "clarify the existing provisions" of covered agreements (Article 3.2 DSU). Overly strict interpretations of provisions designed to ensure due process rights of all parties

³ Report by the Appellate Body on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 ("*Korea - Dairy Products*"), DSR 2001:1, 3, at paras. 124, 127.

⁴ *Ibid.* at para. 127.

would themselves impermissibly burden dispute settlement procedures and frustrate Members' intent to secure a "positive solution to a dispute."

16. In light of these considerations, Poland submits that Thailand's objections to the Request should be rejected for at least four reasons. First, Poland's claims are set forth in sufficient clarity to satisfy the terms of Article 6.2 DSU, particularly in light of the attendant circumstances in this case, including Thailand's actual notice of Poland's claims. Second, any lack of clarity in the Request has been cured by Poland's later actions. Third, Poland has never intended to mislead Thailand in these proceedings. Fourth, Thailand has not demonstrated, based on "supporting particulars"⁵, that it has sustained any meaningful prejudice as a result of the imprecision it now alleges.

17. The terms of Poland's Request are undoubtedly well known to the Panel by now. Poland's Request provides, in relevant part:

Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, inter alia, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement;

Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement;

Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement.⁶

18. In addition, Poland notes that its Request for Establishment states that further factual background regarding Poland's claims is set forth in the Request for Consultations, which provides greater detail regarding the violations that occurred in the underlying Thai investigation. We have attached as Exhibit POLAND 19 the document read to Thailand during those consultations, which details Poland's claims in full, listing sub-provisions of the relevant Articles, and otherwise, once again, giving actual notice to the respondent.

19. Turning now to the specifics of Thailand's claims, it is not correct, as Thailand argues, that this Request fails to satisfy Article 6.2 DSU simply because it fails to include an express listing of the sub-paragraphs of Article 2, 3, 5, and 6 of the Anti-Dumping Agreement. Thailand's argument puts form over substance. Rather, the Appellate Body has now indicated - months after submission of the Request at

⁵ Report by the Appellate Body on Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products, WT/DS98/AB/R, 14 December 1999 ("Korea - Dairy Products"), DSR 2001:I, 3, at para. 131.

⁶ WT/DS122/2, 15 October 1999.

issue - that a listing of such sub-paragraphs is not necessary (nor indeed necessarily sufficient), so long as "due process objectives" are, in fact, accomplished.⁷

20. In the same regard, Thailand argues that the above-referenced paragraphs constitute a "mere listing" of the relevant ADA provisions. In response, Poland need only refer the Panel to the Korea - Dairy Products case. There, without any of the attendant explanation contained in Poland's Request, the European Communities simply requested establishment of a panel for an unspecified "breach of Korea's obligations under the provisions of the Agreement on Safeguards, in particular Articles 2, 4, 5, and 12 of the said Agreement and in violation of Article XIX of GATT 1994."⁸ To equate these two requests, as Thailand suggests, simply because both lack an express listing of sub-paragraphs, is simply not meaningful. It ignores, for example, the fact that Poland's explanation of its Article 3 claims is hinged on express language reflecting the relevant sub-paragraphs 1, 2, 4, and 5 of Article 3. Furthermore, the EC's terse request in Korea - Dairy Products must be viewed in light of its equally terse request for consultations. By contrast, Poland's request for consultations in this dispute and the documents presented at that meeting, as evidenced by Exhibit POLAND 19, demonstrate that the actual subject matter of Poland's claim was repeatedly communicated to Thailand. Thailand similarly ignores the fact that this panel proceeding relates squarely to the actual subject matter of the Thai investigation, in which each of Poland's claims previously were made directly to Thai authorities.

21. The Appellate Body has, of course, mandated that Panels examine Requests not only in terms of the precise language at issue, but more meaningfully, in light of the particular circumstances of the proceeding. Pursuant to this inquiry, Thailand's impassioned pleas ring particularly hollow. As set forth in Poland's Responses to Questions from the Panel, Thai authorities have known for many years of Poland's concerns regarding the Kafkaesque nature of the Thai investigation and the lack of any required basis for imposition of anti-dumping duties on Polish firms. It is perhaps important to detail the Polish concerns once again.

22. As regards Poland's Article 5 ADA claims, it is plain that, from the middle of 1996, Poland has complained to Thai authorities about the lack of evidence of injury or causation in the SYS petition, the failure of Thai authorities to examine the sufficiency of that petition before they initiated this investigation, and the failure of Thailand to give proper notice to Poland before initiation of this investigation.⁹

23. As regards Poland's Article 6 claims, from early 1997, Poland has complained to Thai authorities about the incomprehensibility of the non-confidential summaries that were supplied and about the failure of Thai authorities to explain their evaluation, if any, of relevant evidence.¹⁰ Now that we know that such a document exists, we also are complaining of Thailand's failure to provide Polish respondents the non-confidential summary of the SYS questionnaire response, Exhibit THAILAND 21, during the investigation.

⁷ *Korea - Dairy Products*, *supra*, footnote 1, at para. 126; *see also id.* at 123-31.

⁸ WT/DS98/4, 12 January 1998.

⁹ *See* Poland's 29 March 2000 Response to Question 4 from the Panel.

¹⁰ *Ibid.*

24. As regards Poland's Article 2 claims, from the time of the preliminary determination in January 1997, Poland has complained to Thai authorities about the use of an "unreasonable" amount of profit in its constructed value calculation of normal value.¹¹

25. Most importantly, as regards Poland's Article 3 claims, from the time of the preliminary determination in January 1997, Poland has complained to Thai authorities about the lack of evidence to support a determination of injury by reason of Polish imports, the incoherence and internal inconsistency of the non-confidential documents supplied, and the failure of Thai authorities to explain their evaluation, if any, of relevant evidence.¹² These complaints have now proven prescient, as Exhibit THAILAND 44 demonstrates.

26. All of these points were raised again in the context of the bilateral consultations that took place in Geneva on 29 May 1998.

27. Based on the foregoing realities, it is plain that Thai authorities were in no way burdened in the effective exercise of their rights in this matter. Furthermore, we would emphasize again that the existence of prejudice is not seen in a simple snapshot, but rather in light of the circumstances of a case "in line with the letter and spirit of Article 6.2." In this regard, even any temporary uncertainty, if indeed objectively based, has long been resolved by Poland's First Written Submission, First Oral Statement and Concluding Statement, and answers to quite detailed questions from the Panel during the First Substantive Meeting. For Thailand to claim otherwise has begun to border on the disingenuous.

28. Poland further notes that Thailand's own requests for establishment submitted to the dispute settlement body have not employed the same level of specificity which Thailand now claims is required of others, and that this discrepancy speaks for itself. For example, in Thailand's request in United States - Import Prohibition of Certain Shrimp and Shrimp Products, Thailand (and Malaysia) requested the panel "to find, inter alia, [that the United States] failed to carry out its obligations and commitments under several provisions of the WTO Agreement, including but not limited to Article XI, Article I, and Article XIII of the GATT" and that "such failure is not justified by any provision of the said agreements, including the exceptions set forth in Article XX of the GATT"¹³ Similarly, in its September 1999 request for establishment of a panel in Colombia—Safeguard Measures on Imports of Plain Polyester Filaments from Thailand, Thailand requested that the panel find that "Colombia has failed to carry out its obligations under several provisions of the WTO Agreement, including but not limited to Article 2 and 6 of the ATC".¹⁴

29. Thailand's claims in this regard should be viewed in the light of its own practices during this proceeding. In particular, it is noteworthy that Thailand's Request for Preliminary Ruling lacks any evidence of actual prejudice. As the Appellate Body has made clear, actual prejudice, not imprecise claims thereof, is a necessary prereq-

¹¹ See Poland's 29 March 2000 Response to Question 9 from the Panel.

¹² *Ibid.*

¹³ WT/DS58/2, 10 January 1997.

¹⁴ WT/DS180/1, 8 September 1999.

uisite for the sweeping relief Thailand is now seeking. The burden is on Thailand to "demonstrate" by means of "supporting particulars" how it has sustained *any* prejudice - let alone a degree of prejudice that would justify the sweeping action it now seeks. Simply put, Thailand has failed to meet that burden of proof.

30. This burden should be particularly high with respect to Thailand's allegations of prejudice arising from Poland's claims under Articles 2 and 3. These allegations were raised only in Thailand's closing statement to the Panel, long after Thailand's other Article 6.2 DSU allegations. The implication therefore is that somehow Poland's claims became less clear to Thailand during the "actual course of the panel proceedings". Any such view is completely without merit. We note, for example, that Poland responded orally to very precise questions from Thailand and the Panel regarding its claims under these provisions. Yet Thailand simply ignores the clarifications it sought and received from Poland. Such intentional confusion is no substitute for a demonstration, based on supporting particulars, of actual prejudice.

31. Finally, we submit that the Panel's concern for due process in this proceeding must also take account of Thailand's remarkable attempts to make *ex parte* submissions of "secret" data to the Panel. Surely, those attempts - characterized as "bizarre" by the European Communities - have led to commensurate expenditures of "scarce resources" by parties and third parties.¹⁵ We would point also to Thailand's submission to the Panel of a non-confidential questionnaire response by SYS, Exhibit Thailand 21, which was never supplied to Polish respondents in the investigation. Poland places its faith in the Panel's declaration that it would adopt procedures to ensure that Poland would not be prejudiced as a result of those Thai submissions. The time has long since passed for Thailand to do the same.

II. THAILAND MISINTERPRETS ARTICLE 17.6 ADA, WHICH REQUIRES A THOROUGH REVIEW BY THE PANEL AND DOES NOT SUPPORT THE NEAR TOTAL DEFERENCE REQUESTED BY THAILAND

32. In both its written and oral submissions to the Panel, Thailand advances a claim that the Article 17.6 ADA standard of review requires the Panel to afford near complete deference to all factual claims, practices, and legal interpretations made by the Thai authorities. Thailand deems all its actions "permissible", largely dismissing any notion that the customary rules of interpretation set forth in the Vienna Convention should play a substantive role in resolving any ambiguity in relevant provisions.¹⁶ Thailand apparently hopes to avoid a substantive or serious examination of its practices by the Panel.

33. For the reasons outlined below and as set forth previously, Poland respectfully disagrees with this interpretation. In the present case, facts were *not* properly established by national authorities, and even those few facts properly established were *not* evaluated in an objective and unbiased manner. Furthermore, the Thai prac-

¹⁵ Third Party Oral Presentation by the European Communities, 8 March 2000, at para. 4.

¹⁶ *See, e.g.*, First Written Submission of Thailand at para. 42.

tices in this case are not consistent with the correct interpretation of the relevant Anti-Dumping Agreement provisions at issue. These provisions do not admit of more than one correct interpretation regarding the Thai practices in this case, as though the commonly agreed international obligations in the ADA somehow establish one obligation for a particular Member and a completely different obligation for another Member. As a result, the Panel should not accord inappropriate deference to the Thai actions at issue herein.

34. In its prior submission and statements, Poland has set forth its basic understanding of Article 17.6. With respect to factual questions, under Article 17.6(i) the Panel must first determine whether Thai authorities' establishment of the facts was *proper*. Of course, WTO panels are not in a position to re-determine every factual determination made by a national authority, and Poland does not suggest that such is their role. At the same time, Article 17.6(i) makes clear that in the discharge of its duties, a panel must perform "an assessment of the facts of the matter." Poland submits that in order for the Thai authorities' "establishment" of the facts to be "proper", at an absolute minimum those record facts must first be *consistent* with one another. Therefore, a national authority cannot be found to have established properly any "fact" when that alleged "fact" is contradicted by another "fact" elsewhere in the record of the same proceeding. Such a "fact" is not even established, much less properly so.

35. "Proper" establishment of facts includes several additional requirements which direct the Panel to examine the actions of the Thai authorities in this dispute. Facts cannot be properly established if the respondents in an investigation are not given, *inter alia*, the opportunity to provide all relevant facts, to review the material facts alleged against them, and to correct any mistaken allegations upon which the authorities plan to base their final determination. Therefore, in addition to the consistency of the facts "established", the fact-gathering and evaluation procedures employed by the Thai authorities are also directly relevant to the Panel's required assessment of the facts. National investigating authorities cannot claim to base their determinations on documents outside the record that are not shared with the parties to an anti-dumping investigation.¹⁷ The facts relied upon by Thailand must not only be consistent with one another, but the evidentiary procedures used to gather those consistent facts must also have been fair and open.

36. For those facts found to have been established properly, the Panel must then determine, in light of all available evidence, whether the authorities' evaluation of the facts at issue was *unbiased* and *objective*. The ordinary meaning of "objective" is "expressing or dealing with facts or conditions as perceived without distortion for personal feelings, prejudices, or interpretations"¹⁸ The ordinary meaning of "unbiased" is "not unduly or improperly influenced or inclined; unprejudiced, impartial."¹⁹ An evaluation is not "objective" unless *all* evidence is considered and then weighed without any favouritism toward a national producer or industry. Thus, the baseline of

¹⁷ See *Korea - Anti-Dumping Duties on Imports of Polyacetal Resins from the United States* Report of the Panel (ADP/92, and Corr.1*), 2 April 1993, at paras. 19, 24, 27, 207-209.

¹⁸ Webster's Ninth New Collegiate Dictionary (1990).

¹⁹ Oxford English Dictionary (1971).

an "objective" evaluation is that when a provision of the Anti-Dumping Agreement, such as Article 3.4, requires examination and evaluation of several factors in making a determination, the national authorities should not be permitted to pick and consider only those factors they find convenient or believe might support their case. The omission or disregard of factors that an ADA provision requires authorities to consider is a *prima facie* case of bias in an evaluation.

37. With respect to Article 17.6(ii) - interpreting the extent of a Member's obligations under the Anti-Dumping Agreement and the consistency of a practice being challenged with those obligations - Poland has requested that the Panel turn first and foremost to the customary rules of interpretation of public international law, including the Vienna Convention, Articles 31 and 32. Poland's request in this regard is based on the explicit text of the first sentence of Article 17.6 (ii), which states that panels "shall" perform their interpretive task "in accordance with the customary rules of interpretation of public international law." The point of these interpretive rules is to resolve any ambiguities in a treaty's text. Thus, in virtually all instances, a panel will determine, consistent with the Convention's interpretive guidance, that a provision of the Anti-Dumping Agreement is *not* properly susceptible to more than one correct interpretation. In such instances, the Panel should base its ruling on the consistency of the Thai practice being challenged with the sole proper interpretation of the relevant ADA provision.

38. If, and only if, a panel determines that an Anti-Dumping Agreement provision somehow has multiple "permissible" interpretations in light of the practice or action being challenged, then the panel is instructed to defer to permissible interpretations consistent with the text of the Anti-Dumping Agreement. In Poland's view, such a circumstance would be extremely unusual, and is not present in the case before the Panel. Provisions of the Anti-Dumping Agreement are not subject to differing multilateral obligations, depending on the Member performing the interpretation of a given provision. The deference baselessly urged by Thailand would have exactly this result - creating several differing international obligations from the same ADA provision. Far more faithful to Article 17.6(ii) is a consistent multilateral interpretation based on a *multilateral* understanding of the ADA provision being examined. Effective panel review of the consistency of a Member's actions with the text of the Anti-Dumping Agreement otherwise would be rendered impossible.

39. Therefore, Article 17.6(ii) does not entitle a Member to deference for actions that the Member may deem "permissible", but which the panel determines violate the Member's obligations under the Agreement. In particular, the application of Article 17.6(ii) cannot afford deference to the practices of the Thai authorities in this dispute absent a determination of the Panel to this effect.

40. Not surprisingly, given its authorities' actions in this case, Thailand's professed understanding of Article 17.6 for purposes of this dispute is quite different. Thailand urges a near total deference on the part of the Panel to all actions of the Thai authorities, as Article 17.6 "provide[s] for considerably more deference to the factual and legal determinations ... than ... Article 11 of the DSU."²⁰ Thailand does

²⁰ First Written Submission of Thailand at para. 39.

not explain any material differences between Article 11 DSU and Article 17.6 ADA that justify the radical distinction Thailand wishes to draw, and there are none. Article 17.6 applies only to the degree it differs from Article 11 DSU. Indeed, both the DSU and Anti-Dumping Agreement require an "objective" assessment, and both require interpretation in accordance with the "customary rules of interpretation of public international law."²¹

41. Highlighting the similarity between Article 11 DSU and Article 17.6 ADA that it seeks to deny otherwise, Thailand first informs the Panel that it may not conduct a *de novo* review of the Thai authorities' "factual determinations", as held by a series of WTO cases utilizing the *Article 11* DSU standard of review.²² Thailand neglects to note that the same cases it cites as decisive authority also explain that under Article 11 DSU, "the applicable standard is neither *de novo* review as such, nor 'total deference'."²³ Using Thailand's logic, this balancing principle also applies a *fortiori* under Article 17.6.

42. Thailand next seeks to establish a requirement of total deference to its actions by asserting that international obligations assumed by Members under the Anti-Dumping Agreement have no meaning for purposes of dispute settlement under the Anti-Dumping Agreement. Rather, in Thailand's view, a Member apparently commits to one set of allegedly binding obligations that are not really binding, as Members may only be held accountable for an entirely different set of filtered commitments. Thus, Thailand remarkably asserts that the question of "whether Thailand has fulfilled its obligations under the specific provisions [of Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement] is *not* before the Panel."²⁴

43. Poland had thought this to be the very basis of its challenge of Thailand's actions - that they were inconsistent with Thai obligations under several important provisions of the Anti-Dumping Agreement. In Thailand's view, however, dispute settlement is not to determine whether a Member has or has not fulfilled its international obligations under the specific Articles of a covered Agreement. Rather, those obligations may only be viewed "*as defined, or modified*", by Article 17.6."²⁵ Thus, Thailand seems to assert that Members have two independent sets of "obligations": (1) those substantive obligations actually defined in Articles 2, 3, 5, and 6 of the

²¹ The Ministerial Declaration on Dispute Settlement Pursuant to the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 or Part V of the Agreement on Subsidies and Countervailing Measures, which explains the "need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures," argues for a narrow construction of Article 17.6 ADA and a narrow reading of any differences between Article 11 DSU and Article 17.6 ADA. The Appellate Body has made clear that Article 17.6 applies only to the ADA, while Article 11 DSU applies to the SCM Agreement. Report by the Appellate Body on *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, 14 December 1999, DSR 2000:I, 515, at para. 118. Consistent resolution of disputes between the ADA and SCM Agreement is, therefore, most likely to be achieved when Article 17.6 is properly read narrowly.

²² First Written Submission of Thailand at para. 40.

²³ Report by the Appellate Body on *EC Measures Concerning Meat and Meat Products (Hormones)*, AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, DSR 1998:I, 135, at para. 117 (emphasis added).

²⁴ First Written Submission of Thailand at para. 43 (emphasis added).

²⁵ *Ibid.*

Anti-Dumping Agreement (which have no meaning in Thailand's view), and (2) those obligations, "as defined, or modified, by Article 17.6."

44. Thailand grossly misinterprets both its substantive obligations and Article 17.6. Members' obligations under the Anti-Dumping Agreement are not "defined" or "modified" by Article 17.6, and nothing in the text of the Anti-Dumping Agreement suggests that such is the case. Thailand further offers no citation in support of its proposition, as neither GATT jurisprudence, nor WTO panels nor the Appellate Body have ever suggested that such an approach to a Member's freely assumed international obligations might somehow be permissible. Thailand, of course, offers no explanation of which of its otherwise applicable "obligations" is "modified" by Article 17.6.

45. After suggesting that Members have two independent sets of differing obligations under the ADA, Thailand next asserts that under Article 17.6(i) any decision that "could have been made by a reasonable, unprejudiced person" is acceptable under the ADA standard of review.²⁶ Thailand is again incorrect. The words "could" and "reasonable" are found nowhere in the text of Article 17.6. Had the drafters wanted the more deferential standard suggested by Thailand regarding the mandated assessment of the facts, they were free to say so by, for instance, requiring panels to examine whether evaluations by national authorities "could have been" or "might have been" unbiased and objective. The drafters, however, did not adopt that standard. Instead Article 17.6 speaks of "proper" establishment of the facts, as well as an evaluation that "was unbiased and objective" (emphasis added).²⁷

46. The remainder of the Thai argument regarding the standard of review consists of an inexplicable Thai claim that Poland has not alleged bias by the Thai authorities, repeated assertions by Thailand that it is "clear" its authorities acted properly (thereby applying a standard it has not yet finished defining), and a brief attempt by Thailand to dismiss Article 17.6(ii) as without import, given the Thai view that there are multiple permissible (but unexplained and unarticulated) interpretations of the relevant AD Agreement Articles which should be given deference. We address each of these claims briefly below.

47. The Thai claim that Poland has not made a case for bias or lack of objective evaluation because Poland somehow failed to allege such bias on the part of Thailand is false and inexplicable. In the first paragraph of its legal argument, Poland notes that "the determination of the Thai authorities that Polish imports caused injury to the Thai domestic industry, in the complete absence of, inter alia, positive evidence to support such a finding and without the required 'objective examination' of the factors enumerated for purposes of such an examination was in direct contravention of Article VI of GATT 1994 and Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement".²⁸ As if this were not sufficiently clear, heading III.C.2 of Po-

²⁶ *Ibid.* at para. 45 (emphasis added).

²⁷ Thailand's reliance on *Guatemala Cement* and *Mexico-HFCS* is unpersuasive, as both panels were addressing the sufficiency of evidence warranted for initiation. The degree of evidence needed for initiation is certainly less than that required for the definitive imposition of anti-dumping duties. See First Written Submission of Thailand at para. 50, note 13.

²⁸ See First Written Submission of Poland at para. 38.

land's First Written Submission asserts that "The Thai Determination of Injury Was Not Based On Any Rational Reading of Positive Evidence, Did Not Involve An Objective Evaluation and Was Flatly Inconsistent With the Standards Set Forth in Article VI GATT 1994 and Articles 3.1, 3.2, 3.4 and 3.5 Anti-Dumping Agreement." Both statements provide obvious allegations that the Thai evaluations were not objective and unbiased.

48. The accuracy of the repeated Thai claims that it is "clear" its authorities acted properly is, of course, for the Panel to determine, not Thailand. With regard to Article 17.6(ii), Thailand treats this provision almost as an unfortunate afterthought, quickly dismissing the notion that the legal obligations of Articles 2, 3, 5, and 6, as applied to Thai practices in this case, require anything of Thailand. Thailand concedes the obvious - that application of the Vienna Convention will "in many instances ... lead to only one permissible interpretation" but then asserts that "in many other cases multiple permissible interpretations will exist".²⁹ Thailand does not offer a single example of a provision or subpart of Articles 2, 3, 5 or 6 that is properly subject to multiple correct interpretations. Nor does Thailand offer any support for its statement that Article 17.6(i), not Article 17.6(ii), applies "in most instances in the present dispute."³⁰ Instead, Thailand offers the summary conclusion that "where interpretation of applicable provisions of the Anti-Dumping Agreement was necessary" (as if there are some instances where the Agreement's requirements are not "necessary"), it acted permissibly.³¹ Thailand thus offers no substantive response to Poland's proper interpretation of Article 17.6(ii) and the fact that there will seldom be more than one permissible interpretation of a Member's obligations.

49. In sum, the Panel should read and utilize Article 17.6 ADA and Article 11 DSU together. Article 17.6 ADA applies only in the limited instances when it may differ with Article 11 DSU. Neither Article 11 DSU nor Article 17.6 ADA provides Thai authorities the deference they demand in this case. The limited latitude in Article 17.6 ADA does not extend to false legal interpretations, improper factual establishment, and biased factual evaluations which were not objective. The Panel should examine the full matter before it, including performing an assessment of the facts and a proper interpretation of the relevant Anti-Dumping Agreement provisions in accordance with the customary rules of interpretation of public international law. It should then apply those proper interpretations to the facts of this case.

III. THE THAI DETERMINATION OF INJURY WAS NOT BASED ON POSITIVE EVIDENCE, DID NOT INVOLVE AN OBJECTIVE EVALUATION AND WAS FLATLY INCONSISTENT WITH THE STANDARDS SET FORTH IN ARTICLE VI GATT 1994 AND ARTICLES 3.1, 3.2, 3.4 AND 3.5 ANTI-DUMPING AGREEMENT

50. In its First Written Submission, Thailand demonstrates a fundamental misunderstanding of the requirements of a proper injury determination as set forth in Arti-

²⁹ First Written Submission of Thailand at para. 56.

³⁰ *Ibid.* at para. 42.

³¹ *Ibid.* at para. 57.

cle 3 of the Anti-Dumping Agreement. Thailand appears to believe that it is free to rewrite the established and undisputed record of its injury determination, now claiming (for the first time) that any inconvenient or contradictory facts were simply "typographical" errors it is free to change after the fact for purposes of this panel proceeding.³² Thailand next claims that it "disclosed to interested parties *all* non-confidential information that was considered in reaching its final determination"³³, but then informs the Panel that its real decisions were based on supposedly secret data *of which there is no record or meaningful summary in the investigation*, and which was only recently provided to Poland after a Thai attempt at a prohibited ex parte communication with the Panel.³⁴ Given the alleged data which Poland has now reviewed in the "confidential" Thai exhibits, it is not surprising that Thailand initially attempted to prevent Poland and the Third Parties from even reviewing the data.

51. Remarkably, Thailand informs the Panel that "the clarity of the public summary of confidential information is *irrelevant* to the viability of the injury determination ... based on *confidential* information."³⁵ Thailand apparently feels free to have its investigating authorities claim to base their determinations on documents outside the record that are not shared in any coherent form or manner with the parties to an anti-dumping investigation. The panel should not permit the use in panel proceedings of secret documents offered post hoc as evidence of the existence of the legal prerequisites for an anti-dumping determination.

52. Thailand concludes its defence of its injury determination by repeatedly informing the Panel that because an injury factor is mentioned in a Thai document, that injury factor was definitely and properly established, correctly "considered" and properly "evaluated".³⁶ Thailand offers no evidence of any meaningful establishment, consideration and evaluation of several factors enumerated in Article 3, and utterly ignores the requirement that it explain why it did not give weight to the factors it did not discuss. In short, Thailand makes no demonstration that dumped imports are causing material injury to SYS. As such, Thailand violates several requirements of Article 3 ADA.

53. Poland set forth material violations by Thailand of Articles 3.1, 3.2, 3.4 and 3.5 ADA and Article VI:6 of GATT 1994 in its First Written Submission and Oral Statement at the First Meeting with the Panel. We now wish to discuss these provisions seriatim.

A. *Thailand Demonstrates a Fundamental Misunderstanding of the Requirements Set Forth in Articles 3.1 and 3.2 Anti-Dumping Agreement*

54. Poland views the requirements of Article 3.1 as plain and well-settled: a proper determination of injury *must* be based on "positive evidence" and "an objec-

³² See, e.g., First Written Submission of Thailand at para. 79, footnote 71.

³³ *Ibid.* at para. 77 (emphasis added).

³⁴ See, e.g., *id.* at paras. 89, 92, 95, 96.

³⁵ *Ibid.* at para. 96 (emphasis added).

³⁶ See, e.g., *id.* at paras. 89, 98, 105.

tive examination" of the facts, including both the volume of allegedly dumped imports and their effect on prices for the domestic like product, as well as the impact of the imports on the domestic industry. In support of its claim of violation of these fundamental requirements, and consistent with the teachings of the panel in *Mexico - High Fructose Corn Syrup*³⁷, Poland has identified in its First Written Submission and its First Oral Statement a litany of failures by the Thai authorities, as well as a multitude of confused, internally inconsistent, and simply false factual statements and legal conclusions without any factual basis.

55. As discussed more fully below, Thailand purports to determine that Polish prices went down, when in fact they went up; that Thai prices plummeted, when in fact they did not; that Polish and Thai price movements were linked, when the opposite is true; that Polish volumes surged, when in fact they did not; that Polish market share was large and expanding, when the "secret" Thai statistics presented to the Panel and Poland are gibberish; that domestic prices were lower than export prices, when the opposite is true - all while ignoring other factors on the record, such as SYS' high start-up costs, the level of demand of the local construction industry, the highly aggressive nature of SYS' entry into the H-Beam market, technology developments, and the Kobe earthquake. In response to Poland's claims and the facially obvious contradictions in its own alleged data, Thailand replies simply that Poland has supplied "no evidence" and otherwise "failed to meet its burden of proof".³⁸ We respectfully submit that the facts establish otherwise.

56. With respect to Poland's Article 3.2 claims, Poland respectfully notes that the requirements of these provisions are clear: to find injury, a national authority must find "a *significant* increase in dumped imports" (emphasis added) and "a significant degree of price depression or price suppression." In response, Thailand repeatedly claims that the Thai authorities "clearly" considered whether volume increases were "significant" and whether price depression or price suppression was "significant".³⁹ However, the Thai *determinations* do not contain any such statements or provide any such evidence whatsoever. Furthermore, as Poland and other Members have noted, Thai law at the time was inconsistent with the Anti-Dumping Agreement and did *not* require any such findings.⁴⁰ We therefore find it remarkable that Thailand now seeks to "reiterate"⁴¹ that it found "significant" required volume increases or price effects -

³⁷ *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, DSR 2000:III, 1345, at para. 7.118. At its meeting on 24 February 2000, the Dispute Settlement Body adopted the panel's report. WT/DS132/4, 29 February 2000.

³⁸ *Ibid.* at para. 81; see Thailand's Oral Statement at paras. 29-37.

³⁹ See, e.g., First Written Submission of Thailand at paras. 82, 87, and 94.

⁴⁰ Thailand offers no response in its First Written Submission to the material discrepancy between Article 3.2 of the Anti-Dumping Agreement and Article 7.2 of the Thai anti-dumping law in effect for the Thai investigation of Polish H-Beam steel products. The Thai law, contrary to the ADA, did not require the Thai national authority to consider whether any increases in volume of the imported products were "significant," whether any price undercutting was "significant," whether prices were depressed to a "significant" degree, or whether imports prevented price increases to a "significant" degree. No such determinations were made on the record of the investigation, itself a plain violation of the ADA.

⁴¹ *Ibid.* at para. 91.

one cannot "re-iterate" what one has not once properly established or stated in the first place.

57. Thailand next asserts that it had no obligation to provide comprehensible non-confidential information to Poland as regards price underselling (and by implication other issues).⁴² Thailand admits that "one cannot determine from the public version of this chart alone which products were undersold" , but then claims, *without any citation*, that "[w]hen read in light of other statements appearing elsewhere in the record, however, a reader can readily grasp the pattern of underselling by the dumped Polish imports".⁴³ This claim is breathtaking, for it is Thailand's obligation to provide coherent, rational and consistent explanations for its findings, not Poland's obligation to search futilely through the record in search of any evidence of an unspecified and unproven "pattern" of underselling.⁴⁴ Moreover, this statement only underscores the failure of the Thai authorities to find "significant" underselling - or to document the alleged "underselling" that they did indeed "find" .

58. The next step of this required Article 3 ADA inquiry is whether the Thai authorities properly evaluated all relevant economic factors and indices in order to judge the significance of their impact. Because Poland and Thailand agree on the centrality of this element in assessing the compatibility of Thailand's actions with Article 3, we now discuss Article 3.4 in detail.

B. Thailand Demonstrates a Fundamental Misunderstanding of the Requirements Set Forth in Article 3.4 Anti-Dumping Agreement

59. In its First Written Submission, Thailand demonstrates a fundamental misunderstanding of the requirements of Article 3.4 ADA. Thailand falsely claims to have considered and evaluated all relevant factors, when several factors are not even so much as mentioned in its analysis.⁴⁵ For those mandatory factors deemed worthy of a simple brief reference by the Thai authorities, Thailand seems to believe that a conclusory statement without any supporting evidence suffices for the evaluation required by Article 3.4 ADA. As explained below, Poland respectfully disagrees.

60. Article 3.4 provides guidance with regard to the proper factors that must be considered and evaluated in determining how "significant" an impact imports have on the domestic industry, stating that the evaluation by the investigating authorities "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; factors affecting domestic prices; the magnitude of the margin of dumping;

⁴² First Written Submission of Thailand at para. 95.

⁴³ *Ibid.*

⁴⁴ Article 3.7 Anti-Dumping Agreement provides additional contextual support for the fundamental Article 3 requirement that injury and causation be *demonstrated* rather than assumed, providing that determinations regarding threat of material injury "shall be based on facts and not merely on allegation, conjecture or remote possibility."

⁴⁵ See First Written Submission of Thailand at paras. 97-106.

actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.⁴⁶

61. As Poland discussed with the Panel during the First Substantive Meeting, Article 17.6(i) ADA requires that when a panel examines national authorities' actions, establishment of all facts by the investigating authority must be "proper" (including the state of the factors specified in Article 3.4), and that any evaluation of facts (again, including Article 3.4 factors such as actual decline or increase in sales, etc.) must be "unbiased and objective." The legal weight to be given to those facts properly established and objectively evaluated is a function of the proper legal interpretation of the ADA provision at issue, understood in accordance with the customary rules of interpretation of public international law (see Article 17.6(ii)).

62. In Poland's view, the required consideration, evaluation and weighting applied to the factors listed in Article 3.4 would be a "proper" establishment of the facts only when *all* factors were considered. In the same light, the factors can only be "objectively" evaluated if they are *all* considered, weighed and discussed. Thus, the minimum starting point of an "objective" evaluation is a recognition that when Article 3.4 explicitly requires examination and evaluation of several specified economic factors ("including ...") in making a determination, Thai national authorities should not be permitted to pick and consider only those factors they find convenient or believe might support their case.

63. The omission or disregard of factors that Article 3.4 requires to be considered is a *prima facie* case of bias in an evaluation, and this is exactly what has happened in the present situation. If all factors are not carefully considered, there is no "objective" means by which to judge the degree to which a factor may be more or less relevant to the determination being made. Furthermore, as the text of Article 3.4 makes clear, all listed factors are presumed to be relevant unless shown and explained to be otherwise ("shall include an evaluation of all relevant economic factors ... including ..."). Therefore, if national authorities deem a listed factor somehow not relevant to their determination, they must explain why (in a rational manner consistent with other facts/evidence in the investigation) in the text of their final determination.

64. Since Poland's First Written Submission in this dispute, the requirements of Article 3.4 have also been considered and explained at length by the panel in *Mexico—High Fructose Corn Syrup*.⁴⁷ The *Mexico-HFCS* panel's interpretation of Article 3.4 is consistent with the interpretation set forth by Poland in this case, and the panel completely rejects the Thai suggestion that authorities are free to pick and choose which Article 3.4 factors they will consider, properly evaluate and discuss. First, the panel correctly explains that the text of Article 3.4 is "mandatory", with the "language mak[ing] it clear that the listed factors in Article 3.4 *must* be considered *in all cases*".⁴⁸ The panel further explains that "[t]here may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be *required*."⁴⁹ The panel concludes by explaining that consideration of each of the

⁴⁶ Emphasis added.

⁴⁷ *Mexico -High Fructose Corn Syrup*, *supra*, footnote 37, at paras. 7.128-7.131.

⁴⁸ *Ibid.* at para. 7.128 (emphasis added).

⁴⁹ *Ibid.* (emphasis added).

Article 3.4 factors "*must* be apparent in the final determination of the investigating authority"⁵⁰, and that other panels have made clear in similar contexts that "while the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors".⁵¹

65. The Mexico-HFCS panel's conclusion that all factors must be properly considered finds additional support in light of the change in the relevant text between Article 3.3 in the Tokyo Round Anti-Dumping Code and the present analogous Article 3.4 Uruguay Round ADA. While few changes were made to the text, one change was to delete the words "such as" and insert the word "including." The plain meaning of this change is that while the list of factors to be considered in the Tokyo Round Code could plausibly be considered illustrative examples (such as ...), no such freedom exists in Article 3.4 ADA ("all relevant factors ... including ..."). "Such as" is not synonymous with "including", according to the definitions supplied by the Oxford English Dictionary, and if no change in meaning was intended, there was absolutely no need for the drafters to change the text.

66. In sum, in order for an investigating authority's actions to be consistent with Article 3.4, the investigating authority must consider *all* of the enumerated factors as well as their relevance, clearly explain on the record in the final determination available to the parties which factors, if any, are not relevant and the precise objective reason(s) this is the case in the context of all evidence, and then carefully and fully evaluate and explain each remaining listed factor, as well as any other factors before it that bear on the state of the domestic industry. Each factor in Article 3.4 must be addressed in order for the fact-finding portion of this endeavour to be objective and unbiased.

67. The record in this dispute makes clear that the Thai authorities failed to act consistently with each Article 3.4 requirement. First, Thailand failed even to consider several factors mandated by Article 3.4, including actual and potential decline in productivity, the magnitude of the margin of alleged dumping, actual and potential negative effects on wages, actual and potential negative effects on ability to raise capital, actual and potential negative effects on investments, and actual and potential decline in profits. Thailand has failed to offer any explanation for ignoring these enumerated factors or any evidence that their arbitrary exclusion was based on objective criteria - indeed, it is difficult to see how relevance can be objectively assessed if a factor is not even considered.

68. Second, it is not discernible from the published Thai Final Determination and documents provided to the respondents whether the Thai authorities even evaluated with any adequacy the factors they claimed to "consider." Conclusory statements are not a surrogate for the objective evaluation mandated by Article 3.4. Thailand not only refuses to discuss several specified factors, but it further offers no explanation of the weight it purportedly gave to each factor and the reasons for assigning that weight, both for factors allegedly "considered" and for those completely ignored.

⁵⁰ *Ibid.* (also citing Article 12.2.2) (emphasis added).

⁵¹ *Ibid.* at 7.129.

69. Third, the post hoc secret documents that were never acknowledged or provided to anyone in any form during the case lend no support to the Thai claim to have satisfied Article 3.4. Proper determinations by investigating authorities may not be based on secret documents outside the established record that are never shared or accurately summarised for the parties to an anti-dumping investigation. Further, as detailed below, in numerous material instances, the confidential documents belatedly supplied by Thailand to Poland and Third Parties flatly contradict other alleged record evidence.

70. Lastly, as Thailand is forced to concede, even by the terms of its own deeply flawed and contradictory evaluation, "considered" factors point inescapably to the lack of injury. SYS's production, capacity, capacity utilization, employment, domestic sales volume, overseas sales volume, and market share *all* increased in the IP. The Thai authorities explain that "most evidence[] of domestic injury indicate a positive performance of the [sole Thai] company."⁵² Indeed, although Thailand now claims, after the fact and in the face of this dispute settlement proceeding, that its market share figures were typographical errors, the record of the investigation shows that SYS was so healthy that the company captured over 55 per cent of the domestic market within less than 16 months of selling its first H-Beam.⁵³ Even the few factors alleged by Thailand somehow to favor a finding of injury are contradicted by other clear evidence on the record, as discussed below.

71. In short, no objective reader could consider the Thai final injury determination to have met the requirements of Article 3.4 or to be a proper explanation of the Thai authorities' consideration, evaluation and weighing of the mandatory Article 3.4 factors. Thailand failed to establish properly the material facts (as several contradict one another), it failed to evaluate them in an unbiased and objective manner (as several were ignored), and it failed to meet the legal standard set forth in Article 3.4 requiring evaluation of all relevant economic factors and indices.

C. *The New Secret Thai Data Flatly Contradict the Most Important Public Factual Findings on Injury, Demonstrating that the Thai Final Injury Determination is not Based on Positive Evidence or Objective Examination of Relevant Facts*

72. The ability to comment in significant detail on the confidential data provided by the Thai authorities (just prior to the First Meeting with the Panel) remains somewhat limited for one predominant reason: many of the secret Thai data fundamentally contradict the public Thai data actually shown to and relied upon by the parties during the Thai national proceeding. A typical simple example amply illustrates the issue. Pricing of imports is necessarily central to any proper examination and evaluation of possible injury. Yet, in three places, the Thai authorities provide three completely different figures *for the same purported fact regarding import pricing*. The public Draft Final Injury Notice (at par. 6 and in the Table "Price Data of H-Beams") states that average CIF import prices were 8,754 Baht during the investigation pe-

⁵² Final Injury Information Notice at page 3, para. 16. Exhibits POLAND 10, 11.

⁵³ See First Written Submission of Poland at para. 17 and accompanying chart.

riod. Yet, in the secret Exhibit 44, at paragraph 1.9.1, the Thai authorities state that average CIF import prices were 9,462 Baht during the investigation period. Later in the same exhibit (this time at paragraph 4.6), Thailand states that the average CIF import price was 10,782 Baht. The Thai authorities thus manage to contradict themselves on essential data.

73. The new secret Thai data are remarkable when considered in this light. Not only are fundamental due process concerns implicated, but, in addition, if "proper" establishment of the facts under Article 17.6(i) is to have any meaning, it must certainly stand for the proposition that authorities *not* be permitted to "establish" two (or three) sets of contradictory facts and use whichever set they deem to suit their purposes in a given instance. Poland has therefore posed written questions to Thailand regarding some of the more glaring inconsistencies raised by the recent Thai submissions. Once Thailand has made clear which of its apparent "facts" it is willing to stand behind and the reasons therefore, we would expect to offer substantial additional confidential comment to the Panel.

74. In the face of this perplexing limitation, Poland notes that there were effectively three factors allegedly relied upon in the final determination as somehow demonstrating injury to SYS: the "influence" of Polish prices on Thai prices, which supposedly forced Thai producers to lower their prices to "match" Polish price levels; increase in Polish import volumes; and increase in Polish share of the Thai market. These factors then were deemed, without explanation, to result in price undercutting and price suppression, and to render SYS unable to "recover cost in a reasonable period of time", a finding Thailand apparently links to issues of profit/loss, return on investment, and cash flow, the three factors allegedly "considered" (but not evaluated) by Thai authorities, as discussed above. Because each of these Thai findings is improper, without rational basis and biased, we wish to consider each *seriatim*.

1. The "Influence" of Polish Prices

75. The heart of the DIT's claimed injury finding is the "influence" of Polish prices on the prices of SYS. The Final Injury Determination implies that this influence was dramatic, so much so that average CIF Polish import prices and average SYS prices "move in the same direction" (paragraph 2.2), that SYS had to reduce its prices sharply to "match" Polish prices (paragraph 2.5) and that SYS "has no choice but to decrease its price to the level of Polish imports" (paragraph 2.3). The influence of Polish imports was allegedly demonstrated (paragraph 2.4) by comparison of the Thai market with SYS' export markets, because, as stated in the Final Injury Information Notice, "SYS can sell [its] exports at the price higher than in the domestic market", implying that prices in Thailand would be higher, but for unfairly priced imports.⁵⁴

76. According to Thailand itself, however, none of these findings is correct. They are contradicted by evidence on the non-confidential record - and shattered by the new "confidential" information in Exhibit THAILAND 44.

⁵⁴ Final Injury Information Notice, para. 10.

77. Let us begin with the non-confidential data. These Thai "findings" are contradicted by the data contained in Final Injury Notice Table 1 on Average Quarterly Prices. Table 1 contradicts the first vital finding regarding injury - that average Polish CIF prices and average SYS prices "move in the same direction". Plainly, that was not so, for they move in the same direction less than half the time.⁵⁵ Table 1 also contradicts the second vital finding regarding injury - that SYS lowered its prices to "match" those of Poland. The record clearly shows that SYS entered the market at prices well above those of Polish imports and that SYS prices in the IP were well above those for 1995.⁵⁶ Thirdly, Table 1 punctures any claim of price leadership by Polish firms - for it was SYS that plainly precipitated the first decline in prices during the IP (4th quarter 1995).

78. Exhibit THAILAND 44 for the first time allows Poland to attach purported numbers to Thailand's erroneous conclusions. First, Exhibit 44 shows that Polish prices went up, not down, from 1995 to the IP. Exhibit 44 (at paragraph 1.9.2) shows Polish prices (in Baht/metric ton) moving from 8,409 Baht in 1995 up to 8,473 Baht in the IP.⁵⁷ By contrast, the public Final Injury Information Notice (at paragraph 6 and the Table entitled "Price Data for H-Beams") shows Polish prices moving from 8,409 Baht in 1995 down sharply to 7,975 Baht in the IP. Thus, according to Thailand's own alleged secret data and despite Thailand's public statement to the contrary, Polish prices were rising in the IP.

79. As regards Thai prices, the Final Determination states that they fell sharply to "match" Polish prices. However, Exhibit 44, paragraph 1.12.6, states that for the four quarters of the IP, they were [P+ 3,067.38] Baht, [P+ 2,869.38] Baht, [P+ 1,974.38] Baht, and [P+ 1,768.38] Baht. Two pages later, at paragraph 1.17.1, the Thai authorities appear to change their mind, providing different figures for Thai domestic selling prices during the IP - this time the "facts" are purportedly [P+ 3,002.38] Baht, [P+ 2,869.38] Baht, [P 1,974.38] Baht, and [P+ 1,739.38] Baht.⁵⁸ Whichever set of figures for Thai prices is correct (if either) and whichever set of figures for Polish prices is correct (if either), one fact seems plain - Thai prices during the IP were thousands of Baht more per metric ton than Polish prices. The "finding" in the Final Injury Determination - that SYS reduced its prices to "match" the level of Polish imports - is, using Thailand's own alleged data, therefore demonstrably pure fiction.

80. Turning next to the notion that Polish prices so influenced Thai prices that they moved in the same direction, this also is shown to be false by the new "secret" "facts." As demonstrated above and as expressly found by the DIT, Polish prices

⁵⁵ Final Injury Determination at 2.2. They move in the same direction in 3Q 1995 and 1Q 1996, but in opposite directions in 2Q 1995, 4Q 1995, and 2Q 1996.

⁵⁶ It is also plain that SYS entered the market at prices well above those of the Polish importers. See, e.g., Exhibit THAILAND 41 and page 2 ("the complainant entered the Thai market at significantly higher prices than Polish product ...").

⁵⁷ This figure is repeated in para. 1.11 of Exhibit 44.

⁵⁸ It is unclear why there are different prices listed here than in para. 1.12.6.

were "stable"⁵⁹ increasing modestly from 1995 through the IP. Thai prices were also stable, decreasing modestly during the same time period. They surely did not move in the same direction.⁶⁰ Indeed, as the DIT expressly stated in assessing the Thai domestic market, "*there is price stability with reference to the subject merchandise.*"⁶¹ In the light of such price stability, what remains a mystery is how the Thai authorities could determine the existence of such a strong and negative Polish "influence" on the prices of SYS. It also remains a mystery how they were able to track quarterly price movements in the non-confidential Final Injury Notice, when no quarterly price data for Polish firms is contained in the purported confidential version thereof.⁶²

81. Moreover, as discussed previously, by using CIF prices and ignoring those many cost factors (port fees, regular duty, commissions to local agents, inland transportation costs) that must be included for a proper comparison of domestic prices with CIF import prices, it is plain that Thai authorities have understated the actual level of import prices, again to the detriment of Polish respondents.⁶³

82. The last major claim in the Final Determination regarding injury by reason of price levels is that SYS sold at higher prices in export markets and that, but for unfairly priced imports, SYS would sell at higher prices domestically. We recall that Thai authorities stated in their Final Injury Information Notice, "SYS can sell [its] exports at the price *higher than in the domestic market.*"⁶⁴ The major problem with this claim is that it is flatly contradicted by the new "secret" evidence. As Exhibit 44 states, [X-Conf.].⁶⁵ Apparently, therefore, the statement regarding SYS' higher export price was invented for purposes of the non-confidential version of the Final Determination.

83. The Thai claim regarding higher export prices is particularly telling because it shatters one of the DIT's essential myths - that somehow Polish firms were unfairly subjecting SYS to domestic market conditions far more adverse than would otherwise apply. The realities are quite different - prices in the Thai market were "stable" and well above those in other markets where SYS sold its products. Thai prices remained well above Polish prices with little movement in either direction. SYS did so well that it captured over 55 per cent of the domestic market within 16 months of operation. If export prices had matched Thai domestic prices, it might well have been profitable, a remarkable achievement for any new firm in a capital-intensive industry producing commodities. SYS' failure to meet its ambitious goals - as a result of low prices in overseas markets - is hardly the responsibility of the Polish industry.

⁵⁹ Exhibit 44, para. 1.9.2 ("[t]he average C.I.F. price of imports from Poland remain stable" from 1994 to 1995 to IP).

⁶⁰ This fact was clear even from price movements shown on the Table 1 of the Final Injury Notice.

⁶¹ *Ibid.* at para. 5, page 13 (emphasis added).

⁶² Exhibit 44, para. 1.9 lists only average CIF prices for Polish imports on an annual basis.

⁶³ See Poland's First Written Submission, at para. 27.

⁶⁴ Final Injury Determination at para. 2.4 (para. 10).

⁶⁵ Exhibit THAILAND 44, para. 1.12.6 (first indent) (emphasis added).

2. *Did Polish Imports Increase?*

84. The second alleged cornerstone of the Final Injury Determination (at paragraph 2.1) is the "fact" that the level of Polish imports into Thailand had "continuously increased" and that Poland had an increasing share of total imports. Thai authorities of course never made any finding that such increases were "significant". They did make one finding, however - that Polish import volumes "continuously increased". This conclusion is, in a familiar pattern, wrong. The error requires no second guessing or re-evaluation of the Thai authorities' "findings" - it is apparent from their own documents, in particular, the non-confidential Table 2 attached to the Draft Injury Notice, which shows that "Imports from Poland" move up and move down throughout the period in question. More fundamentally, from the very beginning of this investigation, Poland has raised questions as to the validity of the Thai import data.⁶⁶ When questions were raised, Thai officials dismissively asserted that these sharp differences were "accounted for by shipments on the high seas."⁶⁷

85. But the "high seas" were not responsible for the realities of what took place here. To the contrary, the new "secret" Thai data show that Thailand's "determinations" were based on nothing more than a hopeless jumble of numbers. Exhibit 44 states that total imports in 1994 equalled those in 1995, but also that imports "shrank continuously" during this time.⁶⁸ While it is admitted that SYS output, sales, market share, etc., grew markedly in the IP, Exhibit 44 states that imports in the IP *equalled* domestic demand.⁶⁹ Exhibit 44 further states that Polish imports "skyrocketed" to [I+ 12,445] MT, but that Poland held 25.3 per cent (47,435 MT) of a total market of 187,490 MT.⁷⁰ Some Exhibit 44 data claim to show that domestic demand contracted sharply.⁷¹ Yet the same exhibit also states that domestic demand *increased D* per cent* in the IP, and paragraph 1 of the Final Injury Information Notice states that "during the period of investigation, the consumption of H-Beams in Thailand *increased by 4% from 1995.*" In sum, Thailand's findings concerning Polish import volumes are nothing more than unsupportable numbers placed on a sheet of paper - and hardly could be reconciled by "shipments on the high seas."

3. *Did Polish Market Share Rise Significantly?*

86. The third and final alleged cornerstone of the Final Injury Determination (at paragraph 2.1) is the claimed "fact" that Polish imports captured 26 per cent of the Thai market in the IP, up from 24 per cent in 1995. This finding is inconsistent with

⁶⁶ See, e.g., Letter of Stalexport, dated 2 February 1997, page 1-2, points 1,3, Exhibit THAILAND 26; Letter from Huta Katowice, dated 13 February 1997, page 2, point 9; Exhibit THAILAND 27; Brief of Polish Respondents, dated 9 March 1997, page 3 and footnote 2, Exhibit THAILAND 35. See also Poland's 29 March 1998 Response to Question 9 from the Panel.

⁶⁷ Proposed Final Determination, point 9.1, page 7 (Exhibit POLAND 10; Exhibit THAILAND 37).

⁶⁸ Exhibit 44, para. 1.8.1.

⁶⁹ *Ibid.* at paras. 1.7, 1.8.1 (both were said to equal 187,490 MT in the IP).

⁷⁰ *Ibid.* at para. 1.8.2.

⁷¹ Para. 1.7 of Exhibit 44 shows domestic demand for H-Beams falling from [D- 8,927] MT in 1995 to 187,490 MT in the IP.

the findings in the Final Injury Information Notice and the Preliminary Determination that the Polish market share was 24.2 per cent in 1995 and 25.3 per cent in the Investigation Period. Thus, rather than the 2-per cent market share increase stated in the Final Injury Determination, the actual figure in the record was 1.1 per cent. This factual error is all the more critical because of the failure of Thai authorities to make the required determination whether a 2-per cent increase was "significant" in its own right; of course, they made no such finding with respect to a 1.1 per cent increase either. Moreover, these market share percentages were based on volume figures that have long been disputed by Polish respondents. Given the completely unintelligible volume numbers contained in Exhibit THAILAND 44, and the fact that a wide assortment of figures for Polish imports and Thai demand have been "established" by the authorities, it is not surprising that the market share percentages derived from those figures are likewise unclear. From these data one cannot tell if Polish market share in the IP was 25.3 per cent, 26 per cent, or some other number. Furthermore, we reiterate that Thailand's data on "increase" in market share are based on overlapping time periods, effectively comparing only figures for the first semester of 1995 (either March-June or January-June) with the first semester of 1996. But even if that comparison were meaningful, an authority must first establish actual volume figures. If it fails to do so, yet reaches conclusions based on contradictory and incoherent evidence, it cannot be found to be objectively examining the "facts" before it.

87. One final point needs to be addressed with respect to Exhibit 44. Despite containing purported data regarding Polish respondents which certainly was not "secret" with regard to those respondents, Thailand never shared the alleged "facts" in this document with Polish respondents or with the Republic of Poland during consultations. The Panel needs no reminder that Thailand first sought to submit this document to the Panel only on an ex parte basis. After considerable disagreement, Thailand then submitted it to all parties and third parties. Next, at the First Substantive Meeting of the panel, Thailand surprisingly attempted to distance itself from this and the other new secret Exhibits, stating that they were not a necessary part of the Thai record in this case.

88. Prior GATT and WTO jurisprudence, including Korea-Resins and Guatemala-Cement, condemns the use of documents outside the record that are not shared with the parties to an investigation. In those cases panels have refused to take into account certain alleged "evidence" that authorities claimed was part of their administrative decision-making, but which was not part of the administrative record of an investigation. Poland notes that Exhibit 44 and the purported non-confidential version thereof bear little relation to one another. Secret Exhibit 44 contains *Polish* data which Polish respondents had a right to review. Failure to disclose it constitutes a violation of basic due process (under Article 6.1, 6.1.2, 6.3, 6.4, 6.5.1 and 6.9, just for instance).

89. But the current situation created by Thailand is worse than the other cases mentioned. In this proceeding, Thailand now seeks to distance itself from a secret document that was, according to Thailand, part of the administrative record, but never disclosed in any meaningful form to respondents. For the first time, the alleged "facts" on which the Thai authorities relied have been laid bare, and Thailand understandably wishes to walk away from the several fundamental contradictions they create.

90. In sum, the factual inaccuracies demonstrated by Exhibit 44 render meaningless the claim of the Thai authorities to have made "proper" determination of facts based on "objective examination" of the record.

- Thailand claimed to have publicly determined that Polish prices went down in the IP, when Thai secret data showed that Polish prices went up;
- Thailand claimed to have publicly determined that Thai prices went down sharply to "match" the level of Polish prices, when Thai secret data showed they did not;
- Thailand claimed to have publicly determined that Polish prices and Thai prices "move in the same direction", when Thai secret data showed they do not;
- Thailand claimed to have publicly determined that Polish prices "influence" SYS prices, when Thai secret data showed they were both stable;
- Thailand claimed to have publicly determined that Polish import volumes surged, when Thai secret data are incomprehensible and support no such determination;
- Thailand claimed to have publicly determined that domestic demand rose 4 per cent, when Thai secret data show both that it rose [D*] per cent, but also that it fell;
- Thailand claimed to have publicly determined that Polish market share was large and expanding, when Thai secret volume statistics are incomprehensible and support no such determination;
- Thailand claimed to have publicly determined that Polish market share had risen from 24 per cent to 26 per cent in the IP, when all "evidence" in the record showed the rise to be from 24.2 per cent to 25.3 per cent;
- Thailand claimed to have publicly determined that SYS' domestic prices were lower than SYS' export prices when Thai secret data declare the opposite - that SYS' domestic prices were higher than SYS' export prices.

91. It is thus readily apparent that the findings in Thailand's Final Injury Determination find no support in the new "confidential" data on which they were purportedly based. As a result, the conclusions in that Determination of price suppression and price depression are without factual foundation. Rather, such data paint a picture of a new company with unrealistic market expectations, hoping to sell (and in fact selling) at relatively high prices at home, while selling at sharply lower prices in overseas markets. They show a domestic market with "stable" prices in which a new domestic entrant has catapulted to market leadership. What the data do not show, however, is the existence of material injury.

92. We thus submit that Thailand's Final Injury Determination was not based on "positive evidence" or an "objective examination" of the record in this proceeding. Indeed, positive evidence was overwhelming that no material injury existed by reason of Polish imports. Moreover, the "evidence" set forth in the Final Determination was unsupported by the record, contradicted by "secret" facts, or otherwise meaningless given the methods of comparison employed. The injury Thailand claimed to exist was not properly determined to be "significant" and "material" as required by the Agreement. Finally, Thailand failed to examine external factors called to its atten-

tion, including SYS' aggressive entry into the H-Beam market and the massive Kobe earthquake that disrupted steel supplies throughout Asia in this period. These vital factors appear nowhere in Thailand's analysis.

D. Thailand did not Demonstrate Causation Consistent with Article 3.5 ADA

93. Even if SYS had experienced injury, which it plainly had not, Thai authorities still were required properly to find, based on an objective examination of all relevant evidence, that such injury was caused by reason of dumped Polish imports. The heart of the Thai Final Injury Determination (at paragraph 2.3) is that Polish imports caused material injury by forcing SYS to "decrease its price to the level of Polish imports" and that this resulted in price undercutting and price suppression, occasioning SYS' inability to "increase its price to recover its costs in a reasonable period of time."

94. Poland has commented in the prior section on the substance of these claims, which we have shown to be false in their entirety. Poland reserves its rights to comment more fully on this issue once it has received Thailand's responses to the questions Poland has posed concerning Exhibit THAILAND 44, precisely because that document contains so many "facts" that contradict "facts" found elsewhere in the Thai determinations. As a result, Poland is no longer sure which facts Thailand is relying on in this inquiry. We have long maintained, however, that Thai pricing data were simply incorrect and ignored market reality both in Thailand and elsewhere in Asia.

95. However, even the non-confidential information of the Department of International Trade reveals the insufficiency of the Final Injury Determination on the question of causation. The Determination shows no "examination of all relevant evidence before the authorities", including no examination of why the factors enumerated in Article 3.5 Anti-Dumping Agreement were or were not themselves relevant.⁷² The Final Determination shows no examination of the influence of non-Polish imports, the level of demand of the local construction industry, the highly aggressive nature of SYS' entry into the H-Beam market, domestic industry productivity and cost structure, technology developments, market realities in SYS export markets, or the Kobe earthquake.⁷³ The Final Injury Determination shows no examination of why these factors were outweighed by any other factors elsewhere in the record.⁷⁴ As a result, the Final Injury Determination was inadequate on its face.

96. Moreover, the Final Injury Determination and its companion Draft Injury Information Notice are internally inconsistent on the causation points they do ad-

⁷² For a discussion of relevancy and an authority's obligation to consider all factors and carefully evaluate each "relevant" factor enumerated in this Article, please see the immediately prior section.

⁷³ The impact of the Kobe earthquake was raised by Polish respondents at the oral hearing in Bangkok, during verification, and in the respondents' 13 May 1997 submission (Exhibit THAILAND 40).

⁷⁴ We note that the non-confidential document provided by Thailand as Exhibit Thailand 21, was *not* furnished to Polish respondents and was not, to the best of our knowledge, a part of the Final Determination.

dress. We have discussed these points in our injury section, but, at the risk of repetition, do so again here, in abbreviated form, for the sake of completeness.

97. The DIT's critical finding regarding causation - that the "influence of Polish imports" is so complete that SYS sharply reduced its prices to "match" the level of Polish import prices - cannot be correct.⁷⁵ This finding of a sharp price decline is contradicted by the findings in the non-confidential record that SYS entered the market in 1995 at prices well above those of Polish imports - and that SYS' prices then rose above 1995 levels during the IP.⁷⁶ Moreover, Table 1 contradicts the second vital DIT conclusion regarding causation - that the "influence of Polish imports" is so complete that average Polish CIF prices and average SYS prices "move in the same direction".⁷⁷ Table 1 shows that clearly this was not so; they do so less than half the time. Thirdly, Table 1 punctures any claim of price leadership by Polish firms - for it was SYS that plainly precipitated the first decline in prices during the IP (4th quarter 1995). Even the most basic factual statements - such as those regarding market share are not consistent. The Final Injury Determination states that market share rose from 24 per cent (1995) to 26 per cent (IP), whereas the Final Injury Information Notice and the preliminary injury determination, Exhibit POLAND 8, both state that market share went only from 24.2 per cent to 25.3 per cent.

98. The DFT also attempted to show causation by reason of the quantity of imports from Poland. It inexplicably bases its conclusion (at paragraph 8 of the Final Injury Information Notice) on examination of only two quarters of the IP, during which Thailand claims that Polish imports led to either decreased sales or decreased output by SYS. There are several obvious problems with this conclusion. First, Thai authorities fail to explain their own record evidence directly contradicting their conclusion regarding decreased sales or output. At the same time that one of their charts purports to show decreased sales and output, Thai authorities also acknowledged that SYS market share *tripled* and that production quantity *rose* over 10% (while inventories decreased). In addition, the other two quarters not referenced by Thailand - and the IP as a whole - tell a very different story than Thailand alleges. But even the two quarters examined do not support the claim: in each of those two quarters, SYS sharply raised its prices from previous levels, and, not surprisingly, faced market resistance.⁷⁸

99. Turning now to the confidential information of the DIT, Poland respectfully notes again (and at the risk of repetition) that not a single one of the Thai authorities' key "facts" finds support in Exhibit 44, the "Information for Final Determination Prepared by the Department of Foreign Trade". As noted above, DIT publicly determined that Polish prices fell, when they actually rose. DIT publicly determined that Thai prices fell sharply when Thai prices were "stable". DIT publicly determined that Polish prices "influence[d]" Thai prices, causing SYS to have to "match" Polish

⁷⁵ We note further that in para. 2.5 of the Final Determination, the DIT states that SYS was forced to "match" Polish prices.

⁷⁶ See footnote 56 above.

⁷⁷ See footnote 55 above.

⁷⁸ See table entitled "Average Quarterly Price" attached to Final Injury Information Notice, Exhibits POLAND 10, 11.

import prices, when that was not true - Thai prices were and remained much higher. It found that Polish and Thai prices "move in the same direction", when that was not true. DIT publicly determined that Polish import volumes surged, when Thai secret data are incomprehensible and support no such determination. DIT publicly determined that domestic demand rose 4 per cent, when Thai secret data show both that it rose [D*] per cent, but also that it fell. DIT publicly determined that Polish market share had risen from 24 per cent to 26 per cent in the IP, when all "evidence" in the record showed the rise to be from 24.2 per cent to 25.3 per cent. DIT publicly determined that SYS' domestic prices were *lower* than SYS' export prices when Thai secret data declare the opposite - that SYS' domestic prices were *higher* than SYS' export prices. In sum, and given the Thais' secret finding of "price stability with reference to the subject merchandise".⁷⁹ Exhibit 44 separates the state of the domestic industry from any activities of Polish importers and offers no meaningful basis for any of Thailand's conclusions regarding volume levels or price effects or whether any "injury" was indeed caused by reason of Polish imports.

100. The "secret" Thai data are remarkable in a number of other respects. First, Thailand has blacked out the cost of production data. Poland cannot speculate as to why Thailand has refused to release such outdated information, but glimpses of a possible motive remain in Exhibit 44. For example, paragraph 4.8 points to SYS losses "due to operating expenditures that cannot be reduced." Similarly, paragraph 5 states that "SYS has to bear the costs of new entrants which [are], as a rule, high". It is thus clear that SYS, like any new entrant in its position, had high costs and high operating expenditures that it could not reduce. This is no surprise - but the failure of the Thai authorities to evaluate this obviously relevant economic factor is itself a violation of Articles 3.4 and 3.5. We discuss the cost of production further below.

101. Moreover, Exhibit 44 also details another of the key relevant economic factors affecting the state of the industry - namely the global nature of the steel market, the high prices that pre-dated the IP (due both to the demand cycle and to the interruption of supply due to the Kobe earthquake), and the subsequent evolution of prices due to effects of supply and demand. As the DIT wrote:

Whereas SYS relied on export for about [X-Conf.] per cent of its sales, it is much effected [sic] by the downturn of world market price for H-beams. This is due to the fact that there is a slowdown of construction world-wide coupled with the fact that the total production capacity far surpassed demand.

102. The examination of this evidence, moreover, cannot be divorced from the admission of Thai authorities that "most evidence[] of domestic injury indicate a positive performance of the [sole Thai] company."⁸⁰ It is, of course, undisputed that SYS's production, capacity, capacity utilization, employment, domestic sales volume, overseas sales volume, and market share all increased strongly in the IP. SYS inventories fell even as production was rising.

⁷⁹ Exhibit 44, para. 5, page 13.

⁸⁰ Final Injury Information Notice, at page 3, para. 16. Exhibits POLAND 10, 11.

103. Moreover, Thailand's argument regarding the health of SYS must be viewed in light of two additional relevant facts. First, there are no meaningful cost of production data on the public record of the investigation, and Thailand has failed to submit such data to the Panel. SYS' desire of "maintaining and expanding the market share, so that the volume of sale will be efficient for the factory production and to achieve economy of scale"⁸¹ was simply the rational act of a high-cost producer, a new firm seeking to sell at any price above its marginal cost of production, in order to recover high fixed costs.⁸² Polish respondents made arguments to Thai authorities regarding the inevitable high start-up costs associated with entry into a capital-intensive industry, but Thai authorities failed to examine these factors in their determination.⁸³ Second, SYS had been selling steel for only a matter of months during the time period at issue. In addition to a high cost structure, SYS was an untested market entrant with no track record among customers. Like any new entrant in a capital-intensive industry, SYS could not reasonably expect to recover fully allocated costs in a few calendar quarters, and thus the company was a victim of its own unrealistic expectations. Simply put, the Thai authorities were not objective when they blamed imports for SYS' failure to recover all costs in such a short period of time, thereby denying the most basic marketplace realities.

104. Rather than face the undeniable health of the new Thai producer, Thai authorities simply declared that SYS's health "cannot" be an indicator that "the domestic industry has suffered *no* injury from Polish imports".⁸⁴ By this very declaration, Thailand has impermissibly reversed the standard of causation set forth in Article 3.5, as well as the positive evidence requirement in Article 3.⁸⁵ Respondents are not tasked with proving "no injury" in order to escape an anti-dumping duty order; it is the petitioner that always bears the burden of showing "significant" impact based on "positive evidence" and causing "material" injury.

105. As we have explained, it is the Republic of Poland's view that the Thai DIT's determinations regarding injury are an attempt to protect Thai industry from fair competitive forces in contravention of the evidence on the record, and the Final Determination nearly admits as much. SYS was a new entrant in the steel market in 1995 and Thai authorities candidly confessed their intent that "the company must maintain and increase its market share"⁸⁶ and that "it is imperative that the domestic industry's market share be preserved and expanded".⁸⁷ As Poland has stated previously, the DIT is to be commended for its honesty. But even as a new firm and the

⁸¹ Final Injury Notice at para. 7.

⁸² Exhibit THAILAND 44 at paras. 4.8, 5.

⁸³ See Polish respondents' submissions, Exhibits THAILAND 35, 40.

⁸⁴ Final Injury Determination, Exhibit POLAND 13 at page 2, para. 2.5 (emphasis added).

⁸⁵ The DIT's Final Injury Determination includes an apparent finding of threat of material injury by reason of Polish imports. Exhibit POLAND 13 at para. 2. This was the sole indication to Polish respondents that they were facing a "threat" case. If the Thai authorities did in fact make such a finding, it would violate Article 3.7 of the Anti-Dumping Agreement as being based solely on "allegation, conjecture, or mere speculation". There is no evidence on the record of such a threat and no such evidence was ever requested from any party, to the best of our information.

⁸⁶ Final Injury Information Notice, Exhibits POLAND 10, 11, at page 3, para. 16.

⁸⁷ Final Injury Determination, Exhibit POLAND 13, at page 2, para. 2.5.

sole Thai producer of subject goods, SYS was not entitled to immunity from competition. It has no guaranteed right to recover costs or be profitable in a given period of time, no right to "maintain and increase its market share", and no right to a closed domestic market to ensure its profitability. Thai authorities violate their WTO obligations by finding injury by reason of imports in such circumstances. There is no separate causation standard available to new company complainants.

IV. ADA THAILAND USED AN UNREASONABLE PROFIT FIGURE IN ITS NORMAL VALUE CALCULATION, IN VIOLATION OF ARTICLE 2

106. The Anti-Dumping Agreement is intended to implement and "govern the application of Art. VI of GATT 1994".⁸⁸ Thus, the provisions of the Anti-Dumping Agreement must be read and interpreted in light of GATT 1994. Article VI(1)(b)(ii) of GATT 1994 states that a product is sold at less than normal value if, inter alia, it is exported from one country at a price that is less than "the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit" (emphasis added). Given this explicit requirement in GATT that the amount added for profit must not exceed what is "reasonable," the provisions of the AD Agreement implementing this GATT Article are properly read to include a "reasonableness" requirement.

107. As Poland has stated in its First Written Submission and First Oral Statement, the ordinary meaning of the above provisions is clear and applies to all subparagraphs of Article 2.2: when normal value is calculated based on the cost of production and other expenses, only a "reasonable" amount may be added for profit in the calculation. Adding an unreasonable amount of profit in any such calculation necessarily violates a Member's obligations under Article VI GATT 1994 and Article 2.2 of the Anti-Dumping Agreement.

108. Article 2.2.2 sets forth a number of alternative methodologies for calculation of profit "for the purpose of " Article 2.2. First, it provides that

[f]or the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits *shall* be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. (Emphasis added.)

But where such amounts cannot be determined on this basis, Article 2.2.2 further provides that they "*may*" be determined on the basis of other "reasonable" methodologies:

- (i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

⁸⁸ See Anti-Dumping Agreement Article 1.

(ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other *reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.* (Emphasis added.)

109. As Poland has stated previously, we read Article 2.2.2 as establishing "reasonable" methodologies for purposes of Article 2.2, but believe it is clear that Members understood that such methodologies may, in some cases, yield unreasonable results - which, pursuant to Article 2.2, are not to be employed in constructing normal value. We note that the second sentence of Article 2.2.2 provides only that the subsequent methodologies "may" be employed, whereas if use of such methodologies were required, the second sentence, like the prior sentence, would have employed the verb "shall". Here, we believe, Members instead expressed uncertainty as to whether such methodologies would indeed ipso facto yield reasonable results. We believe this is also clear from the requirement of subparagraph (iii), which expressly provides that even reasonable methodologies may sometimes yield results that are not fairly usable in constructing value. Subparagraph (iii) is also instructive because the ceiling it imposes (that the amount of profit included may not exceed that "normally realised ...") is arguably stricter than that of the "reasonableness" standard which otherwise flows from Article 2.2 to each provision thereunder.

110. This conclusion - that methodologies may not be applied blindly - receives further contextual support from other provisions within Article 2.2. For example, Article 2.2.2 (first sentence) limits "actual data" to data objectively "pertaining to production and sales *in the ordinary course of trade*" (emphasis added). Thus data that would themselves be unrepresentative, and therefore yield unrepresentative results, shall not be employed. Similarly, in order to attempt to achieve such representativeness - that is, to prevent results which, while arithmetically correct, are not themselves representative or "reasonable" - all profit amounts calculated under subparagraphs (i) or (iii) must be calculated not on small (and thus more likely unrepresentative) market segments, but rather more broadly so as to cover all production and sales "*of the same general category of products*" (emphasis added). (This contrasts importantly with Article 2.2.2 (first sentence) which allows for comparison within the narrower "like product" category).⁸⁹

⁸⁹ The use of the methodologies described in Art. 2.2.2 of the AD Agreement to calculate profit is analogous to the use of "Best Information Available" and should be subject to the same limitations, as set forth in Annex II to the AD Agreement. Para. 3 of Annex II states that "all information [submitted by the parties] which is verifiable, which is appropriately submitted ... , [and] which is supplied in a timely fashion ... should be taken into consideration." Furthermore, Para. 7 of Annex II states that when information for BIA is drawn from a secondary source, the authorities should "check the independent sources at their disposal ..." Like the use of BIA, the use of the results of the applica-

111. As Poland has explained previously, in this investigation, the Thai investigating authorities properly determined that DIN specification Polish sales were *not* comparable to Thai sales of JIS standard products and that, as a result, a proper comparison of prices between like products could not take place between the DIN and JIS materials. They instead proceeded, as suggested by Polish respondents, to employ a constructed value calculation. In doing so, they used the methodology set forth in Article 2.2.2(i), but utilized the wrong sales and production data. More specifically, Thailand had an obligation to use production and sales data not just of H-Beams, but more broadly of all products "of the same general category" - i.e., "*Angles, shapes and sections of iron or non-alloy steel under HS 7216*" (emphasis added).⁹⁰ As set forth above, this requirement is expressly provided in Article 2.2.2(i) to avoid what occurred in this case - use of a profit figure well above what even the petitioners claimed was reasonable.

112. Thailand used a profit rate of 36.3 per cent in its final calculations. This figure was more than *five times* the maximum "reasonable" amount of profit (7 per cent) that had been alleged by SYS in its anti-dumping petition, more than *six times* the figure (6 per cent) used by SYS in its suggested calculation of normal value, and more than *eight times* the profit margin (4.55 per cent) for Huta Katowice verified by Thai authorities and shown in the company's most recent annual income statement that was before the DFT.⁹¹ In arriving at a profit rate of 36.3 per cent, Thai authorities claimed to be using the alleged profits from the sales in Poland of DIN products - the very sales that Thai authorities had conclusively rejected for purposes of a normal value comparison of *like* products. But data for the broader "same general category of product" were not employed. Moreover, Thai authorities also neglected the verified fact that Huta Katowice used different production processes in making these two products and that DIN-specification H-Beams are a special niche product, newly on the Polish market and not meaningfully produced or sold within the ordinary course of trade.

113. Even if the results had been based on the same general category of products, the calculation must, for the reasons outlined above, still be examined to determine its reasonableness under Article 2.2. Poland has suggested a "rebuttable presumption" of reasonableness for these purposes, based on the apparent preference for use of the methodologies set forth in Article 2.2.2, at least to the extent they yield results complying with the "reasonableness" mandate of Article 2.2. Yet, even such a presumption arguably is not required. The record in the investigation contained three other profit figures, all closely similar, none even remotely at the level assumed by the authorities. Moreover, given the substantial debate on these issues, including at verification, Thai authorities knew that there were difficulties in proper comparison

tion of the methodologies under subparagraphs (i) or (iii) of Art. 2.2.2 is not *per se* reasonable. Instead, the reasonableness of those results must be measured in light of other available data.

⁹⁰ We view Thailand's contrary comments on this point (at para. 73 of its First Written Submission) as ignoring the plain language of Article 2.2.2.

⁹¹ In its application for relief (at page 12, point 27), SYS informed the DFT that the "reasonable profit rate" in the steel industry was between five and seven percent. Huta Katowice's 1995 income statement, which was also properly before the DFT, shows that the company's 1995 profit margin was 4.55 percent.

of DIN and JIS products and that different production processes were involved, and these facts also required the DFT to question the appropriateness of such an exorbitant figure.

114. Thus, the methodology of subparagraph (i) was not correctly employed in this instance. It yielded a profit amount that is grossly disproportionate to other evidence of reasonable profit contained in the DFT record. Indeed, petitioners have admitted as much. In the face of such evidence, Thailand has done precisely what a WTO Member may not - it has constructed value using an unreasonable profit amount. It is clear that if any of the profit figures in the DFT record had indeed been used, the Polish respondents would not have been found to be dumping, based on Thailand's own calculations. The result has been to penalize the Polish firms impermissibly.

V. THE SYS PETITION FAILED TO SATISFY ARTICLE 5.2 AND, BY INITIATING AN INVESTIGATION ON THE BASIS OF THAT PETITION, THAI AUTHORITIES VIOLATED 5.3. MOREOVER, THEY FAILED TO GIVE REQUIRED NOTICE UNDER ARTICLE 5.5

115. Poland's claims under Article 5 are both simple and fundamental.

116. In the first instance Poland claims that the SYS petition on which the Thai investigation was based failed, in violation of the chapeau of Article 5.2, to contain data, evidence, or analysis of any kind regarding (1) the existence of injury to SYS or (2) a causal link between alleged dumping by Polish firms and any such injury to SYS. This contradicts the plain requirement of Article 5.2 that a petition must include "evidence of (a) dumping, (b) injury within the meaning of Article VI of GATT 1994 as interpreted by this Agreement and (c) a causal link between the dumped imports and the alleged injury".⁹²

117. Poland notes that, in further violation of Article 5.2, the SYS petition contained only raw numerical data on alleged dumping. Such raw data, in and of themselves, are not sufficient under, *inter alia*, Article 5.2(iv), for they constitute no more than "simple assertions, unsubstantiated by relevant evidence.". Under Article 5.2, an application must contain information on the "evolution" of import volume, the likely impact of (allegedly dumped) imports on the domestic industry, and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. As the *Mexico-HFCS* panel explained (at para. 7.72 *et seq.*), the petition must contain "information", in the sense of evidence, which must "demonstrate" the consequent impact of the (allegedly dumped) imports on the domestic industry. While the inclusion of the word "relevant" and the phrase "such as" in Article 4.2(iv) may indicate that an application need not contain information on all the factors set forth in Articles 3.2 and 3.4 of the ADA, it is nonetheless apparent that the application must contain sufficient evidence to "demonstrate" the consequent impact of dumped imports. this the SYS petition also failed to do.

118. In the course of the Panel's First Substantive Meeting, Thailand expressed great irritation at this Polish claim. Thai officials indicated that Poland should con-

⁹² Please see attached Exhibits POLAND 17 and POLAND 18.

tent itself with indications regarding injury and causation contained in the Thai notice of initiation. We respectfully submit that such suggestions are beside the point. The text of Article 5.2 is plain; the SYS petition (Exhibit THAILAND 1) is lacking in respect of these fundamental due process requirements.

119. As a related matter, Poland alleges that Thai authorities failed to conform to the requirements of Article 5.3 of the Anti-Dumping Agreement by initiating this investigation without determining that the evidence in the SYS petition was "sufficient" in terms of both scope and accuracy to justify the initiation of this investigation. No authority should be deemed to have met its Article 5.3 obligations where a petition lacks two of the three basic requirements for initiation, and is wholly deficient with respect to the third. Authorities have a plain obligation to conduct an objective examination of the "accuracy and adequacy" of evidence before they may initiate an investigation.

120. Finally, Poland claims that Thailand failed to meet its obligations under Article 5.5 by neglecting to provide Poland with notice of the planned initiation of this investigation, as required under Article 5.5 of the Anti-Dumping Agreement, as read in conjunction with Article 12.1 thereof. As Poland has stated previously, we recognize that this claim is based on a disagreement with the Thai authorities as to the content of discussions held on 17 July 1996 between the DFT and the Polish Government's Commercial Counsellor in Bangkok. We also recognize the difficulty for a panel to rule properly based on oral communications. For this very reason, we believe that Article 5.5 should be read to require written "notice" to the government of the exporting country concerned, and no such written notice, it must be agreed, was ever provided. We note that the Ad-Hoc Group on Implementation of the Committee on Anti-Dumping Practices has discussed this question, including the issue of the form of notice. This discussion, reported in the Ad-Hoc Group's 4 August 1998 Summary Report, concerned "whether an oral notification, or a note verbale, would be adequate" to meet the requirements of Article 5.5. The summary report appears to indicate that written notice was surely satisfactory in form, but oral notification was not.⁹³

VI. THAILAND HAS VIOLATED ARTICLE 6 IN FAILING TO PROVIDE ESSENTIAL INFORMATION TO POLISH RESPONDENTS DURING THE COURSE OF THE INVESTIGATION

121. In its First Written Submission and its First Oral Statement, the Republic of Poland detailed the Thai authorities' violation of Article 6 by their denial to Polish firms of the opportunities mandated under Article 6 for fair review of evidence during the course of an investigation. As Polish respondents stated in the investigation, "a party has no opportunity to properly defend itself if it does not have access to the proof and evidence by which a foreign government proposes to foreclose future sales in its territory. Transparency is lost, and respondents appropriately believe that con-

⁹³ Committee on Anti-Dumping Practices, Ad Hoc Group on Implementation, Summary Report Of The Meeting Of The Ad Hoc Group On Implementation Of The Committee On Anti-Dumping Practices, 27-28 April 1998, G/ADP/AHG/R/4, 98-3074, 4 August 1998.

clusions were pre-ordained, regardless of actual evidence." As we have stated, this was regrettably the situation in the case at hand.

122. Poland has raised its Article 6 claim as regards the Thai preliminary, draft final, and final determinations. These claims for fair access to information are particularly acute in a case like this one where the authorities have recognized that "most evidence" showed the absence of injury. In such a circumstance, rather than continuing to issue inconsistent draft or preliminary notices and then "expressing surprise" when a proper explanation is requested, authorities have an obligation to explain the basis for their conclusions, their evaluation of factors, and why certain facts weighed so heavily in the authorities' determination. By failing to do so, Thailand has violated Article 6 in at least three regards.

123. First, it has failed to offer Poland "meaningful opportunities ... to see all information that is relevant to the presentation of their case" so as to be allowed to make their "presentations on the basis of this information", as required by Article 6.4. We submit that it would indeed have been "practicable" for Thailand to do so, at the very least as regards coherent non-confidential summaries of submitted information. In this regard, we note, for example, that Polish respondents were never informed of, or given a copy of, the non-confidential version of the SYS questionnaire response, Exhibit THAILAND 21, and were not provided a legally adequate copy of any petition, as the non-confidential summary, Exhibit THAILAND 1, fails to meet the requirements of Article 5.3 AD. We further note that the Final Injury Determination was based not on detailed findings of fact, but on "draft", "preliminary", or "secret" findings, many of which contradict statements found in the Final Injury Determination.

124. As a related matter, Poland submits that the internally inconsistent, conclusory, and opaque nature of the non-confidential summaries that were provided do not meet the requirements of Article 6.5.1. We note that summaries that are provided must be "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." That has not been the case here. Tossing out labels such as "price suppression" and "price undercutting" - especially when contradicted by the very evidence on which such legal conclusions are claimed to be based - cannot be said to meet this requirement. As for Thailand's claim that Article 6.5.1 requires interested parties to furnish non-confidential summaries of their submissions to investigating authorities, but such authorities have no obligation to provide those summaries to exporters or foreign producers, we find this claim plainly wrong. Consistent with the provisions of Article 6.4 that interested parties shall receive timely opportunity to review all non-confidential information material to their claims, such summaries are provided to authorities precisely so that they can then be provided to interested parties. This is no mere formality; rather, it is fundamental to due process rights enshrined in the Agreement. Basic procedural fairness requires that respondents be given timely access to any relevant data or analysis, so they may present their defense or request correction of errors by the investigating authority.

125. Finally, Poland submits that Thailand has violated Article 6.9, because in the context of Thai authorities inviting comments from Polish respondents on the proposed definitive determinations, Exhibit POLAND 11, Exhibit THAILAND 37, Thailand failed to inform Polish firms of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures." Further,

such disclosure did not "take place in sufficient time for the parties to defend their interests" within this investigation. In this regard, we would emphasize that at no point during the investigation did the Thai authorities provide the respondents, *inter alia*, a specification, or a proper weighing, of all relevant economic factors used as the basis for the final injury determination by the Thai Department of International Trade. This would include, for example, any rational basis for using overlapping 12-month periods for comparison in the final determination. And the "disclosure" that took place at the end of the investigation amounted to no more than referencing early "draft" or "preliminary" materials in the administrative record (now contradicted by other record facts), as well as materials submitted by the Polish respondents themselves. Because the Thai documents were replete with inconsistencies, Polish firms were denied the "essential facts" underlying the Thai determinations.⁹⁴

VII. CONCLUSION

126. At issue in this dispute are several important precepts of the Anti-Dumping Agreement. Thailand has failed to comply with its substantive and procedural obligations under the above-referenced provisions of Article VI GATT 1994 and Articles 2, 3, 5, and 6 ADA. Thailand further believes that its anti-dumping practice is not subject to meaningful review by this Panel. The standard of review in this dispute is plain, and the Panel should not retreat from its obligations to examine, under Article 11 DSU and Article 17.6 ADA, the conformity of Thailand's practice with Thailand's obligations to Poland under the Anti-Dumping Agreement.

127. For the foregoing reasons, the Republic of Poland respectfully renews its request that the Panel find that the Kingdom of Thailand has imposed anti-dumping duties on exports from the Republic of Poland in violation of the above-referenced requirements of the Anti-Dumping Agreement.

⁹⁴ We have suggested that these Article 6 claims must be read in the context of the requirements of Article 12.2, which, of course, required the Thai final determination to "set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Under Article 12.2.2, this includes, "all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures" including "the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers."

ANNEX 1-5

RESPONSE OF THE REPUBLIC OF POLAND TO THE
QUESTIONS FROM THE PANEL AND FROM THAILAND

(29 March 2000)

RESPONSES TO QUESTIONS FROM THE PANEL

A. *Requests by Thailand for Rulings under Article 6.2 DSU*1. *Request with respect to Articles 5 and 6 AD*

1. We note the following passage from the Appellate Body Report in the *Korea - Dairy Safeguard* case:

"... There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of *clarity* in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."¹ (emphasis in original)

- (a) How is the phrase "in the light of attendant circumstances" in the above passage to be interpreted, both in general, and in the context of the present dispute? What relevance, if any, could this phrase have in this particular case. Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 5 and 6 AD? Please explain in detail.

Reply

Poland submits that the phrase "in the light of attendant circumstances" in the quoted paragraph should be interpreted in conjunction with the language used by the Appellate Body in the immediately prior paragraph of the *Korea - Dairy Safeguards* case - whether "[i]n view of all the circumstances surrounding that case ... [the respondent had been] misled as to what claims were in fact being asserted against it." In the context of the present dispute, this requires the Panel to assess whether actual prejudice - not vague claims thereof - has indeed been experienced by Thailand and, if so, whether such prejudice is of an objectively significant magnitude as to warrant the drastic measures requested by Thailand. As regards this final factor, we note that the word "misled" includes an element of scienter or deliberate deceit on the part of

¹ WT/DS98/AB/R, DSR 2000:I, 3, para. 124.

an actor. Such intent has not been alleged and surely was not present on the part of Poland in this regard.

The phrase "in light of the attendant circumstances" is also important to this dispute because it requires an examination of "all the circumstances surrounding" Thailand's request. The substance of Poland's Articles 5 and 6 claims were well known to Thailand.

For several years now, Thailand has been amply aware of the contentions of Poland and of Polish respondents that the Thai investigations were not properly initiated in two respects - (i) the petition contained no evidence of injury or causation, such that the subject investigation should not have been initiated; and (ii) the Thai authorities failed to provide required notice to the Government of Poland before the investigation was initiated.

In addition, for several years now, the Thai authorities have known of Polish claims regarding the insufficiency of the non-confidential evidence presented by Thai authorities to Polish firms during the course of the investigation. We note further the failure of Thai authorities to provide Polish respondents with even a non-confidential version one of the key elements of this investigation, the petitioner's questionnaire response.

These claims were repeated in consultations before the request for establishment of this panel, and in Poland's First Written Submission and First Oral Statement.

- (b) Does Poland's request for establishment "merely list" Articles 5 and 6 AD, or does it go beyond a "mere listing"?

Reply

Poland's request with respect to Articles 5 and 6 goes beyond a "mere listing" for the reasons stated in our response to Question 1(d) below. We note at the outset that the quoted paragraph 124 does not state that a "mere listing" would violate "the standard of clarity" of Article 6.2 simply because the article at issue established multiple obligations. Rather, the quoted paragraph simply says that "this *may be* the case". In the *Korea - Dairy Safeguards* case, in fact, the European Communities simply requested establishment of a panel for unspecified "breach of Korea's obligations under the provisions of the Agreement on Safeguards, in particular Articles 2, 4, 5, and 12 of the said Agreement and in violation of Article XIX of GATT 1994," (WT/DS98/4). This terse statement contrasts significantly with the terms of Poland's request. Please see Response to Question 1 (d) below.

- (c) Do Articles 5 and 6 AD each establish one single, distinct obligation or rather multiple obligations? What is the basis for your response?

Reply

The Appellate Body report in *Korea - Dairy Safeguards* does not answer this question, in our view. For example, in paragraph 129 thereof, the Appellate Body makes plain that each of a number of paragraphs in the Safeguards Agreement con-

tains distinct obligations, but does not make clear, whether those obligations, collectively, may be viewed as a single obligation.

- (d) If Poland is of the view that the request for establishment goes beyond a mere listing, would Poland please identify specifically all additional elements that describe its claims under Articles 5 and 6 AD? If Poland is of the view that the request for establishment "merely lists" Articles 5 and 6 AD, would Poland please explain why in its view this satisfies the standard of Article 6.2, e.g. are there any "attendant circumstances", particularly in view of the fact that each of these articles may establish multiple obligations? Please explain, indicating any relevant parts of the Panel record as it currently stands.

Reply

As Poland has stated above, it does not regard its request for establishment as constituting a "mere listing", as that term was used by the Appellate Body regarding the EC's request in *Korea - Dairy Safeguards*. Poland's Request is significantly more informative as to the legal basis of Poland's complaint than the EC request then under scrutiny. We would note that these claims are expanded upon in the request for consultations and were the subject of extensive consultation between the parties on 29 May 1998. We would further note that these very claims had been raised by Polish respondents and the Polish government during the investigation that is the subject of this dispute - with the exception of our claim that Thailand failed to supply Polish respondents with the SYS non-confidential questionnaire response - which, until it was submitted to the Panel as Exhibit THAILAND 21, was unknown to the Polish side. Finally, the claims have been set forth in plain terms both in Poland's First Written Submission and in Poland's First Oral Statement and First Concluding Statement. Please see Poland's responses below to questions 1-4.

Even if the Panel were to decide that Poland's claims constitute a "mere listing", we respectfully submit that, "in light of attendant circumstances", they meet the standard of clarity set forth in Article 6.2 DSU. This would be true whether or not the provisions in question establish multiple obligations. Thailand has experienced no actual prejudice as a result of these alleged omissions, whose existence, in any event, was made clear only in the *Korea - Dairy Safeguards* case, which was issued by the Appellate Body two months after the Request for Establishment herein at issue. Furthermore, there has been no attempt by Poland to mislead or otherwise deprive Thailand of its due process rights in this regard, any more than we are sure, Thailand sought to disadvantage Poland through the untimely submission of its confidential data. Given the identity of these claims with those raised in the investigation and raised again at consultations, and the absence of intent or actual prejudice in any meaningful sense, we submit that the "attendant circumstances" in this matter require denial of Thailand's procedural request.

Finally, the Article 6.2 DSU requirements must be read in the context of dispute settlement as a whole, *inter alia*, "to secure a positive solution to a dispute" (Article 3.7 DSU) so as to provide "predictability" in the multilateral trading system and to "clarify the existing provisions" of covered agreements (Article 3.2 DSU).

For further discussion, please see discussion of this issue in Poland's 29 March 2000 Second Written Submission.

2. We note the following passage from the Appellate Body Report in the *Korea - Dairy Safeguard* case:

"... whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."²

(a) What is the meaning of the phrase "given the actual course of the panel proceedings" in the above passage? Would it, for example, permit the subsequent "remedying" of a possibly insufficient panel request in the course of the panel proceedings? How is this phrase to be interpreted and applied in the present case in respect of the request for a ruling under Article 6.2 relating to Articles 5 and 6 AD? Please explain in detail.

Reply

Poland submits that the phrase "given the actual course of the panel proceedings" in the cited passage means that a respondent must have experienced actual prejudice, in an objective sense, before even a "mere listing" of relevant provisions would violate the standard of Article 6.2. This phrase requires that prejudice be viewed in light of the totality of circumstances and clearly contemplates that a possibly insufficient panel request may be "remedied" by subsequent clarification, particularly in the absence of any intent to "mislead" on the part of the complaining party. In Poland's view, the Panel must therefore consider not just the Request itself, but also Poland's First Written Submission, First Oral Statement and First Concluding Statement, as well as answers provided by Poland during the Panel's First Substantive Meeting and during the course of the underlying investigation. On all of these occasions, each of Poland's concerns was raised with Thai authorities. We would further submit that, even then, further submissions, statements, or answers by Poland could serve to remedy any remaining "insufficiency" on this issue.

3. Up until this point in the Panel proceedings, what are the specific allegations raised by Poland and the specific paragraphs of Articles 5 and 6 AD under which Poland has raised these allegations? Please identify any relevant parts of the Panel record.

Reply

Poland's Article 5.2 claim is that the SYS application failed to include any evidence of (i) injury within the meaning of Article VI of the GATT 1994, as interpreted by the Antidumping Agreement and (ii) a causal link between allegedly dumped imports and the alleged injury. Poland is, quite obviously, not in a position to make any claim regarding the "sufficiency" of any such perhaps-still-to-be-

² WT/DS98/AB/R, *supra*, footnote 1, para. 127.

submitted evidence. Relevant parts of the Panel record include paragraphs 86-90 of Poland's First Written Submission, paragraphs 9, 52-57, and 69 of Poland's First Oral Statement, and Exhibits POLAND 17 and 18, attached to our Second Written Submission, which detail Poland's raising of these claims with Thailand in September and October 1996, respectively.

Poland's Article 5.3 claim is that Thailand failed to "examine the accuracy and adequacy" of the SYS petition in order to "determine whether there is sufficient evidence to justify the initiation". Given the absence of evidence on injury and causation from the SYS petition, Thailand's initiation of an investigation violated the plain terms of Article 5.3. This claim is evidenced in the same parts of the Panel record as Poland's Article 5.2 claims.

Poland's Article 5.5 claim is that Thailand failed to "notify" Poland of Thailand's "receipt of a properly documented application" and Thailand's intent to "proceed to initiate an investigation". Relevant parts of the Panel record include paragraphs 86-90 of Poland's First Written Submission, paragraphs 9, 52-57, and 69, new Exhibits POLAND 17 and 18, attached to our Second Written Submission, and Exhibit THAILAND 14.

Poland's Article 5 claims also were the subject of substantial comment by Poland during the 'Question and Answer' portions of the Panel's First Substantive Meeting.

Poland's Article 6.4 and 6.5 claims may be summarised together as follows. The Thai preliminary, draft final, and final determinations are opaque, internally inconsistent, and conclusory summaries that fail to offer Polish respondents "meaningful opportunities ... to see all information that is relevant to the presentation of their case" so as to be allowed to make their "presentations on the basis of this information", as required by Article 6.4. Furthermore, Thailand violated Article 6.4 in that Polish respondents were never informed of, or given a copy of, the non-confidential version of the SYS questionnaire response, Exhibit THAILAND 21, and were not provided a legally adequate copy of the petition, as the non-confidential summary, Exhibit THAILAND 1, fails to meet the requirements of Article 5.3 AD. We further note that the Final Injury Determination was based not on detailed findings of fact, but on "draft", "preliminary", or "secret" findings, many of which contradict statements found in the Final Injury Determination.

As a related matter, Poland submits that the internally inconsistent, conclusory, and opaque nature of the non-confidential summaries that were provided do not meet the requirements of Article 6.5.1. We note that summaries that are provided must be "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." Of course, failure to provide such summaries at all (Exhibit THAILAND 21) - or to provide wholly inadequate ones (Exhibit THAILAND 1) also violates these express requirements.

Finally, Poland submits that Thailand has violated Article 6.9, because in inviting comments from Polish respondents on the proposed definitive determinations, Exhibit POLAND 11, Exhibit THAILAND 37, Thailand failed to inform Polish firms of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures." Further, such disclosure did not "take place in sufficient time for the parties to defend their interests" within this investigation. In this regard, we would emphasize that at no point during the investigation did

the Thai authorities provide the respondents, *inter alia*, a specification, or a proper weighing, of all relevant economic factors used as the basis for the final injury determination by the Thai Department of International Trade.

In addition to the Request for Establishment itself, Poland's Article 6 claims are set forth in paragraphs 91-95 of Poland's First Written Submission, paragraphs 58-65 of Poland's First Oral Statement, Poland's Concluding Statement, Exhibits POLAND 14, 15, and 16, and THAILAND 27. Poland's Article 6 claims also were the subject of substantial comment by Poland during the 'Question and Answer' portions of the Panel's First Substantive Meeting.

Without repeating here the details provided elsewhere, any claims by Thai authorities of the sufficiency of their draft final and final determinations is wholly shattered by the facts as set forth in Exhibit THAILAND 44.

4. The Panel notes that evidence in the record (Exhibit THAILAND 14/Exhibit POLAND 4) shows that the issue of notification under Article 5.5 AD was raised by Poland during the course of the anti-dumping investigation. Is this relevant to the request by Thailand for a preliminary ruling to dismiss Poland's claims under Articles 5 and 6 AD for lack of specificity under Article 6.2 DSU? Please explain in detail. Were other issues that have been raised by Poland in these Panel proceedings under Articles 5 and 6 AD raised by the Polish exporters during the course of the anti-dumping investigation? If so, please describe in detail and indicate where this is reflected in the record.

Reply

The issue of the sufficiency of a request for establishment depends, ultimately, on whether a respondent objectively has been "misled" in a manner actually prejudicing its ability to defend itself. Such prejudice must be determined in light of the totality of the circumstances, "given the actual course of the panel proceedings". In this inquiry, a respondent's actual knowledge of these claims is highly relevant; indeed, we submit, it is dispositive. Thailand has known since 1996 the precise nature of Poland's claims as to the insufficiency of the "notice" it provided prior to initiation. See Exhibits POLAND 4, 17, 18; Exhibit THAILAND 14. As a result, and despite increasingly unfortunate language to the contrary, there can be no resultant prejudice to Thailand's interests on this matter.

Similarly, the substance of Poland's Article 5.2, 5.3, 6.4, 6.5, and 6.9 claims are found repeatedly in the record of the underlying investigation, as detailed at length above in response to question 3 from the Panel

2. Request with respect to Articles 2 and 3 AD and Article VI GATT 1994

5. In para. 8 of its closing statement at the first substantive meeting of the parties with the Panel on 8 March 2000, Thailand states that it "considers that it is suffering serious prejudice in attempting to respond to Poland's vague and imprecise claims" with respect to Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement and "requests that the Panel determine whether Poland com-

plied with Article 6.2 of the DSU with respect to purported claims under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement".

- (a) How does Poland react to this request by Thailand?

Reply

Please see Poland's response to the next question from the Panel, question 5(b).

- (b) What relevance, if any, is there in the fact that this request by Thailand under Article 6.2 DSU concerning Articles 2 and 3 AD and Article VI GATT 1994 occurred at this point in the Panel proceedings?

Reply

Poland finds Thailand's request both untimely and somewhat shocking. Thailand failed to make such claims in its First Written Submission, First Oral Statement, or during the 1 ½ days of substantive meetings before its closing statements. The implication therefore is that somehow Poland's claims became objectively less clear to Thailand during the "actual course of the panel proceedings." Any such view is simply without merit. Beyond the untimely nature of this unfounded request, we note, for example, that Poland responded orally to very precise questions from Thailand and the Panel regarding its claims under these provisions. It is unfortunate that Thailand has chosen to ignore the request clarifications that Poland has provided. *Please see Responses to Questions 6-9, below.*

6. We refer to the passage from paragraph 124 of the Appellate Body Report in *Korea - Dairy Safeguard* cited in question 1 above.

- (a) Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 2 and 3 AD and Article VI GATT 1994? Please explain in detail.

Reply

We wish to note the actual text of the Polish request for establishment. As regards Poland's Article 3 claims, the Request provides

Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Antidumping Agreement;

This is not a "mere listing" as was present in the *Korea - Dairy Products* dispute. There, as stated, the European Communities requested establishment of a panel simply for unspecified "breach of Korea's obligations under the provisions of the Agreement on Safeguards, in particular Articles 2, 4, 5, and 12 of the said Agreement

and in violation of Article XIX of GATT 1994," (WT/DS98/4). By contrast, Poland's Request is hinged on actual language from the relevant sub-provisions of Article 3, and any fair reading of this paragraph would lead to the conclusion that Poland was advancing Article 3 claims under paragraphs 1, 2, 3, and 5, thereof. Moreover, consideration of the "attendant circumstances" would remove any doubt that might linger among respondents or their counsel. Such attendant circumstances, in light of the actual course of these proceedings, would surely include a careful reading of Poland's First Written Submission (paras. 47-76) and Poland's First Oral Statement (paras. 26-42), as well as a careful consideration of Poland's responses to questions from the panel regarding these provisions. We would further note that Poland's claims are those made at great length during the course of the Thai investigation, and during the 29 May 1998 bilateral consultations, and thus clearly represent no surprise to the Thai authorities. We would respectfully call the Panel's attention to the 1997 briefs of Polish respondents in the investigation, where Articles 3.1, 3.2, 3.4, 3.5 were quoted, cited, and relied on. Exhibits THAILAND 35, 40; *Please see* Responses to Questions 5, 7-9, below.

Second, Thailand now claims that it has somehow suffered prejudice as regards Poland's Article 2 claim. First we note that Poland's request for establishment provides:

Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement.

Once again, this is not a "mere listing" as was present in the *Korea - Dairy Products* dispute. In light of the course of these proceedings and the bilateral consultations between the parties, it is unimaginable how Thai authorities could experience any uncertainty or prejudice regarding this claim. Moreover, any doubt that might linger among respondents or their counsel would surely be removed by reading Poland's First Written Submission (*i.a.*, paras. 77-84), Poland's First Oral Statement (*i.a.*, paras. 43-51), and listening to Poland's responses to questions from the panel regarding these provisions. As above, we would further note that Poland's claims are those made at great length during the course of the Thai investigation, and during 29 May 1998 bilateral consultations, and thus clearly represent no surprise to the Thai authorities. We would respectfully call the Panel's attention to the briefs of Polish respondents in the investigation, where Articles 2 and 2.2 and quoted, cited, and relied on. Exhibits THAILAND 35, 40; *Please see* Responses to Questions 5, 7-9, below.

- (b) Does Poland's request for establishment "merely list" Articles 2 and 3 AD and Article VI GATT 1994, or does it go beyond a "mere listing"?

Reply

As discussed more fully in our 29 March 2000 Written Submission and below in response to question 6 (d) from the Panel, Poland's two paragraph discussion of its Article 2 and 3 claims goes well beyond a "mere listing".

- (c) Do Articles 2 and 3 AD and Article VI GATT 1994 each establish one single, distinct obligation, or rather multiple obligations? What is the basis for your response?

Reply

As regards Question 6(c), please see Poland's answer to question 1(c), above.

- (d) If Poland is of the view that the request for establishment goes beyond a mere listing, would Poland please identify specifically all additional elements that describe its claims under Articles 2 and 3 AD and Article VI GATT 1994? If Poland is of the view that the request for establishment "merely lists" Articles 2 and 3 AD and Article VI GATT 1994, would Poland please explain why in its view this satisfies the standard of Article 6.2, e.g. are there any "attendant circumstances", particularly in view of the fact that each of these articles may establish multiple obligations? Please explain, indicating any relevant parts of the Panel record, as it currently stands.

Reply

Poland's Article 3 claim quotes the express language of Article 3.1, the cornerstone of any injury analysis. In the words of the Panel in *Mexico-HFCS*, "The succeeding sections of Article 3 provide more specific guidance on the determination of injury." *Mexico-HFCS Panel Report* at paragraph 7.119. The compatibility of a Member's practice with its obligation under Article 3.1 is thus determined utilising, *inter alia*, the evaluative standards set forth in Articles 3.2, 3.4, and 3.5. Although Poland's Request did not refer explicitly to each of these subparagraphs of Article 3 by number, the language of the Request clearly and unambiguously implicates each of these subparagraphs. When Poland referred to "import volume and price effects", it was thus referring as well to consideration of "the volume of dumped imports" and "the effect of the dumped imports on prices" in Article 3.2. When Poland referred to Thailand's failure to conduct "the required 'objective examination' of the enumerated factors *such as* ..." it was thus referring as well to the factors enumerated in Article 3.4 (hence the term "such as") which have a bearing on the state of the industry. When Poland referred to Thailand's finding "that Polish imports *caused injury*" in the absence of a proper assessment of the "*consequent impact* of such imports on the domestic industry" it was referring as well to the causation standard set forth in Article 3.5. We think any objective reader of this paragraph would clearly understand Poland's specific objections and the subparagraphs implicated by those objections, as apparently Thailand did until 1 ½ days into the Panel proceeding.

Under very much the same reasoning, Poland's Article 2 claim does not constitute a mere listing under the standard of *Korea - Dairy Products*. Poland explained that it was challenging both the determination of dumping and the calculation of the alleged dumping margin. In particular, the phrase "calculation of the dumping margin" should have provided Thailand with sufficient notice as to the particulars of Poland's Article 2.2 claim.

We would emphasise that each of these claims were made in detail in the underlying investigations and repeated in the bilateral consultations. Thus, Thailand cannot complain that it lacked actual knowledge of the particulars.

For further discussion why "attendant circumstances" preclude dismissal of Poland's Article 2 and 3 claims, even if they are deemed by the Panel to constitute a "mere listing", please see Poland's response to questions 6 (a) -(c) from the Panel.

7. We refer to the passage from paragraph 127 of the Appellate Body Report in *Korea - Dairy Safeguard* cited in question 2 above.

- (a) How is the phrase "given the actual course of the panel proceedings" to be interpreted and applied in the present case in respect of the request by Thailand for a ruling under Article 6.2 relating to Articles 2 and 3 AD and Article VI GATT 1994?

Reply

As set forth *i.a.* in our response to Question 2 above, we believe that the phrase "given the actual course of the panel proceedings" in the cited passage means that a respondent must have experienced actual prejudice to its ability to defend its interests, in an objective sense, before even a "mere listing" of relevant provisions would violate the standard of Article 6.2. This phrase requires that 'prejudice' be judged in light of the totality of circumstances and clearly contemplates that a possibly insufficient panel request may be "remedied" by subsequent clarification, particularly in the absence of any intent to "mislead" on the part of the complaining party. In Poland's view, the Panel must therefore consider issues raised not just in the Request itself, but also those raised in the underlying investigation, in the context of bilateral consultations, in complainant's First Written Submission, First Oral Statement, and First Concluding Statement, as well as answers provided by complainant during the Panel's First Substantive Meeting. We would further submit that, even then, further submissions, statements, or answers by complainant could serve to remedy any remaining "insufficiency" on this issue.

8. Up until this point in the Panel proceedings, what are the specific allegations raised by Poland and the specific paragraphs of Articles 2 and 3 AD and Article VI GATT 1994 under which Poland has raised these allegations? Please identify any relevant parts of the Panel record.

Reply

As regards Article 2, Poland is claiming that, in violation of Article 2.2 AD and Article VI:1(b)(ii) of GATT 1994 Thailand has failed to make a proper dumping calculation by its inclusion of an unreasonable amount of profit in its constructed value calculation of normal value. This claim is set forth in paragraphs 77-84 of Poland's First Written Submission, paragraphs 43-51 of Poland's First Oral Statement. In addition, the claim was discussed at great length during the First Substantive Meeting.

As regards Article 3 and Article VI:6 (a) of GATT 1994, Poland is claiming that that Thailand's determination of injury was not made on the basis of "positive evidence" and an "objective examination" of the facts, in violation of Article 3.1 AD, that Thailand failed to find a "significant" increase in dumped imports and that price suppression or price depression had occurred to a "significant" degree, in violation of Article 3.2 AD, that Thailand failed to a required examination of "all relevant economic factors and indices having a bearing on the state of the industry," in violation of Article 3.4 AD, and that Thailand failed to demonstrate that Polish imports were causing injury to the domestic industry, in violation of Article 3.5 AD. These claims

are set forth in paragraphs 47-76 of Poland's First Written Submission, paragraphs 26-42 of Poland's First Oral Statement, and were discussed at great length during the First Substantive Meeting.

9. Were the issues under Articles 2 and 3 AD and Article VI GATT 1994 raised by Poland in these Panel proceedings raised by the Polish exporters during the course of the anti-dumping investigation? If so, please describe in detail and indicate precisely where this is reflected in the record. Is this relevant to the request by Thailand for a preliminary ruling to dismiss Poland's claims under Articles 2 and 3 AD and Article VI GATT 1994 for lack of specificity under Article 6.2 DSU? Please explain in detail.

Reply

Yes, all claims made by Poland under Article 2 and 3 in these Panel proceedings were raised by Polish exporters during the course of the antidumping proceeding.

As regards Article 2, Poland's claims are, in particular, set forth in great detail in submissions to the Thai authorities dated 9 March 1997 and 13 May 1997. The 9 March 1997 filing, Exhibit THAILAND 35 at pages 5-8, contains nearly four pages of discussion on addition of a "fair amount" of profit in constructing normal value and includes a quotation and citation to relevant WTO and Thai law. The 13 May 1997 filing, Exhibit THAILAND 40 at page 5, contains an additional page of discussion on use of a "fair amount" of profit in constructing normal value and again cites to relevant WTO and Thai law. This issue was discussed at the Hearing in Bangkok, Exhibit THAILAND 36, at pages 3 and 6. It was a subject of proposed definitive dumping determination, Exhibit THAILAND 37, at points 1 and 6 and the comments on the proposed final dumping determination, Exhibit THAILAND 41, at pages 3-4, as well as, of course, the final determination itself. *See also* confidential Exhibit THAILAND 44. Proper calculation of profit also was a subject of the consultations held between the parties, as evidenced by Exhibit POLAND 17.

As regards Article 3, Poland's claims are, in particular, set forth in great detail in submissions to the Thai authorities dated 9 March 1997 and 13 May 1997. The 9 March 1997 filing, Exhibit THAILAND 35 at pages 2-5, contains nearly four pages of discussion on the requirements for a determination of injury quoting the requirements and/or citing the text of Article 3.1, 3.2, 3.4, and 3.5. The 13 May 1997 filing, Exhibit THAILAND 40 at page 2-5, contains an additional four pages of discussion on "injury", the WTO standards, and the facts of this case. This issue was discussed at the Hearing in Bangkok, Exhibit THAILAND 36, at pages 3-5. It was also a subject of the Final Injury Information Notice, Exhibit THAILAND 37, and the comments on the proposed final dumping determination, Exhibit THAILAND 41, as well as the Final Injury Determination itself. *See also* confidential Exhibit THAILAND 44. Proper determination of injury was also a subject of the consultations held between the parties, as evidenced by Exhibit POLAND 17.

These facts are most certainly relevant to Thailand's request for preliminary ruling. They show that Thailand has long known the claims at issue in these proceedings and has not been "misled" in any way. Allegations of prejudice resulting from surprise or unfamiliarity with these claims are simply without merit. Moreover, given

the "actual course" of these proceedings, it should be plain that Poland has clearly confirmed the claims made by Polish exporters in the underlying proceeding. Any assertion of prejudice arising from Poland's Request has begun to border on the disingenuous.

B. Article 5 AD

10. In the view of the parties, in light of the panel report in *Mexico - HFCS*, what documents in the record are relevant to the Panel's examination of Poland's claims concerning the contents of the petition and the sufficiency of evidence to justify the initiation of the investigation?

Reply

The only document in the record of relevance to the Panel's examination regarding the adequacy of the petition and the sufficiency of evidence to justify the initiation of the subject investigation is Exhibit THAILAND 1, the SYS petition. That document contains no information regarding injury or causation.

11. In respect of its claims under Articles 5.2 and 5.3 AD, is Poland arguing that the petition did not contain any information pertinent to some of the factors listed in Article 5.2, or that information was provided, but did not reflect sufficient evidence of dumping, injury and causation to justify the determination to initiate an investigation, or both? Please explain in detail.

Reply

Poland is arguing that the petition did not contain any information relevant to some of the required factors listed in Article 5.2, *i.e.* *injury* and *causation*. This claim is based on the only information in our possession - the non-confidential versions of the petition. Thailand is apparently now claiming that information on causation and injury was contained in the confidential version of the petition, a claim that we are, for obvious reasons, in no position to evaluate. If and when the confidential version of the petition is supplied to the Panel and to Poland, Poland will be in a position to evaluate whether it contains sufficient evidence of injury and causation to justify the determination to initiate an investigation.

12. Would Poland please indicate precisely how it considers that the Thai investigating authorities did not comply with the requirement in Article 5.3 AD to examine "the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation" of the investigation?

Reply

Poland submits that an authority's obligation to examine the "adequacy of the evidence provided" extends to verifying that a petition indeed contains "adequate" evidence of injury and causation, before an investigation is initiated. Failure to ensure that these elements were contained in the SYS petition constitutes a violation of Thailand's duty under Article 5.3.

13. Did the petition contain data on dumping, injury and a causal link? Did the petition contain analysis concerning each of the factors on which data were provided? Please explain in detail, citing specific parts of Exhibit THAILAND 1, where relevant.

Reply

The SYS petition (Exhibit THAILAND 1) contains no data, evidence, or analysis of any kind regarding injury or causation. It contains many charts and tables that were deemed to support a claim of dumping, but there is no analysis at all of such data. As such, even the SYS claim of dumping by Polish firms is unintelligible. Please see Poland's response to Question 14, below.

14. Does Article 5.2 require that an application contain analysis or is numerical data enough? Please explain, and indicate the relevance, if any, of the panel report in *Mexico-HFCS*.

Reply

In addition to lacking data on injury and causation, the SYS petition contained only raw numerical data on dumping and such raw data, in and of themselves, are not sufficient under, *i.a.*, Article 5.2 (iv). Under Article 5.2, an application must contain information on the "evolution" of import volume, the likely impact of (allegedly dumped) imports on the domestic industry, and the attendant relevant economic factors and indices bearing on the likely state of the domestic industry. As the *Mexico-HFCS* panel explained (at para. 7.72 et seq.), as such, the petition must contain "information", in the sense of evidence, regarding the consequent impact of the (allegedly dumped) imports on the domestic industry and such "information" must "demonstrate" the consequent impact of the imports on the domestic industry. And while the inclusion in Article 5.2(iv) of the word "relevant" and the phrase "such as" in the reference to the factors and indices in Articles 3.2 and 3.4 may indicate that an application need not contain information on all the factors and indices set forth in Articles 3.2 and 3.4, it is likewise apparent that the application must contain evidence sufficient to "demonstrate" the consequent impact of dumped imports on the domestic industry.

18. In its first written submission (para. 90), Poland alleges that notification under Article 5.5 AD was "not properly or timely provided" by Thailand. In its oral statement at the first meeting (para. 57), Poland "recognise[d] that this claim is based on a disagreement with the Thai authorities as to the content of discussions held on the 17th of July 1996 between the DFT and our Government's Commercial Counselor in Bangkok".

To both parties

- (a) Under what circumstances and for what stated purpose was Poland invited to the meeting by Thailand?

Reply

The Thai authorities requested a meeting with the Polish Commercial Counselor in Bangkok for the purpose of discussing the "troubling level" of Polish steel imports into Thailand and what could be done about them. No "notice" was given (or mention made) that an antidumping petition had been received or that Thai authorities were to initiate an investigation regarding H-Beams from Poland. Poland is unaware of any documents regarding this meeting other than Exhibit POLAND 4 / THAILAND 14. We view the conduct of the Thai officials as insufficient because of their failure to "notify" our government on a timely basis that a properly documented petition had been received and that an investigation would be initiated.

- (b) What occurred at this meeting? Are there any documents (other than Exhibit POLAND 4 / THAILAND 14) including any invitation to and/or written record of, that meeting that would indicate to the Panel the nature and content of the meeting? If so, please indicate where these are in the record, or provide them to the Panel.

Reply

As regards Question 8(b), please see Poland's answer to question 8(a), above.

- (c) Would Poland please clarify why, and on what legal basis, it does not consider this meeting to have constituted sufficient notification under Article 5.5 AD with respect to its "timeliness" or its "propriety"? What does Poland think should have happened at this meeting, but did not?

Reply

As regards Question 8(c), please see Poland's answer to question 8(a), above.

19. In its oral statement at the first meeting (para. 57), Poland states that "Article 5.5 is meant to require written "notice" to the government of the exporting government concerned".

- (a) What is the legal basis for this view that Article 5.5 AD requires written notice? Please explain, in light of the text and context of the provision and any other relevant considerations.

Reply

We note that the Ad-Hoc Group on Implementation of the Committee on Anti-Dumping Practices has discussed this issue including the specific question of the form of notice required. This discussion, reported in the Ad-Hoc Group's August 4, 1998 Summary Report, concerned "whether an oral notification, or a note verbale, would be adequate" to meet the requirements of Article 5.5. This summary report

appears to indicate that written notice was surely satisfactory in form, but oral notification was not.³

20. The Panel notes that Poland refers to Article 12 AD in connection with its Article 5.5 claim.

- (a) On what basis does Poland invoke this Article, e.g. as context that informs the type of notification required under Article 5.5, or as containing the specific requirements as to the form and content of such notifications, or some other basis?

Reply

Poland refers to Article 12 AD as useful context in connection with its Article 5.5 AD claims.

C. Article 6 AD

21. With respect to your claims under Article 6 AD, please specify the precise information that you believe you should have received during the investigation and did not.

Reply

Polish respondents should have received coherent, comprehensive non-confidential summaries of the facts being relied on by the Thai authorities in reaching their Preliminary Injury Determination. Failure to supply these critical documents violated Thailand's obligations under *i.a.* Articles 6.4 and 6.9 AD.

Polish respondents should have received a copy of the non-confidential version of the SYS questionnaire response, which SYS has now submitted to the Panel as THAILAND Exhibit 21. Failure to supply this critical document violated Thailand's obligation under *i.a.* Articles 6.4 and 6.5 AD.

Polish respondents should have received coherent, comprehensive non-confidential summaries of the facts being relied on by the Thai authorities in reaching their Final Injury Determination (including the Final Injury Information Notice). Instead, the non-confidential summaries provided are opaque and internally inconsistent and fail to address how Thai authorities may have considered and evaluated relevant data. Furthermore, they are flatly contradicted by the actual data relied on by Thai authorities, as shown by Exhibit THAILAND 44. And repeated requests to explain the determinations were met with only "surprise" by the Thai authorities. Please compare Exhibits THAILAND 40, 47, and 48 with Exhibit THAILAND 49. Failure to supply these critical documents violated Thailand's obligations under *i.a.* Articles 6.4 and 6.9 AD.

³ Committee on Anti-Dumping Practices, Ad Hoc Group on Implementation, Summary Report Of The Meeting Of The Ad Hoc Group On Implementation Of The Committee On Anti-Dumping Practices, 27-28 April 1998, G/ADP/AHG/R/4, 98-3074, 4 August 1998.

22. With respect to your reference in paragraph 92 of your first written submission to data based on "overlapping time periods for comparison in the final determination", are you arguing that the use of such data would necessarily introduce a flaw in the analysis conducted by the Thai investigating authorities. If so, why? Could such an approach confirm the persistence of trends over time, as Thailand asserts in paragraph 80 of its first written submission?

Reply

Poland contends that, in the context of this investigation, the use of overlapping time periods introduces a flaw in the Thai authorities' analysis. Analysis under Article 3 concerns, *inter alia*, changes in indicia over time. For example, Article 3.2 concerns the existence of an "increase" in the volume of dumped imports. Likewise Article 3.4 examines "actual of potential decline" in a number of economic factors and indicia. In order for such movements to be meaningful, they require a meaningful baseline from which measurement may be made. This baseline for measurement is particularly important in a case such as this one where, the petitioning company had been in existence for only a matter of months. The use of overlapping periods essentially obscured the situation faced by the company at the beginning of the IP.

By way of example, SYS now claims a market share of 49.8 percent in 1995 and only a slightly higher share for the IP. Thus, it appears that the company's situation during the IP was little changed, when, in fact, SYS' market share rose dramatically during the IP. The company had a zero percent market share in March (or, now according to Thailand, January?) 1995 when it began operations but a 55% market share for the IP. One can only assume, consistent with that trend that its market share just before the IP was much smaller than its share during or at the end of the IP. But all those critical realities are obscured by the Thai methodology. This situation applies *mutatis mutandis* to the other factors in Article 3.4, for example.

Thailand's claim in Paragraph 80 of its First Submission is highly instructive on this point, for it champions the use of overlapping time periods in the context of examination of data for calendar year 1998, 1999, 2000, and July 1999-June 2000, with this last time period "confirming the persistence of trends over time". Poland respectfully submits that such plainly is not the situation here, where the health of the Thai industry before the IP - and the movement of the key factors and indicia thereafter - may be measured only by virtue of the situation shown by the first semester 1995 data. There is no luxury - as in Thailand's example - of "confirming" several years' trends by use as well of overlapping data. All the Thai methodology does is minimise the dramatic successes of SYS.

24. Thailand argues that Article 6.5.1 AD provides that an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof, but that Article 6.5.1 *does not* require the investigating authorities to provide those non-confidential summaries to the exporters or to the foreign producers.

(a) How do you react to this assertion by Thailand?

Reply

Thailand's claim is plainly wrong. The clear purpose of submission of the non-confidential summaries called for in Article 6.5.1 is for such summaries to be provided to other interested parties. It is only via such non-confidential summaries that other parties may enjoy "a full opportunity for the defence of their interests" (Article 6.2) and "timely opportunities ... to see all information that is relevant to the presentation of their cases, that is non-confidential ... and to prepare presentations on the basis of this information" (Article 6.4). Otherwise, such non-confidential summaries are only useful in the event of a dispute settlement proceeding.

This reading is confirmed by Article 6.1.2. This provision would be meaningless if the non-confidential summaries prepared by one interested party are not to be given to other interested parties participating in the investigation. Indeed, as a legal matter, Articles 6.4, 6.5.1, 6.9, and 6.1.2 all affirm this basic due process requirement. Poland views the legal relationship among these provisions as mutually reinforcing.

- (c) In this context, what is the relevance, if any, of Article 6.1.2 AD? Please explain in detail.

Reply

As regards Question 24(c), please see Poland's answer to question 24(a), above.

- (d) What is the legal relationship, if any, between Article 6.4, 6.5.1 and 6.9 AD, on the one hand, and Article 6.1.2 AD, on the other (e.g., does Article 6.4 encompass Article 6.1.2, do they pertain to different things, etc.)?

Reply

As regards Question 24(d), please see Poland's answer to question 24(a), above.

25. The Panel notes that Poland refers to Article 12 in the context of its claims under Article 6.

- (a) On what basis does Poland invoke this Article, e.g. as context that informs Article 6, or some other basis?

Reply

Poland believes that Article 12 is context for interpretation of Article 6.

26. We refer to Tables 1-3 attached to the proposed final determination of injury in Exhibit THAILAND 37. Please identify the specific assertions in Exhibit THAILAND 37 and Exhibit THAILAND 46 derived from the data contained in these tables and explain whether and how the data in the tables support those assertions.

Reply

The only assertions in Exhibit THAILAND 37 that we find can be derived from Tables 1-3 of that Exhibit are: Point 6 (average CIF import price) - although we note again that these figures do not correspond with those in Exhibit THAILAND 44; and Point 9 ("domestic consumption has continued to rise" - assuming one ignores 4th quarter 1995).

The only assertion in Exhibit THAILAND 46 that we find can be derived from Tables 1-3 of Exhibit THAILAND 46 is Point 2.2 ("Price of Polish imports has always been ... lower than the average import price from all other countries") - although we note again that both the cited figure for all countries and the cited figure for Poland are much lower than those set forth in Exhibit THAILAND 44, rendering this chart meaningless.

D. Article 2 AD

27. Poland argued at the meeting of the Panel that, if either Article 2.2.2(i) or 2.2.2(ii) is applied, the methodologies described therein do not *ipso facto* yield "reasonable" results in the sense of Article 2.2 AD and Article VI:1(b)(ii) of GATT 1994, but rather that such results are "presumed" to be reasonable and record evidence in an investigation can rebut this presumption. Would Poland please indicate whether this is a correct understanding of its position, and if so, elaborate on the legal basis for this argument, including in the light of the language in the chapeau of Article 2.2.2 that the methodologies set forth in Article 2.2.2 are to be used "for the purpose of" Article 2.2, which in turn refers to "reasonable" amounts for profits, *inter alia*. In the present dispute, how would Poland argue that the three alternative profit rates that it has proposed rebut the presumption of reasonableness? Other than these proposed alternative profit rates, are there any other factors, elements or considerations that would establish that Thailand's calculation of the profit rate was unreasonable?

Reply

The Panel has correctly re-stated Poland's position. Our view may be summarised as follows: Article VI(1)(b)(ii) of GATT 1994 and Article 2.2 AD both provide that in constructing normal value an authority may not include more than a "reasonable" addition for profit. The ordinary meaning of the above provisions is clear and applies to all sub-paragraphs of Article 2.2. Article 2.2.2 sets forth a number of alternative methodologies for calculation of profit "for the purpose of" Article 2.2.

The meaning of the phrase "for the purpose of" Article 2.2 is not clear from the text, but Poland believes it is better understood as establishing presumptively "reasonable" methodologies for purposes of Article 2.2 without limiting the overarching requirement of Article 2.2 that any amounts added (that is, the results of application of these methodologies) must themselves be "reasonable".

We note that the second sentence of Article 2.2.2 provides only that the subsequent methodologies "may" be employed, whereas if use of such methodologies were required, the second sentence, like the prior sentence, would have employed the verb "shall". Here, we believe, Members instead expressed uncertainty as to whether such methodologies would indeed *ipso facto* yield reasonable results. We believe this

is also clear from the requirement of subparagraph (iii), which expressly provides that even reasonable methodologies may sometimes yield results that are not fairly usable in constructing value. Subparagraph (iii) is also instructive because the ceiling it imposes (that the amount of profit included may not exceed that "normally realised ...") is arguably stricter than that of the "reasonableness" standard which otherwise flows from Article 2.2 to each provision thereunder.

This conclusion- that methodologies may not be applied blindly- receives further contextual support from other provisions within Article 2.2. For example, Article 2.2.2 (first sentence) limits "actual data" to data objectively "pertaining to production and sales *in the ordinary course of trade*." Thus data that would itself be unrepresentative and therefore yield unrepresentative results shall not be employed. Similarly, in order to attempt to achieve such representativeness - that is, to prevent results which, while arithmetically correct, are not themselves representative or "reasonable" - all profit amounts calculated under subparagraphs (i) or (iii) must be calculated not on small (and thus more likely unrepresentative) market segments, but rather more broadly so as to cover all production and sales "*of the same general category of products*." (This contrasts importantly with Article 2.2.2 (first sentence) which allows for comparison within the narrower "like product" category.)⁴ Of course, this was not done by Thai authorities.

Even if the DFT's results had been based on the same general category of products, the calculation must, for the reasons outlined above, still be examined to determine its reasonableness under Article 2.2. As regards the suggestion of a "rebuttable presumption" of reasonableness for these purposes, Poland has made this suggestion in trying to reconcile the apparent preference for use of the methodologies set forth in Article 2.2.2, with the overarching "reasonableness" mandate of Article 2.2. Yet, even such a presumption arguably is not required.

Finally, as regards the proper methodology for assessing reasonableness, we would respond that national authorities should assess reasonableness in the same way that they assess other issues. The record in the investigation contained three other profit figures, all closely similar, none even remotely at the level assumed by the authorities. Moreover, given the substantial debate on these issues, including at verification, Thai authorities knew that there were difficulties in proper comparison of DIN and JIS products, that different production processes were involved, and that these were new products occupying a special niche in the Polish domestic market. These facts required the DFT to question the appropriateness of such an exorbitant figure. As such, they had actual notice and even if they had used data on the "same

⁴ The use of the methodologies described in Art. 2.2.2 of the AD Agreement to calculate profit is analogous to the use of "Best Information Available" and should be subject to the same limitations, as set forth in Annex II to the AD Agreement. Para. 3 of Annex II states that "all information [submitted by the parties] which is verifiable, which is appropriately submitted ... , [and] which is supplied in a timely fashion ... should be taken into consideration." Furthermore, Para. 7 of Annex II states that when information for BIA is drawn from a secondary source, the authorities should "check the independent sources at their disposal ..." Like the use of BIA, the use of the results of the application of the methodologies under subparagraph's (i) or (iii) of Art. 2.2.2 is not *per se* reasonable. Instead, the reasonableness of those results must be measured in light of other available data.

general category of products", they still would have had to assess that result objectively in light of other record evidence.

28. Has Poland dropped its argument that JIS H-beams are too dissimilar to DIN H-beams for the profit on all home-market sales of H-beams to be "reasonable"? If not, how does Poland reconcile this with its argument that the Thai authorities should have based the profit amount on company-wide profit data (4.55%) covering a broad range of products (presumably including all H-beams, as well as other products). Please provide the legal basis for your response, in particular in light of the text of Article 2.2.2.

Reply

No, Poland has not dropped this claim. Both JIS and DIN H-Beams are in the "same general category" of product, but they are not the only products in those categories. Thailand had an obligation to use production and sales data not just of H-Beams, but more broadly of all products "of the same general category" - *i.e.* "Angles, shapes and sections of iron or non-alloy steel under HS 7216". Where, as here, such data was not in the record, we submit that a proper (if admittedly imperfect) surrogate would be the use of company-wide data which would cover a broader range of products, including H-Beams. Article 2.2.2 (i) would not allow for a narrower category than the narrowest "general category". The most "general category" (all products of a company) on the other hand would satisfy the Article 2.2.2 (i) requirement.

29. Assuming that Thailand was permitted under Article 2.2 and/or Article 2.2.2 AD, to use the methodology that it used in order to calculate the amount for profit, does Poland dispute the actual profit calculation (and the figure of 36.3% calculated by Thailand)?

Reply

As a matter of pure arithmetic, the calculation is accurate.

30. At the first meeting of the Panel, Poland indicated that DIN and JIS H-beams could be considered to be in the "same general category" of products. How would Poland define this category, as "all H-beams" or something else?

Reply

Poland believes that the same general category" of products would include all products within HS 7216, namely "Angles, shapes, and sections of iron or non-alloy steel under HS code 7216". DIN and JIS H-Beams are within that "same general category", along with other products.

33. The question has been placed before the Panel whether subparagraphs (i) and (ii) of Article 2.2.2 ADA are "safe havens" whereby applying any one of the methodologies set forth therein yields a result for profit that is *per se* "reasonable" in the sense of Article 2.2 ADA, last sentence, and Article VI:1(b)(ii) of GATT 1994. The chapeau of Article 2.2.2 ADA sets forth the preferred methodology for determining

inter alia the amount of profit in a constructed value calculation, and states that when such amount "cannot be determined on this basis" it "may be determined" on the basis of the methodologies in the subparagraphs (i) and (ii). The use of the word "may" in this context could be seen as linking the word "reasonable" in Article 2.2 to subparagraphs (i) and (ii) (which themselves do not contain the word "reasonable"), thereby introducing a "reasonability" constraint into these subparagraphs. Please comment.

Reply

Poland has felt it necessary to respond to this question within Poland's answer to Question 27 above. As discussed therein, in our Second Written Submission, and at the First Substantive Meeting, Poland agrees with this interpretation of the word "may" in the chapeau of 2.2.2, which we believe confirms that the "reasonability" test found in Article 2.2 applies throughout the sub-paragraphs of that provision. We have suggested the use of a "rebuttable presumption" in order to attempt to reconcile the requirement of "reasonableness" with the language of Article 2.2.2.

34. In this context, for purposes of argument only, assume for example that application of the methodology under subparagraph (i) or (ii) of Article 2.2.2 yields a 300 per cent profit, and that this profit margin is far in excess of the profit margin on the product for the industry as a whole. Would the fact that this result was arrived at based on the correct application of subparagraph (i) or (ii) make it "reasonable" *per se*? Is there any limit on what could be accepted as "reasonable" results of calculations under subparagraphs (i) and (ii)?

Reply

In Poland's view, use of a methodology set forth in subparagraph (i) or (ii) of Article 2.2.2 does not yield a result that it *per se* reasonable. Such a result would need to be considered in light of other evidence in the record - including, for sake of argument, evidence of the profit margin on the product in the same general category under the HS or, failing that, for the industry as a whole - to determine whether such a figure is reasonable and thus satisfies the requirements of Article 2.2. of the ADA and Article VI:1 of GATT 1994.

35. Is the phrase "in the ordinary course of trade" as used in Article 2.2.2 relevant to determining whether there is a reasonability test for calculations of profits under the chapeau of Article 2.2.2 and/or its subparagraphs (i) and (ii)? Please explain.

Reply

Yes, the phrase "in the ordinary course of trade" details the fact that statistical "outliers" or calculations based upon irregular events or product comparisons should not be used for purposes of the Article 2.2.2 calculations - and surely may not be deemed to yield *per se* reasonable results. We note that the restriction applies not just to any trade, or any course of trade, but only such a course of trade as is "ordinary". We discuss this issue more fully in the section on Article 2.2 in our 29 March 2000 Second Written Submission.

E. *Article 3 AD*

38. You have argued that Thailand has not considered all relevant factors listed in Article 3.4 ADA. Please prepare a table with five columns. The first column should list the Article 3.4 factors; the second column should indicate whether or not in your view the factor in question was "considered" in the investigation; the third column should indicate a citation to the record document(s) on which you base your statement that the factor was or was not "considered"; the fourth column should indicate whether you believe the evaluation of the factor in question to be adequate; and the fifth column should indicate the citations to the record in support of your assertion as to the adequacy of the evaluation or lack thereof, when this is relevant.

Reply

Please see the attached Table 1. We understand the Panel's question as limiting Table 1 to those factors expressly listed in Article 3.4 AD. We submit that that listing does not constitute all "relevant" factors that the Thai authorities should have evaluated, as set forth herein (*e.g.* Questions 44-45) and in our discussion of Article 3 in Poland's 29 March 2000 Second Written Submission.

40. Please comment on the hypothesis that a two-stage analysis of the factors listed in Article 3.4 ADA is required. The first stage would be an initial "consideration" to determine the "relevance" or lack thereof of each listed factor and an identification of any other non-listed factors that also were relevant. The second stage would be a full analysis of all of the factors that had been identified as relevant. In other words, the factors in Article 3.4 would be seen as a checklist of what would need to be "considered" in respect of whether or not each factor was relevant. If a given factor were deemed not to be relevant, the analysis of that factor could stop at that point. Under this hypothesis, the final determination would have to address each factor in the checklist, and for each of those that had been deemed not to be relevant would simply indicate that this was the case and why. For each relevant factor, the final determination would have to indicate why it had been deemed to be relevant and in addition would have to contain a full "evaluation" of it. (Please note that the reference to the "final determination" is not necessarily intended to imply the public notice thereof, but rather the report compiled by the investigating authority concerning the investigation, which might or might not be the same as the public notice.)

- (a) Please indicate whether you agree or disagree with all or part of this hypothesis and explain in detail the legal basis for your view.

Reply

As Poland sets forth in detail its Second Written Submission at Section III.B, Poland is largely in agreement with the view expressed above regarding the Article 3.4 factors. In Poland's view, Article 3.4 is not ambiguous. It states, in part, that the evaluation by the investigating authorities "*shall include* an evaluation of *all* relevant economic factors and indices having a bearing on the state of the industry, *including ...*" (emphasis added). The use of the word "shall" makes clear the evaluation is mandatory and the word "all" does not provide for any exceptions.

The required consideration, evaluation and weighting applied to the factors listed in Article 3.4 constitutes "proper" establishment of the facts only when *all* factors are considered. In the same light, the factors can only be "objectively" evaluated if they are *all* considered, weighed and discussed. Thus, the minimum starting point of an "objective" evaluation is a recognition that when Article 3.4 explicitly requires examination and evaluation of several specified economic factors ("including ...") in making a determination, Thai national authorities should not be permitted to pick and consider only those factors they find convenient or believe might support their case.

In this regard, Poland would strongly agree with the statement above that the final determination *must* address each factor in the checklist. The consideration must be such that the basis by which the authorities made their decisions is clear.

The legal basis for Poland's view is the ordinary meaning of the terms of Article 3.4 in their context and in light of the object and purpose of anti-dumping duties, as well as the adopted panel decision in *Mexico-High Fructose Corn Syrup*. There, the panel correctly explained that the text of Article 3.4 is "mandatory", with the "language mak[ing] it clear that the listed factors in Article 3.4 *must* be considered *in all cases*." *Mexico-HFCS Panel Report* at paragraph 7.128 (emphasis added). The *Mexico-HFCS* panel further explained that "[t]here may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be *required*." *Id.* (emphasis added). The panel appropriately concludes by explaining that consideration of each of the Article 3.4 factors "*must* be apparent in the final determination of the investigating authority," *Id.* (also citing Article 12.2.2) (emphasis added).

The *Mexico-HFCS* panel's conclusion that all factors must be properly considered finds additional legal support in light of the change in the relevant text between Article 3.3 in the Tokyo Round Anti-Dumping Code and the present analogous Article 3.4 Uruguay Round ADA. While few changes were made to the text, one change was to delete the words "such as" and insert the word "including."

Please see Section III.B. of Poland's Second Written Submission for detailed additional discussion of our views on these issues.

- (b) If you disagree with this hypothesis, please explain how, without "considering" each factor, its relevance or irrelevance can be judged.

Reply

Without carefully and thoroughly considering each factor, it is *impossible* to judge the relevance of each factor in an objective and unbiased manner. Careful consideration, of course, amounts to far more than a conclusory statement alleging the factor was "considered."

- (c) Is it your view that if an examination of several factors led to a conclusion of injury, it would not be necessary to "consider" any of the other factors? Please explain.

Reply

No. The language of Article 3.4 does not provide that investigating authorities may pick and choose among the factors they consider and evaluate. It states that the examination "*shall include an evaluation of all ... including ...*". To pick and choose is to act without objectivity. A particular factor, viewed in isolation, might tend to support a finding of injury. Yet, that same factor could properly be viewed in an entirely different light as a result of consideration of other listed factors. For example, "sales" do not exist in isolation from "profits" or "market share". Only by considering and carefully evaluating all the factors can authorities properly determine whether "one or several of these factors necessarily give decisive guidance."

41. Please describe the nature of the "relevance" of a factor in the context of Article 3.4 ADA. Is a factor "relevant" only when it supports an affirmative finding of injury, or should "relevance" be judged on a more broad basis, for example in the sense of whether or not a particular factor is informative as to the "state of the industry"? Is a factor also "relevant" when it does not support an affirmative finding of injury? Please explain in detail.

Reply

A factor is *not* "relevant" *only* when it supports an affirmative finding of injury - factors are relevant *both* when they do and do not support an affirmative finding of injury. Factors are thus relevant when, in the words of Article 3.4 they have "a bearing on the state of the industry." Poland notes that according to Article 3.1, a proper determination of injury must be based on "positive evidence" and involve an "objective examination." As Poland discusses at length in its Second Written Submission, positive evidence involving objective evaluation requires examination of any and all factors relevant to the state of the industry and whether it has been injured. Were relevance viewed only from one side of the equation, there would be nothing objective about the examination. In the words of the *Mexico-HFCS* panel: "In our view, this [Article 3.4] language makes it clear that the listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required." *Mexico-HFCS* Panel Report at paragraph 7.128.

Please see Section III.B. of Poland's Second Written Submission for detailed additional discussion of our views on these issues.

42. What is the significance of the fact that the term "such as" in Article 3.3 of the Tokyo Round Anti-dumping code was changed to "including" in Article 3.4 of the Uruguay Round Anti-dumping Agreement? If no change in meaning was intended, why was a change in terminology made? According to the Concise Oxford Dictionary (1990 ed.), the verb "include" means to "comprise or reckon in as part of a whole" or to "enclose". The term "such as" means "like" or "for example". Please explain in what sense, if any, these definitions could be viewed as synonymous.

Reply

A change in meaning was clearly intended and the list provided is no longer merely illustrative. The *Mexico-HFCS* panel's conclusion that all factors must be properly considered therefore finds additional support in light of the change in the relevant text between Article 3.3 in the Tokyo Round Anti-Dumping Code and the present analogous Article 3.4 Uruguay Round ADA. The plain meaning of the change deleting the words "such as" and inserting the word "including" is that while the list of factors to be considered in the Tokyo Round Code could plausibly be considered illustrative examples (such as ...), no such freedom exists in Article 3.4 ADA ("all relevant factors ... *including* ..."). As the dictionary definitions above make clear, "such as" is not synonymous with "including", and if no change in meaning was intended, there was absolutely no need for the drafters to change the text. In Poland's view, the definitions cannot be viewed as synonymous.

43. Please comment on the use of the word "or" at two places in the list of the factors in Article 3.4 ADA, as well as on the use of semi-colons between subgroups of factors in that Article. In particular, what is the significance, if any, of the fact that the word "or" appears only *within* subgroups of factors which are separated by semi-colons, and not *between* those subgroups?

Reply

The use of "or" in two instances must be viewed in light of the word that precedes the detailed listing in Article 3.4: "including". The dictionary definition of "including" suggests the containment of something as a constituent, component, or a subordinate part or a larger whole. Thus, when the word "including" begins a listing, as in Article 3.4, it suggests the items listed are part of a larger whole. In this light, the use of "or" is admittedly perplexing, as it makes less than ideal sense in the context in which it is used here. It appears most likely to be a remnant from the use of "such as" in the 1979 Anti-Dumping Code. As noted above, the drafters determined to change "such as" to "including" in the present text. What is also clear in Article 3.4 is that the fact that the word "or" appears only within subgroups of factors which are separated by semi-colons, and not between those subgroups, eliminates the possibility that the different subgroups of items listed are merely illustrative.

44. Please identify all of the record documents that you consider relevant to the determination of causation. Please explain how they support your argument concerning the adequacy of this determination.

Reply

Poland believes that the only record documents relevant to the determination of causation are the Final Injury Determination, the Final Injury Information Notice, and Exhibit THAILAND 44. As set forth more fully in our discussion of causation in our Second Written Submission, Poland believes that there is not a single material fact that has been properly or objectively found by the Thai authorities. Indeed, in most instances the Thai authorities have made multiple "findings" with respect to each "fact". Indeed, as discussed therein, both the Final Injury Information Notice

and, more importantly the confidential Exhibit THAILAND 44 shatter any contention of Thai authorities demonstrated injury by reason of imports.

45. We understand Poland to have argued that the question of the Kobe earthquake, and world supply and other economic conditions for H-beams, were not adequately considered during in the investigation. Please indicate which of these factors you believe were or were not considered. Please provide relevant citations to the record. Please indicate which of these factors were or were not adequately evaluated in the investigation. Please provide relevant citations to the record.

Reply

The Final Determination shows no consideration of the influence of non-Polish imports, the level of demand of the local construction industry, the highly aggressive nature of SYS' entry into the H-Beam market, domestic industry productivity and cost structure, technology developments, or the Kobe earthquake. It does show consideration of market realities in SYS export markets, in the Final Injury Information Notice.

None of these factors was adequately evaluated. To begin with, it is now plain that prices in SYS export markets were lower - not higher - than those in Thailand. (Exhibit THAILAND 44, paragraph 1.12.6). It is also clear that SYS had a very high cost of production. For example, Exhibit THAILAND 44, paragraph 4.8 points to SYS losses "due to operating expenditures that cannot be reduced." Similarly, Exhibit THAILAND 44, paragraph 5 states that "SYS has to bear the costs of new entrants which [are], as a rule, high". Likewise, it is plain that Thailand should have evaluated the effect of the global slowdown in construction and global overcapacity, fuelled by head-long rush of new firms into the H-Beam sector, for in Exhibit THAILAND 44, paragraph 3.3 they had found:

Whereas SYS relied on export for about [X-Conf.] per cent of its sales, it is much effected [sic] by the downturn of world market price for H-beams. This is due to the fact that there is a slowdown of construction world-wide coupled with the fact that the total production capacity far surpassed demand.

48. Where in the record is the substantiation for your assertion concerning which producer, Huta Katowice or SYS, was the price leader during the POI? Where in the record are the supporting data relevant to your views concerning the finding of price suppression/depression?

Reply

In the face of Thailand's undocumented and unexplained claim that Polish respondents were the price leaders and had caused price suppression/depression, Poland had pointed the Panel to the fact that under Table 1 in the Final Injury Information Notice, it was SYS that precipitated the first decline in prices during the IP (4th quarter 1995). We had also made use of other non-confidential data to show that the record did not support the conclusion that Polish prices had forced a decline in Thai prices to "match" the level of Polish imports. In particular, and as discussed more fully in our Second Written Submission concerning Article 3.4 and 3.5, the

DIT's critical finding regarding causation - that the "influence of Polish imports" is so complete that SYS sharply reduced its prices to "match" the level of Polish import prices - cannot be correct.⁵ This finding of a sharp price decline is contradicted by the findings in the non-confidential record that SYS entered the market in 1995 at prices well above those of Polish imports - and that SYS' prices then rose above 1995 levels during the IP.⁶ Moreover, Table 1 contradicts the second vital DIT conclusion regarding causation - that the "influence of Polish imports" is so complete that average Polish CIF prices and average SYS prices "move in the same direction".⁷ Table 1 shows that plainly this was not so; they do so less than half the time. In order to find price leadership and price suppression/depression, an authority must first establish prices.

Once one turns to the confidential data, several points become clear, as detailed more fully in Poland's Second Written Submission. There is barely a price "found" in the Thai non-confidential determinations that is supported by the secret data of the DIT. For example, the Final Injury Information Notice (at paragraph 6 and the Table entitled "Price Data for H-Beams") shows Polish prices moving from 8,409 Baht in 1995 down sharply to 7,975 Baht in the IP. Exhibit THAILAND 44 (at paragraph 1.9.2) shows Polish prices (in Baht/metric ton) moving from 8,409 Baht in 1995 up to 8,473 Baht in the IP.⁸ As regards Thai prices, the Final Determination states that they fell sharply to "match" Polish prices, and this was perhaps the critical finding on price leadership. However, Exhibit THAILAND 44, paragraph 1.12.6, states that for the four quarters of the IP, Thai prices were [P+ 3,067.38] Baht, [P+ 2,869.38] Baht, [P+ 1,974.38] Baht, and [P+ 1,768.38] Baht. Two pages later, at paragraph 1.17.1, the Thai authorities appear to change their mind, providing different figures for Thai domestic selling prices during the IP - this time the "facts" are purportedly [P+ 3,002.38] Baht, [P+ 2,869.38] Baht, [P+1,974.38] Baht, and [P+ 1,739.38] Baht.⁹ The "finding" in the Final Injury Determination - that SYS reduced its prices to "match" the level of Polish imports - is, using Thailand's own alleged data, therefore demonstrably pure fiction.

Moreover the claims of price leadership and depression/suppression by Polish firms run counter to the express findings of the DIT in Exhibit THAILAND 44 that "there is price stability with reference to the subject merchandise" and that Polish prices were "stable".¹⁰

⁵ We note further that in para. 2.5 of the Final Determination, the DIT states that SYS was forced to "match" Polish prices.

⁶ See, e.g., Exhibit THAILAND 41 and page 2 ("the complainant entered the Thai market at significantly higher prices than Polish product ...). Draft Injury Information Notice Table 1 on Average Quarterly Prices shows upward SYS price movements from that point.

⁷ Final Injury Determination at 2.2. They move in the same direction in 3Q 1995 and 1Q 1996, but in opposite directions in 2Q 1995, 4Q 1995, and 2Q 1996. Similarly, it is not true that Polish imports "continuously increased" during the IP because figures for "Import from Poland" move up and move down throughout the period in question. Final Injury Information Notice, Exhibits POLAND 10, 11; THAILAND 37.

⁸ This figure is repeated in para. 1.11 of Exhibit 44.

⁹ It is unclear why there are different prices listed here than in para. 1.12.6.

¹⁰ *Ibid.* at para. 5, page 13, para. 1.9.2, page 4.

Finally, the leading argument supporting these Thai claims was that Thai domestic prices were much lower than those in SYS export markets, evidencing the pernicious effect of Polish imports (Final Injury Determination at point 2.4; Final Injury Information Notice at point 10). As Exhibit THAILAND 44 states, however, [X-Conf.¹¹].

We would respectfully direct the Panel to our Second Written Submission for additional discussion of these issues.

49. Under what circumstances, or in respect of what sorts of factors, if any, is it the responsibility of the investigating authority to seek information concerning the potential effects of "known" factors other than dumped imports that might be causing injury, and when does the responsibility fall to the responding party to bring such issues to the attention of the investigating authority? For example, if the importing country is in an economic recession, certainly the authority and all interested parties will "know" this. Would the authority have the responsibility on its own initiative to try to identify the specific effects of the recession in the domestic market for the product under investigation, or would it only have to consider this issue if it were raised by an interested party? Would it make a difference if the factor in question was not something widely known but rather was known only to the investigating authority and the domestic industry (i.e., not to the respondent)? Please explain and provide the legal basis for your view.

Reply

Consistent with Article 3.1, the investigating authority is required to base all determinations of injury on *positive* evidence and an *objective* evaluation. In order for an evaluation to be "objective", an investigating authority has the affirmative responsibility to seek *all* available information concerning the potential effects of "known" factors other than dumped imports that might be causing injury. If it does not, the evaluation cannot possibly be objective. While a responding party would be unwise not to bring such issues to the attention of the investigating authority, responding parties do not bear the same burden as the investigating authority.

It should be recalled that the investigating authority is the party seeking to invoke the exception to the norm of using only bound tariff rates - the imposition of anti-dumping duties on the imports of a product from another country. Members have agreed that anti-dumping measures may be applied *only* under the circumstances provided for in Article VI of the GATT 1994 and pursuant to investigations initiated and conducted *in accordance* with the provisions of [the Anti-Dumping] Agreement." Article 1 ADA (emphasis added). Anti-dumping duties may be imposed only "where *all* requirements for the imposition have been fulfilled," including a proper determination of both dumping and injury. Articles 2, 3, 9.1, ADA (emphasis added); Article VI:1, VI:6 GATT 1994.

In addition, as Article 3.5 sets forth, the *objective demonstration* that the dumped imports are causing injury and is the responsibility of the investigating au-

¹¹ Exhibit THAILAND 44, para. 1.12.6 (first indent) (emphasis added).

thority. Foreign respondents may *not be presumed* to cause injury and injury may not be found by means of the investigating authority closing its eyes to all relevant facts.

The example provided by the Panel above illustrates the point. The authority has the responsibility on its own initiative to try to identify the specific effects of the recession in the domestic market for the product under investigation by the explicit text of Article 3.5: "the authorities *shall also examine any known factors* other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors *must not* be attributed to the dumped imports." To be aware of an important factor and to not consider it because it was not raised by an interested party upon whom the investigating authority is seeking to impose AD duties would *not* be objective and would *not* meet the Article 3.5 standard.

Lastly, Poland would note that Thailand was aware of several factors other than Polish imports which were not examined, in particular, the pricing conduct of SYS, technology developments, export performance, domestic industry productivity and the Kobe earthquake.

Please see also Poland's Second Written Submission.

F. Article 17.6 AD: Standard of Review

52. Please comment on the relationship, if any, between Article 17.6 ADA and Article 11 DSU, in particular whether or not these provisions must be read together, drawing on elements from both except to the extent that they "differ" in the sense of Article 1.2 DSU, in which case Article 17.6 ADA would prevail. Please comment on whether you believe this is the correct approach, and whether you do or do not see such a "difference" between Article 11 DSU and Article 17.6 ADA. Please describe any such difference. In this context, please discuss the Appellate Body's statement in *Argentina - Footwear Safeguard*:

"[F]or all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels¹. 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, Article 17.6, sets out a special standard of review* for disputes arising under that Agreement" (underlining supplied).

¹ 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, para. 2.67

Reply

Poland has set forth its views regarding Article 17.6 at length in its First and Second Written Submissions to the Panel. Poland would, therefore, first respectfully refer the Panel to the fuller discussion regarding this question that appears in Poland's Second Written Submission at Section II.

In Poland's view, there is a strong and necessary relationship between Article 11 DSU and Article 17.6 ADA. By the terms of Article 1 DSU, the Anti-Dumping

Agreement is a covered agreement. Article 1.2 DSU does *not* provide that Article 17.6 ADA *exclusively and totally replaces* Article 11 DSU. Rather, Article 1.2 DSU notes that "[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures ... the special or additional rules and procedures in Appendix 2 shall prevail" (emphasis added). Thus, Article 17.6 ADA and Article 11 DSU must be read together, drawing on elements from both *except to the extent that there is a difference*, in which case Article 17.6 ADA would prevail. Poland believes this to be the correct approach, and Poland does not see a significant or material "difference" between Article 11 DSU and Article 17.6 ADA with regard to the issues in this case. Certainly no such differences justify the radical distinction Thailand wishes to draw.

With regard to factual questions both the DSU and ADA require an "objective" assessment, with Article 17.6 also noting that the establishment of facts must be "proper" and "unbiased." With regard to legal issues, both the DSU and ADA require a panel to determine conformity of a given action/practice/law by a Member with the covered agreement, and both require panels to pursue their interpretive task in accordance with the "customary rules of interpretation of public international law" (see Article 3.2 DSU).

The Appellate Body's statement in *Argentina - Footwear Safeguard* acknowledges that, consistent with Appendix 2 of the DSU, the ADA sets forth what the Appellate Body terms a "special" standard of review. Poland agrees entirely with the Appellate Body in this regard. The Appellate body's statement does not suggest that Article 17.6 is materially different than Article 11 DSU with regard to the issues that are at the center of this dispute between Poland and Thailand - it merely notes a "special" standard. The Appellate Body's statement is thus also consistent with Article 1.2 DSU, which notes that such a "special" standard only prevails "[t]o the extent that there is a difference".

53. The parties seem to agree that the appropriate standard of review is somewhere between *de novo* review and total deference. We note that within Article 17.6 itself, the two subparagraphs arguably could be viewed as establishing different levels of review or deference pertaining to two different types of issues. Subparagraph (i) concerns facts and arguably requires a considerable degree of deference and thus relatively limited review by a Panel. By contrast, subparagraph (ii) concerns issues of law and the question of multiple "permissible" interpretations of a given provision of the ADA, among which a national investigating authority is free to choose. Some commentators believe that rarely if ever can there be more than one permissible interpretation of any given treaty provision. This might arguably mean that the required degree of deference under (ii) would be less than under (i). Furthermore, the question arises as to when, if at all, the establishment or evaluation of "facts" by an investigating authority becomes a question of law or legal interpretation under the Anti-dumping Agreement (e.g., where the issue is whether a certain set of facts satisfies a given treaty provision). The question of this "penumbra" between fact and law could be particularly relevant in the context of the Anti-dumping Agreement.

Reply

As with the previous question regarding Article 17.6, Poland first respectfully refers the Panel to the lengthy discussion regarding Article 17.6 that appears in Poland's Second Written Submission at Section II, as well as that in its First Written Submission at Section III.A. Some of that discussion is reiterated below pursuant to the Panel's requests.

- (a) Please comment on your views as to the nature of the differences between the two subparagraphs of Article 17.6 (coverage, degree of deference required, etc.).

Reply

Poland would agree that there exists a bit more latitude with regard to Article 17.6(i) than 17.6(ii), but Poland would also respectfully suggest that the difference in degree of review is not substantial. Poland also agrees that the standard in Article 17.6(i) falls between *de novo* review and total deference. The standard in Article 17.6(ii) requires *the Panel* to determine the proper interpretation of the relevant provision.

Article 17.6(i) is intended to cover strictly factual questions, such as a claimed pricing level or the exact amount constituting a cost of production element. Under Article 17.6(i), the Panel must first determine whether the investigating authorities' establishment of the facts was *proper*. Poland understands that a WTO panel is not in a position to re-determine every factual determination made by a national authority, and Poland therefore does not suggest that such is their role under Article 17.6(i). At the same time, Article 17.6(i) makes clear that in the discharge of its duties, a panel *must* perform "an assessment of the facts of the matter." Poland submits that in order for any investigating authorities' "establishment" of the facts to be "proper", at an absolute minimum those record facts must first be *consistent* with one another, and it is a panel's clear role and duty to investigate whether this was the case. Therefore, a national authority cannot be found to have established properly any "fact" when that alleged "fact" is contradicted by another "fact" elsewhere in the record of the same proceeding. Such a "fact" is not even established, much less properly so. The panel is responsible for making this determination.

"Proper" establishment of facts also includes several additional requirements which direct the Panel to examine directly the actions of the national authorities. Facts cannot be properly established if the respondents in an investigation are not given, *inter alia*, the opportunity to provide all relevant facts, to review the material facts alleged against them, and to correct any mistaken allegations upon which the authorities plan to base their final determination. Therefore, in addition to the consistency of the facts "established", the fact gathering and evaluation procedures employed by the investigating authorities should be examined by the Panel and are directly relevant to the Panel's required assessment of the facts.

For those facts found to have been established properly, consistent with Article 17.6(i), the Panel must then determine, in light of all available evidence, whether the authorities' evaluation of the facts at issue was *unbiased* and *objective* - that the national authorities dealt with facts without distortion for institutional feelings,

prejudices, or interpretations, and without being unduly or improperly influenced or inclined. *The Panel must examine whether they were impartial in what was done and left undone.* An evaluation is not "objective" unless *all* evidence is considered and then weighed without any favouritism toward a national producer or industry. Thus, the baseline of an "objective" evaluation is that when a provision of the Anti-Dumping Agreement, such as Article 3.4, requires examination and evaluation of several factors in making a determination, the national authorities should not be permitted to pick and consider only those factors they find convenient or believe might support their case. The omission or disregard of factors that an ADA provision requires authorities to consider is a *prima facie* case of bias in an evaluation.

Article 17.6(ii) requires the Panel to interpret the extent of a Member's obligations under the Anti-Dumping Agreement and the consistency of a practice being challenged with those obligations. The degree of deference called for is therefore appropriately very small. The Panel should turn first and foremost to the customary rules of interpretation of public international law, including the Vienna Convention, Articles 31 and 32. The point of these interpretive rules is to resolve any ambiguities in a treaty's text. Thus, Poland agrees with the position in the question above that "rarely if ever can there be more than one permissible interpretation of any given treaty provision." In such instances, the Panel should base its ruling on the consistency of the Member's practice being challenged with the sole proper interpretation of the relevant ADA provision.

If, and only if, a Panel determines that an Anti-Dumping Agreement provision somehow has multiple "permissible" interpretations in light of the practice or action being challenged (and Poland fails to see how this could be the case in the present circumstances before the Panel), then the Panel is instructed to defer to permissible interpretations consistent with the text of the Anti-Dumping Agreement. Provisions of the Anti-Dumping Agreement are not subject to differing multilateral obligations, depending on the Member performing the interpretation of a given provision. Poland believes there should be a *multilateral* understanding of the ADA provision being examined. Effective panel review of the consistency of a Member's actions with the text of the Anti-Dumping Agreement otherwise would be rendered impossible.

- (b) Please also describe the standard of review that you believe should apply to issues that fall within the penumbra between factual and legal issues as described above. Is it the standard in 17.6(i), 17.6(ii), or some other standard. Please explain in detail.

Reply

Please first see detailed description of the components of a proper review immediately above.

Poland's view is that both 17.6 (i) and 17.6 (ii) are applicable and should be utilised for mixed questions of fact and law. To the degree that the question before the Panel relates to the establishment of a fact, the Panel would first examine whether the fact was *properly* established. If so, the Panel would next examine if the fact was *evaluated* in an objective and unbiased manner. If these conditions are not satisfied,

the inquiry would end there - the legal significance of a "fact" is immaterial if the "fact" has never been truly established.

If, on the other hand, these conditions are all satisfied, the Panel could then turn to the legal significance of the fact - *e.g.*, whether the properly established and objectively evaluated fact satisfies the legal threshold set forth in the ADA. At this point, the Panel should be guided by Article 17.6 (ii) and the customary rules of interpretation.

In no instance should any issue that requires evaluation and analysis of a legal issue or claim be evaluated under Article 17.6 (i), as opposed to 17.6 (ii).

- (c) Please identify the standard of review (subparagraph (i), subparagraph (ii) or a standard of review applicable in the penumbra if different from (i) or (ii)) that you believe is applicable to each issue before the Panel in this case, and please explain your reasoning.

Reply

In the Republic of Poland's view, Thailand has violated Article VI of GATT 1994 and Articles 2, 3, 5, and 6 of the Anti-Dumping Agreement. Each of these provisions is part of a freely entered international agreement, containing *legal* obligations, to which both Poland and Thailand are parties. Therefore, all legal determinations by the Panel with regard to these provisions necessarily involve Article 17.6(ii).

For the Panel's benefit, Poland would respectfully first reference the detailed legal claims it has made in this proceeding. These claims are set forth in, *inter alia*, the Panel's terms of reference, Poland's First and Second Written Submissions, Poland's First Oral Statement, and Poland's responses to Panel Questions 3, 4, 8 and 9.

In *summary* form, Poland's claims include the following:

Article 2.2: that the profit figure used by the Thai authorities was not "reasonable" - a legal claim involving the application of Article 17.6 (ii);

Article 3.1: that the Thai authorities did not properly make their injury determination based on "positive evidence" and an "objective evaluation" of the enumerated factors - a legal claim involving the application of Article 17.6 (ii);

Article 3.2: that the Thai authorities did not properly consider, *inter alia*, whether there has been a "significant" increase in allegedly dumped imports and whether "price depression" or other factors have occurred to a "significant" degree - a legal claim involving the application of Article 17.6 (ii);

Article 3.4: that the Thai authorities did not "evaluate" all "relevant" economic factors and indices having a bearing on the industry and that Thailand did not adequately evaluate even those it claimed to examine - a legal claim involving the application of Article 17.6 (ii);

Article 3.5: that the Thai authorities did not "demonstrate" that the Polish imports are, through the effects of dumping, "causing injury" within the meaning of the ADA; that the required "demonstration" of a "causal relationship" was not based on an examination of "all relevant evidence" before the authorities; that known factors other than the allegedly dumped imports were not properly examined and that possible "injury" from these other factors was illegally attributed to the allegedly dumped imports - a legal claim involving the application of Article 17.6 (ii);

Article 5.2: that the SYS application failed to include evidence of (i) "injury" within the meaning of Article VI of the GATT 1994 as interpreted by the Antidumping Agreement and (ii) a "causal" link between allegedly dumped imports and the alleged "injury" - a legal claim involving the application of Article 17.6 (ii);

Article 5.3: that Thailand failed to examine the accuracy and adequacy of the SYS petition in order to "determine" whether there was "sufficient" evidence to "justify" the initiation - a legal claim involving the application of Article 17.6 (ii);

Article 5.5: that Thailand failed properly to notify the Republic of Poland - what constitutes proper notification is a legal claim involving the application of Article 17.6 (ii);

Articles 6.4 and 6.5: that the Thai preliminary, draft final, and final determinations are opaque, internally inconsistent, and conclusory summaries that fail to offer Polish respondents "meaningful opportunities ... to see all information that is relevant to the presentation of their case" so as to be allowed to make their "presentations on the basis of this information", as required by Article 6.4; that when Polish respondents were never informed, or given a copy, of the non-confidential version of the SYS questionnaire response by Thailand, this violated 6.4 and 6.5 - legal claims involving the application of Article 17.6 (ii);

Article 6.5.1: that the Thai summaries provided were not "in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence" - a legal claim involving the application of Article 17.6 (ii); and

Article 6.9: that Thailand failed to inform Polish firms of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures" - a legal claim involving the application of Article 17.6 (ii).

In the course of ruling on these legal claims, the Panel will be called upon to make an assessment of the facts of this matter and to determine whether several material "facts" were properly established and, if so, whether their evaluation by the Thai authorities was then unbiased and objective. In these numerous instances, detailed throughout Poland's written submissions, the Panel will appropriately be applying Article 17.6 (i). Thus, for instance, the actual amount or figure of a given import price will be relevant to the Panel's evaluation of the legal existence or lack of existence of price suppression. The amount is a "fact" and the Panel's task is first to assess whether it was properly established. If the Thai authorities never established a number, its legal significance comes into play in the sense that contradictory "facts" or prices are often bound to have legal significance given the provisions of the ADA.

Poland respectfully realises that its good faith attempt to answer this question may not definitively address or resolve every potential issue or circumstance deemed relevant by the Panel to its deliberations. It is difficult for Poland to hypothesize or list every factual circumstance or legal subpoint on which the Panel may want guidance. Poland therefore stands ready to address any specific additional questions of the Panel on this issue in subsequent written questions or at the Second Substantive meeting of the Parties with the Panel.

(TABLE RESPONSE TO QUESTION 38)

INJURY ACCORDING TO ARTICLE 3.4, AGREEMENT ON IMPLEMENTATION OF ARTICLE VI
OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

No.	Economic factors and indices having a bearing on the state of the industry	Was factor "considered" in the investigation? YES or NO	Document in which factor "considered"	Was evaluation adequate?	Document supporting claim of (in)adequacy
1	2	3	4	5	6
1	Actual and potential decline in sales	YES	Allegedly in Final Injury Information Notice	No. No evidence of injury. SYS sales volume grew by 33% in IP versus 1995.	Exhibit THAILAND 37 Exhibit POLAND 10 (page 2, point 3)
2	Actual and potential decline in profits	NO and YES	Allegedly in Final Injury Information Notice; Line 7 of Table on "Market Data of H-Beam of Siam Yamato" has "(" listed for "Net Profit (Loss)". But no further "consideration".	No. Not evaluated adequately as Final Injury Information Notice does not set forth clear facts and reasoning, and is contradictory. Thailand may claim that evaluation based on statement on "business performance" of SYS for "1994 and 1995" (point 11). But the company did not produce subject merchandise in 1994. Never considered/evaluated SYS business performance for 1996 whatsoever. (a) Claim of unprofitability never considered/evaluated (i) in context of new market entrant in capital-intensive industry and (ii) in light of fact that return on investment was clearly improving - much closer to profitability in IP than in 1995, a remarkable economic feat for new entrant.	Exhibit THAILAND 37 Exhibit POLAND 10, point 11 Failure to address these factors set forth by Polish respondents in submissions to Thai authorities. Exhibit THAILAND 35, pages 2-5; Exhibit THAILAND 40, pages 2-4; Exhibit THAILAND 40. See "Actual and potential decline in return on investments" below.
3	Actual and potential decline in output	YES	Allegedly in Final Injury Information	No. No Evidence of injury. SYS output increased by 13% in IP versus 1995.	Exhibit THAILAND 37 Exhibit POLAND 10, page 1, point 2 Exhibit THAILAND 21

No.	Economic factors and indices having a bearing on the state of the industry	Was factor "considered" in the investigation? YES or NO	Document in which factor "considered"	Was evaluation adequate?	Document supporting claim of (in)adequacy
1	2	3	4	5	6
			Notice		SECTION C, page 1
4	Actual and potential decline in market share	YES	Allegedly in Final Injury Information Notice	No. No evidence of injury. SYS market share grew during the IP as compared to 1995 - although Thailand now claims, after the fact and contrary to record evidence, that any increase, while admitted, was not as great as previously calculated, due to "typographical error". Clear that market share of IP versus pre-IP would have skyrocketed, since SYS had more than 55% of domestic market within 16 months of selling first H-Beam.	Exhibit THAILAND 37 Exhibit POLAND 10, chart entitled "Market Data of H-Beam of Siam Yamato".
5	Actual and potential decline in productivity	NO	Not applicable.	No consideration or evaluation whatsoever.	Not applicable.
6	Actual and potential decline in return on investments	YES	Allegedly in Final Injury Information Notice	No. Record does not contain any clear evaluation. Appears to have been erroneously treated as same issue as profitability and not separately evaluated. Possible Thai claim that evaluation might have been based on "business performance" of SYS for "1994 and 1995". But the company did not produce subject merchandise in 1994. Never considered/ evaluated SYS business performance for 1996. Thailand never considered/evaluated this factor (i) in context of new market entrant in capital-intensive industry and (ii) in light of fact that performance was clearly improving - closer to profitability in IP than in 1995.	Exhibit THAILAND 37 Exhibit POLAND 10, point 11 and chart entitled "Market Data of H-Beam of Siam Yamato". Failure to address these factors set forth by Polish respondents in submissions to Thai authorities. Exhibit THAILAND 35, pages 2-5; Exhibit THAILAND 40, pages 2-4; Exhibit THAILAND 40.
7	Actual and potential	YES	Final Injury	No. No evidence of injury. Capacity utilization increas-	Exhibit THAILAND 37 Exhibit

No.	Economic factors and indices having a bearing on the state of the industry	Was factor "considered" in the investigation? YES or NO	Document in which factor "considered"	Was evaluation adequate?	Document supporting claim of (in)adequacy
1	2	3	4	5	6
	decline in utilization of capacity		Information Notice	ing. Actual capacity utilization grew from 64.4% in 1995 to 72.9% in IP by Thailand's own claim.	POLAND 10; chart entitled "Market Data of H-Beam of Siam Yamato". Exhibit THAILAND 21 SECTION C, page 2
8	Factors affecting domestic prices	YES	Final Injury Information Notice	No. Record does not contain any clear evaluation. Claims existence of price suppression, price depression, price undercutting allegedly supported by Table 1. But Table 1 does not support those claims. "Finding" repeated in Final Injury Determination without further support.	Exhibit THAILAND 37 Exhibit POLAND 10, point 7 Exhibit THAILAND 46, Exhibit POLAND 13, point 2.3
9	The magnitude of the margin of dumping	NO	Not applicable	No. No consideration or evaluation.	Not applicable
10	Actual and potential negative effects on cash flow	YES	Allegedly in Final Injury Determination	No. No evaluation or positive evidence whatsoever. Listed in Final Determination without any evaluation as an effect of SYS decreasing prices to Polish import levels - a critical (and false) claim regarding causation	Exhibit THAILAND 46, Exhibit POLAND 13, point 2.3
11	Actual and potential negative effects on inventories	YES	Allegedly in Final Injury Information Notice	No. No evidence of injury; inventory fell from 100 in 1995 to 81 in IP, even while output was rising.	Exhibit THAILAND 37 Exhibit POLAND 10, chart entitled "Market Data of H-Beam of Siam Yamato".
12	Actual and potential negative effects on employment	YES	Allegedly in Final Injury Information Notice	No. No evidence of injury. Employment grew from 100 in 1995 to 110 in IP (even greater percentage growth likely if compare pre-IP with IP).	Exhibit THAILAND 37 Exhibit POLAND 10, chart entitled "Market Data of H-Beam of Siam Yamato".

No.	Economic factors and indices having a bearing on the state of the industry	Was factor "considered" in the investigation? YES or NO	Document in which factor "considered"	Was evaluation adequate?	Document supporting claim of (in)adequacy
1	2	3	4	5	6
					Exhibit THAILAND 21, SECTION A, page 9
13	Actual and potential negative effects on wages	NO	Not applicable	No consideration or evaluation	Not applicable
14	Actual and potential negative effects on growth of the industry	YES	Allegedly in Final Injury Information Notice	No. No evidence of injury. Two new Thai producers were entering the market with enormous combined production capacity of 13 million tons. This factor was not evaluated by Thai authorities other than to state that Thai market share/sales must be preserved and expanded.	Exhibit THAILAND 37 Exhibit POLAND 10; point 15
15	Actual and potential negative effects on ability to raise capital	NO	Not applicable	No. No consideration or evaluation; if anything, large new market entrants evidence easy access to capital.	Not applicable
16	Actual and potential negative effects on investments	NO	Not applicable	No. No consideration or evaluation; if anything, large new market entrants evidence easy access to investment.	Not applicable

RESPONSE OF THE REPUBLIC OF POLAND
TO QUESTIONS OF THAILAND

I. PRELIMINARY OBJECTIONS

1. In Poland's view, do the following articles of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") and GATT 1994 contain one distinct obligation or more than one distinct obligation?
- a. Article 2 of the Anti-Dumping Agreement;
 - b. Article 3 of the Anti-Dumping Agreement;
 - c. Article 5 of the Anti-Dumping Agreement;
 - d. Article 6 of the Anti-Dumping Agreement; and
 - e. Article VI of GATT 1994.

Reply

Please see Poland's response to Question 1 from the Panel, including paragraph (c) thereof.

2. In its Oral Statement, Poland contends that it is not obligated to comply with Article 6.2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") as interpreted by the Appellate Body in *Korea - Dairy Products*. Poland's position is apparently based on the fact that the Appellate Body's interpretation was issued after Poland submitted its request for establishment of a Panel. Based on Poland's interpretation of its obligations under Article 6.2 of the DSU:
- a. Does Poland agree that Thailand could not have violated Articles 2 or 3 of the Anti-Dumping Agreement based on Poland's proposed interpretations of these articles, given that such interpretations were not known to Thailand at the time of the investigation?
 - b. Does Poland agree that Thailand could not have violated Article 3.4 based on the interpretation of this article by the panel in *Mexico - HFCS*, given that this interpretation was issued after the Thai authorities completed the investigation?
 - c. Does Poland agree that Thailand is only obligated to implement any decision of the Panel in this case in future anti-dumping investigations because Thailand would not have had the benefit of the Panel's (or the Appellate Body's) interpretations of many of the provisions in the Anti-Dumping Agreement at the time of the investigation regarding H-beams from Poland?

Reply

We do not agree with these assertions or with the characterization of Poland's claims arising from the Appellate Body's ruling in *Korea - Dairy Products*.

3. Poland contends that it presented its claim under Article 5 of the Anti-Dumping Agreement with sufficient specificity because it asserted that the authori-

ties decided to initiate the investigation without evidence of injury or causation in the application.

- a. Does Poland agree that even this level of detail was not included in its request for establishment of a panel?
- b. In its request for establishment of a panel or in its First Written Submission, did Poland discuss any other aspects of the *chapeau* of Article 5.2 of the Anti-Dumping Agreement or identify sub-paragraphs (i), (ii), (iii), or (iv) of Article 5.2?
- c. Did the Polish respondents during the investigation or did Poland at any time request or otherwise obtain a translation of the Thai language portions of the non-confidential version of the application?

Reply

We believe our written submissions and oral statements speak for themselves. Please see, *e.g.*, Poland's response to Questions 1-4 from the Panel. If by Question (c), Thailand is implying that the non-confidential version of the application, THAILAND Exhibit 1, contains required evidence of injury and causation, we look forward to Thailand's providing such a translation to Poland and the Panel.

4. Poland contends that it presented its claim under Article 3 of the Anti-Dumping Agreement with sufficient specificity. Thailand's position is that the only purported claim raised by Poland under Article 3.4 of the Anti-Dumping Agreement is that "[t]he Thai authorities chose not to present evidence regarding profits, losses, profitability or cash flow." Poland's First Written Submission at para. 74. According to its final comments to the Panel, Poland indicates that Thailand is improperly relying on a single sentence read out of context.

- a. Does Poland agree that it did not reference paragraph 4 of Article 3 or any specific factor therein in its request for establishment of a Panel?
- b. Could Poland identify the paragraphs in its First Written Submission where it identified specific factors under paragraph 4 of Article 3 and alleged that the Thai authorities failed to consider or evaluate such identified factors?

Reply

We believe that our written submissions and oral statements speak for themselves.

5. Does Poland agree that it did not reference the failure of the Thai authorities to examine "other factors" under Article 3.5 of the Anti-Dumping Agreement in its request for establishment of a panel?

Reply

No, we would not agree with this characterization.

II. DUMPING

6. Can Poland confirm the answer it provided during the oral hearing that JIS specification H-Beams and DIN specification H-Beams fall within the "same general category of products"?

Reply

Yes, JIS specification H-Beams and DIN specification H-Beams fall within the same general category of products, but are not the only items within that general category.

7. The factual record indicates that Huta Katowice is earning large profits on domestic sales of H-beams in Poland.

- a. Does Poland consider that Huta Katowice is making an unreasonable profit on sales of H-beams in the Polish domestic market?
- b. If not, why is the profit calculated based on actual data for domestic sales of H-beams then unacceptable for use in calculating a constructed value for anti-dumping purposes?

Reply

Poland does not have available to it the evidence needed to make such a determination in the abstract. Please see Poland's response to Questions 27-30, 33-35 from the Panel.

8. How does Poland propose that investigating authorities decide whether a particular level of profit is reasonable or unreasonable?

Reply

Poland believes that investigating authorities have an obligation to reach proper determinations based on objective examination of the evidence in the record of an investigation. Please see also Poland's response to Questions 27-30, 33-35 from the Panel, as well as discussion of this issue in Poland's Second Written Submission.

III. INJURY

9. As described in the factual record of the investigation, there is only one Thai domestic producer and only one Polish producer. These two producers each supplied confidential information in their respective questionnaire responses. Are the non-confidential tables reported in the injury disclosure to the Polish respondents the only basis on which Poland contends that the Thai authorities did not use actual information?

Reply

No, Poland is contending that the Thai injury analysis was replete with false and internally inconsistent data which cannot support a determination of injury by reason of Polish imports. The new THAILAND Exhibit 44 has only made this situation worse. The misleading tables are only one example of this outcome-

determinative technique. We note further that the Polish respondents were never even given copies of the SYS non-confidential questionnaire response, and that the SYS response, now THAILAND Exhibit 21, also contains quite different data than was relied on by Thai authorities.

10. Poland asserts that Thailand failed to consider the Kobe earthquake as an "other factor" potentially causing injury to the domestic industry under Article 3.5 of the Anti-Dumping Agreement.

- a. In addition to the phrase in footnote 1 of Hogan & Hartson's letter in Exhibit THAILAND - 40, could Poland identify in the record of the investigation where the respondents referred to the Kobe earthquake as an "other factor"?
- b. Does Poland contend that consideration of the effects of the Kobe earthquake are required in addition to consideration of the effects of world market conditions on world market prices? If so, how should the specific effects of an earthquake in Japan on global prices of H-beams be assessed by investigating authorities in Thailand and where was the need for further specificity in examining this factor raised on the record of the investigation?

Reply

Please see Poland's response to Questions 44-45 from the Panel.

11. Does Poland agree that Thailand's compliance with Article 12 of the Anti-Dumping Agreement is outside the Panel's terms of reference?

Reply

Please see Poland's response to Question 25 from the Panel.

ANNEX 1-6

SECOND ORAL STATEMENT OF THE REPUBLIC OF POLAND
(12 April 2000)

INTRODUCTION

1. Mr. Chairman, Members of the Panel. The Panel has already had the opportunity to hear extensive argument on this case from the Republic of Poland, the Kingdom of Thailand, and the Third Parties. It is not our intention today, you will be pleased to know, to belabour points already discussed at length. Our oral statement will concentrate on a number of key issues. In doing so, Poland will take the opportunity to reply to some of the more egregious assertions by Thailand in its Second Written Submission, and in particular, its Responses to Questions from ourselves and the Panel.

2. In addressing these issues, it is important, Poland submits, to take stock of where we all find ourselves in this proceeding. Given Thailand's four-page Second Submission, it would appear that Thailand understands that, after release of Thailand Exhibit 44, Thailand's claims to have conducted a proper and objective investigation have effectively been shattered. The record now contains three or sometimes more findings as to critical facts - with every inadequacy now becoming a "typographical error" or a regrettable mis-translation that fails to capture "the true and full meaning of the Thai language version."¹ As it can no longer truly argue about substance, Thailand seeks to defend its interests only as regards procedure. It thus seeks to ignore the actual course of these proceedings, and its earlier candid statements that it understood (even though it completely mischaracterized) several of the claims against it.² Now Thailand wants to take back its previous admissions and has retreated to claiming, each time with increasing vehemence, that it simply cannot understand the claims presented by Poland. These allegations come of course after attempts to supply data on an *ex parte* basis to the Panel, with attendant delays that Thailand, quite remarkably, now seeks to blame on Poland.³ These allegations come after Thailand has sought - and failed - to distance itself from the very "secret" data it gave so reluctantly to Poland and Third Parties. These allegations come after Thailand even now discovers new, extra-record "data" allegedly from secret committee meetings that it believes will salvage the unsupported "findings" of its national authorities. Rather than admitting the obvious - that Thailand has long had actual notice of Poland's claims in this matter - Thailand simply seeks to bring these proceedings to a screeching halt, ignoring all it deems inconvenient. To Poland, this attitude is quite reminiscent of the conduct of the Thai national proceedings herein at issue. To the Panel, a party's apparently determined effort to frustrate dispute settlement should be met with firm rebuke.

¹ Second Submission of the Kingdom of Thailand at para. 7.

² See, e.g., First Written Submission of the Kingdom of Thailand at para. 75.

³ Second Submission of the Kingdom of Thailand at para. 6.

3. The issues that Poland will address today are:
- the repeated Thai attempts to thwart this proceeding despite the clear and detailed Thai knowledge of each claim by Poland;
 - the Thai claim that Article 17.6 ADA mandates the near total deference preferred by the Thai authorities;
 - the inconsistency of the Thai injury determination with the plain standards and requirements set forth in Articles 3.1, 3.2, 3.4 and 3.5 ADA;
 - the Thai authorities use of a profit figure in calculating dumping that was clearly in violation of Article 2.2 ADA;
 - the Thai initiation of an anti-dumping investigation without substantiation by "relevant evidence" of either injury or causation, as required by Articles 5.2 and 5.3 and without proper notice to the Government of Poland, under Article 5.5; and
 - the Thai authorities' refusal to respect basic the due process requirements set forth in Article 6 ADA.

I. POLAND'S CLAIMS ARE PROPERLY BEFORE THE PANEL

4. We would like to begin by addressing Thailand's allegation that none of Poland's claims is properly before the Panel. The Thai allegation has been made in two parts - first, in its First Written Submission, seeking a preliminary ruling as regards Article 5 and 6 and then, remarkably, in the closing statement at the end of the First Substantive Meeting, when Thailand added an additional request for a "preliminary" ruling as regards Poland's claims under Articles 2 and 3.

5. Thailand's allegations misconstrue Article 6.2 of the Dispute Settlement Understanding (the "DSU") and the teachings of the Appellate Body in *Korea - Dairy Products*⁴, as well as the recent panel report in *Mexico - High Fructose Corn Syrup*. In making its allegations, Thailand seeks to re-write applicable law and impose its own views as to mandatory contents of a Request for Establishment. In this effort, Thailand urges the Panel to ignore the Appellate Body's clear teachings -that the sufficiency of a Request must be viewed in light of attendant circumstances, including whether a respondent has actually suffered meaningful prejudice in its ability to defend its interests in the course of a panel proceeding.⁵ To Thailand, this requirement is irrelevant, and it has treated its burden of demonstrating prejudice accordingly. In so doing, Thailand regrettably ignores the text of Poland's Request, as well as all relevant events both before and after that filing. These events, of course, include the issues raised in the investigation, in the Request for Consultations, during consultations, in Poland's First Written Submission and First Oral Statement, and during nearly two days of discussion of these issues with the Panel, as well as in Poland's lengthy 29 March filings. Despite its protestations at this juncture, it is beyond dis-

⁴ Report by the Appellate Body on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999 ("Korea - Dairy Products"), DSR 2000:I, 3.

⁵ Thailand's 29 March 2000 Response to Questions from the Panel at 14.

pute that Thailand has long had actual knowledge of the exact nature of Poland's claims and, we submit, has in no meaningful respect been prejudiced in "its ability to defend itself in the course of Panel proceedings."⁶

6. Poland's responses to Thailand's allegations have been set forth in considerable detail in our Second Written Submission and Responses to Questions from the Panel. Rather than re-state those responses at this stage, Poland would like to focus the Panel's attention on a few essential elements of the applicable Appellate Body and panel reports. This approach strikes us as more beneficial than presenting just our own views on what applicable standards perhaps ought to be imposed by the Appellate Body.

7. In *Korea - Dairy Products*, the Appellate Body made plain that the sufficiency of a Request for Establishment shall be viewed "in light of the attendant circumstances", taking into account "whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings ...".⁷ In this regard, the Appellate Body has established an objective test - whether the respondent, in view of such attendant circumstances, has actually "been misled as to what claims were in fact being asserted against it as respondent".

8. Thailand appears to argue that Poland has merely listed Articles of the Anti-Dumping Agreement and that this is never sufficient for meeting the Article 6.2 DSU standard for due process. This is an incorrect reading of *Korea - Dairy Products* in the context of, and given the realities of, this proceeding. The Appellate Body has never held that an express listing of all numerical sub-provisions of a particular article of a covered agreement is a *sine qua non* for a proper request for establishment of a panel under Article 6.2 DSU. Such a requirement would put form over substance. Rather, the Appellate Body has made plain that there may be instances where such a "mere listing" is sufficient, and there may be other circumstances where it may not. This would depend on the facts of each case - but would not, as argued by Thailand, depend on whether the Request also includes a detailed listing of all "facts and circumstances regarding the substance of a dispute," a standard that Thailand has lifted from the *Mexico - HFCS* report, but regrettably taken wholly out of context.

9. Poland suggests that, after so much hyperbole, it would be worthwhile to focus the Panel's attention on the precise language of the Appellate Body. First, because prejudice, if any, is to be judged on a "case-by-case basis"⁸ in light of "actual" circumstances, it shall be judged objectively. A respondent's subjective claims, regardless of the intensity or repetition of that party's rhetoric, shall not be given weight.

10. Second, as prejudice shall be viewed in light of "attendant circumstances" as they exist "in the course of the Panel's proceedings", any lack of precision is susceptible to prospective cure by a complainant. This consideration of attendant circumstances and the opportunity to cure any imprecision would logically appear to be even more compelling at the early stages of a proceeding, when the prospect of actual

⁶ *Korea - Dairy Products*, *supra*, footnote 4, at para. 131.

⁷ *Ibid.* at paras. 124, 127.

⁸ *Ibid.* at para. 127.

"prejudice" is all the more remote. The unwillingness of a party to consider events before and after a Request has been filed should not affect a panel's assessment of whether alleged imprecision has indeed been remedied by actual events.

11. Third, an examination of "prejudice" should include an examination of intent - whether a complainant has sought to "mislead" another party - which, in part, requires one to examine the clarity of any now-applicable requirements at the time the Request was originally submitted.

12. Finally, the Article 6.2 DSU requirements must be read in the context of dispute settlement as a whole, *inter alia*, "to secure a positive solution to a dispute" (Article 3.7 DSU) so as to provide "predictability" in the multilateral trading system and "clarify the existing provisions" of covered agreements (Article 3.2 DSU). Overly strict interpretations of provisions designed to ensure due process rights of all parties would themselves impermissibly burden dispute settlement procedures and frustrate Members' intent to secure a "positive solution to a dispute." The WTO is not, as Thailand would have it, a common law court. In this regard, Thailand repeatedly muddles the distinction between a party's statement of its claims and its subsequent arguments regarding those claims. Under Thailand's interpretation of the Article 6.2 requirements, a Request would approach a first written submission. That plainly is not what the Members had in mind.

13. In light of these considerations, Poland submits that Thailand's objections to the Request should be rejected for at least four reasons. First, Poland's claims are set forth in sufficient clarity to satisfy the terms of Article 6.2 DSU, particularly in light of the attendant circumstances in this case, including Thailand's actual notice of Poland's claims. Second, any lack of clarity in the Request has been cured by Poland's later actions. Third, Poland has never intended to mislead Thailand in these proceedings. Fourth, Thailand has not demonstrated, based on "supporting particulars"⁹, that it has sustained any meaningful prejudice as a result of the imprecision it now alleges. We wish to address these issues *seriatim*.

14. The terms of Poland's Request for Establishment have been quoted and re-quoted by the parties. They have been parsed by Poland in response to detailed questions of the Panel. Each of these paragraphs goes beyond the type of "mere listing" of the United States in *Korea - Dairy Products*. We find Thailand's claims particularly shocking in this regard as concerns Poland's Article 2 and 3 claims, which are, we submit, hinged on express language reflecting the relevant sub-paragraphs of those Articles. We note that (at page 25) Thailand, at least as regards Article 3, appears to admit as much. We have discussed this reality in detail in Response to Question 6 of the Panel.

15. Of course, even if the Panel were to determine otherwise - and, we note, notwithstanding Thailand's claims to the contrary - the Appellate Body has made plain that a panel must look beyond the four corners of the Request and consider attendant circumstances in order to ensure that the DSU's "due process objectives" are, in fact, accomplished.¹⁰ Attendant circumstances include events both before the Request and

⁹ *Korea - Dairy Products*, *supra*, footnote 4, at para. 131.

¹⁰ *Ibid.* at para. 126; *see also id.* at 123-31.

those afterwards. Poland notes that its Request provides that further factual background regarding Poland's claims is set forth in the Request for Consultations, which provides greater detail regarding the violations that occurred in the underlying Thai investigation. We have also provided in Exhibit POLAND 19 the document *read to Thailand* during those consultations, which details Poland's claims *in full, listing sub-provisions* of the relevant Articles, and otherwise, once again, giving actual notice to the respondent of the claims here in dispute. This all occurred *prior* to the Request and it is therefore plain why Thailand does not dispute that it had actual notice of Poland's claims. Instead, it tries to take refuge in its own view of what must be expressed in a Request itself.

16. Thailand similarly ignores the fact that this panel proceeding relates squarely to the actual subject matter of the Thai investigation, in which each of Poland's claims previously were made directly to Thai authorities. Again, this fact distinguishes the current dispute from many that may come before a panel, and is important in placing the Appellate Body's words in their proper context. As set forth in Poland's Responses to Questions from the Panel, Thai authorities have known for many years of Poland's concerns regarding the Kafka-esque nature of the Thai investigation and the lack of any required basis for imposition of anti-dumping duties on Polish firms. Pursuant to this inquiry, Thailand's impassioned pleas ring particularly hollow. It is perhaps important to briefly summarize the Polish concerns once again.

17. As regards Poland's Article 5 ADA claims, it is plain that, from the middle of 1996, Poland has complained to Thai authorities about the lack of evidence of injury or causation in the SYS petition, the failure of Thai authorities to examine the sufficiency of that petition before they initiated this investigation, and the failure of Thailand to give proper notice to Poland before initiation of this investigation.¹¹ Relevant parts of the Panel record include paragraphs 86-90 of Poland's First Written Submission, paragraphs 9, 52-57, and 69, new Exhibits POLAND 17 and 18, attached to our Second Written Submission, and Exhibit THAILAND 14. Poland's Article 5 claims also were the subject of substantial comment by Poland during the 'Question and Answer' portions of the Panel's First Substantive Meeting.

18. As regards Poland's Article 6 claims, from early 1997, Poland has complained to Thai authorities about the incomprehensibility of the non-confidential summaries that were supplied and about the failure of Thai authorities to explain their evaluation, if any, of relevant evidence.¹² Now that we know that such a document exists, we also are complaining of Thailand's failure to provide Polish respondents the non-confidential summary of the SYS questionnaire response, Exhibit THAILAND 21, during the investigation. Poland's Article 6 claims are set forth in paragraphs 91-95 of Poland's First Written Submission, paragraphs 58-65 of Poland's First Oral Statement, Poland's Concluding Statement, Exhibits POLAND 14, 15, and 16, and THAILAND 27. Poland's Article 6 claims also were the subject of substantial comment by Poland during the 'Question and Answer' portions of the Panel's First Substantive Meeting.

¹¹ See Poland's 29 March 2000 Response to Question 4 from the Panel.

¹² *Ibid.*

19. As regards Poland's Article 2 claims, from the time of the preliminary determination in January 1997, Poland has complained to Thai authorities about the use of an "unreasonable" amount of profit in its constructed value calculation of normal value.¹³ We would, for example, encourage the panel to read paragraph 3 of Exhibit POLAND 19, the document read to Thailand during those consultations, discussing Poland's claim that "according to article 2.2 of the Agreement [normal value] has not been calculated in the proper way." Poland's Article 2 claims are set forth in Poland's First Written Submission (*i.a.*, paras. 77-84), Poland's First Oral Statement (*i.a.*, paras. 43-51), Poland's oral responses to questions from the panel, Polish respondents' briefs during the investigation, where Article 2 and its sub-provisions are quoted, cited, and relied upon. These are found in the record as THAILAND Exhibits 35 and 40.

20. Finally, and most importantly, as regards Poland's Article 3 claims, from the time of the preliminary determination in January 1997, Poland has complained to Thai authorities about the lack of evidence to support a determination of injury by reason of Polish imports, the incoherence and internal inconsistency of the non-confidential documents supplied, and the failure of Thai authorities to explain their evaluation, if any, of relevant evidence.¹⁴ These complaints have now proven prescient, as Exhibit THAILAND 44 demonstrates. We would, once again, encourage the panel to read paragraphs 1 and 2 of Exhibit POLAND 19, the document read to Thailand during those consultations. These paragraphs detail Poland's Article 3 claim, cite expressly to sub-paragraphs 3.1, 3.2, and 3.4, and discuss causation - "there was no negative impact of Polish imports on the Complainant's economic position." We further encourage the Panel to review Polish respondents' briefs in the investigation where Articles 3.1, 3.2, 3.4, and 3.5 were quoted, cited, and relied on. We note that Poland's Article 3 claims are set forth in Poland's First Written Submission (*i.a.*, paras. 47-76), Poland's First Oral Statement (*i.a.*, paras. 26-42), and Poland's oral responses to questions from the panel. After review of these materials, it is remarkable to us that Thailand still claims that the "facts and circumstances" surrounding this claim remain unknown to it.

21. Based on the foregoing realities, this panel must view this issue in light of the circumstances of a case "in line with the letter and spirit of Article 6.2." In this regard, we submit, the Appellate Body has made plain that even temporary uncertainty, *if indeed objectively based*, may be cured by a party's subsequent actions - this is the meaning of the edict that prejudice is to be viewed in light of the "actual *course* of the panel proceedings". We submit that any uncertainty on the part of Thailand has long been cured by Poland's First Written Submission, First Oral Statement and Concluding Statement, answers to quite detailed questions from the Panel during the First Substantive Meeting, Poland's Second Written Submission, and Responses to Questions from the Panel. For Thailand to claim otherwise has, in our view, begun to border on the disingenuous, but this is, of course, for the Panel to decide.

¹³ See Poland's 29 March 2000 Response to Question 9 from the Panel.

¹⁴ *Ibid.*

22. Now, turning to the third element, we submit that part of this examination is an examination of intent - whether a complainant has sought to "mislead" another party - which, in part, requires one to examine the clarity of any now-applicable requirements at the time the Request was originally submitted. There has been no attempt by Poland to mislead or otherwise deprive Thailand of its due process rights in this regard.

23. Further, as we have mentioned previously, the *Korea - Dairy Products* standard was announced two months after the Request for Establishment herein at issue. We do not claim, as Thailand remarks, that these requirements are inapplicable to Poland; rather, we have claimed that the clarity of such obligations is an element in the totality of the circumstances that must be examined by the panel. In this same regard, and as mentioned in our Second Submission, we believe the Panel should examine Thailand's understanding of the pleading requirements prior to *Korea - Dairy Products*. Despite all the hyperbole to date and undoubtedly, still to come over the next two days, the reality is that Thailand's Requests in both the *United States - Shrimp* and *Colombia—Polyester Filament*¹⁵ disputes were no more expansive than the Request of Poland herein at issue. Thailand obviously believed those Requests to be sufficiently precise.

24. Finally, we would like to turn to the issue of what prejudice Thailand may actually have suffered in this matter. Thailand, of course, claims that it is not required to make any showing of prejudice, but, we submit, the Appellate Body has opined otherwise. The Appellate Body has made clear that actual prejudice, not imprecise claims thereof, is a necessary prerequisite for the sweeping ruling Thailand is now seeking. The burden is on Thailand to "demonstrate" by means of "supporting particulars" how it has sustained *any* prejudice - let alone a degree of prejudice that would justify the sweeping action it now seeks. We note at the outset that neither one of Thailand's Requests for Preliminary Ruling contained any claim of actual prejudice, let alone the "demonstration" based on "supporting particulars" mandated by the Appellate Body. Then, in its Response to the Panel's Questions, Thailand makes vague claims about delay in beginning unspecified translations or "locating" appropriate personnel. These vague claims hardly amount to a demonstration of supporting particulars and are essentially minor and quite temporary in nature. Nor does mischaracterization of third-party comments lend weight to these allegations.¹⁶ Simply put, Thailand has failed to meet that burden of proof on this matter.

25. We would like to add one further point before moving on to the substance of this case. Thailand's burden of proof should be particularly high with respect to Thailand's allegations of prejudice arising from Poland's claims under Articles 2 and 3. These allegations were raised only in Thailand's closing statement to the Panel, long after Thailand's other Article 6.2 DSU allegations and long after Poland and the third parties had a timely opportunity to comment. The implication therefore is that somehow Poland's claims were sufficiently precise until 7 March, but then became less clear to Thailand. This is simply not objectively true and, in any event, effec-

¹⁵ WT/DS180/1, 8 September 1999.

¹⁶ Thailand intimates that the EC supports its position with respect to Articles 2 and 3, when these claims were nowhere discussed by the EC.

tively renders groundless Thailand's claim to have suffered prejudice before 7 March as regards Poland's Article 2 and 3 claims. We note, for example, that during the first meeting with the Panel, Poland responded orally to very precise questions from Thailand and the Panel regarding its claims under these provisions. Yet Thailand simply ignores the clarifications it sought and received from Poland. Thailand's intentional attempt to foster confusion where there is clarity is no substitute for a demonstration, based on supporting particulars, of actual prejudice.

II. ARTICLE 17.6 ADA LENDS NO SUPPORT TO THE THAI ATTEMPT TO PRECLUDE ANY MEANINGFUL REVIEW BY THE PANEL OF THAILAND'S ILLEGAL ACTIONS

26. After the first meeting with the Panel and the Second Written Submissions of the parties, there is little remaining ambiguity regarding the Thai view of Article 17.6 ADA. As explained briefly below, Poland believes the professed Thai understanding of Article 17.6 to be little more than an attempt to avoid, at all costs, meaningful review of Thailand's actions. Because Thailand's view of Article 17.6 finds no support in the text of the provision itself, nor in the jurisprudence of WTO panels or the Appellate Body, that view should be firmly and thoroughly rejected.

27. As Poland has set forth both in its written and oral comments, the standard in Article 17.6(i) may be said properly to fall between *de novo* review and total deference, while the standard in Article 17.6(ii) requires the Panel to determine the proper interpretation of the relevant provision and then apply it to the circumstances being challenged.

28. Poland understands Article 17.6(i) as intended to cover strictly factual questions, such as a claimed pricing level. Under Article 17.6(i), the Panel must first determine whether the investigating authorities' establishment of the facts was *proper*. Poland understands that a panel is not in a position to re-determine every factual determination made by a national authority, and Poland has not suggested that such is their role. At the same time, Article 17.6(i) makes clear that in the discharge of its duties, a panel *must* perform "an assessment of the facts of the matter."

29. While Thailand seeks to empty that "assessment" of any meaning, Poland submits that in order for any investigating authorities' "establishment" of the facts to be "proper", at an absolute minimum those record facts must first be *consistent* with one another, and it is a panel's clear role and duty to investigate whether this was the case. Therefore, a national authority cannot be found to have established properly any "fact" when that alleged "fact" is contradicted by another "fact" elsewhere in the record of the same proceeding (as is repeatedly the case in the present dispute). Such a "fact" is not even established, much less properly so. The panel is responsible for making this determination and Thailand's after-the-fact "explanations" or "clarifications" of contradictory *record* assertions should be flatly rejected under Article 17.6.

30. "Proper" establishment of facts also includes several additional requirements conveniently ignored by Thailand, which also require the Panel to examine directly the actions of the national authorities. Facts cannot be properly established if the respondents in an investigation are not given, *inter alia*, the opportunity to provide all relevant facts in their possession, to review the material facts alleged against them, and to correct any mistaken allegations upon which the authorities plan to base

their final determination. Therefore, in addition to the consistency of the facts "established", the fact gathering and evaluation procedures employed by the investigating authorities should be examined by the Panel and are directly relevant to the Panel's required assessment of the facts. In the present dispute, several material facts were never evaluated and there is no clear record regarding those cursorily examined, even in light of the purported new web of secret Thai "findings" and "determinations" never disclosed, summarized or even referenced during the national proceeding.

31. For those facts that have been established properly, consistent with Article 17.6(i), the Panel must then determine, in light of all available evidence, whether the authorities' evaluation of the facts at issue was *unbiased* and *objective*. The Panel must examine whether the national authorities were *completely* impartial in what was done and left undone. An evaluation is also not "objective" unless *all* evidence is considered and then weighed without any favoritism toward a national producer or industry. Thus, the baseline of an "objective" evaluation is that when a provision of the Anti-Dumping Agreement, such as Article 3.4, requires examination and evaluation of several factors in making a determination, the national authorities are not permitted to consider only those factors they find convenient or believe might support their case. The omission or disregard of factors that an ADA provision requires authorities to consider is a *prima facie* case of bias in an evaluation. In this regard, Thailand fundamentally misunderstands the text of Article 17.6(i) when it asserts that the complaining Member must somehow always prove absolute "bias" or "subjectivity" by some other means (which is never explained by Thailand). It is *the Panel's* duty to determine whether the investigating authority acted in an unbiased and objective manner.

32. Article 17.6(ii) requires the Panel to interpret the extent of a Member's obligations under the Anti-Dumping Agreement and the consistency of a practice being challenged with those obligations. The degree of deference called for is therefore appropriately very small. The text of 17.6(ii) is plain: the Panel should turn to the customary rules of interpretation of public international law as set forth in Articles 31 and 32 of the Vienna Convention and apply them. As Poland has noted several times, *the essential point of these interpretive rules is to resolve any ambiguities in a treaty's text*. Thus, there will seldom, if ever, be more than one permissible interpretation of any given ADA provision. (Thailand does not substantively rebut this point—it merely pleads that there somehow *must* be multiple permissible interpretations, without ever providing an example of even one.) If, and only if, a Panel determines that an Anti-Dumping Agreement provision somehow has multiple "permissible" interpretations in light of the practice or action being challenged, then the Panel is instructed to defer to permissible interpretations consistent with the text of the Anti-Dumping Agreement.

33. Poland's views regarding Article 17.6(ii) are based on the text of the provision, its context, and the conviction that text ("*shall* interpret...") *requires* the Panel to use the customary rules of interpretation *precisely because* there is a proper *multi-lateral* understanding of each ADA provision. Proper understanding of the ADA does not vary depending on the Member performing the interpretation of a given provision. Lastly, as we have already explained, Poland does not view Article 17.6 as materially different than Article 11 DSU with regard to the issues that are at the centre of this dispute between Poland and Thailand.

34. Thailand's professed views stand in sharp contrast to the above. In a tone that has become regrettably familiar, Thailand claims deference for all its factual "findings", practices, and legal interpretations. Given the generous opportunity to amend its earlier statement that the Panel may somehow only consider "obligations" "as modified" or "defined" by Article 17.6, Thailand instead forges ahead with its prior view, informing the Panel that "the substantive and procedural obligations of a Member ... are as such not the object of these proceedings."¹⁷ Indeed, in the Thai view, "[a]lthough the Panel could examine whether Thailand has complied with a particular substantive obligation, such exercise would seem academic".¹⁸ Thailand never explains where it finds support for this radical proposition other than its own understandable desire to avoid any review. Consistent with past Thai practice regarding this assertion, Thailand cites *not one* Panel or Appellate Body decision, because not one tribunal has ever endorsed this unique Thai view.

35. When Poland, a Third Party or the Panel raises a question regarding Thai practice, the Thai response has become predictable. Rather than provide rebuttal, Thailand claims the question is "unfair and prejudicial". And, anticipating that the Panel will indeed perform the required examination of the record of the Thai investigation, Thailand has now supplied several *post hoc* explanations of the facial contradictions on the record of its authorities. From the perspective of a standard of review, it urges the Panel to adopt these after-the-fact revisions without question, despite the fact they are found nowhere on the original record and were unknown to the Polish side. At one point Thailand goes so far as to rewrite its own alleged pricing data, claiming that the patently obvious contradictions vanish once Thailand is permitted to create a *new* chart comparing pricing during one period by SYS with pricing during *a different period* by Polish producers!¹⁹ This is, at best, unfortunate, and the degree to which Thailand now attempts to rewrite even its own alleged "secret" record is alarming.

36. In short, Thailand understandably fears any substantive review whatsoever of either its factual determinations or the consistency of its actions with the legal requirements of the ADA. In one concession, Thailand informs the Panel that while it admits that the Thai authorities (and we quote) "may be substantively obligated to provide a correct establishment of the true facts," even this obligation "is not subject to Panel review."²⁰ Thailand's seeks to create a major distinction between the "correct" establishment of the facts and the "proper" establishment of the facts. Poland sees no such distinction and respectfully requests that the Panel reject Thailand's attempt to have the Panel ignore the several contradictory sets of Thai assertions. By no plausible definition or standard of review can any such Thai assertions be considered "facts" that were "properly" or "correctly" established.

37. Similarly, the Panel should reject the Thai distortion of Article 17.6(ii) ADA. Here, Thailand now claims that 17.6(ii) somehow stands for the proposition that the

¹⁷ See Response of Thailand to Question 50 from the Panel.

¹⁸ *Ibid.*

¹⁹ Compare, for example, Thailand Exhibit 44, the Thai public record, and the newest Thai explanation set forth in response to question 48 from the Panel.

²⁰ Response of Thailand to Question 50 from the Panel.

Panel must deem all Thai actions "permissible" because (and we quote) it would be "odd" to assert that the customary rules of interpretation set forth in the Vienna Convention can play a substantive role in "always, or even regularly" resolving any ambiguity in relevant provisions.²¹ As we have explained, the notion that the provisions of the Anti-Dumping Agreement are subject to differing multilateral obligations, depending on the Member performing the interpretation of a given provision, is incorrect. The unsubtle Thai attempt to dismiss the customary rules of interpretation set forth in the Vienna Convention as of any import should also be rejected.

38. In sum, in the present case facts were *not* properly established by the Thai authorities - indeed *Thailand appears to be establishing and revising them to this very day*. Even those few facts properly established were *not* evaluated in an objective and unbiased manner. Furthermore, the Thai practices in this case are *not* consistent with the correct interpretation of the relevant Anti-Dumping Agreement provisions at issue. These provisions do not admit of more than one correct interpretation regarding the Thai practices in this case and the Thai view that that Members have two independent sets of "obligations" - substantive obligations under the Anti-Dumping Agreement (which remarkably have no meaning) and unexplained obligations "modified" by Article 17.6 - is simply wrong.

39. As a result, the Panel should not accord deference to the Thai actions at issue herein. The Panel should read and utilize Article 17.6 ADA and Article 11 DSU together, with Article 17.6 ADA applying only in the very limited instances when it may differ with Article 11 DSU. Neither Article 11 DSU nor Article 17.6 ADA provides Thai authorities the deference they demand in this case.

III. THE THAI DETERMINATION OF INJURY WAS FLATLY INCONSISTENT WITH THE STANDARDS SET FORTH IN ARTICLE VI GATT 1994 AND ARTICLES 3.1, 3.2, 3.4 AND 3.5 ANTI-DUMPING AGREEMENT

40. We would like now to discuss Poland's Article 3 claims, which are the heart of our complaint.

41. First, Thailand apparently has now abandoned any substantive defence of its authorities injury "finding" . This is the only conclusion that can be drawn from Thailand's four-page Second Submission. The Thai injury determination goes completely without mention. In addition, while Thailand's underlying administrative record already was replete with contradictions, Thailand now manages to contradict even its own submissions in this dispute. For example, whereas Thailand (at paragraph 75) claimed in its First Written Submission to the Panel that Thailand "was able to identify six purported 'claims' under Article 3 of the Anti-Dumping Agreement," it now inexplicably asserts (at paragraph 6 of its Second Submission) that Poland failed to

²¹ Response of Thailand to Question 52(a) from the Panel.

set forth any Article 3 claims.²² We view this approach as inconsistent with the dispute settlement process.

A. *Thailand's Determination of Injury was not Based on "positive evidence" and an "objective examination" of the Facts, in Violation of Article 3.1 and 3.2*

42. Poland believes that the requirements of Articles 3.1 and 3.2 are clear and well settled. Article 3.1 explicitly states that a proper determination of injury *must* be based on "positive evidence" and "an objective examination" of the facts, including both (a) the volume of allegedly dumped imports and their effect on prices for the domestic like product, as well as (b) the impact of the imports on the domestic industry. Furthermore, Article 3.2 requires the investigating authority to consider, *inter alia*, whether the increase in dumped imports, and the effect of those imports on domestic prices, were "significant." Thailand's determination of injury in this case was not based on either "positive evidence" or an "objective examination" of these factors, and Thailand completely failed to consider the significance of increased imports or price effects.

43. Poland submits that a proper Determination of Injury, based on "positive evidence" and an "objective examination of the facts," cannot possibly be made in the presence of inconsistent and directly contradictory data regarding volume of imports and prices. That is, "positive evidence" by definition necessarily precludes the existence of information that flatly contradicts the information upon which the determination was based. In its First and Second Written Submissions, Poland has described a litany of failures by the Thai authorities with respect to the requirements of Article 3.1, as well as a stunning list of contradictory legal and factual statements.

44. Thailand continues to claim that it "disclosed to interested parties *all* non-confidential information that was considered in reaching its final determination." However, Thailand now admits that its real decisions in this investigation were based on secret data *of which there is no record or meaningful summary in the investigation*. This "secret data" was only recently provided to Poland after a Thai attempt at a prohibited *ex parte* communication with the Panel. Given the extent of the glaring inconsistencies and contradictions contained in this secret data, it is not surprising that Thailand attempted to hide it from Poland. These contradictions render dubious each of the factual findings required under Article 3.1.

1. *Volume of Dumped Imports*

45. The first factor that the investigating authorities must consider, in accordance with Article 3.1, is the volume of imports. Again, Article 3.1 requires that the examination of this factor be objective and based upon positive evidence. In addition, Article 3.2 further provides that the investigating authority must consider whether there

²² First Written Submission of Thailand at para. 75; Second Written Submission of Thailand at para. 6.

was a "*significant increase* in dumped imports, either in absolute terms or relative to production or consumption in the importing member."

46. In purported support of its Final Injury Determination (at paragraph 2.1), Thailand cites the "fact" that the level of Polish imports into Thailand had "continuously increased" and that Polish imports captured an increasing share of the Thai market. It is readily apparent, however, from Thailand's own documents that this finding of increased imports is not supported by positive evidence. When Poland raised questions regarding the validity of the Thai import data at the beginning of the investigation²³, Thai officials dismissively asserted that these sharp differences were "accounted for by shipments on the high seas."²⁴

47. The "high seas" were not responsible for the realities of what took place here. To the contrary, the new "secret" Thai data show that Thailand's "determinations" were based on nothing more than a hopeless jumble of numbers. Exhibit 44 states that total imports in 1994 equalled those in 1995, but also that imports "shrunk continuously" during this time.²⁵ While it is admitted that SYS output, sales, market share, *etc.*, grew markedly in the IP, Exhibit 44 states that imports in the IP *equalled* domestic demand.²⁶ Exhibit 44 further states that Polish imports "skyrocketed" to [I + 12,445] MT, but that Poland held 25.3 per cent (47,435 MT) of a *total* market of 187,490 MT.²⁷ Some Exhibit 44 data claim to show that domestic demand contracted sharply.²⁸ Yet the same exhibit also states that domestic demand *increased [D*] per cent* in the IP, and paragraph 1 of the Final Injury Information Notice states that "during the period of investigation, the consumption of H-Beams in Thailand *increased by 4 per cent* from 1995."

48. Thailand's data regarding Poland's share of the Thai market is similarly contradictory. While Thailand's Final Injury Determination claimed that Polish market share had risen from 24 per cent to 26 per cent in the IP, all "evidence" in the record showed the rise to be from 24.2 per cent to 25.3 per cent. And now, based on a new "secret" committee report never before revealed to anyone, Thailand again claims a typographical error and submits a third alleged figure.

49. In sum, Thailand's findings concerning Polish import volumes are nothing more than unsupportable numbers placed on a sheet of paper. Such confusing and inconsistent numbers cannot possibly be characterised as "positive evidence" and the Thai examination of those numbers clearly was not "objective," in violation of Article 3.1.

²³ See, e.g., Letter of Stalexport, dated 2 February 1997, page 1-2, points 1,3, Exhibit THAILAND 26; Letter from Huta Katowice, dated 13 February 1997, page 2, point 9; Exhibit THAILAND 27; Brief of Polish Respondents, dated 9 March 1997, page 3 and footnote 2, Exhibit THAILAND 35. See also Poland's 29 March 1998 Response to Question 9 from the Panel.

²⁴ Proposed Final Determination, point 9.1, page 7 (Exhibit POLAND 10; Exhibit THAILAND 37).

²⁵ Exhibit 44, para. 1.8.1.

²⁶ *Ibid.* at paras. 1.7, 1.8.1 (both were said to equal 187,490 MT in the IP).

²⁷ *Ibid.* at para. 1.8.2.

²⁸ Para. 1.7 of Exhibit 44 shows domestic demand for H-Beams falling from [D-8,927] MT in 1995 to 187,490 MT in the IP.

50. Further, Thailand clearly failed to comply with Article 3.2's requirement that it consider whether the increase in imports had been "significant". Thailand repeatedly claimed in its First Written Submission that the Thai authorities "clearly" considered whether volume increases were "significant" and whether price depression or price suppression was "significant".²⁹ However, the Thai *determinations* do not contain any such statements or provide any such evidence whatsoever. Furthermore, as Poland and other Members have noted, Thai law at the time was inconsistent with the Anti-Dumping Agreement and did *not* even require any such findings of significance.

2. *Effect of Dumped Imports on Prices*

51. Next, Article 3.1 requires investigating authorities to examine "the effect of the dumped imports on prices in the domestic market for like products." Furthermore, Article 3.2 requires the authorities to consider whether the dumped imports had resulted in "significant price undercutting" or price depression in the domestic market.

52. The cornerstone of Thailand's alleged injury determination was its finding that the prices of Polish imports harmed the domestic market. Thailand's Final Injury Determination implies that the influence of Polish imports was so dramatic that average CIF Polish import prices and average SYS prices "move in the same direction" (paragraph 2.2), that SYS had to reduce its prices sharply to "match" Polish prices (paragraph 2.5) and that SYS "has no choice but to decrease its price to the level of Polish imports" (paragraph 2.3).

53. According to Thailand's own documents, however, none of these findings is correct. In fact, these findings are repeatedly contradicted by evidence on the non-confidential record - and shattered by the new "confidential" information in Exhibit THAILAND 44. One glaring example of such inconsistencies demonstrates the magnitude of these problems. In three places, the Thai authorities provide three completely different figures for the same purported fact regarding import pricing. The public Draft Final Injury Notice (at par. 6 and in the Table "Price Data of H-Beams") states that average CIF import prices were 8,754 Baht during the investigation period. Yet in the secret Exhibit 44, at paragraph 1.9.1, the Thai authorities state that average CIF import prices were 9,462 Baht during the investigation period. Later in the same exhibit (this time at paragraph 4.6), Thailand states that the average CIT import price was 10,782 Baht. Needless to say, such contradictions in the data regarding import prices are indicative of a serious problem—it is simply impossible to make a proper examination and evaluation of possible injury without accurate data on import prices. Similar inconsistencies can be found throughout the Thai documents in this case.

54. As Poland explained in detail in its Second Written Submission, an examination of Thailand's documents reveal, among several others, the following inconsistencies and contradictions:

²⁹ See, e.g., First Written Submission of Thailand at paras. 82, 87, and 94.

- While Thailand's Final Injury Determination publicly determined that Polish prices went down in the IP, the Thai secret data showed that Polish prices went up;
- Thailand claimed publicly to have determined that Thai prices went down sharply to "match" the level of Polish prices, when Thai secret data showed they went down only slightly and remained thousands of Baht per metric ton higher than alleged Polish prices throughout the IP. Further, while Thailand publicly claimed that Polish firms were the price leaders in the Thai market, Table 1 to Thailand's Final Injury Notice reveals that SYS precipitated the first decline in prices during the IP (the 4th quarter of 1995);
- Thailand claimed publicly to have determined that Polish prices and Thai prices "move in the same direction", when Thai secret data showed they do not. This inconsistency is only confirmed by the tortured explanation of its authorities' logic now submitted to the Panel, including an attempt, again using a secret committee report, to justify mismatching data across relevant time periods. But even the public data on the record - Table 1 of the Final Injury Notice - show that Thai and Polish prices moved in the same direction less than half the time;
- Thailand claimed publicly to have determined that Polish prices "influence" SYS prices, when Thai secret data showed they were both stable;
- Thailand claimed in the Final Injury Determination that the low prices of Polish imports forced SYS to lower domestic prices to the point that its export prices were *higher* than domestic prices, while Thailand's secret documents show that SYS had a stated policy of exporting at a price *below* its domestic price.

55. Furthermore, Thailand again violated Article 3.2 in failing to make any findings regarding the significance of any alleged price undercutting. As stated above, this failure is not surprising, given that Thai law, in conflict with the Anti-Dumping Agreement, did not even require such a finding.

56. We thus submit that Thailand's Final Injury Determination was not based on "positive evidence" or an "objective examination" of the record in this proceeding. Indeed, "positive evidence" cannot exist in the face of pervasive contradictions and inconsistencies in the data relied upon. The "evidence" set forth in the Final Determination was unsupported by the record, contradicted by "secret" facts, or otherwise meaningless given the methods of comparison employed. In addition, the injury Thailand claimed to exist was not properly determined to be "significant" and "material" as required by the Agreement.

B. Thailand has a Fundamental Misunderstanding of the Requirements Set Forth in Article 3.4 Anti-Dumping Agreement and has now Conceded its Authorities Ignored Several Required Factors

57. Poland's views regarding the inconsistency of Thai actions with Article 3.4 ADA have most recently been set forth at great length in Poland's Second Written Submission and our answers to the Panel's questions. Therefore, we will not repeat each point here, but instead, focus on some of the new Thai claims in its answers to (and revealing refusals to answer) the Panel's questions.

58. While in its First Written Submission Thailand made clear that it misunderstood the requirements of Article 3.4 ADA, the willingness of the Thai authorities to violate the basic precepts of Article 3.4 is illustrated with even greater clarity by the new Thai responses to the Panel's questions regarding Article 3.

59. For example, in its First Submission, Thailand claimed to have considered and evaluated all relevant factors, when several factors were not even so much as mentioned in its analysis.³⁰ While this was perplexing, the Thai response to a recent question from the Panel clarifies that, in fact, Thailand did nothing of the sort. Thailand now concedes, by its refusal to respond in a meaningful manner to the Panel, that its authorities simply ignored several required factors.³¹ Indeed, given the opportunity by the Panel to identify evidence contradicting Poland's (correct) claim that "all relevant economic factors and indices were not examined"³² Thailand has refused to identify *even a single instance* where it performed the mandated evaluation. While the Panel's simple request was straightforward, Poland is not surprised by Thailand's heated refusal to provide the evidence requested, given that no such evidence exists. Indeed, even for the mandatory Article 3.4 factors deemed worthy of a simple brief reference by the Thai authorities, Thailand appears to believe that a conclusory statement without any supporting evidence suffices for the evaluation required by Article 3.4 ADA. Poland, as it has explained previously, strongly disagrees.

60. Thailand's newest legal views regarding Article 3.4 find the same degree of support as its factual claims: *none*. Angered that its actions are now (for the first time) being appropriately reviewed by an independent tribunal, Thailand informs the Panel that "the only question for the Panel is whether ... the authority conducted the referenced evaluation."³³ It offers no credible basis for this assertion beyond its own apparent desire. Thailand next asserts that "interpretation of Article 3.4 is not relevant" to Poland's claims, as Poland has not "proved" that a "factor was or was not evaluated" by Thailand to Thailand's apparent satisfaction.³⁴ In Thailand's view, it is thus Poland's duty to conclusively prove (to Thailand!) that a factor was *not* evaluated, while Thailand feels free to hide "secret" documents for years which contain the alleged basis for all its decisions. Thankfully, this unique Thai version of due process is not found in the Anti-Dumping Agreement and should thus be rejected by the Panel.

61. One final new Thai assertion in response to the Panel's questions must also be noted. Thailand, by necessity, disagrees with the two-stage analysis of the Article 3.4 factors set forth by the Panel in question 40. Thailand never considered or evaluated several factors, much less explained them in its determination, so it seeks refuse for its illegal conduct by professing that the ADA contains no such requirements. But Thailand also cannot explain how it is possible, without carefully and thoroughly considering each factor, for its authorities to judge the *relevance* of each factor in the required *objective* and *unbiased* manner. Thailand's answer to this problem illustrates

³⁰ See First Written Submission of Thailand at paras. 97-106.

³¹ See Response of Thailand to Question 39 from the Panel.

³² First Written Submission of Poland at para. 74.

³³ Response of Thailand to Question 40(a) from the Panel.

³⁴ *Ibid.*

the degree to which it views itself as unencumbered by any sense of fairness or the fundamental requirements of the Anti-Dumping Agreement:

Thailand considers that it is solely for the Thai authorities, not for a panel, to judge whether certain factors are relevant or not. ... Thus, in accordance with the text of Article 3.4 ... the Panel is to review only whether the authority has or has not conducted an examination in which it evaluated factors. The factors examined are those that the authority itself considers relevant and such consideration is not subject to a panel's review.³⁵

62. As Thailand made clear to Polish respondents during the course of its national proceeding, it now makes clear to the Panel that the mysterious and contradictory decisions of the Thai authorities must never be questioned. Thailand will not brook any dissent or tolerate any substantive review of their attempts to protect SYS from fair competition. In this light, Thailand's open admission that "it is imperative that the domestic industry's market share be preserved and expanded" becomes all the more understandable.³⁶

63. Poland's view of Article 3.4 is quite different than that of Thailand. In our view, Article 3.4 provides guidance with regard to the proper factors that *must* be considered and evaluated in determining the impact imports have on the domestic industry, with Article 3.4 stating that the evaluation by the investigating authorities "*shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry,*" including the now well-known list of several factors.³⁷ While Thailand now claims for the first time that Article 3.4 somehow only includes four factors (despite the transparent listing of several more) it offers no rational or persuasive explanation for its new view, instead preferring to claim that the deliberate choice of new language by the drafters ("including" instead of "such as") is meaningless.

64. Poland's view again differs respectfully from that of Thailand. We believe that the required consideration, evaluation and weighting applied to the factors listed in Article 3.4 constitutes a "proper" establishment of the facts only when *all* factors are considered. In the same light, the factors can only be "objectively" evaluated if they are *all* considered, weighed and discussed. Thus, the minimum starting point of an "objective" evaluation is a recognition that when Article 3.4 explicitly requires examination and evaluation of several specified economic factors ("including ...") in making a determination, Thai national authorities should not be permitted to pick and consider only those factors they find convenient or believe might support their case.

65. The omission or disregard of factors that Article 3.4 requires to be considered is a *prima facie* case of bias in an evaluation, and this is exactly what has happened in the present situation. If all factors are not carefully considered, there is no "objective" means by which to judge the degree to which a factor may be more or less rele-

³⁵ Response of Thailand to Question 40(b) from the Panel.

³⁶ Final Injury Determination, at page 2, para. 2.5. Likewise, in the Final Injury Information Notice (at page 3, para. 16), the Thai authorities wrote that SYS "*must* maintain and increase its market share." (emphasis added).

³⁷ Emphasis added.

vant to the determination being made. Furthermore, as the text of Article 3.4 makes clear, all listed factors are presumed to be relevant unless shown and explained to be otherwise. Therefore, if national authorities deem a listed factor somehow not relevant to their determination, they must explain why (in a rational manner consistent with other facts/evidence in the investigation) in the text of their final determination.

66. While Thailand ignores the now-adopted panel decision in *Mexico—High Fructose Corn Syrup*, it also speaks directly to the requirements of Article 3.4.³⁸ The *Mexico-HFCS* panel's completely rejects the Thai position now urged before the present panel. The text of Article 3.4 is "mandatory", with the "language mak[ing] it clear that the listed factors in Article 3.4 *must* be considered *in all cases*."³⁹ The panel further explains that "[t]here may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be *required*."⁴⁰ The panel concludes by explaining that consideration of each of the Article 3.4 factors "*must* be apparent in the final determination of the investigating authority,"⁴¹ and that other panels have made clear in similar contexts that "while the authorities may determine that some factors are not relevant or do not weigh significantly in the decision, the authorities may not simply disregard such factors, but must explain their conclusion as to the lack of relevance or significance of such factors."⁴² Thailand's view of this adopted decision: *silence*.

67. In sum, in order for an investigating authority's actions to be consistent with Article 3.4, the investigating authority must consider *all* of the enumerated factors as well as their relevance, clearly explain on the record in the final determination available to the parties which factors, if any, are not relevant and the precise objective reason(s) this is the case in the context of all evidence, and then carefully and fully evaluate and explain each remaining listed factor, as well as any other factors before it that bear on the state of the domestic industry. Each factor in Article 3.4 must be addressed in order for the fact-finding portion of this endeavour to be objective and unbiased.

68. In the present case, Thailand failed in each and every one of these requirements. No objective reader could consider the Thai final injury determination to have met the requirements of Article 3.4 or to be a proper explanation of the Thai authorities' consideration, evaluation and weighing of the mandatory Article 3.4 factors. Thailand failed to establish properly the material facts (as several contradict one another), it failed to evaluate them in an unbiased and objective manner (as several were ignored), and it failed to meet the legal standard set forth in Article 3.4 requiring evaluation of all relevant economic factors and indices.

³⁸ *Mexico - High Fructose Corn Syrup*, DSR 2000:III, 1345, at paras. 7.128-7.131.

³⁹ *Ibid.* at para. 7.128 (emphasis added).

⁴⁰ *Ibid.* (emphasis added).

⁴¹ *Ibid.* (also citing Article 12.2.2) (emphasis added).

⁴² *Ibid.* at 7.129

C. *Thailand Failed to Establish a Causal Connection between Dumped Imports and Injury to the Domestic Industry, in Violation of Article 3.5*

69. Even if Thailand had properly established that its domestic industry had suffered injury—which it plainly did not—Thailand still was required under Article 3.5 to establish that such injury was *caused by the allegedly dumped imports*. In considering this causal relationship, Article 3.5 requires the investigating authorities to examine "*all relevant evidence* before the authorities," including "*any known factors* other than the dumped imports which at the same time are injuring the domestic industry." The provision specifically states that "the injuries caused by these other factors must not be attributed to the dumped imports."

70. Poland has repeatedly challenged Thailand's determination of causation under Article 3.5 in two respects. First, as set forth in Poland's First and Second Written Submissions, the evidence relied upon by Thailand fails to establish any causal connection between Polish imports and any alleged injury to the Thai industry. Second, Poland has repeatedly asserted that Thailand failed to consider other important factors besides Polish imports that may have contributed to the condition of the Thai industry.

71. At the outset, we note that Thailand has stubbornly refused to provide substantive responses to questions from the Panel and Poland with respect to its Article 3.5 causation determination. Instead, Thailand has repeatedly stated that Poland had failed to assert "specific claims" regarding Article 3.5. Poland submits that Thailand is simply wrong on this account. Poland has clearly and repeatedly articulated its Article 3.5 claims and Thailand has simply chosen to ignore them. This panel must not permit a party to remain wilfully ignorant of clearly stated claims against it.

72. First, Poland has explained that Thailand's Article 3.5 injury determination is improper under Article 3.5 because, *inter alia*, there is no positive evidence in the record to support that determination. Thailand's causation determination allegedly relies upon its "findings" regarding the influence of Polish imports on prices and the quantity of Polish imports. With respect to prices, Thailand determined (1) that SYS reduced its prices to match the level of Polish Prices; (2) that Polish prices and Thai prices moved in the same direction; and (3) that Polish firms were the price leaders in the Thai market.

73. None of these findings, however, is supported by the evidence in the record. Again, a review of the non-confidential data in the Thai Final Injury Notice and the Thai secret data in Exhibit THAILAND 44 and elsewhere reveals a dizzying list of inconsistencies and contradictions in the evidence allegedly considered by Thailand: DIT publicly determined that Polish prices fell, when they actually rose. DIT publicly determined that Thai prices fell sharply when Thai prices were "stable". DIT publicly determined that Polish prices "influence[d]" Thai prices, causing SYS to have to "match" Polish import prices, when that was not true - Thai prices were and remained much higher. It found that Polish and Thai prices "move in the same direction", when that was not true. DIT publicly determined that Polish import volumes surged, when Thai secret data are incomprehensible and support no such determination. DIT publicly determined that domestic demand rose 4 per cent, when Thai secret data show both that it rose [D*] per cent, but also that it fell. DIT publicly determined that Pol-

ish market share had risen from 24 per cent to 26 per cent in the IP, when all "evidence" in the record showed the rise to be from 24.2 per cent to 25.3 per cent. DIT publicly determined that SYS' domestic prices were *lower* than SYS' export prices when Thai secret data declare the opposite - that SYS' domestic prices were *higher* than SYS' export prices. In sum, and given the Thais' secret finding of "price stability with reference to the subject merchandise"⁴³, Exhibit 44 separates the state of the domestic industry from any activities of Polish importers and offers no meaningful basis for any of Thailand's conclusions regarding whether any "injury" was indeed caused by reason of Polish imports.

74. Thailand also attempted to show causation by reason of the quantity of imports from Poland. It inexplicably bases its conclusion (at paragraph 8 of the Final Injury Information Notice) on examination of only two quarters of the IP, during which Thailand claims that Polish imports led to either decreased sales or decreased output by SYS. There are several obvious problems with this conclusion. First, Thai authorities fail to explain their own record evidence directly contradicting their conclusion regarding decreased sales or output. At the same time that one of their charts purports to show decreased sales and output, Thai authorities also acknowledged that SYS market share *tripled* and that production quantity *rose* over 10 per cent (while inventories decreased). In addition, the other two quarters not referenced by Thailand - and the IP as a whole - tell a very different story than Thailand alleges. But even the two quarters examined do not support the claim: in each of those two quarters, SYS sharply raised its prices from previous levels, and, not surprisingly, faced market resistance.⁴⁴

75. As this discussion demonstrates, Thailand clearly did not fully consider all relevant data, as required by Article 3.5. For if it had, Thailand could not possibly have concluded, on the basis of that evidence, that Polish imports caused any injury to the Thai industry.

76. Second, Poland asserts that Thailand failed to consider whether any injury to the Thai industry was caused by factors other than Polish imports. The Final Determination shows no examination of the influence of non-Polish imports, the level of demand of the local construction industry, the highly aggressive nature of SYS' entry into the H-Beam market, domestic industry productivity and cost structure, technology developments, market realities in SYS export markets, or the Kobe earthquake. The Final Injury Determination also shows no examination of why these factors were outweighed by any other factors elsewhere in the record.

77. In its written submissions and its responses to the Panel, Thailand has argued that it has no obligation to consider "other factors" in its causation analysis unless those factors are specifically raised by the interested parties. As stated in Poland's responses to the Panel's questions, Poland disagrees. In order for an evaluation to be "objective" and based upon "positive evidence, as required by Article 3.1, an investigating authority has the affirmative responsibility to seek *all* available information

⁴³ Exhibit 44, para. 5, page 13.

⁴⁴ See table entitled "Average Quarterly Price" attached to Final Injury Information Notice, Exhibits POLAND 10, 11.

concerning the potential effects of "known" factors other than dumped imports that might be causing injury. While a responding party would be unwise not to bring such issues to the attention of the investigating authority, they do not bear the same burden as the investigating authority. Thus, Thailand failed to consider numerous factors other than Polish imports in reaching its causation determination, violation of Article 3.5.

78. Even if Thailand is correct that investigating authorities are only obligated to consider those factors that are brought to their attention by the parties, the record clearly shows that Thailand failed to consider certain factors related to causation that Poland repeatedly raised. For example, Poland argued that Thai authorities must consider the disruption to world steel supplies due to the Kobe earthquake and the resulting effect on world market prices. The impact of the Kobe earthquake was raised by Polish respondents at the oral hearing in Bangkok, during verification, and in the respondents' 13 May 1997 submission (Exhibit THAILAND 40). Thus, even under Thailand's own interpretation of Article 3.5, its authorities should have considered the economic effects of the Kobe earthquake in this case.

79. Furthermore, Thailand's secret data indicates that its authorities clearly were aware of the impact of changes in the global steel market upon its domestic industry. In Exhibit 44, the DIT wrote:

Whereas SYS relied on export for about [X-Conf.] per cent of its sales, it is much effected [sic] by the downturn of world market price for H-beams. This is due to the fact that there is a slowdown of construction world-wide coupled with the fact that the total production capacity far surpassed demand.

Given this obvious awareness of the impact of global market conditions, it is not clear why Thai authorities failed to consider this issue in the Final Injury Notice.

80. Similarly, during the Thai investigation, Polish respondents made arguments to Thai authorities regarding the status of SYS as a new market entrant and the inevitable high start-up costs associated with entry into a capital-intensive industry. SYS had been selling steel for only a matter of months during the time period at issue. In addition to a high cost structure, SYS was an untested market entrant with no track record among customers. Notably, there are no meaningful cost of production data on the record of the investigation and Thailand has failed to submit such data to the Panel. Indeed, Thailand has even blacked out the cost of production data from the Thai secret Exhibit 44. Poland cannot speculate as to why Thailand has refused to release such outdated information, but glimpses of a possible motive remain in Exhibit 44. For example, paragraph 4.8 points to SYS losses "due to operating expenditures that cannot be reduced." Similarly, paragraph 5 states that "SYS has to bear the costs of new entrants which [are], as a rule, high". It is thus clear that SYS, like any new entrant in its position, had high costs and high operating expenditures that it could not reduce. SYS could not reasonably expect to recover fully allocated costs in a few calendar quarters, and thus the company was a victim of its own unrealistic expectations. Thai authorities, however, failed to examine these factors in their de-

termination.⁴⁵ Simply put, the Thai authorities were not objective when they blamed imports for SYS' failure to recover all costs in such a short period of time, thereby denying the most basic marketplace realities.

81. In sum, Thailand failed to comply with the requirements of Article 3.5 in making its causation determination. The evidence in the record does not support Thailand's finding that Polish imports caused any injury to the Thai industry. Furthermore, Thailand failed to consider a number of relevant factors known to have an effect on the Thai industry. For these reasons, Thailand's examination was not objective and based upon positive evidence.

IV. THAILAND USED AN UNREASONABLE PROFIT FIGURE IN ITS NORMAL VALUE CALCULATION, IN VIOLATION OF ARTICLE 2 ADA

82. We wish to turn now to the issue of the calculation of the dumping margin in this case. Poland has argued that Thailand's calculation of its anti-dumping margin did not comply with the requirements of Article VI (1)(b)(ii) of GATT 1994 and Article 2.2 of the Anti-Dumping Agreement, both of which mandate that only an objectively "reasonable" amount for profit may be added when normal value is calculated based on the cost of production and other expenses.

83. The issue has arisen in this proceeding whether the "reasonableness" requirement of Article 2.2 is somehow limited by the language of Article 2.2.2 thereunder.

84. While Article 2.2.2 establishes "reasonable" methodologies "for purposes of" Article 2.2, we believe it is clear that Members understood that such methodologies may, in some cases, yield unreasonable results - which, pursuant to Article 2.2, are not to be employed in constructing normal value. We note that the second sentence of Article 2.2.2 provides only that the subsequent methodologies "may" be employed, whereas if use of such methodologies were required, the second sentence, like the prior sentence, would have employed the verb "shall". Here, we believe, Members instead expressed their conviction that such methodologies may not always yield reasonable results. We believe this is clear also from the requirement of subparagraph (iii), which expressly provides that even reasonable methodologies may sometimes yield results that are not fairly usable in constructing value. Subparagraph (iii) is also instructive because the ceiling it imposes (that the amount of profit included may not exceed that "normally realised ...") is arguably stricter than that of the "reasonableness" standard which otherwise flows from Article 2.

85. This conclusion - that methodologies may not be applied blindly - receives further contextual support from other provisions within Article 2.2. For example, Article 2.2.2 (first sentence) limits "actual data" to data objectively "pertaining to production and sales *in the ordinary course of trade*" (emphasis added). Thus data shall not be employed concerning "extra-ordinary" sales - as such data would themselves be unrepresentative and therefore yield unrepresentative results. Similarly, in order to attempt to achieve such representativeness - that is, to prevent results which,

⁴⁵ See Polish respondents' submissions, Exhibits THAILAND 35, 40.

while arithmetically correct, are not themselves representative or "reasonable" - all profit amounts calculated under subparagraph (i) must be calculated not on small (and thus more likely unrepresentative) market segments or on "like products", but rather more broadly so as to cover all production and sales "*of the same general category of products*" (emphasis added).

86. As Poland has explained previously, the Thai authorities have failed to comply with this requirement under Article 2.2.2. They utilized the wrong sales and production data when applying the methodology set forth in Article 2.2.2(i), that is, they used data on H-Beams only. Thailand had an obligation to use production and sales data not just of H-Beams, but more broadly of all products "of the same general category" - of which the narrowest grouping would be "*Angles, shapes and sections of iron or non-alloy steel under HS 7216*".⁴⁶ This requirement is expressly provided in Article 2.2.2(i) to avoid what occurred in this case - 'calculation' and use of a profit figure well above what even the petitioners claimed was reasonable.

87. We recall that Thailand used a profit rate of 36.3 per cent in its final calculations. This figure was more than *five times* the maximum "reasonable" amount of profit (7 per cent) that had been *alleged* by SYS in its anti-dumping petition, more than *six times* the figure (6 per cent) used by SYS in its suggested calculation of normal value, and more than *eight times* the profit margin (4.55 per cent) for Huta Katowice verified by Thai authorities and shown in the company's most recent annual income statement that was before the DFT.⁴⁷ In arriving at a profit rate of 36.3 per cent, Thai authorities claimed to be using the alleged profits from the sales in Poland of DIN products - the very sales that Thai authorities had conclusively rejected for purposes of a normal value comparison of *like* products. But data for the broader "same general category of product" were not employed. Indeed, the only evidence collected by Thai authorities and thus in the record concerning any "general category" of product is the 4.55 per cent profit figure for all steel products made by Huta Katowice. Moreover, Thai authorities also neglected the verified fact that Huta Katowice used different production processes in making these two products and that DIN-specification H-Beams are a special niche product, newly on the Polish market and not meaningfully produced or sold within the ordinary course of trade.

88. Thus, even if the results had been based on the same general category of products, the result arrived at by the Thai authorities still had to be examined to determine its reasonableness under Article 2.2. The record in the investigation contained three other profit figures, all closely similar, none even remotely at the level assumed by the authorities. Moreover, given the substantial debate on these issues, including at verification, Thai authorities knew that there were difficulties in proper comparison of DIN and JIS products and that different production processes were involved, and these facts also required the DFT to question the appropriateness of

⁴⁶ We view Thailand's contrary comments on this point (at para. 73 of its First Written Submission) as ignoring the plain language of Article 2.2.2.

⁴⁷ In its application for relief (at page 12, point 27), SYS informed the DFT that the "reasonable profit rate" in the steel industry was between five and seven per cent. Huta Katowice's 1995 income statement, which was also properly before the DFT, shows that the company's 1995 profit margin was 4.55 per cent.

such an exorbitant figure. The Thai authorities had an obligation to examine the record in its entirety and to use a profit figure properly supported by the record evidence.

89. In sum, the methodology of subparagraph (i) was not correctly employed in this instance. It yielded a profit amount that is grossly disproportionate to other evidence of reasonable profit contained in the DFT record. Indeed, petitioners have admitted as much. In the face of such evidence, Thailand has done precisely what a WTO Member may not - it has constructed value using an unreasonable profit amount. It is clear that if any of the profit figures in the DFT record had indeed been used, the Polish respondents would not have been found to be dumping, based on Thailand's own calculations. The result has been to penalize the Polish firms impermissibly.

V. INITIATING AN INVESTIGATION WITHOUT RATIONAL BASIS AND WITHOUT REQUIRED NOTICE VIOLATES ARTICLE 5 OF THE ANTI-DUMPING AGREEMENT

90. We would like now to turn to Poland's claims under Article 5 of the Anti-Dumping Agreement. Poland claims that Thailand failed to comply with the requirements of Articles 5.2, 5.3 and 5.5 in initiating its anti-dumping investigation of Poland.

91. Article 5.2 Anti-Dumping Agreement requires that an anti-dumping petition include evidence of *all* of the following: (1) dumping, (2) injury, and (3) causation—that is, evidence of a causal link between the dumped imports and injury to the domestic industry. The provision states that "[s]imple assertion, unsubstantiated by relevant evidence, cannot be considered sufficient to meet the requirements" for initiating an investigation.

92. Similarly, Article 5.3 Anti-Dumping Agreement further requires that "authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation."

93. These requirements are plain. There must exist sufficient, relevant evidence to initiate an anti-dumping investigation. Such relevant evidence must be presented concerning dumping, injury, and causation. Simple assertions on any of these three points renders a petition insufficient for purposes of initiation. Authorities have an obligation to conduct an objective examination of the "accuracy and adequacy" of evidence presented before they may initiate an investigation.

94. Poland wishes immediately to draw the Panel's attention to Thailand's responses to the Panel's specific questions regarding Poland's Article 5 claims. Those responses demonstrate that Thailand has *no* defence to the Article 5 claims. The Panel's Questions 13 through 16 specifically asked whether, in the view of the parties, the petition and the notice of initiation contained the required data and analysis on dumping, injury and causal link. The Panel also asked for specific references to relevant parts of the petition and notice of initiation. In response to all four of these questions, Thailand was not able to provide a *single* reference to supporting data. Instead, Thailand defiantly stated that its "authorities examined the application and

determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation." One can only assume from this response that Thailand is admitting its inability to identify any specific evidence in the petition and notice. If any such evidence were presented in those documents, presumably Thailand would have brought it to the attention of the panel.

95. The record of the Thai investigation demonstrates that the initiation application of the petitioner, Siam Yamato Steel Co, Ltd., did not contain sufficient evidence to satisfy any of the three requirements under Art. 5.2. First, the petition provided nothing more than raw numerical data to support the allegation of dumping. The petition therefore offers nothing more than "simple assertion" with respect this element and is consequently wholly insufficient. Second, the application appears to contain *no evidence of injury* whatsoever. Third, the petition provided *no* evidence of a *causal link* between the between the allegedly dumped imports of respondents and the alleged injury suffered by SYS, the domestic producer. Thus, the petition completely fails to address these latter two requirements. We submit that conclusory statements in a notice of initiation are no substitute for the basic requirement that a petition contain requisite evidence supporting initiation. We invite the Panel to examine the petition of SYS (Thailand Exhibit 1) for evidence of injury and causation. If deemed insufficient on any of these three points, then Thailand violated Articles 5.2 and 5.3 of the ADA.

96. In addition, Thai authorities failed to comply with the requirements of Article 5.3 of the Anti-Dumping Agreement by initiating this investigation without determining that the evidence in the SYS petition was "sufficient" in terms of both scope and accuracy to justify the initiation of this investigation. No authority should be deemed to have met its Article 5.3 obligations where a petition lacks any one of the three basic requirements for initiation, much less all three. Authorities have a plain obligation to conduct an objective examination of the "accuracy and adequacy" of evidence before they may initiate an investigation.

97. We wish to discuss one further claim with respect to Article 5. Thailand had a responsibility under Article 5.5 of the Anti-Dumping Agreement to notify Poland regarding filing of the petition in this investigation. In violation of Thailand's obligations, such notice was not properly or timely provided, as discussed at length previously.

VI. DENYING FUNDAMENTAL INFORMATION TO A MEMBER VIOLATES ARTICLE 6

98. In its First and Second Written Submissions and in its First Oral Statement, the Republic of Poland detailed the Thai authorities' violation of Article 6 by their denial to Polish firms of the opportunities mandated under Article 6 for fair review of evidence. As Polish respondents stated in the investigation, "a party has no opportunity to properly defend itself if it does not have access to the proof and evidence by which a foreign government proposes to foreclose future sales in its territory. Transparency is lost, and respondents appropriately believe that conclusions were pre-ordained, regardless of actual evidence." Such was the situation in this case.

99. Poland has raised its Article 6 claim with respect to Thailand's preliminary, draft final, and final determinations. As discussed above, none of these documents

offers Poland the required explanation of Thailand's basis for its conclusions. In each of these documents, Thailand fails to discuss its evaluation of the factors supporting its determination, or to explain why certain purported facts outweighed the authorities' own recognition that "most evidence" showed the absence of injury. When Poland brought this deficiency to the attention of the Thai authorities, Thailand responded by "expressing surprise" rather than offering meaningful disclosure. Thailand has violated Article 6 in at least three regards.

100. First, Thailand has failed to offer Poland "meaningful opportunities ... to see all information that is relevant to the presentation of their case" so as to be allowed to make their "presentations on the basis of this information", as required by Article 6.4. We submit that it would indeed have been "practicable" for Thailand to do so, at the very least by providing Poland with coherent non-confidential summaries of submitted information. We note, for example, that Polish respondents were never even informed of, much less given a copy of, the non-confidential version of the SYS questionnaire response. Similarly, Poland was never provided a legally adequate copy of any petition, as the non-confidential summary fails to meet the requirements of Article 5.3 AD. We further note that the Final Injury Determination was based not on detailed findings of fact, but on "draft", "preliminary", or "secret" findings, many of which contradict statements found in the Final Injury Determination.

101. Second, Poland submits that the non-confidential summaries provided by Thailand failed to meet the requirements of Article 6.5.1 because they were internally inconsistent, conclusory, and opaque. We note that such summaries must provide "sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence." Thailand did not satisfy this requirement here. Tossing out labels such as "price suppression" and "price undercutting" - especially when contradicted by the very evidence on which such conclusions are said to be based - cannot be said to meet this requirement. In response to this claim, Thailand has argued that while Article 6.5.1 requires interested parties to furnish non-confidential summaries of their submissions to the investigating authorities, those authorities have no obligation to provide the summaries to exporters or foreign producers. Poland submits that Thailand is plainly wrong on this issue. Indeed, such summaries are submitted to authorities precisely so that they can then be provided to other interested parties. The provision of these summaries is consistent with Article 6.4, which requires that interested parties shall receive timely opportunity to review all non-confidential information material to their claims. The receipt of these non-confidential summaries is no mere formality; rather, it is fundamental to due process rights enshrined in the Agreement. Basic procedural fairness requires that respondents be given timely access to any relevant data or analysis, so they may present their defence or request correction of errors by the investigating authority.

102. Finally, Poland submits that Thailand has violated Article 6.9 by failing to inform Polish firms of the "essential facts under consideration which form the basis for the decision whether to apply definitive measures". While Thai authorities invited comments from Polish respondents on proposed definitive determinations, the authorities did not sufficiently disclose the factual basis for those determination. Further, Thailand did not disclose such facts "in sufficient time for the parties to defend their interests" within this investigation. In this regard, we would emphasize that at no point during the investigation did the Thai authorities provide the respondents,

inter alia, a specification, or a proper weighing, of all relevant economic factors used as the basis for the final injury determination by the Thai Department of International Trade. For example, the Thai authorities failed to identify any rational basis for using overlapping 12-month periods for comparison in the final determination. And the "disclosure" that took place at the end of the investigation amounted to no more than referencing early "draft" or "preliminary" materials in the administrative record (now contradicted by other record facts), as well as materials submitted by the Polish respondents themselves. Because the Thai documents were replete with inconsistencies, Polish firms were denied the "essential facts" underlying the Thai determinations.

103. Indeed, when the Polish respondents asked for such a disclosure on 20 June and again on 23 June 1997, they were informed by the Thai Ministry of Commerce that no disclosure would follow.⁴⁸ Rather, the Thai authorities expressed "surprise" at this request, suggesting the Polish firms should be content with what had been supplied previously, and referring Polish respondents back to *preliminary* or *draft* materials in the administrative files in this case. No reasons were given for the rejection of relevant arguments made by the Polish firms. Basic procedural fairness requires that the respondents should have been given timely access to any relevant data or analysis, so they could present their defence or request correction of any errors by the investigating authority. Rather, they were off-handedly referred back to *preliminary* or *draft* statements in the record, as detailed above, which did not support the decision that was taken.

CONCLUSION

104. Mr. Chairman, Members of the Panel, the Republic of Poland submits that this dispute involves several of the most important precepts of the Anti-Dumping Agreement. We hope that this oral presentation has assisted in clarifying any issues that remained unclear from our earlier submissions and statement. If there are any issues which the Panel considers not entirely clear or if there are any points made by Thailand, which the Panel considers we have not answered, we will be very happy to do so in reply to questions. Thank you for your kind attention

⁴⁸ Exhibits POL-14, 15, and 16.

ANNEX 2-1

FIRST WRITTEN SUBMISSION OF THAILAND
(14 February 2000)

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I. INTRODUCTION

1. As the detailed factual record demonstrates, Thailand's investigating authorities expended significant resources in their first anti-dumping case to ensure that the investigation conformed to all of the substantive and procedural requirements of the Anti-Dumping Agreement. Moreover, Poland has failed to satisfy its burden to demonstrate that Thailand violated Article VI of GATT 1994 or the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement").

2. Thailand took significant steps beyond those required under the Anti-Dumping Agreement to ensure that interested parties and the Government of Poland were provided with all information necessary to defend their interests. Poland seems to agree with this contention, given that it has not raised any claims regarding Thailand's notifications of the initiation, preliminary determination, or final determination under Article 12 of the Anti-Dumping Agreement. Moreover, Poland has not raised any claims regarding the consistency of the preliminary determination imposing a provisional measure, given the absence of any claim under Article 7 of the Anti-Dumping Agreement and the failure to even allege "significant impact" of such measure as required under Article 17.4 of the Anti-Dumping Agreement.

3. Thailand has prepared two versions of its First Written Submission, a Confidential Version and a Non-Confidential Version. The Confidential Version was submitted to the Panel only and contains nine Exhibits designated as CONFIDENTIAL. The Non-Confidential Version was submitted to both the Panel and the Parties to this dispute and does not contain the confidential Exhibits. Thailand considered that this approach was necessary to balance its obligation to protect confidential information submitted during the investigation by both Thai and Polish companies with its right to defend itself in this proceeding.¹

4. In accordance with Article 17.7 of the Anti-Dumping Agreement, Thailand respectfully requests that the Panel not disclose the Exhibits designated as CONFIDENTIAL to Poland or to Third Parties without formal authorisation from Thailand. As specified in Appendix 2 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU"), Article 17.7 of the Anti-Dumping Agreement is a special or additional rule of dispute settlement. Under Article 1.2 of the DSU, such special or additional rules of dispute settlement prevail over conflicting rules of the DSU. Accordingly, to the extent that any rules of the DSU conflict with Article 17.7 of the Anti-Dumping Agreement and would require disclosure of the confidential exhibits, Article 17.7 prevails and obligates the Panel to maintain the confidentiality requested by Thailand. Thailand would, of course, be willing to discuss the adoption of additional Panel working procedures that would allow Parties access to the confidential exhibits under certain circumstances, provided that such procedures would guarantee protection of this confidential information. These procedures should also safeguard this confidential information from disclosure in subsequent WTO proceedings, including those before the Appellate Body.

II. THAILAND REQUESTS A PRELIMINARY RULING BASED ON POLAND'S FAILURE TO PRESENT PRECISE CLAIMS

5. Poland's request for establishment of a panel and its First Written Submission only contain sweeping allegations, not precise claims sufficient to present the problem clearly. This "shotgun" or "fishing expedition" approach to pleading seriously prejudices Thailand's right of defence in this proceeding.

6. At this stage in the proceeding, Thailand requests that the Panel issue a preliminary ruling dismissing Poland's purported claims under Articles 5 and 6 of the Anti-Dumping Agreement based on Poland's violation of its obligations under Article 6.2 of the DSU. According to the Appellate Body, Article 6.2 of the DSU requires that the complainant identify the "claims" in its request for establishment of a panel with sufficient clarity to present the problem clearly.² The Appellate Body has emphasised that the listing of articles of covered agreements allegedly violated may

¹ Thailand notes that Article 17.5(ii) of the Anti-Dumping Agreement obligates a panel to examine an anti-dumping matter based upon "the facts made available in conformity with the appropriate domestic procedures to the authorities of the importing Member."

² See Report of the Appellate Body, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, DSR 2000:I, 3, para. 124 (14 Dec. 1999) ("*Korea - Dairy Products*").

not satisfy the standard "where the articles listed establish not a single, distinct obligation, but rather multiple obligations."³ Articles 5 and 6 of the Anti-Dumping Agreement contain a multitude of procedural and evidentiary obligations relating to the conduct of an anti-dumping investigation. Accordingly, by, in effect, merely listing Articles 5 and 6 without adding additional detail, Poland has failed to comply with the standard set forth under Article 6.2 of the DSU.

7. The Appellate Body also seems to require that a Member alleging that its procedural rights under the DSU have been violated must also demonstrate that it sustained prejudice through the presentation of "supporting particulars."⁴ In this case, Poland has presented no legal or factual basis whatsoever for its claimed violations of Articles 5 and 6. As a result, Poland has denied Thailand its right to present an effective defence to purported "claims" under Articles 5 and 6 in its First Written Submission. Essentially, Poland has removed one complete stage of Thailand's defence and has eliminated any opportunity for Third Parties to respond to these "claims."⁵ Therefore, Poland's violation of Article 6.2 of the DSU has already seriously prejudiced Thailand's right to present a defence, and the Panel should dismiss these "claims".

8. Without prejudice to the Panel's response to Thailand's request for a preliminary ruling, Thailand will attempt to respond in its First Written Submission to all of the purported "claims" raised by Poland. However, Thailand respectfully urges the Panel to monitor carefully the serious prejudice to Thailand's defence caused by Poland's approach and to apply the burden of proof in a manner that ensures that Poland makes its own case to the Panel.

9. Thailand reserves its right to raise additional procedural objections under Article 6.2 of the DSU and under general principles of due process with respect to other purported "claims" raised by Poland.

III. POLAND FAILED TO SET FORTH THE COMPLETE AND ACCURATE FACTUAL RECORD OF THE INVESTIGATION

A. Domestic Investigating Authorities

10. The Ministry of Commerce conducted the anti-dumping investigation on H-beams from Poland. Within the Ministry of Commerce, the domestic investigating authorities that were involved in this case included the Department of Business Eco-

³ See Report of the Appellate Body, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, DSR 2000:I, 3, para. 124 (14 Dec. 1999) ("*Korea - Dairy Products*").

⁴ *Ibid.* at para. 131.

⁵ In other words, because of Poland's imprecise pleading, Thailand is prevented in its First Written Submission from presenting any defence to Poland's purported claims under Articles 5 and 6, and Third Parties are similarly prevented from addressing Poland's purported claims in third party submissions. To the extent the Panel allows Poland to revise its claims during any subsequent stage of the proceeding, Thailand's opportunity to defend itself and strengthen such defence over the course of the Panel's proceedings is severely prejudiced because its opportunities to present its defence are limited and no longer include the critical First Written Submission. For Third Parties, their opportunity to address any revised claims would be completely eliminated.

nomics ("DBE"), the Department of Foreign Trade ("DFT"), and the Department of Internal Trade ("DIT").

11. The DBE conducted the investigation into whether the application contained sufficient evidence to justify initiating the investigation. The DBE then provided recommendations to the Committee to Consider Procedures for the Imposition of Special Duty on Products which are Imported into Thailand at Unfair Prices and for the Imposition of Special Duty on Products (the "CPS Committee"). The CPS Committee considered DBE's recommendations and decided whether to accept or reject them, in whole or in part.

12. The DFT conducted the preliminary and final dumping investigation, and the DIT conducted the preliminary and final injury investigation. DFT and DIT submitted reports and recommendations to the Committee on Dumping and Subsidy (the "CDS Committee"). The CDS Committee considered each department's recommended determinations and decided whether to approve or reject them.

13. All of these government entities constitute the Thai investigating authorities for purposes of the anti-dumping investigation on H-beams from Poland.

B. Factual Record of the Investigation

14. The Thai investigating authorities took exceptional steps to ensure that it established the facts of the case properly and evaluated the facts in a fair and objective manner. Poland's presentation of the factual record presents a one-sided, incomplete, and biased view of the record of the investigation. Thailand describes below the more complete record of the investigation to ensure that the Panel has all of the information necessary to evaluate the consistency of the Thai authorities' actions with the Anti-Dumping Agreement. To provide a more readily accessible record of the investigation for the Panel, for other parties to this dispute, and for the WTO professional staff, Thailand has incorporated Poland's exhibits, where appropriate, into its volume of exhibits.

15. On 21 June 1996, Siam Yamato Steel Co. Ltd. ("SYS") filed an application for the imposition of anti-dumping duties on, *inter alia*, H-beam steel products. The non-confidential version of the application is attached as THAILAND - 1.

16. On 17 July 1996, officials from the DBE met with Mr. Michal W. Byczkowski, Commercial Counsellor, Embassy of Poland, at the DBE where he was informed that Thailand had received a properly documented anti-dumping application. *See* THAILAND - 14 (POLAND - 4).

17. On 30 August 1996, the Director-General of the DBE and Chair of the CPS Committee sent a letter to Mr. Michal W. Byczkowski (Commercial Counsellor of Poland), Huta Katowice, Stalexport, GSE General Steel Export, and Duferco transmitting the notice of initiation. *See* THAILAND - 2 (POLAND - 1) (letter to Huta Katowice only).

18. On 17 September 1996, the DFT transmitted to Huta Katowice, Stalexport, GSE General Steel Export, and Duferco a number of items. *See* THAILAND - 3 (POLAND - 2) (letter to Huta Katowice only). These items included: (1) the notice of initiation, (2) the Department of Foreign Trade Statement (THAILAND - 5 (POLAND - 3)), (3) Exporters/Producers Questionnaire (THAILAND - 4), and (4) formatted diskette for the questionnaire response.

19. On 17 September 1996, the DFT sent a letter to the Government of Poland explaining the initiation of the investigation. *See* THAILAND - 5 (POLAND - 3). Enclosures to the letter included: (1) the notice of initiation, (2) the exporter questionnaire, and (3) a copy of the non-confidential complaint. DFT asked the Government of Poland to assist interested parties in responding to the questionnaire, identified Huta Katowice as a known exporter, and indicated that Huta Katowice was being sent the enclosures directly. The deadline for questionnaire responses was set at 37 days after the questionnaires were released, *i.e.*, 24 October 1996.
20. On 27 September 1996, Huta Katowice wrote to the DFT requesting an extension of 30 days to the deadline to respond to the questionnaire. *See* THAILAND - 6.
21. On 3 October 1996, the DFT granted Huta Katowice an extension of 15 days to the deadline for responding to the questionnaire. *See* THAILAND - 7. Accordingly, Huta Katowice was given 52 days to respond to the questionnaire.
22. On 10 October 1996, Huta Katowice wrote a letter to the DBE and DFT raising some issues relating to its ability to submit information in defence of its interests. *See* THAILAND - 8. On 11 October 1996, DFT promptly responded and indicated that "all points raised will be taken in to due account during the course of the investigation." *See* THAILAND - 9.
23. On 16 October 1996, Stalexport sent DFT portions of its questionnaire response. *See* THAILAND - 10 (cover letter only). On 29 October 1996, DFT sent a fax to Stalexport indicating that its response was incomplete (no sections A, C, E, or I and missing parts of sections D, F, and G) and requesting additional information by 8 November 1996, thereby granting an additional 10 days to respond. *See* THAILAND - 11. On 6 November 1996, Stalexport sent the DFT additional information in response to its request. *See* THAILAND - 12 (cover letter only).
24. On 18 October 1996, the Government of Poland requested consultations with the Government of Thailand under Article 17.2 of the Anti-Dumping Agreement. *See* THAILAND - 13. On 14 November 1996, the Permanent Representative of Thailand to the WTO provided a detailed answer. *See* THAILAND - 14 (POLAND - 4).
25. On 4 November 1996, DIT sent SYS a copy of the producer's injury questionnaire. *See* THAILAND - 15. The deadline for responding to the questionnaire was 9 December 1996, 30 days after DIT transmitted the questionnaire. On 5-6 November 1996, DIT sent the importers' questionnaire to 43 importers. *See* THAILAND - 16. On 14 November 1996, the DIT sent a letter to three trade associations and requested that the relevant questionnaires be transmitted to other producers, importers, and users unknown to DIT. *See* THAILAND - 17.
26. On 8 November 1996, Huta Katowice filed its dumping questionnaire response with DFT. *See* THAILAND - 18 (confidential version); THAILAND - 19 (non-confidential version).
27. On 6 December 1996, SYS filed its confidential injury questionnaire response with DIT. *See* THAILAND - 20. On 20 January 1997, SYS filed the non-confidential version of its response. *See* THAILAND - 21.
28. On 27 December 1997, Thailand imposed provisional anti-dumping measures. On 20 January 1997, DFT transmitted to Huta Katowice and Stalexport three documents relating to the preliminary determination. *See* THAILAND - 22 (letter to

Huta Katowice only). These documents included: (1) Ministry of Commerce Notification Regarding Imports (No. 118) (THAILAND - 23 (POLAND - 5)); (2) Ministry of Commerce Notification Regarding Anti-Dumping Duty Levied (THAILAND - 24 (POLAND - 5)); and (3) DFT Notification Regarding the Preliminary Determination of Dumping (No. 1) with the attached Preliminary Determination of Injury (THAILAND - 25 (POLAND - 5)).

29. On 7 February 1997, Stalexport sent a letter to the DFT commenting on the preliminary determination and requesting a hearing and disclosure of information. *See* THAILAND - 26. On 13 February 1997, Huta Katowice sent a letter to the DFT posing nine questions regarding the preliminary determination and requesting a hearing and disclosure of information. *See* THAILAND - 27. On 19 February 1997, DFT sent letters to Stalexport and Huta Katowice informing them that disclosure information was being sent by registered delivery, that the hearing was tentatively scheduled for 6 March 1997, and that DFT may need to conduct an on-the-spot investigation to verify information. *See* THAILAND - 28 (POLAND - 7).

30. On 20 February 1997, DFT sent disclosure information to Huta Katowice and Stalexport. The confidential dumping disclosure sent to Huta Katowice included eight points of explanation and three annexes relating to the summary of calculation, profitability calculation, and weighted average export price. *See* THAILAND - 29 (confidential); THAILAND - 30 (non-confidential version). The confidential dumping disclosure sent to Stalexport included 3 detailed points of explanation and two annexes relating to the summary of calculation and weighted average export ex-factory price. *See* THAILAND - 31 (confidential); THAILAND - 32 (non-confidential version). Poland only included a portion of the relevant dumping disclosures in Exhibit POLAND - 7 of its First Submission and provided no explanation for its omissions. On 27 February 1997, the DFT also faxed to both parties' disclosure information relating to the preliminary injury determination. *See* THAILAND - 33 (POLAND 8).

31. On 4 March 1997, the Washington, D.C. law firm of Hogan & Hartson (on behalf of Huta Katowice and Stalexport) requested an extension of time to file the written submission for the hearing. *See* THAILAND - 34. On 9 March 1997, the law firm filed detailed comments on the preliminary determination of injury and dumping. *See* THAILAND - 35.

32. On 13 March 1997, DFT conducted a hearing for interested parties to present their views. A summary of the hearing was released on 28 March 1997. *See* THAILAND - 36 (POLAND - 9).

33. On 1 May 1997, DFT transmitted to Huta Katowice, Stalexport, SYS and the Government of Poland copies of the proposed final determination of dumping and injury. *See* THAILAND - 37 (POLAND - 10). Under the same cover, DFT transmitted confidential disclosure of findings to Huta Katowice. *See* THAILAND - 38 (confidential); THAILAND - 39 (non-confidential version) (POLAND - 11 partial). The disclosure included information on cost of production, discounts, the dumping calculation, normal value, ex-factory price, and the profitability calculation. Again, Poland failed to include all of the disclosure information in Exhibit POLAND - 11 of its First Written Submission and failed to provide any explanation for such omissions.

34. On 13 May 1997, Hogan & Hartson filed detailed comments on behalf of Huta Katowice and Stalexport regarding the proposed final determination. *See*

THAILAND - 40. On 19 May 1997, DFT transmitted its response to the comments received from Hogan & Hartson. *See* THAILAND - 41 (POLAND - 12). On 19 May 1997, DFT also transmitted its response to the comments received from SYS regarding the proposed final determination. *See* THAILAND - 42.

35. Prior to the CDS Committee meeting scheduled for 26 May 1997, both the DFT and the DIT transmitted a confidential report and supporting documentation to the Committee for its consideration and approval regarding the final dumping and injury determinations. *See* THAILAND - 43 and THAILAND - 44.

36. On 4 June 1997, DFT transmitted to interested parties and to the Embassy of Poland documents relating to the final determination of dumping and injury, including the 26 May 1997 notification of definitive anti-dumping duty levied on the subject merchandise (THAILAND - 45 (POLAND - 13)) and the notification of the 30 May 1997 final determination (THAILAND - 46 (POLAND - 13)).

37. On 20 June 1997, Stalexport sent a letter to DFT commenting on the final determination and requesting disclosure of additional information. *See* THAILAND - 47 (POLAND - 14). On 23 June 1997, Huta Katowice also sent a letter to DFT commenting on the final determination and requesting additional information. *See* THAILAND - 48 (POLAND - 15). On 7 July 1997, DFT responded to the letters. *See, e.g.*, THAILAND - 49 (POLAND - 16).

38. As the above discussion indicates and as Thailand's exhibits reflect, the Thai investigating authorities engaged in a comprehensive anti-dumping investigation regarding imports of H-beams from Poland. The authorities fully considered all of the information presented by interested parties and fully notified and explained its decisions to these parties and to the Government of Poland, to the extent permitted by WTO rules regarding confidentiality. In each and every aspect of the case, the authorities were in full compliance with the procedural and substantive requirements of Article VI of GATT 1994 and the Anti-Dumping Agreement.

IV. POLAND FAILED TO SET FORTH THE CORRECT STANDARD OF REVIEW APPLICABLE UNDER THE ANTI-DUMPING AGREEMENT

39. Article 17.6 of the Anti-Dumping Agreement provides the standard of review that the Panel must apply in assessing the determinations of the Thai investigating authorities in this case, and Poland's related allegations. Thailand considers it worth noting that Article 17.6 of the Anti-Dumping Agreement is intended to provide for considerably more deference to the factual and legal determinations of a Member's domestic authorities than the general standard of review under Article 11 of the DSU.

40. Past GATT and WTO practice consistently provides that a panel must not conduct a *de novo* review of a Member authorities' factual determinations, *e.g.*, regarding the requirements applicable in the context of safeguards, subsidies or general

exceptions.⁶ Of course, this principle also applies *a fortiori* under Article 17.6 of the Anti-Dumping Agreement.

41. Article 17.6 of the Anti-Dumping Agreement provides:

"In examining the matter referred to in paragraph 5:

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

42. In paragraphs 42 to 46 of its First Written Submission, Poland failed to set forth the correct standard of review applicable to WTO anti-dumping proceedings. First, Poland overlooked the fact that in most instances in the present dispute Article 17.6 (i), not Article 17.6 (ii), is the standard to be applied to the Thai authorities' examinations and determinations. Second, Poland misconstrues both Article 17.6 (ii) and the specific provisions in Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement when it asserts that all of the latter do not admit of more than one "permissible interpretation". Of course, to assert that these articles do not permit more than one interpretation would presuppose that one has first engaged in a thorough and detailed interpretation of each word or rule contained in those articles based on customary rules of treaty interpretation. Thailand fails to see that Poland has, or even could have possibly, done so.

43. It is undisputed that the specific provisions of the Anti-Dumping Agreement (*inter alia* Articles 2, 3, 5 and 6) define the Members' international obligations. However, both the Panel and the Parties must consider those obligations exclusively through the lens of Article 17.6 of the Anti-Dumping Agreement. Article 17.6 of the Anti-Dumping Agreement alone defines the scope of those obligations for all purposes of these proceedings. The question whether Thailand has fulfilled its obligations under the specific provisions is *not* before the Panel. Rather the subject matter in dispute here is whether Thailand has fulfilled its obligations *as defined, or modified, by Article 17.6 of the Anti-Dumping Agreement*.

⁶ See, e.g., Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, 135, para. 117 (adopted 13 Feb. 1998) ("*EC - Hormones*"); Report of the Panel, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement From Mexico*, WT/DS60/R, DSR 1998:IX, 3797, para. 7.57 (19 June 1998) ("*Guatemala - Cement (Panel)*"); Report of the Appellate Body, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, DSR 2000:I, 515, paras. 118-121 (14 Dec. 1999); Report of the Panel, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/R, DSR 2000:II, 575, para. 8.117 (25 June 1999) (citing further panel reports in para. 8.118).

44. Turning to the interpretation and application of Article 17.6 of the Anti-Dumping Agreement, the essence of paragraph (i) of Article 17.6 has been summarized as follows:

"This provision [...] encapsulates a notion developed in several panel reports that when a panel examines the factual conclusions of national investigating authorities it should act as a 'review body', and should not substitute its own factual assessment for that of the authorities unless the latter is seriously flawed[...]. The 1998 Cement panel expressed this standard by saying that *an assessment should be respected if it was one that could have been reached by a reasonable, unprejudiced person.*"⁷ (Emphasis added)

45. Thus, the question to be answered is whether the decisions by the Thai investigating authorities in this case *could* have been made by a reasonable, unprejudiced person.⁸ Thailand respectfully submits that Poland has failed to discharge its primary obligation under the burden of proof to even establish a *prima facie* case to the contrary, as demonstrated in further detail below.⁹

46. Thailand notes that the first requirement under Article 17.6 (i) is that the authorities properly establish the facts. However, this requirement cannot be entirely disassociated from the second part of the standard in Article 17.6(i), *i.e.*, an "unbiased and objective evaluation". Together these requirements form a standard designed to prevent arbitrariness, bad faith, bias and undue protectionism, while permitting, and thereby promoting, Members' unbiased, good faith exercise of their right to apply anti-dumping duties.

47. The requirement that facts be properly established seeks to ensure procedural fairness, in particular that all interested parties are given proper hearing.¹⁰ Thailand notes that its authorities have in all instances ensured that the process of the establishment of the relevant facts respects all interests concerned, as amply demonstrated in the factual record. Poland has clearly failed to discharge its burden of proof to even establish a *prima facie* case to the contrary.

48. The first sentence of Article 17.6 (i) also imposes the requirement that authorities perform an "unbiased and objective evaluation" of the facts.¹¹ The interpre-

⁷ Edmond McGovern, International Trade Regulation (Issue 7, February 1999), § 12.141.

⁸ Both GATT and WTO panels have consistently applied the standard of a "reasonable, unprejudiced person." *See, e.g., United States - Measures affecting Import of Softwood Lumber from Canada*, SCM/162, para. 335, BISD40S/358, adopted 27-28 October 1993 ("*US - Softwood Lumber*"); and most recently *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, DSR 2000:III, 1345, para. 7.57 (28 Jan. 2000) ("*Mexico - HFCS*").

⁹ Thailand notes that in para. 48 of Poland's First Written Submission, Poland states that "anti-dumping duties are an exception to the otherwise applicable freedom to trade between WTO Members." In fact, the Members' right to impose anti-dumping duties under Article VI of GATT 1994 and the Anti-Dumping Agreement forms part of the carefully constructed balance of rights and obligations that make up the WTO free-trade regime. In any event, the characterisation of these rights and obligations does not change the fact that the burden of producing evidence of a violation rests at all times with Poland. *See EC - Hormones*, DSR 1998:I, 135, at para. 104.

¹⁰ *See* Edmond McGovern, International Trade Regulation (Issue 7, February 1999), § 12.141.

¹¹ Thailand notes that the specific provisions of the Anti-Dumping Agreement themselves first require an objective and unbiased assessment by the investigating authorities of which data are nec-

tation of this requirement, which forms the cornerstone of the deferential standard established under Article 17.6 (i) of the Anti-Dumping Agreement, has been partly refined by recent panel practice. The requirement contains two elements to be established, or rather, two flaws to be avoided or rectified through panel review: (1) bias on the part of the investigating authorities; and (2) subjectivity or, rather, "un-objectivity" in the conclusions reached. Beyond pure allegations, Poland has failed to establish a *prima facie* case of either bias or subjectivity. Therefore, Thailand respectfully submits that the panel is bound under Article 17.6(i) of the Anti-Dumping Agreement to accept the determinations of Thai investigating authorities as consistent with Thailand's WTO obligations.

49. Recent panel practice has concentrated primarily on the first, personal element. In this regard, the panel in *US - DRAMs* articulated the following test:

"[...] Korea's claim would require us to determine whether [...] an unbiased and objective investigating authority could properly have found that the Flamm study did not "reasonably reflect the costs associated with the production and sale" of DRAMs."¹²

50. Again, the key question that a panel must ask itself when reviewing a determination by national authorities, therefore, is whether an unbiased and objective authority *could* have reached the conclusions reached by the authorities in the case.¹³ Thailand notes that this test is both personal and negative, reflecting the essence of the deferential standard of review imposed by Article 17.6 (i) of the Anti-Dumping Agreement. Thailand respectfully submits, positively, that its authorities clearly acted without bias.

51. Moreover, it is not Thailand's burden to prove that it acted without bias. As the panel in *US - DRAMs* noted, the burden of proof is, of course, on the *claimant* to establish the bias of the investigating authorities. Thailand notes, as did the panel in *US - DRAMs*¹⁴ that the Appellate Body stated in *EC - Hormones* that:

"[t]he initial burden lies on the complaining party, which must establish a *prima facie* case of inconsistency with a particular provision of

essary, required and useful in light of the specific object and purpose of the investigation and, in particular, the individual aspects of the case. Thailand finds it useful to recall, in this context, that, of course, the question of what exactly constitutes the proper establishment of the facts in a given case is also a matter of interpretation of those provisions one by one. The proper establishment of the facts thus cannot be dissociated from both the permissible interpretation (Article 17.6 (ii)) of the provisions defining the factual bases and their objective and unbiased evaluation.

¹² Report of the Panel, *United States - Anti-Dumping Duty on Dynamic Random Access Memory Semiconductors (DRAMs) of One Megabit or above from Korea*, WT/DS99/R, DSR 199:II, 521, para. 6.67 (29 January 1999) ("US - DRAMS") (the panel applied the same test in paras. 6.72 and 6.76).

¹³ The recent panel in *Mexico - HFCS*, *supra*, footnote 8, at paras. 7.95 and 7.98, applied the same test in the context of the initiation of an Anti-Dumping investigation. See also *Guatemala-Cement* *supra*, footnote 6, (Panel) at para. 7.57. Although both panels were addressing the substantive requirements relating to the assessment of "sufficient evidence" for initiation, it is clear that the differing thresholds for initiation and preliminary or final determinations of dumping, injury and causal link do not warrant a different approach to the authorities' act of evaluation insofar as the standard of review is concerned.

¹⁴ *US - DRAMS*, *supra*, footnote 12, at para. 6.68.

the *SPS Agreement* on the part of the defending party, or more precisely, of its SPS measure or measures complained about. When that *prima facie* case is made, the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."¹⁵

52. The panel in *US - DRAMS* applied this to the test set out above and concluded:

"we consider that Korea has failed to 'establish a *prima facie* case' that an objective and impartial investigating authority could *not* properly have found that the study did *not* 'reasonably reflect the costs associated with the production and sale' of DRAMS."¹⁶ (Emphasis added)

53. In its First Written Submission, Poland fails to allege bias on the part of the Thai investigating authorities and fails to present any evidentiary basis for bias to the extent such allegation can be inferred from its submission. As a result, Poland has clearly not made out a *prima facie* case of bias.

54. With regard to the "objective evaluation" criterion, Thailand recalls one commentator's statement that:

"The last of the new criteria - an objective evaluation - seems to allow the possibility that the substance of the authorities' factual conclusions, rather than the procedures which they have followed, could lead to them being condemned. In other words, a panel might decide that the conclusions were so clearly wrong that they could not have been based on an objective evaluation."¹⁷ (Emphasis added)

55. Again, it is important to point out the purely negative nature of the test to be applied and the consequences for the burden of proof. It is clear that Poland has failed to present a *prima facie* case that the authorities lacked objectivity, much less a *prima facie* case that the authorities' conclusions "were so clearly wrong that they could not have been based on an objective evaluation".

56. Finally, Thailand wishes to draw the Panel's attention again to Article 17.6 (ii) of the Anti-Dumping Agreement, that provides for substantive deference to a Member's permissible interpretations of the Anti-Dumping Agreement. Although Thailand is fully aware that in many instances the application of customary rules of interpretation of public international law may lead to only one "permissible" interpretation under this provision, in many other cases multiple permissible interpretations will exist.

57. Thailand submits that where interpretation of applicable provisions of the Anti-Dumping Agreement was necessary in the processes of initiation, investigation, determination and imposition of measures, the Thai authorities have developed and consistently acted based on permissible interpretations to which the Panel should defer under Article 17.6 (ii) of the Anti-Dumping Agreement. Article 17.6(ii) applies to *all* provisions of the Anti-Dumping Agreement, including provisions for determin-

¹⁵ *EC - Hormones, supra*, footnote 9, at para. 98.

¹⁶ *US - DRAMS, supra*, footnote 12, at para. 6.69.

¹⁷ Edmond McGovern, *International Trade Regulation*, para. 12.141.

ing dumping, injury and causation under Articles 2 and 3. Because the Thai investigating authorities' interpretations of law were "permissible", and the authorities otherwise adhered to Thailand's international obligations in the application of anti-dumping rules, Thailand considers that the Panel should defer to the authorities' determination on the record in this case.

V. THAILAND ACTED CONSISTENTLY WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

58. Poland's only claim with respect to the calculation of the dumping margin in this case is that the Thai investigating authorities violated Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement by improperly calculating profit for constructed value purposes in its final determination of dumping.

A. *The Dumping Calculation Issue: Poland's Claim*

59. The Polish respondent argued against the use of home-market sales prices of H-beams sold as a basis for calculating constructed value. According to the respondent:

"[S]ales in the Polish market of products sold in Thailand do not reach the 5 per cent standard for any product size, which means that the Polish market sales of those products are not a viable comparison for Thai market sales;"

"[t]here are no sales in the Polish market of products that can be called 'similar' for these purposes. The reason is that the remainder of the Huta Katowice division's sales in the Polish market is comprised of products that are produced according to a system of standards that is entirely different from standards for products sold in the Thai market. Thai market products are manufactured according to standards established by the Japanese Institute of Standards ('JIS') ... While a few products sold in Poland are manufactured to JIS specifications ... , most are manufactured according to a completely different system, the HE specifications established by the German standards authority Deutsche Industria Normen ('DIN').¹⁸

60. The Thai investigating authority accepted the claim of the respondent that domestic sales of the like product were below the 5 percent standard. Accordingly, to determine a dumping margin it used "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" ("constructed value"), as authorised by Article 2.2 of the Anti-Dumping Agreement. The use of constructed value is not open to question. In paragraphs 82 to 84 of its First Written Submission, Poland only contends that the Thai investigating authority did not determine a "reasonable profit" for the constructed value calculation. As explained below, the profit margin used by the Thai investigating authority was reason-

¹⁸ Huta Katowice Questionnaire Response, response to question C.3 (THAILAND - 19).

able and was that actually realised on domestic sales that may be considered, at the very least, the same general category of products.

B. The Agreement's Requirements for Calculating Profit

61. The general requirement of Article 2.2 is that the profit must be "reasonable," and, if possible, the profit calculation must be based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." If profit cannot be determined on this basis, it may be based on any of the following:

- "(i) the actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts incurred and realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

C. The Thai Investigating Authority's Calculation of Profit

62. The products covered by the investigation were set forth clearly in the questionnaire provided to the respondent producer Huta Katowice:

"The product concerned by this proceeding is angles, shapes and sections of iron or non-alloy steel H sections, classified under HS code 7216.33.0005."¹⁹

63. The respondent producer fully complied with the instructions to report all of its sales of the covered product in the Polish market and to Thailand. Accordingly, the Thai investigating authority had a complete database consisting of all home-market sales of H-beams by Huta Katowice, and a complete database consisting of all sales to Thailand of H-beams by Huta Katowice.²⁰

64. Having accepted the claim of the Polish respondent that the sales of H-beams in the home market were not sufficiently comparable to the H-beams sold to Thailand to permit a proper comparison based on the 5 percent standard, the Thai investigating authority proceeded to use the data presented to it by the respondent to calculate constructed value. The Thai investigating authority used *all* reported home-market sales of H-beams to calculate the reasonable amount of profit. Thus, it could not have inflated Huta Katowice's home market H-beam profit artificially, as might occur if only a portion of the home-market sales database had been used.

¹⁹ Producers/Exporters Questionnaire at 1 (THAILAND - 4).

²⁰ Huta Katowice Questionnaire Response, Section C (THAILAND - 18).

65. Thus, Poland's claim that the DFT's use of a 36.3 percent profit margin for Huta Katowice was an "assumption"²¹ is clearly incorrect. The 36.3 percent was the product of a calculation made in accordance with the requirements of the Anti-Dumping Agreement based on Huta Katowice's own data, and was not an assumption.

66. The respondent and Poland have taken the position that the home-market sales were not sufficiently comparable for the preferred "price-to-price" calculation of Article 2.1. It does *not* follow from that fact, however, that such sales are not sales of the "same general category of products."

67. Thus, Poland has combined one true statement and one false statement in a compound proposition in its First Written Submission when it claims that "for price comparison purposes, the DFT admitted [that the questionnaire response data on Polish and Thai domestic sales] were not properly comparable and not within the 'same general category of products'."²² To the contrary, the DFT accepted Poland's strenuous argument that the Polish and Thai sales were not comparable for purposes of Article 2.1. The DFT then found, quite properly and completely contrary to the baseless claim made by Poland, that the Polish and Thai H-beams indeed were of the "same general category of products." It is entirely consistent with the requirements of the Anti-Dumping Agreement to conclude that products are not comparable for purposes of Article 2.1, and also to conclude that the data for sales and production of such products do provide a proper basis for a profit calculation under Article 2.2, because such products belong to the "same general category of products."

68. The sales reported by Huta Katowice clearly belong to the "same general category of products." They were all sales of H-beams.²³ The Thai investigating authority determined that this was a general category of product to which the sales to Thailand belonged.²⁴

69. Poland appears to argue that DIN H-beams and JIS H-beams are not like products and that they also do not fall within the "same general category of products." There is certainly no basis for the claim that they are not the "same general category of products" as the products sold to Thailand. They are, after all, *all* "iron or non-alloy steel H-sections, classified under the HS code 7216.33.0005", and that certainly is a correct description of one "general category of products" to which the products sold to Thailand belong.

70. In addition, although the Polish respondent and Poland made much of the alleged incomparability of JIS-specification-produced H-beams and DIN-produced H-beams, the Thai investigating authority discovered that Huta Katowice maintained only a single set of cost of production data for H-beams, *undifferentiated* as between

²¹ First Written Submission, Republic of Poland, para. 83.

²² Poland's First Written Submission at para. 15; *see also* Huta Katowice Questionnaire Response, response to question C.3 (THAILAND - 18).

²³ The unadopted Report of the Panel in *EC - Antidumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136 (1995) (*EC - Audio Cassettes*), para. 394, stated that this in effect meant "products of the same general category as the like product". *See* McGovern, *International Trade Regulation*, p. 12.23-4 (1999).

²⁴ *See* Proposed Final Determination, section 6 (THAILAND - 37).

H-beams made to JIS standards and H-beams made to DIN standards. The Thai investigating authorities explained that:

The questionnaire requested Huta Katowice to separate cost of production for each type of the product concerned as considered relevant. It is Huta Katowice's proposal that the cost of production need not distinguish between different types (DIN, JIS, etc.) and could essentially be based on cost per metric tonne. This proposal by Huta Katowice was considered acceptable as it was also proposed by other interested parties.²⁵

71. Indeed, the Thai investigating authority determined that the profitability of home-market sales of products identical to those sold to Thailand was "virtually the same" as the overall profitability of all home-market sales of H-beams.²⁶ This is further (albeit unnecessary) confirmation that the JIS-specification and DIN-specification H-beams all belong to the same general category of products.

72. Poland's argument reduces to an assertion that it was entitled to have the Thai authorities use an extremely broad definition of "general category of products" - company-wide profit for this huge integrated producer making a vast variety of steel products besides H-beams - as the basis for determining profit.²⁷ Thailand respect-

²⁵ Responses to the issue[s] raised by the Polish producers/exporters to the draft final determination, at 4 (THAILAND - 41).

²⁶ See Proposed Final Determination, section 6.3 (THAILAND - 40). Indeed, in light of these facts, it would have been reasonable for the Thai investigating authority to have found that all the H-beams sold in the Polish home market were in fact like products, not merely products belonging to the same general category of products as the like products. In that case, the Thai investigating authority's calculation using all reported home-market sales of H-beams would have been properly characterised as the calculation of profit based on the "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation"-which is the preferred method under Article 2.2.2 for calculating profit in the situation when home market sales "do not permit a proper comparison" per the introductory para. of Article 2.2. As provided in the introductory para. of Article 2.2 of the Anti-Dumping Agreement, in fact, the Polish respondent vastly overstated the differences between DIN-specification and JIS-specification H-beams. The chemical and metallurgical properties of these products are comparable and substitutable. Of course, regardless of whether the database used by the Thai investigating authority was comprised entirely of "like products" or of the "same general category of products," the results would be the same, and the profit thus calculated was reasonable.

²⁷ See Poland's First Written Submission at paras. 15 and 82. In para. 82 of its First Written Submission, Poland also alleges that Thailand rejected two other "reasonable" methods for calculating profit. First, "the typical JIS product profit claimed in the Thai petition" clearly is not the kind of profit figure that would be applied except in the situation where the investigating authority lacked any other data to make any of the profit calculations set forth in Article 2.2.2 and, therefore, had to rely on "facts available," as provided for under Article 6.8. In other words, use of the typical JIS product profit surmised by the Thai petitioner in its petition would come only as a last resort. Because the authority had data supplied to it by the respondent on the same general category of products, it was not necessary to rely on "facts available" - which, it turns out, are not accurate facts. In fact, Huta Katowice is making much higher profits on H-beams than the petitioner surmised based on the limited information known to it at the time the application was filed. In addition, as pointed out above, it was appropriate for the Thai investigating authority to use all JIS and DIN sales in the home market to calculate profit, because they all do belong to the same general category of products; besides that, the Thai authority specifically confirmed that the profit margin for the JIS home-market

fully submits that Article 2.2.2(i) does not provide for any particular breadth of definition of "same general category of products." Rather, the Anti-Dumping Agreement leaves the decision to use a narrower general category (like, for example, the category "hominid" for human beings) rather than a broader general category (like, for example, the category "mammal" or "animal" for human beings) to the reasonable discretion of the investigating authorities.

73. In fact, even if there were some limit to the reasonable discretion of administering authorities implicit in Article 2.2.2(i), that limit would militate toward requiring the administering authorities to use a *narrower*, rather than a *broader*, "general category of products" to calculate profit. Broader and broader categories will encompass products less and less "like" the products for which a profit is sought to be calculated. As a result, the broader the general category definition, the greater the likelihood that the profit calculation will be inaccurate. This conclusion follows from the hierarchy of methodologies found in Article 2.2.2. The preferred methodology is to use the narrowest category, sales of the *like product* made by the particular producer. If that cannot be achieved, then Article 2.2.2(i) authorizes the use of a somewhat broader universe of data to calculate profit - profit made by that producer for the "same general category of products" as the like product. Article 2.2.2(ii) authorizes a broader definition still if the other methods cannot be used. At the apogee of permissible methodologies is Article 2.2.2(iii), which provides for the use of "any other reasonable method" of calculation of profit made by other exporters or producers of the same general category. The Thai investigating authority's calculation fell well within the outermost orbits of these authorized profit calculation methodologies. The profit calculated was, in short, reasonable, as required by Article 2.2.

74. Poland has not pointed to any fact on the record that would establish that the Thai authorities acted unreasonably in considering that all H-beams sold in Poland belong to the same general category as the H-beams sold to Thailand. Moreover, Poland has not pointed to any fact on the record showing that Huta Katowice reported home-market sales of *other* H-beams that the DFT failed to include in its profit calculation. Poland's argument with regard to the Thai authorities' dumping calculation claims incorrectly that the profit was sheer "assumption", and claims incorrectly that Poland was entitled to have profit calculated on an exceptionally broad "general category of products" - a category so broad that it would *mask* the very high profit at which Huta Katowice sells H-beams in its home market compared

sales was commensurate with the average profit margin for JIS and DIN combined. *See, e.g.*, THAILAND - 41 at 3-4. Second, as for Poland's proposal that "the profit rates from Huta Katowice sales of truly like products in third countries" be used in preference to constructed value, Article 2.2 does not express a preference for third-country sales of the like products over "the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits" (constructed value) - the choice to use one or the other in Article 2.2 is expressed in the disjunctive. It is not surprising in the least that this choice should be given to the investigating authorities. After all, there may be cases in which a producer enjoying a monopoly in its protected market is selling at uniformly dumped prices everywhere in the world except in its home market; if there were a requirement to use third-country like product sales in preference to constructed value, such universal dumpers could easily escape determinations of dumping - that is, as long as they followed the maxim, "dump equally in all foreign markets."

to the profit at which it sells H-beams to Thailand. Poland's argument is that the monopoly profits being extracted by Huta Katowice to finance its dumped sales to Thailand should be diluted by Huta Katowice's lesser profit performance for other products that are less like the H-beams sold to Thailand and the H-beams sold in the home market. Poland's argument clearly should be rejected.

VI. THAILAND ACTED CONSISTENTLY WITH ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

75. Based on Poland's request for establishment of a panel and its First Written Submission, Thailand is only able to identify six purported "claims" under Article 3 of the Anti-Dumping Agreement. Poland claims that:

- (a) Thailand violated Article 3.1 of the Anti-Dumping Agreement because its final determination of injury was not based on positive evidence. *See* Poland's First Written Submission at para. 71.
- (b) Thailand violated Article 3.1 of the Anti-Dumping Agreement because its final injury determination of injury did not involve an objective examination of the impact of dumped imports from Poland on the Thai domestic industry. *See* Poland's First Written Submission at para. 71.
- (c) Thailand violated Article 3.2 of the Anti-Dumping Agreement by finding material injury without considering (1) whether there was a significant increase in dumped imports from Poland and (2) whether (a) there was significant price undercutting or (b) a depression of prices (or restraint of a price increase) to a significant degree. *See* Poland's First Written Submission at para. 72.
- (d) Thailand violated Article 3.4 of the Anti-Dumping Agreement by failing to evaluate profits, losses, profitability or cash flow as relevant economic factors and indices having a bearing on the state of the industry. *See* Poland's First Written Submission at para. 74.
- (e) Thailand violated Article 3.5 of the Anti-Dumping Agreement by failing to demonstrate that the Polish imports are causing injury. *See* Poland's First Written Submission at para. 75.
- (f) Thailand violated Article 3.5 of the Anti-Dumping Agreement by failing to examine other factors that may be causing injury to the domestic industry, including the pricing conduct of SYS, technology developments, export performance, domestic industry productivity, or the Kobe earthquake. *See* Poland's First Written Submission at para. 75.

76. The remainder of Poland's submission makes sweeping assertions about violations of the Agreement without presenting any factual or legal basis for such assertions. Thailand is unable and unwilling to respond to these vague assertions contained in Poland's First Written Submission.

77. Thailand also notes that Poland complains throughout its First Written Submission that the Thai authorities did not provide sufficient disclosure of the informa-

tion on which its determinations were based.²⁸ To the contrary, Thailand disclosed to interested parties all non-confidential information that was considered in reaching its final determination and then, unlike the practice in other Members, took the additional step of attempting to summarise confidential information that was considered in its injury analysis.²⁹ Thailand considers that its investigating authority struck a reasonable and responsible balance between illegitimately disclosing highly confidential information (which would violate Article 6 of the Anti-Dumping Agreement) and providing no information at all. In this regard, Thailand notes that with only one complaining party and two respondents, its authorities were faced with the formidable challenge of balancing the required confidentiality with the obligation to disclose the essential facts under consideration. Thailand respectfully requests that the Panel consider Thailand's position regarding these conflicting obligations in assessing whether it complied with its obligations under Article 3.

A. *Thailand Based its Final Determination of Injury on "positive evidence" Consistent with Article 3.1 of the Anti-Dumping Agreement*

78. In paragraph 71 of its First Written Submission, Poland apparently claims that Thailand violated Article 3.1 of the Anti-Dumping Agreement by failing to base its final injury determination on "positive evidence". However, Poland has provided no specific legal or factual basis to support this purported claim, much less even alleged that Thailand failed to establish the facts properly or was biased or subjective in its consideration of evidence. Accordingly, Poland has failed to satisfy its burden of proof, and the Panel should reject Poland's purported claim.

79. In any event, Article 3.1 of the Anti-Dumping provides, in relevant part, that "[a] determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence." Absent any specific basis on which to respond to Poland's purported claim, Thailand considers that a significant amount of "positive"³⁰ evidence on which the final injury determination is based is contained in the record of the investigation and is reported in the respective notices, letters, and disclosures provided to interested parties. *See* Section III above.³¹

²⁸ In, *inter alia*, paras. 2, 19, 24, 29, and 66, Poland alleges that the Thai investigating authorities did not rely on actual data in making their determination. This is obviously not the case, as evidenced by the text of the notices, letters, and disclosures provided to interested parties. Moreover, as discussed in more detail below, the relative figures included in the charts must necessarily have been derived from actual, albeit confidential, data.

²⁹ For example, in the United States, confidential information reported in tables would be replaced with "*****". Thailand merely tried to provide both a textual and data summary of the confidential information considered in making its final determination.

³⁰ "Positive" is defined as "dealing only with matters of fact; practical; not speculative or theoretical." *The Shorter Oxford English Dictionary* at 1634 (1973).

³¹ Thailand notes that several of DIT's documents contain inadvertent typographical or translation errors. First, in para. 16 of DIT's draft information used for the final injury determination (THAILAND - 37), the reference to SYS beginning operations in "March of 1995" should read "January of 1995", as suggested in Section C of SYS' questionnaire response (THAILAND - 21) and confirmed in para. 1.10.1 of DIT's confidential report to the CDS Committee (THAILAND - 44).

80. In paragraphs 2, 17, 19, and 22, Poland alleges that Thailand inappropriately relied on "overlapping time periods" in conducting its injury investigation, although it never alleges the precise article that such an approach would violate. Poland appears to contend that because some of the periods examined happen to overlap with each other, some intellectual error - which Poland has failed to specify - was committed by the Thai investigating authority. Thailand wishes to make clear that there were no mismatching of periods used in examining data - that is, the Thai investigating authority did not, for instance, compare import data of Time X to domestic sales data of Time Y as if Time Y were Time X. To the contrary, all comparisons were of the "apples-to-apples" variety. The fact that some periods examined overlapped with other periods examined is of no moment whatsoever, and there is nothing intellectually suspect about it. A reasonable investigating authority might, for example, examine calendar year data for 1998, 1999 and 2000, and also data for July 1999-June 2000. The fact that the periods calendar year 2000 and July 1999 - June 2000 overlap does not vitiate the investigating authorities' analysis. In fact, it may strengthen it in terms of confirming the persistence of trends over time.³²

B. Thailand's Final Determination of Injury Involved an Objective Examination of the Impact of Dumped Imports from Poland on the Thai Domestic Industry Consistent with Article 3.1 of the Anti-Dumping Agreement.

81. In paragraph 71 of its First Written Submission, Poland apparently claims that Thailand violated Article 3.1 of the Anti-Dumping Agreement because its final injury determination did not involve an objective examination of the impact of dumped imports from Poland on the Thai domestic industry. However, Poland provides no evidence to support any claim that Thailand's investigating authority was not objective in its examination of the consequent impact of dumped imports. Thus, Poland has failed to satisfy its burden of proof with respect to whether Thailand conducted an "objective" examination, and the Panel should reject Poland's claim. Regarding whether the Thai authorities conducted the requisite "examination" under Article 3.1,

Second, in the chart for Market Data of H-Beam of Siam Yamato in the same document (THAILAND - 37), the reference to "19.8" for 1995 market share should read "49.8", as stated in the disclosure for the preliminary determination (THAILAND - 33) and in para. 1.13.1 of DIT's confidential report to the CDS Committee (THAILAND - 44). Finally, in para. 2 of the final determination of injury, the reference to "threat" is an incorrect translation of the Thai language version of the determination. The term "threat" is not included in the final determination, as evidenced by the Thai language version included in THAILAND - 44. As a result, Poland's arguments in paras. 2, 3, and 19 regarding the use of only 10 months of data for 1995, its arguments in paras. 3, 64, and 68 of its submission regarding SYS "tripling" its market share and its reference in footnote 64 to a "threat" determination are all without merit.

³² In other words, the use of overlapping periods amounts to adding a constant, or averaging in a constant, to the two numbers being compared. This constant is the value for the period of the overlap. Although this changes the two numbers that are being compared, it does so in a predictable way. The authorities can just as easily make an assessment based on overlapping numbers as on non-overlapping numbers.

Thailand addresses this claim in the context of Poland's purported claim under Article 3.4 of the Anti-Dumping Agreement.

C. Thailand Complied with Article 3.2 of the Anti-Dumping Agreement in its Examination of the Volume and Price Effects of Dumped Imports

1. The Thai Investigating Authorities Considered whether there had been a Significant Increase in Dumped Imports

82. In paragraph 72 of its First Written Submission, Poland contends that Thailand violated Article 3.2 of the Anti-Dumping Agreement because the Thai authorities gave "no consideration" to whether there was significant increase in imports. Article 3.2 provides that "[w]ith regard to the volume of dumped imports, the investigating authorities shall consider whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the importing Member". The record of the investigation clearly shows that the Thai investigating authorities *considered* whether there had been a significant increase in dumped imports in absolute terms.

83. First, paragraph 4 of "Information used in The Determination" contained in the Draft Information Used for the Final Injury Determination by the DIT attached to the Proposed Final Determination (the "Draft Information") (THAILAND - 37) states that "[d]uring the period of investigation, Total H-beams imported to Thailand decreased at 8% from 1995 while imports from Poland increased 10%."

84. Second, on page 2 of its response to issues raised by respondents (THAILAND - 41), DFT states under the heading "Quantity of imports from Poland" that "Polish imports increased consistently prior to and during the investigation period."

85. Third, on pages 3-4 and 10 of its confidential report to the CDS Committee (THAILAND - 44), DIT again sets forth the information collected on the increase in imports from Poland and indicates that they had risen "substantially".

86. Fourth, in paragraph 2.1 of the final injury determination, the Thai authorities state that "[t]he import volume of subject merchandise from Poland has continuously increased when the total imports declined. When compared Polish imports with all other imports, Polish imports had increased from 31 per cent in 1994, to 48 per cent in 1995, to 57 per cent during the POI."

87. It is clear that the Thai authorities "considered" whether there had been a significant increase in dumped imports in absolute terms. Accordingly, Thailand acted consistently with its obligation under the first sentence of Article 3.2 of the Anti-Dumping Agreement.

2. *The Thai Investigating Authorities Considered whether there had been Significant Price Undercutting or a Depression of Prices (or restraint of price increases) to a Significant Degree*

88. In paragraph 72 of its First Written Submission, Poland claims that Thailand violated Article 3.2 of the Anti-Dumping Agreement by failing to consider properly the effect of dumped imports on prices. Article 3.2 provides:

"With regard to the effect of the dumped imports on prices, the investigating authority shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member *or* whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred to a significant degree. No one or several of these factors can necessarily give decisive guidance." (Emphasis added.)

89. The Thai investigating authority did *consider*, using confidential information on the record, whether the dumped Polish imports were significantly underselling the Thai products and/or whether the effect of dumped Polish imports was to cause price suppression or depression.

90. First, paragraph 7 of the Draft Information (THAILAND - 37) states that "[i]f [one] compares between selling prices of H-beams of Siam-Yamato Steel Co., Ltd. and the import price from Poland, it can see the circumstance of price undercutting. Siam Yamato Steel Co., Ltd. made the decision to discount the price for maintaining and expanding the market share, so that the volume of sale will be efficient for the factory production and to achieve economy of scale. Thus, this leads to the situation [of] price depression, and price suppression."

91. Second, on page 1 of its response to issues raised by respondents (THAILAND - 41), DFT states that "[i]n summary, the Thai Investigating Authorities reiterate that ... significant price-undercutting was established resulting in price depression and price suppression. "

92. Third, on pages 4-5 and 10 of its confidential report to the CDS Committee (THAILAND - 44), DIT sets forth the confidential pricing information and discusses the consistent price underselling by the dumped imports.

93. Fourth, in paragraph 2.2 of the final injury determination (THAILAND - 46), the Thai authorities state that "[p]rice of Polish imports has always been lower than that of Siam Yamato and lower than the average import price from all other countries." In paragraph 2.3, the authorities state that "the domestic industry has no choice but to decrease its price to the level of Polish imports. This has resulted in price undercutting and suppression including the fact that the Thai domestic industry is unable to increase its price to recover its costs in a reasonable period of time. This, in turn, has effected cash flow. "

94. Therefore, it is also clear that the Thai authorities "considered" whether there had been significant price undercutting or whether the effects of the dumped Polish imports was price depression or suppression to a significant degree. Accordingly, Thailand acted consistently with its obligation under the second sentence of Article 3.2 of the Anti-Dumping Agreement.

95. In making its allegations with respect to price comparisons, Poland has confused the public version of the chart provided by the Thai authorities (THAILAND - 37) with the actual confidential pricing data examined during the investigation. The Thai investigating authority provided the public version of its pricing chart in order to provide Poland with reference information, without at the same time divulging confidential information in violation of Article 6.5 of the Anti-Dumping Agreement. Although Poland correctly observes that one cannot determine from the public version of this chart alone which products were undersold, this observation assumes, incorrectly, that this chart exists in a vacuum. When read in light of statements appearing elsewhere in the record, however, a reader can readily grasp the pattern of underselling by the dumped Polish imports.

96. In order for a comparison of relative price trends to be meaningful, the price relationship between the compared products must, of course, be provided. That is to say, it must be clear which product is priced higher. The Thai authorities provided this price relationship context in their Final Injury Determination: the "[p]rice of Polish imports has always been lower than that of [SYS]"..³³ The relative price relationship, therefore, is such that the "100" starting reference for Polish H-beams necessarily is *lower* than the "100" reference for Thai H-beams. And, in any case, the clarity of the public summary of confidential information is irrelevant to the viability of the injury determination made by the Thai investigating authority based on its examination of all relevant factors based on confidential information.

D. Thailand Complied with Article 3.4 of the Anti-Dumping Agreement by Evaluating all Relevant Factors, Including Profits, Losses, Profitability and Cash Flow

97. In paragraph 74 of its First Written Submission, Poland apparently claims that Thailand violated Article 3.4 of the Anti-Dumping Agreement by "cho[osing] not to present evidence regarding profits, losses, profitability or cash flow." To the contrary, the record of the investigation demonstrates that the Thai authorities evaluated these factors.

98. First, paragraph 11 of Draft Information (THAILAND - 37) states that "[t]he Department of Internal Trade considered the business performance of the domestic industry by examining the financial report and cost of production of Siam Yamato Co. Ltd., from the years of 1994 and 1995." As reflected in the table attached to the Draft Information, it looked specifically at confidential information regarding "Net Profit (Loss)".

99. Second, on page 1 of its response to issues raised by respondents (THAILAND - 41), DFT states that "[t]he complainant suffered significant financial losses which are directly attributable to the dumping prices of the Polish exporters concerned."

100. Third, on pages 3 and 11-12 of its confidential report to the CDS Committee (THAILAND - 44), DIT states that it used SYS ' audited financial statement and balance sheet to assess the state of the domestic industry and discusses the financial loss

³³ Final Injury Determination, para. 2.2 (THAILAND - 46).

attributable to the prices at which the dumped Polish imports are sold in the Thai market.

101. Fourth, as stated above, in paragraph 2.3 of the final injury determination (THAILAND - 46), the Thai authorities state that "the domestic industry has no choice but to decrease its price to the level of Polish imports. This has resulted in price undercutting and suppression including the fact that the Thai domestic industry is unable to increase its price to recover its costs in a reasonable period of time. This, in turn, has effected cash flow."

102. Therefore, the Thai authorities clearly evaluated profits, losses, profitability and cash flow consistent with its obligations under Article 3.4 of the Anti-Dumping Agreement.

103. In paragraph 74 of its First Written Submission, Poland also contends that "[e]very Article 3.4 factor examined by Thailand and on which the Thai authorities claimed to rely unambiguously supports a finding of no injury." Other than the factors identified above, Poland does not appear to claim that Thailand failed to evaluate other relevant factors. Rather, Poland simply disputes the weight accorded by the Thai authorities to each of the factors that it evaluated during the investigation. Moreover, as discussed in Section IV above, Poland has failed to satisfy its burden of proof to present *prima facie* evidence that the Thai authorities were biased or subjective in their evaluation of all relevant factors.

104. As demonstrated above, the significant market penetration of Polish H-beams, coupled with significant underselling showed that the Thai industry was suffering material injury. Poland attempts to avoid this reality by focusing on, and at times misconstruing, the other factors considered by the Thai authorities.³⁴ Again, it must first be recalled that the injury determination entails a balancing process. As a result, the import volumes and the low, dumped prices cannot be ignored despite attempts to distract attention away from these factors.

105. In concentrating on the factors that the Thai authorities accorded less weight in the balance of their investigation, Poland seems to argue that *all* factors would have to indicate injury in order for an injury finding to be sustainable. This obviously is false. The Anti-Dumping Agreement only requires investigating authorities to *consider* all relevant factors.

106. Poland effectively argues that an industry needs to be "mortally wounded" in order to be "materially injured." In fact, an industry may be in a state of relative health and still be suffering material injury. The H-beams in question are commodity products such that even a small price differential can divert sales to the lowest-priced producers. Thus, when significant volumes of dumped imports are introduced into a

³⁴ For example, Poland argues that Thai capacity utilisation would have to be lower than it was in order to sustain an injury finding. *See* Poland's First Written Submission at para. 22. This proposition, however, is not correct. Any producer, and particularly a new producer, might rationally decide to respond to the dumping by matching the dumper's low prices while preserving capacity utilisation. The result would be material injury experienced as price suppression and/or price depression, rather than material injury experienced as idling of capacity. A domestic producer clearly does not need to suffer all indicia of material injury before a reasonable investigating authority can legitimately find that the domestic industry is suffering material injury by reason of dumped imports.

market, an authority could reasonably find that such imports were causing material injury to the domestic industry because of price undercutting and consequent price suppression and depression.³⁵

E. Thailand Complied with Article 3.5 of the Anti-Dumping Agreement by Demonstrating that Dumped Imports were Causing Injury to the Domestic Industry

107. In paragraph 75 of its First Written Submission, Poland apparently claims that Thailand violated Article 3.5 of the Anti-Dumping Agreement by failing to demonstrate that "the Polish imports are causing injury." However, Poland has provided no specific legal or factual basis to support this purported claim, much less even alleged that Thailand failed to establish the facts properly or was biased or subjective in its consideration of evidence. Accordingly, Poland has failed to satisfy its burden of proof, and the Panel should reject Poland's purported claim under Article 3.5. *See* Section IV above.

108. In any event and in the absence of any specific basis on which to respond to Poland's purported claim, Thailand considers that the record of the investigation demonstrates the causal link between the dumped Polish imports and the material injury to the domestic industry as reported in the respective notices, letters, and disclosures provided to interested parties. It is clear that the Thai investigating authority determined that the sustained pattern of underselling of commodity-product imports dumped at the rate of 27.78 percent, leading to price depression and suppression, coupled with the exceptionally high market share taken by the dumped imports, was

³⁵ In paras. 2, 3, 22, 32, 49, 64, 67, 74, and 76 of its First Written Submission, Poland contends that the following statements by the Thai investigating authorities are in some unspecified way improper:

"Though most evidences of domestic injury indicate a positive performance of the company, but [SYS] began its operation in [January] of 1995. Hence, to gain the benefit of the economy of scale, the company must maintain and increase its market share" (THAILAND - 37)

"The mere fact that the production and sales of the domestic industry has increased cannot be the sole indicators that the domestic industry has suffered no injury from Polish imports. In this early stage, it is possible that economy of scale is yet to be reached. Therefore, it is imperative that the domestic industry's market share be preserved and expanded to attain the sale level in keeping with its production at a level that it can continue to be in business. This was done by decreasing its prices to match that of the Polish imports, resulting in the fact that the price then became lower than it should have been. As a result, timely cost recovery has not been attained."

These statements, translated from the Thai language, simply highlight the fact that the Thai investigating authorities in this specific case were required to determine whether this particular domestic industry consisting of a single company that entered the market in January 1995 was suffering material injury as a result of dumped Polish imports. The Thai investigating authority considered that although certain factors may have showed an improving trend, as can be expected for a new entrant in an untapped domestic market, the dumped Polish imports were causing material injury because of the effect of, *inter alia*, price undercutting on the financial state of the company and its ability to stay in business. Moreover, Poland ignores the level at which these factors should have been, absent the effects of dumped Polish imports.

causing material injury to the Thai industry, and that such a determination was eminently reasonable in the circumstances. Injury determinations where the dumping margin is in the single digits, the margin of underselling is lower, the market penetration is significantly less, and the products are not commodity products (which compete primarily based on price) are commonplace - and are reasonable. Poland simply wants to re-balance the relevant factors and to trivialise those factors that are most indicative of material injury. That is not the role of the Panel, however. The role of the Panel is to review whether a reasonable investigating authority could have balanced the relevant economic factors in a such way that it could have reached the conclusions on injury and causation that this investigating authority in fact did reach. Thailand respectfully submits that its investigating authority's determinations on injury and causation meet this standard (the standard of Article 17.6(i)) with ease, given the facts before the Thai investigating authority.

F. Thailand Complied with Article 3.5 of the Anti-Dumping Agreement by Examining Known Factors other than Dumped Imports that may have Caused Injury to the Domestic Industry

109. In paragraph 75 of its First Written Submission, Poland claims that Thailand violated Article 3.5 of the Anti-Dumping Agreement because the Thai authorities failed to examine factors other than the dumped imports that may be injuring the domestic industry, including the pricing conduct of SYS, technology developments, export performance, domestic industry productivity, or the Kobe earthquake. In relevant part, Article 3.5 provides:

"The authorities shall also examine any *known* factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which *may be* relevant in this respect include, *inter alia*, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade-restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry."
(Emphasis added)

110. Thus, Article 3.5 obligates an investigating authority to examine only those other factors that (1) are known and (2) are, at the same time, injuring the domestic industry. If these conditions are satisfied, the injuries caused by these "other factors" must not be attributed to the dumped imports. Article 3.5, however, does not require that the authority examine all relevant other factors, but merely contains a list of factors that "may be relevant."

111. In paragraphs 9 and 15 of its Draft Information (THAILAND - 37), the Thai investigating authority examined information relating to world-wide demand for H-beams and potential trade restrictive practices of and competition between the for-

eign and domestic producers.³⁶ These factors were "known" but were not considered to be injuring the domestic industry.

112. On page 2 of DFT's response to issues raised by respondents (THAILAND - 41), DIT examined other factors that were made "known" to it by respondents, including imports from other third countries, general economic development, technology developments, and trade restrictive practices. These factors were again found not to be injuring the domestic industry.

113. In section 3 and in paragraph 4.7 of its confidential report to the CDS Committee (THAILAND - 44), DIT presented factual information relating to global market conditions in the steel industry and concluding that the events of the world market unlikely affected SYS performance due to the continued increase in domestic demand.

114. Finally, in paragraph 2.4 of the final injury determination (THAILAND - 46), the Thai authorities discuss their examination of global demand (on which the Kobe earthquake would have an effect). The authorities state that

"Siam Yamato Steel has entered the market when the global and domestic demand were high. Later, the global demand had contracted but domestic demand still expanded. Together with the fact that during the POI, over 40 per cent of sales were from export, therefore, the global demand for H-beams cannot be a cause of injury to the company during the POI."

115. Thus, Thailand examined factors other than the dumped Polish imports that were known to it and found in each case that they were not causing injury to the domestic industry. The Thai investigating authorities were not obligated to seek out "other factors" on their own initiative and were not obligated to examine "other factors" not made known by interested parties during the course of the investigation.³⁷ Moreover, Poland has provided no evidence that its determinations regarding the relevant other factors to examine and its evaluation of whether such factors were causing injury was biased or subjective. Accordingly, the Panel should reject Poland's claims under Article 3.5 of the Anti-Dumping Agreement.

VII. THAILAND ACTED CONSISTENTLY WITH ARTICLE 5 OF THE ANTI-DUMPING AGREEMENT

A. Initiation

116. In paragraph 89 of its First Written Submission, Poland asserts that the Thai authorities did not have sufficient evidence to justify the initiation of an investigation under Article 5 of the Anti-Dumping Agreement. This broad allegation is completely unsubstantiated and is included in a single paragraph of Poland's submission. There-

³⁶ See Paras. 9 and 15 of "Information used in The Determination" contained in the Draft Information Used for the Final Injury Determination by the DIT attached to the Proposed Final Determination (THAILAND - 37).

³⁷ See United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway, ADP/87, paras. 547 and 550 (adopted 27 Apr. 1994).

fore, Thailand is in the untenable position of having absolutely no basis on which to respond to Poland's purported "claim". Thailand respectfully urges the Panel to issue a preliminary ruling dismissing Poland's "claims" under Article 5 of the Anti-Dumping Agreement based on the arguments presented in Section II above.

117. Alternatively, Thailand respectfully requests that the Panel carefully evaluate the serious prejudice that is likely to result if Poland presents a more specific claim during the rebuttal stage of the proceeding. At such time, Thailand's ability to respond will be limited to the final oral hearing, and third parties will have *no* opportunity to respond.

118. Without prejudice to the above, Thailand emphasises that it complied with both Articles 5.2 and 5.3 of the Anti-Dumping Agreement in initiating the investigation. The authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams, but that insufficient evidence was presented to justify initiating an investigation on I-Beams and U-Beams. *See* THAILAND - 1 to - 5 (except 4).

B. Notice of the Acceptance of a Properly Documented Application

119. In Paragraph 90 of its First Written Submission, Poland claims that Thailand violated its obligation under Article 5.5 of the Anti-Dumping Agreement. Article 5.5 states that "[a]fter receipt of a properly documented application and before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned".

120. On 21 June 1996, Thailand received an anti-dumping application from SYS. *See* THAILAND - 1. On 17 July 1996, the DBE met with Mr. Michal Byczkowski, the Commercial Counsellor of the Republic of Poland in the Kingdom of Thailand. During that meeting, the DBE notified Mr. Byczkowski that a properly documented anti-dumping application had been received. The DFT reminded the Government of Poland regarding this meeting in a letter from the DFT to the Embassy of Poland. *See* THAILAND - 14. On 30 August 1996, Thailand initiated the investigation. *See* THAILAND - 2. By notifying Poland less than one month after the receipt of the application and six weeks before the decision to initiate the investigation, Thailand clearly complied with its obligations under Article 5.5 of the Anti-Dumping Agreement.³⁸

VIII. THAILAND ACTED CONSISTENTLY WITH ARTICLE 6 OF THE ANTI-DUMPING AGREEMENT

121. In its First Written Submission, Poland alleged that Thailand has violated the procedural and evidentiary requirements provided in Article 6 of the Anti-Dumping

³⁸ Thailand notes that at its meeting on 29-30 April 1997, the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices (the "Ad Hoc Group") discussed the confusion over the "practical mechanics" of notification under Article 5.5 of the Anti-Dumping Agreement, including "who should be notified, where, and how." *See* G/ADP/AHG/R/2 at 2 (7 July 1997).

Agreement. Poland merely asserted in its First Written Submission that the Thai authorities did not disclose information used for its final determination and that these actions were inconsistent with Articles 6.4, 6.5.1 and 6.9 of the Anti-Dumping Agreement (paragraph 92 of Poland First Written Submission). Because of these sweeping assertions, Thailand is again in the untenable position of having absolutely no basis on which to respond to Poland's arguable "claims". Thailand respectfully urges the Panel to issue a preliminary ruling dismissing Poland's "claims" under Article 6 of the Anti-Dumping Agreement based on the arguments presented in Section II above.

122. Alternatively, Thailand respectfully requests that the Panel carefully evaluate the serious prejudice that is likely to result if Poland presents a more specific claim during the rebuttal stage of the proceeding. At such time, Thailand's ability to respond will be limited to the final oral hearing, and third parties will have *no* opportunity to respond.

123. In any event, Thailand clearly complied with its obligations during the entire investigation by providing all interested parties timely opportunities to examine relevant information and to defend their interests.

A. Article 6.4

124. In paragraph 92, Poland contends that Thailand violated Article 6.4 of the Anti-Dumping Agreement because "interested parties could not see the relevant information." Absent more precise pleading, Thailand cannot respond in more detail to Poland's purported "claim" and can only reiterate that the Thai authorities provided interested parties, whenever practicable, timely opportunities to see all information that was not confidential. Thailand refers the Panel to the exhaustive factual record set forth in Section III above.

B. Article 6.5.1

125. In paragraph 92, Poland claims that Thailand violated Article 6.5.1 of the Anti-Dumping Agreement by failing to provide interested parties with a proper non-confidential summary.

126. Article 6.5.1 provides that the investigating authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. It does not require the investigating authorities to provide those non-confidential summaries to the exporters or to the foreign producers. Thus, Poland's claim is based on a misinterpretation of Article 6.5.1.

127. As discussed in Section III, the Thai investigating authorities required interested parties to submit non-confidential versions of, for example, the application and questionnaire responses. This requirement was set forth in section 9.1, paragraph 2 of the Notification of the Ministry of Commerce on the Imposition of Anti-Dumping and Countervailing Duties B.E. 2539 (1996). Thus, there is no question that Thailand was in full compliance with Article 6.5.1 of the Anti-Dumping Agreement.

128. Poland faults Thailand for rejecting respondents' requests to disclose confidential information submitted in this investigation.³⁹ Respondents, however, had no entitlement under WTO law to receive such confidential data. Moreover, Thailand stresses that its investigating authorities were bound by Article 6.5 of the Anti-Dumping Agreement to maintain the strict confidentiality of information submitted by both the petitioner and respondents in this investigation. Article 6.5 of the Anti-Dumping Agreement provides that confidential information "shall not be disclosed without specific permission of the party submitting it." While this provision provides little practical guidance to investigating authorities, Thailand considers its basic premise to be quite clear: absent a submitting party's consent, confidential information must not be disclosed.

129. In October 1996, the WTO Committee on Anti-Dumping Practices identified a range of topics that required attention in the context of anti-dumping practice. These topics were referred to the Ad Hoc Group for discussion and consideration of possible recommendations to the Committee. Members were invited to comment on these topics, including Topic #1: Treatment of confidential information in anti-dumping investigations.⁴⁰ The Anti-Dumping Committee and Ad Hoc Group's initiatives represent an institutional attempt to formulate more specific rules with respect to the treatment of confidential information. Until the Anti-Dumping Committee, or the WTO as an organisation, provides additional rules in this area, governments must simply follow the dictates of Article 6.5 and refrain from disclosing confidential information.

C. Article 6.9

130. Poland claims that Thailand violated Article 6.9 of the Anti-Dumping Agreement by failing to inform certain interested parties of the essential facts under consideration which formed the basis for the decision whether to apply definitive measures.

131. The factual record shows that the following information used in the final determination were provided to the interested parties :

- Proposed final dumping determination and draft information used for the final injury determination (THAILAND - 37);
- Confidential disclosure of the final dumping calculation (THAILAND - 38);
- Letter responding to the issues raised by the Polish producers/exporters to the draft final determination (THAILAND - 41);
- The final determinations of dumping and injury (THAILAND - 46).

³⁹ See Poland's First Written Submission at para. 92.

⁴⁰ Many WTO Members, including Thailand, submitted materials in response to the Anti-Dumping Committee's solicitation of papers and proposals. See, e.g., G/ADP/AHG/W/25 (9 Oct. 1997).

132. Thailand considers that the information included in the above-listed documents contained all "essential" non-confidential information taken into consideration in forming the basis for the decision whether to apply definitive measures.⁴¹

IX. CONCLUSION

133. Based on the above, Thailand respectfully requests that the Panel find that Thailand acted consistently with its obligations under Article VI of GATT 1994 and the Anti-Dumping Agreement.

⁴¹ The Ad Hoc Group also discussed the nature of the obligations under Article 6.9 of the Anti-Dumping Agreement, including what constituted the essential facts subject to the required disclosure and how and when such disclosure should be made. *See* G/ADP/AHG/R/2 at 2 (7 July 1997). The Group "recognized that the particular investigative and decision-making process in different Members' systems led to differences in how this obligation was met." *Ibid.* Moreover, some Members maintained that "the Article 6.9 requirement was less extensive than the requirement for explanations in the public notices issued under Article 12." *Ibid.* at 3. As stated in Section I of this submission, Thailand's compliance with Article 12 of the Anti-Dumping Agreement is outside the Panel's terms of reference. In any event, the Ad Hoc Group could not reach any conclusions on these important interpretative issues and reverted the topic for discussion at a later date. *Ibid.*

TABLE OF EXHIBITS

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
THAILAND - 1	Application filed by Siam Yamato Steel Co. Ltd. ("SYS") (non-confidential version)	21 June 1996
THAILAND - 2 (POLAND - 1)	Letter from DBE to Huta Katowice transmitting public notice of initiation	30 August 1996
THAILAND - 3 (POLAND - 2)	Letter from DFT to Huta Katowice transmitting notice of initiation, DFT Statement, questionnaire, and diskette	17 September 1996
THAILAND - 4	Producers/Exporters Questionnaire	
THAILAND - 5 (POLAND - 3)	Letter from DFT to the Government of Poland (the Department of Foreign Trade Statement) discussing the initiation and transmitting the notice of initiation, the questionnaire, and a copy of the application	17 September 1996
THAILAND - 6	Letter from Huta Katowice to DFT requesting an extension to the deadline for filing its questionnaire response	27 September 1996
THAILAND - 7	Letter from DFT to Huta Katowice granting a 15-day extension to the deadline for filing its questionnaire response	3 October 1996
THAILAND - 8	Letter from Huta Katowice to DBE and DFT regarding the ability to submit information	10 October 1996
THAILAND - 9	Facsimile from DFT to Huta Katowice	11 October 1996
THAILAND - 10	Cover letter from Stalexport to DFT transmitting portions of questionnaire response	16 October 1996
THAILAND - 11	Fax from DFT to Stalexport informing of a deficient questionnaire response and requesting additional information by 8 November 1996 (CONFIDENTIAL)	29 October 1996
THAILAND - 12	Cover letter from Stalexport to DFT transmitting certain additional information	6 November 1996
THAILAND - 13	Letter from the Permanent Representative of Poland to the WTO to the Permanent Representative of Thailand to the WTO requesting consultations under Article 17.2 of the Anti-Dumping Agreement	18 October 1996
THAILAND - 14 (POLAND - 4)	Letter from the Permanent Representative of Thailand to the WTO to the Permanent Representative of Poland responding to the 18 October 1996 letter and commenting on informal discussions held regarding the investigation	14 November 1996
THAILAND - 15	Cover letter and injury questionnaire from DIT to SYS	4 November 1996
THAILAND - 16	Cover letter (and list of importers) from DIT to 43 importers transmitting importers' questionnaire (Thai language version only) and Importers' Questionnaire	5-6 November 1996
THAILAND - 17	Cover letter from DIT to three trade associations transmitting questionnaires and requesting that they be forwarded to unknown producers, importers, and/or users (Thai language version only)	14 November 1996
THAILAND - 18	Dumping questionnaire response from Huta Katowice (CONFIDENTIAL)	8 November 1996
THAILAND - 19	Dumping questionnaire response from Huta Katowice (non-confidential version)	8 November 1996

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EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
THAILAND - 20	Injury questionnaire response from SYS (CONFIDENTIAL - Section F.3 (Cost of Production by Sizes) and attachment G-2 (Operating Result Comparison) removed)	6 December 1996
THAILAND - 21	Injury questionnaire response from SYS (non-confidential version)	20 January 1996
THAILAND - 22	Letter from DFT to Huta Katowice transmitting three documents relating to the preliminary determination	20 January 1997
THAILAND - 23 (POLAND - 5)	Ministry of Commerce Notification Regarding Imports (No. 118)	27 December 1996
THAILAND - 24 (POLAND - 5)	Ministry of Commerce Notification Regarding Anti-Dumping Duty Levied on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Section Originating In or Exported From the Republic of Poland	27 December 1996
THAILAND - 25 (POLAND - 5)	DFT Notification Regarding the Preliminary Dumping Determination on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Section Originating In or Exported From the Republic of Poland (No. 1) (Preliminary Determination of Injury attached)	20 January 1997
THAILAND - 26	Letter from Stalexport to DFT commenting on the preliminary determination and requesting a hearing and disclosure of information	7 February 1997
THAILAND - 27 (POLAND - 6)	Letter from Huta Katowice to DFT posing nine questions regarding the preliminary determination and requesting a hearing and disclosure of information	13 February 1997
THAILAND - 28 (POLAND 7)	Letters from DFT to Stalexport and Huta Katowice informing them that disclosure information was being sent by registered delivery, that the hearing was tentatively scheduled for 6 March 1997, and that DFT may need to conduct an on-the-spot investigation to verify information	19 February 1997
THAILAND - 29 (POLAND - 7 partial)	Disclosure to Huta Katowice of information on which the preliminary determination of dumping was based (CONFIDENTIAL)	20 February 1997
THAILAND - 30 (POLAND - 7 partial)	Disclosure to Huta Katowice of information on which the preliminary determination of dumping was based (non-confidential version)	20 February 1997
THAILAND - 31 (POLAND - 7 partial)	Disclosure to Stalexport of information on which the preliminary determination of dumping was based (CONFIDENTIAL)	20 February 1997
THAILAND - 32 (POLAND - 7 partial)	Disclosure to Stalexport of information on which the preliminary determination of dumping was based (non-confidential version)	20 February 1997
THAILAND - 33 (POLAND - 8)	Disclosure of non-confidential information on which the preliminary determination of injury was based	27 February 1997
THAILAND - 34	Letter from Hogan & Hartson to DFT requesting an extension to the deadline for filing its written comments on the preliminary determination	4 March 1997
THAILAND - 35	Letter from Hogan & Hartson to DFT commenting on the preliminary determination	9 March 1997
THAILAND - 36 (POLAND - 9)	Summary of the hearing held by the DFT on 13 March 1997	28 March 1997
THAILAND - 37 (POLAND - 10)	Proposed final determinations of dumping and injury	1 May 1997

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
THAILAND - 38 (POLAND - 11 partial)	Disclosure of findings for Huta Katowice (CONFIDENTIAL)	
THAILAND - 39 (POLAND - 11 partial)	Disclosure of findings for Huta Katowice (non- confidential version)	
THAILAND - 40	Letter from Hogan & Hartson to DFT providing de- tailed comments on behalf of Huta Katowice and Stalexport regarding the proposed final determina- tion	13 May 1997
THAILAND - 41 (POLAND - 12)	Letter from DFT to Hogan & Hartson responding to the comments received on the proposed final deter- mination	19 May 1997
THAILAND - 42	Letter from DFT to SYS responding to the com- ments received on the proposed final determination (CONFIDENTIAL)	19 May 1997
THAILAND - 43	DFT's report to the CDS Committee on the final de- termination of dumping (CONFIDENTIAL)	21 May 1997
THAILAND - 44	DIT's report to the CDS Committee on the final de- termination of injury (CONFIDENTIAL - reference in para. 1.15 to SYS production costs removed)	
THAILAND - 45 (POLAND - 13)	Ministry of Commerce Notification Regarding Anti- Dumping Duty Levied on Angles, Shapes and Sec- tions of Iron or Non-Alloy Steel: H-Section Originat- ing In or Exported From the Republic of Poland (No. 4)	26 May 1997
THAILAND - 46 (POLAND - 13)	DFT Notification Regarding the Final Determination on Angles, Shapes and Sections of Iron or Non-Alloy Steel: H-Section Originating In or Exported From the Republic of Poland (No. 2) (including the final injury determination)	30 May 1997
THAILAND - 47 (POLAND - 14)	Letter from Stalexport to DFT providing comments and requesting additional disclosure of information	20 June 1997
THAILAND - 48 (POLAND - 15)	Letter from Huta Katowice to DFT providing com- ments and requesting additional disclosure of infor- mation	23 June 1997
THAILAND - 49 (POLAND - 16)	Letter from DFT to Huta Katowice responding to its 23 June letter	7 July 1997

ANNEX 2-2

THAILAND'S OPENING STATEMENT (1st Meeting)
(7 March 2000)

1. Mr. Chairman, distinguished Members of the Panel, professional staff, it is an honour and a pleasure to appear and speak before you today. My name is Thawatchai Sophastienphong, and I am Deputy Director-General of the Department of Business Economics for Thailand's Ministry of Commerce.
2. On behalf of the Royal Government of Thailand, I would like to express my appreciation for your willingness to spend valuable time assisting Thailand and Poland in reaching a settlement to this dispute. I will present brief opening remarks and then will introduce my colleague to present Thailand's detailed Oral Statement.
3. As an initial matter, I would like to note that the detailed factual record that Thailand provided in its First Written Submission demonstrates that Thailand complied with *each and every* obligation under Article VI of GATT 1994 and the WTO Anti-Dumping Agreement. Thailand is ready and willing to defend against any challenge to this investigation in accordance with the rules set forth in the WTO's Dispute Settlement Understanding.
4. Thailand reiterates, however, that a positive solution to this dispute must be based on the application of the principles of due process and fairness that are embodied in the DSU. Thailand considers that Poland failed to comply with its obligations under the DSU since the very beginning of this dispute. By doing so, Poland has severely prejudiced the ability of Thailand to defend its interests, and Third Parties have also raised concerns.
5. First, Poland presented an extremely vague and imprecise request for establishment of a panel. Because this request failed to present the problem clearly, Poland violated its obligations under Article 6.2 of the Dispute Settlement Understanding. This violation has caused the adoption of imprecise terms of reference. Moreover, from the start of this dispute and as a direct result of Poland's violation, Thailand and, according to their submissions, both the United States and the EC as Third Parties have been unable to identify the precise claims against Thailand. Under the Anti-Dumping Agreement, where each article contains numerous distinct obligations, Poland's violation severely prejudices the rights of Thailand to present its defence and the rights of Third Parties to defend their interests.
6. Second, in its First Written Submission, Poland again failed to present any precise claims. As a result, Thailand was left to speculate as to the legal and factual basis on which Poland actually relied in asserting that Thailand violated the Anti-Dumping Agreement. In its Third Party Submission, the EC even stated that "the lack of sufficient clarity in the Polish request for the establishment of the panel has been aggravated by the fact that Poland has failed to state clearly its claims even in its First Written Submission." The United States similarly stated that "in several instances, the precise claims of Poland are sufficiently vague to make comment difficult."
7. Finally, Poland has failed to present a *prima facie* case on any of its purported claims based on the applicable standard of review. Thailand (and the Panel) should not now be forced to make Poland's case for it by presenting, or being effectively

forced to present, more and more information, argument, and questions in the absence of any *prima facie* case. Under such circumstances, Poland would be allowed to continue its "fishing expedition" and would simply launch a new round of vague and imprecise assertions about the investigation during subsequent stages of this proceeding. In so doing, Thailand's defence would be completely undermined and Third Parties, of course, would no longer be participating in the proceeding.

8. Based on Poland's violation of Article 6.2 of the DSU and as stated in its First Written Submission, Thailand requests a preliminary ruling dismissing Poland's purported claims under Articles 5 and 6 of the Anti-Dumping Agreement. Poland's vague approach to pleading is especially prejudicial for these two articles and has completely foreclosed any opportunity for Thailand to present a defence.

9. Thailand respectfully requests that the Panel issue a preliminary ruling immediately in order to avoid Thailand expending additional scarce resources. The Panel's rejection of Poland's purported "claims" at this stage in the proceeding would reaffirm that all WTO Members must adhere to procedural obligations under the DSU and the Anti-Dumping Agreement and that failure to do so will have actual consequences.

10. With respect to Poland's other purported claims, Thailand reserves its right to raise additional procedural objections in order to protect its rights under the DSU.

11. Before closing, Thailand is especially appreciative of the Panel's work in facilitating a resolution to the difficult issue of confidentiality of submissions. Thailand only submitted the confidential information in order to provide the Panel and the Parties with the complete factual record of the investigation. Thailand would like to make clear that it will only be relying on the confidential information to the extent that Poland has presented a *prima facie* case of a violation. As stated in its First Written Submission and repeated earlier, however, Thailand considers that Poland has failed to set forth any precise claims and has failed to present a *prima facie* case of a violation under the applicable standard of review. Thus, Thailand need not rely on the confidential information. Importantly, the Panel should not allow Poland to conduct a further "fishing expedition" based on the confidential information in order to fabricate claims that have never before been raised.

12. I now turn to Mr. Kajit who will present Thailand's detailed Oral Statement. Thank you.

ANNEX 2-3

FIRST ORAL STATEMENT OF THAILAND

(1st Meeting)

(7 March 2000)

I. INTRODUCTION

1. Good Morning. Mr. Chairman, distinguished Members of the Panel, it is indeed a pleasure to meet old colleagues, particularly yourself Mr. Chairman, and it is an honour to appear and speak before you today.

2. Before reviewing Thailand's substantive arguments and trying to respond to the assertions made by the Republic of Poland, which we consider to be imprecise, I would like to draw the attention of the Panel to the detailed factual record of the anti-dumping investigation in this case. It shows the significant steps taken by the Thai investigating authorities to ensure that all interested Parties, including the Government of Poland, were provided with the information necessary to defend their interests. It also demonstrates that during the entire investigation, the authorities complied with each and every requirement under Article VI of GATT 1994 and the Anti-Dumping Agreement.

3. As stated in the Opening Remarks, Thailand finds itself in an extremely difficult situation. It is challenged not by Poland's substantive arguments, but rather by the necessity to respond to unsupported assertions and imprecise claims. As demonstrated to the Panel, neither Thailand nor Third Parties have a clear understanding of Poland's charges in this case. Thus, without having any indication as to the precise basis for Poland's grievances, Thailand remains unable to fully defend its interests in this proceeding.

4. In this Oral Statement, I will first summarise Thailand's request for a preliminary ruling based on Poland's violation of Article 6.2 of the DSU. Second, I will discuss the applicable standard of review under Article 17.6 of the Anti-Dumping Agreement. Finally, I will address separately Thailand's response to Poland's purported claims under Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement.

**II. THAILAND REQUESTS A PRELIMINARY RULING BASED ON
POLAND'S FAILURE TO PRESENT PRECISE CLAIMS.**

5. Mr. Thawatchai, the leader of my delegation, presented the Panel with Thailand's request for a preliminary ruling based on, among other things, Poland's violation of Article 6.2 of the DSU. Thailand's First Written Submission contains Thailand's detailed arguments that I would like to summarise for the benefit of the Panel as follows.

6. Article 6.2 of the DSU imposes obligations on a complaining Member with respect to the specificity of its request for establishment of a panel. The obligations under Article 6.2 are extremely important because the request for establishment of a panel must (a) define a panel's terms of reference and (b) inform the defending Member and other potentially interested Members of the legal basis of the complaint.

7. Under such article, the request for establishment of a panel must be "sufficient to present the problem clearly." In *Korea - Dairy Products*, the Appellate Body found that the mere listing of treaty articles may not be satisfactory to meet the standard of Article 6.2. This is especially true when the listed articles contain numerous obligations.

8. As the EC stated in its Third Party Submission, "[i]n its request for establishment of a panel, Poland has merely listed the articles claimed to have been violated by Thailand, without taking into account the fact that each of the articles listed, i.e. Article VI of GATT 1994, Articles 2, 3, [], 5 and 6 of the ADA are all composed of many paragraphs, each of them setting out distinct obligations." Therefore, based on the Appellate Body's interpretation, Poland has clearly violated Article 6.2 of the DSU with respect to its purported claims under, among possible others, Articles 5 and 6 of the Anti-Dumping Agreement.

9. The Appellate Body in *Korea - Dairy Products* also appeared to impose a requirement that the Member alleging a procedural violation must show that it sustained prejudice. Thailand considers that a Member should not be effectively rewarded for violating a procedural obligation through the adoption of an "effects" test (where none exists for substantive violations). In any event, however, Thailand has in its First Written Submission and in its Opening Remarks demonstrated that it has already been denied the opportunity to respond fully to Poland's complaint in the first stage of this proceeding. The denial of this opportunity has seriously prejudiced Thailand's ability to defend its interests. As they indicated in their Third Party Submissions, both the EC and the United States also appear to state that their rights to participate and defend their interests fully in these proceedings have similarly been prejudiced.

10. In accordance with its Opening Remarks to this hearing and its First Written Submission, Thailand would like to reiterate its request for a preliminary ruling dismissing Poland's purported claims under Articles 5 and 6 of the Anti-Dumping Agreement.

11. If the Panel refuses to issue a preliminary ruling in this case under Article 6.2 of the DSU, Thailand will be left with absolutely no guidance as to how to approach the subsequent stages of this proceeding. The Panel's refusal to make a ruling could be interpreted to mean that Poland has sufficiently identified its "claims" in its request for establishment of a panel. Moreover, it could mean (1) that Poland would be free to make arguments based on any distinct obligations under the numerous subparagraphs and sub-subparagraphs of Articles 5 or 6 and (2) that the Panel will review and consider these arguments in determining whether Thailand violated its obligations under the Anti-Dumping Agreement.

12. To defend its interests, Thailand would be forced to assume that Poland will at some stage of the proceeding, possibly even at the last meeting of the Panel, make an argument with respect to each and every one of these distinct obligations. As a result, Thailand would have to speculate *now* as to what each and every argument may be and provide an appropriate response. If it waits until the arguments are made, it may be too late to respond. Certainly, the due process protections of the DSU do not mean that Thailand must now demonstrate its compliance with, at least, the approximately 38 subparagraphs and sub-subparagraphs of Articles 5 and 6 of the Anti-

Dumping Agreement. The Panel should prevent this situation and the prejudicial consequences that may result by issuing a preliminary ruling immediately.

13. In any event, Thailand reserves its right to raise additional procedural objections under Article 6.2 of the DSU and under general principles of due process with respect to other purported "claims" that Poland has already raised or may fabricate as these proceedings progress.

14. Without prejudice to its position under Article 6.2 of the DSU, Thailand now turns to address some of the specific issues that seem to underlie the present dispute.

III. THE CORRECT APPLICATION OF THE STANDARD OF REVIEW DEMONSTRATES THAT POLAND HAS FAILED TO MAKE ITS CASE.

15. I will now discuss the special standard of review applicable to WTO panel review of anti-dumping cases under Article 17.6 of the Anti-Dumping Agreement. Thailand considers it essential that the Panel interpret this special standard of review correctly.

16. In Thailand's view, Poland has the burden of proof as a matter of law throughout this dispute to demonstrate that Thailand has violated its obligations under Article VI of GATT 1994 and the Anti-Dumping Agreement. As a matter of process, Poland must first present a *prima facie* case of a violation under the applicable standard of review in order to trigger any obligation by Thailand to respond. Based on Article 17.6(i) of the Anti-Dumping Agreement, Poland must establish a *prima facie* case that:

- (a) the Thai investigating authorities did not properly establish the facts;
- (b) the Thai investigating authorities acted with bias; or
- (c) the conclusions reached by the Thai investigating authorities, that is, the determinations of dumping, injury and causation, are so clearly wrong that they could not have been reached in an objective evaluation.

Poland has failed to present the required case and has, in most instances, failed to even make the requisite allegations. Therefore, Thailand respectfully submits that Poland's failure to establish a *prima facie* case under the applicable standard of review should end the Panel's review.

17. Notably, Thailand should not be forced, and the Panel should not on its own accord, make Poland's case for it. Moreover, Thailand should not be forced to wait until the last stage of these proceedings for Poland to clarify its vague and imprecise claims. At that stage, Poland may indeed set forth a recognizable claim, but it will then be too late for Thailand to respond and the Third Parties will have long since lost an opportunity to protect their interests.

18. Finally, recalling Article 17.6 (ii), Thailand considers that the factual record demonstrates that the Thai investigating authorities have done their utmost to make sure that they adhered both to the letter and the spirit of the rules set out in the Anti-Dumping Agreement. They have adopted permissible interpretations of the pertinent provisions wherever such interpretations were not clear and obvious from the outset. It is the function of Article 17.6 (ii) to ensure that interpretations reached by national

authorities, whenever they are permissible, are respected and upheld by the panel, even if the panel would have reached a different interpretation.

19. We ask the Panel to consider whether the interpretation acted upon by the Thai investigating authorities *cannot*, that is under no reasonable application of the customary rules of treaty interpretation, be considered a permissible one. Of course, Thailand is fully aware that often the application of those customary rules of treaty interpretation will lead to only one conclusion or interpretation. However, this is clearly not always the case.

20. Thailand will now address the particular substantive issues of this case, insofar as it was possible to discern any purported "claims" from Poland's First Written Submission.

IV. THAILAND ACTED CONSISTENTLY WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

21. I will now turn to Poland's assertions under Article 2 of the Anti-Dumping Agreement. Poland's only purported claim is whether the Thai investigating authorities determined the appropriate amount of profit in calculating constructed value. Thailand submits that Poland appears to misunderstand the provisions of Article 2.2 and Article 2.2.2.

22. Under Article 2.2 of the Anti-Dumping Agreement, Thailand determined that H-beams sold in the home market were not sufficiently comparable to H-beams sold in Thailand in order to permit a proper comparison. This determination was based on the information provided by Polish respondents and was in accordance with their request. Based on this determination, Thailand decided to use constructed value to calculate a dumping margin. Poland has not challenged this decision.

23. As Thailand states in its First Written Submission, the general requirement of Article 2.2 is that the amount of profit used for constructed value must be "reasonable." Article 2.2.2 specifies the manner by which an amount for profit must be calculated. This provision provides only one alternative setting any limit whatsoever on the magnitude of profit that may be used, that is, under Article 2.2.2(iii).

24. Article 2.2.2 provides that the profit amount for constructed value purposes must be calculated, if possible, using "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." The Thai investigating authorities considered that profit could not be calculated on this basis. Poland has not challenged this decision.

25. Article 2.2.2 then provides three alternative methods to calculate profit for constructed value. Article 2.2.2(i) provides that the amount of profit may be calculated on the basis of "actual amounts incurred and realised by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products." In accordance with the Thai authority's instructions, the Polish respondents reported sales and production information for *all* H-beams, including the JIS-specification H-beams predominantly sold in Thailand and the DIN-specification H-beams predominantly sold in Poland. Based on the calculation method under Article 2.2.2(i), the Thai investigating authorities used *all* reported home-market sales and production cost information for the

"same general category of products", that is, all H-beams, to calculate the reasonable amount of profit. Thus, the Thai authorities calculation was entirely consistent with the Anti-Dumping Agreement.

26. The Third Parties that addressed this issue agreed with Thailand's interpretation. For example, the United States stated that Poland's interpretation of these provisions of Article 2 "is based on an incomplete and selective reading of these provisions" and "imposes a limitation on the amount for constructed value profit where no such requirement exists under the Agreement."

27. In its Third Party Submission, the European Communities concludes "that the Thai investigating authorities established the amount for profit included in the constructed normal value in conformity with Article 2.2.2 and, therefore, that Poland's claim under this heading should be rejected by the Panel." The EC also states that Poland's contention "that DIN H-beams and JIS H-beams cannot be considered to be the 'same general category of products'" is "plainly wrong".

28. Indeed, Thailand considers that all of Poland's contentions relating to the calculation of profit are "plainly wrong." Moreover, Poland has not established, nor even alleged, a *prima facie* case of a violation under the applicable standard of review. Accordingly, the Panel should find that Thailand calculated the profit in accordance with Article 2 of the Anti-Dumping Agreement.

V. THAILAND ACTED CONSISTENTLY WITH ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT.

29. I will now address Poland's assertions relating to Article 3 of the Anti-Dumping Agreement.

30. Based on Poland's request for establishment of a panel and its First Written Submission, Thailand has only been able to identify six purported "claims" under Article 3 of the Anti-Dumping Agreement. To the extent that these purported claims could even be considered identifiable, however, they are clearly unsubstantiated by facts on the record of this investigation. Moreover, Poland has otherwise failed to present a *prima facie* case of a violation based on the applicable standard of review.

31. Thailand will now briefly summarise its response to each of the six purported claims it has identified in Poland's First Written Submission.

32. First, Poland apparently claims that Thailand violated Article 3.1 of the Anti-Dumping Agreement because its final determination of injury was not based on positive evidence. Poland has not provided a specific legal or factual basis to support this purported claim. Neither has Poland alleged that Thailand failed to establish the facts properly or was biased or subjective in considering evidence. With these two points in mind, it is clear that Poland has failed to satisfy its burden of proof. Thus, the Panel should reject Poland's purported claim.

33. Absent any specific basis on which to respond to Poland's purported claim, Thailand can only reference the full record of positive evidence on which the final injury determination was based, including that reported in the respective notices, letters, and disclosures provided to interested parties.

34. At several points in its First Written Submission, Poland seems to allege that Thailand inappropriately relied on "overlapping time periods" in conducting its injury

investigation. Poland has not, however, identified the precise WTO rule that such an approach would violate. Instead, Poland appears to contend that because some of the periods examined overlap with each other, some unspecified intellectual error was committed by the Thai investigating authority.

35. Thailand wishes to make clear that all comparisons were of the "apples-to-apples" variety. The fact that some periods examined overlapped with other periods examined is of no relevance whatsoever. A reasonable investigating authority might, for example, examine calendar year data for 1998, 1999 and 2000, and also data for July 1999 to June 2000. The fact that the periods calendar year 2000 and July 1999 to June 2000 overlap does not invalidate the investigating authorities' analysis. In fact, it may strengthen it in terms of confirming the persistence of trends over time.

36. Poland's second purported claim is that Thailand violated Article 3.1 of the Anti-Dumping Agreement because its final determination of injury did not involve an objective examination of the impact of dumped imports from Poland on the Thai domestic industry.

37. Poland provides no evidence to support any claim that Thailand's investigating authorities were not objective in their examination of the consequent impact of dumped imports. Thus, Poland has failed to satisfy its burden of proof with respect to whether Thailand conducted an "objective" examination, and the Panel should reject Poland's claim.

38. Third, Poland apparently claims that Thailand violated Article 3.2 of the Anti-Dumping Agreement by finding material injury without considering (1) whether there was a significant increase in dumped imports from Poland and (2) whether there was (a) significant price undercutting or (b) a depression of prices (or restraint of a price increase) to a significant degree.

39. The record of the investigation clearly shows that the Thai investigating authorities *considered* whether there had been a significant increase in dumped imports in absolute terms.

40. For example, in the record of the investigation, the Thai investigating authorities have stated, among other things:

- "During the period of investigation, Total H-beams imported to Thailand decreased at 8 per cent from 1995 while imports from Poland increased 10 per cent;" and
- "Polish imports increased consistently prior to and during the investigation period;" and
- "Polish imports [have] risen substantially;" and
- "The import volume of subject merchandise from Poland has continuously increased when the total imports declined. When compared Polish imports with all other imports, Polish imports had increased from 31 per cent in 1994, to 48 per cent in 1995, to 57 per cent during the POI."

41. Based on the record of the investigation, therefore, Thailand clearly acted consistently with its obligation under the first sentence of Article 3.2 of the Anti-Dumping Agreement.

42. Poland also seems to claim that Thailand violated Article 3.2 of the Anti-Dumping Agreement by failing to consider properly the effect of dumped imports on

prices. The Thai investigating authority did *consider*, using confidential information on the record, whether the dumped Polish imports were significantly underselling the Thai products and/or whether the effect of dumped Polish imports was to cause price suppression or depression.

43. For example, in the record of the investigation, the investigating authorities have stated the following, among other things:

- "[i]f [one] compares between selling prices of H-beams of Siam-Yamato Steel Co., Ltd. and the import price from Poland, it can see the circumstance of price undercutting;" and
- "[i]n summary, the Thai Investigating Authorities reiterate that ... significant price-undercutting was established resulting in price depression and price suppression;" and
- "[p]rice of Polish imports has always been lower than that of Siam Yamato and lower than the average import price from all other countries;" and
- "the domestic industry has no choice but to decrease its price to the level of Polish imports. This has resulted in price undercutting and suppression ..."

44. Therefore, contrary to Poland's allegations, it is clear that the Thai authorities "considered" whether there had been significant price undercutting or whether the effects of the dumped Polish imports was price depression or suppression to a significant degree.

45. Thailand notes that Poland correctly observed that one cannot determine solely from the public version of the charts in the factual record which products were undersold. However, this observation assumes, incorrectly, that these charts exist in a vacuum. Reading the document in light of related statements on the record, one can readily grasp the pattern of underselling by the dumped Polish imports.

46. Poland's fourth purported claim relating to Article 3 of the Anti-Dumping Agreement is that Thailand violated Article 3.4 by "cho[osing] not to present evidence regarding profits, losses, profitability or cash flow." To the contrary, the record of the investigation demonstrates that the Thai authorities evaluated these factors.

47. For example, the investigating authorities have stated, among other things, the following in the record:

- "[t]he Department of Internal Trade considered the business performance of the domestic industry by examining the financial report and cost of production of Siam Yamato Co. Ltd., from the years of 1994 and 1995"; and
- "[t]he complainant suffered significant financial losses which are directly attributable to the dumping prices of the Polish exporters concerned;" and
- "the domestic industry has no choice but to decrease its price to the level of Polish imports. This has resulted in price undercutting and suppression including the fact that the Thai domestic industry is unable to increase its price to recover its costs in a reasonable period of time. This, in turn, has effected cash flow."

In addition, the investigating authorities specifically referred to "Net Profit (Loss)" in its table disclosed to interested parties.

48. In light of these facts, it is clear that the Thai authorities evaluated profits, losses, profitability and cash flow consistent with their obligations under Article 3.4 of the Anti-Dumping Agreement.

49. In paragraph 74 of its First Written Submission, Poland also contends that "[e]very Article 3.4 factor examined by Thailand and on which the Thai authorities claimed to rely unambiguously supports a finding of no injury." Other than the factors identified above, Poland does not appear to claim that Thailand failed to evaluate other relevant factors. Rather, Poland simply disputes the weight accorded by the Thai authorities to each of the factors that it evaluated during the investigation. Moreover, Poland has failed to satisfy its burden of proof to present *prima facie* evidence that the Thai authorities were biased or subjective in their evaluation.

50. Poland's fifth purported claim is that Thailand violated Article 3.5 of the Anti-Dumping Agreement by failing to demonstrate that the Polish imports are causing injury.

51. Poland has provided no specific legal or factual basis to support this purported claim. In addition, Poland has not even alleged that Thailand failed to establish the facts properly or was biased or subjective in its consideration of evidence. Accordingly, Poland has failed to satisfy its burden of proof, and the Panel should reject Poland's purported claim under Article 3.5.

52. In any event and in the absence of any specific basis on which to respond to Poland's purported claim, Thailand considers that the record of the investigation demonstrates the causal link between the dumped Polish imports and the material injury to the domestic industry as reported in the respective notices, letters, and disclosures provided to interested parties.

53. Finally, Poland apparently claims that Thailand violated Article 3.5 of the Anti-Dumping Agreement by failing to examine "other factors" that may be causing injury to the domestic industry.

54. Article 3.5 obligates an investigating authority to examine only those other factors that (1) are known and (2) are, at the same time, injuring the domestic industry. If these conditions are satisfied, the investigating authorities are obligated to attribute the injury caused by these so-called "other factors" to the dumped imports.

55. The record of the investigation demonstrates that the Thai investigating authority examined information relating to the following other factors made "known" to it:

- imports from third countries;
- potential trade restrictive practices of and competition between the foreign and domestic producers;
- technology developments; and
- global and domestic industry and market conditions.

The investigating authorities found that these factors were not causing injury to the domestic industry.

56. As the facts on the record demonstrate, therefore, Thailand examined factors other than the dumped Polish imports that were known to it. It found in each case

that these factors were not causing injury to the domestic industry. The Thai investigating authorities were not obligated to find "other factors" on their own initiative. In addition, the Thai authorities were not obligated to examine "other factors" not made known during the course of the investigation.

57. Thailand reiterates that Poland has provided no evidence that the Thai investigating authorities' consideration of relevant other factors or its evaluation of whether such factors were causing injury was biased or subjective. Poland simply disagrees with the Thai investigating authorities conclusions reached in its evaluation of such factors.

58. In view of these arguments, Thailand submits that the Panel should reject Poland's purported claim under Article 3.5 of the Anti-Dumping Agreement.

VI. THAILAND ACTED CONSISTENTLY WITH ARTICLES 5 AND 6 OF THE ANTI-DUMPING AGREEMENT.

59. Finally, I will discuss Thailand's response to Poland's assertions relating to Articles 5 and 6 of the Anti-Dumping Agreement.

60. In its request for establishment of the panel, Poland did not present any legal or factual basis for Thailand's alleged violations of Articles 5 and 6 of the Anti-Dumping Agreement. As discussed earlier, Poland's failure amounts to a clear violation of Article 6.2 of the DSU. Thailand reiterates its request that the Panel issue a preliminary ruling dismissing Poland's purported claims under Articles 5 and 6 of the Anti-Dumping Agreement.

61. Without prejudice to its request for a preliminary ruling, Thailand considers that it complied with both Articles 5.2 and 5.3 of the Anti-Dumping Agreement in initiating the investigation. The Thai investigating authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams.

62. In addition, by notifying Poland less than one month after the receipt of the anti-dumping application and six weeks before the decision to initiate the investigation, Thailand clearly complied with its obligations under Article 5.5 of the Anti-Dumping Agreement.

63. Thailand also cannot accept Poland's allegations that Thailand violated the procedural and evidentiary requirements under Article 6 of the Anti-Dumping Agreement. As the detailed factual record demonstrates, Thailand complied with each and every procedural and evidentiary obligation under Article 6 during the entire investigation. In fact, the factual record shows that prior to issuing their final determination, the Thai authorities provided the respondents with more than ample opportunities to examine the information on which the final determination was based and to defend their interests.

64. Finally, I would like to re-emphasise that the Thai investigating authorities complied with their obligations under Article 6.5.1 of the Anti-Dumping Agreement. The authorities required and received from both the Thai petitioner and the Polish respondents non-confidential summaries of confidential information. Poland is simply mistaken when it asserts that this provision also requires the investigating authorities to provide those non-confidential summaries to exporters or to the foreign

producers. Thailand notes, however, that such summaries were nonetheless available upon request.

65. Poland has no basis to fault Thailand for refusing to disclose confidential information submitted by all interested parties during the investigation. In fact, under WTO rules in general and Article 6.5 of the Anti-Dumping Agreement in particular, neither Thai nor Polish interested parties had an entitlement to receive confidential data. Article 6.5 clearly states that confidential information "shall not be disclosed without specific permission of the party submitting it". The investigating authorities received confidential information from both the Thai petitioner and the Polish respondents. Thailand decided not to disclose any of this information in order to avoid the risk of putting any of the interested parties at a significant competitive disadvantage. Where possible, however, non-confidential summaries were provided to interested parties.

VII. CONCLUSION

66. In conclusion, Mr. Chairman and distinguished Panel Members, based on the aforementioned and without prejudice to its request for a preliminary ruling, Thailand respectfully requests that the Panel find that it acted consistently with its obligations under Article VI of GATT 1994 and the Anti-Dumping Agreement.

ANNEX 2-4

THAILAND'S CLOSING STATEMENT

(8 March 2000)

1. Mr. Chairman, distinguished Members of the Panel, professional staff, Thailand appreciates this opportunity to present its closing remarks. We consider that the meeting has been very useful and that it has assisted Thailand in clarifying certain issues. Other issues, however, remain matters of concern to my government. At this stage, I will only be making brief remarks and consider that our focus should now turn to responding to the questions of the Panel and Poland and to preparing our rebuttal.
2. As a preliminary matter, Thailand notes that the actions of Poland in presenting its case have caused an unfortunate but necessary focus on procedural issues in this dispute. Thailand's intent in submitting the detailed record of the investigation was to highlight the extreme care with which it conducted each and every aspect of its investigation. Thailand, however, still finds that its ability to defend this record based on the rules of the DSU has been severely prejudiced. Thailand fears that this prejudice will continue during subsequent stages of this proceeding. As indicated by the Panel, Poland has the burden of proof in this case. As a result, Thailand should *not* be forced to demonstrate compliance with each and every distinct obligation under the Anti-Dumping Agreement. The proper approach for Thailand is to respond only to each specific claim of Poland. The absence of such specific claims has genuinely caused Thailand confusion as to how to defend this case.
3. Notably, Thailand is raising procedural concerns to safeguard its rights regarding how to defend the substance of the investigation. The provisions of the DSU as interpreted in relevant WTO practice reflect important due process rights that must be enforced. This enforcement is critical to preserve the actual and perceived fairness of the WTO's dispute settlement system.
4. On other matters, Thailand first notes that it understands, although respectfully disagrees with, the Panel's basis for refusing to make an immediate preliminary ruling based on Article 6.2 of the DSU. Thailand, however, understands that the Panel will address Thailand's preliminary objections in its final report.
5. Although Thailand understands the Panel's decision, it considers that such decision means that Thailand will now have to suffer additional prejudice through the remainder of these proceedings and will have to expend scarce resources to defend imprecise claims.
6. Thailand notes, for example, that it remains unclear regarding the precise nature of Poland's claims under Article 5 and 6 of the Anti-Dumping Agreement. Since September 1996, Poland had before it the notice of initiation, the DFT's Statement, and the non-confidential application. In Thailand's view, Poland certainly could have articulated claims more precisely based on this information. Its failure to do so and its clear violation of Article 6.2 of the DSU should not be rewarded, and the serious prejudice to Thailand's defence should not be ignored.
7. Thailand now understands that it must provide additional information to the Panel and the Parties in order for the Panel to consider Poland's sweeping claims

under Article 5 of the Anti-Dumping Agreement. If it fails to provide this information, Thailand runs the risk that the Panel will find a violation based on Poland's sweeping allegations. Thailand reiterates that it will be submitting this information without any idea as to Poland's specific claims. Moreover, Thailand fears that Poland will present precise claims only when Thailand has absolutely no opportunity to address them with any degree of precision.

8. With respect to Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement, Thailand considers that it is suffering serious prejudice in attempting to respond to Poland's vague and imprecise claims. As a result, Thailand requests that the Panel determine whether Poland complied with Article 6.2 of the DSU with respect to purported claims under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement.

9. Thailand will address this request in more detail on rebuttal. In any event, however, Poland's failure to comply with Article 6.2 of the DSU has tainted these entire proceedings from the outset. Poland followed its imprecise request for establishment of a panel with a first written submission that makes sweeping allegations. In a good faith effort to respond, Thailand addressed those purported claims that it could identify. Poland has not provided any further elaboration on its claims.

10. During the hearing, the Panel appeared to embrace Poland's sweeping allegations. For example, the Panel has requested that the Parties catalogue where the investigating authorities considered and evaluated each of the factors under Article 3.4 of the Anti-Dumping Agreement.

11. As it stated during the hearing, Thailand considers that this extremely broad legal and factual issue is simply not relevant to the case before the Panel. Poland's only purported claim is that Thailand did not present evidence regarding four specific factors. In its other assertions with respect to, for example, Thailand's alleged failure to evaluate all relevant factors, Poland does not identify any specific factor whatsoever.

12. Thailand understands from their comments yesterday that the Panel has not pre-judged any aspect of the case. As it stated during the hearing, however, Thailand would like to reiterate respectfully its concern that the Panel not make Poland's case for it. Thailand considers that if Poland's claims had been clear from the outset and if Poland had simply articulated precise claims as required under the DSU, Thailand would have understood the case against it and could have responded from the beginning to Poland's precise claims.

13. Thailand looks forward to providing detailed discussion in its rebuttal on these and other substantive and procedural issues impacting Thailand's defence.

14. Again, I would like to thank the Panel and the professional staff for taking the time to assist Thailand and Poland in achieving a resolution to this dispute. I would also like to thank Poland and Third Parties for their active participation in this proceeding. Thank you.

ANNEX 2-5

SECOND WRITTEN SUBMISSION OF THAILAND
(29 March 2000)

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I. INTRODUCTION

1. Thailand is only able to provide a brief rebuttal and refers the Panel to its detailed responses to the questions from the Panel and from Poland. As discussed in response to Questions 2 (b) and 7 (b), Thailand does not consider that it has any further basis on which to present any defence, given that Poland has not clarified any of its purported claims, has not provided any support for the assertions that it has made, and has, in fact, caused additional confusion during the First Oral Hearing as to the nature of its complaint. Thailand's continued inability to respond in a meaningful and substantive manner as a result of Poland's actions has seriously prejudiced Thailand's ability to defend itself and has undermined its due process rights.

2. As a result, this rebuttal will be limited to brief comments regarding the current status of this dispute and Thailand's views regarding the Panel's review.

II. THAILAND REQUESTS THAT THE PANEL DISMISS POLAND'S COMPLAINT IN ITS ENTIRETY

3. In the prior stages of this proceeding, Thailand has requested that the Panel dismiss Poland's complaint based on Poland's violation of Article 6.2 of the DSU. In its responses to Questions 1 to 9 from the Panel, Thailand has provided a reasonable interpretation of the obligations under Article 6.2 of the DSU in the context of anti-dumping cases and has presented a compelling case that such interpretation is critical to preserving fairness and due process rights for defending Members and third parties. In accordance with Thailand's interpretation and based on the facts presented, Thailand respectfully reiterates its request that the Panel dismiss Poland's complaint in its entirety.

III. THAILAND REQUESTS THAT THE PANEL LIMIT ITS FINDINGS TO THE MATTER BEFORE IT, INCLUDING THE CLAIMS PROPERLY PRESENTED, IF ANY

4. As discussed in response to the Panel's questions, Thailand is concerned that in certain instances the Panel appears to be asking questions unrelated to the claims actually presented by Poland. Thailand recalls the Panel's statement during the First Oral Hearing that it has not reached a conclusion regarding any issues before it. Thailand would simply like to note that it remains concerned that the Panel may be overstepping its authority by addressing certain issues that are outside the scope of the matter before it and that the Panel should limit its findings only to the claims properly presented by Poland, if any. Thailand recognises that the Panel may raise arguments at any time to clarify the claims that it considers Poland to have raised. However, it would be beyond the Panel's mandate to raise claims, or arguments relating to such claims, that Poland has not presented in its request for establishment of a panel.

IV. THAILAND IS UNABLE TO ASSESS WHETHER THE CONFIDENTIAL INFORMATION ON THE RECORD IS OR IS NOT RELEVANT TO RESPOND TO POLAND'S COMPLAINT

5. During the First Oral Hearing, Thailand understands that the Panel asked whether Thailand considered that the confidential information submitted prior to the Hearing was relevant to its defence. To clarify and/or confirm its response, Thailand considers that it remains unable to assess whether the confidential information on the record is or is not relevant to respond to Poland's complaint because, in Thailand's view, Poland has failed to properly set forth any precise claims. However, Thailand considers that the confidential data is necessary to support the affirmative final determination in the underlying anti-dumping investigation.

6. Thailand would also like to remind the Panel that any limitations on Poland's ability to respond to the confidential information submitted by Thailand is irrelevant to Poland's failure to comply with Article 6.2 of the DSU or to specify its precise claims. This data was not necessary for Poland to set forth precise claims in its request for establishment of a panel or in its First Written Submission. Moreover, Thailand submitted but did not rely on the confidential data in its First Written Submis-

sion and thus it was not relevant up to and including the First Oral Hearing. In addition, Thailand did not object to any delay in the timing of the First Oral Hearing. Rather, the Panel decided not to grant Poland's request. Finally, as the Panel may recall, it was Poland that waited for over two weeks to agree to a settlement that would have simply allowed all parties access to the confidential information.

V. THAILAND REQUESTS THAT THE PANEL CONSIDER THAT THE ENGLISH LANGUAGE TRANSLATIONS OF THAI DOCUMENTS DO NOT ENTIRELY REFLECT THE MEANING OF THE THAI LANGUAGE VERSIONS

7. Thailand notes that a significant amount of the data, reports, notices, and analysis was prepared in the Thai language. Although unofficial English language translations were prepared with care, these translations often do not reflect the true and full meaning of the Thai language version. Thailand respectfully requests that the Panel take this into consideration in examining the Thai and English versions of the documents on the record and in reviewing Thailand's clarifications of certain translations.

VI. THAILAND OBJECTS TO PROVIDING TRANSLATIONS OF DOCUMENTS THAT POLAND SHOULD HAVE TRANSLATED PRIOR TO PRESENTING ITS COMPLAINT

8. Finally, Thailand considers that its authorities are not obligated to translate each and every document that is on the record of an investigation or that is provided to interested parties. Interested parties in anti-dumping cases (and WTO Members) must take responsibility on their own behalf to make translations of relevant documents or to retain local counsel to assist with ensuring a full defence. In its letter provided as THAILAND - 34, the legal counsel for the Polish respondents indicates that it retained such local counsel. The respondent's legal counsel is also advising Poland's delegation in this dispute and thus could have presumably used the same local counsel.

9. Accordingly, there is no justification for Poland not obtaining translations of, for example, the non-confidential version of the application prior to submitting its request for establishment of a panel and prior to its First Written Submission in order to support its purported claims. Thailand objects to Poland's approach and urges the Panel to question Poland's decision to present vague and imprecise claims rather than cite relevant information available to it.

10. Nevertheless, Thailand has provided the translations requested by the Panel, although it remains uncertain whether they are or are not relevant to defending Poland's purported claims. Thailand respectfully requests that the Panel not reward Poland's approach and penalise Thailand for its good faith provision of information. So doing would send a dangerous message to all Members that co-operation in providing evidence to a panel where the relevancy of such evidence is unclear may have serious adverse consequences.

VII. CONCLUSION

11. Based on the above, Thailand respectfully requests that the Panel find that Thailand acted consistently with its obligations under Article VI of GATT 1994 and the Anti-Dumping Agreement.

TABLE OF EXHIBITS

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
THAILAND - 50	Request for Establishment of a Panel in Mexico - <i>Anti-Dumping Investigation of High-Fructose Corn Syrup (HFCS) from the United States (WT/DS132/2)</i>	14 October 1998
THAILAND - 51	Pre-application letter from Santi Chankonrawee, Managing Director, SYS to H.E. Minister of Commerce	9 January 1996
THAILAND - 52	Application filed by Siam Yamato Steel Co. Ltd. (CONFIDENTIAL - information on cost of production removed)	21 June 1996
THAILAND - 53	Application filed by Siam Yamato Steel Co. Ltd. (non-confidential version with translation)	21 June 1996
THAILAND - 54	Internal DBE document providing preliminary assessment of the application and requesting more information	July 1996
THAILAND - 55	Tables submitted to CPS Committee by DBE regarding pre-initiation allegations of injury and causation (CONFIDENTIAL)	
THAILAND - 56	Memorandum from Chutima to Director-General, DBE	18 July 1996
THAILAND - 57	Letter from Mr. Amnuay Yossuk, Thailand Deputy Minister of Commerce to H.E. Mr. Maciej Lesny, Undersecretary of State, Ministry of Foreign Economic Relations, Republic of Poland	9 October 1996
THAILAND - 58	Draft Recommendation Concerning the Timing of the Notification under Article 5.5 (G/ADP/AHG/W/49)	4 August 1998
THAILAND - 59	Summary Report of the Meeting of the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, 26-27 October 1998, Note by the Secretariat (G/ADP/AHG/R/5)	10 February 1999
THAILAND - 60	Summary Report of the Meeting of the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, 29-30 April 1997, Note by the Secretariat (G/ADP/AHG/R/2)	7 July 1997
THAILAND - 61	Summary Report of the Meeting of the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices, 27-28 April 1998, Note by the Secretariat (G/ADP/AHG/R/4)	4 August 1998
THAILAND - 62	Letter from DFT to Hogan & Hartson responding to the comments received on the proposed final determination (more legible) (same as THAILAND - 41)	19 May 1997
THAILAND - 63	Thai language page of the Final Determination with highlighted portion referring to "material injury"	30 May 1997
THAILAND - 64	DIT's report to the CDS Committee on the final determination of injury (CONFIDENTIAL - reference in para. 1.15 to SYS production costs removed) (Thai language version)	
THAILAND - 65	Draft Information Used for the Final Injury Determination (Thai language version)	1 May 1997
THAILAND - 66	Table reported to CDS for consideration containing correct figures for SYS sales and total imports (CONFIDENTIAL)	

EXHIBIT NO.	DOCUMENT DESCRIPTION	DATE
THAILAND - 67	Table reflecting the confidential information provided to the CDS Committee on average quarterly prices and the non-confidential information provided to respondents (CONFIDENTIAL)	
THAILAND - 68	Attachment G-2 to SYS' Confidential Questionnaire Response (with most raw data relating to production costs removed) (CONFIDENTIAL)	
THAILAND - 69	Copies of invoices for sales of Polish imports in Thailand (CONFIDENTIAL)	

ANNEX 2-6

**RESPONSES BY THAILAND TO THE PANEL'S AND
POLAND'S QUESTIONS FROM THE FIRST MEETING**

(29 March 2000)

THAILAND'S RESPONSES TO THE PANEL'S QUESTIONS

A. Requests by Thailand for Rulings under Article 6.2 DSU

1. Request with Respect to Articles 5 and 6 AD

1. We note the following passage from the Appellate Body Report in the *Korea - Dairy Safeguard* case:

"... There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2."¹ (emphasis in original)

(a) How is the phrase "in the light of attendant circumstances" in the above passage to be interpreted, both in general, and in the context of the present dispute? What relevance, if any, could this phrase have in this particular case. Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 5 and 6 AD? Please explain in detail.

Prior to addressing the Panel's specific questions, it is useful to set forth Thailand's view of the correct interpretation of the obligations imposed on complaining Members in bringing complaints and the rights of responding Members and third party Members in responding to such complaints.

First, in WTO proceedings, the complainant must define the "measure" and the precise "claims" that compose the "matter" in dispute. According to the Appellate Body,

"[A]ll claims must be included in the request for establishment of a panel in order to come within a panel's terms of reference, based on the practice of panels under the GATT 1947 and in the Tokyo Round Codes. That past practice required that a claim had to be included in

¹ WT/DS98/AB/R, DSR 2000:I, 3, para. 124.

the documents referred to, or contained in, the terms of reference in order to form part of the 'matter' referred to a panel for consideration. Following both this past practice and the provisions of the DSU, in *European Communities - Bananas*, we observed that there is a significant difference between the claims identified in the request for establishment of a panel, which establish the panel's terms of reference under Article 7 of the DSU, and the *arguments* supporting those claims, which are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties as a case proceeds."² (Emphasis in original)

Thus, all "claims" must be set forth in the complainant's request for establishment of a panel. Of course, parties to the dispute (and a panel) can present "arguments" based on these claims at later stages of the proceedings.

Second, Article 6.2 of the DSU requires that the complainant "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly." The Appellate Body has interpreted this language to mean that, again, the request for establishment of a panel must contain the "claims" on which the matter is based.³

Third, in *Korea - Dairy Products*, the Appellate Body found that the mere listing of articles may not be sufficient to satisfy the requirements of Article 6.2 of the DSU to "present the problem clearly" and, therefore, may not be sufficient to define the "claims" on which the matter is based. The Appellate Body considered that this could especially be the case where an article contained more than one distinct obligation. Thailand notes that this interpretation is consistent with past GATT practice in which a panel stated:

"Depending on the circumstances, there could be more than one legal basis for alleging a breach of the same provision of the Agreement and that, accordingly, a claim in respect of one of these would not also constitute a claim in respect of the other. A separate and distinct claim would be required."⁴

Therefore, the central question is what is the level of detail required for a complainant to identify its "claims" in a request for establishment of a panel in order to "present the problem clearly". In Thailand's view, the test is whether, in setting forth the "claims", the complainant has identified (1) the precise obligation allegedly violated and (2) the facts and circumstances on which the alleged violation is based. This test is simple, is in accordance with past practice, especially in the anti-dumping area,

² Report of the Appellate Body, *India - Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R, DSR 1998:I, 9, para. 88 (adopted 16 Jan. 1998), quoted in Report of the Appellate Body, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R, DSR 1998:I, 135, para. 156 (16 Jan. 1998).

³ See, e.g., Report of the Appellate Body, *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/AB/R, DSR 1998:IX, 3767, para. 69 (2 Nov. 1998) ("Article 6.2 of the DSU requires that both the 'measure at issue' and the 'legal basis for the complaint' (or the 'claims') be identified in a request for the establishment of a panel").

⁴ *EC - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn From Brazil*, ADP/137, para. 445 (adopted 4 July 1995).

and achieves the object and purpose of the provision by, *inter alia*, preserving due process for both the respondent and third parties.

Interpreting a "claim" to mean more than just the listing of an article allegedly violated is consistent with past GATT and WTO practice and with common sense generally. Common sense would dictate that simply stating that the final anti-dumping measure violates, for example, Article 3 of the Anti-Dumping Agreement provides absolutely no meaningful guidance whatsoever. It is critical for a complainant in an anti-dumping case to identify the precise obligation within Article 3 that was violated and to present additional facts or circumstances. This is especially the case where the relevant article contains numerous distinct obligations.

Past GATT practice in anti-dumping and countervailing duty cases has consistently provided that the mere listing of articles is insufficient to set forth claims with the proper degree of specificity.⁵ Moreover, the Panel in *Mexico - HFCS* stated that

"The United States' request for establishment in this case does not merely list the articles alleged to have been violated. The request also sets forth *facts and circumstances describing the substance of the dispute*. In our view, the request is sufficiently detailed to set forth the legal basis of the complaint so as to inform the defending Member, Mexico, and potential third parties of the claims made by the United States."⁶ (Emphasis added)

Thus, in *Mexico - HFCS*, the Panel determined that the United States had identified its "claims" with sufficient specificity to inform the defending party and third parties because it listed the articles allegedly violated and set forth facts and circumstances describing the substance of the dispute, *i.e.*, the facts and circumstances on which the alleged violations are based. The U.S. request in *Mexico - HFCS* is provided in THAILAND - 50.⁷

The interpretation of "claims" as requiring an identification of the precise obligation allegedly violated and the facts and circumstances on which the alleged violation is based also upholds the object and purpose of Article 6.2 of the DSU and the general due process protections of the DSU. The Appellate Body has often described the object and purpose of both the request for establishment of a panel under

⁵ See *United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, paras. 333-335 (adopted 26 April 1994); *United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, paras. 208-214 (adopted 27 April 1994); *European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, paras. 438-466 (adopted 4 July 1995); *EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan*, ADP/136, para. 295 (28 April 1995 (not adopted)). The Appellate Body in *Brazil - Desiccated Coconut* cited the cases under the Tokyo Round Anti-Dumping Code favourably in stating that a Complaining Party must precisely identify the claims in its request for establishment of a Panel. (WT/DS22/AB/R (21 February 1997)), DSR 1997:I, 167.

⁶ *Mexico - Anti-Dumping Investigation on High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, DSR 2000:III, 1345, para. 7.15 (28 Jan. 2000).

⁷ Thailand considers that the U.S. request is still inadequate to identify certain "claims" because it discloses only one of the two necessary components.

Article 6.2 of the DSU and the panel's terms of reference. For example, the Appellate Body in *EC - Bananas* stated:

As a panel request is normally not subjected to detailed scrutiny by the DSB, it is incumbent upon a panel to examine the request for the establishment of the panel very carefully to ensure its compliance with both the letter and the spirit of Article 6.2 of the DSU. It is important that a panel request be sufficiently precise for two reasons: first, it often forms the basis for the terms of reference of the panel pursuant to Article 7 of the DSU; and, second, it informs the defending party and the third parties of the legal basis of the complaint.⁸

In *Brazil - Desiccated Coconut*, the Appellate Body stated the following regarding a panel's terms of reference:

A panel's terms of reference are important for two reasons. First, terms of reference fulfil an important due process objective - they give the parties and third parties sufficient information concerning the claims at issue in the dispute in order to allow them an opportunity to respond to the complainant's case. Second, they establish the jurisdiction of the panel by defining the precise claims at issue in the dispute.⁹

Thus, the above interpretation of Article 6.2 of the DSU satisfies the object and purpose of defining a panel's terms of reference, including the precise claims at issue in the dispute, and of providing sufficient information to the respondent and third parties in order for them to defend their interests.

Importantly, the above interpretation would also prevent intentional or inadvertent manipulation and abuse of panel procedures by the complainant, as well as the resulting prejudice to the respondent and third parties. For example, if a complainant is permitted to merely list the articles in its request for establishment of a panel, then its "claims" would consist only of alleged violations of such articles. All subsequent submissions could arguably be considered "arguments" relating to the "claims" set forth in the request for establishment of a panel.

In the extreme case, after identifying a particular article in a request for establishment of a panel, the complainant could wait until the last possible moment (*i.e.*, the final oral hearing) and then introduce an "argument" that the defending Member violated an obligation in a particular paragraph or subparagraph of the referenced article. In such case, the particular obligation would have never before been referenced prior to the final oral hearing. For example, a complainant could identify Article 5 of the Anti-Dumping Agreement in its request for establishment of a panel and then raise "arguments" under paragraph 8 of Article 5 at the final oral hearing. Assuming these "arguments" presented a *prima facie* case, would a panel be obligated to find in favour of the complainant? How would the respondent or third parties challenge such a decision? There must be a check on the potential for this abuse, whether in the extreme case cited above or in less extreme instances. By enforcing the letter

⁸ Report of the Appellate Body, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, DSR 1997:II, 591, para. 142 (adopted 25 Sept. 1997).

⁹ *Brazil - Desiccated Coconut*, *supra*, footnote 5, at 21.

and spirit of Article 6.2 of the DSU in accordance with Thailand's interpretation above, a panel would provide a simple, but critical, check on the potential for abuse of the dispute settlement process.

In the case against Thailand, Poland has intentionally or inadvertently engaged in the abuse described in the previous paragraph. It listed Article VI of GATT 1994 and Articles 2, 3, 5 and 6 of the Anti-Dumping Agreement in its request for establishment of a panel. In its subsequent submissions, it has failed to articulate any precise claims (*i.e.*, the precise obligations allegedly violated and the facts and circumstances on which the alleged violation is based) that would provide Thailand or Third Parties with any idea of how to respond. Now, it is conceivable that Poland could make "arguments" or "claims" or "allegations" with sufficient clarity in its written rebuttal (filed simultaneously with Thailand's rebuttal) for Thailand to identify the claims against it. Assuming this is the case, however, Thailand will have only one opportunity to respond to Poland's claims (at the final oral hearing) and Third Parties will have no opportunity. This situation is extremely unfair and is seriously prejudicial to Thailand and to Third Parties.

Thailand considers that clarifying this interpretative question would appropriately address the prejudice in this case and would also provide critical guidance in future cases by ensuring more predictability and less waste of resources. Absent protection from imprecise pleading, defending Members will become more and more disenfranchised with a system in which they are never given a clear indication of the case against them. Without more discipline, Members will be forced either (1) to assume the burden to prove that each and every action and decision is consistent with the agreement and risk that in a highly complex case it will fail to satisfy this burden or (2) to suffer the adverse consequences of having limited or no opportunity to respond to claims that are only made precise and cognisable at the end of the proceeding. The Panel should continue the Appellate Body's work in preventing Members from being forced to make such choices.

With respect to the Panel's specific question and in accordance with the above interpretation, Thailand considers that the language "in light of attendant circumstances" was introduced by the Appellate Body to account for the situation where the two components of a "claim" are understood from the listing of the relevant article and the identification of the specific measures at issue. In such instances, the listing of the relevant article identifies the precise obligation allegedly violated, because the article consists of *only one distinct obligation*. The identification of the specific measures at issue provides the facts and circumstances on which the alleged violation is based, because the measures involve, for example, the application of various laws and regulations applicable to the importation of a particular good or service.

This phrase is not relevant to this particular case because there are no attendant circumstances that would justify finding that the mere listing of articles in an anti-dumping case was sufficient to satisfy the requirements of Article 6.2 of the DSU. First, as the Appellate Body has confirmed, *anti-dumping cases are confined to three possible measures* under Article 17.4 of the Anti-Dumping Agreement—application of definitive anti-dumping duties, acceptance of price undertakings, or

provisional measures.¹⁰ The predominant number of cases will actually relate to one particular measure only, the final measure imposing definitive dumping duties. Thus, the identification of the anti-dumping measure at issue does not provide any indication of the facts and circumstances on which the alleged claims challenging that measure are based. In this case, Poland simply identified the imposition of definitive anti-dumping duties with no further description of the measure, and thus, the facts and circumstances on which Poland bases its claims cannot be understood from the identification of the specific measure at issue.

Second, articles in covered agreements that govern the activities of domestic authorities in conducting investigations do not normally contain only one distinct obligation.¹¹ As a result, simply listing an article does not allow a Member to identify the precise obligation allegedly violated. As explained in response to part (c) below, Poland listed articles in GATT 1994 and the Anti-Dumping Agreement that contain numerous distinct obligations. Therefore, Thailand would contend that neither Thailand, Third Parties, nor the Panel have been able to identify the precise obligations that Poland is alleging that Thailand violated.

- (b) Does Poland's request for establishment "merely list" Articles 5 and 6 AD, or does it go beyond a "mere listing"?

Poland's request for establishment of a panel states:

"The principal measures to which Poland objects are:

- Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Antidumping Agreement."¹²

¹⁰ In *Guatemala - Cement*, the Appellate Body stated:

"Furthermore, Article 17.4 of the *Anti-Dumping Agreement* specifies the types of 'measure' which may be referred as part of a 'matter' to the DSB. Three types of anti-dumping measure are specified in Article 17.4: definitive anti-dumping duties, the acceptance of price undertakings, and provisional measures. According to Article 17.4, a 'matter' may be referred to the DSB *only if* one of the relevant three anti-dumping measures is in place. This provision, when read together with Article 6.2 of the DSU, requires a panel request in a dispute brought under the *Anti-Dumping Agreement* to identify, as the specific measure at issue, either a definitive anti-dumping duty, the acceptance of a price undertaking, or a provisional measure. This requirement to identify a specific anti-dumping measure at issue in a panel request in no way limits the nature of the *claims* that may be brought concerning alleged nullification or impairment of benefits or the impeding of the achievement of any objective in a dispute under the *Anti-Dumping Agreement*."

WT/DS60/AB/R, *supra*, footnote 3, para. 79 (2 Nov. 1998).

¹¹ See, e.g., *Korea - Dairy Products*; *United States - Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, *supra*, footnote 1, paras. 333-335 (adopted 26 April 1994); *United States - Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, paras. 208-214 (adopted 27 April 1994); *European Communities - Imposition of Anti-Dumping Duties on Imports of Cotton Yarn from Brazil*, ADP/137, paras. 438-466 (adopted 4 July 1995); *EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan*, ADP/136, para. 295 (28 April 1995 (not adopted)).

¹² WT/DS122/2, 2 (15 Oct. 1999).

Thailand considers that Poland has provided only a mere listing of Articles 5 and 6 and has not identified any paragraphs or subparagraphs of Article 5 or 6. Therefore, Poland has not identified the precise obligation allegedly violated and has provided absolutely no other facts or circumstances on which the alleged violations are based.

(c) Do Articles 5 and 6 AD each establish one single, distinct obligation or rather multiple obligations? What is the basis for your response?

Articles 5 and 6 of the Anti-Dumping Agreement provide numerous distinct obligations. Virtually every paragraph (and subparagraph if applicable) of Articles 5 and 6 contains at least one distinct obligation and often more than one. Thailand considers that the test is whether a Panel would find a violation of Article 5 or 6 based on the violation of a particular paragraph, subparagraph, or provision within a paragraph or subparagraph.

The following are examples of a few of the distinct obligations under Article 5. A Panel could find:

- that a Member violated Article 5.2(i) by initiating an investigation based on an application that did not include information reasonably available to the applicant regarding a complete description of the allegedly dumped product;
- that a Member violated Article 5.2(i) by initiating an investigation based on an application that did not include information reasonably available to the applicant regarding the names of the country or countries of origin or export in question;
- that a Member violated Article 5.2(i) by initiating an investigation based on an application that did not include information reasonably available to the applicant regarding the identity of each known exporter or foreign producer;
- that a Member violated Article 5.2(i) by initiating an investigation based on an application that did not include information reasonably available to the applicant regarding a list of known persons importing the product in question;
- that a Member violated Article 5.3 by initiating an investigation without examining the accuracy of the evidence regarding dumping;
- that a Member violated Article 5.3 by initiating an investigation without examining the accuracy of the evidence regarding injury;
- that a Member violated Article 5.3 by initiating an investigation without examining the accuracy of the evidence regarding causal link;
- that a Member violated Article 5.3 by initiating an investigation without examining the adequacy of the evidence regarding dumping;
- that a Member violated Article 5.3 by initiating an investigation without examining the adequacy of the evidence regarding injury;
- that a Member violated Article 5.3 by initiating an investigation without examining the adequacy of the evidence regarding causal link;

- that a Member violated Article 5.3 by initiating an investigation without properly determining that there was sufficient evidence of dumping to justify initiation of the investigation;¹³
- that a Member violated Article 5.3 by initiating an investigation without properly determining that there was sufficient evidence of injury to justify initiation of the investigation;¹⁴
- that a Member violated Article 5.3 by initiating an investigation without properly determining that there was sufficient evidence of a causal link to justify initiation of the investigation;¹⁵
- that a Member violated Article 5.5 by publicising the application prior to a decision to initiate the investigation; or
- that a Member violated Article 5.5 by failing to give proper notice.¹⁶

The same analysis can be applied to Article 6, where virtually every paragraph contains at least one, and in most cases more than one, distinct obligation. Thailand would be pleased to provide a list of all of the distinct obligations under Articles 5 and 6 upon request, but considers that its response above has demonstrated that Articles 5 and 6 each establish multiple obligations.

2. We Note the Following Passage from the Appellate Body Report in the Korea - Dairy Safeguard case:

"... whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."¹⁷

- (a) What is the meaning of the phrase "given the actual course of the panel proceedings" in the above passage? Would it, for example, permit the subsequent "remedying" of a possibly insufficient panel request in the course of the panel proceedings? How is this phrase to be interpreted and applied in the present case in respect of the request for a ruling under Article 6.2 relating to Articles 5 and 6 AD? Please explain in detail.

As an initial matter, Thailand considers that there may be some confusion as to where a finding of prejudice is relevant. First, after determining that the content of the relevant panel request fails to satisfy Article 6.2 of the DSU, is a finding of

¹³ See Report of the Panel, *Guatemala - Cement*, DSR 1998:IX, 3797, at para. 7.67.

¹⁴ See Report of the Panel, *Guatemala - Cement*, *supra*, footnote 13, at para. 7.77.

¹⁵ See Report of the Panel, *Guatemala - Cement*, *supra*, footnote 13, at para. 7.78.

¹⁶ See Report of the Panel, *Guatemala - Cement*, *supra*, footnote 13, at para. 7.39. Thailand also notes that a WTO panel found that Mexico acted consistently with Articles 5.2, 5.3 and 5.8 of the Anti-Dumping Agreement after examining whether the investigation conformed with some of the obligations listed above. See *Mexico - HFCS*, *supra*, footnote 6, at para. 8.1.

¹⁷ WT/DS98/AB/R, *supra*, footnote 1, para. 127.

prejudice a necessary secondary step for finding a violation of Article 6.2 of the DSU? The Panel in *Mexico - HFCS* appears to apply this form of the prejudice analysis by first finding that the request "sets out claims with sufficient specificity to present the problem clearly" and then finding that "Mexico's assertions as to the effect of the alleged inadequacies ... do not, in our view, rise to the level of demonstrating that Mexico's rights of defence in this panel proceeding were affected, given the course of the panel proceeding." *Mexico - HFCS* at para. 7.17.

Alternatively, is the showing of prejudice relevant to determining whether the mere listing of articles is sufficient to present the problem clearly? Under this approach, prejudice must be shown as a component of determining whether the content of a particular request should have been more detailed in order to satisfy the requirements under Article 6.2 of the DSU. The Appellate Body in *Korea - Dairy Products* appears to mix this approach and the former by first citing the *EC - Computer Equipment* case ("[a]s the ability of the European Communities to defend itself was not prejudiced by a lack of knowing the measures at issue, we do not believe that the fundamental rule of due process was violated by the Panel") and then issuing its own finding ("we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated").¹⁸ In effect, however, any distinction between the two approaches is irrelevant because both readings impose a direct condition of prejudice on a finding that a Member violated Article 6.2 of the Anti-Dumping Agreement.

In accordance with the interpretation provided in response to Question 1 from the Panel, the main question should be whether the complainant has complied with Article 6.2 of the DSU by indeed identifying the precise obligations allegedly violated and by providing sufficient facts and circumstances on which the alleged violations are based. Determining whether proper identification has been made and whether sufficient facts and circumstances have been presented is a question that a panel can objectively assess under Article 11 of the DSU.

In Thailand's view, if the Panel decides to apply any "prejudice" or "effects" test, it should apply an extremely low threshold in determining whether a Member has been prejudiced or adversely impacted as a result of a violation of the DSU. In fact, Thailand considers that, as with violations of other covered agreements, a violation of the DSU should establish an irrebuttable presumption that the affected Member has suffered prejudice.

Article 3.8 of the DSU states:

In cases where there is an infringement of the obligations assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge.

¹⁸ *Korea - Dairy Products, supra*, footnote 1, at paras. 126 and 127.

Article 1.1 defines "covered agreements" to include the agreements listed in Appendix 1 of the DSU. Notably, the DSU itself is listed in Appendix 1. Therefore, if a Member violates a provision of the DSU, there is a presumption that such violation will have an adverse impact on other Member parties to the DSU.

One commentator has written that Article 3.8 of the DSU

"suggests that the presumption of nullification and impairment is rebuttable and that the demonstration of an absence of an 'adverse impact' is sufficient. However, there is no case of a successful rebuttal of the presumption in the history of the GATT, and ... GATT panels have also systematically rejected as insufficient the demonstration of an absence of a trade impact."¹⁹

WTO panels and the Appellate Body have affirmed that it is unnecessary to examine whether a violation of a substantive provision of a covered agreement has caused adverse trade effects and that a violation of a covered agreement is irrebuttably presumed to have such effects.²⁰

The same analysis should apply to violations of procedural provisions, whether included in the DSU or another covered agreement. In *Guatemala - Cement*, the Panel rejected the argument that a violation of the notification obligation under Article 5.5 of the Anti-Dumping Agreement must also involve an evaluation of whether the violation caused adverse effects or prejudice to the affected Member. The Panel stated:

In our view, having found that Guatemala failed to notify the Government of Mexico in a timely fashion, we need not determine that the failure to carry out an obligation had particular or demonstrable adverse trade effects in order to find that the benefits accruing to Mexico under the ADP Agreement were nullified or impaired. Rather, to the extent that the presumption of nullification or impairment may be rebutted in the case of the breach of a procedural obligation, it would be incumbent on the Member that has breached the obligation to demonstrate that its failure to respect the obligation *could not have had any effect on the course of the investigation in question*. In this case, the procedural obligation breached was the requirement to notify the exporting Member prior to proceeding to initiate an anti-dumping investigation. A key function of the notification requirements of the ADP Agreement is *to ensure that interested parties, including Members, are able to take whatever steps they deem appropriate to defend their interests*. Where a required notification is not made in a timely fashion, the ability of the interested party to take such steps is vitiated. *We cannot now speculate on what steps Mexico might have taken had it been timely notified, and how Guatemala might have responded to those steps*. Thus, while it is possible that the investigation would

¹⁹ Frieder Roessler, *The Concept of Nullification and Impairment in the Legal System of the World Trade Organization, in International Trade Law and the GATT/WTO Dispute Settlement System* 125, 127 (Ernst-Ulrich Petersmann ed., 1997).

²⁰ See, e.g., *EC - Bananas*, *supra*, footnote 8, at para. 253.

have proceeded in the same manner had Guatemala timely notified Mexico before proceeding to initiate the investigation, we cannot say with certainty that the course of the investigation would not have been different. Under these circumstances, we cannot conclude that Guatemala has rebutted the presumption that its failure to carry out its obligation under Article 5.5 consistent with the ADP Agreement nullified or impaired benefits accruing to Mexico under that Agreement.²¹ (Footnote omitted; emphasis added).

One GATT panel also discussed this issue in the context of the request for establishment of a panel and stated:

"[w]e could not understand the basis on which a Panel could after the fact consider whether certain claims might have been resolved in previous stages of the dispute settlement process had those claims been raised during those stages of the process. Nor would a Panel after the fact have a basis on which to consider whether the rights of third parties to protect their interests through participation in the Panel process were jeopardized by the failure of a complainant to raise a claim at the time it requested the establishment of a Panel."²²

In Thailand's view, therefore, the Panel should apply an irrebuttable presumption as to whether a procedural violation has caused adverse effects or prejudice on the ability of an affected Member to defend their interests. Moreover, in accordance with the Panel's findings in *Guatemala - Cement*, Thailand considers that whether it has been prejudiced by Poland's violation of Article 6.2 of the DSU should not be relevant to the Panel's determination whether Poland did or did not violate such provision. Finally, Thailand notes that the content of the request for establishment of a panel is explicitly regulated by Article 6.2 of the DSU, and thus is not a matter left to the discretion afforded to panels under Appendix 3 of the DSU.

In accordance with and without prejudice to the interpretation above, Thailand considers that the language "given the actual course of the panel proceeding" would only authorise a panel to accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings. This would be the case only where (1) a panel found that the complainant had failed to present a *prima facie* case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request.

In any other situation, a panel would have no basis to determine whether the parties could have resolved the claims at an earlier stage, whether the responding Member could have presented a more persuasive defence, or whether third parties could have contributed information, argument or evidence that would have changed the outcome of the case. Thus, this language does not permit "remedying" an insufficient panel request during the course of the proceeding. The only remedy is for the

²¹ *Guatemala - Cement*, *supra*, footnote 3, at para. 7.42.

²² *EC - Anti-Dumping Duties on Audiotapes in Cassettes Originating in Japan*, ADP/136, para. 301 (28 April 1995 (unadopted)).

complainant to begin the process over again, assuming it considers that such an action would be fruitful as required under Article 3.7 of the DSU.

Accordingly, the language "given the actual course of the panel proceedings" will only be relevant to this case if the Panel determines that Poland has failed to present a *prima facie* case of a violation under Articles 5 or 6 of the Anti-Dumping Agreement or otherwise decides not to reach these purported claims.

- (b) How, specifically, has Thailand been prejudiced - in the sense of not having a full opportunity for defence of its interests or in some other sense - by Poland's panel request relating to Articles 5 and 6 AD in these Panel proceedings up to and including the first substantive meeting?

Without prejudice to its position in Question 2(a) above, Thailand has been seriously prejudiced as a result of Poland's mere listing of the articles allegedly violated in its request for establishment of a panel.

First, prior to Poland's filing of its First Written Submission, Thailand could not identify and therefore could not understand the claims against it. As a result, Thailand could not take any steps to prepare its defence, such as collecting sufficient factual information, making sufficient and precise translations given the significant volume of complex documents in the Thai language, and locating key individuals from the relevant authorities to assist in explaining decisions and methodologies. Thailand notes that three different departments of the Thai Ministry of Commerce were involved in this investigation and that the entire structure and responsibility for anti-dumping cases has changed since the time of the investigation on H-beams from Poland. Thailand also could not assess whether it was more or less in Thailand's interest to seek a potential settlement given that it had no indication of the relative strength or weakness of Poland's case and considered that it had conducted the investigation entirely in accordance with its WTO obligations.

Third Parties appeared to have similar difficulty understanding the complaint. In paragraph 8 of its Third Party Submission, the EC stated that

"[f]ollowing Poland's failure to present its claims clearly the EC, as a third party, has not been able to know the legal basis of the complaint until it has received the First Submission by Poland. This has impaired the EC's ability to exercise to the fullest extent its procedural rights in this proceeding."

In addition, although not presuming to speak for them, Thailand suspects that other Members had a difficult time determining whether they had a substantial trade interest in the matter under Article 4.11 of the DSU. If they had known the potential scope of this case, additional Members may have joined the dispute as third parties. The important point is that the Panel has no way to determine, and cannot expect Thailand to demonstrate, that one or more other Members would have joined the dispute had Poland complied with Article 6.2.

Second, in its First Written Submission, Poland made sweeping allegations and arguments regarding Articles 5 and 6, but failed to provide any more detail as to the *precise* claims at issue. As a result, Thailand was prejudiced because it was unable to exercise its right to defend itself fully or to defend itself in any reasonable

manner whatsoever in its First Written Submission. Thus, Poland's mere listing of articles caused Thailand to lose its first opportunity to present a defence.

Thailand also notes that it considered requesting a delay in these proceedings in order to take the steps discussed above to respond to Poland's case. However, it decided against the proposition because Thailand still had no conception of the case against it.

Third, both the EC and the United States as Third Parties indicated that they were unclear regarding Poland's case and that this lack of clarity adversely affected their ability to defend their interests in this dispute. In fact, in paragraph 9 of its Third Party Submission, the EC expressly stated that

"The lack of sufficient clarity in the Polish request for the establishment of the panel has been aggravated by the fact that Poland has failed to state clearly its claims even in its First Written Submission, to the extent that the EC still has doubts on the scope and legal basis of certain Polish claims."

As a result of this lack of clarity, the Third Parties were unable to address fully Poland's purported claims. Thus, Thailand is convinced that the Third Parties were prejudiced in their ability to defend their interests. In addition, Thailand was prejudiced because it was denied input from Third Parties that may have assisted in its defence, and the Panel was denied input that may have lent support to Thailand's case.

Fourth, because the Third Parties were unable to respond fully to Poland's claims and because the third party submissions were the only "new" submissions in the panel proceeding, Thailand was left with very little additional legal argument or factual information on which to base its First Oral Statement, and as a result, its First Oral Statement essentially just repeated the defence provided in its First Written Submission. Therefore, Poland's mere listing of articles resulted in Thailand also losing any meaningful opportunity to respond in its First Oral Statement.

Fifth, in its First Oral Statement, Poland provided no additional specificity for its purported claims, added further confusion, and even appeared to change the basis for its purported claims.

- With respect to paragraph 5 of Article 5, Poland initially asserted only that "notice was not properly or timely provided." Poland's First Written Submission at para. 90. Now, Poland seems to contend that, in fact, the content is the only basis for its purported claim and that written notice is required. Thailand would have addressed this issue in more detail in its First Written Submission and in its First Oral Statement had it been aware of Poland's precise claim. Moreover, the Third Parties and perhaps additional third parties would have wanted to contribute their views on this issue, as evidenced by the debate on it within the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices.
- With respect to its other purported claims under Article 5, Poland continues to merely assert that the application contained no evidence of injury or causal link. Poland still fails to refer to the initiation notice or the DFT Statement. During the hearing, Poland did raise the non-confidential application for the first time. However, it just restated that it

contained no evidence without referring to any specific subparagraph in the Anti-Dumping Agreement that describes the type of evidence that an application must contain. Moreover, Poland did not refer to any of the Thai language portions of the non-confidential application and has never, as far as Thailand is aware, requested or obtained a translation of this version of the application. Thus, Poland still provides (1) no indication as to the precise obligation allegedly violated (Article 5.2 *chapeau*, subparagraphs (i) to (iv) of Article 5.2, or Article 5.3 (accuracy, adequacy, and/or sufficiency)) and (2) no facts or circumstances on which the alleged violation is based.

- With respect to paragraph 4 of Article 6, Poland has still not identified any specific information or data that was not provided.
- Under Article 6.5.1, Poland now appears to change the basis for its purported claim. In paragraph 92 of its First Written Submission, it alleged a violation of Article 6.5.1 because "parties were not provided with a proper non-confidential summary". In paragraph 61 of its First Oral Submission, Poland now contends that "the internally inconsistent, conclusory, and opaque nature of the non-confidential summaries that were provided do not meet the requirements of Article 6.5.1." Thailand is confused regarding the basis for Poland's purported claim and does not know if the most recent version refers to the non-confidential summaries provided by interested parties in the investigation or to the Thai authorities' non-confidential summaries provided to interested parties. Thailand also does not know the specific non-confidential summary or summaries to which Poland now refers. Thailand fears that when this becomes clear, it will be too late to offer a full and meaningful response in accordance with its rights under the DSU.
- With respect to paragraph 9 of Article 6, Thailand still does not know the basis for Poland's purported claim. Poland has pointed to no "essential facts" that it was not provided and only indicates that Thailand did not provide a specification or a proper weighing of all relevant economic factors. Is this the only "essential fact" that Poland considers was not provided? Does Poland mean the factors in Article 3.1 of the Anti-Dumping Agreement or those in Article 3.4? Facts regarding what particular factor were not disclosed?

Finally, because of the simultaneous filing of rebuttal submissions, Thailand has no further basis to present its defence, other than in response to the questions from the Panel. Thus, Poland's actions have removed this third and next-to-last opportunity for Thailand to defend itself.

All of the above prejudice is caused, *inter alia*, by the uncertainties that flow directly from Poland's approach of merely listing Articles 5 and 6 of the Anti-Dumping Agreement. Moreover, as evidenced by Poland's approach under Article 6.5.1, it is unclear whether Poland may at rebuttal develop new claims under previously mentioned or even completely different paragraphs. For example, in response to the Panel's questions, will Poland now raise a claim that Thailand acted inconsistently with Article 6.1.2?

Thailand notes that this case is easily distinguishable from *Mexico - HFCS*, because the request in *Mexico - HFCS* did not merely list the articles allegedly violated. See THAILAND - 50. According to the Panel, the request in *Mexico - HFCS* also described the facts and circumstances on which the alleged violations were based.²³ Moreover, Mexico appears to have conceded that it was not prejudiced following the filing of the U.S. First Written Submission.²⁴ Finally, third parties did not express uncertainty as to the nature of the U.S. claims.²⁵

In this case, Poland merely listed Articles 5 and 6 and did not provide any additional facts or circumstances. Thailand has demonstrated that Poland's listing of the articles or otherwise its violation of Article 6.2 have caused prejudice prior to the filing of Poland's First Written Submission and at every stage thereafter. Finally, Third Parties have expressly indicated their uncertainty as to the precise nature of Poland's case and the difficulty that this has caused in defending their interests.

As a corollary to the above, Thailand considers that it is prejudiced by the fact that Poland's violation of Article 6.2 of the DSU has resulted in the Panel asking a significant number of questions that seek clarification of Poland's case at this late stage or otherwise address issues that do not seem to fall within the "matter" in dispute. For example, in Questions 3, 8 and 13 to 16, the Panel asks Thailand to either set forth its views of Poland's allegations or demonstrate compliance with each and every aspect relating to, for example, its compliance with Article 5 of the Anti-Dumping Agreement. Thailand considers that it only has the burden to respond to claims properly raised by Poland, including exclusively those claims that identify with specificity the precise obligation allegedly violated and the facts and circumstances on which the alleged violation is based.

3. Up until this point in the Panel proceedings, what are the specific allegations raised by Poland and the specific paragraphs of Articles 5 and 6 AD under which Poland has raised these allegations? Please identify any relevant parts of the Panel record.

Thailand considers that the Panel's request for Thailand to specify Poland's claims is highly unusual and suggests that such claims have never been presented with any degree of clarity. As it has repeatedly stated, Thailand does not understand the claims against it and considers that requiring Thailand to speculate as to such claims would be unfair and prejudicial.

4. The Panel notes that evidence in the record (Exhibit THAILAND -14/Exhibit POLAND-4) shows that the issue of notification under Article 5.5 AD was raised by Poland during the course of the anti-dumping investigation. Is this relevant to the request by Thailand for a preliminary ruling to dismiss Poland's claims under Articles 5 and 6 AD for lack of specificity under Article 6.2 DSU? Please explain in detail. Were other issues that have been raised by Poland in these Panel proceedings under

²³ See *Mexico - HFCS*, *supra*, footnote 6, at para.7.15.

²⁴ *Ibid.* at para. 7.16.

²⁵ *Ibid.* at footnote 533.

Articles 5 and 6 AD raised by the Polish exporters during the course of the anti-dumping investigation? If so, please describe in detail and indicate where this is reflected in the record.

The fact that the issue of Article 5.5 of the Anti-Dumping Agreement (or any issue under Articles 5 or 6 of the Anti-Dumping Agreement) was or was not raised during the underlying investigation is completely irrelevant to the lack of specificity under Article 6.2 of the DSU. As discussed above, the requirement for specificity in the panel request is intended to (1) define the panel's terms of reference and (2) inform the defending Member and third parties regarding the case against them.

First, the fact that an issue was raised during the investigation would not provide any degree of certainty as to the Panel's terms of reference. Given the listing of articles by Poland, would this approach mean that the Panel has authority to review each and every issue raised during the course of the investigation? Certainly, such an approach would lead to extremely imprecise terms of reference and to abuse by complainants in bringing cases to WTO panels.

Second, the fact that an issue was raised to one particular Department in a highly complex investigation that concluded several years ago does not provide Thailand with any meaningful notice regarding the actual claims that it must defend now in this dispute before the Panel. Since the completion of the investigation, Thailand has restructured its administrative approach to conducting investigations, and personnel that worked on the Polish H-beam investigation have not necessarily remained with the Government or with the same department within the Government. In addition, given the multitudes of issues raised over the course of the investigation and given the mere listing of articles by Poland, Poland's actual claims before the Panel would remain unclear, because neither the precise obligation allegedly violated nor specific facts and circumstances on which the alleged violation is based would be provided. Thus, the fact that respondents raised issues during the investigation would not give the defending Member any meaningful notice or any information regarding the claims against it.

Third, the identification of an issue during the investigation would provide third parties with absolutely no information regarding the complaint and absolutely no means for determining if they have a substantial interest in the case under Article 4.11 of the DSU.

Fourth, the Panel's proposed linking of issues identified during the investigation with lack of specificity under Article 6.2 of the DSU raises serious questions. For example, at what level of detail must they be raised? In what venue must the issue be raised? Is it sufficient to raise it before the authority in writing? Is it sufficient to raise it before the authority orally? Must the issue be raised in an appeal to domestic courts? The Panel's question even seems to suggest that there may be an obligation to raise all issues that may be subject to WTO dispute settlement before the authorities of the investigating Member. In other words, would the linking of the two effectively result in requiring that respondents exhaust all administrative and judicial remedies prior to seeking WTO review?

Finally, because it does not know nor understand the issues raised by Poland in these Panel proceedings, it is unable to determine whether Polish respondents did or did not raise such issues during the investigation. Moreover, as demonstrated

above, Thailand considers that whether or not issues were raised should be considered irrelevant to the specificity of a request under Article 6.2 of the DSU.

2. *Request with Respect to Articles 2 and 3 AD and Article VI GATT 1994*

5. In para. 8 of its closing statement at the first substantive meeting of the parties with the Panel on 8 March 2000, Thailand states that it "considers that it is suffering serious prejudice in attempting to respond to Poland's vague and imprecise claims" with respect to Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement and "requests that the Panel determine whether Poland complied with Article 6.2 of the DSU with respect to purported claims under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement".

(b) What relevance, if any, is there in the fact that this request by Thailand under Article 6.2 DSU concerning Articles 2 and 3 AD and Article VI GATT 1994 occurred at this point in the Panel proceedings?

The timing of Thailand's request during the First Oral Hearing is completely irrelevant to whether Poland did or did not violate its obligations under Article 6.2 of the DSU. Thailand has engaged in these procedures in good faith in an effort to resolve the dispute as required under Article 3.10 of the DSU. In so doing, Thailand made an effort to identify the purported claims that Poland raised in its First Written Submission. Despite Thailand's repeated indications in its First Written Submission that it did not understand the claims against it under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement, however, Poland failed to confirm that the purported claims identified by Thailand were the precise claims raised.²⁶ Moreover, during the First Oral Hearing, Poland seemed to raise claims based on different obligations and different facts and circumstances. Thus, in order to protect its rights, Thailand was forced to object when it became aware that its good faith assessment of Poland's purported claims was inaccurate and/or incomplete.

Notably, the DSU does not indicate the appropriate stage in a proceeding at which time a defending Member or third parties should raise alleged violations of due process rights under the DSU. Thailand raised its concerns regarding the specificity of pleading in its First Written Submission and made its request for a finding regarding compliance with Article 6.2 of the DSU prior to the rebuttal stage of the proceeding. Thus, Poland had (and has) more than adequate time to respond.

Finally, if the Panel issues a finding that a defending Member must raise objections under Article 6.2 of the DSU only in its First Written Submission, it will send the clear message that defending Members should not take any good faith steps to identify the claims against it before immediately asserting a procedural objection.

²⁶ Para. 9 of Thailand's First Written Submission stated that "Thailand reserves its right to raise additional procedural objections under Article 6.2 of the DSU and under general principles of due process with respect to other purported 'claims' [*i.e.*, purported claims under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement] raised by Poland."

Thailand considers that creating such a disincentive to engage in good faith efforts is inconsistent with the letter and spirit of Article 3 of the DSU.

6. We refer to the passage from paragraph 124 of the Appellate Body Report in Korea - Dairy Safeguard cited in question 1 above.

(a) Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 2 and 3 AD and Article VI GATT 1994? Please explain in detail.

In accordance with the interpretation provided in response to Question 1(a), the phrase "attendant circumstances" is not relevant to this particular case, and there are no attendant circumstances that would justify finding that the mere listing of articles in an anti-dumping case was sufficient to satisfy the requirements of Article 6.2 of the DSU. This analysis and interpretation applies to Thailand's view that Poland violated Article 6.2 of the DSU in its request for establishment of a panel with respect to Articles VI of GATT 1994 and Articles 2, 3, 5, and 6 of the DSU.

(b) Does Poland's request for establishment "merely list" Articles 2 and 3 AD and Article VI GATT 1994, or does it go beyond a "mere listing"?

Poland's request for establishment of a panel merely lists Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement. The relevant portion of Poland's request states:

"Thailand has imposed definitive antidumping duties on imports of H-beam steel products originating in Poland in contravention of the basic procedural and substantive requirements of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT 1994) and of the Anti-dumping Agreement. The principal measures to which Poland objects are:

- Thai authorities have made a determination that Polish imports caused injury to the Thai domestic industry, in the absence of, *inter alia*, "positive evidence" to support such a finding and without the required "objective examination" of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry, in contravention of Article VI of GATT 1994 and Article 3 of the Anti-dumping Agreement;
- Thai authorities have made a determination of dumping and calculated an alleged dumping margin in violation of Article VI of GATT 1994 and Article 2 of the Antidumping Agreement;"

As stated in its interpretation in response to Question 1(a), Thailand considers that a "claim" must consist of both the precise obligation allegedly violated and facts and circumstances on which the alleged violation is based. For Articles VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement, Poland simply lists the article allegedly violated. It does not identify any paragraphs, subparagraphs, or other distinct obligations within those articles and/or provide any facts or circumstances whatsoever regarding the basis for its alleged violations.

The only more detailed reference of any kind is a repetition of the "enumerated factors" in paragraph 1 of Article 3. Thus, at a minimum, Poland may arguably have identified the precise obligations under paragraph 1 of Article 3. However, as noted above for all articles, it failed to provide any facts or circumstances whatsoever on which its alleged violation of Article 3.1 is based. Thailand notes that Poland did not provide any reference to obligations under Articles 3.2, 3.4, or 3.5 of the Anti-Dumping Agreement, any reference to the distinct obligations under Article 2.2 of the Anti-Dumping Agreement, or any reference to the distinct obligations contained in Article VI of GATT 1994.

- (c) Do Articles 2 and 3 AD and Article VI GATT 1994 each establish one single, distinct obligation, or rather multiple obligations? What is the basis for your response?

Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement provide numerous distinct obligations. Moreover, virtually every paragraph (and subparagraph if applicable) of Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement contain at least one distinct obligation and often more than one. This amounts to a minimum of 42 distinct obligations.

Thailand considers that the test is whether a Panel would find a violation of Article VI of GATT 1994 or of Article 2 or 3 based on the violation of a particular paragraph, subparagraph, or provision within a paragraph or subparagraph. For example, in *Mexico - HFCS*, the Panel concluded:

"Mexico's inadequate consideration of the impact of dumped imports on the domestic industry, its determination of threat of material injury on the basis of only a part of the domestic industry's production, that sold in the industrial sector, rather than on the basis of the industry as a whole, and its inadequate consideration of the potential effect of the alleged restraint agreement in its determination of likelihood of substantially increased importation are not consistent with the provisions of Articles 3.1, 3.2, 3.4, 3.7 and 3.7(i) of the AD Agreement."

Thus, a Panel has already concluded that Article 3 of the Anti-Dumping Agreement contains at least 5 distinct obligations under paragraphs 1, 2, 4, and 7.

At the Panel's request, Thailand would be pleased to provide a detailed list of each and every distinct obligation under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement. However, Thailand considers that its response above has demonstrated that the referenced articles each establish multiple obligations.

7. We refer to the passage from paragraph 127 of the Appellate Body Report in *Korea - Dairy Safeguard* cited in question 2 above.

- (a) How is the phrase "given the actual course of the panel proceedings" to be interpreted and applied in the present case in respect of the request by Thailand for a ruling under Article 6.2 relating to Articles 2 and 3 AD and Article VI GATT 1994?

In accordance with and without prejudice to the interpretation in response to Question 2(a) above, Thailand considers that the language "given the actual course of the panel proceeding" would only authorise a panel to accept the mere listing of a particular article as sufficient if absolutely no prejudice was possible during the course of the proceedings. This would be the case only where (1) a panel found that the complainant had failed to present a *prima facie* case and thus the adequacy of the defence was irrelevant or (2) a panel did not reach the claims under the listed articles because it decided the case solely on claims properly described in the request.

In any other situation, a panel would have no basis to determine whether the parties could have resolved the claims at an earlier stage, whether respondent could have presented a more persuasive defence, or whether third parties could have contributed information, argument or evidence that would have changed the outcome of the case. Thus, this language does not permit "remedying" an insufficient panel request during the course of the proceeding. The only remedy is for the complainant to begin the process over again, assuming it considers that such an action would be fruitful.

Accordingly, the language "given the actual course of the panel proceedings" is only relevant to this case if the Panel determines that Poland has failed to present a *prima facie* case of a violation under Article VI of GATT 1994 or Article 2 or 3 of the Anti-Dumping Agreement or otherwise decides not to reach these purported claims.

- (b) How, specifically, has Thailand been prejudiced - in the sense of not having a full opportunity for defence of its interests or in some other sense - by Poland's panel request relating to Articles 2 and 3 AD and Article VI GATT 1994 in these Panel proceedings up to and including the first substantive meeting?

Without prejudice to its position provided in response to Question 2 (a) above, Thailand has been seriously prejudiced as a result of Poland's mere listing of the articles allegedly violated in its request for establishment of a panel. The prejudice described in response to Question 2 (b) similarly results for the purported claims under Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement. This includes (1) the inability to effectively prepare following the request for establishment of a panel by taking steps to collect sufficient factual information, make sufficient and precise translations given the significant volume of complex documents in the Thai language, and locate key individuals from the relevant authorities to assist in explaining decisions and methodologies; (2) the prejudice highlighted by Third Parties, including the EC's reference with respect to purported claims under all listed articles; (3) the denial of Thailand's right to fully defend itself in its First Written Submission; (4) the absence of full input from Third Parties regarding the relevant claims; (5) the denial of Thailand's right to fully defend itself in its First Oral Statement; and (6) the denial of Thailand's right to fully defend itself in its Rebuttal Submission due to the continued lack of clarity of Poland's claims.

In its First Oral Statement, Poland has still not provided any specificity for its purported claims regarding, *inter alia*:

- With respect to Article 3.1, Poland has not identified with any degree of specificity the precise findings on which it contends that Thailand failed

to base its decision on positive evidence. Simply providing a general discussion of Poland's views regarding what decision the authorities should have reached based on the record evidence does not provide any guidance. During these proceedings, Poland has never clearly stated a claim, for example, that "Thailand violated Article 3.1 of the Anti-Dumping Agreement by making an affirmative determination of injury that was not based on positive evidence because the authority failed to collect data on the volume of Polish imports." Moreover, Poland has not even referenced the applicable standard of review.

- In its Question 3 to Thailand, in paragraph 53 of its First Written Submission, in paragraph 39 of its First Oral Statement and in its Concluding Statement to the First Oral Hearing, Poland appears to contend that the Thai authorities violated Articles 3.1, 3.2 and/or 3.4 because they did not find that the impact of dumped imports on the domestic industry was "significant" and thus could not have found that such impact was "material". Articles 3.1, 3.2 and/or 3.4 do not impose such a requirement with respect to the impact of dumped imports on the domestic industry. Therefore, Thailand is unclear whether Poland has in fact presented any claim regarding whether the Thai authorities properly evaluated the consequent impact of the dumped imports on the domestic industry.
- With respect to Article 3.4, Poland has stated:
 - "Thai authorities have made a determination that Polish imports caused injury ... without the required 'objective examination' of enumerated factors such as import volume, price effects, and the consequent impact of such imports on the domestic industry." *See* Poland's request for establishment of a panel.
 - "Undisputed evidence on the record demonstrates that SYS's production, capacity utilisation, employment, sales (both domestic and overseas), and market share all increased in the IP." *See* First Written Submission at para. 64 (emphasis in original).
 - "Every factor examined by Thailand and on which the Thai authorities claimed to rely unambiguously supports a finding of no injury. The Thai authorities chose not to present evidence regarding profits, losses, profitability or cash flow." *See* First Written Submission at para. 64.

Thus, prior to the First Oral Statement, Poland only questioned how the Thai authorities weighed the factors that it examined under Article 3.4 and claimed that the authorities "chose not to present evidence" regarding four specific factors. In its First Oral Statement and in response to the U.S. submission, Poland now contends that the Thai authorities did not consider and evaluate the factors under Article 3.4. However, Poland did not identify a single factor that was or was not considered or evaluated. In its Question 38, the Panel is asking Poland to provide an indication of the specific factors that the Thai authorities did or did not consider. Thailand considers that Poland was obligated in its request for establishment of a panel to identify, at a minimum, Article 3.4 and identify specific factors that were not considered. The fact that it will not do so, in all likelihood, until its Rebuttal Submission means that Thailand

still has no basis to respond, except for its good faith attempt to show where evidence was provided regarding four factors listed in Poland's First Submission. Thailand considers that it should not have the burden of demonstrating that it considered and evaluated each and every factor under Article 3.4 before Poland has even identified a specific factor that raises an alleged violation. Finally, Poland has not even referenced the applicable standard of review.

- With respect to Article 3.5, Thailand notes that Poland appears now to only raise questions regarding the consideration or lack thereof of the impact of the "massive Kobe earthquake that disrupted steel supplies throughout Asia in this period." See First Oral Statement at para. 39. Given the continued absence of any other information, evidence, or argument provided regarding Poland's assertions in paragraph 75 of its First Written Submission, Thailand is confused as to whether Poland continues to have questions regarding the "other factors" listed in its First Written Submission.

The prejudice to Thailand's case is caused, *inter alia*, by the uncertainties that flow directly from Poland's approach of merely listing Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement. Moreover, as evidenced by the Panel's approach with respect to Article 3.4 of the Anti-Dumping Agreement, it is apparent Poland may at rebuttal develop new claims regarding whether Thailand did or did not consider or evaluate specific factors not previously identified.

As noted in response to Question 2 (b) above, Thailand considers that this case is easily distinguishable from *Mexico - HFCS*, because the request in *Mexico - HFCS* did not merely list the articles allegedly violated. See THAILAND - 50. According to the Panel, the request in *Mexico - HFCS* also described the facts and circumstances on which the alleged violations were based.²⁷ Moreover, Mexico appears to have conceded that it was not prejudiced following the filing of the U.S. First Written Submission.²⁸ Finally, third parties did not express uncertainty as to the nature of the U.S. claims.²⁹

In this case, Poland merely listed Article VI of GATT 1994 and Articles 2 and 3 of the Anti-Dumping Agreement and did not provide any additional facts or circumstances. Thailand has demonstrated that Poland's listing of the articles or otherwise its violation of Article 6.2 have caused prejudice prior to the filing of Poland's First Written Submission and at every stage thereafter. Finally, Third Parties have expressly indicated their uncertainty as to the precise nature of Poland's case and the difficulty that this has caused in defending their interests.

As a corollary to the above, Thailand considers that it is prejudiced by the fact that Poland's violation of Article 6.2 of the DSU has resulted in the Panel asking a significant number of questions that seek to identify Poland's claims at this late stage. In question 38 to Poland, the Panel states "[y]ou have argued that Thailand has not considered all relevant factors listed in Article 3.4 ADA." The Panel then asks for

²⁷ See *Mexico - HFCS*, *supra*, footnote 6, at para.7.15.

²⁸ *Ibid.* at para. 7.16.

²⁹ *Ibid.* at footnote 533.

information to support this "argument" and provides a structure under which Poland can identify any factors that the Thai authorities have or have not considered or evaluated.

In the next question directed to Thailand, the Panel begins with the clause "[t]o the extent that you feel that it is significant to your case" and then asks for the same information.³⁰ Thailand considers it highly prejudicial that the same clause was not used in asking the question to Poland, that the Panel assumed the role of clarifying Poland's claims at this late date, and that the Panel is making Thailand decide whether responding to the Panel's methodology for identifying Poland's "claims" is or is not significant to its case. If Poland had complied with the DSU, Thailand would not be in a position to guess whether it would need to respond.

8. Up until this point in the Panel proceedings, what are the specific allegations raised by Poland and the specific paragraphs of Articles 2 and 3 AD and Article VI GATT 1994 under which Poland has raised these allegations? Please identify any relevant parts of the Panel record.

Thailand considers that the Panel's request for Thailand to specify Poland's claims is highly unusual and suggests that such claims have never been presented with any degree of clarity. As it has repeatedly stated, Thailand does not understand the claims against it and considers that requiring Thailand to speculate as to such claims would be unfair and prejudicial.

9. Were the issues under Articles 2 and 3 AD and Article VI GATT 1994 raised by Poland in these Panel proceedings raised by the Polish exporters during the course of the anti-dumping investigation? If so, please describe in detail and indicate precisely where this is reflected in the record. Is this relevant to the request by Thailand for a preliminary ruling to dismiss Poland's claims under Articles 2 and 3 AD and Article VI GATT 1994 for lack of specificity under Article 6.2 DSU? Please explain in detail.

The fact that any issue under Article VI of GATT 1994 or Articles 2 or 3 of the Anti-Dumping Agreement was or was not raised during the underlying investigation is completely irrelevant to the lack of specificity under Article 6.2 of the DSU.

As stated in Thailand's Response to Question 1(a) from the Panel, the requirement for specificity in the panel request is intended to (1) define the panel's terms of reference and (2) inform the defending Member and third parties regarding the case against them. This object and purpose is not satisfied and is, in fact, severely undermined by an approach that links raising issues during the domestic investigation to the specificity of a request for establishment of a panel in a WTO dispute settlement proceeding. Thailand repeats below the basis for this position as provided in its Response to Question 4 from the Panel.

³⁰ Thailand notes that a similar approach is taken with respect to Poland's purported claims relating to causation under Article 3.5 of the Anti-Dumping Agreement. *See* Questions 46 and 47 from the Panel.

First, the fact that an issue was raised during the investigation would not provide any degree of certainty as to the Panel's terms of reference. Given the listing of articles by Poland, would this approach mean that the Panel has authority to review each and every issue raised during the course of the investigation? Certainly, such an approach would lead to extremely imprecise terms of reference and to abuse by complainants in bringing cases to WTO panels.

Second, the fact that an issue was raised to one particular Department in a highly complex investigation that concluded several years ago does not provide Thailand with any meaningful notice regarding the actual claims that it must defend in the dispute before the Panel. Since the completion of the investigation, Thailand has restructured its administrative approach to conducting investigations, and personnel that worked on the Polish H-beam investigation have not necessarily remained with the Government or with the same department within the Government. In addition, given the multitudes of issues raised over the course of the investigation and given the mere listing of articles by Poland, Poland's actual claims before the Panel would remain unclear, because neither the precise obligation allegedly violated nor specific facts and circumstances on which the alleged violation is based would be provided. Thus, the fact that respondents raised issues during the investigation would not give the defending Member any meaningful notice or any information regarding the claims against it.

Third, the identification of an issue during the investigation would provide third parties with *absolutely no information* regarding the complaint and *absolutely no means* for determining if they have a substantial interest in the case under Article 4.11 of the DSU.

Fourth, the Panel's proposed linking of issues identified during the investigation with lack of specificity under Article 6.2 of the DSU raises serious questions. For example, at what level of detail must they be raised? In what venue must the issue be raised? Is it sufficient to raise it before the authority in writing? Is it sufficient to raise it before the authority orally? Must the issue be raised in an appeal to domestic courts? The Panel's question even seems to suggest that there may be an obligation to raise all issues that may be subject to WTO dispute settlement before the authorities of the investigating Member. In other words, would the linking of the two effectively result in requiring that respondents exhaust all administrative and judicial remedies prior to seeking WTO review?

Finally, because it does not know nor understand the issues raised by Poland in these Panel proceedings, it is unable to determine whether Polish respondents did or did not raise such issues during the investigation. Moreover, as demonstrated above, Thailand considers that whether or not issues were raised should be considered irrelevant to the specificity of a request under Article 6.2 of the DSU.

B. Article 5 AD

10. In the view of the parties, in light of the panel report in Mexico - HFCS, what documents in the record are relevant to the Panel's examination of Poland's claims concerning the contents of the petition and the sufficiency of evidence to justify the initiation of the investigation?

Thailand considers that Poland has not made any "claims" in accordance with its obligations under the DSU. Therefore, Thailand does not consider that any documents "are relevant to the Panel's examination of Poland's claims."

The information and evidence relevant to the Thai authorities' decision to initiate the investigation are, *inter alia*:

- Letter from SYS to the Minister of Commerce providing pre-application information regarding injury caused by dumped Polish H-beams (THAILAND - 51);
- The confidential version of the application, including periodic provision of additional information in response to the concerns of the authorities (THAILAND - 52);
- The non-confidential version of the application, including periodic provision of additional information in response to the concerns of the authorities (THAILAND - 1; THAILAND - 53 (translation));
- Internal DBE document providing preliminary assessment of the application and requesting more information (THAILAND - 54);
- Documents relating to the consideration of the petition by the CPS Committee at two meetings in August 1996 (THAILAND - 55 (tables on injury and causation only));
- The notice of initiation (THAILAND - 2); and
- The DFT Statement (THAILAND - 5).

13. Did the petition contain data on dumping, injury and a causal link? Did the petition contain analysis concerning each of the factors on which data were provided? Please explain in detail, citing specific parts of Exhibit THAILAND-1, where relevant.

As stated throughout this proceeding, Thailand considers that Poland has not set forth its claims in accordance with the DSU. Thailand does not have the burden of proof in this dispute and need not demonstrate compliance with each and every aspect of Article VI of GATT 1994 and the Anti-Dumping Agreement. Accordingly, Thailand simply reiterates that the authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams from Poland. Thailand respectfully refers the Panel to the evidence contained in the documents listed in its response to Question 10.

14. Does Article 5.2 require that an application contain analysis or is numerical data enough? Please explain, and indicate the relevance, if any, of the panel report in Mexico-HFCS.

As stated throughout this proceeding, Thailand considers that Poland has not set forth its claims in accordance with the DSU. Thailand does not have the burden of proof in this dispute and need not demonstrate compliance with each and every aspect of Article VI of GATT 1994 and the Anti-Dumping Agreement. Accordingly, Thailand simply reiterates that the authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams from Poland. Thailand respect-

fully refers the Panel to the evidence contained in the documents listed in its response to Question 10.

15. Please indicate where in the notice of initiation (or any other documents) it is demonstrated that the application contained evidence of dumping, injury and causal link within the meaning of Article 5.2 AD.

As stated throughout this proceeding, Thailand considers that Poland has not set forth its claims in accordance with the DSU. Thailand does not have the burden of proof in this dispute and need not demonstrate compliance with each and every aspect of Article VI of GATT 1994 and the Anti-Dumping Agreement. Accordingly, Thailand simply reiterates that the authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams from Poland. Thailand respectfully refers the Panel to the evidence contained in the documents listed in its response to Question 10.

16. Please indicate how the Thai authorities examined "the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation" of the investigation within the meaning of Article 5.3 AD, and identify the record document(s) relevant to this examination.

As stated throughout this proceeding, Thailand considers that Poland has not set forth its claims in accordance with the DSU. Thailand does not have the burden of proof in this dispute and need not demonstrate compliance with each and every aspect of Article VI of GATT 1994 and the Anti-Dumping Agreement. Accordingly, Thailand simply reiterates that the authorities examined the application and determined that it contained sufficient evidence of dumping, injury and a causal link to justify the initiation of the investigation on H-beams from Poland. Thailand respectfully refers the Panel to the evidence contained in the documents listed in its response to Question 10.

17. To the extent that Thailand considers that it may be relevant to respond to Poland's allegation in paragraph 89 of its first written submission³¹, please provide an English language translation of the headings to the tables forming part of the petition (Exhibit THAILAND-1), as well as any narrative sections of that Exhibit that remain exclusively in the Thai language.

The translated non-confidential application is contained in THAILAND - 53. Thailand remains uncertain regarding whether this application is or is not relevant to respond to Poland's allegations, because Poland's allegations remain vague and imprecise. As stated in part V of its Rebuttal, Thailand considers that Poland had the obligation to translate this document and to use it and/or other record documents to

³¹ Para. 89 of Poland's first written submission reads, in part: "[f]irst...the application contained no evidence of injury. Second, the application completely failed to offer any reasonable factors explaining how the condition of SYS, the domestic producer, had worsened. Lastly, no causal link between allegedly dumped imports and alleged injury was provided."

articulate precise claims under Article 5 of the Anti-Dumping Agreement. The Panel should not reward Poland's failure to do so and penalise Thailand for supplying evidence in good faith.

18. In its first written submission (para. 90), Poland alleges that notification under Article 5.5 AD was "not properly or timely provided" by Thailand. In its oral statement at the first meeting (para. 57), Poland "recognise[d] that this claim is based on a disagreement with the Thai authorities as to the content of discussions held on the 17th of July 1996 between the DFT and our Government's Commercial Counsellor in Bangkok".

- (a) Under what circumstances and for what stated purpose was Poland invited to the meeting by Thailand?

Prior to 17 July 1996, Mr. Michal W. Byczkowski (Commercial Counsellor of Poland) telephoned Ms. Chutima Bunyapraphasara (Director of the Multilateral Trade Division) to seek clarification regarding an article appearing in "Metal Bulletin". The article apparently reported that SYS had requested that the Government of Thailand investigate dumped steel products from Poland. *See* Memorandum from Chutima to Director General, DBE reporting on the meeting (THAILAND - 56). During the telephone conversation, both parties agreed to meet at the DBE on 17 July in order to verify the facts of the matter relating to the possible initiation of an anti-dumping investigation.

- (b) What occurred at this meeting? Are there any documents (other than Exhibit POLAND-4/THAILAND-14) including any invitation to and/or written record of, that meeting that would indicate to the Panel the nature and content of the meeting? If so, please indicate where these are in the record, or provide them to the Panel.

During the meeting, Ms. Chutima informed Mr. Byczkowski that "the Thai steel company has filed an application requesting the Thai Government to investigate the dumped steel products from Poland." Ms. Chutima also informed him that "the matter was under consideration whether the Company had enough information for the Committee to initiate the investigation." Mr. Byczkowski then suggested to take into consideration during any investigation whether trading firms were the cause of alleged dumping. This account of the meeting is taken from Ms. Chutima's 18 July 1996 report to the Director-General of DBE provided as THAILAND - 56. The exhibit includes an unofficial English translation, and the Thai language version shows the initials and thanks from the Director-General.

In addition, on 9 October 1996, Mr. Amnuay Yossuk, the Deputy Minister of Commerce, sent a letter to H.E. Mr. Maciej Lesny, the Undersecretary of State, Ministry of Foreign Economic Relations, Republic of Poland. In paragraph 2.1, the letter states that

"[t]he Polish Government representatives HAD been notified of the petition PRIOR to the initiation of the case in full compliance with Article 5.5. I specifically refer to the meeting held at the Department of Business Economics on 17 July, 1996. The Polish delegation,

headed by Mr. Michal W. Byzkowski, was fully informed of the situation current at the time."

The letter of 9 October 1996 is attached as THAILAND - 57. Given the letters sent directly to the Government of Poland (THAILAND - 14 and THAILAND - 57), Thailand is suspicious as to why Poland did not even acknowledge this meeting in its First Written Submission, thereby preventing Thailand from presenting a more detailed response to Poland's purported claims based on Poland's views of such meeting. This action suggests that Poland is intentionally, rather than inadvertently, manipulating the procedures to deny Thailand a full opportunity to defend itself.

- (d) How does Thailand feel that the meeting of 17 July 1996 complied with the requirements of Article 5.5 pertaining to both the form and timing of the notification referred to in that provision?

Thailand provides a response without prejudice to its position that none of Poland's claims under Article 5 are properly before the Panel. With respect to timing, in its First Written Submission, Thailand notified Poland less than one month after the receipt of the application and six weeks before the decision to initiate the investigation. The Draft Recommendation Concerning the Timing of the Notification under Article 5.5 issued by the Ad Hoc Group on Implementation of the Committee on Anti-Dumping Practices (the "AHG") states that the notification should be made

"as soon as possible after the receipt by the investigating authorities of a properly documented application, and as early as possible before any decision is taken regarding initiation of an investigation on the basis of that properly documented application."³²

The timing of Thailand's notification was clearly within this window. Moreover, Poland has never claimed that Thailand issued its notice late, but rather contends that Thailand provided no notification at all.

With respect to content, Thailand considers that the language of Article 5.5 is extremely vague and, in fact, gives no indication as to *what* should be notified between the two specified events. The Panel in *Guatemala - Cement* even noted "that the Agreement does not specify the contents of that notice."³³ In addition, as evidenced in the October 1998 minutes of the AHG, WTO Members remain substantially divided as to what the content of the notification should be. *See* G/ADP/AHG/R/5, paras. 17 and 18 (10 February 1999) (attached as THAILAND - 59).

As shown in the report of the meeting (THAILAND - 56), Thailand indicated that an application had been received and that the authorities were considering whether it contained sufficient information to justify initiation. Importantly, the report of the meeting also evidences that Poland was given the opportunity to comment and did so prior to any decision to initiate the investigation. Accordingly, Thailand considers that the content of its notification satisfied the requirements of Article 5.5.

³² *See* THAILAND - 58.

³³ *Guatemala - Cement, supra*, footnote 13, at footnote 225.

Moreover, it is Poland that must demonstrate that the notification failed to satisfy such requirements, and it has failed to do so.

19. In its oral statement at the first meeting (para. 57), Poland states that "Article 5.5 is meant to require written "notice" to the government of the exporting government concerned".

(b) How do you react to Poland's assertion that Article 5.5 AD requires written notice?

Thailand considers that Poland has not even attempted to justify its position and that the Panel should reject this interpretation. The text of Article 5.5 of the Anti-Dumping Agreement does not specify whether such notice must be written or oral. This is in contrast to the fact, for example, that an application must be "written" under Article 5.1 of the Anti-Dumping Agreement.

In its meeting in April 1997, the AHG was still debating the "practical mechanics" of notification under Article 5.5, including "who should be notified, where, and how."³⁴ The minutes of the AHG meeting one year later in April 1998 stated:

"The 'how' of the Article 5.5 notification was also discussed, including such questions as whether an oral notification, or a *note verbale*, would be adequate, and who should receive the notification. In this regard, it was noted that the lack of diplomatic or other representation in some Members' capitals might explain why such notifications were not always received. Several Members suggested that a list of contact points for this purpose would be useful."³⁵

The fact that the AHG established such an indicative list means that the Members consider that Article 5.5 can be satisfied with oral notification.³⁶

Finally, Thailand considers that its interpretation that notification under Article 5.5 of the Anti-Dumping Agreement may be written or oral is certainly a permissible interpretation that the Panel should accept in accordance with Article 17.6(ii) of the Anti-Dumping Agreement.

20. The Panel notes that Poland refers to Article 12 AD in connection with its Article 5.5 claim.

(b) How does Thailand react to Poland's reference to Article 12 AD in this context?

Thailand concedes that it does not understand what Poland means in referencing Article 12.1 of the Anti-Dumping Agreement in the context of Article 5.5. Thailand simply notes that Poland has not raised any claims under Article 12 of the Anti-Dumping Agreement and thus claims and the arguments derived therefrom are not within the Panel's terms of reference and should be ignored.

³⁴ THAILAND - 60.

³⁵ THAILAND - 61.

³⁶ See G/ADP/AHG/1 (10 Feb. 1999) (THAILAND - 59).

With respect to the Panel's proposed basis to consider Article 12, as provided to Poland in Question 20(a), Thailand directs the Panel to the analysis of a virtually identical issue under the Agreement on Safeguards. In *Argentina - Safeguard Measures on Imports of Footwear*, the panel stated:

"In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of substantive compliance with Articles 2 and 4 [regarding the determinations of increased imports and serious injury]."

"Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation."³⁷

Thailand considers that the same analysis would apply here, but with even more force given that Poland has not even raised a claim under Article 12 of the Anti-Dumping Agreement. In other words, notification requirements under Article 12 of the Anti-Dumping Agreement are separate from and do not have implications for the question of substantive compliance with Article 5 of the Anti-Dumping Agreement. Rather, compliance should be measured using the more detailed information from the record of the investigation.

ARTICLE 6 AD

23. Please confirm whether or not non-confidential summaries of all confidential information that was used by the Thai investigating authorities in the anti-dumping investigation were provided to the Polish respondents in the course of the investigation. Please identify all record documents provided to the Polish exporters in this context.

Thailand confirms that non-confidential summaries of confidential information that was used by the Thai investigating authorities in the anti-dumping investigation were made available to the Polish respondents.

The following confidential and non-confidential documents were affirmatively provided to the Polish respondents:

- Application filed by SYS (THAILAND - 1);
- Disclosure to Huta Katowice of information on which the preliminary determination of dumping was based (THAILAND - 29);
- Disclosure to Stalexport of information on which the preliminary determination of dumping was based (THAILAND - 31);
- Disclosure of non-confidential information on which the preliminary determination of injury was based (THAILAND - 33);
- Disclosure of findings for Huta Katowice (THAILAND - 38); and

³⁷ WT/DS121/R, DSR 2000:II, 575, paras. 8.298 and 8.300 (25 June 1999).

- Disclosure of essential facts in the Proposed Definitive Determination (THAILAND - 37).

24. Thailand argues that Article 6.5.1 AD provides that an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof, but that Article 6.5.1 does not require the investigating authorities to provide those non-confidential summaries to the exporters or to the foreign producers.

- (b) What is the legal basis for this assertion?

This assertion is based on a textual interpretation of Article 6.5.1 of the Anti-Dumping Agreement, which expressly states that the "authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof." On its face, this provision does not contain any obligation requiring the authorities to provide non-confidential summaries to interested parties.

- (c) In this context, what is the relevance, if any, of Article 6.1.2 AD? Please explain in detail.

Poland has never claimed or even argued that the Thai authorities acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement. Therefore, Thailand considers that any interpretation of Article 6.1.2 or even a reference thereto is unfair and prejudicial.

- (d) What is the legal relationship, if any, between Article 6.4, 6.5.1 and 6.9 AD, on the one hand, and Article 6.1.2 AD, on the other (e.g., does Article 6.4 encompass Article 6.1.2, do they pertain to different things, etc.)?

Poland has never claimed or even argued that the Thai authorities acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement. Therefore, Thailand considers that any interpretation of Article 6.1.2 or even a reference thereto is inappropriate and prejudicial.

25. The Panel notes that Poland refers to Article 12 in the context of its claims under Article 6.

- (b) How does Thailand react to Poland's reference to Article 12 AD in this context?

In its request for the establishment of the panel, Poland did not identify Article 12 of the Anti-Dumping Agreement. Therefore, any claims under Article 12 are outside the Panel's terms of reference and arguments regarding Article 12 are irrelevant to this proceeding.

Thailand directs the Panel to the analysis of a virtually identical issue under the Agreement on Safeguards. In *Argentina - Safeguard Measures on Imports of Footwear*, the Panel stated:

"In our view, the notification requirements of Article 12 are separate from, and in themselves do not have implications for, the question of

substantive compliance with Articles 2 and 4 [regarding the determinations of increased imports and serious injury]."

"Ultimately, should a violation of Articles 2 and 4 be alleged, it would be the more detailed information from the record of the investigation, and in particular the published report(s) on the findings and reasoned conclusions of that investigation, that would form the basis for evaluation of such an allegation."³⁸

Thailand considers that the same analysis would apply here, but with even more force given that Poland has not raised a claim under Article 12 of the Anti-Dumping Agreement. In other words, notification requirements under Article 12 of the Anti-Dumping Agreement are separate from and do not have implications for the question of substantive compliance with Article 6 of the Anti-Dumping Agreement. Rather, compliance should be measured using the more detailed information from the record of the investigation.

26. We refer to Tables 1-3 attached to the proposed final determination of injury in Exhibit THAILAND-37. Please identify the specific assertions in Exhibit THAILAND-37 and Exhibit THAILAND-46 derived from the data contained in these tables and explain whether and how the data in the tables support those assertions.

In the determination of injury, the Thai investigating authorities based their analysis on questionnaire responses from the Thai and Polish parties. The investigating authorities provided non-confidential tables reflecting this information where possible. Thailand considers that the textual explanation together with the disclosure of information and trends based on actual data adequately illustrated the basis for the determination made by the Thai investigating authority, while complying with its obligation to maintain confidentiality of submitted data.

Thailand notes that it does not have the burden to demonstrate before the Panel how each and every aspect of its findings and analysis (referred to as "assertions" by the Panel) are or are not supported by the relevant tables. Rather, it is Poland's burden to raise claims, including providing the precise obligation allegedly violated and facts and circumstances on which the alleged violation is based. Poland has yet to even reach this threshold level of detail.

C. Article 2 AD

31. Does Thailand believe that the "same general category of products" under Article 2.2.2 AD refers to all H-beams, but not to all steel products produced by the Polish company in question? If so, what is the legal basis for this view?

Thailand considers that in this case the "same general category of products" under Article 2.2.2 of the Anti-Dumping Agreement refers to all H-beams, but not to all steel products produced by the respondent Polish producer. However, the concept

³⁸ WT/DS121/R, *supra*, footnote 37, paras. 8.298 and 8.300 (25 June 1999).

of "same general category of products" is subject to interpretation within the particular facts of a particular case, including the data available to the authorities. In a case where the investigating authorities have both H-beam and "all-products" information, Thailand considers that it would make more sense to choose the narrower category as the "same general category of products." This is because broader and broader categories will encompass products less and less "like" the products for which a profit is sought to be calculated. As a result, the broader the general category definition, the greater the likelihood that the profit calculation will be inaccurate.

32. Thailand argues, concerning its calculation of the amount for profit used for constructed value, *inter alia*, that Huta Katowice maintained a single set of accounting records which covered all H-beams, seeming to imply that calculation of a separate profit amount just for home market sales of JIS H-beams was not possible. Thailand also argues, however, that "[t]he Thai investigating authority determined that the profitability of home-market sales of products identical to those sold to Thailand was 'virtually the same' as the overall profitability of all home market sales of H-beams." On what basis was the investigating authority able to make this determination if no accounting data were separately available on home market sales of JIS H-beams?

It is important to distinguish between the stages of the investigation. For the preliminary determination, which was reached without the benefit of an on-site verification, all information contained in the Polish questionnaire response was taken into account, and all requests made by the Polish respondent were preliminarily accepted on face value. The Polish respondent claimed that there were insufficient sales of the like product in the home market, and therefore, the DFT proceeded to establish normal value on the basis of constructed value. For the cost of manufacturing ("COM"), the respondent claimed that exports to Thailand were from a plant designated for JIS production of H-beams and that this plant produced at lower costs than facilities producing H-beams for the home market. As a result, DFT used the COM reported for JIS production only to take account of this allowance. All other allowances were accepted, including discounts and credit terms. Profit was based upon the amount actually realised in the home market for all sales of H-beams of both JIS and DIN standard.

For the final determination, adjustments were made in the light of the information obtained during the on-site-verification. During this verification, DFT established that there were no separate production or stock records for export and for domestic production, and discounts requested were found to be lower than claimed. As a result, the normal value was adjusted by combining the COM and the amount declared for administrative, selling and general costs. The profit rate for the final determination was based on this revised cost compared to the selling price of all (JIS and DIN) home market sales on a transaction-by-transaction basis. The total profit realised was then expressed on a unit basis by dividing by total domestics sales.

The DFT also demonstrated to the Polish respondents that the profitability of home market sales of DIN and JIS H-beams were virtually identical. *See* DFT's letter to the law firm of Hogan & Hartson on behalf of respondents responding to the comments received on the proposed final determination, at 3-4 (THAILAND - 41; THAILAND 62). The calculation consisted of the cost of production (combined for the final determination) compared to the weighted average selling price of JIS and

then DIN. *Id.* No separate production data was therefore required to calculate the profit rate.

As previously expressed, Thailand considers that the Polish exporter may have deliberately chose to separate DIN and JIS sales on the domestic market to draw the attention of the authorities away from actual home market selling prices for normal value. A comparison of actual domestic prices and export prices revealed substantial dumping.

It is also clear that the Polish respondent assumed that normal value based on a constructed value for a dumping margin calculation would be more preferable in that an average profit margin could be used. However, they failed to recognise the standard approach of establishing profit on identical and/or the same category of goods. As a result of this calculation, the dumping margin established is virtually identical to the one that would have been established if the respondent had claimed, and the Thai authorities had accepted, that domestic sales of comparable products were above 5 percent.

33. The question has been placed before the Panel whether subparagraphs (i) and (ii) of Article 2.2.2 ADA are "safe havens" whereby applying any one of the methodologies set forth therein yields a result for profit that is per se "reasonable" in the sense of Article 2.2 ADA, last sentence, and Article VI:1(b)(ii) of GATT 1994. The chapeau of Article 2.2.2 ADA sets forth the preferred methodology for determining inter alia the amount of profit in a constructed value calculation, and states that when such amount "cannot be determined on this basis" it "may be determined" on the basis of the methodologies in the subparagraphs (i) and (ii). The use of the word "may" in this context could be seen as linking the word "reasonable" in Article 2.2 to subparagraphs (i) and (ii) (which themselves do not contain the word "reasonable"), thereby introducing a "reasonability" constraint into these subparagraphs. Please comment.

First, Thailand disagrees that the term "may" in any way links the term "reasonable" in Article 2.2 to the methods of calculation in Article 2.2.2. The term "may" clearly means "is permitted to" in ordinary and common sense usage.³⁹ Article 2.2.2 essentially states that you are obligated to calculate administrative, selling and general costs and profits using method X, but if you are unable to use method X, you are permitted to use method Y or Z.

Second, Poland seems to argue that "reasonable" under Article 2.2 operates as a constraint on the level of constructed value and therefore on the level of the dumping margin. However, to effect the purpose of the Anti-Dumping Agreement - to neutralise the impact of dumped imports - "reasonable" here must mean "as close as possible to the actual dumping margin." If dumping is occurring at the rate of 500 percent, then it clearly would be reasonable to use a methodology that assigns a rate of 500 percent - even if the profit seems in some *other* sense "unreasonable".

³⁹ The definition of "may" includes "have permission to" or "be free to". Webster's Ninth New Collegiate Dictionary (Merriam-Webster 1996).

Third, it follows from the above two observations that the profit calculated under Article 2.2.2(i), (ii) or (iii) necessarily is reasonable *per se*, when the relevant conditions for using Article 2.2.2 (i), (ii) or (iii) are met—that is, when the preferred method for calculating profit cannot be used. When the conditions for using Article 2.2.2 (i), (ii), or (iii) are met, there is no permissible way to measure profit other than by using the methodologies specified under Article 2.2.2 (i), (ii), or (iii). Thus, in those circumstances, no meaning can be attached to the term "reasonable" other than what is generated by the application of Article 2.2.2 (i), (ii) or (iii), as the case may be.

34. In this context, for purposes of argument only, assume for example that application of the methodology under subparagraph (i) or (ii) of Article 2.2.2 yields a 300 per cent profit, and that this profit margin is far in excess of the profit margin on the product for the industry as a whole. Would the fact that this result was arrived at based on the correct application of subparagraph (i) or (ii) make it "reasonable" *per se*? Is there any limit on what could be accepted as "reasonable" results of calculations under subparagraphs (i) and (ii)?

As indicated in Thailand's answer to Question 33 above, a result arrived at based on the correct application of Article 2.2.2 (i) or (ii) is *per se* reasonable. The 300 percent profit figure simply means that the enterprise examined would be dumping at a level far in excess of the level at which other enterprises would be dumping if they were selling to the foreign market at equally low prices. If an investigating authority were to reduce the dumping margin because it was out of line with the industry as a whole, it would be masking, and not accurately representing, the dumping that is actually occurring. Reducing profit from the level that the producer was experiencing under Article 2.2.2(i) would actually be *unreasonable*, because it would be less accurate. Such a result would contradict the purpose of the antidumping duty law, because the foreign producer would be allowed to continue dumping, albeit at a somewhat lower level than before the investigation.

As noted above, there is no limit on what could be accepted as "reasonable" results of calculations under subparagraphs (i) and (ii). That is, of course, as long as the methodology of 2.2.2(i) is applied properly.

Thailand considers that what may occur with some frequency in anti-dumping cases is that respondents anticipate that their dumping may be attacked, and as a result, they develop a marketing and sales strategy for shielding against dumping findings in foreign markets. The strategy involves a producer selling a limited quantity of a certain item according to one specification in its home market, while selling a large quantity of an extremely similar, almost identical item, but made according to a different specification, to the foreign market. The purpose of the strategy is to set up a claim that there are small but sufficient sales of the "like" product in the home market and use of these sales for normal value will generate a low or zero margin. It is important that the Agreement be interpreted in such a way as to permit anti-dumping authorities to capture such efforts at evasion of legitimate dumping findings. (In the particular case before the Panel, the limited quantity of the product sold in the home market (JIS sales) did not reach the required 5 percent, so there was no question of comparing the home market JIS sales to the JIS sales made to Thailand).

The fact is that all H-beams constitute an obvious, natural category, and the respondent must have the burden to show why there is a major discrepancy caused by using the methodology in Article 2.2.2(i), particularly when the respondent is costing all H-beams in a single accounting database and the authorities find that profits on the like product in the home market are virtually identical to profits for the same general category of products, *i.e.*, all H-beams.

Also, it clearly was not the case in this investigation that the profit level from one product within the same general category is causing an unreasonably high profit level that was then attributed to the like product. The Thai authorities were able to run a check comparing the home market JIS H-beam profit level to the DIN/JIS H-beam profit level combined, showing that the profit levels were "virtually identical." Thus, it clearly was the case that the profit calculated for the general category of products (all home market H-beams) accurately reflects the profit of the like product.⁴⁰

35. Is the phrase "in the ordinary course of trade" as used in Article 2.2.2 relevant to determining whether there is a reasonability test for calculations of profits under the chapeau of Article 2.2.2 and/or its subparagraphs (i) and (ii)? Please explain.

The phrase sales "in the ordinary course of trade" is not relevant to determining whether there is a "reasonability test". Calculations must always be based on sales "in the ordinary course of trade." A calculation that included sales not "in the ordinary course of trade" would be an incorrect calculation - not because the figures calculated were not "reasonable," but because they were not based on sales "in the ordinary course of trade." In other words, "in the ordinary course of trade" is an "independent test" for determining whether a dumping calculation has been made correctly. Most importantly, in the circumstances of our case, neither the petitioner nor the respondent made any claim before the authorities that any of the home-market sales were not "in the ordinary course of trade." If either party had raised such a claim, the authorities could have considered whether to exclude those sales from the profit calculation. In sum, the Thai investigating authorities were entitled to assume that all sales were sales in the ordinary course of trade, absent a party demonstrating that they were not.

⁴⁰ Thailand notes that in the case where profits are virtually identical across products within the same general category of products, the profit rates for the "general category" will accurately reflect the profit rate for the "like" product. In such case, the level of profit would never reach an "unreasonable" level because it would reflect the actual profit earned by the like product in the home market. This is precisely the level intended to be used under the *chapeau* of Article 2.2.2 of the Anti-Dumping Agreement for calculating profit. In addition, during the First Oral Hearing, Thailand recalls that the Panel asked whether the absence of a reasonability constraint would create a disincentive for new or innovative companies to earn high profits. In fact, no disincentive is created. Rather, such a company must simply ensure that it does not discriminate between markets in earning such large profits.

D. Article 3 AD

36. Footnote 9 of the Anti-Dumping Agreement states that, under the Agreement, "the term injury shall, unless otherwise specified, be taken to mean material injury to a domestic industry, threat of material injury to a domestic industry or material retardation of the establishment of such an industry...". Would Thailand please confirm the nature of the injury found in its final determination, i.e. was it material injury, threat of material injury or material retardation? Please indicate the documents in the record (and specific parts of those documents) that form the basis for your response.

The Thai authorities based its preliminary and final determination on material injury. This is evidenced in the following places in the record:

- Paragraph 5 of the Preliminary Determination states that SYS was "injured". See THAILAND 25. Although it is not clear from the reference, letters from respondents contained in THAILAND - 35 and THAILAND - 40 demonstrate that they understood the basis for the injury determination.
- Page 1 of DFT's letter responding to respondents' contention that no showing was made of material injury. See THAILAND - 41; THAILAND - 62.
- Paragraph 6 of the DFT's report to the CDS Committee in which the Secretariat confirms the recommendation that dumping has caused "material injury". See THAILAND - 43.
- Paragraph 5 of the DIT's report to the CDS Committee stating that the "DIT is of the opinion that the imports from Poland had caused material injury." See THAILAND - 44.
- Paragraph 2 of the Final Determination states that imports of H-beams from Poland resulted in "material injury" to the domestic industry and that "[m]aterial injury was found because of the following reasons: ..." See THAILAND - 46; THAILAND - 63.

37. We note that in paragraph 1.8.2 of Exhibit THAILAND-44, information is provided concerning Poland's percent share of total imports during three years (31 percent, 48 percent and 57 percent, respectively). In paragraph 4.2 of the same document, the same percentages during the same years seem to be presented as Poland's share of the Thai market. Please clarify.

A word-for-word translation of the first part of paragraph 4.2 is as follows:

"The import of H-beam from Poland expanded continuously by increasing at 16 percent in 1995 by 13 percent during the IP at the same time the total import into Thailand declined by 25 percent in 1995 and by 4 percent in IP leading to the imports from Poland when comparing with the total imports increases from 31 percent in 1994 to 48 percent and 57 percent in 1995 and IP, respectively..."

See THAILAND - 64. Both paragraph 1.8.2 and paragraph 4.2 refer to Poland's percent share of total imports.

39. To the extent that you feel that it is significant to your case, please provide in the same table format as described above the information that you consider relevant concerning the Article 3.4 factors such as requested from Poland in question 38.

As stated in response to Question 7(b) from the Panel, Thailand considers this question to be unfair and prejudicial to Thailand's defence. Thailand considers that it should not be placed in a position to determine whether such a table is or is not significant in the absence of any specific claims from Poland regarding Article 3.4. However, in order to respond in good faith, Thailand will provide its views on the appropriate interpretation of Article 3.4 and will provide a response to the Question based on its understanding of Poland's purported claims as set out in its First Written Submission.

First, Thailand supports the EC's interpretation as a permissible interpretation of Article 3.4 of the Agreement. Accordingly, Thailand similarly believes that Article 3.4 does not set forth a list of mandatory factors that must be considered in every case. As the EC stated in paragraph 40 of its Third Party Submission, the 1992 panel in *United States - Salmon* confirmed the illustrative nature of the list of factors.⁴¹ Although this finding was made under the slightly different language of the Tokyo Round Code, the illustrative nature of the list is still confirmed by the use of the two words "or" within Article 3.4 of the Anti-Dumping Agreement.

Thailand recalls that the Panel provided the following hypothetical (or one similar thereto) to the Third Parties: When could a decision be made if a treaty provided that "a decision must be agreed to by all major trading nations, including the EC, Japan and the United States"? The Panel then asked whether the Third Parties agreed that all three listed nations must agree in order for a decision under the treaty to be effective. Thailand considers that a more appropriate hypothetical would be: When could a decision be made if a treaty provided that "a decision must be agreed to by all relevant major trading nations for which the decision has a bearing, including the EC, Japan, or the United States; Australia; Brazil, Argentina, or Venezuela." Under this hypothetical, it is clearly not the case that all of the nations listed must agree in order for a decision to be effective. The only question is whether only the countries for which the decision is relevant as having a bearing must agree or whether at least one country from each of the groups divided by semi-colons must agree. In any event, under the EC's interpretation, it is clear that Thailand complied with Article 3.4.

To the extent that the Panel rejects the above interpretation, Thailand considers that only one other permissible interpretation exists that gives full effect to the text of the provision in its context and with consideration of its object and purpose.

⁴¹ In addition to the citation cited by the EC, the panel also stated that it "considered, in light of its review of the analysis undertaken by the USITC that the USITC had not failed to carry out 'an evaluation of all relevant economic factors and indices having a bearing on the state of the industry' as provided for in Article 3:3. The factors considered by the USITC (consumption, production, production capacity, shipments, employment sales, profits and operating losses, cash flow) were specifically mentioned in the (illustrative) list of 'relevant economic factors and indices' in Article 3:3."

Report by the Panel, *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, para. 537 (adopted 27 Apr. 1994).

This interpretation provides that an authority must conduct "an evaluation of all relevant economic factors and indices having a bearing on the state of the industry." These relevant economic factors include the following *four* factors: (1) actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilisation of capacity; (2) factors affecting domestic prices; (3) the magnitude of the margin of dumping; and (4) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. Notably, these "factors" provide more flexibility than the factors listed in, for example, the Agreement on Safeguards, as should be the case given the lower standard of injury in the Anti-Dumping Agreement. Factors (1) and (4) relate to the actual and potential "decline" or "negative effects" on a series of indices separated by "or". Thus, an evaluation of factors (1) and (4) involve an evaluation of the actual and potential decline or negative effect of at least one of the indices in each of the lists. Factors (2) and (3) are somewhat vague and suggest that the authority has wide discretion regarding how to evaluate them.

Poland's only purported claim is that Thailand "chose not to present evidence regarding profits, losses, profitability or cash flow." Under the Panel's interpretation, Poland is apparently claiming that Thailand failed to "consider" factors (1) and (4), but has not claimed that Thailand failed to evaluate them. Thailand provides the following table based on Poland's purported claim.

Factor	Consid.?	Where ⁴²	Eval.?	Where
(1) actual or potential decline in sales, profits, output, market share, productivity, return on investments, <i>or</i> utilisation of capacity	Yes	Profits/losses and profitability considered: - Para. 11 and attached table in THAILAND - 37 - Page 1 of THAILAND - 41 - Pages 3 and 11-12 in THAILAND - 44 - Paragraph 2.3 in THAILAND - 46	N/A	N/A
(2) factors affecting domestic prices	N/A	N/A	N/A	N/A
(3) the magnitude of the margin of dumping	N/A	N/A	N/A	N/A
(4) actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital <i>or</i> investments	Yes	Cash flow considered: - Paragraph 2.3 in THAILAND - 46	N/A	N/A

"N/A" - Not Applicable

⁴² The statements in the record were provided in paras. 98 to 101. Poland has offered no response to Thailand's position.

40. Please comment on the hypothesis that a two-stage analysis of the factors listed in Article 3.4 ADA is required. The first stage would be an initial "consideration" to determine the "relevance" or lack thereof of each listed factor and an identification of any other non-listed factors that also were relevant. The second stage would be a full analysis of all of the factors that had been identified as relevant. In other words, the factors in Article 3.4 would be seen as a checklist of what would need to be "considered" in respect of whether or not each factor was relevant. If a given factor were deemed not to be relevant, the analysis of that factor could stop at that point. Under this hypothesis, the final determination would have to address each factor in the checklist, and for each of those that had been deemed not to be relevant would simply indicate that this was the case and why. For each relevant factor, the final determination would have to indicate why it had been deemed to be relevant and in addition would have to contain a full "evaluation" of it. (Please note that the reference to the "final determination" is not necessarily intended to imply the public notice thereof, but rather the report compiled by the investigating authority concerning the investigation, which might or might not be the same as the public notice.)

- (a) Please indicate whether you agree or disagree with all or part of this hypothesis and explain in detail the legal basis for your view.

Thailand considers that the above analytical approach could be used by an investigating authority. Thailand, however, does not find any support in the text of the article itself for imposing an obligation that such authority indicate whether a factor is or is not relevant and why. The text of Article 3.4 of the Anti-Dumping Agreement is much more limited and merely states that "[t]he examination ... shall include an evaluation."

Thailand considers, therefore, that the only question for the Panel is whether, in accordance with the applicable standard of review, the authority conducted the referenced evaluation. If an authority has made such evaluation, the Panel may then move to determine, again under the applicable standard of review and if within the matter in dispute, whether this evaluation supports an affirmative injury determination. Finally, Thailand notes that in this particular case, the interpretation of Article 3.4 is not relevant to address the specific claims raised by Poland. Poland had the obligation to present and to prove its claim that a particular factor was or was not evaluated. Poland has neither presented nor proved such a claim in its affirmative case or otherwise.

- (b) If you disagree with this hypothesis, please explain how, without "considering" each factor, its relevance or irrelevance can be judged.

Thailand considers that it is solely for the Thai authorities, not for a panel, to judge whether certain factors as relevant or not. The text of the Agreement does not provide for such an assessment, indicating that the drafters viewed such "consideration" as wholly within the discretion of an authority which has the requisite expertise to make such a judgement. Thus, in accordance with the text of Article 3.4, with the matter in dispute and with the applicable standard of review, the Panel is to review only whether the authority has or has not conducted an examination in which it evaluated factors. The factors examined are those that the authority itself considers relevant and such consideration is not subject to a panel's review.

- (c) Is it your view that if an examination of several factors led to a conclusion of injury, it would not be necessary to "consider" any of the other factors? Please explain.

Thailand considers that this would only be the case if the remaining factors, even if found relevant and found to indicate no injury, could not counterbalance the finding of injury using the evaluated factors. Article 3.4 seems to contemplate this in stating that "[t]his list is not exhaustive, nor can one or several of these factors *necessarily* give decisive guidance." (Emphasis added) The use of "necessarily" suggests that even one factor alone could give decisive guidance.

Thailand considers that the Panel must distinguish between an appropriate (or most appropriate) method for an authority to conduct an anti-dumping investigation and the manner in which a WTO panel reviews an investigation to determine whether it is consistent with the Anti-Dumping Agreement. If a Member considers that the authorities of another Member reached an affirmative injury determination inconsistently with its obligations under Article 3.4, the complaining Member has the burden to present and prove such claim. The complaining Member could claim, for example, that the authority's determination was biased or subjective because it failed to evaluate a particular factor or factors that if evaluated would outweigh the negative impact shown by the factors actually evaluated. The Panel would then review the Thai authorities' approach to determine if omitting the evaluation of such factor was biased or subjective.

41. Please describe the nature of the "relevance" of a factor in the context of Article 3.4 ADA. Is a factor "relevant" only when it supports an affirmative finding of injury, or should "relevance" be judged on a more broad basis, for example in the sense of whether or not a particular factor is informative as to the "state of the industry"? Is a factor also "relevant" when it does not support an affirmative finding of injury? Please explain in detail.

Thailand considers that a factor is "relevant" if its analysis could potentially impact the investigating authorities' determination of injury by having a bearing on the state of the industry. Thailand considers that a factor not supporting an affirmative finding of injury may well be relevant to the injury analysis.

42. What is the significance of the fact that the term "such as" in Article 3.3 of the Tokyo Round Anti-dumping code was changed to "including" in Article 3.4 of the Uruguay Round Anti-dumping Agreement? If no change in meaning was intended, why was a change in terminology made? According to the Concise Oxford Dictionary (1990 ed.), the verb "include" means to "comprise or reckon in as part of a whole" or to "enclose". The term "such as" means "like" or "for example". Please explain in what sense, if any, these definitions could be viewed as synonymous.

Thailand believes that the drafters did not intend that this change in the language of the Anti-Dumping Agreement would have any effect on the interpretation. In the context of the Anti-Dumping Agreement, Thailand considers "such as" and "including" to be synonymous to the extent that they both require an investigating authority to evaluate all *relevant* factors set out after "such as" or "including". Moreover, Thailand's position that the change was unintentional is supported by the fact that the drafters also rearranged the items listed in Article 3:3 of the Tokyo Round

Code from "output, sales, market share, profits" to "sales, profits, output, market share" in Article 3.4 of the Anti-Dumping Agreement.

Thailand considers that regardless of the effect given to "including", the Panel must also give effect to the two uses of the word "or" in Article 3.4. Finally, Thailand notes that no matter how Article 3.4 is interpreted, an investigating authority must still have a basis for finding material injury, whether using one or numerous factors and whether consideration of the factors is mandatory or not.

43. Please comment on the use of the word "or" at two places in the list of the factors in Article 3.4 ADA, as well as on the use of semi-colons between subgroups of factors in that Article. In particular, what is the significance, if any, of the fact that the word "or" appears only *within* subgroups of factors which are separated by semi-colons, and not *between* those subgroups?

Thailand supports the arguments advanced by the European Communities' in paragraph 41 of its Third Party submission:

"the presence of the conjunction "or" to link some of the listed factors necessarily implies that the investigating authorities are left the discretion to decide which of the factors and indices listed can be considered relevant and which not in each particular case. If the Article 3.4 list had a mandatory nature and "all" factors and indices listed had to be evaluate, the drafters of the ADA would have used the conjunction "and", as they had not hesitated doing in many other contexts."

In the alternative, Thailand directs the Panel to its permissible interpretation in response to Question 39 from the Panel. That interpretation gives the appropriate meaning and effect to the use of "or" within relevant factors. Thailand disagrees with the Panel's narrowing of the term "factors" to mean less than what is separated by the semi-colons.

46. To the extent that you feel that it is significant to your case, please provide the information that you consider relevant concerning the determination of causation such as requested from Poland in question 44.

Thailand considers that it is unfair and prejudicial to ask Thailand to consider whether such a question is or is not significant in the absence of any specific claims from Poland regarding Article 3.5. In any event, as stated in response to Question 7(b), Poland has offered no new arguments or assertions regarding Thailand's compliance with Article 3.5. Moreover, it is not Thailand's burden to demonstrate compliance with each and every aspect of Article 3.5 in the absence of any properly presented or precise claims to the contrary. As a result, Thailand can only direct the Panel to its response already provided in paragraphs 107 and 108 of its First Written Submission. In good faith, Thailand also directs the Panel, *inter alia*, to

- Paragraphs 1 to 16 of the Draft Information on Injury and the attached tables;
- Confidential Table attached as THAILAND - 67 reflecting in English the information on average quarterly prices supplied to the CDS Committee and the non-confidential information reported to Poland;

- Pages 1-2 of DFT's response to Hogan & Hartson (THAILAND - 62; THAILAND - 41);
- Sections 1, 3, 4, and 5 of the Confidential Report to the CDS Committee (THAILAND - 44); and
- Paragraphs 2.2 to 2.5 in the Final Determination (THAILAND - 45).

47. To the extent that you feel that it is significant to your case, please provide the information that you consider relevant concerning the consideration of factors other than imports such as requested from Poland in question 45.

Thailand considers that it is unfair and prejudicial to ask Thailand to consider whether such a question is or is not significant in the absence of any specific claims from Poland regarding Article 3.5. For example, Poland has never indicated where respondents raised any specific concern regarding the effects of the Kobe earthquake that were not analysed in the context of the effects of global market conditions. As a result, Thailand can only direct the Panel to its response already provided in paragraphs 109 to 115 of its First Written Submission.

48. Where in the record is the substantiation for your assertion concerning which producer, Huta Katowice or SYS, was the price leader during the POI? Where in the record are the supporting data relevant to your views concerning the finding of price suppression/depression?

As the record reflects, SYS decreased its prices in negotiations with its customers in order to keep or win business in the face of unfair import competition. To do so, it had to match consistently lower Polish offer prices. However, the Polish imports certainly won a considerable amount of business, despite SYS's attempts to compete, and the prices displayed in the sales made by the respondents were lower than those otherwise seen in the domestic market. Thus, Polish prices were lower both in the sense that their offer prices to customers were lower, forcing SYS to lower prices to meet the competition, and in the sense that the sales that they did win were at even lower prices. The "price leader" statement is based on these effects in the market.

As provided in response to Question 10 from Poland, it is also instructive to view the movements of actual prices, given the fact that the Polish respondent offered a price [X-Conf.] months in advance of delivery, and SYS offered a price [X-Conf.] month in advance. As a result, SYS was competing with prices in, for example, Quarter 1 that were reflected in Polish price data for Quarter 2. Thus, using the confidential average quarterly prices provided in THAILAND - 67, the authorities' comparison of quarterly price movements was as follows:

Period	Poland	Movement	Period	SYS	Movement
QTR 2/95	[P]		QTR 1/95	[P+ 1,000.38]	
QTR 3/95	[P+ 739.21]	+	QTR 2/95	[P+ 2,104.38]	+
QTR 4/95	[P+ 2,422.32]	+	QTR 3/95	[P+ 3,002.38]	+
QTR 1/96	[P+ 605.37]	-	QTR 4/95	[P+ 2,869.38]	-
QTR 2/96	[P+ 174.82]	-	QTR 1/96	[P+ 1,974.38]	-

Thus, SYS prices and Polish prices not only moved in the same direction, but the Polish respondent was the price leader.

The data relevant to the authorities' finding of price depression and suppression can be found, *inter alia*, in THAILAND - 1, THAILAND - 20 (section G), THAILAND - 52, THAILAND - 53 (Summarised Information of SYS, additional information submitted on 15 July 1996), and THAILAND - 68 (attachment G-2 to SYS injury questionnaire response).

49. Under what circumstances, or in respect of what sorts of factors, if any, is it the responsibility of the investigating authority to seek information concerning the potential effects of "known" factors other than dumped imports that might be causing injury, and when does the responsibility fall to the responding party to bring such issues to the attention of the investigating authority? For example, if the importing country is in an economic recession, certainly the authority and all interested parties will "know" this. Would the authority have the responsibility on its own initiative to try to identify the specific effects of the recession in the domestic market for the product under investigation, or would it only have to consider this issue if it were raised by an interested party? Would it make a difference if the factor in question was not something widely known but rather was known only to the investigating authority and the domestic industry (i.e., not to the respondent)? Please explain and provide the legal basis for your view.

Thailand respectfully refers to its response in paragraphs 109 to 115 of its First Written Submission. The responsibility to seek information concerning potential effects of "other factors" only arises when such factors are made "known" to the investigating authority in the context of the investigation at issue. In Thailand's view, "other factors" can only be "known" to the investigating authority if they are evident from responses from interested parties, *i.e.*, either the petitioner or respondents. This position is supported by the use of the term "known" in Article 3.5 and the use of the language "[f]actors which may be relevant in this respect include, *inter alia*..."

If a particular region is in an economic recession, the authorities and interested parties may generally have knowledge of it. However, the authorities cannot be presumed to "know" that the economic recession in any way has an effect on the state of the particular industry under investigation for purposes of Article 3.5 of the Anti-Dumping Agreement. Without input from interested parties, the investigating authority cannot be expected to affirmatively identify the infinite number of "other factors" that may or may not affect the domestic industry. In fact, when looking at the next step, *i.e.*, injury caused by such other factor, it would seem logical that the respondents must raise some presumption that the other factor is causing injury to the domestic industry. This would be no different that the petitioner's burden to show material injury as a result of dumped imports. Otherwise, investigating authorities would

be left with an infinite number of factors for which injury assessments would need to be made.

With respect to the final question, Thailand reiterates that if a factor becomes "known" because it was referenced in submissions from interested parties then the authorities must determine whether such factor is or is not injuring the domestic industry. It appears that the Panel's questioning suggests that investigating authorities should be obligated to seek out any obscure factor that the petitioner has not disclosed, that is not known to the respondents, but that is nevertheless an "other factor" causing injury. Thailand views such a standard as impossible to meet, given the infinite number of industry-specific factors that could affect the state of an industry and the limited resources available to most authorities. The respondents must take some responsibility for defending their interests and some responsibility to know and present the factors that may affect an industry in which they are directly participating.

E. Article 17.6 AD: Standard of Review

50. Would Thailand please discuss in detail in what respects it believes that Article 17.6 AD "defines" and "modifies" Members' obligations under the AD Agreement. Where, specifically, would these considerations be relevant to the Panel's examination in this dispute?

The obligations of a WTO Member applying anti-dumping measures are substantively defined by the specific provisions of the Anti-Dumping Agreement, such as Articles 2, 3, 5 and 6. However, a Member's compliance with such obligations is determined based on panel review under the standard of review provided under Article 17.6 of the Anti-Dumping Agreement. In other words, the Panel is to examine compliance only and exclusively through the lens of Article 17.6. Thus, although the substantive and procedural obligations imposed on a Member remain unaffected by Article 17.6, they are *as such* not the object of these proceedings. Therefore, the Panel could only find Thailand in violation of its procedural or substantive obligations after applying the standard of review under Article 17.6 in order to determine compliance. It is only in this sense that the relevant procedural and substantive obligations of Thailand are "defined" or "modified" by Article 17.6.

Although the Panel could examine whether Thailand has complied with a particular substantive obligation, such exercise would seem academic if it does not help answering the relevant questions posed by Article 17.6: (1) Did Thailand not properly establish the facts? (2) Were the Thai authorities acting with bias in their evaluations? Were the evaluations subjective (or un-objective)? (3) Are the interpretations applied by the Thai authorities impermissible under customary rules of treaty interpretation? In other words, although Thailand may be substantively obligated to provide a *correct* establishment of the *true* facts, this obligation is not subject to panel review. Only a part, or less stringent version, of such obligation is in dispute: the *proper* establishment of the facts. If the establishment of the facts was proper, it is irrelevant whether, in the end, the facts turn out to be different than established. Moreover, although Thailand may be substantively obligated to provide *correct* evaluations of the facts, this obligation is not subject to panel review. Only a part, or a less stringent version, of the obligation is relevant: the *unbiased and objective*

evaluation. Finally, although Thailand is substantively obligated to apply the *correct* interpretations of provisions of the Anti-Dumping Agreement and although panels and the Appellate Body are competent to provide authoritative and thus *correct* interpretations of the WTO Agreement, the question is not whether the interpretation applied by Thailand is the *correct* one, but whether it is a *permissible* one.

51. Would Thailand please explain its statement that in most instances, Article 17.6(i), rather than Article 17.6(ii), is the standard to be applied to the Thai authorities' examinations and determinations. That is, to what particular aspects of the investigation at issue in this dispute does each apply?

The crucial steps in anti-dumping investigations are the authorities' determinations, or assessments of dumping, injury and causation. Of course, it is a matter of legal interpretation what the actual terms "dumping", "injury" and "causation" mean. However, once a (permissible) interpretation of these concepts is found, and once the relevant economic data or facts are (properly) established, the actual assessment or conclusion whether there is such dumping, injury and causal link is a matter of an (unbiased and objective) evaluation of the economic facts established, *i.e.*, review under the "evaluation" clause of Article 17.6 (i).

As Thailand has repeatedly stated throughout this dispute, Poland has failed to even assert, much less substantiate, that Thailand has failed to establish the facts properly, failed to make unbiased or objective evaluations, or failed to apply permissible interpretations. Thus, Thailand remains uncertain as to both the purported claims at issue in this dispute and the applicable standard of review provision of Article 17.6 that should apply to such issues. Again, Poland's approach has directly resulted in denying Thailand the opportunity to offer a meaningful response to the Panel's question.

In general, Thailand considers that Article 17.6 addresses the specific steps to be taken in an anti-dumping investigation under the Anti-Dumping Agreement and establishes different levels of deference with regard to the aspects of these steps. In addition, Thailand does not agree that paragraph (i) of Article 17.6 is solely "about facts" and Paragraph (ii) is solely "about law." The question here is: which step in the investigation by the Thai authorities is addressed under which part of the specific system of review established by Article 17.6 of the ADA?

Article 17.6 (i) is intended to specifically address the application of law to fact (or "mixed questions") in the context of the authorities' determinations in anti-dumping investigations and to take account of the fact that these evaluations are primarily economic in nature. The drafters of Article 17.6(i) have clearly, and appropriately, established a standard providing that these evaluations are highly complex and cannot usefully be replaced by panel review beyond the exclusion of bias and subjectivity. Thailand considers that the requirement of "unbiased and objective evaluation" in Article 17.6 (i) constitutes the *lex specialis* for the entire process of determination, or assessment, of dumping, injury and causation.

Past panels have understood this clearly and applied Article 17.6 (i) accordingly. The panel in *United States - DRAMS* was called upon to examine the determinations made by the U.S. investigating authorities regarding the requirement that the data examined "reasonably reflect the costs associated with the production and sale" under Article 2.2.1.1 of the Anti-Dumping Agreement. Of course, this determination

arguably involves a legal step of interpretation, *inter alia*, of the terms "reasonably" and "associated with". However, the panel concluded without hesitation that this complex and primarily economic assessment by the authorities, as a whole, is an "evaluation" under Article 17.6 (i):

" [I]n light of Articles 17.5(ii) and 17.6(i) of the AD Agreement, Korea's claim would require us to determine whether, given the record evidence before the DOC, an unbiased and objective investigating authority could properly have found that the Flamm study did not 'reasonably reflect the costs associated with the production and sale' of DRAMs."⁴³

Of course, before applying this test and the standard of Article 17.6 (i) of the Anti-Dumping Agreement, the panel had first to examine whether Korea's legal interpretation, *i.e.*, that Article 2.2.1.1 of the Anti-Dumping Agreement requires a Member to accept projections of future costs based on historical cost data as relevant data, was "permissible" under Article 17.6 (ii). Once the panel accepted Korea's legal interpretation for the sake of argument, however, the complex assessment as a whole and the conclusions by the investigating U.S. authorities were a matter of "unbiased and objective evaluation" in accordance with Article 17.6 (i).

Other panels have applied Article 17.6 of the Anti-Dumping Agreement in a similar way. Notably, they have done so in the context of Article 5.3 of the Anti-Dumping Agreement, *i.e.*, examining the question of whether there was "sufficient evidence" to initiate an investigation. The panels in *Guatemala - Cement* and *Mexico - HFCS* found that the determination of "sufficient evidence" is an evaluation within the meaning of Article 17.6 (i):

"What constitutes 'sufficient evidence' to justify the initiation of an anti-dumping investigation is not defined in the ADP Agreement. In this case, of course, we are bound by the requirements of Article 17.6(i) of the ADP Agreement as the standard of review applicable to our examination of the Ministry's decision to initiate."⁴⁴

"We believe that the approach taken by the Panel in the *Softwood Lumber* dispute is a sensible one and is consistent with the standard of review under Article 17.6(i). Thus, we agree with the Panel in *Softwood Lumber* that our role is not to evaluate anew the evidence and information before the Ministry at the time it decided to initiate. Rather, we are to examine whether the evidence relied on by the Ministry was sufficient, that is, *whether an unbiased and objective investigating authority evaluating that evidence could properly have determined* that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation."⁴⁵ (Emphasis added, footnote omitted)

⁴³ *United States - DRAMs*, Panel Report, WT/DS99/R, DSR 199:II, 521, para. 6.67. See also paras. 6.69, 6.72 and 6.73.

⁴⁴ *Guatemala - Cement*, Panel Report, *supra*, footnote 13, WT/DS60/R, para 7.54.

⁴⁵ *Mexico - HFCS*, Panel Report, WT/DS 132/R, *supra*, footnote 6, para. 7.57.

Thailand considers that if the standard of Article 17.6 (i) - unbiased and objective evaluation - covers the act of determining that there is "sufficient evidence" of dumping, injury and causal link, it also covers *a fortiori* the act of determining the actual existence of dumping, injury and causal link.

52. Please comment on the relationship, if any, between Article 17.6 ADA and Article 11 DSU, in particular whether or not these provisions must be read together, drawing on elements from both except to the extent that they "differ" in the sense of Article 1.2 DSU, in which case Article 17.6 ADA would prevail. Please comment on whether you believe this is the correct approach, and whether you do or do not see such a "difference" between Article 11 DSU and Article 17.6 ADA. Please describe any such difference. In this context, please discuss the Appellate Body's statement in *Argentina - Footwear Safeguard*:

"[F]or all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels¹. 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, Article 17.6, sets out a special standard of review for disputes arising under that Agreement*" (underlining supplied).

¹ 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, para. 2.67

Thailand agrees with the Appellate Body's *dictum* in *Argentina - Footwear*. Article 11 of the DSU provides the standard of review applicable to all covered agreements, including, in principle, the Anti-Dumping Agreement, but only to the extent that Article 17.6 of the Agreement as *lex specialis*, expressly listed in Appendix 2 of the DSU, does not provide for a "different" standard. As Thailand has explained during the course of these proceedings, this standard is clearly different from the one established by Article 11 of the DSU and provides for considerably more deference with respect to the establishment of the facts, the evaluation of the facts, and the interpretation of the applicable provisions of the Anti-Dumping Agreement.

Article 11 of the DSU asks a panel to make an "objective assessment of the matter before it, including [1] an objective assessment of the facts of the case and [2] the applicability of and conformity with the relevant covered agreements." It is clear that for both steps, Article 17.6 of the Anti-Dumping Agreement provides for a specific approach to the review of an anti-dumping measure, and thus differs from the standard of review under Article 11 of the DSU. For example, in reviewing an anti-dumping measure, a panel is not to make an "objective [(i.e., authoritative)] assessment of the facts" and determine the measure's "conformity with the relevant covered agreements [(i.e., with the panel's interpretations)]." Rather, "in its assessment of the facts of the matter", a panel is to examine solely whether the authorities established the data properly and whether their evaluation was unbiased and objective.

Thailand also considers that Article 17.6(ii) is "different" from Article 11 of the DSU regarding the interpretation of the pertinent provisions of the Anti-Dumping Agreement. Article 17.6 (ii) applies to all provisions relevant for the question before

the panel, *i.e.*, whether the defending Member and its authorities acted in accordance with the provisions of the Anti-Dumping Agreement. Article 11 of the DSU directs a panel to assess the conformity of a Member's actions with the relevant covered agreement. In other words, it directs a panel to review whether a Member's applications of law are correct, *i.e.*, consistent with the Panel's own authoritative interpretations of that agreement. Article 17.6 (ii) provides for a different, special standard with regard to all interpretations in the application of the Anti-Dumping Agreement: Where the application of legal concepts outside of the complex determinations themselves is concerned, the Panel is bound to assess the conformity of the measure with the Anti-Dumping Agreement not, as usually under Article 11 DSU, according to its own interpretation of the same but according to all interpretations that are to be respected as "permissible".

53. The parties seem to agree that the appropriate standard of review is somewhere between *de novo* review and total deference. We note that within Article 17.6 itself, the two subparagraphs arguably could be viewed as establishing different levels of review or deference pertaining to two different types of issues. Subparagraph (i) concerns facts and arguably requires a considerable degree of deference and thus relatively limited review by a Panel. By contrast, subparagraph (ii) concerns issues of law and the question of multiple "permissible" interpretations of a given provision of the ADA, among which a national investigating authority is free to choose. Some commentators believe that rarely if ever can there be more than one permissible interpretation of any given treaty provision. This might arguably mean that the required degree of deference under (ii) would be less than under (i). Furthermore, the question arises as to when, if at all, the establishment or evaluation of "facts" by an investigating authority becomes a question of law or legal interpretation under the Anti-dumping Agreement (e.g., where the issue is whether a certain set of facts satisfies a given treaty provision). The question of this "penumbra" between fact and law could be particularly relevant in the context of the Anti-dumping Agreement.

- (a) Please comment on your views as to the nature of the differences between the two subparagraphs of Article 17.6 (coverage, degree of deference required, etc.).

Thailand refers to its Responses to Questions 50 to 52 above regarding its views on the coverage of the two subparagraphs of Article 17.6 of the Anti-Dumping Agreement. Thailand wishes to emphasise that it does not consider that subparagraph (i) of Article 17.6 is limited strictly to "facts". Article 17.6 (i), in Thailand's view, clearly deals with questions of the application of legal concepts to facts (or the "penumbra") in the evaluation of whether, for example, an authorities determinations of dumping, injury and causal link are consistent with its obligations under the Anti-Dumping Agreement.

Regarding the degree of deference, Thailand refers to its extensive treatment of the issue in its First Written Submission. Thailand considers that a Member's authorities must be accorded substantial deference under Article 17.6(i) in order to uphold the intent of the drafters. With respect to Article 17.6 (ii), Thailand considers respectfully that it is not necessarily relevant whether commentators would conclude that rarely, if ever, may there be more than one "permissible" interpretation under the

customary rules of treaty interpretation, as codified in Articles 31 and 32 of the Vienna Convention. Thailand submits that this is a narrow and incorrect reading of the term "permissible", which was introduced precisely to allow panels more flexibility for accepting legal interpretations on the highly complex and technical legal provisions under the Anti-Dumping Agreement.

Of course, it is the very purpose of rules of interpretation and of interpretation itself to ideally lead to one interpretation. However, it seems rather odd to assert that this is always, or even regularly, the case in practice. This would mean, for example, that a panel would have to ignore the significant disagreement among the WTO Members, *i.e.*, the parties to the treaty, within the AHG regarding the correct interpretation of numerous key provisions. It would also mean that the panel would necessarily remove most of the value of academic discussions by learned legal scholars, as all but one of the diverging interpretations advanced in such debates would have to be considered "impermissible", *i.e.*, not justifiable under the customary rules of treaty interpretation.

The text, the context, the object and purpose, the subsequent practice, and the negotiating history of the provision strongly suggest that there is often room for diverging "permissible" interpretations of provisions of the Anti-Dumping Agreement. The term "permissible," thus, recognises the fact that in many cases there will be disagreement on the correct interpretation, even among WTO Members and learned experts applying customary rules of treaty interpretation. Thailand respectfully submits that the Panel should give due weight to this term and to interpret the corresponding elements of Article 17.6 (ii) accordingly.

- (b) Please also describe the standard of review that you believe should apply to issues that fall within the penumbra between factual and legal issues as described above. Is it the standard in 17.6(i), 17.6(ii), or some other standard. Please explain in detail.

Please see Thailand's response to Question 53 (c) below.

- (c) Please identify the standard of review (subparagraph (i), subparagraph (ii) or a standard of review applicable in the penumbra if different from (i) or (ii)) that you believe is applicable to each issue before the Panel in this case, and please explain your reasoning.

Thailand notes again that the standard of review applicable to the "penumbra" between law and fact is found in the "unbiased and objective evaluation" portion of Article 17.6(i). As stated throughout this proceeding, Thailand does not know the precise issues before the Panel because Poland has failed to present them properly and with any degree of clarity. Thailand's inability to respond to this question with any detail simply evidences the continuing prejudice to its defence caused by Poland's imprecise pleading and its violation of Thailand's due process rights under Article 6.2 of the DSU.

In general, Thailand considers that the proper establishment of the facts under Article 17.6(i) refers to whether or not information and evidence was or was not, in fact, collected or examined and whether or not the relevant procedures were fair and consistent with the Anti-Dumping Agreement. For example, this would apply in de-

termining whether the Thai authorities collected data properly for calculating constructed value. Thailand considers that the evaluation of the facts under Article 17.6(i) covers issues within the "penumbra", including whether, for example, factors under Article 3.1 of the Anti-Dumping Agreement do or do not support an affirmative finding of material injury. Finally, Article 17.6(ii) covers legal interpretations, such as whether Article 5.5 of the Anti-Dumping Agreement requires written notification.

THAILAND'S RESPONSES TO POLAND'S QUESTIONS

1. Does the Antidumping Agreement apply different rules to new producers? Throughout the investigation, your administration characterized SYS as a "new entrant" that in its "early stages" deserved "timely cost recovery". Where are such factors to be considered in the AD Agreement?

The Anti-Dumping Agreement does not apply different rules to new producers in assessing whether a domestic industry has been materially injured as a result of dumped imports. The references in the question were not "factors" under the Anti-Dumping Agreement, but rather were noted by the Thai authorities in their analysis as conditions of competition relevant to their injury analysis.

In examining the consequent impact of the dumped imports on the domestic industry under Article 3.1 of the Anti-Dumping Agreement, the Thai investigating authorities considered the relevant factors in Article 3.4 of the Anti-Dumping Agreement and evaluated such factors in light of the particular circumstances and conditions of competition in the Thai domestic H-beam industry. Certainly, Thailand must consider such conditions and circumstances, and failure to do so may raise serious questions regarding compliance with the Anti-Dumping Agreement. Moreover, Poland has not provided a reference to any provision of the Anti-Dumping Agreement that prohibits an investigating authority from considering the circumstances and conditions of a domestic industry, whether they indicate more or less vulnerability to material injury from dumped imports.

2. Your authorities characterized steel as a "target industry" of the Thai Crown. What special rights or protections does SYS enjoy as a result?

Poland apparently takes the phrase "target industry" from paragraph 2 of the Final Injury Determination in Exhibit THAILAND - 46. The full paragraph states that

"The DIT is of the opinion that the imports from Poland had caused material injury to the Thai domestic industry producing like product. Moreover, this is a target industry which the Royal Thai Government is seeking to *promote fair competition* in Thailand and that it shall favorably reflect upon the Thai construction industry in the future."

(Emphasis added). In other words, Thailand identified the Thai steel industry as a domestic industry that was suffering from unfair competition from imports. Accordingly, consistent with its WTO rights and obligations, Thailand could impose remedial measures in the form of anti-dumping duties if unfairly dumped imports were causing material injury to the industry.

3. We understand that at the time of this investigation, Thai law did not require that investigating authorities find that the impact of dumped imports was "significant" in order to find that they caused injury to a domestic industry. The Thai law has apparently been changed since then. Is our understanding correct? If so, how could your finding of injury possibly comply with Article 3.2 ADA?

Thailand notes that Poland has repeatedly misinterpreted Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement. In the question above, in paragraph 53 of its First Written Submission, in paragraph 39 of its First Oral Statement and in its Concluding Statement to the First Oral Hearing, Poland contends that Articles 3.1, 3.2, and 3.4 of the Anti-Dumping Agreement require that Thailand determine that the consequent impact of the dumped imports on the domestic industry was "significant" and therefore "material" in order to justify an affirmative injury determination. Neither Article 3.1 nor Article 3.2 of the Anti-Dumping Agreement require that the consequent impact of the dumped imports on the domestic industry must be "significant". Moreover, Article 3.4 provides that the "examination of the impact of the dumped imports on the domestic industry concerned shall include" the referenced evaluation. Article 3.4, however, similarly does not provide that the examination must show a "significant" effect. Thailand considers that Poland's interpretation may explain why it disagrees with Thailand's conclusions regarding its evaluation of the consequent impact of the dumped imports on the domestic industry.

Thailand applied its domestic law in full compliance with the requirements under Article VI of GATT 1994 and the Anti-Dumping Agreement. Thailand is not obligated to determine whether dumped imports had a "significant" effect on the domestic industry. Thus, Thailand did not need this provision in Thai law either at the time of the investigation or now.

As Poland may already know, Thailand was asked a question relating to Article 3.2 by the United States after reviewing the relevant domestic legislation:

"Question (US 10)

Article 7.2(1) of the Notification specifies the Committee shall examine the volume of imported products and the effect on prices of domestic like products without specifying that the Committee must consider whether any increases in volume of imported products are "significant," whether any price undercutting is "significant," whether prices are depressed to a "significant degree," or whether imports prevent price increases "to a significant degree." which are required by Article 3.2 of the A-D Agreement and Article 15.2 of the SCM Agreement. How does Article 7.2(1) include these requirements of the A-D and SCM Agreements?

Response

Although Article 7.2 (1) of the notification does not enumerate all the requirements set forth in Article 3.2 of the A-D Agreement and Article 15.2 of the SCM Agreement, the Thai Authorities will use these WTO provisions as a guideline when considering whether to make an injury determination under Article 7.2 (1) of the notification."

See Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: Replies of Thailand to Questions from ... the United States, G/ADP/Q1/THA/9, 6 (14 Oct. 1997) (available in the Document Dissemination Facility at www.wto.org).

4. Is Poland correct that Thailand no longer views the confidential data it has submitted as material to this case?

Thailand submitted the confidential data as exhibits to its First Written Submission in order to provide a more complete record of the investigation. Poland asks whether Thailand "no longer" views such data as material to "this case". As stated in previous submissions, Thailand has at all times been and continues to be uncertain whether the confidential data is or is not material to the case before the Panel because Poland has only presented vague and imprecise claims. Thailand, however, considers that the confidential data is necessary to support the affirmative final determination in the underlying anti-dumping investigation.

In addition, under Article 17.5 of the Anti-Dumping Agreement, the Panel is to examine the "matter", *i.e.*, the *measure* and the *claims* challenging such measure, based on "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member", including the confidential data. However, the Panel may only address such facts, including the confidential data, in examining the precise "matter" at issue, *i.e.*, in examining the measure and the precise claims on which the dispute is based. Because these claims remain uncertain, Thailand remains uncertain whether the confidential data is or is not within the Panel's authority to review.

5. Footnote 31 of your First Written Submission claims that the Final Determinations in this matter were incorrect in a number of critical substantive regards. You claim that these were typographical or translation errors. Are we correct that these errors have never been noted before this point, even by SYS? On what basis do you make this claim? If the correct market share of SYS was not 19.8 percent prior to the IP, where in the record did the Thai authorities express SYS' market share for any period prior to the IP? The English version of the Final Injury Determination issued by the Thai authorities states that Polish respondents posed a "threat of material injury" to SYS, although a "threat" case was never initiated. Where in the Thai version of the Exhibit 44 does it show otherwise? What is the Thai word or phrase that you claim is mis-translated?

Thailand does not claim nor concede that "the Final Determinations in this matter were incorrect in a number of critical substantive regards." Thailand refers Poland to footnote 31 which states only that "several of DIT's documents contain inadvertent typographical or translation errors." These inadvertent errors were not raised either by the domestic industry *or the Polish respondents* during the investigation. If such inadvertent errors were so critical, Thailand is curious as to why the respondents did not raise questions at the time and suspects that they were so obvious to the respondents as to be immaterial. Thailand notes that these clerical errors could have been cleared up at any time over the past 3 years had Poland (or the respondents) simply raised them with the Thai authorities.

First, in paragraph 16 of DIT's draft information used for the final injury determination (THAILAND - 37), the reference to SYS beginning operations in "March of 1995" should read "January of 1995". The DIT inadvertently referenced "January" as "March" in the determination. SYS began operations in January 1995, as specified in (1) paragraph 1 of the Summarized Information of Siam Yamato Steel Co., Ltd. contained in the application (THAILAND - 1; THAILAND - 53), (2) Section C of SYS' questionnaire response (THAILAND - 21), and (3) paragraph 1.10.1 of the Confidential Report for the CDS Committee (THAILAND - 44). Certainly, as a sophisticated global seller, the Polish respondent knew precisely when SYS began production and began to compete with imported Polish products.

Second, in the chart for Market Data of H-Beam of Siam Yamato in the same document (THAILAND - 37), the reference to "19.8" for 1995 market share should read "49.8". In the Thai language version of the Proposed Final Determination, the authorities referred to the correct market share figure of 49.8 percent. *See* THAILAND - 65. Obviously, DIT simply inadvertently transcribed the "4" to a "1" in the English language translation. Moreover, the correct figure was provided, *inter alia*, in the disclosure for the preliminary determination (THAILAND - 33) and in paragraph 1.13.1 of DIT's confidential report to the CDS Committee (THAILAND - 44). Notably, the respondent highlighted the 49.8 percent figure in its 9 March 1997 letter to DFT (THAILAND - 35 at 2), used this figure in its defence during the hearing at which SYS was in attendance (THAILAND - 36 at para. 6.1), but failed to reference the error in any subsequent pleadings after the error appeared. Again, as a sophisticated global seller, the Polish respondent certainly knew that SYS market share was 49.8 percent and not the 19.8 percent inadvertently reported in the English translation.

Third, in paragraph 2 of the final determination of injury, the reference to "threat" is an incorrect translation of the Thai language version of the determination. The term "threat" is not included in the final determination. In THAILAND - 63, Thailand provides the respective pages of the final determination with the relevant Thai language and English language portions highlighted. The Thai language states "material injury" and does not refer to "threat". *See also* Thailand's response to Question 36 from the Panel.

6. At Paragraphs 109 and following of its First Submission, Thailand claims that its authorities took into account disruption to steel supply in Asia caused by the 1995 Kobe earthquake, pointing to a series of rather general statements by those authorities regarding demand for steel. Specifically, where did Thailand consider disruption to supply and its effect on prices caused by the Kobe earthquake? Do Members have any obligation to take notice on their own initiative of such superceding, intervening causes? Or need such causes be considered only to the extent they are raised by a party in the context of a proceeding?

In its First Written Submission, Thailand indicates that it complied with its obligations under Article 3.5 of the Anti-Dumping Agreement by considering whether factors known to it were causing injury to the domestic industry. One "other factor" known to the Thai authorities at the time of the investigation was global market conditions and their effect on prices. Thailand considers that, to the extent relevant to conditions in the global market for H-beams, the Kobe earthquake contrib-

uted to these conditions and was therefore addressed by the authorities during the investigation. Moreover, at the time of the investigation, the respondents did not provide the authorities with any information or argument as to why the effects of the Kobe earthquake should be considered as a separate and isolated "other factor".

Thailand's position regarding the interpretation of Article 3.5 of the Anti-Dumping Agreement is clear from its First Written Submission. In paragraph 115, Thailand stated:

"Thus, Thailand examined factors other than the dumped Polish imports that were known to it and found in each case that they were not causing injury to the domestic industry. The Thai investigating authorities were not obligated to seek out "other factors" on their own initiative and were not obligated to examine "other factors" not made known by interested parties during the course of the investigation."³⁷

³⁷ See *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, paras. 547 and 550 (adopted 27 Apr. 1994)."

7. Is it your reading of Article 3.4 ADA that all factors taken into account in an injury determination must be explained in a final determination, or is Article 3.4 better read as allowing Members to evidence final determinations by pointing to working papers in an administrative file, reducing a final determination to a mere recitation of data and conclusions?

The public notices and/or separate reports of the final determination must comply with Article 12 of the Anti-Dumping Agreement. Poland has not challenged Thailand's public notices and/or separate reports under Article 12. Therefore, the Panel must presume that Thailand's public notices and/or separate reports of the final determination are compatible with Article 12 of the Anti-Dumping Agreement.

As Poland and the Panel are aware, Thailand does not consider that it has any basis on which to respond to Poland's claims under Article 3, given Poland's failure to comply with Article 6.2 of the DSU. In any event and without prejudice to this position, an assessment of whether Thailand complied with Article 3.4 of the Anti-Dumping Agreement must be based on the facts made available to the authority (as specified in Article 17.5(ii) of the Anti-Dumping Agreement) and the analysis of those facts in the record. Because Thailand is presumed to comply with Article 12 of the Anti-Dumping Agreement, it is unnecessary for the Panel to decide which notices and separate reports are or are not relevant to assessing compliance. Rather, it may use any such notices or reports on the record of the investigation to determine substantive compliance with Article 3.4 in accordance with the applicable standard of review.

8. What is the basis for Thailand's view that its obligations under the Antidumping Agreement are only those "defined or modified" by Article 17.6?

Thailand refers Poland to its response to Question 50 from the Panel.

9. Our understanding is that the Draft Injury Information Notice of 1997 was never adopted or issued in "final" form. Is that correct? We also understand that the Final Injury Determination of June 1997 relies on the facts as set forth in the Draft Injury Information Notice. Is this also correct?

As specified in the cover letter, Exhibit THAILAND - 37 contains the Proposed Definitive Determination. This Proposed Definitive Determination provided (1) the essential facts under consideration which form the basis for the decision whether to apply definitive measures and (2) a small quantum of proposed analysis of such facts. Under Article 6.9 of the Anti-Dumping Agreement, the authorities are obligated to disclose essential facts. In Thailand's view, however, the Thai authorities are not obligated to provide proposed analysis prior to the final determination. Thailand did so in order for interested parties to have an opportunity to review and comment on such analysis.⁴⁶

The DIT considered comments from interested parties (THAILAND - 41; THAILAND - 62 (more legible)) on the Proposed Definitive Determination in preparing its Confidential Report to the CDS Committee (THAILAND - 44). Based on this Report, the Committee found material injury and issued, through the DIT, the Final Determination of Injury (THAILAND - 46). The Final Determination was based on the same essential facts as disclosed to interested parties in the Proposed Definitive Determination. The proposed analysis in the Proposed Definitive Determination, however, was finalised for the final determination, after considering comments from interested parties.

10. We would ask you to compare the Final Injury Determination with the Draft Injury Information Notice. Could you please comment on all inconsistencies or discrepancies that you find between those two documents. For example, could you please explain the following items:

⁴⁶ Notably, Members disagree as to whether providing disclosure of proposed analysis is required under the Agreement. The two most recent AHG meetings discussed the issue as follows:

"Some Members suggested that it was unclear whether disclosure before a determination was made could be meaningful, since which facts were "essential" was not known until the decision was taken. On [the] other hand, some Members suggested that the disclosure of essential facts could not constitute a prejudgment of the investigating authorities' decision, which would be made after the disclosure. There was discussion of whether the disclosure obligation was satisfied by a disclosure exclusively of facts, or whether some disclosure of analysis or reasoning was also needed. Some Members pointed out that disclosure of reasoning or analysis suggested that the decision had been made at the time the disclosure was made, which was not, in their view, a correct implementation of the requirement."

G/ADP/AHG/R/2, para. 8 (7 July 1997) (THAILAND - 60).

"Several Members noted that the disclosure of essential facts was to take place before the final decision, and therefore must not prejudice the final decision. Thus, such disclosure should relate to bare facts without analysis on weight or judgement. One Member noted the relation between this topic, and the question of treatment of confidential information, and suggested that the Agreement should read consistently across these two requirements. Another Member noted that different methods of disclosure could all be acceptable under the Agreement."

G/ADP/AHG/R/4, para. 27 (4 August 1998) (THAILAND - 61).

- the Final Determination states that Polish imports represented 24 percent of the Thai market in 1995 and 26 percent in the IP, while the Draft Injury Information Notice states that the Polish market share was 24.2 percent in 1995 and 25.3 percent in the IP.

The Proposed Final Determination (*i.e.*, the "essential facts") reported market shares of 24.2 per cent in 1995 and 25.3 percent for the IP. The authorities inadvertently reported the IP market share figure from the preliminary determination, instead of the correct figure used for the final determination. The correct market share figures are as follows:

	Total Consumption	Polish Imports	Market Share
1995	[D]	[I]	24.2
IP	[D+ 22,855]	[I+ 12,445]	25.9

The consumption figures reported in the Confidential Report to the CDS Committee were [D- 8,927]MT for 1995 and [D+ 22,534] MT for the IP.⁴⁷ Other information submitted to the Committee included the table at THAILAND - 66, which provides the correct figures for *both* total SYS domestic sales and for total imports. When these figures are properly added, they reflect the correct total consumption figures in the above table.

- The Final Determination states (at para. 2.2) that "[a]verage CIF import price and the average price of Siam Yamato move in the same direction". However, Table 1 in the Draft Injury Information Notice indicates that they moved in the same direction in only 3 of 6 calendar quarters examined.

The statement is based on the fact that the Polish respondent offered a price [X-Conf.] months in advance of delivery, and SYS offered a price [X-Conf] month in advance. As a result, SYS was competing with prices in, for example, Quarter 1 that were reflected in Polish price data for Quarter 2. Thus, using the confidential average quarterly prices provided in THAILAND - 67, the authorities' comparison of quarterly price movements was as follows:

Period	Poland	Movement	Period	SYS	Movement
QTR 2/95	[P]		QTR 1/95	[P+ 1,000.38]	
QTR 3/95	[P+ 739.21]	+	QTR 2/95	[P+ 2,104.38]	+
QTR 4/95	[P+ 2,422.32]	+	QTR 3/95	[P+ 3,002.38]	+
QTR 1/96	[P+ 605.37]	-	QTR 4/95	[P+ 2,869.38]	-
QTR 2/96	[P+ 174.82]	-	QTR 1/96	[P+ 1,974.38]	-

- The Final Determination states (at para. 2.5) that SYS "decreas[ed] its price to *match* those of the Polish imports" and states (at para. 2.3) that

⁴⁷ See Confidential Report to the CDS Committee (Thai language version), para. 1.7 (THAILAND - 64). The English language translation of the Report inadvertently repeated the total import figure of 187,490 MT in para. 1.7.

SYS "decrease[d] its price to the level of Polish imports." But the Final Determination also states (at para. 2.2) that the price of Polish imports "has always been lower".

A more accurate translation of the relevant portion of paragraph 2.3 is "the company has no other way but to reduce its price following that of import from Poland." Similarly, a more accurate translation of the relevant portion of paragraph 2.5 is "by reducing its selling price to the level close to the Poland import price." The Thai language version of the Final Determination is provided at THAILAND - 46 for Poland to verify the translation.

The explanation in paragraph 2.3 is drawing a conclusion regarding the "influence of Polish imports upon the Thai domestic market," including the causal link between the dumped imports and SYS' pricing. The phrase in paragraph 2.5 was similarly analysing the effect of dumped imports on SYS' pricing.

- The Final Determination states (at para. 2.2) that Polish import prices were below other import prices. Given also the above statement that SYS decreased its prices to those of Polish levels, does this mean that SYS prices were below such other import prices?

SYS prices were below prices of the fairly priced imports from other countries.

- The Final Determination states that the "import volume of subject merchandise from Poland has continuously increased" (para 2.1), whereas the Table labeled "Import from Poland" in the Draft Notice shows that Polish import figures moved up and down throughout the IP.

The statement is based on annual import data, consisting of increased imports from 82,011 MT in 1994 to 94,682 MT in 1995 to 107,127 MT during the IP. *See* Confidential Report to the CDS Committee, para. 1.8.2 (THAILAND - 44).

11. The Final Injury Determination (at para. 1) states that the DIT "examined all relevant factors as prescribed in the Ministry of Commerce Notification". Could you please list the factors set forth in that Notification, including an English-language translation of the Notification, if one is available.

Thailand applied its domestic law in full compliance with the requirements under Article VI of GATT 1994 and the Anti-Dumping Agreement. Thailand provided the following questions and replies regarding Thailand's application of its domestic law at the time of the investigation:

"Question (HKG 9(a))

Numerous provision of the Agreement are not feature in the Notification of the codification may not be adequate. ...

(a) In the absence of explicit domestic provisions reflecting the above Agreement provisions, how will Thailand ensure compliance with the Agreement?

Response

The purpose of the present Ministerial Notification is to temporary providing means for the implementation of the A-D Agreement

in Thailand. It is in no way to cover all the specific details, however, it should be noted that the Anti-Dumping and Countervailing Duty Act is in a process of drafting. This Act will be in full compliance to the letter of the Agreement.

In the interim, the Thai Authorities implementing the Notification are fully aware of requirements under the WTO Agreement and intend to maintain a full compliance with all such requirements.

* * *

Question (US 11)

What economic factors or indices will the Committee evaluate under Article 7.2(2) of the regulations in examining the effects of the imported products on producers of like products in Thailand, and how is such an evaluation or examination consistent with Article 3.4 of the A-D Agreement and Article 15.4 of the SCM Agreement?

Response

In making a determination under Article 7.2(2) of the notification, the Thai authorities will abide by Article 3.4 of the A-D Agreement and Article 15.4 of the SCM Agreement."

See Notification of Laws and Regulations under Articles 18.5 and 32.6 of the Agreements: Replies of Thailand to Questions from ... Hong Kong, China ... and the United States, G/ADP/Q1/THA/9, 3-4 and 6-7 (14 Oct. 1997) (available in the Document Dissemination Facility at www.wto.org).

12. The Final Injury Determination (at para. 2.3) contains two statements further on which we seek clarification. It states that "the Thai domestic industry was unable to increase its prices to recover costs in a reasonable period of time". It also states that Polish imports "affected [SYS] cash flow. Could you please indicate precisely where in the Draft Final Injury Determination the DIT made such findings?

Poland is confusing the "information" on which Thailand based its analysis and the analysis itself. These are separate aspects. See, e.g., *Mexico - HFCS* at footnote 597 (stating that "[I]t is thus not clear whether Article 6.4 necessarily applies to conclusions drawn by the authority on the basis of information, or only applies to the information itself"). The non-confidential factual information on which the referenced analysis (or "findings") are based is contained in points 7 and 11 and in the tables (e.g., Net Profit (Loss) and Return on Investment) of the Draft Final Injury Information. See THAILAND - 37.

13. The Final Injury Determination (at para. 2.2) compares CIF import prices and average SYS prices. Poland's understanding is that Thai authorities made no adjustments to these prices in making this comparison. Is that correct?

The Thai Authorities considered all relevant information regarding the level of price undercutting. As it will be appreciated, price undercutting varies on a transaction-by-transaction basis as well as on the information made available to the Thai authorities. In this context, a wide range of prices were used to establish price under-

cutting. For the purpose of the disclosure provided to Poland, price undercutting was illustrated as a comparison between CIF import prices and SYS ex-factory prices, *i.e.*, "landed" prices in Thailand.

Taking either landed prices or adjusted landed prices, Thailand established price undercutting. In addition, the Thai authorities were made aware that quantities of Polish H-beams were being offered at CIF prices with credit terms of **[X-Conf.]** days. *See, e.g.*, actual invoices in THAILAND - 69. Poland, and even the Polish respondent, may not be aware of this because Polish sales were on an FOB basis, and it was the traders that offered these terms. However, this affected the level of price undercutting, given that offering such terms is the equivalent of unloading product on the market at any price.

14. The Draft Injury Information Notice (at para. 8) states that "the increase in Polish imports during July-September 1995 led to a decrease in sales of the complainant and the increase in imports during April - June 1996 resulted [in] the decline in output of the complainant.". Where did the Thai authorities explain how either of these "increases" (the existence of which is, in any event, disputed by Poland) "caused" either of those events at issue or how such imports would affect sales in one circumstance and output in another, for example. As set forth in Table 2 of the Draft Injury Information Notice, on which the statement in paragraph 8 expressly relies, please note that in the calendar quarter in which sales were "affected" output, in fact, rose, and in the calendar quarter in which output was "affected", sales, in fact, rose.

In paragraph 8 of the Draft Injury Information Notice, the Thai authorities first provided a general assessment of the data, including the general effects on production and sales caused by the increased penetration of Polish imports. The preliminary analysis in sub-paragraphs 1 and 2 were provided to explain the data relating to the two significant quarterly import spikes. The first spike was considered to cause a decrease in sales because Polish imports were not "growing the market" but were causing customers to shift to cheaper supply. Although production did not decrease, this simply meant that domestic inventories were increasing to make up the difference. The second spike was considered to cause a decline in production because sales were not meeting targets and SYS already had excessively high inventory levels as a result of the previous import spike. The failure to meet sales targets is reflected in paragraph 1.12.2 of the Confidential Report to the CDS Committee (THAILAND - 44).

In any event, although its analysis of the specific effects in these two quarters was valid, the Thai authorities considered it unnecessary to adopt the same narrow analysis in the Final Determination. Instead, the authorities relied on their more comprehensive assessment. This decision can be attributed, in part, to the comments received from respondents on this particular issue. *See* THAILAND - 40, at 4.

ANNEX 2-7

**RESPONSES BY THAILAND TO ADDITIONAL
QUESTIONS FROM POLAND**

(7 April 2000)

Dear Mr. Chairman,

In accordance with its continuing good faith efforts to resolve this dispute, Thailand provides the enclosed responses to Poland's Additional Questions to Thailand. By providing these responses in advance of the Second Oral Hearing, Thailand hopes Poland will have an opportunity to address them during the hearing.

Poland indicates that its additional questions are based on "secret" data. Thailand assumes that Poland's use of the term "secret" instead of the more accurate term "confidential" was unintentional and just argumentative. Any other explanation would suggest that Poland intends to ignore its obligation to prevent the disclosure of this confidential information. The fact that Poland has not designated which data in its Additional Questions is "confidential" suggests that the alternative explanation may unfortunately be the case.

Poland also states that this "secret" data was contained in exhibits that were filed in an "unusual" way. Thailand simply reminds Poland that a defending Member is not obligated to submit any argument or data at any time during a panel proceeding. If a complainant properly presents claims and a prima facie case to support them, a defending Member must rebut such case based on the particular data and arguments it considers most relevant and persuasive. As stated throughout this proceeding, however, Thailand does not know whether the confidential data is or is not relevant to its defence because Poland has never properly presented its claims.

Concerning problems of translation, Thailand reiterates to the Panel that there is no obligation in the Anti-Dumping Agreement for the Thai Authorities to translate documents from Thai to English. Under Thai law, all decisions, determinations, and reports for an anti-dumping investigation must be prepared in the Thai language. The translations of the determinations in this case were made in a good faith effort to assist the exporting parties in defending their essential interests in the investigation and to provide the Panel with the confidential basis for the Thai authorities' decision, to the extent relevant. There are unintentional inaccuracies in the English translation, given that they were completed entirely in-house and only with the assistance of a thesaurus and dictionary. The latter accounts for the use of over expressive English terminology, namely "skyrocketed" or "shrunk".

As Poland is in possession of both the official Thai versions and unofficial English translations of relevant exhibits and as the Polish exporters also benefited from a Thai legal counsel during the proceeding, Mr. Suwit Suwan of "Dr. Ukrit Mongkolnawin Law Office", Thailand encourages Poland to verify any corrections that Thailand makes to the English translations. Thailand notes that Poland did not respond to Thailand's question as to whether Poland or the Polish respondents ever requested or otherwise obtained a translation of the Thai documents supplied and/or available to them during the investigation.

Thailand remains willing to provide responses to any additional questions that Poland may have in the light of the answers that we have submitted in this document. Thailand also reserves the right to clarify its responses herein at the Second Oral Hearing.

1. Is Poland correct in its understanding that THAILAND Exhibit-44 is the sole confidential document on which the Final Injury Determination is based, or are there other such documents?

THAILAND - 44 is the text of a report prepared by the DIT for the CDS Committee. The report is a summary of confidential and non-confidential evidence supplied by interested, co-operating parties during the course of the investigation, including the information obtained by the Thai authorities on their own initiative. This evidence includes, *inter alia*, SYS' and the Polish producers' questionnaire responses, material obtained during the on-site-verification, Thai customs statistics, technical dossiers on specifications, etc.

Moreover, the text of THAILAND - 44 was based on multitudes of confidential working papers such as the table provided in THAILAND - 66. These working papers summarize several hundred source documents that provided, for example, transaction-specific price information, production information, sales information, and other information considered relevant by the CDS Committee.

2. Would it be accurate to state that any discrepancies between (i) THAILAND Exhibit-44 and (ii) the Final Injury Notice and Final Injury Determination would represent mistakes by the Thai authorities?

The referenced discrepancies concern minor translation errors in the English version of THAILAND - 44 and a few typographical errors in the original versions of other documents. These errors were known to the CDS Committee, as the Thai language and working paper documents for THAILAND - 44 clearly show, including corrections that were made during the meeting itself.

None of these errors were material to the analysis and conclusions reached by the DIT and the CDS Committee as there were no errors in the source documents and the evidence upon which these documents are based.

To claim that a difference between the two sets of documents constitutes a "mistake" represents a misunderstanding of the purpose of the documents concerned. THAILAND - 37 represent the disclosure of *non-confidential* essential facts. THAILAND - 44, however, represents the final confidential summary report containing facts and analysis for consideration by the CDS Committee. The two reports are not identical. For example, THAILAND - 44 took account of the comments on the essential facts from all interested parties and examined considerations relating to whether the imposition of anti-dumping duties was in the national interest.

3. Could you please explain the statement in paragraph 1.7 of this Exhibit that domestic demand for subject merchandise was [D - 128,921 MT] in 1994, [D - 8,927 MT] in 1995, but only 187,490 in the IP?

Please see paragraph 1.7 in the Thai language version of the report (THAILAND - 64). The figure in the Thai version was [D + 22,534 MT]. The figure

of 187,490 MT (which represents total imports during the IP as reflected in paragraph 1.8.1) was inadvertently used for domestic demand in paragraph 1.7 of the English language translation.

How can those figures be reconciled with the statement in the same paragraph that domestic demand increased [D*] per cent in the IP?

Please see above.

How can those same figures be reconciled with the statement in the Final Injury Determination (at para. 2.4) that domestic demand "expanded" in the IP?

Please see above.

How can those same figures be reconciled with the statement in the Draft Final Injury Notice (at para. 1) that domestic consumption increased by 4 per cent from 1995 to the IP?

Please see above.

How do you reconcile that finding of a 4 per cent increase in consumption with the above-stated finding in Exhibit 44 that consumption increased [D*] per cent?

THAILAND - 37 inadvertently reported "4" per cent instead of "[D*]" per cent for the increase in consumption from 1995 to the IP.

4. Could you please explain the statement in paragraph 1.8.1 of this Exhibit that imports of subject merchandise "shrunk continuously" from 261,863 MT in 1994 to 261,863 in 1995, to 187,490 MT in the IP?

Please see paragraph 1.8.1 in the Thai language version of the report (THAILAND - 64). Obviously, the figure of 261,863 was inadvertently repeated for 1994 and 1995. The actual figure, 196,076 MT, was corrected for the CDS Committee and is provided in the Table entitled "Comparison of Production, Sales and Imports from Poland" in THAILAND - 66.

How do these figures support the conclusion that imports "shrunk continuously"?

Please see above.

How do they reconcile with the figures set forth in paragraph 1.7? Did domestic demand equal imports in 1994 and again in the IP?

Please see above.

How can those figures be reconciled with the statement in the same paragraph 1.8.1 that imports decreased 25 per cent in 1995 and 8 per cent in the IP?

The original Thai version of THAILAND - 44 states correctly a decrease of 4 per cent. See THAILAND - 64.

How can those same figures be reconciled with the statement in the Draft Final Injury Notice (at para. 4) that imports decreased 8 per cent from 1995 to the IP?

THAILAND - 37 inadvertently reported "8" per cent instead of "4" per cent for the decrease in imports from 1995 to the IP.

5. Could you please explain the statement in paragraph 1.8.2 of this Exhibit that Polish imports of subject merchandise "skyrocketed" during the IP to [I + 12,445] MT, given the fact that Thai authorities have claimed that Polish imports held an

approximately 25.3 per cent market share and the total domestic demand was 187,490 MT?

In its cover letter to these responses, Thailand explains the translation of the term "skyrocketed". A more accurate translation would have been "increased significantly". In any event, Thailand provides the following clarification of the translation:

"The imports from Poland, on the other hand, have continued to increase. Polish imports in 1994 were about [I - 12,671] MT, or [I* - 17] per cent of total imports. Polish imports in 1995 were about [I] MT, or [I*] per cent of total imports. During the IP, Polish imports skyrocketed to [I + 12,445] MT, or [I* + 9] per cent of total imports. The rise of Polish imports is 16 per cent in 1995 and 13 per cent in the IP."

Therefore, Paragraph 1.8.2 states that Polish imports "skyrocketed" both in absolute terms (from [I] MT in 1995 to [I + 12,445] MT for the IP) and compared to total imports (from [I*] per cent in 1995 to [I* + 9] per cent for the IP). This paragraph does not refer to the domestic market share held by Polish imports. The demand figure is addressed above in response to question 3.

Do these figures ([I + 12,445] of 187,490 MT) indicate that Polish firms held more than half of the Thai market (which would contradict the DIT's market share figures) or that Polish imports actually fell to about 47,000 MT (25% of 187,000 MT)?

Please see above.

How do the figures in paragraph 1.8.2 reconcile with the statements in the Final Injury Determination (at para. 2.1) that Polish imports had "continuously increased" or those in the Draft Final Injury Notice (at para. 4) that Polish imports increased 10 per cent from 1995 to the IP?

Please see above. THAILAND - 37 inadvertently reported "about 10" per cent instead of "13" per cent for the increase in Polish imports from 1995 to the IP.

6. We would now like to turn Thailand's attention to the issue of pricing as THAILAND Exhibit-44 contains the first meaningful pricing data available to Poland.

Could you please confirm the accuracy of the statement in paragraph 1.9.1 of this Exhibit that average CIF import prices were B 8,952 in 1994, B 9,936 in 1995, and B 9,462 during the IP?

The average CIF price of B 9,462 in THAILAND - 44 refers to the IP, whereas B 8,754 in THAILAND - 37 refers to 1996. The information in THAILAND - 37 inadvertently refers to the IP instead of 1996. The error has no effect on the ability of interested parties to compare CIF prices from all countries and from Poland and to comment accordingly. Given the confidentiality of domestic prices, the only purpose of the table in THAILAND - 37 was to show the relationship between Polish import prices and those from other countries.

How do you explain that the Draft Final Injury Notice (at para. 6 and in the Table "Price Data of H-Beam"), while confirming this first two figures, states that average CIF import prices were B 8,754 during the IP?

Please see above.

How do these figures reconcile with the Thai claim in paragraph 4.6 of Exhibit 44 that the average CIF import price was B 10,782?

As specified in paragraph 1.11 of THAILAND - 44, the average CIF import price of B 10,782 reflects the price for all other imports excluding Polish imports.

Where in its Final Determination did Thailand make a finding of "significant" price undercutting, "significant" price depression, or "significant" increase in Polish import volume?

Although the translation of the Final Determination does not use the word "significant", the Thai language version clearly leads to the conclusion that the increase in Polish imports was "significant" and that the price undercutting and depression/suppression was "significant".

It should be pointed out that the analysis of price -undercutting presented to the CDS Committee was in far more detail than the summary provided. The presentation of price undercutting involved comparisons of actual selling prices of Poland available to the DIT with the actual selling price of the domestic industry at the same level of trade in Thailand (end user) and on the same terms. This information was used for the preliminary determination, confirmed for the final determination, and presented in detail to the CDS Committee. *See, e.g.*, paragraph 2 of the Preliminary Determination (THAILAND - 25).

7. Could you please confirm the accuracy of the statement in paragraph 1.9.2 of THAILAND Exhibit-44 that average Polish CIF import prices were "stable" from 1994, to 1995, to the IP? We note further that paragraph 5 (at page 13) of this Exhibit states that "there is price stability with respect to the subject merchandise".

This term is simply used to describe the fact that average Polish CIF import price for 1995 (B 8,409) was approximately the same as the price for the IP (B 8,473). "Stable" was also used in the context of Polish import prices being below the prices of the domestic industry during the period of 1994 - IP. The Thai authorities did not intend the term "stable" to mean, for example, not causing any market disruption.

Paragraph 1.9.2 provides that Polish import prices actually rose significantly during the period in question, from B 7792 in 1994 to B 8409 in 1995 to B 8473 in the IP.¹

Please see above.

Please confirm that you view such price movements as demonstrating price "stability".

Please see above.

How do you explain that, in contrast to the figures set forth in paragraph 1.9.2 of THAILAND Exhibit-44, the Draft Final Injury Notice (at para. 6 and in the Table "Price Data of H-Beam"), while confirming this first two figures, states that average Polish import prices were B 7,975 during the IP?

THAILAND - 37 inadvertently referred to "IP" instead of "1996". The Polish price of B 7,975 is for the period 1996, not for the IP.

¹ The B 8,473 figure is also set forth in para. 1.11 of THAILAND Exhibit 44.

8. Could you please confirm the statement in paragraph 1.12.6 (first indent) of THAILAND Exhibit-44 that [X-Conf]?

The purpose of this paragraph was for the benefit of the CDS Committee. Before deciding to impose definitive measures, the CDS Committee is also responsible for assessing whether such measures would be in the consumer or national interest. In this particular context, the concern of the CDS Committee was [X-Conf]. The DIT explained that the exports from the company concerned, while below actual domestic prices during the proceeding (by the fourth quarter of the IP they were generally above), were in any case [X-Conf].

How do you explain the opposite statement, contained in paragraph 10 of the Draft Final Injury Notice, that SYS "can sell [its] exports at the price higher than in the domestic market"?

There is no contradiction. Paragraph 10 of the draft final injury notice refers to the fact that SYS "can" export to markets above domestic price, *i.e.*, they were able to do so. In fact, SYS did on occasions sell on export markets above domestic prices on a transaction basis, particularly in the fourth quarter of the IP. However, the DIT acknowledges that yearly averages of prices would show that export prices were generally below domestic selling prices.

Thailand had previously claimed that its *higher* export price indicates price suppression and price depression by reason of imports into Thailand. Given that the factual premise of that statement is false (that is, given that export prices were, in fact, *lower*), what is the relation between high domestic prices and a claim of possible price suppression or price depression?

The Thai authorities did not claim that exports were a basis for its finding of price depression or suppression. The authorities found that the dumped imports were the cause of the price depression and suppression.

Would Thailand agree that its lower prices in export markets were the actual causes of SYS' failure to cover costs or otherwise fail to meet its ambitious sales targets?

No. The actual cause of SYS' failure to cover costs or otherwise fail to meet its sales targets was the dumped Polish imports.

9. Could you please confirm the accuracy of the SYS pricing data contained in paragraph 1.12.6 (second and third indents) of THAILAND Exhibit-44? We note that these data confirm the fact that export prices were well below Thai domestic prices.

This information reveals that export prices were below Thai domestic prices, except for the fourth quarter of the IP.

Given these data, the statement in paragraph 1.9.2 of THAILAND Exhibit 44 that Polish import prices were "stable", and the accompanying data in that paragraph that Polish import prices in fact continually rose, was not the DIT wrong in concluding in the Final Injury Determination (at paragraph 2.2) that average import and domestic prices "move in the same direction"?

No. Please see the responses to Poland's questions herein and Thailand's responses to Poland's previous questions.

Given these same factors, was not the DIT wrong in concluding in the Final Injury Determination (at paragraph 2.3) that SYS "decrease[d] its price to the level of Polish imports", given that Thai prices have always been much higher?

No. Please see Thailand's response to previous Question 10 from Poland.

Table 1 of the Draft Final Injury Notice provides that Thai domestic prices actually rose from 111 to 118 during final quarter of the IP, an increase of 6.3 per cent. Given that reported increase, how can Thailand now claim (in indent two) that the price in the final quarter fell from [P - B 1974.38] to [P - B 1768.38]?

The Thai authorities inadvertently committed a typographical error by listing "118" instead of "108" in the index.

10. On the issue of causation, we note the statement in paragraph 3.3 of THAILAND Exhibit 44 that "[w]hereas SYS relies on export for about [X-Conf.] per cent of its sales, it is much effected [sic] by the downturn of world market price for H-beams. This is due to the fact that there is a slowdown of construction world-wide coupled with the fact that the total production capacity far surpassed the demand".

What consideration of these facts was made in the Final Injury Determination?

The information in paragraphs 3.2 and 3.3 were considered in evaluating the "other factor" of global market conditions. Paragraph 2.4 of the Final Determination discusses the conclusions reached based on this information.

Given these important external factors, how could the DIT possible conclude that Polish imports were the cause of SYS' alleged injury?

The Thai authorities assessed this "other factor". Poland simply disagrees with the authorities' conclusion.

11. Paragraphs 4.2 and 4.3 contain statements that Polish imports are "likely" to be the price leader in the Thai market. Where in the record did Thai authorities make a determination that Polish imports *were* the price leader?

The issue of price leadership was of considerable importance to the DIT throughout the investigation, and the conclusions reached are based on the entire record of the investigation. In summary, the fact that Polish import prices were below domestic industry prices obviously has a bearing on price leadership. This was considered decisive in that the H-beams exported by Poland and the H-beams produced by the domestic industry were competing in the same segment of the market, generally of the same quality, specifications and end use. Poland was well-known by the consuming industry as a major supplier of H-beams in Asia. There was also no quality difference between the product of SYS and Poland that would justify this price difference. Consequently, decisions of sourcing of H-beam from Poland or the domestic industry was dictated by price.

Having established that the products were in direct competition, the Thai authorities determined that sales of Polish imports were made using offers provided [X-Conf.] months in advance and discovered that this fact was used as a basis of negotiation within the domestic market to drive down prices of future supplies. In addition, the DIT noted that during the IP traders were also offering Polish product with [X-Conf.] day credit terms. Given these circumstances, the Thai authorities were fully justified in finding that Polish imports assumed a leadership position in the Thai domestic market.

12. Paragraph 4.4 states that the "situation described in 4.2 and 4.3 demonstrates *instances* of price undercutting and suppression"? How does such a finding support the conclusion in paragraph 2.3 of the Final Injury Determination that Polish imports "resulted in price undercutting and suppression"?

A more accurate translation of "instances" is "situation". Thailand notes that paragraph 4.4, in both the English and Thai language, clearly states that paragraphs 4.2 and 4.3 demonstrate that Polish imports were resulting in the situation of price undercutting and suppression, not just some instances thereof.

13. Paragraph 4.8 remarks on the fact that SYS losses are "due to operating expenditures that cannot be reduced." Would you agree that SYS endured high start-up costs? If not, how do you explain the statement in paragraph 5 (at page 13) that "SYS has to bear the costs of new entrants which is, as a rule, high"?

A crucial aspect of the investigation was to assess whether the Thai domestic prices were reasonable bearing in mind the high start-up costs concerned. In other words, although there was price-undercutting, the DIT also considered it of importance to decide whether the targeted selling prices of SYS were reasonable. In this respect, it was noted that [X-Conf.]. The DIT considered these targeted selling prices to be reasonable in that they reflected a selling price of some of the most efficient manufacturers world-wide. However, the domestic industry could not have foreseen that Pland would resort to substantial dumping and undercut domestic prices.

ANNEX 2-8

SECOND ORAL STATEMENT OF THAILAND - OPENING REMARKS

(12 April 2000)

1. Mr. Chairman, distinguished Members of the Panel, professional staff of the WTO Secretariat, I would like to thank you again for taking the time to assist Poland and Thailand in resolving this dispute.
2. Before presenting our oral statement, I would like to provide a few remarks to place this dispute in the proper context and to explain the background and philosophy behind the use of anti-dumping instruments in Thailand.
3. Thailand would like to emphasise that it places significant importance on the ability of its industries to embrace competition in the Thai domestic market, and we acknowledge the need for our industries to remain vigilant in meeting the demands of the global marketplace. In our view, this philosophy is to the ultimate benefit of our consumers, our producers, and our economy as a whole.
4. A practical result of this philosophy has been a demonstrated reluctance to use anti-dumping measures, except where dumping and injury are at such a significant level that the public interest dictates the imposition of such measures. In implementing our obligations under the Anti-Dumping Agreement, we studied the approach taken over the past few decades by the major users of these rules and regulations, including the United States and the EC. For the first time in the H-beams investigation, we even adopted the approach of separating the administrative bodies that investigate dumping and injury.
5. Although we did not have years of experience or a large anti-dumping budget like the major users, we nevertheless complied with each and every obligation under the Anti-Dumping Agreement in the H-beams investigation.
6. Specifically, our authorities have gone beyond the requirements of the Agreement in a number of important respects.
7. First, for example, to ensure that Polish exporters had a full opportunity to defend their interests, documents were translated from the official Thai language into English, including the questionnaires, disclosures, and determinations.
8. Second, Thailand did not hesitate to provide an extension to the deadline for the Polish respondents to file their questionnaire responses. This extension was well beyond the period mandated under the Agreement.
9. Third, Thailand accepted all of the allowances provided in the respondents' questionnaire responses for both the preliminary and final determinations. The authorities considered that this would minimize trade disruption pending the outcome of on-site verification.
10. Fourth, Thailand responded specifically to the comments and arguments from the Polish respondent on the draft final determination.
11. Fifth, in spite of the fact that there was only one Thai producer and one Polish producer, the Thai authorities provided a summary of the confidential information on which its determinations were based.

12. Thailand urges the Panel to compare these good faith efforts with the complete failure on the part of Poland to take any responsibility for the defence of its interests or to act in good faith in this dispute. Just as an example,

- Poland received the non-confidential application over 3 years before requesting establishment of a panel, but never requested nor, as far as we are aware, obtained a translation.
- Poland (and the Polish respondents) failed to request clarification of any clerical errors and other purported inconsistencies between the preliminary determination, essential facts, and final determination.
- Poland failed to present any precise claims whatsoever until its rebuttal, after Thailand offered speculation as to Poland's purported claims and after the Panel formulated questions to elicit precise responses.
- And, finally, Poland refused to respond to the questions that Thailand presented to Poland after the First Oral Hearing.

13. In Thailand's view, WTO Members (and their foreign producers and exporters) must take at least a minimum amount of responsibility to defend their interests, must take minimal steps to present their own case, and must act in good faith in WTO proceedings. Poland has failed to meet even the most forgiving standards.

14. On specific issues, Thailand considers that the most reasonable basis for the calculation of profit for constructed value is to use the profit actually realized in the domestic market for the identical or same general category of products. As the level of profit on the domestic market often determines the ability of an exporter to dump, Thailand considers that any other profit margin would actually allow exporters to manipulate the process and to dump with impunity.

15. With respect to injury and causation, the Thai authorities used extensive and detailed information as the basis for its determinations. This information was properly established and was evaluated in an unbiased and objective manner.

16. Notwithstanding Poland's protests otherwise and as the exhaustive factual record demonstrates, the DIT did not undertake the investigation in order to blindly approve the domestic industry's case. For example, although price undercutting and price suppression and depression were clearly attributable to the dumped imports, the DIT nevertheless established whether the selling prices of the domestic industry were reasonable from the outset, and whether Polish prices simply represented those of an efficient manufacturer.

17. In deciding this issue, the authorities relied upon information on capacity, technology, and other relevant aspects obtained from, *inter alia*, the on-site verification. The authorities concluded that the Polish producer was not more efficient and that pricing represented unfair trade. In fact, the Polish producer's low level of efficiency, including the use of outdated technologies, was independently confirmed from reports on the restructuring of Huta Katowice as part of the accession to the EC, as well as related documents on the privatisation of the group. Based on this information, it was considered that Huta Katowice was, in fact, one of the least efficient producers in the world.

18. Notably, the Thai authorities also determined that the imposition of the measure at issue was in the overall public interest, including consideration of the potential

effect on consumers in Thailand. This also shows the lack of bias on the part of the authorities.

19. In summary, Thailand considers that its investigating authorities went to great lengths to comply with both the letter and the spirit of Article VI of GATT 1994 and the Anti-Dumping Agreement.

20. I would now like to ask my colleague to present Thailand's detailed oral statement

ANNEX 2-9**SECOND ORAL STATEMENT OF THAILAND - MAIN STATEMENT**

(12 April 2000)

I. INTRODUCTION

1. Mr. Chairman, distinguished Members of the Panel, WTO professional staff, it is indeed an honour and a pleasure to appear and speak before you today.

II. THAILAND REQUESTS A PRELIMINARY RULING BASED ON POLAND'S FAILURE TO PRESENT PRECISE CLAIMS

2. As a preliminary matter, Thailand reiterates its request that the Panel dismiss Poland's complaint based on its violation of Article 6.2 of the DSU. Thailand directs the Panel to its Responses to the Panel's questions on the proper interpretation of Article 6.2 of the DSU and provides several responses to Poland's arguments.

3. First, in paragraph 13 of its rebuttal, Poland contends that the Appellate Body's reference to "attendant circumstances" and to "the course of the panel's proceedings" means that any lack of precision is susceptible to prospective cure by a complainant. Such a concept is obviously inconsistent with the principles of due process and would be like a criminal prosecutor being allowed to add new criminal charges on which a guilty verdict could be made at any time during a trial. In paragraph 143 of its report in *Bananas III*, the Appellate Body clearly recognised this and expressly stated that "[i]f a claim is not specified in the request for the establishment of a panel, then a faulty request cannot be subsequently 'cured' by a complaining party's argumentation in its first written submission to the panel or in any other submission or statement made later in the panel proceeding."

4. Thailand notes that the EC also agrees that "no subsequent remedy can cure the fact that the complainant failed to provide in its request for establishment of a panel 'a brief summary of the legal basis of the complaint sufficient to present the problem clearly'. In the EC's view, allowing such a remedy would "deprive this formal act of its *raison d'être*."

5. Second, in paragraph 11 of its rebuttal and in response to Question 1(a) from the Panel, Poland contends that a violation of Article 6.2 requires that the Panel examine the intent of the complainant to determine if the complainant acted with "scienter" or "deliberate deceit". Poland also argues that the Panel should conduct this examination without considering the Appellate Body's interpretation of Article 6.2 of the DSU. In Thailand's view, Poland's approach would be no different than including an examination of intent or deceitful intent with respect to the violation of any provision of any covered agreement. Does Poland suggest that the Panel should also examine whether Thailand intended to violate the Anti-Dumping Agreement? Whether any Thai violation was intended to be deceitful? Whether such intent could possibly exist, given that the interpretations of provisions by the panel in *Mexico - HFCS* occurred after the investigation? Given that Poland's interpretations of the Anti-Dumping Agreement were not known at the time of the investigation? Given that this

Panel's interpretations were not known at that time? Poland's interpretation that an examination of intent or deceitful intent is required is simply unsupported and un-supportable.

6. In order to complete the record, however, Thailand offers the following particulars to demonstrate that Poland has and continues to intentionally deceive Thailand: (1) Poland merely listed articles in its request for establishment of a panel; (2) Poland only offered sweeping allegations in its First Written Submission, rather than provide precise claims based on the documents in its possession since the investigation; (3) without justification, Poland delayed for over two weeks in accepting a settlement that would allow all parties access to the confidential basis for the Thai authorities' determinations; (4) Poland withheld its companies' consent to the disclosure of their confidential information and argued that the entire dispute should be decided on the basis of non-confidential information; (5) Poland used the delay that it caused as a basis for rhetoric intended to discredit Thailand before the Panel; (6) Poland failed to confirm Thailand's understanding of Poland's claims under Articles 2 and 3 of the Anti-Dumping Agreement during the Oral Hearing; (7) Poland changed the basis for its claims in its First Oral Statement and in its rebuttal; (8) Poland refused to answer Questions from Thailand, including, as just an example, whether it had requested or otherwise obtained a translation of the non-confidential application, where in the record the Polish respondents identified "other factors" and the specific effects of the Kobe earthquake in particular, and how a "reasonable" profit should be calculated; and (9) Poland presented claims in its rebuttal that were never raised before. All of these particulars objectively demonstrate that Poland has intentionally with scienter and with deliberate deceit misled Thailand as to the claims being asserted against it.

7. Third, in paragraph 15 of its rebuttal, Poland claims that "overly strict interpretations of provisions designed to protect due process rights" would frustrate the intent of Members' to secure positive solutions to disputes. Thailand cannot understand how such a claim can conform to the basic protection afforded by the rule of law. Thailand simply reminds Poland and the Panel that no dispute settlement system based on the rule of law can operate effectively nor can it be considered legitimate by its users without ensuring basic and effective protection of due process rights. These rights must be more important than reaching a decision at all costs and regardless of fairness to the parties.

8. Fourth, in paragraph 18 of its rebuttal, Poland states that "further factual background" regarding Poland's claims is set forth in its request for consultations and in POLAND - 19, which purports to be the document read to Thai officials during consultations. From a factual perspective, neither Poland's request for consultations nor POLAND - 19 provide any additional "factual background". Poland's request for consultations gives the date and the dumping margins for the preliminary determination, the date and the dumping margin for the final determination, and the dates of the respondents' request for disclosure and the authority's reply. The request then states that "Poland has serious concerns regarding the conformity with the Agreement of the following:

- the determination of injury to the Thai domestic industry according to Article 3 of the Agreement;

- the determination of dumping (and particularly the calculation of the dumping margin) according to Article 2 of the Agreement;
- inconsistency of the procedure applied by the Thai investigating authorities with the provisions of Articles 5 and 6 of the Agreement.

9. It is obvious that the request for consultations provides absolutely no indication of or "additional background" for Poland's purported claims.

10. In POLAND - 19, Poland attempts to provide evidence as to why Thailand should not be confused regarding its specific claims. POLAND - 19, however, only gives broad discussions of various aspects of the investigation and then simply concludes that "we are of the opinion that the domestic industry of Thailand did not suffer any material injury" or "there was no negative impact." Simple disagreements with conclusions cannot rise to the level of identifying claims that involve the violation of specific provisions of the agreement. Notably, POLAND - 19 does not even reference Articles 3.5, 5 (other than 5.5) or 6 of the Anti-Dumping Agreement or Article VI of GATT 1994.

11. From a legal perspective, Poland's arguments also fail. Poland contends that the unconfirmed oral presentation of a two-page statement such as POLAND - 19 is sufficient to remedy a deficient request for establishment of a panel and is sufficient to prevent prejudice to the defending Member and Third Parties as a result of such deficient request. Poland is simply wrong.

12. First, as provided under Article 4.6 of the DSU, "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceeding." Thus, third party Members not involved in consultations will have no indication as to the claims that compose the matter in dispute and would not be aware of any clarification of such claims during the course of consultations. Moreover, Article 4.6 states that consultations are not to prejudice the rights of "any" Member. This includes the rights of the defending Member and third parties to know the precise claims that will compose the matter subject to panel review.

13. Thailand reminds Poland that what transpires during consultations is supposed to remain confidential between the parties. Raising consultations during a panel dispute undermines the entire consultation process under the DSU. In fact, Poland's actions threaten to stifle the willingness of any Member to enter future consultations with Poland, knowing that Poland is likely to use the discussions during consultations in any subsequent dispute.

14. Second, past practice of WTO panels and the Appellate Body have found that (1) the DSU does not require precise and exact identity between the specific measures that were the subject of consultations and the specific measures identified in the request for the establishment of a panel (Appellate Body, *Brazil - Aircraft*, para. 132); (2) a panel must examine claims under a provision of a covered agreement if such provision is identified in the panel's terms of reference, even if such provision was not mentioned during consultations (*Japan - Agricultural Products*, para. 8.4); and (3) "[t]he only requirement under the DSU is that consultations were in fact held, or were at least requested, and that a period of sixty days elapsed ... What takes place in those consultations is not the concern of a panel (*Korea - Alcoholic Beverages*, para. 10.19)".

15. In *Bananas III*, the panel stated that "[c]onsultations are ... a matter reserved for the parties. The DSB is not involved; no panel is involved; and the consultations are held in the absence of the Secretariat. In these circumstances, we are not in a position to evaluate the consultation process in order to determine if it functioned in a particular way ... Ultimately, the function of providing notice to a respondent of a complainant's claims and arguments is served by the request for establishment of a panel and by the complainant's submissions to that panel." (*Bananas III*, paras. 7.19 and 7.20).

16. This past practice demonstrates that any claims allegedly raised between the two parties during consultations are not the concern of a panel and, in fact, will not necessarily be the claims that compose the matter subject to panel review. It is the terms of reference as defined by the request for establishment of a panel that define the precise claims that will be subject to panel review. In this case, the basis for this past practice is evident given that Poland alleges that POLAND - 19 was read to Thai officials during consultations. There is no way to verify this fact, and it is impossible for Thailand to prove what Poland actually said or did not say during consultations. Moreover, Third Parties will have had no access to this oral presentation by Poland and must rely, like the Panel, on the request for establishment of a panel.

17. Based on this prior practice, it is clear that what transpired in writing or orally during the course of consultations is irrelevant as to whether Poland violated Article 6.2 of the DSU or whether Thailand and/or Third Parties were prejudiced by Poland's actions, or lack thereof.

18. Thailand's fifth point regarding Poland's arguments on Article 6.2 of the DSU is that in paragraph 20 of its rebuttal, Poland contends that Thailand "ignores, for example, the fact that Poland's explanation of its Article 3 claims is hinged on express language reflecting the relevant sub-paragraphs 1, 2, 4, and 5 of Article 3." To the contrary, Poland's request for establishment of a panel only refers to the express language of paragraph 1 of Article 3 and to the "enumerated factors" in this paragraph. The request provides absolutely no reference to the distinct obligations contained in paragraphs 2, 4, or 5 of Article 3. Thailand also notes that Poland has merely listed Articles 2, 5, and 6 of the Anti-Dumping Agreement and Article VI of GATT 1994.

19. Poland's arguments seems to suggest that the best way forward is for the Panel to conclude that referring solely to the enumerated factors in Article 3.1 is sufficient to set forth claims under Articles 3.2, 3.4, and 3.5. Such an approach, however, would be like charging an individual with one crime (without referring to any facts or circumstances on which the charges are based) and then adding charges for related crimes at later stages in the trial, thereby giving the individual less and less opportunity to defend against charges on which a guilty verdict or violation could be based. Of course, this approach completely lacks fundamental fairness and due process and cannot be an acceptable way to operate a system based on the rule of law.

20. Sixth, in paragraph 28 of its rebuttal, Poland attempts to argue that Thailand's compliance or lack thereof with Article 6.2 of the DSU is relevant to Poland's actions in this dispute. Of course, Thailand's actions in other cases are completely irrelevant to this case. Thailand would also direct the Panel and Poland to its Response to Question 1(a) from the Panel where Thailand explains the application of Article 6.2 of the DSU in anti-dumping cases. Thailand also notes that its September 1999 re-

quest fully complies with the requirements of Article 6.2 of the DSU, as evidenced by reading the *entire* request for DS181 (not DS180 as Poland cited). Poland simply quotes from the concluding summary and ignores the special procedures applicable to disputes under the Agreement on Textiles and Clothing.

21. Seventh, in paragraph 30 of its rebuttal, Poland contends that Thailand has taken a meritless position in considering that Poland's claims became less clear during the proceedings. To the contrary, as explained in its Response to Question 5(b) from the Panel, Thailand made a good faith attempt to identify "claims" under Articles 2 and 3 from Poland's First Written Submission. During the hearing, however, Poland did not provide any "clarification" whatsoever and ignored Thailand's concerns. In fact, Poland did not confirm that Thailand had identified Poland's claims correctly, proceeded to present new "claims", and changed ones that Thailand had attempted to identify. As a result, Thailand was left with no choice but to object to Poland's entire case. A simple comparison of Poland's request for establishment, its First Written Submission, and its rebuttal highlights the incomplete and imprecise nature of the claims presented up to the rebuttal stage.

22. Finally, in paragraph 31 of its rebuttal, Poland tries again to characterise Thailand's submission of evidence in its defence as "*ex parte*" and "remarkable" and "secret". Poland continues to misunderstand the nature of panel proceedings. To show a violation, Poland must present precise claims and then must present a *prima facie* case to support such claims. If such a case is made, Thailand must rebut such case with relevant and persuasive evidence and argument. In this case, Poland's claims are only now at this late stage becoming clear. In retrospect, if Thailand had known that Poland would delay the opportunity for all parties to review confidential information of both the Polish respondents and the petitioner and then would use the delay that it caused to present misleading rhetoric throughout the remaining stages of the dispute, Thailand would have waited until this point to respond to the claims finally presented in this final stage of the dispute.

23. As it has repeatedly stated in its submissions and directly to the Polish delegation, Thailand has no objections to Poland reviewing any and all information on which the Thai authorities based their determinations, subject to the procedures established to protect confidentiality. Poland's repeated failure to recognise Thailand's good faith and its failure to itself act accordingly is inappropriate, undiplomatic, and unfair and has no place in WTO dispute settlement.

24. With respect to the submissions of the Third Parties, Japan stated that "specificity of the panel request effectively prevents the complaining parties from continuously raising additional legal claims throughout the panel proceedings. In short, the specificity requirement serves to ensure due process and fairness in the panel proceeding." Moreover, Japan also specifically stated that Poland failed to satisfy the requirements of Article 6.2 and that the Panel should allow Poland to remedy the lack of specificity only in exceptional circumstances and only when the Panel can ascertain "that the ability of the respondent to defend itself is in *no way* prejudiced."

25. Without prejudice to its position under Article 6.2 of the DSU, Thailand now turns to address some of the specific issues that seem to underlie the present dispute.

III. THE CORRECT APPLICATION OF THE STANDARD OF REVIEW DEMONSTRATES THAT POLAND HAS FAILED TO MAKE ITS CASE

26. With respect to the applicable standard of review under Article 17.6 of the Anti-Dumping Agreement, Thailand considers that it has provided an exhaustive discussion of this provision in its First Written Submission and in its Responses to Questions 50 - 53 from the Panel. Thailand provides only a brief response to Poland's interpretation.

A. Article 17.6(i)

27. In paragraphs 34 and 35 of its rebuttal, Poland contends that the proper establishment of the facts requires that (1) the data on which the authorities rely is internally consistent and (2) the method that the Thai authorities gathered the facts must be fair and open and allow interested parties to review and respond to such facts. Without prejudice to its interpretation and without necessarily disagreeing with Poland's interpretation, Thailand simply emphasises that Poland has completely ignored the obligation of the investigating authorities to protect confidential information. More importantly, in its responses to Questions from the Panel and from Poland, Thailand has demonstrated that none of the data relied upon by its authorities was internally inconsistent and that its fact-gathering methods were fair and open and allowed interested parties to review and comment on data, to the extent it was not confidential.

28. In paragraph 36 of its rebuttal, Poland bases its interpretation of Article 17.6(i) on its interpretation of Article 3.4. Thailand simply notes that its interpretation of Article 3.4 is not consistent with Poland's interpretation of Article 3.4 and that the Thai authorities were not "biased" under any permissible interpretation.

B Article 17.6(ii)

29. From its rebuttal, it is apparent that Poland still fails to understand the text, let alone the object and purpose, of Article 17.6 (ii) of the Anti-Dumping Agreement. First, Poland asserts in paragraph 33 of its rebuttal that the relevant provisions of the Anti-Dumping Agreement do not admit of more than one *correct* interpretation. Leaving aside the unhelpful generality of the assertion, it simply misses the point. Article 17.6(ii) does not speak to "correct" or "incorrect" interpretations. Unlike Article 11 of the DSU, Article 17.6 (ii) does not address this question and instead provides that an authority may use any permissible interpretation.

30. Second, in paragraph 48 of its rebuttal, Poland recognises the obvious possibility of more than one "permissible" interpretation. Thus, even Poland realises that the language of Article 17.6(ii) must be given some effect, and a panel is not free to adopt an interpretation that would reduce a provision to redundancy or inutility.

31. Third, in paragraphs 32 and 48 of its rebuttal, Poland refers to the permissibility, or impermissibility, of Thailand's *actions*. The issue is not the permissibility of actions, but of the Thai authorities' interpretations. Of course, the former may follow from the latter, but that is a different question. By its repeated reference to the permissibility of Thailand's actions, Poland seems to suggest that Thailand is somewhat

generally claiming "permissibility" of its actions under Article 17.6(ii). This is incorrect. Thailand has done nothing more and nothing less than interpret the rule embodied in Article 17.6 (ii). In Thailand's view, if the actions of the Thai authorities are based on a permissible interpretation of the applicable rule, than the Panel should not overturn the authorities interpretation and the actions flowing from it.

32. Fourth, Thailand fully agrees with Poland's statement in paragraph 39 of its rebuttal that it is irrelevant whether the Member interpreting and applying a provision of the Anti-Dumping Agreement "deems" its actions permissible. The permissibility of an interpretation is for the Panel to decide. However, Thailand considers that Poland is simply misunderstanding Thailand's interpretation and the text itself of Article 17.6(ii) when it asserts that there cannot be different obligations for different Members derived from the same rule. All Members have the same obligations under the same provisions. But if and when there are two or more permissible interpretations of one provision or two or more "multilateral understandings" of one provision, any Member is justified under the standard established by Article 17.6(ii) if it applies one of those permissible interpretations. In that sense, it may indeed happen that different Members' actions may be upheld by panels based on different interpretations. But it is any Member's right to rely on any of these permissible interpretations of one and the same obligation.

33. In paragraph 45 of its rebuttal, Poland contends that Thailand introduces a new standard by stating that an appropriate test is whether a decision "could have been made by a reasonable and unprejudiced person." Not only is this the test applied by multiple panels in the application of Article 17.6 (i), but it is also quite obviously an interpretation of the requirements of Article 17.6 (i), not an introduction of new elements. By merely restating that the text of Article 17.6 (i) states "unbiased and objective", Poland does little to assist the Panel in formulating an interpretation of Article 17.6(i) consistent with past practice.

34. In addition, in paragraph 47 of its rebuttal, Poland attempts to offer a reference *post hoc* to its "claim" alleging bias on the part of the Thai authorities. First, Poland refers only to obligations of the investigating authorities under Article 3.1 of the Anti-Dumping Agreement, including positive evidence and an objective *examination*. Poland does not refer to bias, to the absence of an objective *evaluation*, or to the applicable standard of review under Article 17.6. Thailand notes that an examination (or the act of investigating) is not the same as an evaluation (or the act of determining the value of). Second, under the applicable standard of review, Poland must present a *prima facie* case with respect to each and every claim. A single sweeping allegation is insufficient. Finally, Poland has still not presented any evidence to support even this broad and sweeping allegation of lack of objectivity.

35. Finally, in its Response to Question 53 from the Panel, Poland discloses its misunderstanding of its obligations in a WTO panel dispute. In part (a) of Question 53, Poland repeatedly refers to what Article 17.6(i) obligates the Panel to investigate or examine in the context of the Thai investigation. In fact, the Panel is limited under the *chapeau* of Article 17.6 of the Anti-Dumping Agreement to examine the matter before it, including the measure and the claims comprising such matter. It is only within this context that the Panel may apply the standard of review. In other words, the Panel must apply the standard of review in examining the claims presented by

Poland and not the validity of the Thai investigation outside the scope of such claims.

37. Thailand reiterates that Poland has the burden of proof as a matter of law throughout this dispute to demonstrate that Thailand has violated its obligations under the Anti-Dumping Agreement and GATT 1994. As a matter of process, Poland must first present a *prima facie* case of a violation under the applicable standard of review in order to trigger any obligation by Thailand to respond. According to Thailand, Poland has failed to present the required case and has, in most cases, failed to even make the requisite claims. Therefore, Thailand respectfully submits that Poland's failure to establish a *prima facie* case under the applicable standard of review should end the Panel's review on all aspects of Poland's complaint.

38. In section (c) of its Response to Question 53, Poland finally attempts to list its claims in this dispute. Poland states that such claims can be found in the Panel's terms of reference, in Poland's First and Second Written Submissions, in Poland's First Oral Statement, and Poland's Responses to Panel Questions 3, 4, 8, and 9. As the Appellate Body has stated, however, "claims" must be set forth in the request for establishment of a panel. Thailand simply urges the Panel to compare these "claims" in Poland's Response to Question 53 with the purported "claims" listed in its request for establishment of a panel. Only one claim appears to be the same. For this one purported claim, however, Poland still does not provide sufficient detail, given that it does not list which of the three factors in Article 3.1 was not considered, much less provide any additional facts or circumstances on which the alleged violation is based.

IV. THAILAND ACTED CONSISTENTLY WITH ARTICLE 2 OF THE ANTI-DUMPING AGREEMENT

39. With respect to Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement, Thailand refers the Panel to its previous submissions and to the submissions of the EC and the United States.

40. Thailand considers that its authorities were permitted to calculate profit using the method provided under Article 2.2.2(i) and that the amount calculated was *per se* reasonable. In its response to Question 29 from the Panel, Poland admitted that the Thai authorities correctly calculated the amount of profit under the method provided in subparagraph (i). Therefore, Thailand acted in accordance with Articles 2.2 and 2.2.2(i) of the Anti-Dumping Agreement and Article VI of GATT 1994.

41. Even if an additional obligation to ascertain the "reasonableness" of the amount of profit calculated under Article 2.2.2(i) is introduced, the Thai authorities demonstrated the reasonableness of the profit amount. In the "Fair amount of profit" section of THAILAND - 62, the Thai authorities compared the profit amount for all H-beams and the profit amount for the like product (JIS H-beams) and demonstrated that the profit amounts were virtually identical. The Thai authorities also found in THAILAND - 62 that "based on the price information submitted by Huta Katowice, it is noted that there is no significant difference between the weighted average price of profitable sales of JIS (989.22 PLN per tonne) and DIN (993.12 PLN per tonne) products sold on the Polish domestic market."

42. As evidenced in its responses (or lack thereof) to Questions 7 and 8 from Thailand, Poland has offered no method for determining whether a particular level of

profit is "reasonable". Moreover, although Huta Katowice is actually earning profits in excess of 35 percent on all H-beams and virtually the same profits on JIS H-beams, Poland continues to regard this profit level as unreasonable. Thailand simply cannot understand how an investigating authority could ever justify using Poland's approach of taking a profit amount other than that actually realised on the domestic sales of the identical or general category of products concerned.

43. Thus, assuming the Panel decides to address Poland's allegations, Thailand respectfully urges the Panel to find that Poland has failed to demonstrate that the Thai authorities' interpretation of Articles 2.2 and 2.2.2(i) of the Anti-Dumping Agreement and Article VI of GATT 1994 was not permissible and, in the alternative, that the Thai authorities were biased or subjective in assessing the reasonableness of the profit amount used for constructed value.

V. THAILAND ACTED CONSISTENTLY WITH ARTICLE 3 OF THE ANTI-DUMPING AGREEMENT

44. At this point in this proceeding, and despite all of its highly charged and un-diplomatic rhetoric, it is clear that Poland's complaint is entirely based on its disagreement with the conclusions reached by the Thai authorities with respect to injury and causation. As Thailand has demonstrated, the information and analysis on which the injury and causation determinations were made was properly established and evaluated without bias or subjectivity in reaching an affirmative determination. While Thailand has admitted to making a number of reporting and clerical errors, Poland is well aware that such errors were not material to the determinations made and have been adequately and thoroughly explained during the course of these proceedings.

45. Poland is now referencing these errors and the confidential information supplied by interested parties using unhelpful, argumentative, and meaningless terms such as "secret", "*ex parte*", "*post hoc*", "gibberish", and "breathtaking". Quite surprisingly, Poland repeatedly alleges that information on the record was not shared with the interested parties. Apparently, Poland does not understand or has chosen to completely ignore Thailand's obligation to protect confidential information. Although Poland's approach in this dispute constitutes a transparent attempt to discredit Thailand before the Panel, it does nothing to support any of the claims made by Poland, to the extent that such claims can, in fact, be identified.

46. Another unfortunate aspect of Poland's rebuttal is that it continues to misunderstand the nature of WTO panel proceedings. For example, in paragraph 52 of its rebuttal, Poland asserts that Thailand has offered no evidence on the "meaningful establishment, consideration and evaluation of several factors enumerated in Article 3, and utterly ignores the requirement that it explain why it did not give weight to the factors it did discuss." Poland also states that Thailand makes no demonstration that dumped imports caused material injury to SYS. Notwithstanding that the Thai authorities did comply with Articles 3.4 and 3.5 in finding injury and causation, it is not Thailand's obligation in this panel proceeding to explain how each and every aspect of its injury and causation findings complied with the Anti-Dumping Agreement. Rather, in order for the Panel to find that Thailand acted inconsistently with the Agreement, Poland must present claims in its request for establishment of a panel; it

must present a *prima facie* case of a violation based on such claims; and Thailand must be found not to have rebutted any *prima facie* case.

47. In this case, Poland (1) failed to set forth its claims in its request for establishment of a panel with sufficient specificity; (2) failed to present a *prima facie* case on any claims that were properly raised; and (3) therefore, failed to satisfy its burden of proof that Thailand acted inconsistently with the Agreement on any aspect of the Thai authorities' injury or causation determinations.

A. *Articles 3.1 and 3.2*

48. In paragraphs 54 to 57 of its rebuttal, Poland demonstrates its complete misunderstanding of the confidential factual record on which the Thai authorities based its determination. This record contains positive evidence that the Thai authorities objectively examined with respect to all of the factors listed in Article 3.1 of the Anti-Dumping Agreement. Thailand considers that it has also demonstrated in this proceeding that the Thai authorities did consider that increases in imports were significant and that price undercutting and price suppression and depression was occurring to a significant degree.

49. Thailand has explained the difficulties in summarising non-confidential information for the interested parties and in providing translations of original Thai language documents. The Thai authorities provided these summaries and translations in good faith in order to provide the respondents with an opportunity to comment in defence of their interests. With only one respondent and one petitioner, the Thai authorities would have been completely within their rights under Article 6 to block out the actual data in confidential tables and not provide relative figures, as is the practice of other Members. Thailand would also have acted consistently with the Anti-Dumping Agreement in refusing to provide any translation of the essential facts and determinations. Thailand's good faith efforts should not be penalised.

B. *Article 3.4*

50. With respect to Article 3.4, the essential question for the Panel is how it will approach its examination of the matter in dispute under its terms of reference, including the claims, if any, provided therein. In its request for establishment of a panel, Poland failed to set forth any precise claims. Poland only stated that the Thai authorities violated their obligations under Article 3 in finding injury and recited the language in Article 3.1 of the Anti-Dumping Agreement.

51. In its First Written Submission, Poland stated that all relevant economic factors were not examined and clarified what it had said during consultations, *i.e.*, that it disagreed with the authorities' conclusions reached because certain factors evaluated under Article 3.4 indicated that the domestic industry was not injured. Poland then asserted, specifically, that the "Thai authorities chose not to present evidence regarding profits, losses, profitability or cash flow." Thailand responded to the specific allegation that evidence was not presented on the four factors and directed the Panel and Poland to where this evidence was referenced.

52. In its First Oral Statement, Poland simply reiterated its broad allegation under Article 3.4 and failed to identify any additional specific factors. Instead of speculating as to which of the factors that Poland may consider relevant, but unexamined or

unevaluated, Thailand again referred to where the evidence evaluated on the four factors identified by Poland could be found.

53. In its questions, the Panel proposed an interpretation of Article 3.4. Although Poland obviously embraced the Panel's interpretation, Thailand disagrees with the Panel's proposed factor-by-factor approach and considers it to be impermissibly strict and contrary to the object and purpose of Article 3.4, *i.e.*, to examine the impact of the dumped imports on the domestic industry under circumstances where no factor can give decisive guidance.

54. Thailand considers that there may indeed be another permissible interpretation of Article 3.4 of the Anti-Dumping Agreement that Thailand has not raised. Under Article 3.4, the "examination" or "investigation" shall include an "evaluation" of all relevant factors or, consistent with the definition of "evaluate" in the *Concise Oxford English Dictionary*, shall include the "formation of an idea of the amount, number, or value of" all relevant factors. A question could arise as to whether the reference to "evaluation" in Article 3.4 means forming an idea about the amount, number, or value of each individual "factor" or forming an idea about the amount, number, or value of the impact as a whole of dumped imports, *i.e.*, evaluating whether there is injury and whether it is material. Under such an interpretation, Article 3.4 would not require a factor-by-factor evaluation, but would require an evaluation of the raw data obtained on the entire set of relevant factors.

55. In any event, in response to the Panel's request for Poland's position on the 16 factors presumed to be listed in Article 3.4, Poland now specifies at the rebuttal stage of these proceedings that the Thai authorities did not "consider" a series of specifically identified factors, reiterates that none were adequately evaluated, and then offers an allegation in the context of the applicable standard of review.

56. Thailand is left in the unfortunate position of either attempting to identify and respond during the final Oral Hearing to Poland's new claims provided at the rebuttal stage or to trust the Panel to recognise that any semblance of due process would be destroyed and that the validity of WTO proceeding in the eyes of WTO Members would be undermined if the Panel were to accept Poland's late claims and make findings on them. Thailand will trust the Panel to protect its due process rights in this proceeding.

57. Subject to its objections and the necessary prejudice that flows from Poland's approach to this case, Thailand offers a response to Poland's charges, to the extent it is able to formulate one at this late stage in the proceeding. As Thailand has stated, during its examination, the Thai authorities evaluated or formed an idea of the amount, number, or value of all relevant economic factors and indices having a bearing on the state of the industry. Thailand notes that in its rebuttal, Poland predominantly refers to its disagreement with the Thai authorities' conclusions reached regarding its evaluations, not to whether such evaluations were indeed conducted.

58. In paragraph 1 of POLAND - 19, in paragraph 64 of its First Written Submission and in paragraph 32 of its First Oral Statement, Poland admitted that the Thai authorities formed an idea about the amount, number, or value for output, capacity utilisation, sales, market share, and employment, indicating that they were all increasing. Poland also indicated that inventories were falling and capacity (*i.e.*, growth) was increasing. Thus, even Poland concedes that the Thai authorities evaluated these factors.

59. For actual and potential decline in profits and actual and potential negative effects on cash flow, the Thai authorities formed an idea about the amount, number, or value as specified in paragraphs 98 to 101 of Thailand's First Submission and as reflected, *inter alia*, in paragraph 1.17 of THAILAND - 44 and paragraph 2.3 of the Final Injury Determination in THAILAND - 46.

60. With respect to actual and potential decline in return on investments and actual and potential negative effects on ability to raise capital and on investment, the Thai authorities evaluated these factors, *inter alia*, in paragraph 1.17 and section 5 of THAILAND - 44.

61. For factors affecting domestic prices, THAILAND - 44 contains an evaluation of domestic production, import volumes, consumption, global and domestic market conditions, credit terms, and other factors that affect domestic prices.

62. With respect to the magnitude of the margin of dumping, the Thai authorities obviously did not know the magnitude of the final margin until after the final dumping determination. Thus, its evaluation of the magnitude of the margin was based on the significantly lower price that Poland was able to offer to take sales in Thailand as a result of its dumping and the impact that such low prices have on the domestic industry. This evaluation is reflected in, among other places, section 4 of THAILAND - 44.

63. The Thai authorities also agree with the interpretation of this factor given by the authorities of other Members, including the US International Trade Commission. According to the U.S. ITC, for example, the magnitude of the margin of dumping does not illuminate either the nature of competition in the importing Member between subject imports and the domestic like product, or the extent of any injury caused to domestic producers caused by such imports. Instead, the magnitude of the margin of dumping typically speaks to differences in conditions in the home market as compared to the market of the importing Member or in the variables used to construct normal value or export price.

64. For actual and potential decline in productivity, paragraph 2.5 of the Final Determination explains that SYS was still seeking economy of scale as a new producer, and thus, its productivity was necessarily always increasing during this period of expansion and development.

65. With respect to actual and potential negative effects on wages, Thailand regrets that its evaluation relied on cost information that SYS has not authorised Thailand to disclose. As shown in THAILAND - 67, SYS submitted labour cost information. These costs reflect that the vast majority of workers are paid on minimum statutory levels. Thus, labour costs are directly linked to the number of employees.

66. Notably, section 4 and 5 of THAILAND - 44 and the Final Injury Determination in THAILAND - 46 reflect the investigation into the impact of dumped imports on the domestic industry and the evaluation of the entire set of relevant factors and indices in determining whether the impact of dumped imports caused material injury.

67. In paragraphs 72 to 92 of its rebuttal, Poland raises a number of issues relating to data that Thailand has clarified in its rebuttal and in its responses to Poland's questions. Thailand notes, however, that it has never and does not now "seek to distance itself" or "wish to walk away" from its confidential report. Rather, Thailand considers that the report correctly summarises the basis for the Thai authorities' de-

termination and demonstrates that such determination was entirely consistent with the Anti-Dumping Agreement.

C. Article 3.5

68. In paragraph 95 of its rebuttal, Poland introduces for the first time a completely new interpretation of Article 3.5 of the Anti-Dumping Agreement and claims that Thailand violated Article 3.5 because the Thai authorities provided "no examination of why the factors enumerated in Article 3.5 [of the] Anti-Dumping Agreement were or were not themselves relevant." Poland's newest claim has no basis in the text of Article 3.5 and completely ignores the other factors that the Thai authorities did consider. Moreover, Poland's new claim simply redirects the Panel away from the fact that Poland has failed to respond to Thailand's question regarding where any interested party raised the Kobe earthquake as having a specific effect separate and distinct from the effect of global market conditions for H-beams.

69. In footnote 73 of its rebuttal, Poland simply notes that the Kobe earthquake was "raised" during the oral hearing and at verification, without any evidence to support its claim, including no reference in THAILAND - 36. Poland also cites to THAILAND - 40, where the earthquake was mentioned only in a footnote and only in the context of prices in the Asian markets as a whole. Thus, Poland has provided no explanation or supporting evidence regarding the basis on which any unique effects of the earthquake should be examined in addition to global market conditions for H-beams. Poland has also not indicated where the "other factors" that it merely lists were raised in the underlying proceeding.

70. In paragraph 100 of its rebuttal, Poland states that it "cannot speculate as to why Thailand has refused to release [SYS' cost of production] information." To prevent Poland from "speculating", Thailand reminds Poland that SYS has not authorised disclosure of this information because it considers that the Government of Poland will not protect the confidentiality of this information from its state-controlled steel company. Given Poland's repeated and exhaustive references to "secret" rather than the correct term, "confidential", in referring to data that Poland is to prevent from disclosure, Thailand considers that SYS' fears may be well-founded. Thailand also notes that Poland's confusion may explain why it delayed obtaining approval from its respondents to disclose their confidential data and even, at one point, stated that the Panel should limit its examination to non-confidential information.

71. Poland's remaining arguments regarding causation are based on issues that Thailand has clarified in its rebuttal and in its responses to Poland's questions and reflect the essential basis of Poland's complaint, that is, Poland simply would have reached a different conclusion based on the record of the investigation.

VI. THAILAND ACTED CONSISTENTLY WITH ARTICLE 5 OF THE ANTI-DUMPING AGREEMENT

72. In its rebuttal, Poland finally provides some clarification of its assertions with respect to Article 5. Thailand is now, however, in the seriously prejudicial position of having to respond to these allegations orally at the last hearing. Poland cannot now remedy its violation of Article 6.2 of the DSU by clarifying its assertions during re-

buttal. Such an approach violates Article 6.2, undermines Thailand's due process rights, and seriously prejudices Thailand's ability to defend itself. Notably, Third Parties have never seen the clarification that Poland now provides for the first time. To the best of its ability at this late stage, Thailand offers its response.

A. *Article 5.2 Chapeau*

73. In paragraphs 116 to 117 of its rebuttal, Poland alleges for the first time that Thailand violated the *chapeau* of Article 5.2 of the Anti-Dumping Agreement. Poland apparently contends that the application contained no "evidence" whatsoever on injury or causal link. The "evidence" of injury and causal link are provided in both the non-confidential and confidential versions of the application contained in THAILAND - 1, THAILAND - 52, and THAILAND - 53. Notably, the *chapeau* of Article 5.2 only provides that the application must contain "evidence" that is relevant and that is beyond simple assertion. No quantum of evidence beyond this minimum threshold is required. Moreover, the *chapeau* does not require that an application contain analysis of any kind. As the panel in *Mexico - HFCS* (para. 7.76) stated, "Article 5.2 does not require an application to contain analysis, but rather to contain information, in the sense of evidence, in support of allegations." The application of SYS clearly satisfies the requirements of the *chapeau* of Article 5.2.

74. Thailand directs the Panel to, as a brief example, the attachments to the confidential and non-confidential applications which contain relevant evidence beyond simple assertion on: selling prices of H-beams, SYS selling prices, SYS financial statements, total imports from Poland compared with total consumption in Thailand, import quantity, import price, sales volume of SYS, domestic market quantity and market share by country, product size information, domestic market quantity and market share by group of products, quantity and import price from other countries, imports from 1988-1996, summarised information on SYS including domestic market conditions, import duty comparison, import prices, average import prices from Poland, and SYS inventories.

75. As noted earlier, Poland did not respond to Thailand's question as to whether it requested or otherwise obtained a translation of the non-confidential application. As even a cursory examination of THAILAND - 53 demonstrates, Poland would probably not have raised these allegations had it or the Polish respondents taken any amount of responsibility for determining the basis for the initiation. The non-confidential application was distributed to Poland and to the Polish respondents over three years prior to the filing of the request for establishment of a panel. In response to Question 11 from the Panel, Poland states that the non-confidential application was the only information in its possession and that it can only provide detail when it receives the confidential application. As already stated, Poland has had well over three years to request or obtain a translation of the non-confidential application in its possession and has failed to do so.

76. In footnote 92 to its rebuttal, Poland cites POLAND - 17 and POLAND -18 for support. Thailand simply notes that neither exhibit refers to Article 5 or, specifically, to Article 5.2. In fact, Poland only contends that Thailand "infringed" articles 12.1.1(iii) and 12.1.1(iv) of the Anti-Dumping Agreement. Poland has not raised these articles in the context of this dispute. Interestingly, the majority of POLAND -

18 does not even relate to this dispute, but contains five comments on "other inconsistencies of the Thai anti-dumping legislation with the Agreement."

B. Article 5.2(iv)

77. In paragraph 117 of its rebuttal, Poland then makes the rather confusing claim that the application contained only raw numerical data on dumping and that this data is not sufficient under Article 5.2(iv) because it is not more than simple assertion, unsubstantiated by relevant evidence. First, Thailand again emphasises that Poland has never identified subparagraph (iv) of Article 5.2 prior to the rebuttal stage. Second, Thailand considers that the information relating to dumping is that information reasonably available to the applicant under subparagraph (iii) of Article 5.2, including relevant price information. Therefore, Thailand is unclear as to the nature of Poland's allegation under Article 5.2(iv).

78. In paragraph 117, Poland continues by providing an incomplete reference to the *Mexico-HFCS* panel report. As Poland correctly states, the panel in *Mexico-HFCS* considered that the information provided in an application must "demonstrate" the consequent impact of the imports on the domestic industry. Poland, however, did not refer to footnote 575 which cites the *Concise Oxford Dictionary* and states that "[w]e do not understand 'demonstrate' in this context to mean 'prove', but rather to mean 'show evidence of; describe or explain by help of specimens ... '". Notably, the panel in *Mexico-HFCS* (para. 7.74) also stated that "the applicant need only provide such information as is 'reasonably available' to it with respect to the relevant factors." As discussed earlier, the application clearly contained information reasonably available to the applicant on factors relevant to the allegation of injury and this information "shows evidence of" the consequent impact of dumped imports on the domestic industry.

79. In accordance with the panel's legal and factual findings in *Mexico-HFCS*, Thailand respectfully urges the Panel to find, to the extent it decides to reach Poland's claims, that Poland has failed to present a *prima facie* case that the Thai authorities were biased or subjective in finding that the application satisfied the requirements of the *chapeau* and subparagraph (iv) of Article 5.2.

C. Article 5.3

80. In paragraph 119 of its rebuttal, Poland claims that Thailand violated Article 5.3 of the Anti-Dumping Agreement because the Thai authorities could not satisfy the obligations of Article 5.3 if "the petition lacks two of the three basic requirements for initiation, and is wholly deficient with respect to the third." Poland confirms that this is the basis for its allegation under Article 5.3 in its Response to Question 12 from the Panel. As Thailand has demonstrated, the Thai authorities complied with the *chapeau* of Article 5.2 and Article 5.2(iv) and thus the basis for Poland's allegation under Article 5.3 lacks foundation.

81. Thailand notes that the panel in *Mexico - HFCS* (para. 7.95) stated that its analysis under Article 5.3 would principally be based "on the notice of initiation, but also take into account information that was before [the investigating authority] at the time of its determination, to the extent consideration of it can be discerned from the notice." As Thailand has repeatedly stated, Poland has not identified any portion of

the record as described in Thailand's Response to Question 10 from the Panel on which its allegations under Article 5.3 are based. This may be because Poland erroneously considers, as stated in its response to Question 10 from the Panel, that the non-confidential application is the only relevant document for determining if the Thai authorities complied with Article 5.3. Thus, the only basis for Poland's claim under Article 5.3 must be its claim that Thailand violated Article 5.2. As just stated, Poland's allegation under Article 5.2 is without merit.

82. Accordingly, to the extent that the Panel decides to reach Poland's claim under Article 5.3, Thailand respectfully urges the Panel to find that Poland has failed to present a *prima facie* case that the Thai authorities were biased or subjective in finding that sufficient evidence existed to justify the initiation of an investigation.

D. Article 5.5

83. With respect to its allegations under Article 5.5 of the Anti-Dumping Agreement, Thailand simply notes that Poland has provided no legal basis for its position that Article 5.5 requires written notification and that oral notification is not permissible. Poland's only support is the same AHG minutes that Thailand considers support its position that written notice is not required.

84. In their responses to Question 3 from the Panel, Third Parties similarly found that Article 5.5 does not require written notification.

85. With respect to the facts surrounding the meeting between the Thai authorities and a representative of the Government of Poland, Poland asserted its view of the facts in response to Question 8 from the Panel. Poland did not provide any documentary evidence to support its views and did not provide any of the details requested in Question 8(c) from the Panel with respect to the "timeliness" or "propriety" of the notification or with respect to what should have happened at the meeting but did not.

86. Thailand refers the Panel to its Response to Question 8 and to THAILAND - 14, THAILAND - 56, and THAILAND - 57.

VII. THAILAND ACTED CONSISTENTLY WITH ARTICLE 6 OF THE ANTI-DUMPING AGREEMENT.

87. In paragraph 123 of its rebuttal, Poland first inaccurately quotes from Article 6.4 of the Anti-Dumping Agreement and then sets forth its claims in detail for the first time. As I stated earlier, Thailand is now in the seriously prejudicial position of having to respond to these claims orally at the last hearing. Poland cannot now remedy its violation of Article 6.2 of the DSU by making its claims during rebuttal. Such an approach violates Article 6.2, undermines Thailand's due process rights, and seriously prejudices Thailand's ability to defend itself. Notably, Third Parties have never seen these claims. To the best of its ability at this late stage, Thailand offers its response.

A. *Article 6.4*

88. Poland contends for the first time that Thailand violated Article 6.4 because the Thai authorities never informed the Polish respondents that SYS filed a non-confidential version of its questionnaire response and never affirmatively provided such response to the Polish respondents. Poland and the Polish respondents obviously knew that SYS filed a questionnaire response, as evidenced in paragraph 1 of the Preliminary Injury Determination in THAILAND - 25. Because the Thai authorities were obligated to require interested parties to furnish a non-confidential summary under Article 6.5.1 of the Anti-Dumping Agreement, Poland and the Polish respondents either knew or should have known that a non-confidential version was filed by SYS. In its First Written Submission, Poland did *not* claim that the authorities failed to require SYS to submit a non-confidential version. If Poland had not known that the non-confidential version existed, it certainly would have claimed that Thailand violated Article 6.5.1 for not requiring one from SYS.

89. Thailand now reminds Poland and the Panel of the precise requirements of Article 6.4. This article states that "whenever practicable" the authorities shall provide "timely opportunities for all interested parties to see all information" that (1) is relevant to the presentation of their cases, (2) is not confidential, and (3) is used by the authorities in its investigation. Poland has not demonstrated that the authorities failed to allow respondents to see, where practical, information that satisfies these three conditions. Moreover, Poland has presented no evidence to demonstrate that respondents were denied a timely opportunity to see the non-confidential version, to the extent Poland can demonstrate that the information contained in the version satisfies the conditions under Article 6.4. Thus, Poland has failed to present a *prima facie* case that Thailand violated Article 6.4.

90. Next, Poland claims that Thailand violated Article 6.4 because the Thai authorities failed to provide "a legally adequate copy of any petition, as the non-confidential summary, Exhibit THAILAND 1, fails to meet the requirements of Article 5.3 AD." As I stated earlier, the non-confidential version of the application provided to Poland and the Polish respondents in September 1996 satisfies the requirements of Article 5.2 of the Anti-Dumping Agreement and the authority acted consistently with Article 5.3 of the Anti-Dumping Agreement. Moreover, the compliance with Article 5.3 is irrelevant to whether Thailand complied with Article 6.4. Thus, Poland's claims are both unsubstantiated and irrelevant.

91. Next, again in paragraph 123 of its rebuttal, Poland makes an assertion relating to whether the Final Determination was based on detailed findings of fact or on "secret" findings that contradict statements in the Final Injury Determination. Thailand is not clear how Poland considers that Thailand violated Article 6.4 and, accordingly, simply refers to Thailand's responses to the questions from the Panel and Poland.

B. *Article 6.5.1*

92. In paragraph 124 of its rebuttal, Poland provides no additional clarification of its purported claim under Article 6.5.1 of the Anti-Dumping Agreement. Either intentionally or unintentionally, Poland refers to the non-confidential summaries "that were provided." Thailand does not understand whether Poland is claiming that the

authorities' non-confidential summaries do not meet the requirements of Article 6.5.1 or whether the non-confidential summaries filed by the interested parties violate Article 6.5.1. Poland refers to "tossing out labels" of price suppression and price undercutting, suggesting that its claim is that the authorities' summaries violated Article 6.5.1. On its face, however, Article 6.5.1 does not apply to any summaries prepared by the authorities.

93. In paragraph 124 of its rebuttal, Poland then shifts from its original assertion under Article 6.5.1 to a new one. Now, Poland apparently contends that failure to provide non-confidential summaries does not, in fact, violate Article 6.5.1, but Article 6.4. I have already addressed Poland's Article 6.4 claims.

C. Article 6.9

94. In paragraph 125, Poland again asserts that Thailand violated Article 6.9 of the Anti-Dumping Agreement. At this point, Poland claims that this violation is based on the failure of the authorities to provide the respondents with a weighing of all relevant economic factors used as the basis for the final injury determination, including the basis for using overlapping 12-month periods for comparison. As Thailand has stated in its Responses to Questions 9 and 12 from Poland, the Thai authorities were obligated to disclose non-confidential essential "facts" not the analysis of those facts. It was not obligated to disclose how it intended to weigh economic factors for which it collected facts or its basis for reporting both 1995/IP and quarterly data. Poland has not provided any basis in Article 6.9 for the obligation to disclose analysis in addition to facts.

95. Poland continues to complain about the reporting of overlapping periods for certain factors. It has still failed, however, to demonstrate that any distortion is introduced by the use of these periods. Moreover, in most cases, the Thai authorities analysed monthly, quarterly, and 1995/IP data, as evidenced in THAILAND - 44, THAILAND - 66, and THAILAND - 67. Because of the confidential nature of this data, however, the authorities decided to disclose indexed 1995/IP data for a number of factors. Finally, as Thailand has stated in previous submissions, the comparison of overlapping periods is as meaningful as a comparison of periods that do not overlap, given that the authorities were well aware of the nature of the comparison.

96. In paragraph 125 of its rebuttal, Poland also contends that the Thai authorities should have disclosed additional facts that were not contained in the disclosure of essential facts in THAILAND - 37 or in the disclosure on dumping to the Polish respondents in THAILAND - 38. Poland has still not provided any indication of the additional data that should have been disclosed. Moreover, Thailand has fully explained any inadvertent clerical errors or discrepancies between the confidential information on which the final determination was based and the non-confidential disclosure provided to interested parties. None of these errors or discrepancies materially affected the disclosure of essential facts or the ability of interested parties to defend their interests. Poland has failed to demonstrate otherwise.

97. Poland's Response to Question 21 from the Panel continues to raise Thailand's "surprise" at additional requests for disclosure. In an attempt to misleadingly portray the Thai authorities as non-responsive, Poland asks the Panel to compare THAILAND - 40, 47, and 48 with THAILAND - 49. Of course, Poland did not refer

to the comprehensive response to THAILAND - 40 that the Thai authorities provided in THAILAND - 41. Poland also ignores the fact that the final determination was not based on any new information, as was stated in THAILAND - 49. Thus, there were no new non-confidential facts that could have been disclosed.

VIII. CONCLUSION

98. Based on the aforementioned, Thailand respectfully requests that the Panel find that it acted consistently with its obligations under Article VI of GATT 1994 and the Anti-Dumping Agreement.

ANNEX 2-10

**RESPONSES FROM THAILAND TO ORAL QUESTIONS OF THE PANEL
AT THE SECOND MEETING**

(13 April 2000)

1. Pursuant to your instruction, Thailand provides the following clarifications to its responses to questions from the Panel and Poland:
2. In its Opening Remarks to the Second Oral Hearing, Thailand referred to a document regarding the restructuring of Huta Katowice in the context of Poland's accession to the EU. The Thai delegation has not been able to confirm the nature and date of this document from the source of the passage. Accordingly, Thailand requests that the Panel disregard this reference as irrelevant to this dispute.
3. Mr. Gauthier asked for a more detailed explanation of the factors considered by the Thai authorities in its determination of price undercutting. The Thai authorities first determined that Polish imports and domestic products competed on the basis of price. As stated in response to Additional Question 11 from Poland (and confirmed in paragraph 1.5 of THAILAND - 44):

This was considered decisive in that the H-beams exported by Poland and the H-beams produced by the domestic industry were competing in the same segment of the market, generally of the same quality, specifications, and end-use. Poland was well-known by the consuming industry as a major supplier of H-beams in Asia. There was also no quality difference between the product of SYS and Poland that would justify this price difference. Consequently, decisions of sourcing of H-beams from Poland or the domestic industry was dictated by price.

The authorities then compared Polish import prices and SYS' prices in a number of different ways. As stated in response to Additional Question 6 from Poland (and confirmed in paragraph 2 of THAILAND - 25):

It should be pointed out that the analysis of price-undercutting presented to the CDS Committee was in far more detail than the summary provided. The presentation of price undercutting involved comparisons of actual selling prices of Poland available to the DIT with the actual selling price of the domestic industry at the same level of trade in Thailand (end user) and on the same terms. This information was used for the preliminary determination, confirmed for the final determination, and presented in detail to the CDS Committee.

This analysis was conducted on a transaction-by-transaction basis, where such information was available, on an average monthly basis, on an average quarterly basis, and on an average 1995/IP basis. For purposes of reporting to Poland, the Thai authorities used a quarterly basis as evidenced in THAILAND - 67 and in Thailand's response to Question 13 from Poland, which states:

The Thai authorities considered all relevant information regarding the level of price undercutting. As it will be appreciated, price undercutting varies on a transaction by transaction basis as well as on the information made available to the Thai authorities. In this context, a

wide range of prices were used to establish price undercutting. for the purpose of the disclosure provided to Poland, price undercutting was illustrated as a comparison between c.i.f. import prices and SYS ex-factory prices, i.e. "landed" prices in Thailand.

For other purposes, the Thai authorities also considered, *inter alia*, the effect of credit terms (paragraph 1.18 of THAILAND - 44 and Thailand's response to Question 13 from Poland), the import duty (paragraph 3.4 of THAILAND- 44), the BOI surcharge (paragraph 3.4 of THAILAND - 44), and the timing of offers (paragraph 4.3 of THAILAND - 44 and Thailand's response to Question 10 from Poland). Notably, Poland has presented no rebuttal to Thailand's responses to Poland's Questions and Additional Questions.

4. Mr. de Azevedo asked whether there was a distinction between the meaning of "fact" and "data" or whether they have the same meaning in the context of this dispute. According to the 10th Edition of the *Concise Oxford Dictionary*, "fact" is defined as "information used as evidence" or, chiefly in law, "the truth about events as opposed to interpretation". "Data" is defined as "facts and statistics used for reference of analysis". In the context of this dispute, Thailand considers that "data" is a subset of "facts" and is normally confined to statistics. All facts are capable of verification as to their truth or falsity and are normally presumed true, absent conclusive evidence to the contrary. An example of a fact that is not data would be whether a Thai official met with a Polish official and what was discussed between the two. Whether what was discussed permissibly satisfies Article 5.5 of the Anti-Dumping Agreement, for example, is not a fact but an interpretation.

5. In response to Thailand's question to Poland to identify examples of "supporting particulars" for purposes of showing prejudice, Poland stated that it is the case of "knowing it when you see it". Thailand suggests that this inability to objectively identify such particulars is consistent with Thailand's response to Question 2(a) from the Panel, including the passage cited in *Guatemala - Cement* on the harmless error of the failure to notify. In any event, as shown in Thailand's responses to Question 2(b) and 7(b) from the Panel, Thailand has demonstrated with supporting particulars that it lacked actual knowledge of the claims against it and that it was seriously prejudiced in this proceeding.

ANNEX 3-1

THIRD PARTY SUBMISSION BY THE EUROPEAN COMMUNITIES
(21 February 2000)

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1. INTRODUCTION

1. The European Communities (hereafter "the EC") welcomes this opportunity to present its views in the proceeding brought by Poland over the consistency with Article VI of the General Agreement on Tariffs and Trade (hereafter "GATT 1994"), and with Articles 2, 3, 5, and 6 of the Agreement on Implementation of Article VI of the GATT (hereafter "ADA") of the definitive anti-dumping duties imposed by Thailand on imports of angles, shapes and sections of iron or non-alloy steel and H-beams from Poland.

2. The EC has decided to intervene as third party in this case because of its systemic interest in the correct interpretation of the ADA and in the correct application of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereafter "DSU"). Many of the issues in dispute relate to questions of fact on which the EC is not in a position to comment. Accordingly, the EC will limit its submission to a number of issues of legal interpretation which are of particular interest to the EC.

3. Section II discusses the EC's procedural concerns. Sections III considers some of the claims submitted by Poland.

2. PROCEDURAL ISSUES

2.1 *The Article 6.2 DSU Standard for Requests for the Establishment of a Panel*

4. Thailand has requested the Panel to issue a preliminary ruling dismissing Poland's claims under Articles 5 and 6 ADA because in its request for the establishment of a panel Poland has not presented any factual or legal basis for these violations, thus denying Thailand its right to present an effective defence and violating Article 6.2 of the DSU.

5. Article 6.2 DSU sets the standards for the request for the establishment of a panel. It provides, in the relevant part, that:

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

6. In *Korea - Dairy Products*¹, the Appellate Body has recently refined its previous findings on the exact requirements of Article 6.2 DSU. In *EC - Bananas*, in fact, it had held that it was sufficient for the complainants "to list the provisions of the specific agreements alleged to have been violated without setting out detailed arguments as to which specific aspects of the measures at issue relate to which specific provisions of those agreements".² In that occasion the Appellate Body had also specified that the panel request needs be "sufficiently precise" for two reasons: because it forms the basis for the terms of reference of the panel, and because "it informs the defending party and the third parties of the legal basis of the complaint".³ Now, returning on the same issue, the Appellate Body has clarified that the identification of the treaty provisions alleged to be violated is "always necessary" and constitute a "minimum prerequisite" to present the legal basis of the complaint. If this might, in some cases, be enough to meet the standard of Article 6.2 DSU, in other cases, for instance when an article contains more than one distinct obligation, the mere listing of articles of an agreement is likely to be not sufficient to inform the defending party and any third parties of the legal basis of the complaint.⁴ In *Korea - Dairy Products*, these considerations lead the Appellate Body to find that, although the articles listed contained each several distinct obligations and the request of the panel by the complainant should have been more detailed, the defendant had failed to demonstrate that the mere listing of the articles alleged to have been violated had prejudiced its ability to defend itself.

¹ Report by the Appellate Body on *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, 14 December 1999, DSR 2000:I, 3.

² Report by the Appellate Body on *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, AB-1997-3, WT/DS27/AB/R, 9 September 1997, DSR 1997:II, 591, at para. 141.

³ *Ibid.*, at para. 142.

⁴ Report by the Appellate Body on *Korea Dairy Products*, cited above, *supra*, footnote 1, at paras. 114 ff.

7. In the request for the establishment of this Panel, Poland has merely listed the articles claimed to have been violated by Thailand, without taking into account the fact that each of the articles listed, i.e. Article VI GATT 1994, Articles 2, 3, 4, 5 and 6 of the ADA are all composed of many paragraphs, each of them setting out distinct obligations.

8. Following Poland's failure to present its claims clearly the EC, as a third party, has not been able to know the legal basis of the complaint until it has received the First Submission by Poland. This has impaired the EC's ability to exercise to the fullest extent its procedural rights in this proceeding.

2.2 *Poland's Failure to State Clearly the Claims in the First Written Submission*

9. The lack of sufficient clarity in the Polish request for the establishment of the panel has been aggravated by the fact that Poland has failed to state clearly its claims even in its First Written Submission, to the extent that the EC still has doubts on the scope and legal basis of certain Polish claims.⁵ This raises the further issue of whether Poland has been able to submit a *prima facie* case that Thailand has violated Article VI GATT 1994 and the ADA.

10. The Appellate Body has made it clear in several occasions that a panel cannot make a case for the complainant. In particular, a panel cannot rule in favour of a complaining party "which has not established a *prima facie* case of inconsistency based on specific legal claims asserted by it".⁶

2.3 *Thailand's Failure to Provide Certain Confidential Exhibits to the Other Parties*

11. With regard to Thailand's failure to provide certain confidential exhibits to the other parties, the EC refers to the comments contained in its submission to the Panel of 18 February 2000.

12. The compromise solution proposed by Thailand in its letter to the Panel of 17 February is still unacceptable to the EC. It implies in fact that the other parties would not have access to some of the information provided to the Panel.

13. The EC would like to reiterate that if Thailand considers Article 18.2 DSU not sufficient to secure the protection of its confidential information, it has the possibility to propose to the Panel the adoption of more stringent rules as part of its Working Procedures.

⁵ See, below, paras. 14 and 36.

⁶ Report by the Appellate Body on *Japan - Measures Affecting Agricultural Products*, AB-1998-8, WT/DS76/AB/R, 22 February 1999, DSR 1999:I, 277, at para. 129. See also Report by the Appellate Body on *Brazil - Export Financing Programme for Aircraft*, AB-1999-1, WT/DS46/AB/R, 2 August 1999, DSR 1999:III, 1161, at para. 194.

3. CLAIMS SUBMITTED BY POLAND

3.1 *Amount of Profit Used in the Calculation of the Constructed Normal Value*

14. Poland claims that the Thai authorities used an "unreasonable" amount of profit in calculating the normal value. Although Poland's submission does not identify clearly the specific provisions allegedly breached by Thailand, Poland's complaint appears to be that the Thai authorities violated Article VI.1(b)(ii) GATT 1994 and the last sentence of the first paragraph of Article 2.2 ADA⁷. On the basis of the facts known to the EC, this claim is unfounded and should be rejected by the Panel.

15. The decision by the Thai authorities to construct the normal value appears to have been based on the following factual findings:

- first, export sales to Thailand consisted of JIS H-beams;
- second, JIS H-beams were not sold in Poland in sufficient quantity to allow a proper comparison; and
- third, the DIN H-beams sold in Poland are not "like" JIS H-beams⁸.

16. In turn, the decision by the Thai authorities to use the profit margin realised by Huta Katowice on its domestic sales of both JIS and DIN H-beams rests on the finding that, while not being "like" products, DIN and JIS H-beams belong to the "same general category of products".

17. Poland does not challenge the conclusion of the Thai authorities that domestic sales of JIS H-beams were too small to permit a proper comparison. Nor does Poland contest that DIN H-beams are not "like" JIS H-beams.⁹ Indeed, that finding was requested by the Polish exporters themselves. Finally, Poland does not dispute that, in light of those two findings, the Thai authorities were justified in calculating the normal value on the basis of the cost of production. Poland's complaint is that the amount of profit included by the Thai authorities in the constructed normal value was "unreasonable". According to Poland, the Thai authorities should have used instead any of the three "reasonable" profit rates proposed by the Polish exporters.

18. As recalled by Poland¹⁰, both Article VI.1(b)(ii) GATT 1994 and the last sentence of the first paragraph of Article 2.2 ADA set forth the principle that the amount of profit included in the constructed normal value must be "reasonable". That principle, however, is further specified in Article 2.2.2 ADA, which lays down detailed rules for the determination of the "reasonable amount for profit". Contrary to what Poland appears to suggest, Article VI.1(b)(ii) GATT 1994 and the last sentence of the first paragraph of Article 2.2 ADA do not establish a supplementary "reasonabil-

⁷ Poland's First submission, at para. 78.

⁸ Thailand now argues that, in light of the close similarity between the two types of H-beams, it would have been reasonable for the Thai investigating authority to have found that all the H-beams sold in Poland were "like" products. See Poland's First Written Submission, at footnote No 26. Although the issue is not before the Panel, the EC would agree that the Thai investigating authorities seem indeed to have made an unduly limited interpretation of the notion of "like product".

⁹ Poland's First Written Submission, at para. 81.

¹⁰ *Ibid.*, at para. 78.

ity" test, different from that embodied in Article 2.2.2. Rather, to the extent that a Member complies with the rules of Article 2.2.2, it must be deemed to comply as well with the general principle enounced in Article VI.1(b)(ii) of GATT and in the last sentence of the first paragraph of Article 2.2 ADA.

19. Therefore, the relevant issue before the Panel is whether Thailand determined the reasonable amount for profit in accordance with the relevant rules of Article 2.2.2. For the reasons explained below, the EC is of the view that the determination made by the Thai authorities was consistent with those rules and, consequently, also with Article VI.1(b)(ii) GATT 1994 and with the last sentence of the first paragraph of Article 2.2 ADA.

20. The chapeau of Article 2.2.2 provides that, in principle, the amount of profit must be based "on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation".

21. In the present case, the Thai authorities concluded that the method set out in the chapeau of Article 2.2.2 could not be applied since domestic sales of the relevant "like" product (i.e. JIS H-beams) were not made in sufficient quantity to allow a proper comparison. That conclusion has not been challenged by Poland in this dispute.

22. The chapeau of Article 2.2.2 goes on to state that, where the reasonable amount for profit cannot be determined on the basis of the profit realised on the domestic sales of the like product, it may be determined on the basis of one the following methods:

- "(i) the actual amounts [...] realised by the exporter or producer in question in respect of [...] sales in the domestic market of the country of origin of the same general category of products;
- (ii) the weighted average of the actual amounts [...] realised by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin".

23. Article 2.2.2 does not prescribe any hierarchy among the above three options. Nor does it require that the investigating authorities should try first all of them before selecting that which yields the most "reasonable" result in each particular case. Rather, Article 2.2.2 leaves complete discretion to the investigating authorities to choose whichever of the three options they consider most appropriate.

24. Thailand has expressed the view that options (ii) and (iii) are subordinated to option (i)¹¹. That view, however, finds no support in the wording of Article 2.2.2. Moreover, contrary to what Thailand suggests, that interpretation is by no means required by the object and purpose of Article 2.2.2. The constructed normal value is a

¹¹ Thailand's First Written Submission, at para. 73.

surrogate for the normal value based on domestic prices. The purpose of the rules set out in Article 2.2.2 is to arrive at a constructed value as close as possible to the normal value that would have been determined on the basis of domestic prices, had there been sufficient comparable sales in the ordinary course of trade. Option (i) is not inherently more apt to achieve that objective than option (ii) or than "any other reasonable method" consistent with option (iii).

25. Contrary to Thailand's assertion¹², the universe of data relevant for option (ii) is not necessarily "broader" than that relevant for option (i). Both options involve an enlargement of the pool of data, albeit in different directions.

26. Moreover, the level of profits realised by a producer on its domestic sales of the subject product depends not only on company specific factors, such as its relative efficiency compared to other producers of the like product, but also on structural or market factors affecting equally all companies selling the same product. While option (i) allows to take into account the first category of factors, it fails to capture the impact of those in the second category, which is often preponderant. For example, if the product subject to investigation is isolated from imports by high tariffs, the profit realised by other exporters on their domestic sales of that product is likely to provide a more accurate basis than the profit realised on the sale of other products belonging to the "same general category of products" which do not enjoy similar tariff protection.

27. The Thai authorities have explained that in the case at hand they chose to apply option (i). Since Poland does not contest that the method provided for in the chapeau of Article 2.2.2 was not available in this case, it is also beyond dispute that the Thai authorities were entitled to resort to option (i). Thus, the only issue which needs to be addressed by the Panel is whether the Thai authorities applied correctly option (i). In the EC's view, Poland has not satisfied the burden to demonstrate that the Thai authorities failed to do so.

28. In essence, Poland contends that DIN H-beams and JIS H-beams cannot be considered to belong to the "same general category of products" in view of the Thai authorities' previous finding that they are not "like" products.¹³ This argument, however, is plainly wrong. The notion of "general category of products" is broader than that of "like" products. That conclusion is commanded not only by the ordinary meaning of those two terms, but also by the structure of Article 2.2.2. If the notion of "general category of products" had the same, or a narrower, scope than that of "like" products, option (i) would become totally redundant, since its application presupposes always that the reasonable amount for profit cannot be determined on the basis of the sales of "like" products.

29. The EC notes that, aside from the above argument, Poland has not advanced any other argument, let alone evidence, to show that the "general category of products" was wrongly defined by the Thai authorities.

30. Instead, Poland goes on to argue that the profit rate determined by the Thai authorities is "unreasonable" because it is higher than the rates obtained with any of

¹² *Ibid.*

¹³ Poland's First Written Submission, at para. 83.

the methods proposed by the Polish exporters.¹⁴ That argument, however, is wholly irrelevant. As explained above, the only issue before the Panel is whether the determination made by the Thai authorities is consistent with the terms of option (i) of Article 2.2.2, and not whether, *in casu*, option (i) yields the "most reasonable" result, compared to the results of "any other reasonable method".

31. The mere fact that the profit rate used by the Thai authorities is relatively high compared to other (allegedly) "reasonable" rates proposed by the Polish exporters does not make it "unreasonable". A profit rate determined in accordance with the method set out in option (i) is conclusively presumed to be "reasonable" in all circumstances, irrespective of the results of that method in each particular case. This is confirmed by the wording of option (iii) of Article 2.2.2, which refers to "any *other* reasonable method...[emphasis added]", thus indicating clearly that the preceding methods set out in the chapeau and in options (i) and (ii) are "reasonable" *per se*.

32. For the above reasons, the EC is of the view that the Thai investigating authorities established the amount for profit included in the constructed normal value in conformity with Article 2.2.2 and, therefore, that Poland's claim under this heading should be rejected by the Panel.

3.2 *Determination of Material Injury: Evaluation of all Relevant Factors*

33. Poland claims that the Thai authorities have violated Article VI GATT 1994 and Article 3 ADA because they have made "no proper showing of material injury". In particular, according to Poland, the Thai authorities did not base their determination on positive evidence; they did not conduct "an objective examination of the volume and effects on price of the Polish imports, and the impact of those imports on SYS"; they failed to consider whether there had been a significant increase in imports or a significant price undercutting or a depression of prices; they did not examine "all relevant economic factors and indices"; and they failed to demonstrate that the Polish imports were causing injury.¹⁵

34. On the basis of the facts known, the EC is not in a position to judge the correctness of these arguments. Admittedly, Thailand's determination of injury could be more detailed. At the same time, however, the EC would note that, contrary to Poland's repeated assertions¹⁶, the mere fact that output, sales, capacity utilisation, employment and market shares were positive in the investigation period does not exclude *per se* a finding of injury. It should, for instance, be noted that the Thai producer was not profitable.

35. In addition, the EC would like to put forward some general systemic considerations with respect to the extent of the requirements imposed upon the investigating authorities by Article 3 ADA.

¹⁴ *Ibid.*, at paras. 82 and 83.

¹⁵ *Ibid.*, at paras. 64-76.

¹⁶ See e.g. Poland's First Written Submission, at paras. 64 and 74.

36. In its written submission, Poland refers several times to the fact that one of the principles set forth by Article VI GATT 1994 and Article 3 ADA is "the fundamental principle that an injury determination shall include an evaluation of all factors".¹⁷ However, Poland neither explains where in Article VI GATT 1994 or Article 3 ADA this "fundamental principle" is enunciated, nor it specifies what it refers to with the expression "all relevant factors". In particular, it is not clear whether Poland intends to say that the injury determination shall include an evaluation of all the three factors indicated in paragraph 1 of Article 3, i.e. the volume of the dumped imports, the effect of the dumped imports on prices in the domestic market for like products, and the consequent impact of these imports on domestic producers of such products. Or, if it paraphrases the wording of paragraph 4 of Article 3, which requires the investigating authorities to include in their examination of the impact of the imports on the domestic industry

"an evaluation of all relevant economic factors and indices having a bearing on the state of the industry".

In the first hypothesis the EC would support Poland's assertion that all the three factors need to be evaluated. In the second hypothesis, instead, the EC would contest this assertion and would consider necessary for the Panel to turn its attention to the exact meaning of this paragraph.

37. The EC is aware that the recent report of the panel in the *Mexico - HFCS* case¹⁸ has interpreted Article 3.4 as requiring the consideration of each of its listed factors.¹⁹ Since the Panel may be faced with the need to deal with the same provision in the present case, the EC feels it must dedicate some time to explain further why the interpretation of the panel in the *Mexico - HFCS* case appears excessive, incorrect and certainly not in line with the consistent previous reading of this norm. This notwithstanding the fact that the panel's report is still subject to appeal and that its inaccuracies could still be corrected by the Appellate Body.

38. Article 3.4 ADA reads as follows:

"The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or invest-

¹⁷ *Ibid.*, at para. 50.

¹⁸ Report by the Panel on Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS132/R, 28 January 2000, DSR 2000:III, 1345, at para. 7.128.

¹⁹ The United States did not argue that Article 3.4 required the consideration of all the injury factors listed therein (see Report by the Panel on *Mexico - HFCS*, cited above, *supra*, footnote 18, at para. 7.121). Thus, the Panel's conclusion was not only erroneous, but also *ultra petitem*. The EC can only wonder why the Panel devoted such lengthy considerations to an issue which was not raised by any of the parties to the dispute and the resolution of which was clearly not necessary to decide the claim before it.

ments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

39. The current text of Article 3.4 is unchanged from that in Article 3.3 of the 1979 Anti-dumping Code, with the exception that it specifies that the impact is "of the dumped imports", it includes the "magnitude of the margin of dumping" as one of the indices having a bearing on the state of the industry, and it uses the locution "including" in lieu of "such as".

40. The 1992 panel in *US - Salmon* was called to verify whether the US authorities had properly considered the factors mentioned in Article 3.3 of the 1979 Anti-dumping Code. According to the panel, purpose of this norm is to require

"investigating authorities to include in their examination of the impact of the imports on the domestic industry an evaluation of all relevant economic factors and indices having a bearing on the state of the industry and *it contains an illustrative list* of those factors and indices" (emphasis added).²⁰

41. The illustrative and not mandatory nature of the Article 3.4 is apparent from its wording. First of all, paragraph 4 requires investigating authorities to evaluate not "all economic factors and indices" but only all those economic factors and indices which are "relevant". The use of this adjective strongly qualifies the elements to be considered and, by allowing discerning between what is and what is not "relevant", it certainly introduces an element of discretion. Secondly, the use of the word "including" to introduce the list of factors and indices implies, similarly to the expression "such as", that what follows are only some of the examples that could be given. Thirdly, the presence of the conjunction "or" to link some of the listed factors necessarily implies that the investigating authorities are left the discretion to decide which of the factors and indices listed can be considered relevant and which not in each particular case. If the Article 3.4 list had a mandatory nature and "all" factors and indices listed had to be evaluate, the drafters of the ADA would have used the conjunction "and", as they had not hesitated doing in many other contexts. Finally, the last sentence of paragraph 4 clearly states that

"This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

While the first part of this sentence could be interpreted to mean that, in certain circumstances, investigating authorities need to evaluate more factors than the ones actually listed, the second part of this sentence *a contrario* affirms that some times one or several, and thus not all, of the listed factors can give decisive guidance to examine the impact of the dumped imports on the domestic industry concerned. It is thus clear that in these cases the investigating authorities are not required to look further.

42. The panel in *Mexico - HFCS* placed considerable reliance on a series of previous panel reports concerning the interpretation of Article 4.2 of the Agreement on

²⁰ Report by the Panel on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted by the Committee on Anti-Dumping Practices on 27 April 1994, at para. 493.

Safeguards (the "AS") and Article 6.3 of the Agreement on Textiles and Clothing (the "ATC").²¹ The panel, however, completely ignored the existence of important textual differences between those two provisions and Article 3.4 ADA, which render the analogy drawn by the Panel totally inapposite.

43. In the first place, the list of injury factors in Article 3.4 ADA includes many factors that are not mentioned in Article 4.2 AS or in Article 6.3 ATC. Specifically, Article 4.2 AS does not list factors such as "return on investments", "cash flow", "inventories", "wages", "growth", "ability to raise capital" and "investments", whereas Article 6.2 ATC does not mention "return on investment", "cash flow", "growth" and "ability to raise capital". The fact that the list of injury factors is shorter in Article 4.2 AS and 6.3 ATC constitutes a clear indication that the consideration of each of the factors listed in Article 3.4 ADA may not always be necessary for reaching an injury finding.

44. Another important textual difference disregarded by the panel in *Mexico - HFCS* is that in both Article 4.2 AS and 6.3 ATC, the injury factors are linked by the conjunction "and", instead of "or". This difference reflects the fact that in Article 4.2 AS and 6.3 ATC the list of injury factors is limited to those which *a priori* are likely to be most directly relevant for any injury determination. By contrast, in Article 3.4 ADA, where the list includes many other factors, it is appropriate to leave some discretion to the investigating authority in order to discern which factors may be relevant in a given case.

45. Finally, it is significant that the last sentence of Article 3.4 ADA has no equivalent in Article 4.2 AS. That omission must surely have some meaning. Yet the panel in *Mexico - HFCS* did not even address it.

46. The panel in *Mexico - HFCS* not only overlooked the above textual differences, but in addition failed to take into account the different rationale for the imposition of safeguard measures and anti-dumping measures. As emphasised by the Appellate Body in *Argentina - Footwear* and *Korea - Dairy Products*²², "the application of safeguard measure does not depend upon unfair trade action, as is the case with anti-dumping or countervailing measures".²³ For that reason, the injury threshold for the imposition of safeguard measures ("serious injury" in the case of measures imposed pursuant to the AS; and "serious damage" in the case of measures applied under Article 6 ATC) is higher than the standard of injury required for the imposition of anti-dumping measures ("material injury"). Yet the interpretation of Article 3.4 of the ADA made by the panel in *Mexico - HFCS* would have the paradoxical result that

²¹ Report by the Panel on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, 6 January 1997, DSR 1997:I, 343, at para. 7.25; report by the Panel on *Korea - Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, 17 September 1998, DSR 1999:I, 44, at para. 7.55; and Report by the Panel on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, 25 November 1997, DSR 1998:III, 1033, at para. 8.123.

²² Report of the Appellate Body on *Korea - Dairy Products*, cited above, *supra*, footnote 1, at para. 87.

²³ Report by the Appellate Body on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, AB-1998-1, WT/DS56/AB/R, 27 March 1998, *supra*, footnote 21, at para. 94.

the imposition of anti-dumping measures, a remedy against "unfair trade", would require a more exhaustive injury examination than the imposition of safeguard measures, a remedy against "fair trade".

47. The panel in *Mexico - HFCS* compounded its mistake by concluding that the consideration of each of the Article 3.4 factors is not only mandatory, but moreover "... must be apparent in the final determination of the investigation authority".²⁴ As only justification for that sweeping assertion, the panel contented itself with quoting in a footnote part of Article 12.2.2, namely that:

"A public notice of conclusion or suspension of an investigation in the case of an affirmative determination providing for the imposition of a definitive duty or the acceptance of a price undertaking shall contain, or otherwise make available through a separate report, all relevant information on the matters of fact and law and reasons which have led to the imposition of final measures ..."

It will not escape the careful reader that the norm refers to the obligation to indicate in the public notice of final determination "all *relevant* information on the matters of fact and law and reasons which have led to the imposition of final measures" [emphasis added]", which is very different from saying, as the panel in *Mexico - HFCS* does, that "each of the Article 3.4 factors must be apparent in the final determination of the investigating authority". Scope of Article 12.2.2 is to allow interested parties and the public to review the determination of the investigating authorities. In this light, investigating authorities are asked to provide a series of information. The final part of Article 12.2.2, which the panel in *Mexico - HFCS* has not noted, is even clearer on this issue:

"In particular, the notice or report shall contain the information described in subparagraph 2.1, as well as the reasons for the acceptance or rejection of relevant arguments or claims made by the exporters and importers ..."

Subparagraph 2.1 of Article 12 requires, with regard to Article 3 ADA, that a public notice shall contain in particular

"(iv) considerations *relevant* to the injury determination as set out in Article 3". [emphasis added]

Once again, no express mention of "all the factors" in Article 3.4.

48. In conclusion, the correct interpretation of Article 3.4 ADA brings to the following considerations. In an injury determination, one of the three factors that investigating authorities have always to examine is the impact of the dumped imports on the domestic industry concerned. However, in this examination, investigating authorities are allowed to discern which of the economic factors and indices, having a bearing on the state of the industry and listed in Article 3.4, are relevant. It is from the point of view of these considerations that the main flaw in the reasoning of the panel in the *Mexico - HFCS* case appears evident. The panel confuses the nature of the evaluation of all relevant factors in the examination of the impact of the dumped

²⁴ Report by the Panel on *Mexico - HFCS*, cited above, *supra*, footnote 18, at para. 7.128.

imports on the domestic industry concerned, which is "mandatory", with the nature of the list of economic factors and indices provided, which is illustrative.

ANNEX 3-2

THIRD PARTY SUBMISSION BY JAPAN
(21 February 2000)

INTRODUCTION

The WTO Agreement, in particular the Anti-Dumping Agreement (hereinafter referred to as the AD Agreement) permits the use of anti-dumping measures only under strict conditions stipulated therein because such measures are exceptions to the non-discriminatory principle and the rule prohibiting duties that exceed the bound rate of the WTO. By virtue of being such exceptions, the authorities must adhere strictly to the rules of the AD Agreement when initiating AD investigations. We have witnessed a substantial increase in the number of instances in which anti-dumping measures are invoked, and have increasingly become concerned about the abuse of the AD measures in some cases.

Japan has requested to take part in this proceeding of the panel as a third party so as to evaluate whether this particular AD measure in question was undertaken in accordance with the rules of the AD Agreement. In particular, the AD Agreement obligates the Members to evaluate information in an objective manner and to disclose information in a manner described in the AD Agreement.

Hence, Japan requests that the Panel examine whether the view espoused by Thailand with regard to the Standard of Review (Article 17.6 of the AD Agreement) is appropriate, whether the authority of Thailand conducted investigation in accordance with Article 5.2 and 5.3, whether Thailand disclosed the information in accordance with Article 6.9, and whether Thailand provides the panel with sufficient information.

ARGUMENT

1. Standard of Review (Article 17.6)

Thailand asserts that Article 17.6 defines or modifies the obligations of Member states under Articles 2, 3, 5 and 6 of the AD Agreement (See Thailand's first written submission, para. 43). Japan does not share the same view as Thailand's. Japan considers that Article 17.6 provides the criterion or the standard by which the panel must judge the case, and that this provision does by no means "define" or "modify" the obligations of Members under the provisions of the AD Agreement.

2. Initiation of Investigations (Article 5.2, 5.3)

Initiating AD investigations itself inflicts a chilling effect on exportation even if provisional or definitive anti-dumping measure is never taken. It is therefore crucial that the requirements of Articles 5.2 and 5.3 are strictly adhered to when the authorities initiate the investigation. Japan requests that the panel examine whether the Thailand's initiation of the investigation fulfils the requirements of Article 5.2 and 5.3 of the AD Agreement.

3. *Disclosure of Information in Sufficient Time before Arriving at a Final Decision (Article 6.9).*

Article 6.9 of the AD Agreement requires the authority to "inform all interested parties of the essential facts (...) which form the basis for the decision whether to apply definitive measures" before a final determination. Japan considers that it is the obligation of the Member states to have its authorities provide sufficient information, in order that defendants can fully understand essential facts which form the basis of determination on dumping, injury and causation. Japan requests the panel to judge whether Thailand acted in a manner consistent with the requirement of Article 6.9 of the AD Agreement.

4. *Thailand's Submission of Information before the Panel*

Japan considers that it is indispensable that Thailand provide the panel with the sufficient information in order for the panel to determine, pursuant to Article 17.6 of the AD Agreement, whether authorities of Thailand established the facts in an objective and unbiased manner so as to be consistent with the provisions of the AD Agreement. For example, we believe that the panel should examine the following points:

- Whether the injury was determined in a manner consistent with the provisions of the AD Agreement, against the circumstance under which a company increased its market share, volume of sales, etc.
- Whether the profits was constructed properly in accordance with the provisions of the AD Agreement.

ANNEX 3-3

THIRD PARTY SUBMISSION BY THE UNITED STATES

(21 February 2000)

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I. INTRODUCTION

1. The United States makes this third party submission to comment on certain legal interpretations of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Agreement"). Many of the issues in this dispute appear to involve questions of fact, and, in several instances, the facts are either unclear or are in dispute. In addition, in several instances, the precise claims of Poland are sufficiently vague to make comment difficult. For this reason, the United States has emphasized what it believes to be the proper legal interpretation of several provisions of the Agreement, without expressing a definitive view as to whether, over all, the facts of this case spell out a violation of the Agreement.

2. Section II below addresses several of the issues raised by the parties, including (1) the requirement that the determination of the Member's investigating authorities show that all of the enumerated injury factors were evaluated, (2) the requirement that the authorities disclose to the interested parties all non-confidential information used by the authorities in the investigation, and (3) the calculation of constructed value profit. On this latter issue, in particular, the United States urges the Panel to reject Poland's interpretation of the Agreement's constructed value profit provisions - contained in Articles 2.2 and 2.2.2 - because it imposes a comparative

"reasonableness" standard and creates a cap on constructed value profit amounts where no such provisions exist in the Agreement.

3. Finally, Section III addresses the issue of whether the parties are required to submit confidential information to the Panel and to serve such information on other parties to the dispute, including third parties. The United States emphasizes that, since Thailand has apparently chosen to submit confidential information to the Panel and has offered, under appropriate safeguards, to serve this information on the other parties, it does not appear that this is an issue that the Panel has to decide in this proceeding.

II. US VIEWS ON THE PARTIES' CLAIMS AND ARGUMENTS

A. *The Appropriate Standard of Review is Deference to the Investigating Authority Under Article 17.6 of the Agreement*

4. The United States generally endorses Thailand's discussion of the application of Article 17.6 of the Agreement to WTO anti-dumping proceedings.¹ The United States also agrees, as recently stated in the panel report in *High Fructose Corn Syrup*, that the proper approach is to examine whether the evidence before the investigating authority is such that an unbiased and objective investigating authority evaluating that evidence could properly have made the same determination.² In addition, as the panel stated in *Guatemala - Cement*, the panel's "role is not to evaluate anew the evidence and information before" the investigating authority, but rather to examine whether the evidence it relied on was sufficient.³

B. *Application of the Standard of Review to the Injury Determination*

5. Article 3.4 specifically requires that the investigating authorities' examination of the impact of the dumped imports on the domestic industry

include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential

¹ Thailand also argues that Poland has not met its burden of proof to establish a *prima facie* case that Thailand's process of establishing the relevant facts did not respect all interests concerned. First submission of Thailand, dated February 14, 2000, at para. 47. The United States does not take a position on this issue, but agrees with Thailand that, absent a *prima facie* case of bias, the burden of proof does not shift to Thailand to prove that it acted without bias. *Ibid.*, para. 51.

² Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States, WT/DS132/R, Report of the Panel (January 14, 2000), DSR 2000:III, 1345, paras. 7.94 - 7.95.

³ *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, Report of the Panel (June 19, 1998), DSR 1998:IX, 3797, para. 7.57. We note that the panel in *High Fructose Corn Syrup* stated that, although the Appellate Body reversed the *Guatemala-Cement* panel's conclusion, the panel's report set out a standard that it considered instructive. *High Fructose Corn Syrup*, *supra*, footnote 2, para. 7.94.

negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

6. As Poland points out, Thailand does not include explicit findings concerning each and every factor in Article 3.4.⁴ This allegation in itself does not, in the view of the United States, set out a violation. The Agreement, in requiring that each factor be evaluated, does not necessarily require that the investigating authorities make a finding as to each factor. Rather, Article 12.2 requires that the authorities set forth "in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." While all enumerated factors must be evaluated, not all are necessarily material in any particular case. Poland's simple assertion that all relevant economic factors were not examined does not inform the Panel as to how Thailand may have violated the Agreement.

7. The Agreement also, however, clearly states that "[i]t must be demonstrated that the dumped imports are, through the effects of dumping as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement."⁵ While the United States does not believe that Articles 3.2 and 3.4 require in each case a specific finding on each enumerated factor, it must be discernible from the authorities' determination that they evaluated each of the enumerated factors. This objective may be achieved when a determination, through its demonstration of why the authorities relied on the specific factors they found to be material in the case, thereby discloses why other factors on which they do not make specific findings were accorded less weight. In the current case, the United States shares Poland's concern about the adequacy of Thailand's findings not only because of the lack of discussion of a number of the enumerated factors, but also because Thailand's specific findings on the factors it addressed do not in any way elucidate why it did not give weight to factors it did not discuss.

8. Poland also argues, in part, that Thailand has not met the requirements of Article 3 of the Agreement. The United States is unclear as to the exact nature of Poland's assertion regarding Thailand's assessment of the market share of the subject imports.⁶ If Poland is arguing that an absolute increase in the volume of subject imports is required, the plain text of Article 3.2 provides that the investigating authorities may consider whether there has been such a significant increase "either in absolute terms or relative to production or consumption."⁷ Thus, the Agreement permits the investigating authorities to consider whether either an absolute or a relative increase in imports is significant, and does not require either one or the other. If Poland is simply asserting that the alleged 1.1 per cent increase in market share is not significant, then this is a factual matter for the Panel to decide.

⁴ See First submission of Poland, dated January 24, 2000, paras. 74-75.

⁵ Article 3.5.

⁶ See Poland's first submission, paras. 65, 72.

⁷ Article 3.2.

C. The Investigating Authorities Must Disclose to all Interested Parties the Essential Facts that Form the Basis of their Decision

9. Poland claims that Thailand failed to provide to respondents non-confidential information upon which it based its findings.⁸ On June 20 and 23, 1997, respondents requested disclosure of the information used in the final determination. On July 7, 1997, the Thailand Ministry of Commerce "expressed surprise" at this request, stating that it had previously provided the information, and did not provide any further information.

10. Article 6.4 of the Agreement provides that:

The authorities shall whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases, that is not confidential as defined in paragraph 5, and *that is used by the authorities in an anti-dumping investigation*, and to prepare presentations on the basis of this information.

(Emphasis added.)

11. While the United States may not be privy to all the facts relevant to this point⁹, it is clear that interested parties involved in an anti-dumping proceeding are to be given the opportunity to defend their interests by obtaining certain fundamental information applicable to the investigation. A reading not just of Article 6.4, but of Article 6 in its entirety, gives rise to this interpretation. If the Thai authorities did in fact omit to provide respondents with the non-confidential information they used to formulate their findings, they disregarded not only the letter but the spirit of the Agreement.

*D. Options for the Calculation of Constructed Value Profit Consistent with Articles 2.2 and 2.2.2 are Limited, but not in the Manner Advocated by Poland*¹⁰

12. Articles 2.2 and 2.2.2 of the Agreement set forth the requirements for calculating profit when normal value is based on constructed value instead of prices. Article 2.2 provides for the addition to cost of production of a reasonable amount for profit, *inter alia*. Article 2.2.2 then sets forth several explicit options for how a reasonable profit may be determined.

13. Poland argues that Thailand impermissibly used an "unreasonable" amount for constructed value profit. According to Poland, Article 2.2, read in conjunction

⁸ Poland's first submission, paras. 91-92.

⁹ The panel is presented with conflicting information in that Thailand states that not only did its investigating authority disclose all non-confidential information to the parties that it considered in reaching its final determination, but it also attempted to summarize the confidential information. Thailand's first submission, para. 77.

¹⁰ Nothing the United States has said with respect to the constructed value profit issue should be construed as expressing agreement or disagreement with Thailand's actual calculation of a profit amount in this case, as the United States does not have access to the specific factual information considered by Thailand.

with Article 2.2.2(iii), imposes a comparative "reasonableness" standard which limits the amount for profit that can be utilized in calculating constructed value. Poland contends that "[c]alculation of reasonable profits should thus involve fair and similar comparisons."¹¹ Using this standard, Poland compares the profit amount calculated by Thailand with profit figures proposed by Poland¹² and concludes that the profit figure used by Thailand is impermissible under the Agreement because it exceeds a "maximum 'reasonable' amount of profit."¹³

14. The United States disagrees with Poland's interpretation of Articles 2.2 and 2.2.2 which, based upon an incomplete and selective reading of the applicable provisions, imposes a limitation on the amount for constructed value profit where no such requirement exists in the Agreement. The general requirement of Article 2.2, which provides for the addition to cost of production of a "reasonable" amount for profit, does not itself create an absolute limit on profit amount because Article 2.2 provides no specific or express standard against which to judge a profit figure. The only explicit limitation on the determination of constructed value profit found in the Agreement is that in Article 2.2.2. Therefore, if a profit amount is determined pursuant to one of the methodologies specified under Article 2.2.2, it is "reasonable" within the meaning of Article 2.2. With one exception, discussed below, these methodologies in Article 2.2.2 limit *how* the administering authorities may determine profit amount, *not the amount of the profit* itself.

15. The *chapeau* of Article 2.2.2 provides that the preferred option for constructed value profit is to calculate an amount for profit based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." If, however, an amount for profit cannot be determined on this basis, it may be based on any of the following three alternatives:

- (a) the actual amounts incurred and realized by the exporter or producer in question in respect of product and sales in the domestic market of the country of origin of the same general category of products;
- (b) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

16. The *chapeau* of Article 2.2.2 and subparts (i) and (ii), therefore, provide limitations only as to the source of the data used to calculate a profit figure (*i.e.*, the loca-

¹¹ Poland's first submission, paras. 79-80.

¹² The three profit options proposed by Poland are the profit figure in the petition, Huta Katowice's company-wide profit rate, and the profit rate from Huta Katowice's third country sales of the like product. Poland's first submission, para. 82.

¹³ *Ibid.*, para. 83.

tion of the sales and the types of products), but not as to the amount. In contrast, subpart (iii) does contain a limitation on profit amount. Specifically, subpart (iii) provides a cap on the amount of constructed value profit by requiring that the profit amount not exceed profits normally realized by other exporters or producers on sales of products in the same general category in the home market.

17. The "profit cap" in subpart (iii), therefore, is the only explicit limitation on the choice of a constructed value profit figure - and is applicable only to profit amounts determined under subpart (iii). The cap is necessary in this instance to impose some limitations on "other" methodologies for determining profit not specifically articulated in the Agreement. Significantly, subpart (iii) *does not* expressly or implicitly impose a similar limitation upon the preferred profit methodology in the *chapeau* or the alternatives in subparts (i) or (ii). Such a limitation is not necessary with respect to these provisions because each one itself defines a specific "reasonable" methodology.

18. Article 31(1) of the *Vienna Convention on the Law of Treaties*¹⁴ (the "Vienna Convention") states: "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 light of its object and purpose." Furthermore, "it is the duty of any treaty interpreter to 'read all applicable provisions of a treaty in a way that gives meaning to all of them, harmoniously.'"¹⁵ Poland's interpretation of the constructed value profit provisions bundles the various provisions together in order to imply the existence of a limitation where none exists. Such an interpretation is contrary to the plain language of Article 2.2.2, which provides the only explicit limitation on the calculation of constructed value profit. Furthermore, Poland's construction of the constructed value profit provisions would render the preferred option found in the *chapeau* of Article 2.2.2, as well as those in subparts (i) and (ii) of Article 2.2.2, superfluous.

19. Finally, the negotiating history of the Agreement¹⁶ reveals the delicate negotiated balance reflected in Article 2.2.2.¹⁷ The 1979 Code provided that constructed value include a "reasonable" amount for profit. The term "reasonable", however, was not defined; nor were explicit profit calculation methodologies included in the 1979 Code. During the Uruguay Round negotiations, a number of delegations advocated that profit be determined on the basis of a company's actual data and proposed alternative methodologies for determining profit when actual data was unavailable.¹⁸ The resulting provisions of Article 2.2.2 of the Agreement reflect a similar structure, *i.e.*, a preferred option and three alternatives. Poland's interpretation accords neither with the negotiators' intent nor with the meaning of Articles 2.2 and 2.2.2.

¹⁴ Vienna Convention, done at Vienna, 23 May 1969, 1155 U.N.T.S. 221; 8 *International Legal Materials* 697 (1969).

¹⁵ See *Korea - Definitive Safeguard Measures on Imports of Certain Dairy Products*, Report of the Appellate Body, AB 1999-8 (adopted 14 December 1999), DSR 2000:I, 3, para. 81.

¹⁶ Under Article 32 of the Vienna Convention, this material may be considered to confirm the meaning of a provision of a treaty.

¹⁷ See generally Terence P. Stewart, *et al.*, *The GATT Uruguay Round: A Negotiating History (1986-1992)* 171-190 (1993) (discussing the negotiations concerning constructed value profit, *inter alia*).

¹⁸ See Stewart, *supra* note 17, at 175-77 n.1012-1024, and GATT documents cited therein.

20. For these reasons, the United States believes that Poland's interpretation of the profit provisions found in Articles 2.2 and 2.2.2 should be rejected. Furthermore, in accordance with Article 17.6(i), should the panel determine that Thailand's establishment of the facts was proper, that the facts on the record support the methodology employed, and that the evaluation was unbiased and objective, the panel should sustain Thailand's calculation of constructed value profit for Huta Katowice as consistent with Article 2.2.2.

III. THE AGREEMENT DOES NOT REQUIRE THE PARTIES TO PROVIDE CONFIDENTIAL INFORMATION TO THE PANEL, BUT IF SUCH INFORMATION IS SO PROVIDED, IT NEED NOT BE MADE AVAILABLE TO ALL PARTIES TO THE DISPUTE

21. As noted above in Section II.C, while Article 6 of the Agreement provides a mandate for interested parties to obtain the information needed to defend their interests, this mandate applies only with respect to non-confidential information. Should confidential information be requested, it may not be disclosed without the specific permission of the party submitting it pursuant to Article 6.5. In essence, the authorities are forbidden to disclose such information without the consent of the party that submitted it. A footnote to Article 6.5 recognizes that some countries, such as the United States, have administrative protective order procedures that provide for limited disclosure. In so providing, however, the footnote recognizes that other countries may choose not to adopt such procedures for limited disclosure of confidential information. The United States' view that the Thai authorities had an obligation to disclose the information upon which they relied in making their final determination pertains solely to non-confidential information.

22. Members are not required to submit confidential information to a panel, although subject to the conditions in the Agreement, they may do so. The Agreement prohibits disclosure absent consent. Article 17.7 plainly reiterates the need for permission from the party submitting the sensitive information to disclose it.¹⁹ No provision of either the Agreement or the Dispute Settlement Understanding transforms information that was confidential in the underlying investigation into non-confidential information that may be disclosed once the matter is presented to a WTO panel.

¹⁹ Article 17.7 of the Agreement states: "Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided." Thus, on its face, Article 17.7 does not require disclosure of confidential information to panels. It requires panels, when they in fact receive such information, not to release it further without permission.

23. In this proceeding, Thailand has submitted confidential information to the Panel. However, Thailand's action cannot prejudice the choices made by Poland in this proceeding or other parties in other proceedings before other panels.²⁰

24. The EC has provided comments on Thailand's confidential submission, terming it "inadmissible" for a number of reasons. Thailand has, however, apparently offered to submit the information to the parties. As a result, the Panel need not reach the issues raised in the EC's submission. Nevertheless, because of the Chairman's request that the parties do so, the United States presents its comments concerning the appropriateness of *in camera* inspection of confidential information.

25. The United States disagrees with the EC's contention that Thailand should not be permitted to submit confidential information to the Panel without submitting it to all parties to the proceeding. Article 17.7 specifically contemplates such a procedure. It provides that confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. This provision plainly includes information gathered by the authorities that conducted the investigation at issue in a panel review. Further, Article 17.7 does not exempt disclosure to other parties to a panel proceeding from its prohibition on disclosure. Thus, Article 17.7 provides for circumstances in which a Member may provide to a panel confidential information that may not be disclosed to other parties to a proceeding.

26. The EC's contention that Article 17.7 contemplates disclosure to parties before a panel when it speaks of disclosure to a panel is contrary to the use of the term "panel" in Article 17. For example, Article 17.6 addresses how the panel shall determine whether authorities' establishment of the facts was proper and how it shall interpret the relevant provisions of the Agreement. Plainly, the "panel" to which Article 17.6 refers does not encompass the parties before the panel. Nothing in Article 17.7 indicates that the term "panel" as used there is intended to have any different meaning from the term as used in the preceding article.

27. To the extent that the EC argues that Article 18.1 of the Dispute Settlement Understanding is contrary to Article 17.7 of the Agreement, Article 1.2 of the Dispute Settlement Understanding guarantees that Article 17.7 controls. Article 17.7 is identified as a special or additional rule under Appendix 2 of the Dispute Settlement Understanding. Article 1.2 of the DSU provides that "[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail."

²⁰ The United States is in agreement with Thailand that confidential information disclosed to this Panel must be protected against disclosure in subsequent WTO proceedings, including those before the Appellate Body. *See* Thailand's first submission, para. 4.

ANNEX 3-4

ORAL STATEMENT OF THE EUROPEAN COMMUNITIES
(8 March 2000)

Mr Chairman, Members of the Panel,

1. Introduction

1. The European Communities is intervening as third party in this case because of its systemic interest in the correct interpretation of the Anti-Dumping Agreement and in the correct application of the DSU.

2. Many of the issues disputed in this case relate to questions of fact on which the European Communities is not in a position to comment. Therefore, it has limited its third party contribution to some specific issues of procedure and of legal interpretation raised by this dispute.

3. Today, the European Communities will focus its intervention on two main issues arising from Poland's claims:

- the amount of profit used in the calculation of the constructed normal value;
- and, the factors that need to be evaluated in determining the existence of material injury.

1.1 Thailand's Communication of Confidential Exhibits only to the Panel

4. Before turning its attention to these issues, the European Communities would like to express its satisfaction for the way the Panel has handled Thailand's bizarre communication of confidential exhibits.

5. As it has made clear in its letter to the Panel of 18 February, the European Communities considers that the adoption of Supplemental Working Procedures is the correct way of balancing Thailand's concerns on confidential information with the need to respect due process, the principle of equality of arms, and the adversarial nature of the WTO dispute settlement system.

6. Today, therefore, the European Communities can only welcome Thailand's submission of all exhibits to all parties to this dispute. Only one wrinkle remains in this procedure. Due to this question of confidentiality, Thailand has ended up communicating part of its First Submission more than two weeks after the originally agreed deadline, which means only 3 working days before this meeting, a time too short to allow the other party and the third parties to properly review these documents.

7. The Panel, in its letter of 2 March 2000, has reassured the parties that "they will be given full opportunity to raise and address all issues that they wish during the remainder of the Panel's proceeding". However, on the basis of the agreed Working Procedure, third parties are invited to participate only at the first substantive meeting

of the Panel. Therefore, the EC and the other third parties to this dispute will not have any other opportunity to make their views on the data submitted by Thailand known to the Panel.

8. The European Communities, therefore, can only regret that its fullest participation in this Panel's procedure has been prejudiced by Thailand's failure to address properly and timely the issue of confidentiality.

2. Claims submitted by Poland

2.1 Amount of Profit Used in the Calculation of the Constructed Normal Value

9. The European Communities will now turn their attention on the first of the two issues raised by Poland's claims: the amount of profit used in the calculation of the constructed normal value.

10. In its Submission, Poland claims that the Thai authorities used an "unreasonable" amount of profit in calculating the normal value. Poland's complaint appears to be that the Thai authorities violated Article VI.1(b)(ii) GATT 1994 and the last sentence of the first paragraph of Article 2.2 of the Anti-Dumping Agreement.¹ For the reasons already explained in its Written Submission, the European Communities considers that this claim is unfounded and should be rejected by the Panel.

11. Those two provisions, in fact, do not establish a supplementary "reasonability" test, different from that embodied in Article 2.2.2 of the Anti-Dumping Agreement. To the extent that a Member complies with the rules of Article 2.2.2, it must be deemed to comply as well with the general principle enounced in Article VI.1(b)(ii) of GATT and in the last sentence of the first paragraph of Article 2.2 of the Anti-Dumping Agreement. Therefore, the relevant issue before the Panel is whether Thailand determined the reasonable amount for profit in accordance with Article 2.2.2.

12. The chapeau of Article 2.2.2 provides that, in principle, the amount of profit must be based

"on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation".

13. In the present case, the Thai authorities concluded that the method set out in the chapeau of Article 2.2.2 could not be applied since domestic sales of the relevant "like" product (i.e. JIS H-beams) were not made in sufficient quantity to allow a proper comparison. That conclusion has not been challenged by Poland in this dispute.

14. Article 2.2.2 goes on to state that, where the method set out in the chapeau cannot be used, the reasonable profit margin may be determined on the basis of one of the three methods described in that Article.

15. No hierarchy among those three options is prescribed by Article 2.2.2. Nor does this norm require that the investigating authorities should try first all of these methods before selecting that which yields the most "reasonable" result in each par-

¹ Poland's First Written Submission, at para. 78.

ticular case. Rather, Article 2.2.2 leaves complete discretion to the investigating authorities to choose whichever of the three options they consider most appropriate.

16. Thailand has suggested that options (ii) and (iii) are subordinated to option (i). That view is mistaken. The constructed normal value is a surrogate for the normal value based on domestic prices. The purpose of Article 2.2.2 is to arrive at a constructed value as close as possible to the normal value that would have been determined on the basis of domestic prices. Option (i) is not inherently more apt to achieve that objective than option (ii) or than "any other reasonable method" consistent with option (iii).

17. The Thai authorities have explained that they chose to apply option (i). Poland does not contest that the method in the chapeau of Article 2.2.2 was not available in this case. Therefore, it is also beyond dispute that the Thai authorities were entitled to resort to option (i). Thus, the only issue which needs to be addressed by the Panel is whether the Thai authorities applied correctly option (i). In the European Communities' view, Poland has not satisfied the burden to demonstrate that the Thai authorities failed to do so.

18. In essence, Poland contends that DIN H-beams and JIS H-beams cannot be considered to belong to the "same general category of products" because of the Thai authorities' previous finding that they are not "like" products. This argument, however, is plainly wrong, because the notion of "general category of products" is broader than that of "like" products.

19. Poland goes on to argue that the profit rate determined by the Thai authorities is "unreasonable" because it is higher than the rates obtained with any of the methods proposed by the Polish exporters. As shown in our written submission, this argument is wholly irrelevant.

20. In conclusion, the mere fact that the profit rate used by the Thai authorities is relatively high compared to other (allegedly) "reasonable" rates proposed by the Polish exporters does not make it "unreasonable". A profit rate determined in accordance with the method set out in option (i) is decisively presumed to be "reasonable" in all circumstances, irrespective of the results of that method in each particular case.

2.2 Determination of Material Injury: Evaluation of all Relevant Factors

21. The European Communities will now turn their attention to the second issue raised by Poland's claims regarding determination of material injury.

22. In its claims regarding Thailand's violation of Article VI GATT 1994 and Article 3 Anti-Dumping Agreement, Poland refers several times to the fact that one of the principles set forth in these articles is

"the fundamental principle that an injury determination shall include an evaluation of *all factors*" (emphasis added).²

23. The European Communities strongly disagree with this interpretation of Article 3.4. The letter, the context and the purpose of Article 3.4 of the Anti-Dumping

² Poland's First Written Submission, at para. 50.

Agreement (and of its predecessor, Article 3.3 of the 1979 Anti-Dumping Code) as well as their consistent application unequivocally indicate that the *list of factors* that national investigating authorities have to consider in their examination of the impact of dumped imports on the domestic industry, is of an *illustrative* and *not of a mandatory* nature.

24. From a textual point of view, Poland does not explain where in Article VI GATT 1994 or Article 3 of the Anti-Dumping Agreement this "fundamental principle" is enunciated. Nor is this principle evident from the wording of Article 3.4. This norm reads in fact:

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

The first element which appears evident from the wording of this norm is that paragraph 4 requires investigating authorities to evaluate not "all economic factors and indices" but only all those economic factors and indices which are "relevant". The use of this adjective strongly qualifies the elements to be considered and, by allowing discernment between what is and what is not "relevant", it introduces an element of discretion. Secondly, the use of the word "including" to introduce the list of factors and indices implies that what follows are only some of the examples that could be given. Thirdly, the presence of the conjunction "or" to link some of the listed factors necessarily entails that the investigating authorities are left the discretion to decide which of the factors and indices listed can be considered relevant and which not in each particular case. If the Article 3.4 list had a mandatory nature and "all" factors and indices had to be evaluated, the drafters of the Anti-Dumping Agreement would have used the conjunction "and" - as they had not hesitated doing in many other contexts. Finally, the last sentence of paragraph 4 clearly states that

"This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

Read *a contrario*, the second part of this sentence affirms that some times one or several, and thus not all, of the listed factors can give decisive guidance to examine the impact of the dumped imports on the domestic industry concerned. It is thus clear that in these cases the investigating authorities are not required to look further.

25. Moving on to analyse the context of Article 3.4, it is evident that the context of Article 3.4 is Article 3 of the Anti-Dumping Agreement, which has as its object to determine whether injury occurred because of the dumped imports. In this light, purpose of Article 3.4 is to require that national investigating authorities determine the impact of these imports on the domestic industry evaluating those economic factors and indices which "have a bearing", "make a difference" on the state of the industry. In the present case, for instance, the European Communities would note that factors

like output, sales, capacity utilisation, employment and market shares of SYS were positive in the investigation period. However, this does not exclude *per se* a finding of injury because, at the same time, the Thai producer was not profitable.

26. The illustrative and not mandatory nature of the Article 3.4 is also confirmed by previous practice. In 1992, the panel in *US - Salmon* was called to verify whether the US authorities had properly considered the factors mentioned in Article 3.3 of the 1979 Anti-Dumping Code. The panel qualified as "illustrative" the list of factors and indices contained in this norm.³

27. The European Communities is aware that the recent report of the panel in the *Mexico - HFCS* case⁴ has interpreted Article 3.4 as requiring the consideration of each of its listed factors. The European Communities considers to have devoted sufficient time in its Written Submission to explain why interpretation of the panel in the *Mexico - HFCS* case is excessive, incorrect and certainly not in line with the consistent previous reading of this norm. Today, the European Communities would only like to draw the attention of the Panel to the following facts:

- the respondent party in the *Mexico - HFCS* case, the United States, had not argued that Article 3.4 required the consideration of all the injury factors listed therein⁵ and thus the panel's conclusion was not only erroneous, but also *ultra petitum*. As a matter of fact, the same issue had also been discussed in the only previous WTO antidumping case, the first *Guatemala Cement* case, where the United States had clearly affirmed the contrary.⁶ One can only wonder why the Panel devoted such lengthy considerations to an issue which was not raised by any of the parties to the dispute and the resolution of which was clearly not necessary to decide the claim before it;
- the panel in *Mexico - HFCS* relied on a series of previous panel reports concerning the interpretation of Article 4.2 of the Agreement on Safeguards and of Article 6.3 of the Agreement on Textiles and Clothing⁷, completely ignoring the existence of important textual differences between those two provisions and Article 3.4;

³ Report by the Panel on *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, adopted by the Committee on Anti-Dumping Practices on 27 April 1994, at para. 493.

⁴ Report by the Panel on *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, 28 January 2000, DSR 2000:III, 1345, at para. 7.128.

⁵ See Report by the Panel on *Mexico - HFCS*, cited above, *supra*, footnote 4, at para. 7.121.

⁶ Report by the Panel on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, WT/DS60/R, 19 June 1998, DSR 1998:IX, 3797, at para. 5.52.

⁷ Report by the Panel on *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/R, 6 January 1997, DSR 1997:I, 343, at para. 7.25; report by the Panel on *Korea - Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, 17 September 1998, DSR 1999:I, 44 at para. 7.55; and Report by the Panel on *Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WT/DS56/R, 25 November 1997, DSR 1998:III, 1033, at para. 8.123.

- at the same time, the panel did not take into consideration previous panel findings on Article 3.4 of the Anti-Dumping Agreement or on its predecessor, Article 3.3 of the 1979 Anti-Dumping Code;
- the Panel in *Mexico - HFCS* concluded that the consideration of each of the Article 3.4 factors is not only mandatory, but moreover "... must be apparent in the final determination of the investigation authority.⁸ Nowhere, in the Anti-Dumping Agreement in general and in Article 12.2.2 of this Agreement in particular, is this requirement spelt out;
- finally, the Panel confused the nature of the evaluation of all relevant factors in the examination of the impact of the dumped imports on the domestic industry concerned, which is "mandatory", with the nature of the list of economic factors and indices provided, which is illustrative.

28. Thus, the correct interpretation of Article 3.4 of the Anti-Dumping Agreement brings us to the following conclusion. In an injury determination, one of the three factors that investigating authorities have always to examine is the impact of the dumped imports on the domestic industry concerned. However, in this examination, investigating authorities are allowed to discern which of the economic factors and indices, having a bearing on the state of the industry and listed in Article 3.4, are relevant.

Mr. Chairman, Members of the Panel, thank you for your attention.

⁸ Report by the Panel on *Mexico - HFCS*, cited above, *supra*, footnote 4, at para. 7.128.

ANNEX 3-5

ORAL STATEMENT OF JAPAN
(8 March 2000)

Mr. Chairman, Distinguished Members of the Panel,

On behalf of the Government of Japan, I would like to thank you for this opportunity to submit our views in this dispute.

In our statement today we will address the procedural issues that have been raised by the parties prior to this Panel meeting. As we have already expressed our views in our letter dispatched on 1 March 2000, we will confine ourselves to highlighting the main points of our argument and supplementing the views already submitted, while we leave our argument on the substantive issues to our third party submission submitted on 21 February.

1. Ensuring Fairness of the Panel Deliberation

In our letter addressed to the Panel, we emphasised the importance of ensuring fairness of Panel deliberation among all the parties concerned, including the third parties. Japan disagrees with the views expressed by the United States and Thailand in their respective submissions on the treatment of confidential information. Japan disagrees with the United States and Thailand that Article 17.7 of ADA is in conflict with and prevails over Article 18.2 of DSU. Rather, Japan believes that Article 17.7 of ADA supplements Article 13.1 of the DSU. The Panel has, however, not indicated its interpretation of these provisions in communicating its decision to establish the Supplemental Working Procedures. Considering the importance of the issues raised, Japan would like to request the Panel to provide its interpretation of these provisions.

2. Establishment of Supplemental Working Procedures

Japan considers it appropriate that the Panel has now established a supplemental procedure for immediate and simultaneous disclosure of the exhibits as well as the treatment of Business Confidential Information.

On the issues of meeting dates, however, Japan shares the views expressed by Poland and EC in their letters dated 2 March. In order for all the parties concerned to have equal opportunities to review all relevant information and to be heard by the Panel on these issues, the Panel should ensure that the rights of the parties under the DSU are not prejudiced. Given that the first substantive meeting of the parties is now being held without giving the third parties an opportunity to review all issues including the procedural issues described above, and to be heard by the Panel on such issues, Japan respectfully asks the Panel to clearly indicate how all the parties concerned will be given full opportunity to raise and address all issues that the parties wish during the remainder of the Panel's proceedings.

This concludes Japan's statement. Thank you for your attention.

ANNEX 3-6**ORAL STATEMENT OF THE UNITED STATES**
(8 March 2000)**Introduction**

1. Thank you, Mr. Chairman, and members of the Panel. It is a pleasure for us to appear before you today to present the views of the United States in this proceeding. The purpose of this oral statement is to highlight certain aspects of our written statement, in light of issues raised by other third parties, and to comment on new matters raised subsequent to our written submission.

Standard of Review

2. As stated in its third party written submission, the United States generally endorses Thailand's discussion of the application of Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* to WTO anti-dumping proceedings. Contrary to Japan's position, Article 17.6, a special or additional rule under the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU"), states in unambiguous terms that, in assessing the facts, if the Panel determines that the investigating authority's assessment of the facts was proper and its evaluation was unbiased and objective, it may not overturn the decision even though it may have reached another conclusion.

Application of Standard of Review

3. As the United States stated in its written submission, Thailand need not include explicit findings regarding each and every economic factor that is listed in Article 3.4 of the Agreement, but it needs to show that it did evaluate each of them. This does not mean that every report must contain a factor-by-factor explanation of that evaluation. A competent authority's written report may adequately reflect its compliance with Article 3.4 if the report as a whole makes it reasonably discernible why the authority gave weight to the factors it discussed and why it did not give weight to the factors that it did not discuss. The United States shares Poland's concern about whether the report of the Thai authority meets such a standard.

4. On the other hand, the United States disagrees with Poland's apparent assertion that an absolute growth in the volume of imports is necessary to an affirmative determination under Article 3.2 of the Agreement. The United States, however, expresses no view as to whether the investigation here met the standard for an affirmative determination of injury that is set forth in Article 3. We note the EC's disagreement with the recent panel report in *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*. Rather than burden the Panel here with extensive argumentation concerning another case, the United States simply expresses its disagreement with the EC's contentions and notes that, since the EC's submission here, that report has been adopted by the Dispute Settlement Body.

Constructive Value Profit

5. As stated in our submission, the United States disagrees with Poland's interpretation of Articles 2.2 and 2.2.2 because it appears to be based upon an incomplete and selective reading of the applicable provisions and imposes a limitation on the amount for constructed value profit where no such limitation exists. The United States' complete views regarding the proper interpretation of Art. 2.2 and 2.2.2 are set forth in our submission. Thus, there is no need to repeat these views here. Instead, the United States would like to stress the following points.

6. First, the general requirement of Article 2.2, which provides for the addition to cost of production of a "reasonable" amount for profit, does not itself impose any specific and separate requirement as to the absolute amount of constructed value profit or as to how constructed value profit should be calculated. Such requirements are embodied in the chapeau of Art. 2.2.2 and its subparts. To the extent that a profit amount is determined pursuant to one of the methodologies specified under Article 2.2.2, it is "reasonable" within the meaning of Article 2.2.

7. Second, while the chapeau of Article 2.2.2 and subparts (i) and (ii) provide limitations as to the source of the data used to calculate a profit figure (*i.e.*, the location of the sales and the types of products), it is only subpart (iii) that contains an express limitation on profit amount. Subpart (iii) provides a cap on the amount of constructed value profit by limiting the amount to that normally realized by other exporters or producers on sales of products in the same general category in the home market.

8. Third, Poland's interpretation is contrary to the plain language of the chapeau and subparts of Article 2.2.2 because it improperly bundles those provisions together to imply a limitation on the amount of constructed value profit where none exists. One result of Poland's interpretation is to render the two provisions that do not contain an absolute limitation superfluous. Another result is to ignore the delicate balance achieved by the Members in negotiating Article 2.2.2.

9. For these reasons, the United States believes that Poland's interpretation of the profit provisions found in Articles 2.2 and 2.2.2 should be rejected.

10. Additionally, the United States would like to note that it concurs with the European Communities that the Anti-Dumping Agreement "does not establish a supplementary 'reasonability' test, different from that embodied in Article 2.2.2."¹ In addition, the United States concurs with the European Communities that, "to the extent that a Member complies with the rules of Article 2.2.2, it must be deemed to comply as well with the general principle enunciated in Article VI.1(b)(ii) of GATT and in the last sentence of the first paragraph of Article 2.2 [of the Anti-Dumping Agreement]."²

¹ Third Party Submission of the European Communities, dated February 21, 2000, para. 18.

² *Ibid.*

Anti-dumping Measures Not Exception

11. The United States disagrees with Japan's characterization of anti-dumping measures as an exception to free-trade principles of the WTO. To the contrary, the right conferred by Article VI and the Anti-Dumping Agreement, to impose anti-dumping measures, forms part of the carefully crafted balance of rights and obligations under the WTO.

12. Japan appears to conclude that, because it believes that anti-dumping measures are an exception, application of these measures requires a heightened "strict" level of scrutiny and imposes some burden on the Member imposing such measures to justify their imposition. Similar arguments have been rejected by WTO panels and the Appellate Body. For example, in *Wool Shirts and Blouses from India*, the Appellate Body recognized that it must respect the balance of rights and obligations embodied in the transitional safeguard mechanism of Article 6 of the Agreement on Textiles and Clothing.³ It rejected the argument that the positive obligations in the transitional safeguard mechanism were "exceptions" imposing the burden of proof on the party asserting their use. In doing so, the Appellate Body distinguished between affirmative defenses, that is, limited exceptions from obligations under certain other provisions of the GATT 1994, and positive rules that establish obligations in and of themselves. The Anti-Dumping Agreement embodies positive rules that are part of the WTO balance of rights and obligations. They are not an exception that must be proven or which is subject to any special scrutiny.

13. This issue has been raised in a number of disputes and, appropriately, the panels and Appellate Body have not shifted any burdens of proof or engaged in any heightened scrutiny due to the alleged "exception" of anti-dumping duties. Where panels and the Appellate Body have addressed Article VI of the GATT or the Tokyo Round agreements based on Article VI, none of the panels (1) found that Article VI was an exception, (2) imposed the "burden of proof" on the party imposing anti-dumping or countervailing duties, or (3) expressly indicated a requirement to interpret Article VI in a narrow manner.⁴ In *Desiccated Coconuts*, one of the few cases to

³ *United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, WT/DS33/AB/R, DSR 1997:I, 323, at 337.

⁴ See *Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC*, SCM/85, Report of the Panel issued 13 October 1987 (unadopted); *EEC - Regulation on Imports of Parts and Components*, L/6657, Report of the Panel adopted 16 May 1990, BISD 37S/132 (Japan argued that in interpreting Article XX(d), panel should take into account that Article VI is an exception); *United States - Anti-Dumping Duties on Gray Portland Cement and Cement Clinker from Mexico*, ADP/82, Report of the Panel issued 7 September 1992 (unadopted); *United States - Imposition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, ADP/87, Report of the Panel adopted 26-27 April 1994; *United States - Imposition of Countervailing Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway*, SCM/153, Report of the Panel adopted 28 April 1994; and *EC - Anti-Dumping Duties on Audio Tapes in Cassettes Originating in Japan*, ADP/136, Report of the Panel issued 28 April 1995 (unadopted); *United States-anti-dumping Duty on Dynamic Random Access Memory Semiconductors (Drams) of One Megabit or above from Korea*, WT/DS99/R, Panel Report issued 29 January 1999, DSR 1999:II, 521.

In two cases, a third-party raised the issue. *Korea -Anti-dumping Duties on Imports of Polyacetal Resins*, ADP/92 and Corr. 1, BISD 40S/205; and *United States - Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in France*, Ger-

consider Article VI of the GATT 1994, both the panel and the Appellate Body refrained from treating Article VI as an "exception".⁵

14. As the Appellate Body stated in the *Hormones* case:

The general rule in a dispute settlement proceeding requiring a complaining party to establish a *prima facie* case of inconsistency with a provision of the *SPS Agreement* before the burden of showing consistency with that provision is taken on by the defending party, is *not* avoided by simply describing that same provision as an "exception". In much the same way, merely characterizing a treaty provision as an "exception" does not by itself justify a "stricter" or "narrower" interpretation of that provision than would be warranted by examination of the ordinary meaning of the actual treaty words, viewed in context and in the light of the treaty's object and purpose, or, in other words, by applying the normal rules of treaty interpretation.⁶

15. In summary, anti-dumping measures do not constitute exceptions from the rest of the WTO framework. They are subject to the same rules of interpretation as any other provision of the WTO Agreements. Therefore, the Panel should decline to endorse Japan's assertion that anti-dumping measures constitute an exception to free trade principles or, by implication, require the application of a heightened level of scrutiny.

Disclosure of Essential Facts

16. Article 6.4 of the Agreement requires that the authorities provide all interested parties with the non-confidential information that is used in an anti-dumping investigation. Article 6 in its entirety promotes the ability of interested parties to defend their interests by obtaining certain non-confidential information. Not being completely familiar with the proceedings before the Thai authority, the United States is not in a position to state a view as to whether the authority complied with Article 6.4 in this investigation.

Disclosure of Confidential Information

17. Article 6.5 of the Agreement precludes the disclosure of confidential information absent the permission of the party submitting it. Article 17.7 reiterates the need to obtain permission from the party submitting confidential information before that information may be disclosed. This provision specifically contemplates the situation at issue here, that is, the submission of confidential information to the Panel absent submission to all parties. Contrary to the claim by Japan, Article 17.7 of the Agree-

many and the United Kingdom, SCM/185, Report of the Panel issued 15 November 1994 (un-adopted).

⁵ See *Brazil - Measures Affecting Desiccated Coconuts*, WT/DS22/R, Report of the Panel, as modified by the Appellate Body, WT/DS22/AB/R, adopted 20 March 1997, DSR 1997:I, 167.

⁶ *EC - Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, DSR 1998:I, 135, para. 104.

ment is not a "supplement" to any article of the DSU. To the extent that Japan's position entails a reading of Article 18.1 of the DSU contrary to the plain language of Article 17.7 of the Agreement, Article 1.2 of the DSU provides that Article 17.7 controls.

18. The United States notes the parties have agreed on a method for disclosure of some of the confidential information obtained during the course of the investigation. We note that the parties recognize the principle, espoused by the United States, that one must obtain consent from the submitter of confidential information before disclosing it.

Conclusion

19. This concludes our presentation to the Panel. We will be happy to respond to any questions of the Panel or the parties.

ANNEX 3-7

**RESPONSE OF THE EUROPEAN COMMUNITIES TO THE
PANEL'S QUESTIONS**

(29 March 2000)

- A. *Request by Thailand for Ruling under Article 6.2 DSU with Respect to Articles 5 and 6 AD*

Question 1

We note the following passage from the Appellate Body Report in the Korea - Dairy Safeguard case:

"... There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.¹ (emphasis in original)

- (a) How is the phrase "in the light of attendant circumstances" in the above passage to be interpreted, both in general, and in the context of the present dispute? What relevance, if any, could this phrase have in this particular case. Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 5 and 6 AD? Please explain in detail.

Reply

The European Communities does not consider this phrase relevant in the context of the present dispute because both Article 5 and Article 6 ADA fall under the second example given by the Appellate Body, i.e. that of articles establishing "not one single, distinct obligation, but rather multiple obligations".

- (b) Does Poland's request for establishment "merely list" Articles 5 and 6 AD, or does it go beyond a "mere listing"?

¹ WT/DS98/AB/R, DSR 2000:I, 3, para. 124.

Reply

As explained already in its Written Submission to the Panel, the EC considers that Poland, in its request for the establishment of the Panel, has merely listed the articles claimed to have been violated by Thailand.

- (c) Do Articles 5 and 6 AD each establish one single, distinct obligation or rather multiple obligations? What is the basis for your response?

Reply

It is clear just from a textual analysis of Articles 5 and 6 ADA that they are both composed of numerous paragraphs, each of them setting out distinct obligations.

Question 2

We note the following passage from the Appellate Body Report in the Korea - Dairy Safeguard case:

"... whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."²

What is the meaning of the phrase "given the actual course of the panel proceedings" in the above passage? Would it, for example, permit the subsequent "remedying" of a possibly insufficient panel request in the course of the panel proceedings? How is this phrase to be interpreted and applied in the present case in respect of the request for a ruling under Article 6.2 relating to Articles 5 and 6 AD? Please explain in detail.

Reply

The EC believes that the phrase "given the actual course of the panel proceedings" recalls the concept of a case-by-case analysis of the adequacy of a request for the establishment of a panel.

In this regard, the EC considers useful to recall that, according to the Appellate Body, one of the reasons for which a panel request needs to be "sufficiently precise" is that "it informs the defending party and the third parties of the legal basis of the complaint"³ In other words, a main objective of Article 6.2 DSU is to ensure that the respondent and the third parties are able to take whatever steps they deem appropriate to defend their interests. On the contrary, where the request for the establishment of a panel is not able "to present the problem clearly", the ability of the interested parties to take such steps is vitiated. In this light, no subsequent remedy can cure the fact that the complainant failed to provide in its request for the establishment

² WT/DS98/AB/R, *supra*, footnote 1, para. 127.

³ *Ibid.*, at para. 142.

of the panel "a brief summary of the legal basis of the complaint sufficient to present the problem clearly". Sustaining the contrary would deprive this formal act of its *raison d'être*.

B. Article 5 AD

Question 3

Does Article 5.5 AD require written notice, or would a meeting between government officials be sufficient under this provision? Please explain in detail.

Reply

The term "notify" ("*notificar*" in Spanish, "*notifier*" in French) implies some degree of formality. This does not necessarily exclude, however, that a notification can be made orally in the course of an official meeting with representatives of the exporting Member. It is obvious, nevertheless, that, in the absence of any written record, it may be difficult for the importing Member to rebut a subsequent allegation that no proper notification was made.

In practice, most Members seem to make the notification provided for in Article 5.5 ADA in writing. The practice of the EC, for example, is to inform the Government of the exporting Member by means of a *note verbale* delivered to the Mission of that country in Brussels.

C. Article 6 AD

Question 4

With respect to Poland's reference in paragraph 92 of its first written submission to data based on "overlapping time periods for comparison in the final determination", Poland appears to argue that the use of such data might necessarily introduce a flaw in the analysis conducted by the Thai investigating authorities. Is this necessarily the case? Could such an approach confirm the persistence of trends over time, as Thailand asserts in paragraph 80 of its first written submission?

Reply

The use of overlapping time periods does not necessarily vitiate an injury determination. In the EC practice, for example, the period of reference for the injury determination covers several calendar years plus the period of investigation for the dumping determination, which sometimes overlaps with the last calendar year.

The EC would note, nevertheless, that in the present case the reference period for the injury determination consisted, apparently, of only one calendar year plus an additional 12-months period which overlapped with the calendar year to a considerable extent (from 3 to 6 months). It may be questionable whether a comparison of data for just two, largely overlapping, time periods may provide a sufficient basis for an injury determination.

Question 5

Thailand argues that Article 6.5.1 AD provides that an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof, but that Article 6.5.1 does not require the investigating authorities to provide those non-confidential summaries to the exporters or to the foreign producers.

Reply

By its own terms, Article 6.5.1 ADA does not impose any obligation upon the investigating authorities to provide the non-confidential summaries received from the domestic producers to the exporters or to the foreign producers. This does not mean, however, that the investigating authorities are under no such obligation. The obligation to make the non-confidential summaries available to the exporters and foreign producers arises from other provisions of the ADA, and in particular from Articles 6.1.2 and 6.3.

In sum, while Thailand appears to have violated the ADA by not providing the non-confidential summaries to the Polish exporters, Poland has brought its complaint under the wrong provision of the ADA.

- (a) In this context, what is the relevance, if any, of Article 6.1.2 AD? Please explain in detail.

Reply

Non-confidential summaries furnished by the domestic industry constitute "evidence presented in writing by one interested party". Therefore, Article 6.1.2 ADA requires that those summaries be made available promptly to the exporters or foreign producers.

- (b) What is the legal relationship, if any, between Article 6.4, 6.5.1 and 6.9 AD, on the one hand, and Article 6.1.2 AD, on the other (e.g., does Article 6.4 encompass Article 6.1.2, do they pertain to different things, etc.)?

Reply

Article 6.4 does not encompass Article 6.1.2, but rather overlaps with it. Article 6.4 is broader than Article 6.1.2 in that it applies irrespective of the source of the information. In contrast, Article 6.1.2 applies only to evidence provided by the interested parties. On the other hand, Article 6.1.2 has a broader scope in that it covers all evidence presented in writing, while Article 6.4 only extends to information that is both "relevant" and "used" by the investigating authorities.

Article 6.1.2 and Article 6.4 are subject to the requirement not to disclose information provided on a confidential basis set out in Article 6.5. In turn, Article 6.5 is qualified by Article 6.5.1, which provides that, where information has been provided on a confidential basis, the investigating authorities must require a non-confidential summary thereof. Those summaries are not, by definition, confidential and therefore fall within the scope of the obligations imposed by Articles 6.1.2 and Article 6.4.

The requirement imposed by Article 6.9 is entirely different from those set forth in Articles 6.1.2 and 6.4. The latter may be satisfied by granting access to the public file to the interested parties. In contrast, Article 6.9 imposes on the investigating authorities a positive duty to identify and point to each interested party which facts, among those made available in the public file in accordance with Articles 6.1.2 and 6.4, as well as those submitted by that interested party on a confidential basis, constitute the "essential facts" which will form the basis for the decision of the investigating authority whether to apply definitive measures.

D. Article 2 AD

Question 6

Poland appears to argue that, if either Article 2.2.2(i) or 2.2.2(ii) is applied, the methodologies described therein do not ipso facto yield "reasonable" results in the sense of Article 2.2 AD and Article VI:1(b)(ii) of GATT 1994, but rather that such results are "presumed" to be reasonable and record evidence in an investigation can rebut this presumption. Please comment on this argument, including in the light of the language in the chapeau of Article 2.2.2 that the methodologies set forth in Article 2.2.2 are to be used "for the purpose of" Article 2.2, which in turn refers to "reasonable" amounts for profits, inter alia. What factors, elements or considerations (if any) could establish that a calculation of the profit rate under Article 2.2.2(i) or (ii) was "unreasonable"?

Reply

As argued extensively in its third party submission, the EC considers that the amounts for profit established in accordance with either Article 2.2.2 (i) or 2.2.2 (ii) are always "reasonable". This is not a refutable presumption, but rather a presumption *iuris et de iure*.

The above is confirmed by the wording of subparagraph (iii) which refers to "any other reasonable method". This implies necessarily that the preceding methods, including the one set out in the chapeau, are "reasonable" per se. As a matter of simple logic, a "reasonable" method cannot yield an "unreasonable" result.

Furthermore, if Article 2.2 imposed a supplementary "reasonability test", the requirement in subparagraph (iii) that "any other methods" must be "reasonable" would become redundant.

Poland's proposition that Article 2.2.2 establishes simply a refutable presumption of reasonability finds no support whatsoever in the wording of Article 2.2.2.

The terms "for the purposes of Article 2.2" serve to indicate that the amounts mentioned therein are those to be included in the calculation of the constructed normal value as provided for in Article 2.2. If they purported to have the meaning suggested in the question, the drafters would have used instead clearer wording to that effect such as "subject to Article 2.2 ...", "without prejudice to Article 2.2 ...", or "provided that the requirements of Article 2.2 are satisfied ...".

Moreover, the terms "for the purposes of" precede also the method set out in the chapeau of Article 2.2. Therefore, the argument outlined in the question would have the consequence that the additional reasonability test supposedly contained in

Article 2.2 would apply also to that method, something which not even Poland seems to be arguing.

Finally, it is worth noting that where the drafters of the ADA intended to establish a refutable presumption, they did so expressly (see e.g. footnote 2 ADA). The same is true of other WTO Agreements (see e.g. Article 6.2 of the SCM Agreement, and Article 2.5 of the TBT Agreement).

Question 7

The question has been placed before the Panel whether subparagraphs (i) and (ii) of Article 2.2.2 ADA are "safe havens" whereby applying any one of the methodologies set forth therein yields a result for profit that is per se "reasonable" in the sense of Article 2.2 ADA, last sentence, and Article VI:1(b)(ii) of GATT 1994. The chapeau of Article 2.2.2 ADA sets forth the preferred methodology for determining *inter alia* the amount of profit in a constructed value calculation, and states that when such amount "cannot be determined on this basis" it "*may* be determined" on the basis of the methodologies in the subparagraphs (i) and (ii). The use of the word "may" in this context could be seen as linking the word "reasonable" in Article 2.2 to subparagraphs (i) and (ii) (which themselves do not contain the word "reasonable"), thereby introducing a "reasonability" constraint into these subparagraphs. Please comment.

Reply

The EC fails to see how the use of the word "may" could have the far reaching consequences described in the question.

In Article 2.2.2, the word "may" indicates permission and not mere possibility, as the question appears to suggest. It implies that Members are entitled to establish the amount for profit in accordance with the methods set out in subparagraphs (i) and (ii). This is confirmed by the Spanish and the French versions which use the terms "*podrán*" and "*pourront*", respectively, instead of "*pueden*" and "*peuvent*".

The reading suggested in the question would render subparagraphs (i) and (ii) superfluous. If Members do not have the right, but merely the possibility to use those methods, what is the use of spelling them out in detail in Article 2.2.2? It is not plausible that they were inserted in the ADA with a simple pedagogical purpose, so that "new users" of anti-dumping measures such as Thailand could learn some possible methods for determining an "amount for profit".

Furthermore, the term "may" applies not only to subparagraphs (i) and (ii), but also to subparagraph (iii). If it were correct that the word "may" introduces a "reasonability constraint" into subparagraphs (i) and (ii), it would do the same also with respect to subparagraph (iii). But, if so, it would have been sufficient to refer in paragraph (iii) to "any other method", instead of to "any other reasonable method".

Question 8

In this context, for purposes of argument only, assume for example that application of the methodology under subparagraph (i) or (ii) of Article 2.2.2 yields a 300 per cent profit, and that this profit margin is far in excess of the profit margin on the product for the industry as a whole. Would the fact that this result was arrived at based on the correct application of subparagraph (i) or (ii) make it "reasonable" per

se? Is there any limit on the acceptable "reasonableness" of calculations under subparagraphs (i) and (ii)?

An amount for profit is not "unreasonable" simply because it is high. The "reasonability" of the amount for profit to be included in the constructed value should not be considered in the abstract, but rather in the light of the object and purpose of Article 2.2.2, which is to arrive at a constructed value as close as possible to the normal value that would have been determined on the basis of domestic prices, had there been comparable sales in the ordinary course of trade.

Profit margins may vary considerably from one country to another, as well as among different product markets, depending on the prevailing competitive conditions. In a market where there is little or no competition, profit margins will be high. Accordingly, the "reasonable amount for profit" in that market will have to be also high if it is to be representative of the conditions prevailing in that market.

A monopolistic producer protected by high tariffs will charge prices which consumers could justifiably consider as "unreasonably" high. Yet the ADA contains no provision allowing, let alone requiring, to disregard domestic prices for the purposes of a normal value calculation in those circumstances, or in any other situation where prices are "too high" from the point of view of consumers. By the same token, the mere fact that the profit margin yielded by the method set out in subparagraphs (i) or (ii) is in any given case relatively high, compared to those prevailing in other countries or product markets, is not a sufficient reason to call into question its "reasonability".

The methods set out in subparagraphs (i) and (ii) are based on *actual* profit data, albeit for different exporters or products. A 300 per cent profit margin is unusual in any country or product market. The EC, therefore, doubts of the practical relevance of the example mentioned in the question. However, assuming *arguendo* that the correct application of the methods subparagraphs (i) and (ii) yielded that result, the EC would still regard it as "reasonable".

Assume, for example, that in the present case there were two Polish exporters of H-beams to Thailand (companies A and B). A has no domestic sales, while B made sufficient domestic sales in the ordinary course of trade. The average profit margin obtained by B on those sales is 300 per cent. Why should it be "unreasonable" to assume that, had A made some domestic sales, it would have obtained at least the same profit margin as B? And why would that assumption be less "reasonable" than to establish B's normal value on the basis of its domestic prices (which incorporate a 300 per cent profit margin)?

Question 9

Is the phrase "in the ordinary course of trade" as used in Article 2.2.2 relevant to determining whether there is a reasonability test for calculations of profits under the chapeau of Article 2.2.2 and/or its subparagraphs (i) and (ii)? Please explain.

Reply

The phrase "in the ordinary course of trade" as used in Article 2.2.2 has the implication that, in establishing the reasonable amount for profit, the investigating authorities must disregard sales made at unreliable prices, including in particular sales below cost (provided that the requirements of Article 2.2.1 are met).

That phrase gives no support to the proposition that the methods set out in Article 2.2.2 are subject to an additional "reasonability test". To the contrary, the exclusion of sales not in the ordinary course of trade, which could have distorted the result, provides an additional justification for the presumption that those methods are "reasonable" per se.

E. Article 3 AD

Question 10

Please comment on the hypothesis that a two-stage analysis of the factors listed in Article 3.4 ADA is required. The first stage would be an initial "consideration" to determine the "relevance" or lack thereof of each listed factor and an identification of any other non-listed factors that also were relevant. The second stage would be a full analysis of all of the factors that had been identified as relevant. In other words, the factors in Article 3.4 would be seen as a checklist of what would need to be "considered" in respect of whether or not each factor was relevant. If a given factor were deemed not to be relevant, the analysis of that factor could stop at that point. Under this hypothesis, the final determination would have to address each factor in the checklist, and for each of those that had been deemed not to be relevant would simply indicate that this was the case and why. For each relevant factor, the final determination would have to indicate why it had been deemed to be relevant and in addition would have to contain a full "evaluation" of it. (Please note that the reference to the "final determination" is not necessarily intended to imply the public notice thereof, but rather the report compiled by the investigating authority concerning the investigation, which might or might not be the same as the public notice.)

- (a) Please indicate whether you agree or disagree with all or part of this hypothesis and explain in detail the legal basis for your view.
- (b) If you disagree with this hypothesis, please explain how, without "considering" each factor, its relevance or irrelevance can be judged.
- (c) Is it your view that if an examination of several factors led to a conclusion of injury, it would not be necessary to "consider" any of the other factors? Please explain.

Reply

The EC would tend to consider the two-stage approach proposed by the Panel to interpret the "examination" to be conducted under Article 3.4 as too formalistic and not based on any textual element. In particular, the EC fears that from this interpretation the Panel may derive requirements that are not contained in Article 3.4. In particular, the two-stage approach could not go as far as requiring investigating authorities to indicate for each discarded factor why it was deemed not to be relevant.

The EC would tend to consider reasonable to interpret Article 3 as articulating a realistic rather than a formal notion of injury. In this light, it has to be recalled that, in the economic reality of specific injury determinations, not only do the factors

listed in Article 3.4 differ in importance from case to case, but it is possible to deduce that certain of them are inherently likely to be more significant than others and that findings on some may make findings on others superfluous. Thus, for instance, how can a calculation of return on investments possibly be relevant or even meaningful in the case of an industry that is making losses? Some times one or several of the factors listed in Article 3.4 can give decisive guidance to determine the impact of the dumped imports on the domestic industry concerned. In these cases, the investigating authorities are not required to look further. Therefore, evaluation of all the factors cannot be regarded as compulsory.

The conclusion that some factors listed in Article 3.4 are inherently more important than others is partly drawn from everyday understanding of business economics, and partly from a consideration of the broad context of Article 3.4. By the latter the EC means the parallel provisions in the Safeguards Agreement and the ATC, which provides for an assessment of injury to a national industry, i.e. Article 4.2(a) of the Safeguards Agreement and Article 6.3 of the ATC. A comparison between these provisions shows significant differences. In particular, the provisions in the Safeguards Agreement and the ATC omit a number of factors which are present in the ADA. While all the Agreements are open-ended regarding the factors that may be considered, there seems to be no reason, other than their perceived relative importance, for the omission. Although the question of injury arises in quite distinct contexts in the three categories of agreements, in each case the issue is whether a domestic industry is being injured by imports. There appears to be no reason why the factors to be considered should vary between them. That being so, it would be perverse to suggest that the list of 'compulsory' factors should be different in each case. Much more likely is that the drafters intended the relevant national authorities to make a realistic assessment of the situation according to the facts of each case, giving most emphasis to those factors that have most relevance. It is reasonable to conclude that the crucial factors are almost always going to be amongst those that are common to all three agreements.

Question 11

Please describe the nature of the "relevance" of a factor in the context of Article 3.4 ADA. Is a factor "relevant" only when it supports an affirmative finding of injury, or should "relevance" be judged on a more broad basis, for example in the sense of whether or not a particular factor is informative as to the "state of the industry"? Is a factor also "relevant" when it does not support an affirmative finding of injury? Please explain in detail.

A factor is "relevant" in the context of Article 3.4 ADA when it provides guidance to determine the impact of dumped imports on the domestic industry concerned, i.e. when it helps assess whether there is injury.

From a textual point of view, the EC would like to draw the Panel's attention on the fact that all the categories (or "sub-groups" in the word of the Panel) of factors and indices listed in Article 3.4 ADA, but one, are clearly negative factors, namely: "actual and potential *decline* in ...", "magnitude of the *margin of dumping*" (inherently negative), "actual and potential *negative effects* on" (emphasis added). This interpretation of the factors listed in Article 3.4 is reinforced by a consideration of the opening phrase, which speaks of the "*impact* of the dumped imports". The word

"impact" carries a negative aspect, which is not present, for example, in the phrase "the effect of the imports" in the corresponding provision of Article 6 of the ATC.

Although this textual argument cannot go as far as saying that an evaluation of these factors would only be "relevant" when it supports an affirmative finding of injury, the EC believes that it can at least shed some light on the nature of "the economic factors and indices having a bearing on the state of the industry" that the investigating authorities are called to evaluate.

Question 12

What is the significance of the fact that the term "such as" in Article 3.3 of the Tokyo Round Anti-Dumping Code was changed to "including" in Article 3.4 of the Uruguay Round Anti-Dumping Agreement? If no change in meaning was intended, why was a change in terminology made? According to the Concise Oxford Dictionary (1990 ed.), the verb "include" means to "comprise or reckon in as part of a whole" or to "enclose". The term "such as" means "like" or "for example". Please explain in what sense, if any, these definitions could be viewed as synonymous.

See answer under Question 13.

Question 13

Please comment on the use of the word "or" at two places in the list of the factors in Article 3.4 ADA, as well as on the use of semi-colons between subgroups of factors in that Article. In particular, what is the significance, if any, of the fact that the word "or" appears only *within* subgroups of factors which are separated by semi-colons, and not *between* those subgroups?

Reply

As explained at length in its Written Submission, the EC recognises that the first sentence of Article 3.4, if taken by itself, contains conflicting elements. If "including" and "or" were in fact to be taken literally, their concurrent use would lead to a perverse interpretation. Consequently, the interpretation of this norm has to be conducted taking into account the ordinary meaning of all its terms and its context.

Thus, if it is true that textually the word "including" may mean "enclosing", in the context of Article 3.4 this notion is undermined by the nature of the list of factors that follows. These factors are broken into four categories by semi-colons, and within some of the parts the word "or" is used. As already pointed out in its Submission, the EC firmly believe that the presence of the conjunction "or" to link some of the listed factors necessarily implies that the investigating authorities are left the discretion to decide which of the factors and indices listed can be considered relevant and which not in each particular case. If the Article 3.4 list had a mandatory nature and "all" factors and indices listed had to be evaluate, the drafters of the ADA would have used the conjunction "and", as they had not hesitated doing in many other contexts. One example of this being that only the conjunction "and" and not the conjunction "or" does appear in the injury factors' lists of the Safeguards Agreement and ATC. This is further confirmed by the negotiating history of the ADA. During the Uruguay Round, in fact, New Zealand proposed to make the list of factors presented in what is now Article 3.4 an entirely compulsory checklist. In its proposed text the list of factors followed a colon (:) and the 'or' in '*...or utilization of capacity*' is missing. This

approach was vigorously rejected by the other parties, who felt the list should be indicative, and the present text is the result of this rejection.

Furthermore, any possible ambiguity in the first sentence is eliminated by the second sentence of Article 3.4 ADA, which makes perfectly clear that it is not necessary to consider all the factors listed in the first sentence. The EC has already provided its interpretation of this part of paragraph 4 in its Written Submission. However, a further element needs to be noticed. The relevant part of paragraph 4 states that:

"This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance."

The use of the words "nor ... necessarily" (meaning "need not, but may") in the second part of this sentence means that sometimes one or several, and thus not all, of the listed factors can give "decisive guidance". Since a single factor can thus give "decisive guidance", it is clear that in these cases the investigating authorities are not required to look further.

The necessity of a concurrent textual and contextual analysis of all elements of Article 3.4 is well illustrated by the comparison of the following sentences, in part used as an example by the Panel itself during the oral hearing:

- (1) The President of Iruthia shall evaluate all major trading nations' proposals, including those of the EC, Japan and the United States.
- (2) The President of Iruthia shall evaluate all major trading nations' proposals, including those of the EC, Japan or the United States. This list is not exhaustive, nor can one or several of these proposals necessarily give decisive guidance.

It is clear that in example N° 1, the word "including" does mean "comprising", "at the very least", and thus the President of this hypothetical state will have to evaluate proposals from all three nations mentioned. On the contrary, in the second case, the context of the phrase is such that the meaning of "including" is not that neat anymore and the President can claim a discretionary authority in choosing which proposals to evaluate: those from the EC, Japan and the United States plus others; only those from the United States and Japan; etc.

Question 14

Under what circumstances, or in respect of what sorts of factors, if any, is it the responsibility of the investigating authority to seek information concerning the potential effects of "known" factors other than dumped imports that might be causing injury, and when does the responsibility fall to the responding party to bring such issues to the attention of the investigating authority? For example, if the importing country is in an economic recession, certainly the authority and all interested parties will "know" this. Would the authority have the responsibility on its own initiative to try to identify the specific effects of the recession in the domestic market for the product under investigation, or would it only have to consider this issue if it were raised by an interested party? Would it make a difference if the factor in question was not something widely known but rather was known only to the investigating authority and the domestic industry (i.e., not to the respondent)? Please explain and provide the legal basis for your view.

Reply

As suggested by the Panel, Article 3.5 ADA might be read as requiring the investigating authorities to examine any relevant other factors "known" to them, even if those factors have not been invoked by the respondents. In practice, nevertheless, this issue is likely to be of little relevance.

In the first place, the wording of Article 3.5 makes it clear that the investigating authorities must "know" not only the existence of the factor in question, but also that that factor is "injuring the domestic industry". Thus, to take up the Panel's example, the investigating authorities must be aware not only of the existence of a recession, but also that the recession is causing injury to the industry concerned. While, as suggested by the Panel, it may be reasonable to assume that the investigating authorities "know" the existence of a recession, it cannot be assumed that they "know" also its effects on the domestic industry concerned. (The Panel suggests that a recession will always cause "injury" to all domestic industries. That is not necessarily so. Some industries may even benefit from a recession).

Second, the burden of proving that the investigating authorities "knew" one factor lies with the complaining Member. Moreover, in accordance with Article 17.5 (ii) ADA, Panels may not examine facts that were not "made available" to the investigating authorities in conformity with appropriate domestic procedures.

Thus, in sum, in order to establish a violation of 3.5 ADA, the complaining Member would have to prove, on the basis of facts made available to the investigating authorities, that those authorities "knew" that some "other factor" was causing injury to the domestic industry. In practice, that kind of proof may be extremely difficult to furnish unless the respondents have invoked the existence of that "other factor" in the course of the investigation

*F. Article 17 AD***Question 15**

Please comment on the relationship, if any, between Article 17.6 ADA and Article 11 DSU, in particular whether or not these provisions must be read together, drawing on elements from both except to the extent that they "differ" in the sense of Article 1.2 DSU, in which case Article 17.6 ADA would prevail. Please comment on whether you believe this is the correct approach, and whether you do or do not see such a "difference" between Article 11 DSU and Article 17.6 ADA. Please describe any such difference. In this context, please discuss the Appellate Body's statement in *Argentina - Footwear Safeguard*:

"[F]or all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panels.¹ 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, Article 17.6, sets out a special standard of review* for disputes arising under that Agreement" (underlining supplied).

¹ 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, para. 2.67

Reply

See answer under Question 16.

Question 16

The parties seem to agree that the appropriate standard of review is somewhere between *de novo* review and total deference. We note that within Article 17.6 itself, the two subparagraphs arguably could be viewed as establishing different levels of review or deference pertaining to two different types of issues. Subparagraph (i) concerns facts and arguably requires a considerable degree of deference and thus relatively limited review by a Panel. By contrast, subparagraph (ii) concerns issues of law and the question of multiple "permissible" interpretations of a given provision of the ADA, among which a national investigating authority is free to choose. Some commentators believe that rarely if ever can there be more than one permissible interpretation of any given treaty provision. This might arguably mean that the required degree of deference under (ii) would be less than under (i). Furthermore, the question arises as to when, if at all, the establishment or evaluation of "facts" by an investigating authority becomes a question of law or legal interpretation under the Anti-Dumping Agreement (e.g., where the issue is whether a certain set of facts satisfies a given treaty provision). The question of this "penumbra" between fact and law could be particularly relevant in the context of the Anti-Dumping Agreement.

- (a) Please comment on your views as to the nature of the differences between the two subparagraphs of Article 17.6 (coverage, degree of deference required, etc.).
- (b) Please also describe the standard of review that you believe should apply to issues that fall within the penumbra between factual and legal issues as described above. Is it the standard in 17.6(i), 17.6(ii), or some other standard. Please explain in detail.
- (c) Please identify the standard of review (subparagraph (i), subparagraph (ii) or a standard of review applicable in the penumbra if different from (i) or (ii)) that you believe is applicable to each issue before the Panel in this case, and please explain your reasoning.

Reply

The EC believes that Article 17 ADA, although an additional rule in the meaning of Appendix 2 DSU, constitutes overall a restatement of the provisions found in the DSU. The argument that, on the basis of Article 1.2 DSU, Article 17 ADA would always prevail, is thus not sustainable because the prerequisite for the application of Article 1.2 DSU is missing: Article 17 ADA and the norms of the DSU do not usually differ. As the Appellate Body has pointed out clearly in its

analysis of the relation between the ADA and the DSU, two sets of rules should be considered to differ when they cannot be read as complementing each other, i.e. "when adherence to one provision would lead to a violation of the other provision". Apart from such cases, the special or additional rules of the ADA should be seen as forming an integrated whole with the DSU⁴

In this light, Article 11 of the DSU and Article 17.6 ADA can be considered to differ only in one respect. Under Article 11 DSU a panel is asked to "make an objective assessment" of "the facts of the case and the applicability of and conformity with the relevant covered agreements". Thus, on the basis of this norm, the panel will *in prima persona* and objectively assess both the issues of fact and the issues of law that are at the basis of the controversy submitted to its judgement. Under Article 17.6, a panel is also asked to deal directly with the legal issues at the basis of the case. Article 17.6(ii) reads in fact in the relevant part:

"the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law."

However, with regard to issues of fact, Article 17.6(i) only requires the panel to "determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective". In this case, thus, the panel is only required to review the assessment of the facts conducted by the investigating authorities and not to conduct it *ex novo*. This higher deference to the factual findings of the national authorities is also confirmed by the final disposition contained in Article 17.6(ii), which reads:

"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".

Apart from this different standard of deference applicable as far as the assessment of the facts of the case are concerned, the EC does not see any "difference" in the provisions of Article 11 DSU and Article 17.6 ADA. This implies, among other things, that all the remaining rules of Article 11 DSU apply also in anti-dumping cases.

As far as the so-called "penumbra" between fact and law that the Panel refers to, the EC is not in a position to comment because unable to perceive that "penumbra". For the EC, the issues that panels are called to assess are "brightly" issues of fact or issues of law.

Finally, the EC would like to recall that it has intervened as third party in this case because of its systemic interest in the correct interpretation of the ADA and in

⁴ Report by the Appellate Body on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, AB-1998-6, WT/DS60/AB/R, 2 November 1998, DSR 1998:IX, 3767, at paras. 65-68.

the correct application of the DSU. The EC, instead, is not in a position to comment on the many issues in dispute which relate to questions of fact. Accordingly, the EC is not in a position to answer to Panel's Question 16 (c).

ANNEX 3-8

RESPONSE OF JAPAN TO THE PANEL'S QUESTIONS

A. *Request by Thailand for Ruling under Article 6.2 DSU with Respect to Articles 5 and 6 AD*

1. We note the following passage from the Appellate Body Report in the *Korea - Dairy Safeguard* case:

"... There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.¹ (emphasis in original)

- (a) How is the phrase "in the light of attendant circumstances" in the above passage to be interpreted, both in general, and in the context of the present dispute? What relevance, if any, could this phrase have in this particular case. Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 5 and 6 AD? Please explain in detail.

Reply

(i) In general, when interpreting the phrase "in the light of the attendant circumstances", one must first visit the object and purpose of Article 6.2 on which all panel establishment requests must be based.

(ii) The issue of fulfilment of the specificity requirement provided for in Article 6.2 has been repeatedly raised in a number of cases and is one of the most controversial issues of legal interpretation under the DSU. As has been reaffirmed by the past panels and the Appellate Body, the object and purpose of the requirement is, first, to ensure clarity of panel's terms of reference, which pursuant to Article 7 of the DSU are typically determined by the panel request, and, second, to inform the respondent and potential third parties of the scope of the complaining party's claims and to enable them to respond adequately. We also believe that specificity of the panel request effectively prevents the complaining parties from continuously raising additional legal claims throughout the panel proceedings. In short, the specificity requirement serves to ensure due process and fairness in the panel proceeding.

¹ WT/DS98/AB/R, DSR 2000:I, 3, para. 124.

(iii) Article 6.2 of the DSU provides two specific requirements; first, identification of the specific measures at issue, and second, provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly. With regard to the first requirement, we support the interpretation developed by the panel on Japan - Film which found that for a measure not explicitly described in a panel request to be regarded as being included in the measures specifically identified, it must have a clear relationship, that is, must be subsidiary or so closely related, to the latter so that the responding party can reasonably be found to have received adequate notice. Although we believe that the standard developed by the panel is implicit in the terms of Article 6.2, it should be articulated in that provision, if necessary. As for the second requirement, the past panels and the Appellate Body found that it was sufficient for the complaining parties to list the provisions of the specific agreements alleged to have been violated without setting out detail arguments. We disagree. Since a simple listing of the provisions which are allegedly violated is not enough to properly perform a notice function of the panel request, the linkage between the specific measures concerned and the provisions allegedly violated thereby be presented. In line with the above understanding, Japan has submitted its own panel request which in our opinion would fulfil the above requirements, as was the case at the time of our panel establishment request for the Canada-Auto Pact.

(iv) Thus, the exact threshold as to what level of specificity of claim would satisfy the requirement of Article 6.2, must be judged against the two specific requirements explained above. In order for a panel establishment request to fulfil these requirements, due consideration should be given to the "attendant circumstances" of respective cases because not all cases can be based on the same level of specificity.

(v) In the context of the present dispute, Articles 5 and 6 AD are cited in the panel request. As these Articles impose upon the Member initiating the investigation a detailed set of requirements, the claims in the panel establishment request should go beyond merely listing Articles 5 and 6, and "identify the specific measures at issue and provide a brief summary of the legal basis of the complaint" so that the linkage between the specific measures concerned and the provisions allegedly violated thereby is presented.

(vi) In Japan's view, Poland fails to fulfil these requirements because the panel establishment request in question states no more than Thai authorities violated these provisions in their initiation and conduct of the investigation.

(b) Does Poland's request for establishment "merely list" Articles 5 and 6 AD, or does it go beyond a "mere listing"?

Reply

Japan is of the view that Poland's request merely lists Articles 5 and 6 AD because the request fails to explain what actions by the Thai investigating authorities violated the obligations set forth in these Articles.

(c) Do Articles 5 and 6 AD each establish one single, distinct obligation or rather multiple obligations? What is the basis for your response?

Reply

Articles 5 and 6 establish multiple obligations. For example, Article 5.2 AD lists four categories of information that shall be contained in an application for the initiation of an investigation. Article 6.9, on the other hand, requires the disclosure of essential facts to interested parties.

2. We note the following passage from the Appellate Body Report in the *Korea - Dairy Safeguard* case:

"... whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."²

What is the meaning of the phrase "given the actual course of the panel proceedings" in the above passage? Would it, for example, permit the subsequent "remedying" of a possibly insufficient panel request in the course of the panel proceedings? How is this phrase to be interpreted and applied in the present case in respect of the request for a ruling under Article 6.2 relating to Articles 5 and 6 AD? Please explain in detail.

Reply

(i) As presented in our response to Question 1.(a) above, the specificity requirement of Article 6.2 effectively prevents the complaining parties from continuously raising additional legal claims throughout the panel proceedings, thereby ensuring due process and fairness in the panel proceeding.

(ii) If the panel establishment request clearly fails to fulfil the standard imposed by Article 6.2, the DSB should not decide to establish the panel.

(iii) In many instances in which the defending parties requested the panel to make a preliminary ruling on such issues as the specificity requirement, however, the panel had to examine all the relevant issues as well as legal claims before it ruled on such preliminary issues. The examination of the phrase "given the actual course of the panel proceedings" must therefore take into account such reality that the panel may not be able to determine whether the panel establishment request meets the requirement of Article 6.2 at an early stage of the panel proceeding, failing the decision of the DSB to reject that panel establishment request.

(iv) Issues such as the specificity requirement, however, had better be dealt with at an early stage of the panel proceeding in order for the panel to concentrate on the substance of the issues raised. Thus, the specificity requirement of Article 6.2 must be stringently administered before the establishment of the panel. Only under exceptional circumstances should the panel allow the complaining party to present any additional specificity of claims during the course of the panel proceeding in order to

² WT/DS98/AB/R, *supra*, footnote 1, para. 127.

clear the threshold of specificity imposed by Article 6.2, and only when the panel can ascertain that the ability of the respondent to defend itself is in no way prejudiced.

(v) Should the panels allow the complaining parties to remedy the lack of specificity in the panel establishment request with ease, it would lead to the kind of situations in which the complaining parties continuously raise additional legal claims throughout the panel proceedings, which places the defending parties at a disadvantage to the discredit of the WTO Dispute Settlement mechanism.

(vi) In the context of the case in question, Poland's panel establishment request fails to fulfil the specificity requirement of Article 6.2, and only under the exceptional circumstances any remedy for the lack of specificity be made available to Poland.

B. Article 5 AD

3. Does Article 5.5 AD require written notice, or would a meeting between government officials be sufficient under this provision? Please explain in detail.

Reply

Although Article 5.5 does not specify that notification should be in writing, other considerations suggest that Article 5.5 requires written notification. The word "notify" suggests a more formal process than mere oral notification. The New Shorter Oxford English Dictionary (1993 ed.) defines the word "notify" as follows: "make known, publish". Interpreting Article 5.5 to require only oral notification could also create an evidentiary dilemma in that the government of the exporting Member concerned may deny having received (sufficient) oral notification. Absent a requirement for written notification, however, the risk of failing to meet this obligation should fall on the party making the notification.

C. Article 6 AD

5. Thailand argues that Article 6.5.1 AD provides that an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof, but that Article 6.5.1 does not require the investigating authorities to provide those non-confidential summaries to the exporters or to the foreign producers.

Reply

Japan believes that data based on overlapping time periods do not necessarily introduce a flaw in an investigation. It depends on the reasons the authority has for analyzing overlapping time period. This issue should be decided on a case-by-case basis. Ultimately, whatever comparison periods are used, investigating authorities must show injury by reasons of unfairly price imports and must be able to explain the risk behind the analytic methodology being used. Japan believes that a member challenging a particular analytic methodology should explain clearly the flaws in the methodology being attacked.

- (a) In this context, what is the relevance, if any, of Article 6.1.2 AD? Please explain in detail.

Reply

5(a) Article 6.1.2 expands on the obligation created under Article and 6.5.1. Article 6.5.1 provides that authorities "shall require interested parties providing confidential information to furnish non-confidential summaries thereof". Article 6.1.2 provides that written evidence "shall be made available promptly to other interested parties in the investigation". The interaction of these Articles created an obligation on the part of Thailand to make non-confidential summaries available to other interested parties in a prompt manner. In this regard, consideration should be given to the purpose of non-confidential summaries, which is to allow interested parties to participate in investigations. Moreover, under Article 6.2, all interested parties "shall have a full opportunity for the defense of their interests". Such a defense would be impaired without access to non-confidential summaries.

- (b) What is the legal relationship, if any, between Article 6.4, 6.5.1 and 6.9 AD, on the one hand, and Article 6.1.2 AD, on the other (e.g., does Article 6.4 encompass Article 6.1.2, do they pertain to different things, etc.)?

Reply

These Articles are interrelated, and create an obligation for authorities to provide interested parties with relevant (non-confidential) information in a timely fashion. Article 6.4 is more expansive and general than Article 6.1.2. Article 6.1.2 refers only to "evidence presented in writing", while Article 6.4 refers to "all information" that is relevant to the case of an interested party and that is used by authorities in an investigation.

Article 6.5.1 elaborates on the obligation under Article 6.1.2 to provide promptly interested parties with evidence presented in writing by other interested parties. Article 6.5.1 outlines in general terms what information must be contained in non-confidential summaries of information.

Finally, Article 6.9 stipulates to the obligation of authorities to disclose "essential facts" to all interested parties, which is a subset of the information that must be made available to interested parties under Article 6.4. Article 6.9, however, contains stricter conditions because of the important nature of "essential facts". Accordingly, Article 6.9 does not employ Article 6.4's term "whenever practicable", and carefully defines when the "essential facts" must be informed all interested parties.

D. Article 2 AD

6. Poland appears to argue that, if either Article 2.2.2(i) or 2.2.2(ii) is applied, the methodologies described therein do not ipso facto yield "reasonable" results in the sense of Article 2.2 AD and Article VI:1(b)(ii) of GATT 1994, but rather that such results are "presumed" to be reasonable and record evidence in an investigation can rebut this presumption. Please comment on this argument, including in the light of the language in the chapeau of Article 2.2.2 that the methodologies set forth in Article 2.2.2 are to be used "for the purpose of" Article 2.2, which in turn refers to

"reasonable" amounts for profits, inter alia. What factors, elements or considerations (if any) could establish that a calculation of the profit rate under Article 2.2.2(i) or (ii) was "unreasonable"?

Reply

Japan agrees that a reasonableness requirement underlies Article 2.2.2 in calculating "the amounts of administrative, selling and general costs and for profits" by virtue of the cross-reference in the chapeau of that Article to Article 2.2. The methodologies employed pursuant to Article 2.2.2 cannot be presumed to yield, ipso facto, "reasonable" results without reading away the word "reasonable". A determination of whether a methodology under Article 2.2.2 was "reasonable" should be guided by whether there is evidence that reasonable alternatives were rejected without a good rationale.

7. The question has been placed before the Panel whether subparagraphs (i) and (ii) of Article 2.2.2 ADA are "safe havens" whereby applying any one of the methodologies set forth therein yields a result for profit that is per se "reasonable" in the sense of Article 2.2 ADA, last sentence, and Article VI:1(b)(ii) of GATT 1994. The chapeau of Article 2.2.2 ADA sets forth the preferred methodology for determining inter alia the amount of profit in a constructed value calculation, and states that when such amount "cannot be determined on this basis" it "may be determined" on the basis of the methodologies in the subparagraphs (i) and (ii). The use of the word "may" in this context could be seen as linking the word "reasonable" in Article 2.2 to subparagraphs (i) and (ii) (which themselves do not contain the word "reasonable"), thereby introducing a "reasonability" constraint into these subparagraphs. Please comment.

8. In this context, for purposes of argument only, assume for example that application of the methodology under subparagraph (i) or (ii) of Article 2.2.2 yields a 300 per cent profit, and that this profit margin is far in excess of the profit margin on the product for the industry as a whole. Would the fact that this result was arrived at based on the correct application of subparagraph (i) or (ii) make it "reasonable" per se? Is there any limit on the acceptable "reasonableness" of calculations under subparagraphs (i) and (ii)?

9. Is the phrase "in the ordinary course of trade" as used in Article 2.2.2 relevant to determining whether there is a reasonability test for calculations of profits under the chapeau of Article 2.2.2 and/or its subparagraphs (i) and (ii)? Please explain.

Reply

Please see the answers to question 6 which demonstrates Japan's basic position.

E. Article 3 AD

10 Please comment on the hypothesis that a two-stage analysis of the factors listed in Article 3.4 ADA is required. The first stage would be an initial "consideration" to determine the "relevance" or lack thereof of each listed factor and an identification of any other non-listed factors that also were relevant. The second stage would be a full analysis of all of the factors that had been identified as relevant. In

other words, the factors in Article 3.4 would be seen as a checklist of what would need to be "considered" in respect of whether or not each factor was relevant. If a given factor were deemed not to be relevant, the analysis of that factor could stop at that point. Under this hypothesis, the final determination would have to address each factor in the checklist, and for each of those that had been deemed not to be relevant would simply indicate that this was the case and why. For each relevant factor, the final determination would have to indicate why it had been deemed to be relevant and in addition would have to contain a full "evaluation" of it. (Please note that the reference to the "final determination" is not necessarily intended to imply the public notice thereof, but rather the report compiled by the investigating authority concerning the investigation, which might or might not be the same as the public notice.)

- (a) Please indicate whether you agree or disagree with all or part of this hypothesis and explain in detail the legal basis for your view.

Reply

Japan disagrees with the hypothesis that there might be irrelevant factors listed in Article 3.4 on a case-by-case basis, when examining the impact of the dumped imports. Japan believes that, according to the language of Article 3.4, all factors listed are "relevant". Authorities shall not arbitrarily exclude certain factors because they do not believe them to be relevant.

- (b) If you disagree with this hypothesis, please explain how, without "considering" each factor, its relevance or irrelevance can be judged.

Reply

Please see the answer to question 10(a).

- (c) Is it your view that if an examination of several factors led to a conclusion of injury, it would not be necessary to "consider" any of the other factors? Please explain.

Reply

Article 3.4 specifically requires an "evaluation of all relevant economic factors and indices". This is important because an evaluation of only certain factors could lead to an erroneous conclusion. Whereas one or two factors may point to imports as causing injury to the domestic industry, an evaluation of the remaining factors might contradict this conclusion.

11. Please describe the nature of the "relevance" of a factor in the context of Article 3.4 ADA. Is a factor "relevant" only when it supports an affirmative finding of injury, or should "relevance" be judged on a more broad basis, for example in the sense of whether or not a particular factor is informative as to the "state of the industry"? Is a factor also "relevant" when it does not support an affirmative finding of injury? Please explain in detail.

Reply

Japan thinks that the nature of the "relevance" requirement in Article 3.4 must be judged on a broader basis than merely inquiring whether a factor supports an affirmative finding of injury. This conclusion emerges from the language of Article 3.4 which is not restrictive. Thus, Article 3.4 uses the phrase "evaluation of all relevant factors ... having a bearing on the state of the industry" as opposed to referring to factors having a bearing on the "injury" of the industry.

12. What is the significance of the fact that the term "such as" in Article 3.3 of the Tokyo Round Anti-dumping code was changed to "including" in Article 3.4 of the Uruguay Round Anti-dumping Agreement? If no change in meaning was intended, why was a change in terminology made? According to the Concise Oxford Dictionary (1990 ed.), the verb "include" means to "comprise or reckon in as part of a whole" or to "enclose". The term "such as" means "like" or "for example". Please explain in what sense, if any, these definitions could be viewed as synonymous.

Reply

Japan believes that the change in terminology was made for a specific reason. Whereas, "such as" means "like" or "for example" and therefore does not entail a requirement that each factor subsequently listed be reviewed, "including" does entail such a requirement. Because "including" means "part of a whole", the factors listed after the word "including" are a subset of a potentially larger group of factors that must be reviewed by authorities.

13. Please comment on the use of the word "or" at two places in the list of the factors in Article 3.4 ADA, as well as on the use of semi-colons between subgroups of factors in that Article. In particular, what is the significance, if any, of the fact that the word "or" appears only *within* subgroups of factors which are separated by semi-colons, and not *between* those subgroups?

Reply

Please see the answer to question 10(a).

14. Under what circumstances, or in respect of what sorts of factors, if any, is it the responsibility of the investigating authority to seek information concerning the potential effects of "known" factors other than dumped imports that might be causing injury, and when does the responsibility fall to the responding party to bring such issues to the attention of the investigating authority? For example, if the importing country is in an economic recession, certainly the authority and all interested parties will "know" this. Would the authority have the responsibility on its own initiative to try to identify the specific effects of the recession in the domestic market for the product under investigation, or would it only have to consider this issue if it were raised by an interested party? Would it make a difference if the factor in question was not something widely known but rather was known only to the investigating authority and the domestic industry (i.e., not to the respondent)? Please explain and provide the legal basis for your view.

Reply

Japan believes there is an obligation on the part of authorities to consider the potential effects of factors other than dumped imports that might be causing injury to the domestic industry. This obligation derives from the third sentence of Article 3.5 which expressly states that "the authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry". Moreover this sentence does not use the phrase "before the authorities" contained in the previous sentence of Article 3.5, thereby indicating a broader scope of the obligation of authorities.

F. Article 17 AD

15. Please comment on the relationship, if any, between Article 17.6 ADA and Article 11 DSU, in particular whether or not these provisions must be read together, drawing on elements from both except to the extent that they "differ" in the sense of Article 1.2 DSU, in which case Article 17.6 ADA would prevail. Please comment on whether you believe this is the correct approach, and whether you do or do not see such a "difference" between Article 11 DSU and Article 17.6 ADA. Please describe any such difference. In this context, please discuss the Appellate Body's statement in *Argentina - Footwear Safeguard*:

"[F]or all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panel³. 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, Article 17.6, sets out a special standard of review* for disputes arising under that Agreement" (underlining supplied).

Reply

Japan believes that Article 17.6 ADA and Article 11 DSU should be read together. Article 17.1 provides that "Except as otherwise provided herein, the Dispute Settlement Understanding is applicable to consultations and the settlement of disputes under this Agreement. The Appellate Body's statement in *Argentina Footwear Safeguard* merely describes Article 17. This statement does not purport to explain how Article 17.6 ADA and Article 11 DSU should be interpreted together as a matter of treaty interpretation. The appellate body does not indicate that art.17 ADA has completely replaced Article 11 DSU.

³ 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, para. 2.67

ANNEX 3-9

RESPONSE OF THE UNITED STATES TO THE PANEL'S QUESTIONS
FIRST SUBSTANTIVE MEETING

A. *Request by Thailand for Ruling under Article 6.2 DSU with Respect to Articles 5 and 6 AD*

1. We note the following passage from the Appellate Body Report in the *Korea -Dairy Safeguard* case:

"124. There may be situations where the simple listing of the articles of the agreement or agreements involved may, in the light of attendant circumstances, suffice to meet the standard of clarity in the statement of the legal basis of the complaint. However, there may also be situations in which the circumstances are such that the mere listing of treaty articles would not satisfy the standard of Article 6.2. This may be the case, for instance, where the articles listed establish not one single, distinct obligation, but rather multiple obligations. In such a situation, the listing of articles of an agreement, in and of itself, may fall short of the standard of Article 6.2.¹ (emphasis in original)

(a) How is the phrase "in the light of attendant circumstances" in the above passage to be interpreted, both in general, and in the context of the present dispute? What relevance, if any, could this phrase have in this particular case. Are there any "attendant circumstances" in this case that might be relevant to the request by Thailand for a ruling under Article 6.2 DSU with respect to Articles 5 and 6 AD? Please explain in detail.

Response:

This question relates specifically to Poland's statement in its request for the establishment of panel that

The principal measures to which Poland objects are:

Thai authorities initiated and conducted this investigation in violation of the procedural and evidentiary requirements of Article VI of GATT 1994 and Articles 5 and 6 of the Anti-Dumping Agreement.

"[I]n light of the attendant circumstances" means, in general terms, that the factual context surrounding the request for a panel, including any record of the consultations or other communications between the parties, or the circumstances of the measure being reviewed, may mean that a relatively abbreviated description of the legal claim may be sufficient to satisfy the requirement of Article 6.2 DSU that the request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly".

¹ WT/DS98/AB/R, DSR 2000:I, 3, para. 124.

Articles 5 (Initiation and Subsequent Investigation) and 6 (Evidence) of the Anti-Dumping Agreement are lengthy and contain various obligations which might have been the intended object of Poland's request for the establishment of a panel. With one possible exception, the United States is unaware of any circumstances attendant to Poland's request for establishment that would have clarified what Poland meant by its general reference to Articles 5 and 6 of the Anti-Dumping Agreement. The arguable exception is that certain aspects of the underlying investigation would have made some Article 5 and 6 claims unlikely. For instance, Article 6.10 is applicable in cases, among others, where there are numerous exporters. Since the investigation at issue here involved only one exporter, it is unlikely that Poland believed it had a claim based on the "multiple exporter" provisions of Article 6.10. However, the United States did not participate as a third party in the consultations held between the parties and therefore cannot comment on what information regarding the Article 5 and 6 claims Poland may have consulted upon with Thailand. If there are documents (e.g., questions Poland posed to Thailand) delineating Poland questions and concerns, these would be relevant for the Panel to consider. The United States notes Thailand's argument that the lack of specificity in the request for establishment has denied Thailand its right to present an effective defense to the Article 5 and 6 claims. This fact would suggest that the "attendant circumstances" were not such that a listing of the articles was sufficient to meet the standard of clarity in the statement of the legal basis of the complaint. Further clarity might have been provided by, for instance, providing a narrative description of the problem.

- (b) Does Poland's request for establishment "merely list" Articles 5 and 6 AD, or does it go beyond a "mere listing"?

Response:

Poland's request for establishment puts Articles 5 and 6 into a sentence, stating that Thailand initiated and conducted the investigation in violation of those articles. This statement is the functional equivalent of listing the articles.

- (c) Do Articles 5 and 6 AD each establish one single, distinct obligation or rather multiple obligations? What is the basis for your response?

Response:

Articles 5 and 6 establish various obligations. Article 6.2 DSU requires that the establishment request "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly". In the case of Articles 5 and 6, it would appear that DSU Article 6.2 read in conjunction with AD Article 17.5(i) would require some specificity as to the Article 5 and 6 obligations alleged to have been breached, without necessarily requiring a listing of specific paragraphs of the article. For example, the panel in *Mexico -Anti-Dumping investigation of High Fructose Corn Syrup (HFCS) from the United States* found that the US request for establishment narratively describing the US allegations met the requirements of DSU Ar-

ticle 6.2 and AD Article 17.5(i), were not cited² Poland's request for establishment regarding AD Articles 5 and 6 do not provide any such detail. Further, Thailand has alleged that its ability to defend itself was prejudiced by this lack of detail, which is one of the factors that the Appellate Body has identified as important in considering a claim under Article 6.2 DSU.

2. We note the following passage from the Appellate Body Report in the *Korea - Dairy Safeguard* case:

"127. Whether the mere listing of the articles claimed to have been violated meets the standard of Article 6.2 must be examined on a case-by-case basis. In resolving that question, we take into account whether the ability of the respondent to defend itself was prejudiced, given the actual course of the panel proceedings, by the fact that the panel request simply listed the provisions claimed to have been violated."³

What is the meaning of the phrase "given the actual course of the panel proceedings" in the above passage? Would it, for example, permit the subsequent "remedying" of a possibly insufficient panel request in the course of the panel proceedings? How is this phrase to be interpreted and applied in the present case in respect of the request for a ruling under Article 6.2 relating to Articles 5 and 6 AD? Please explain in detail.

Response:

A panel could determine, based on the course of the panel proceedings, that the original establishment request was sufficient in that it presented the problem sufficiently clearly. This could be the case, for instance, if it were apparent from the parties' subsequent submissions that there was a common understanding of the claim as set forth in the request. If there was a common understanding, then it is unlikely that a party's ability to defend itself was prejudiced by the supposed lack of clarity.

In the instant dispute, it is not clear from the facts of the actual course of the panel proceedings that Thailand was aware of Poland's precise legal claims. Indeed, in Poland's first submission, its brief discussion of its Article 5 and 6 claims discussed, for the first time, Article 12. 2 of the Anti-Dumping Agreement (concerning the public notice of determinations). This lack of notice could very well prejudice the ability of a party to defend itself.

B. Article 5 AD

3. Does Article 5.5 AD require written notice, or would a meeting between government officials be sufficient under this provision? Please explain in detail.

² See US request for establishment (WT/DS132/2) and the panel's findings in sections VII(B)(1) and (2) of its report (WT/DS/132/R, 28 January 2000), DSR 2000:III, 1345.

³ WT/DS98/AB/R, *supra*, footnote 1, para. 127.

Response:

Article 5.5 is silent on the issue of the type of notice required. To date, disputes concerning the application of Art. 5.5 have centered around the time frame for providing notice⁴ rather than the method of notification.

The absence of an express requirement of written notice provides authorities with the latitude to develop notification procedures that are consistent with both their international obligations and their internal domestic policies. A meeting between government officials could satisfy the notification requirement, provided that the objective of the meeting is specific and sufficiently documented to support a review on the record by the panel.

C. Article 6 AD

4. With respect to Poland's reference in paragraph 92 of its first written submission to data based on "overlapping time periods for comparison in the final determination", Poland appears to argue that the use of such data might necessarily introduce a flaw in the analysis conducted by the Thai investigating authorities. Is this necessarily the case? Could such an approach confirm the persistence of trends over time, as Thailand asserts in paragraph 80 of its first written submission?

Response:

The United States generally agrees with the approach set forth by Thailand in paragraph 80 of its first written submission. That is, using overlapping time periods is of no import with respect to a determination of injury. It is true that comparing, for example, a compilation of three years of data and then comparing two partial years of data may assist the investigating authority in its determination of injury by reason of the subject imports. This is especially true with respect to industries in which seasonal variations in purchasing patterns are evident. For instance, at a time when typewriters were utilized as often as computers are used today, major purchases took place at the beginning of the school year and at Christmastime. Thus, comparing shipments and other data for the full 12 months in, for example, 1980, with such data compiled for the full years 1981 and 1982, and then comparing such data for the third and fourth quarters of 1981 with such data for the third and fourth quarters of 1982, would prove particularly useful in determining such facts as whether or not subject imports were rising or declining, whether or not domestic production had increased or decreased, and the like. Comparisons of interim period data are particularly useful when an extraordinary event has occurred, such as a major capital expenditure or economic crisis, that may skew the full-year data. The interim period data serve in such a case to help isolate various causes of injury, whether subject imports or other causes.

⁴ Recently, the Committee on Anti-dumping Practices issued a recommendation calling for notification to occur "as soon as possible after the receipt ... of a properly documented application, and as early as possible before the decision is taken regarding initiation...." *Recommendation Concerning The Timing of the Notification under Article 5.5.*, G/ADP/5 circulated Nov. 3, 1998. However, that recommendation is silent as to the type of notification required.

Data for an interim period should not, however, be compared with full-year data. To do so would involve a mismatching of periods, or a comparison of apples to oranges. Using the example set forth above, assuming the domestic industry had undergone a capital expansion in the last quarter of 1982, and that data were compared with full-year 1981 data, it may appear that the cause of any injury were other than what would be shown had the interim 1982 data been compared with interim 1981 data.

5. Thailand argues that Article 6.5.1 AD provides that an investigating authority shall require interested parties providing confidential information to furnish non-confidential summaries thereof, but that Article 6.5.1 does not require the investigating authorities to provide those non-confidential summaries to the exporters or to the foreign producers.

(a) In this context, what is the relevance, if any, of Article 6.1.2 AD? Please explain in detail.

Response:

Article 6.1.2 of the Agreement states: "Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation." There is no conflict between this provision and Article 6.5.1 of the Agreement stating, in pertinent part, that "[t]he authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof." Article 6.5.1 recognizes, as does Article 6.1.2, the need to protect confidential information and provides a means for doing so. Members assure compliance with Article 6.1.2 by requiring an interested party to provide summaries to the other interested parties, as it would in accordance with Article 6.5.1.

The United States notes that Article 6.1.2 states that the information "shall be made available". The plain meaning of this language is that service on other parties is not required. The summaries may simply be placed in a room, open to the public, so that interested parties may obtain them if they wish to do so.

Article 6.1.2 also states that the information is to be made available "promptly". In keeping with the intent of this provision as evidenced in Articles 6.2 and 6.9 providing that information is to be disclosed in sufficient time for the interested parties to defend their interests, interpreting "promptly" in the full context of Article 6.1.2 means that the submitter of the confidential information must make available a non-confidential summary in sufficient time for the interested parties to defend their interests.

(b) What is the legal relationship, if any, between Article 6.4, 6.5.1 and 6.9 AD, on the one hand, and Article 6.1.2 AD, on the other (e.g., does Article 6.4 encompass Article 6.1.2, do they pertain to different things, etc.)?

Response:

Article 6.1.2 aims, as stated above, to allow the parties to defend their interests while paying due regard to the need to protect confidential information. Article

6.4 furthers this end and, indeed, extends it to some degree. In stating that "whenever practicable" the authorities are to provide timely opportunities for all interested parties to utilize all non-confidential information that is relevant to their cases, the Article places an onus on the authorities to take affirmative action to provide that information to the parties at appropriate times during the investigation. This provision thus allows interested parties to be active participants in the investigation by enabling them to prepare their presentations on the basis of relevant information that is used by the authorities. Article 6.5.1 seeks to balance the need to protect confidential information with the requirement that the interested parties be able to prepare their cases. Article 6.9 places an affirmative obligation on the authorities to provide to the interested parties certain key information, *i.e.*, the essential facts that form the basis of their decision. A reading of this provision in conjunction with Articles 6.1.2, 6.4 and 6.5.1 leads to the conclusion that, in disclosing the essential facts, confidential information is to be protected.

D. Article 2 AD

6. Poland appears to argue that, if either Article 2.2.2(i) or 2.2.2(ii) is applied, the methodologies described therein do not ipso facto yield "reasonable" results in the sense of Article 2.2 AD and Article VI:1(b)(ii) of GATT 1994, but rather that such results are "presumed" to be reasonable and record evidence in an investigation can rebut this presumption. Please comment on this argument, including in the light of the language in the chapeau of Article 2.2.2 that the methodologies set forth in Article 2.2.2 are to be used "for the purpose of" Article 2.2, which in turn refers to "reasonable" amounts for profits, *inter alia*. What factors, elements or considerations (if any) could establish that a calculation of the profit rate under Article 2.2.2(i) or (ii) was "unreasonable"?

Response:

As the United States stated in its submission to the panel, if a profit amount is determined pursuant to one of the methodologies specified under Article 2.2.2, it is "reasonable" within the meaning of Article 2.2. The preferred option for constructed value profit, articulated in the *chapeau* of Article 2.2.2, is to calculate an amount for profit based on "actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation." If, however, an amount for profit cannot be determined on this basis, the administering authority has the discretion to determine profit based on any of the three alternative methodologies articulated in Articles 2.2.2(i), 2.2.2(ii), or 2.2.2(iii).

The simple answer to the panel's question as to whether there are factors that could establish that a profit rate calculated under Articles 2.2.2(i) or 2.2.2(ii) is "unreasonable" is no. The panel's question suggests some sort of standard against which a third party might judge the "reasonableness" of a profit figure. The Agreement does not provide for this.

Under the framework of Articles 2.2 and 2.2.2, an administering authority has the discretion to calculate an amount for profit based on *any* of the three alternative methodologies (provided the preferred option is unavailable). The *authority* may determine, based on the evidence before it, that use of a particular methodology is

inappropriate; however, a panel's review of the authority's choice of a profit methodology and the calculation itself is governed by the standard set forth in Article 17.6(i), *i.e.*, whether the authority's establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. As the Article 17.6(i) states, "[i]f 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."

Finally, the negotiating history of the Agreement further confirms this interpretation of Article 2.2. and 2.2.2 and its subparagraphs. The negotiating history demonstrates that a balance was struck between competing interests with respect to the method for calculating a profit rate as provided for under Article 2.⁵¹ At no point during the negotiations did the delegations attempt to define the term "reasonable." Instead, the delegates focused upon the *methodologies*, reflected in the chapeau and subparagraphs of Article 2.2.2, that would provide the *means* for calculating a "reasonable" profit. The delegations granted the investigating authority with the discretion to determine, ultimately, what is a reasonable amount for profit. Different minds may reach different conclusions as to what is a "reasonable" amount for profit, nonetheless, the Agreement permits such an outcome.

7. The question has been placed before the Panel whether subparagraphs (i) and (ii) of Article 2.2.2 ADA are "safe havens" whereby applying any one of the methodologies set forth therein yields a result for profit that is per se "reasonable" in the sense of Article 2.2 ADA, last sentence, and Article VI:1(b)(ii) of GATT 1994. The chapeau of Article 2.2.2 ADA sets forth the preferred methodology for determining inter alia the amount of profit in a constructed value calculation, and states that when such amount "cannot be determined on this basis" it "*may* be determined" on the basis of the methodologies in the subparagraphs (i) and (ii). The use of the word "may" in this context could be seen as linking the word "reasonable" in Article 2.2 to subparagraphs (i) and (ii) (which themselves do not contain the word "reasonable"), thereby introducing a "reasonability" constraint into these subparagraphs. Please comment.

Response:

The United States is of the view that subparagraph (iii), which provides that the authority may use "any other reasonable method" to calculate a profit rate, implies that the foregoing methods, *i.e.*, subparagraphs (i) and (ii), are equally "reasonable." Further, as explained above, the United States maintains that the *chapeau* of Article 2.2.2 and its subparagraphs provide the methods for calculating a reasonable profit rate. There are no constraints on the calculation of constructed value profit other than those explicitly articulated in the Agreement - *i.e.*, the *chapeau* of Article

⁵¹ At various stages during the negotiations, several countries strongly encouraged the use of actual data where at all possible. *See e.g.*, *Submission of Japan on the Amendments to the Anti-dumping Code*, GATT Doc. No. MTN.GNG/NG8/W/30 (June 20, 1988) at 3; *Submission of Korea*, GATT Doc. No. MTN.GNG/NG8/W/34 (Oct. 27, 1988) at 4; *Communication from the Delegation of Hong Kong*, GATT Doc. No. MTN.GNG/NG8/W/30 (June 20, 1987) at 2; *Submission from the Nordic Countries*, GATT Doc. No. MTN.GNG/NG/W/15 (Nov. 16, 1987) at 4.

2.2.2 and subparts (i) and (ii) provide limitations as to the source of the data used to calculate a profit figure (*i.e.*, the location of the sales and the types of products) and subpart (iii) provides a cap on the amount of constructed value profit. A "reasonability" constraint would suggest the existence of some generally-recognized neutral measure or standard for profit - an unlikely concept, at best, given the delicate negotiated balance reflected in Article 2.2.⁶ To impose a constraint where none exists may well amount to changing that finely drawn balance.

8. In this context, for purposes of argument only, assume for example that application of the methodology under subparagraph (i) or (ii) of Article 2.2.2 yields a 300 per cent profit, and that this profit margin is far in excess of the profit margin on the product for the industry as a whole. Would the fact that this result was arrived at based on the correct application of subparagraph (i) or (ii) make it "reasonable" per se? Is there any limit on the acceptable "reasonableness" of calculations under subparagraphs (i) and (ii)?

Response:

It is the United States' position that the administering authority has the discretion to determine, based on the evidence before it, that use of a particular methodology is inappropriate. Theoretically, therefore, an authority could determine to reject a particular methodology that results in a 300 percent profit rate because the rate is "far in excess of the profit margin on the product for the industry as a whole." However, a panel's review of the authority's choice of a profit methodology and the calculation itself is governed by the standard set forth in Article 17.6(i), *i.e.*, whether the authority's establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective.

9. Is the phrase "in the ordinary course of trade" as used in Article 2.2.2 relevant to determining whether there is a reasonability test for calculations of profits under the chapeau of Article 2.2.2 and/or its subparagraphs (i) and (ii)? Please explain.

Response:

No. The phrase "in the ordinary course of trade" as used in Article 2.2.2, however, implies that only sales in the ordinary course of trade are appropriate for use in calculating an amount for profit. Article 2.2.1 provides that certain below-cost sales may be treated as not being in the ordinary course of trade.

E. Article 3 AD

10 Please comment on the hypothesis that a two-stage analysis of the factors listed in Article 3.4 ADA is required. The first stage would be an initial "consideration" to determine the "relevance" or lack thereof of each listed factor and an identification of any other non-listed factors that also were relevant. The second stage would be a full analysis of all of the factors that had been identified as relevant. In

⁶ See generally Terence P. Stewart, *et al.*, The GATT Uruguay Round: A Negotiating History (1986-1992) 171-190 (1993) (discussing the negotiations concerning constructed value profit, *inter alia*).

other words, the factors in Article 3.4 would be seen as a checklist of what would need to be "considered" in respect of whether or not each factor was relevant. If a given factor were deemed not to be relevant, the analysis of that factor could stop at that point. Under this hypothesis, the final determination would have to address each factor in the checklist, and for each of those that had been deemed not to be relevant would simply indicate that this was the case and why. For each relevant factor, the final determination would have to indicate why it had been deemed to be relevant and in addition would have to contain a full "evaluation" of it. (Please note that the reference to the "final determination" is not necessarily intended to imply the public notice thereof, but rather the report compiled by the investigating authority concerning the investigation, which might or might not be the same as the public notice.)

- (a) Please indicate whether you agree or disagree with all or part of this hypothesis and explain in detail the legal basis for your view.

Response:

The United States agrees with this hypothesis in part. As stated in its third party written submission, all of the factors enumerated in Article 3.4 must be evaluated, although not all are necessarily material in any particular case^{7 1} Given that some of the factors may not be material in a particular case, some may not be even relevant to the determination of the impact of the dumped imports on the domestic industry. Similarly, insofar as Article 3.4 states that the list of factors is not exhaustive, there may be other factors that are not listed that are relevant to this determination⁸ The panel in *High Fructose Corn Syrup* agreed:

The text of Article 3.4 is mandatory ... [T]he listed factors in Article 3.4 must be considered in all cases. There may be other relevant economic factors in the circumstances of a particular case, consideration of which would also be required. In a threat of injury case, for instance, the AD Agreement itself establishes that consideration of the Article 3.7 factors is also required. But consideration of the Article 3.4 factors is required in every case, even though such consideration may lead the investigating authority to conclude that a particular factor is not probative in the circumstances of a particular industry or a particular case, and therefore is not relevant to the actual determination. Moreover, the consideration of each of the Article 3.4 factors must be apparent in the final determination of the investigating authority.⁹

However, the United States disagrees that Article 3.4 of the Agreement sets forth a single method by which an investigating authority's final determination must make such consideration apparent. The requirements for the contents of the notice or report reflecting the authority's final determination appear not in Article 3.4, but rather in

⁷ Third Party Submission of the United States of America, para. 6.

⁸ See *Mexico - Anti-Dumping Investigation of High Fructose Corn Syrup (HCFS) from the United States*, WT/DS132/R, Report of the Panel (January 28, 2000), DSR 2000:III, 1345, para. 7.124 (no one factor by itself is necessarily decisive).

⁹ *High Fructose Corn Syrup*, *supra*, footnote 8, para. 7.128.

Article 12.2. That article provides, in relevant part, "Each such notice shall set forth, or otherwise make available through a separate report, in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities." Article 12.2.1 further provides that "[s]uch a notice or report shall, due regard being paid to the requirement for the protection of confidential information, contain in particular ... considerations relevant to the injury determination as set out in Article 3 [and] the main reasons leading to the determination." None of these provisions utilizes the particular "checklist" approach hypothesized by the Panel's question. Rather, Article 12.2 as a whole indicates a need for explicit findings on those of the "considerations relevant to the injury determination as set out in Article 3" that an authority "considered material" in the particular case. By doing so, an authority may make apparent why the authority did not deem other considerations material and thus, without following a checklist approach, comply with the requirement to provide its findings and conclusions "in sufficient detail." Certainly, an authority may assure more confidently against a possible finding of a failure to comply with the Agreement by following the checklist method that the Panel's questions posit. The Agreement does not, however, compel that method as the sole permissible approach to the drafting of reports.

- (b) If you disagree with this hypothesis, please explain how, without "considering" each factor, its relevance or irrelevance can be judged.

Response:

See Response to Questions 10(a) and (c). Art. 3.4 states that the investigating authority must evaluate (and thus "consider") the listed economic factors in the course of its investigation. However, Art. 12.2 requires the administering authority to discuss in its report only those factual and legal issues it considers to be material. When the Panel can ascertain from the determination why an authority regarded as immaterial the factors for which it did not make specific findings, an authority's consideration of those factors may be disclosed even without such findings. In some instances, an authority's explanation of the importance of particular factors may show why others are of attenuated relevance. This Panel should not articulate a general rule that an authority must expressly explain the irrelevance of each factor that it has found immaterial when the Agreement does not articulate such a requirement.

- (c) Is it your view that if an examination of several factors led to a conclusion of injury, it would not be necessary to "consider" any of the other factors? Please explain.

Response:

It is the view of the United States that each of the factors must be "considered." Article 3.4 is a mandate, stating that the example of the impact of the imports on the domestic industry "*shall include* an evaluation of all relevant economic factors," emphasis added, and sets forth what it later explains is a non-exhaustive list of these factors. Article 3.4 also states that neither "one [n]or several of these factors [can] necessarily give decisive guidance" as to whether or not the dumped imports have adversely impacted the domestic industry. Article 3.4 thus contemplates that

some factors may tend to support an injury determination while others may tend to contradict such a finding. Balancing the significance of such factors is a question for the investigating authority. As has been explained, whether an authority's explanation of why it found certain factors to be particularly persuasive also can explain why it found factors not to be persuasive is an issue that should be decided on the basis of particular decisions, not by imposition of a general "checklist" rule.

11. Please describe the nature of the "relevance" of a factor in the context of Article 3.4 ADA. Is a factor "relevant" only when it supports an affirmative finding of injury, or should "relevance" be judged on a more broad basis, for example in the sense of whether or not a particular factor is informative as to the "state of the industry"? Is a factor also "relevant" when it does not support an affirmative finding of injury? Please explain in detail.

Response:

The United States avers that a factor is certainly "relevant" in the context of Article 3.4 when it supports an affirmative finding that the dumped imports have adversely impacted the domestic industry. Along with an examination of the volume of the dumped imports and the effect of these imports on domestic prices pursuant to Article 3.1, the investigating authorities may determine that there is injury to the domestic industry by reason of the dumped imports.

However, the "relevance" of the Article 3.4 factors extends beyond supporting an injury determination. Article 3.4 states that "all relevant economic factors and indices having a bearing on the state of the industry" must be evaluated. Thus, even if a factor does not lend support to an affirmative injury determination, the authority must evaluate it so long as it sheds light on the condition of the domestic industry.

It is possible that certain factors may be irrelevant because they do not support either an affirmative or a negative determination of injury. For instance, an authority may find that a certain industry must operate with high capacity utilization in order to remain viable and may do so even if it must do so at a loss. A finding that such an industry is operating at high capacity may not be particularly probative either in terms of supporting or contradicting an injury determination. Thus, in such a case an authority would regard making findings about the particular capacity utilization of the industry to be irrelevant.

12. What is the significance of the fact that the term "such as" in Article 3.3 of the Tokyo Round Anti-dumping code was changed to "including" in Article 3.4 of the Uruguay Round Anti-dumping Agreement? If no change in meaning was intended, why was a change in terminology made? According to the Concise Oxford Dictionary (1990 ed.), the verb "include" means to "comprise or reckon in as part of a whole" or to "enclose". The term "such as" means "like" or "for example". Please explain in what sense, if any, these definitions could be viewed as synonymous.

Response:

By changing the term "such as" to "including", the Uruguay Round Agreement negotiators clarified the need for the authority to evaluate each and every listed factor that is relevant to the state of the industry. The term "such as" could be understood to imply that the list is merely illustrative, and that the authority could pick and choose the factors that it wished to consider. These terms may be deemed synony-

mous to the extent that what follows each is not an exhaustive list, but rather comprises only some of the factors that may be considered relevant in any investigation and that must be evaluated.

13. Please comment on the use of the word "or" at two places in the list of the factors in Article 3.4 ADA, as well as on the use of semi-colons between subgroups of factors in that Article. In particular, what is the significance, if any, of the fact that the word "or" appears only *within* subgroups of factors which are separated by semi-colons, and not *between* those subgroups?

Response:

With respect to the use of the word "or" in Article 3.4 of the Agreement, the first "or" ends a listing of factors that indicate declines in the domestic industry. The use of the term "or" here does not detract from the requirement that "all *relevant* economic factors" be evaluated, but only indicates that a decline must not be found in each of these factors in order to find injury, as might have been implied if the negotiators had used the word "and." This usage in the first sentence of Article 3.4 thus reflects that, as stated in the second sentence, no "one or several of these factors necessarily give decisive guidance."

As pertains to the second "or," it simply precedes another word for "capital," and reflects that the first term, "investments," may be substituted for the second term, "capital."

If "or" occurred between the subgroups listed in Article 3.4, the intent of the negotiators would have been to enable the investigating authority to evaluate as few as one of the economic factors listed, such as factors affecting domestic prices. However, the negotiators clearly intended that more factors be evaluated rather than fewer. The fact that "all relevant economic factors" are to be evaluated, and the clear statement that the list is not exhaustive, make this intent explicit.

14. Under what circumstances, or in respect of what sorts of factors, if any, is it the responsibility of the investigating authority to seek information concerning the potential effects of "known" factors other than dumped imports that might be causing injury, and when does the responsibility fall to the responding party to bring such issues to the attention of the investigating authority? For example, if the importing country is in an economic recession, certainly the authority and all interested parties will "know" this. Would the authority have the responsibility on its own initiative to try to identify the specific effects of the recession in the domestic market for the product under investigation, or would it only have to consider this issue if it were raised by an interested party? Would it make a difference if the factor in question was not something widely known but rather was known only to the investigating authority and the domestic industry (i.e., not to the respondent)? Please explain and provide the legal basis for your view.

Response:

The investigating authority is not obligated to seek causes of injury to the domestic industry other than the dumped imports. The panel in *United States - Impo-*

sition of Anti-Dumping Duties on Imports of Fresh and Chilled Atlantic Salmon from Norway¹⁰ addressed this issue in interpreting Article 3.4 of the Tokyo Round Agreement which, like Article 3.5 of the Uruguay Round Agreement, required authorities not to attribute injuries caused by other factors to the imports from another Member. The Panel stated "there is no express requirement that investigating authorities examine in each case on their own initiative the effects of all other possible factors other than imports under investigation."¹¹ It continued by stating that this does "not mean that, in addition to examining the effects of the imports under Articles 3:1, 3:2 and 3:3, the [investigating authority] should somehow have identified the extent of injury caused by these other factors in order to isolate the injury caused by the imports. Rather, [the investigating authority] was required to conduct an examination sufficient to ensure that in its analysis of the factors set forth in Articles 3:2 and 3:3 it did not find that material injury was caused by imports from Norway when material injury to the domestic industry allegedly caused by imports from Norway was in fact caused by factors other than these imports."¹²

The slight change in terminology between the Tokyo Round Code's Article 3.4 and the Anti-Dumping Agreement's Article 3.5, if anything, reinforces this interpretation. The Tokyo Round Code article posited that "[t]here may be other factors which at the same time are injuring the industry." The Anti-Dumping Agreement article states that "authorities shall examine any known factors other than the dumped imports which at the same time are injuring the domestic industry." Unlike the phrasing used in the Panel's question, therefore, the Anti-Dumping Agreement does not require examination of "potential effects" of known factors that *might be* injuring the domestic industry, but rather of those that *are* injuring the domestic industry. This change from the Code reinforces the point that the authorities need not, as the *Norwegian Salmon* panel put it, examine "on their own initiative the effects of all other possible factors."

To address the example posited by the Panel, a recession may be a generally known phenomenon but may or may not have a known effect on every industry within an economy. Some may be countercyclical and others for specific reasons may not be particularly affected by a recession. An authority should be able to expect that interested parties will identify a recession as a known factor that is injuring the domestic industry if they regard it as one. Foreign and domestic producers and importers are the active experts concerning the operation of the marketplace. Their silence on the subject would be persuasive evidence to an authority that a recession was not a known factor injuring the industry and thus would not warrant further examination.

It is difficult to address the Panel's second hypothetical in the abstract, because it is difficult to picture how a factor would arise that was not something widely known but rather was known only to the investigating authority and the domestic industry, which, at the same time, an authority could address in its public report. As has been previously discussed, an interested party's public summaries must be made available to other interested parties, so that a respondent's failure to "know" such an

¹⁰ BISD 41S/229, adopted 27 April 1994.

¹¹ United States - Salmon at para. 550.

¹² United States - Salmon at para. 555.

other factor would be the result either of its own lack of diligence or of the factor's being confidential. If it is confidential, it cannot be discussed in the public report under Article 12.2. Exactly how such a circumstance would arise is at best speculative, and the Panel should not address such a question unless it is squarely presented by the facts. Moreover, it is apparent that the negotiators of the Agreement did not contemplate such a situation, and the Agreement, by not defining to whom such a factor must be "known," does not specifically address it. This being the case, the matter admits of more than one permissible interpretation and under Article 17.6 (ii) the Panel may not impose a single interpretation if a Member adopts an interpretation of the requirements that the terms of the Agreement permit.

F. Article 17 AD

15. Please comment on the relationship, if any, between Article 17.6 ADA and Article 11 DSU, in particular whether or not these provisions must be read together, drawing on elements from both except to the extent that they "differ" in the sense of Article 1.2 DSU, in which case Article 17.6 ADA would prevail. Please comment on whether you believe this is the correct approach, and whether you do or do not see such a "difference" between Article 11 DSU and Article 17.6 ADA. Please describe any such difference. In this context, please discuss the Appellate Body's statement in *Argentina - Footwear Safeguard*:

"[F]or all but one of the covered agreements, Article 11 of the DSU sets forth the appropriate standard of review for panel¹³. 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, Article 17.6, sets out a special standard of review for disputes arising under that Agreement*" (underlining supplied).

Response:

The United States agrees with the Appellate Body's statement in *Argentina - Footwear Safeguard* that Article 17.6 sets out a special standard of review for disputes arising under the Agreement. Article 17.6(i) of the Agreement clearly states that in assessing the facts of the matter before it, a panel is to "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". To the extent there is any difference between the Agreement and the Dispute Settlement Understanding, Article 1.2 of the DSU guarantees that Article 17.6, which is identified as a special or additional rule under Appendix 2 of the DSU, controls. Article 1.2 of the DSU provides that "[t]o the extent that there is a difference between the rules and procedures of this Understanding and the special or additional rules and procedures

¹³ 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, DSR 1998:I, 135, paras. 114-119; *Australia - Salmon*, *supra*, footnote 26, para. 2.67

set forth in Appendix 2, the special or additional rules and procedures in Appendix 2 shall prevail".

Article 11 of the DSU encompasses more than a standard of review, however. It reads:

The function of panels is to assist the DSB in discharging its responsibilities under this Understanding and the covered agreements. Accordingly, 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. Panels should consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution.

Panels are directed by Article 11 of the DSU to make other findings that will assist the DSB and to consult regularly with the parties to the dispute, two matters that do not involve a standard of review. Thus, Article 11 of the DSU must be read in conjunction with Article 17.6 of the Agreement in order to ensure that, pursuant to Article 1 of the DSU, the rules and procedures of the DSU are applied to disputes. Similarly, Article 17.6(ii) of the Agreement explains that although customary rules of interpretation of public international law govern, more than one interpretation of a provision of the Agreement is permitted, while there is no such language in Article 11 of the DSU. In order to satisfy the requirements of both the DSU and the Agreement, one must read the two provisions in tandem.

Specifically, Article 17.6 of the Anti-Dumping Agreement provides a special and additional rule that must prevail with respect to any consideration of the "objective assessment of the matter" in the context of Article 11 of the DSU. As to factual determinations, Article 17.6 makes clear, *inter alia*, that the matter before the Panel is not whether there was injury or dumping, but rather whether the investigating authority properly established the facts and evaluated them in an unbiased and objective way. Article 17.6 further makes clear that a Panel does not conduct the required assessment of that question if it evaluates what findings it would make if presented with the same evidence. As to legal questions, Article 17.6 makes clear that a Panel fails to make the required assessment of the applicability or conformity of an authority's action with the Anti-Dumping Agreement when, if the terms of the Agreement admit of multiple permissible interpretations, a Panel decides that an authority's action fails to conform with the Anti-Dumping Agreement when it conforms to one of those interpretations.

16. The parties seem to agree that the appropriate standard of review is somewhere between *de novo* review and total deference. We note that within Article 17.6 itself, the two subparagraphs arguably could be viewed as establishing different levels of review or deference pertaining to two different types of issues. Subparagraph (i) concerns facts and arguably requires a considerable degree of deference and thus relatively limited review by a Panel. By contrast, subparagraph (ii) concerns issues of law and the question of multiple "permissible" interpretations of a given provision of the ADA, among which a national investigating authority is free to choose. Some commentators believe that rarely if ever can there be more than one permissible in-

interpretation of any given treaty provision. This might arguably mean that the required degree of deference under (ii) would be less than under (i). Furthermore, the question arises as to when, if at all, the establishment or evaluation of "facts" by an investigating authority becomes a question of law or legal interpretation under the Anti-dumping Agreement (e.g., where the issue is whether a certain set of facts satisfies a given treaty provision). The question of this "penumbra" between fact and law could be particularly relevant in the context of the Anti-dumping Agreement.

- (a) Please comment on your views as to the nature of the differences between the two subparagraphs of Article 17.6 (coverage, degree of deference required, etc.).

Response:

The two parts of Article 17.6 state complementary rules of decision that recognize that both questions of fact and law under the Anti-Dumping Agreement can be expected to raise issues to which there is more than one permissible answer. In both contexts, the article imposes a default rule that requires a Panel not to impose its own choice between (or among) such answers.

The two aspects of the Article overlap in scope. In particular, whether an authority's "establishment of the facts was proper" under Article 17.6(i) may raise issues involving legal interpretation of provisions of the Agreement under Article 17.6(ii). Such issues may entail interpretation of articles of the Agreement, for instance, that specify procedures for gathering information bearing on the determinations of dumping and injury.

Even apart from such overlap of coverage, it cannot be unequivocally stated that either subarticle imposes a greater degree of deference. The difference between the terms used in the two subarticles reflects at least in part that an authority's establishment of the facts will be reflected, at least in essence, in its published determination or report (report). In contrast, an authority's report may not articulate or even imply a particular interpretation of the terms of the Anti-Dumping Agreement, particularly in countries in which the WTO Agreements are implemented by statute rather than being self-executing. Consequently, Article 17.6(ii) does not ask whether an authority's evaluation of the requirements of the Agreement was unbiased and objective. To this extent, Article 17.6(ii) states a more lenient standard than does Article 17.6(i), since under Article 17.6(ii) a result that might be sustainable had an authority undertaken an evaluation of the facts cannot be sustained in the absence of such an evaluation.

Although some commentators have described Article 17.6(ii) as imposing a "two-step" approach¹⁴ it is not clear that this fact particularly distinguishes Article 17.6(ii) from Article 17.6(i) in terms of the degree of deference required. Article 17.6(ii) specifies that, in interpreting the Anti-Dumping Agreement, panels will have reference to "the customary rules of interpretation of public international law." The

¹⁴ See Steven P. Croley & John H. Jackson, *WTO Dispute Procedures, Standard of Review, and Deference to National Governments*, 90 *Am. J. Int'l L.* 193 (1996).

Anti-Dumping Agreement likewise sets forth certain rules that apply to the establishment of facts. Nevertheless, both subarticles stipulate that application of those rules will in certain instances leave questions unresolved. In both cases, the Panel must defer to that result which does not overturn the measure challenged.

The Panel's question suggests that some may regard the default aspect of Article 17.6(ii) as applying in at most rare cases. Such a view would in general violate the general principle that a panel is not free to adopt an interpretation that would reduce a provision to redundancy or inutility^{15 1} More importantly, such a view of Article 17.6(ii) fails to recognize the implication that Article 17.6(ii) itself has for the interpretation of other provisions of the Agreement. The negotiators of the Anti-Dumping Agreement, uniquely among negotiators of the WTO Agreements, saw fit to make specific provision for the possibility that customary rules of interpretation would not resolve disputes concerning the meaning of the Anti-Dumping Agreement^{16 1} This very fact provides context for the interpretation of that Agreement. It reflects the negotiators' understanding that they had left a sufficient number of issues unaddressed or ambiguous such that they needed to make special provision for cases in which customary rules would not provide an unequivocal result. In fact, Article 17.6(ii) reflects a deliberate choice by the negotiators to allow for multiple interpretations. In this sense, Article 17.6(ii) constitutes an admonition to panels to take special care not, as reflected in Articles 3.2 and 19.2 of the DSU, to add to the obligations of Members. The reference to "customary rules of interpretation of public international law" is not specific. While we may presume that it refers to the Vienna Convention, the panel may not apply the Convention in a manner which renders any of the express language of the Agreement a nullity. Thus, to the extent that the commentator suggests that Articles 31 and 32 of the Convention require or even permit a panel to choose one interpretation of ambiguous language in the Agreement as the only interpretation, that commentator would render a nullity the second sentence of Article 17.6(ii) of the Agreement. That sentence expressly acknowledges that the drafters of the Agreement were aware that they had fashioned language that allowed of more than one permissible interpretation, and they expressly directed that panels were not to resolve such ambiguities in favor of only one interpretation.

Moreover, as commentators have recognized¹⁷ the terms of the second prong of Article 17.6(ii) are nearly identical to those of a leading United States Supreme Court decision, *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 US 837 (1984). That decision, concerning the interpretation of statutes governing the actions of administrative agencies of government, held that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a *permissible* construction of the statute." *Id.* at 843

¹⁵ See United States - Standards for Reformulated and Conventional Gasoline, AB-1996/1 of April 1996, Section IV, DSR 1996:I, 3, at 20.

¹⁶ In addition, the Ministerial Declaration on AD/CVD Dispute Settlement applies the standard of review set forth in Article 17.6 of the AD Agreement to matters pertaining to subsidies and countervailing measures, in view of "the need for consistent resolution of disputes arising from anti-dumping and countervailing duty measures."

¹⁷ See Croley & Jackson, 90 Am J. Int'l L. at 204.

(emphasis supplied). Although US courts have given various statements as to what a permissible construction consists of, the most prominent statement is that given by *Chevron* itself, namely, whether the interpretation is "reasonable."¹⁸ The standard of whether an interpretation is "permissible" provided an available model for Article 17.6(ii) because the Anti-Dumping Agreement concerns decisions made by national administrative authorities. Such usage reflects an evident recognition that the task of panels would be similar to that of courts reviewing the actions of administrative agencies.

This does not mean that the negotiators intended to adopt US jurisprudence wholesale in adopting terminology from US law. Rather, the terms of Article 17.6(ii) and the context of the Anti-Dumping Agreement as a whole suggest that, if anything, the standard to be applied by DSB panels would be more deferential than that applied by US courts. First, whereas the *Chevron* doctrine is a generic standard applying to all statutes governing administrative agencies, Article 17.6(ii) is specific to the Anti-Dumping Agreement and thus, as has been discussed, reflects a particular judgment about the extent to which its drafters regarded that Agreement as resolving legal questions. Indeed, while under *Chevron*, an administrative agency is liable to have articulated its interpretation of the relevant statute, no such explicit interpretation is required of a Member's authority under Article 17.6(ii). Thus, it would be expected that the second prong of Article 17.6(ii) would come into play more frequently than the second prong of the United States' *Chevron* doctrine.

Second, as commentators have suggested, the customary of rules of construction of public international law are likely to resolve questions of ambiguity in interpretation less frequently than would rules of interpretation of US law. In particular, as commentators have noted, while US judges often resort to legislative history of statutes to resolve whether a statute speaks unambiguously to an issue of agency authority, negotiating history is likely to be less available for interpreting the Anti-Dumping Agreement. Moreover, whereas in statutes passed by legislatures, the views of a minority who voted against a provision as to its purpose can be disregarded, the Anti-Dumping Agreement reflects a consensus among negotiators and thus a resolution of conflicting purposes. Article 17.6(ii) is an affirmative reflection that no single purpose prevailed in the drafting of a significant number of provisions.

Third, *Chevron* concerns how to interpret what the US Supreme Court called a "delegation" of authority from the US Congress to administrative agencies the parameters of whose authority it defines. In the WTO, in contrast, the delegation runs in the other direction. The WTO itself is established by its Members, and it is they who have delegated to the DSB the authority to seek to resolve disputes. Anti-Dumping measures and the authorities that administer them are not established pursuant to delegation from the WTO and indeed preceded that organization. The Members have agreed to bind their actions only to the extent agreed. Thus, although some commentators have suggested that such "sovereignty" concerns should not have informed the negotiation of any agreement under the WTO, it would be implausible

¹⁸ See Croley & Jackson, 90 Am. J. Int'l L. at 203.

to suggest that the two-prong test of Article 17.6(ii) was meant to be less deferential than the similar US test on which it was modelled.

In summary, to the extent that some have suggested that Article 17.6(ii) should provide less deference to national authorities on issues of law than does Article 17.6(i), that suggestion finds no support in the text or manifest purpose of those articles. In keeping with the fact that the Anti-Dumping Agreement reserves the functions of investigating and establishing the facts to national authorities, the Agreement provides that panels will accord substantial deference to their findings. Likewise, reflecting that the Agreement left substantial areas in which Members might choose how to establish and operate anti-Dumping regimes, the Agreement provides that panels will accord substantial deference on questions of interpretation.

- (b) Please also describe the standard of review that you believe should apply to issues that fall within the penumbra between factual and legal issues as described above. Is it the standard in 17.6(i), 17.6(ii), or some other standard. Please explain in detail.

Response:

No general answer can properly be given to this question. The United States assumes that what the Panel refers to as the "penumbra" are what in United States jurisprudence would be called mixed questions of law and fact. Such questions may arise in a variety of contexts and which aspect of Article 17.6 will apply will vary according to the particular issue and the way in which parties pose their arguments to panels.

This is not only because, as discussed above, the two subarticles of Article 17.6 overlap in their coverage. Specific questions may be framed in multiple ways. For example, in the recent panel proceeding concerning Mexico's anti-dumping measures with respect to high fructose corn syrup from the United States, the United States argued that Mexico violated the Anti-Dumping Agreement because, having defined the relevant domestic industry as all producers of sugar, the Mexican authority examined the impact of subject imports only on the production of sugar for commercial use. It is evident that such a contention might be said to involve both subarticles. Certainly, for example, the United States was making arguments concerning how the Mexican authority established the facts, both with respect to the investigation conducted and the findings made. In doing so, however, it invoked interpretations of the substantive articles concerning the meaning of injury under the Agreement and its relation to the definition of domestic industry. Although the United States did not impugn the motivation of the Mexican authority, it might have made arguments concerning whether Mexico, in choosing to examine the effects of imports only on the aspect of domestic industry production most likely to be affected by imports, had made an unbiased and objective evaluation of the facts. Thus, the same claim properly would raise questions sounding under all aspects of Article 17.6.

- (c) Please identify the standard of review (subparagraph (i), subparagraph (ii) or a standard of review applicable in the penumbra if different from (i) or (ii)) that you believe is applicable to each issue before the Panel in this case, and please explain your reasoning.

Response:

Because of the overlap in coverage between the two subarticles of Article 17.6, both apply to the issues before this Panel.

With respect to the issue regarding whether the Thai authority evaluated all the factors in accordance with Article 3.4 of the Agreement, the Panel must examine the factors the authority evaluated and determine whether the authority's evaluation was unbiased and objective, a determination that is made under subparagraph (i). The Panel may also consider whether the investigating authority had an obligation to seek information regarding other factors and indices that it did not evaluate, which is a matter of law under subparagraph (ii).

As pertains to whether or not the Thai injury determination was based on a rational reading of positive evidence and was an objective evaluation, subparagraph (i) applies insofar as the facts established by the Thai investigating authority and on which it relied in making its injury determination must be assessed by the Panel. The Panel must determine whether the Thai authority's evaluation of those facts was unbiased and objective in accordance with subparagraph (i). Because Poland also claims that the Thai domestic industry suffered no material injury, subparagraph (ii) is also invoked as per the example given in response to (b) above.

As pertains to the proper calculation of the dumping margin, the Panel must first examine the calculation that was used, especially how much profit was included, in accordance with subparagraph (i). Then, as the United States explained in its Third Party Submission, legal interpretations of Articles 2.2 and 2.2.2 are required in order to determine what constitutes a reasonable profit¹⁹. The United States believes the customary rules of interpretation of public international law must be applied, *i.e.*, the Vienna Convention and other interpretive documents must be invoked²⁰. This procedure is set forth in subparagraph (ii).

As pertains to whether the investigation was properly initiated, subparagraph (i) is applicable in that the petitioner's application for initiation of the investigation must be examined. The Panel must determine exactly what comprised the application and whether the Thai authority's evaluation of the application, *i.e.*, its finding that the application contained sufficient evidence to initiate an investigation under Article 5 of the Agreement, was unbiased and objective. The need for a factual determination of whether the elements listed in Article 5.2 were present places this issue within the purview of subparagraph (i). Yet if certain facts in the application were sparse, subparagraph (ii) is invoked in that a legal decision must be made as to whether the application provided sufficient information to justify the initiation of an investigation in accordance with Article 5.3.

Whether or not Poland was properly or timely notified of the filing of the petition is a factual matter to which subparagraph (i) applies. Subparagraph (ii) may be invoked if there is need to determine what constituted the necessary notification under Article 5.5.

¹⁹ Para. 14.

²⁰ See *id.* Paras. 18-19 & nn.

Whether or not the Thai investigating authority properly disclosed the information used for its final determination is an issue of fact and subparagraph (i) is applicable. The record of the underlying investigation will show whether or not the parties were granted timely opportunities, whenever practicable, to see all non-confidential information relevant to the presentation of their cases pursuant to Article 6.4. The record will also show whether the essential facts forming the basis for the Thai authority's decision were disclosed to the parties. A determination of what comprise the "essential facts" may necessitate a legal interpretation in accordance with subparagraph (ii).

As pertains to whether Article 6.5.1 required the Thai authority to disclose non-confidential summaries to the foreign exporters or producers is matter of legal interpretation that requires application of subparagraph (ii). The United States response to Question 5 addresses this issue in more detail.

To the United States

17. In your written submission at paragraph 4, you state that the Guatemala - Cement Panel stated that a panel's "role is not to evaluate anew the evidence and information before' the investigating authority, but rather to examine whether the evidence it relied on was sufficient". The reference to the examination of whether the "evidence it relied on was sufficient" appears to be language of the United States, rather than of the Cement Panel. Please confirm whether this is the case. The above passage from the United States submission seems to imply that the United States believes that in an anti-dumping dispute a panel can only examine the "sufficiency" of the "evidence" used in an investigation, and cannot examine *how* or *how well* that evidence was evaluated by the investigating authority. Is this a correct understanding of the United States' argument? Or does this argument refer exclusively to the question of sufficiency of evidence to *initiate* an investigation under Article 5.3 ADA?

Response:

One issue before the *Guatemala-Cement* panel was to determine what constitutes "sufficient evidence" to justify the initiation of an anti-dumping investigation. In this context the panel analyzed the decision of the panel in *United States - Measures Affecting Imports of Softwood Lumber from Canada*²¹. The *Guatemala-Cement* panel adopted the approach of the *United States-Softwood Lumber* panel with respect to the standard of review, stating that the approach

is a sensible one and is consistent with the standard of review under Article 17.6(i). Thus, we agree with the Panel in *Softwood Lumber* that our role is not to evaluate anew the evidence and information ... Rather, we are to examine whether the evidence relied on by the Ministry was sufficient, that is, whether an unbiased and objective investigating authority evaluating that evidence could properly have de-

²¹ BISD 40S/358 (October 27, 1993).

terminated that sufficient evidence of dumping, injury, and causal link existed to justify initiating the investigation."

The standard of review set forth in Article 17.6 is not restricted to the initiation of investigations. By its very terms, it is the standard that governs the settlement of disputes under the Agreement^{22 1} In quoting this language the United States was not referring to the initiation of an investigation, but to the standard of review governing this Panel's decision.

Additional Comment Concerning Whether Anti-Dumping Measures Are an "Exception"

As a final note, the United States would like to clarify its recitation of authority with regard to the argument that the Anti-Dumping Agreement does not constitute an exception to free trade principles, as first presented in its oral presentation on March 8, 2000. In citing cases that deal with the "Anti-dumping as an exception" issue, the United States inadvertently omitted a discussion of the *Pork from Canada*²³ and *Wine and Grape Product*²⁴ disputes.

Proponents of the "Anti-dumping as an exception" issue, cite the *Pork from Canada* case as support. This case purports to characterize Article VI:3 of GATT 1947 as an exception. In that case, the panel, which authorized the imposition of countervailing duties, depicted Article VI "as an exception to basic principles of the General Agreement [that] had to be interpreted narrowly." Also, the panel shifted the burden of proof to the United States with respect to having met the requirements of that provision because the United States was the party invoking that exception.

The *Pork from Canada* analysis is not compelling. The panel's statement was conclusory in nature, and the panel cited no authority for the proposition that Article VI was an "exception." Moreover, this aspect of the panel's decision was *dicta*, because nothing in the remainder of the panel report indicates that the panel's characterization of Article VI:3 as an "exception" influenced the panel's analysis of the matter. Similarly, the *Wine and Grape Products* report is equally unpersuasive on this issue: it contained a single sentence, with no analysis, to the effect that Article VI must "be interpreted in a narrow way."²⁵

²² Article 17.6 recites the standard for "examining the matter referred to in para. 5." The matter referred to in Article 17.5 (para. 5) pertains to matters for which a panel is established, i.e., to determine "how a benefit accruing to [a Member], directly or indirectly, under this Agreement has been nullified or impaired, or that the achieving of the objectives of the Agreement is being impeded."

²³ United States - Countervailing Duties on Fresh, Chilled and Frozen Pork from Canada, DS7/R, Report of the Panel adopted 11 July 1991, BISD 38S/30, para. 4.4 (hereinafter, "Pork from Canada").

²⁴ United States - Definition of Industry Concerning Wine and Grape Products, SCM/71, Report of the Panel adopted 28 April 1992, BISD 39S/436 (hereinafter "Wine and Grape Products").

²⁵ *Ibid.* at 447. In the only other case up to that point where the issue of Article VI as an "exception" had been argued, the panel did not incorporate the argument into its decision. Canada - Imposition of Countervailing Duties on Imports of Manufacturing Beef from the EEC, SCM/85, Report of the Panel issued 13 October 1987 (unadopted), even though the panel referred directly to the para. in

Finally, whether anti-dumping measures are or are not an "exception" no longer has any legal relevance, since the WTO Appellate Body has now established that the status of a provision as a so-called exception (1) does not shift the burden of proof (*Wool Shirt*²⁶ and *Hormone*²⁷) and (2) does not warrant a different approach to interpreting the provisions (*Hormones*).

The United States reiterates its view, therefore, that anti-dumping measures do not constitute exceptions from the rest of the WTO framework. They are subject to the same rules of interpretation as any other provision of the WTO Agreements. Therefore, the Panel should decline to endorse Japan's assertion that anti-dumping measures constitute an exception to free trade principles or, by implication, require the application of a heightened level of scrutiny.

the Wine and Grape Products report where the Article VI-as-exception statement was made. *Ibid.* at para. 5.16.

²⁶ United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, DSR 1997:I, 323 at 335.

²⁷ EC - Measures Concerning Meat and Meat Products (Hormones), WT/DS26/AB/R, Report of the Appellate Body adopted 13 February 1998, *supra*, footnote 13, para. 104.

ANNEX 4-1**LETTER FROM THE CHAIR OF THE PANEL TO THAILAND CONCERNING
CONFIDENTIAL INFORMATION**

(14 February 2000)

The Secretariat has informed me of a procedural issue that may arise in connection with the presentation of Thailand's first submission in the above dispute. In particular, it has come to the Secretariat's attention that your intention is to submit to the Panel alone, with your first submission, confidential exhibits which, because of their confidential nature, you do not intend to provide to Poland, the complaining party. I further understand that you believe that Article 17.7 of the Agreement on the Implementation of Article VI of the GATT 1994 ("the Anti-Dumping Agreement") permits a submission of this kind.

In the view of the Panel, the issue of whether or not the Anti-Dumping Agreement in conjunction with the DSU permits a Panel to accept confidential information that has not been provided to the opposing party is a complex one, which appears to raise a number of questions of legal interpretation on which the Panel ultimately may have to make a ruling. Before it can resolve this issue, the Panel wishes to hear and consider the views of both parties.

In view of this, so as not to prejudice the interests of either party, the Panel believes that it should not accept the confidential information in question today. By this letter, the Panel invites both parties to present their views on this issue, in writing, by close of business on Thursday, 17 February 2000. The Panel will consider these views and try to resolve this issue as quickly as possible, and in any case not later than at the first meeting of the Panel with the parties. Any implications for the overall schedule of the dispute arising from the Panel's consideration of this issue, as well as the possible need under Article 17.7 of the Anti-Dumping Agreement for a non-confidential summary of the information to be provided, will be addressed by the Panel at a later date.

ANNEX 4-2

LETTER FROM POLAND TO THE PANEL CONCERNING
CONFIDENTIAL INFORMATION
(16 February 2000)

We are in receipt of your letter of 15 February regarding Thailand's submission to the Panel of confidential exhibits that Thailand does not intend to supply to our Government, the complaining party in the above-referenced dispute. We believe that the Panel may not accept such a submission under the relevant provisions of the Dispute Settlement Understanding (DSU), and that Article 17.7 of the Anti-Dumping Agreement does not provide an exception to those basic requirements of fair play. Such requirements of procedural fairness are particularly acute where, as in this case, the withheld information appears to concern a key issue before a Panel, whether trade data and other economic indicia were properly evaluated by a Member.

Under Article 12.6 of the DSU, which is applicable to all dispute settlement procedures under covered WTO agreements: "Each party to the dispute shall deposit its written submissions with the Secretariat for immediate transmission to the Panel and to the other party or parties to the dispute".

Under Article 18.1 of the DSU, "There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body". Furthermore, Article 18.2 of the DSU provides: "Written submissions to the Panel or the Appellate Body shall be treated as confidential, but *shall be made available to the parties* to the dispute A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public".

Appendix 3 of the DSU establishes the Working Procedures that will be applicable to panel procedures. These provide *inter alia*: "Members shall treat as confidential, information submitted by another Member to the panel which that Member has designated as confidential. Where a party to a dispute submits a confidential version of its written submission to the Panel, it shall also, upon request of a Member, provide a non-confidential summary of the information contained in its submission that could be disclosed to the public".

We would note further that in the 22 December 1999 Working Procedures for the Panel, which are expressly "in addition" to relevant provisions of the DSU, it is provided that "each party's written submissions ... shall be made available to the other party or parties". (point 10)

These basic DSU requirements of due process are plain: a panel and all parties shall be given all submissions. *Ex parte* communications are prohibited. A Party may declare that its submissions are confidential, and such information shall not be disclosed by the *panel or any other party* without the express approval of the submitting party. In certain circumstances, the Panel or *any Member* may request that a non-confidential summary of such a confidential submission be made available so that it may be disclosed beyond the panel and parties to the dispute. The importance of these due process provisions has recently been underscored by the Appellate Body

in the *Brazil-Aircraft* case, which (at paragraphs 108-125) offers important context in consideration of this matter.

There are, of course, additional rules and procedures applicable to disputes under the Anti-Dumping Agreement, as detailed in Appendix 2 of the DSU, and Article 17.7 of the Anti-Dumping Agreement is one such provision. It provides: "Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided".

The Government of Poland respectfully submits that this provision was never intended to eviscerate the rules of due process and accountability otherwise applicable to WTO dispute settlement, in particular the most basic of requirements that parties "shall" receive submissions, including confidential submissions, from other parties in a dispute. Under Article 1.2 of the DSU, Article 17.7 of the Anti-Dumping Agreement informs this issue only to the extent that there is a "difference" between it and the otherwise-applicable DSU standard. Under basic rules of interpretation, these provisions should be read to avoid the incidence of such a conflict. That should be especially true where, as here, basic issues of procedural fairness are at stake.

When read in conjunction with the earlier-referenced DSU provisions, and informed by the context thereof, we submit that Article 17.7 was essentially intended to apply a heightened duty of care with respect to sensitive information in anti-dumping cases, but not to make complaining parties enter a star chamber. We note that Article 17.7 never states that confidential submissions are not to be served on all parties, and that if such extreme measures were truly contemplated, the Agreement would have said so. Rather Article 17.7 states only that a *panel* should not disclose such information without consent. This may be read in the context of the Article 12.6 DSU requirement that submissions are to be deposited with the "Secretariat for immediate transmission to the panel *and* to the other party or parties to the dispute". Read in context therefore, we believe that the Article 17.7 requirement is designed to prevent disclosure by the panel to other, 'non-party' Members: this interpretation is also supported by the distinction between the confidentiality requirements on parties (for example, in Article 18.2 DSU) and those on Members, set forth in Appendix 3, paragraph 8.

This is a dispute in which numbers matter, and my Government's perception is that reliance on the confidentiality of those numbers jeopardizes the ability of the panel to perform its assigned functions. Sanitized figures are not sufficient. We respectfully wish to reserve all rights regarding the admissibility and materiality of such information at least until such time as the first meeting of the Panel. We do not believe that Article 17.7 was intended to deny material information to opposing parties.

ANNEX 4-3

LETTER FROM THAILAND CONCERNING
CONFIDENTIAL INFORMATION
(17 February 2000)

On 14 February 2000, you provided the Kingdom of Thailand ("Thailand") with a letter explaining the reasons for refusing to accept confidential exhibits to Thailand's First Written Submission in the dispute: *Thailand - Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland (WT/DS122)*. In your letter, you request that both parties to the dispute present their views regarding this issue, in writing, by 17 February 2000. Thailand respectfully submits the following comments to supplement the position set forth in its First Written Submission.

At the outset, Thailand would like to confirm that its overriding interest is to ensure that these proceedings are fair to both parties and to third parties. Thailand welcomes the Panel's guidance regarding the appropriate manner under the WTO Agreement for Thailand to balance its obligation to protect confidential information obtained during the anti-dumping investigation with its right to defend its interests before the Panel. Thailand agrees that striking the appropriate balance between Thailand's rights and obligations must nevertheless not prejudice the interests of Poland and Third Parties in this dispute.

In summary, Thailand considers that Articles 17.5 and 17.7 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-Dumping Agreement") provide parties in a dispute under the Agreement the right to submit confidential information solely to a panel for its consideration and the right to prevent the panel from disclosing this confidential information to the other party or third parties without formal authorization.

Article 17.5(ii) of the Anti-Dumping Agreement provides that a panel in a dispute under the Agreement must examine the matter based upon "the facts made available in conformity with appropriate domestic procedures to the authorities of the importing Member". These facts necessarily include confidential and non-confidential submission by both petitioners and respondents and reports of the investigating authority in which this confidential and non-confidential information is compiled and analysed.

Article 17.7 states that:

"[c]onfidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided".

Accordingly, in examining the factual record of the matter, a panel must consider confidential information provided to it by one of the parties, but is obligated not to disclose such information to any other party without formal authorization. If one

of the other parties requests such information and if the panel does not receive authorization to disclose it, "a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided".

Article 18.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes ("DSU") states that "[t]here shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body." Article 18.2 provides that "[w]ritten submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute". Clearly, there is a "difference" or conflict between Article 18 of the DSU and Article 17.7 of the Anti-Dumping Agreement. The provision of confidential information to a panel but not to the other parties under Article 17.7 of the Anti-Dumping Agreement would constitute an *ex parte* communication under Article 18.1 of the DSU, and Article 17.7 of the Anti-dumping Agreement contemplates that confidential information would "be requested" by the other party or third parties and thus would not have been made available to them in written submissions as required under Article 18.2 of the DSU.

Notably, Article 17.7 (and Article 17.5) of the Anti-Dumping Agreement are special or additional rules of dispute settlement identified in Appendix 2 of the DSU. Under Article 1.2 of the DSU, these rules prevail over "different" or conflicting rules in the DSU. Because these rules conflict and cannot be applied consistently with one another on this particular issue, Article 17.7 prevails and accords a party the right to submit confidential information only to a panel for its consideration. This interpretation is entirely consistent with existing WTO practice, given that past decisions have simply reaffirmed the obligations under Article 18.2 of the DSU and have not addressed the special rule under Article 17.7 of the Anti-Dumping Agreement.

Thailand's right to submit the confidential exhibits exclusively to the Panel is especially important under the facts of this particular case. The Thai investigating authorities collected information on dumping from only one Polish producer (and one Polish exporter) and collected information on injury from only one Thai producer. In its First Written Submission, Poland repeatedly contends that the Thai investigating authorities did not base their determinations on actual data. Under Article 6.5 of the Anti-Dumping Agreement and its domestic law, Thailand was (during the investigation) and is (during the Panel's proceedings) obligated not to disclose the confidential information submitted by interested parties during the investigation. In order to defend itself, however, Thailand considers it essential to provide the Panel with evidence that its authorities did, in fact, base their determinations on actual information, contrary to Poland's assertions. Therefore, without the ability under Article 17.7 of the Anti-Dumping Agreement to submit confidential information to the Panel only, Thailand will be unable to disclose the actual data on which it made its determinations and, therefore, will be unable to defend against Poland's assertions to the Panel.

Without prejudice to its position above, Thailand considers that the following compromise could provide a mutually acceptable solution regarding how to treat the confidential exhibits:

1. Thailand will disclose Exhibits THAILAND - 11, THAILAND - 18, THAILAND - 29, THAILAND - 31, THAILAND - 38, THAILAND -42, and THAILAND - 43 upon receipt of written au-

thorization from Huta Katowice and Stalexport waiving all rights to maintain the confidentiality of their data in this panel proceeding. Thailand requests that Poland obtain the requisite authorization from both Polish companies.

2. Based on express authorization from the petitioner, Siam Yamato Steel Co. Ltd. ("SYS"), Thailand will disclose Exhibits THAILAND - 20, and THAILAND - 44 to the Panel and to the other Parties. However, these exhibits will not contain information on cost of production. SYS has not authorized Thailand to disclose cost of production information either to the Panel or to the other Parties.

Thailand considers that intentional or inadvertent disclosure of the confidential information contained in the nine exhibits identified above could be of significant competitive advantage to petition, respondents, and third companies and could cause significant adverse effects to the source of the information. Therefore, under the above mutually acceptable solution, Thailand would respectfully urge the Panel to remind the Parties' delegations of their obligation under Article 18.2 of the DSU not to disclose confidential information obtained during the course of the Panel's proceedings. In addition, Thailand would request that the Panel not disclose confidential information contained in the above nine exhibits to other Members or to the public in its final report without formal authorization from Thailand.

Thailand, of course, would be willing to discuss other alternatives to resolve this issue on a mutually acceptable basis, provided that such procedures would guarantee protection of confidential information in accordance with Thailand's domestic and international obligations and would enable Thailand to exercise its right to defend its interests in this proceeding.

ANNEX 4-4

**COMMENTS BY THE EUROPEAN COMMUNITIES ON THAILAND'S
FAILURE TO PROVIDE CERTAIN CONFIDENTIAL EXHIBITS
TO THE OTHER PARTIES
(18 February 2000)**

I refer to your letter to the main parties in this dispute dated 14 February 2000 concerning the procedural issue raised by Thailand's decision not to submit certain confidential exhibits to the other parties. A copy of that letter was made available by the Secretariat to the EC yesterday.

As a third party to this dispute, the EC is entitled, in accordance with the provisions of Articles 10.3 and 18.2 of the DSU, to receive a complete copy of the first submission filed by Thailand. Therefore, the EC is directly concerned by this procedural issue.

The Secretariat's letter of yesterday does not set out any deadline for the submission of comments by third parties. The EC was planning to submit its views on this issue on 21 February 2000, as part of its third party submission. However, in view of the Panel's stated intention to make a ruling as quickly as possible, the EC has decided to submit its views immediately, so as to ensure that they can be taken into account by the Panel.

We are providing a copy of this letter and its enclosure to the Permanent Missions of Thailand, Poland, United States and Japan.

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1. COMMUNICATION OF INFORMATION ONLY TO THE PANEL

1. In the introductory part of its First Written Submission, Thailand informs the Panel that it has prepared two versions of this submission, a "Confidential Version" submitted to the Panel only and containing nine exhibits designated as confidential, and a "Non-Confidential Version" submitted to the Panel and the other Parties to the dispute and containing no confidential exhibits. Thailand cites Article 17.7 ADA as the legal basis for this course of action and for its request to the Panel not to disclose the confidential Exhibits "to Poland or to Third Parties without formal authorisation from Thailand". Thailand justifies this procedure with the need to balance the duty to protect confidential information received from the industry during its anti-dumping investigation and its right of defence in the present case.¹

2. The EC considers this procedure inadmissible because:
- it assumes a conflict between Article 17.7 ADA and the relevant DSU rules which does not exist;
 - it is based on an incorrect reading of Article 17.7 ADA and of the relevant DSU rules;
 - it excludes the other parties to the dispute from access to information and the right to comment and thus violates due process, the principle of equality of arms, and the adversarial nature of WTO dispute settlement;
 - it replaces the procedures envisaged by the DSU to protect business confidential information with arbitrary procedures established unilaterally by Thailand;
 - and it amounts to an *ex parte* communication prohibited by Article 18 DSU.

1.1 The Communication of Information only to the Panel Assumes a Conflict between Article 17.7 ADA and the Relevant DSU Rules which does not Exist

3. It is generally accepted that Article 17.7 ADA, although an additional rule in the meaning of Appendix 2 DSU, repeats the rules found in the DSU regarding protection of confidential information.² The argument maintained by Thailand, on the basis of Article 1.2 DSU, that Article 17.7 ADA would prevail on any rule which requires disclosure of the confidential exhibits, is not sustainable because the prerequisite for the application of Article 1.2 DSU is missing: Article 17.7 and the DSU

¹ Thailand's First Written Submission, at paras. 3 and 4.

² McGovern E., *International Trade Regulation*, London: Globefield Press, 1999, at para. 12.141.

rules on protection of confidential information do not differ. As the Appellate Body has pointed out clearly in its analysis of the relation between the ADA and the DSU, two sets of rules should be considered to differ when they cannot be read as complementing each other, i.e. "when adherence to one provision would lead to a violation of the other provision". Apart from such cases, the special or additional rules of the ADA should be seen as forming an integrated whole with the DSU.³

4. Article 17.7 ADA and the relevant DSU rules have been drafted at different points in time to deal with the same issue: how to balance the two competing interests, both rooted in fairness and due process, that parties must be given access to the information that is introduced as evidence before a panel and that private businesses and national authorities must be granted with adequate protection for their confidential information when parties deem it necessary to refer to such evidence in support of their case. Accordingly, these rules have to be applied concurrently, and only to the extent that Article 17.7 differs from the DSU rules, the latter prevails. As it will be pointed out below, this hypothesis occurs only in relation to minor procedural aspects of the disclosure to the public of non-confidential summaries.

1.2 The Communication of Information only to the Panel is Based on an Incorrect Reading of Article 17.7 ADA and of the Relevant DSU Rules

5. Thailand cites Article 17.7 ADA as the basis for the duty of the Panel not to disclose the information submitted only to it by Thailand in its submission. This reading of Article 17.7 is incorrect under two points of view:

- first, because it applies this rule to the protection of confidential information provided by a party in its own submission;
- second, because it interprets the expression "information provided to the panel" as meaning "information provided to the three panellists".

6. Such interpretation is in contrast with the ordinary meaning of the words of this provision, read in their context and in the light of the object and purpose of the treaties involved.

7. Following the reasoning of the Appellate Body in *Guatemala - Cement I*, the context in which Article 17.7 ADA has to be interpreted is that of the WTO rules on the settlement of disputes, in particular the DSU. The DSU contains several provisions which deal with the issue of confidentiality. In the present case, two norms are particularly relevant, Articles 13.1 and 18.2.

8. Article 18.2 DSU sets the standard of confidentiality to be respected by all Members of the WTO, as well as "any person that a Member selects to act as its representative, counsel or consultant", for the information submitted by the parties during panel and Appellate Body proceedings.⁴ It states in the relevant part:

³ Report by the Appellate Body on *Guatemala - Anti-Dumping Investigation Regarding Portland Cement from Mexico*, AB-1998-6, WT/DS60/AB/R, 2 November 1998, DSR 1998:IX, 3767, at paras. 65-68.

⁴ Report by the Appellate Body on *Brazil - Export Financing Programme for Aircraft*, AB-1999-1, WT/DS46/AB/R, 2 August 1999, DSR 1999:III, 1161, at para. 123. See also Report by the Panel on

"Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. ... Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

9. Article 13.1 DSU, instead, regulates the issue of confidentiality for information that is provided to a panel in its discretionary authority to seek information and technical advice from any individual or body it may consider appropriate.⁵ It reads in the relevant part:

"Each panel shall have the right to seek information and technical advice from any individual or body which it deems appropriate. ... Confidential information which is provided shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information."

10. Contrary to the reading by Thailand, Article 17.7 ADA covers this second hypothesis: how to ensure the confidentiality of information provided to the panel not by the parties themselves but by a "person, body or authority". Article 17.7 ADA reads in fact:

"Confidential information provided to the panel shall not be disclosed without formal authorization from the person, body or authority providing such information. Where such information is requested from the panel but release of such information by the panel is not authorized, a non-confidential summary of the information, authorized by the person, body or authority providing the information, shall be provided."

11. The "speciality" of Article 17.7 ADA with regard to Article 13.1 DSU resides in the fact that Article 17.7 regulates also how the panel can disclose to the public the confidential information it has received. In particular, in case the panel has not been previously authorised to disclose this confidential information by the person, body or authority that has provided it, the panel has to obtain this authorisation before it can make public even the non-confidential summary.

Indonesia - Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, 2 July 1998, DSR 1998:VI, 2755, at para. 14.1.

⁵ The authority of a panel to seek information and technical advice has been the object of several decisions by the Appellate Body. See, for instance, Report by the Appellate Body on EC Measures Concerning Meat and Meat Products (Hormones), AB-1997-4, WT/DS26/AB/R, WT/DS48/AB/R, 16 January 1998, DSR 1998:I, 135, at para. 147; Report by the Appellate Body on Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, AB-1998-1, WT/DS56/AB/R, 27 March 1998, DSR 1998:III, 1003, at paras. 84-86; Report by the Appellate Body on United States - Import Prohibition of Certain Shrimp and Shrimp Products, AB-1998-4, WT/DS58/AB/R, 12 October 1998, DSR 1998:VII, 2755, at paras. 99 et ff.

12. The second flaw in Thailand's reading of Article 17.7 ADA and the relevant DSU rules derives from the interpretation of the expression "information provided to the panel" as meaning "information provided to the three panellists" , and probably, given Article 27 DSU, to the WTO Secretariat, which assists the panel.

13. It is clear from Article 18.2 DSU that submissions by the parties, even if confidential, "shall be made available to the parties to the dispute". Even in the case of information or technical advice provided to the panel by individuals or bodies, Article 13.1 DSU has never been interpreted to mean that the confidential information submitted to the panel was meant only for review by the panellists and the WTO Secretariat and not by the other parties. It is established practice in WTO dispute settlement that, when issues of confidentiality are concerned, the concept of "panel" is generally opposed to that of "public" and not to that of "other parties to the dispute" and that the expression "information provided to the panel" has to be read as equivalent to "information provided during the proceeding before the panel".

14. This rule is also confirmed by the fact that the only existing exception is clearly indicated. In providing additional rules and procedures for expert review groups established in accordance with Article 13.2 DSU, paragraph 5 of Appendix 4 of the DSU states that:

"The parties to a dispute shall have access to all relevant information provided to an expert review group, unless it is of a confidential nature. Confidential information provided to the expert review group shall not be released without formal authorization from the government, organization or person providing the information. Where such information is requested from the expert review group but release of such information by the expert review group is not authorized, a non-confidential summary of the information will be provided by the government, organization or person supplying the information."

1.3 The Communication of Information only to the Panel Excludes the Complainant from Access to Information and the Right to Comment and thus Violates Due Process and the Adversarial Nature of WTO Dispute Settlement

15. The course of action chosen by Thailand is in contrast also with the object and purpose of WTO dispute settlement rules. Both Article 17 ADA and DSU rules are drafted to allow the settlement of disputes in the area of anti-dumping in a manner that ensures that the rights and obligations of Members are preserved and that fairness and due process are guaranteed.

16. The justification that Thailand provides for the adoption of this procedure - that it has to balance the duty to protect confidential information received by the industry with its right of defence in the present case - completely ignores the right of the other parties to this dispute as well as the basic principle of equality of arms during legal proceedings. Thailand is free to submit to the Panel whatever information it deems appropriate to defend itself. Thailand can also avail itself of the possibility of designating such information as confidential. However, in that case, Article 18.2 DSU establishes clear rules protecting the confidentiality of written submission and information submitted to the Panel that Thailand, as any other WTO Member, has to

follow. Thailand cannot, in the name of its own rights of defence, negate similar rights to other Members.

17. Equality of arms is guaranteed to the parties even in a case as exceptional as the one regulated by Appendix 4.5 DSU. In that case, in fact, restrictions on access to relevant confidential information would apply equally to all parties to the dispute and non-confidential summary of the information would have to be provided to all parties.

1.4 The Communication of Information only to the Panel Replaces the Procedures Envisaged by the DSU to Protect Business Confidential Information with Arbitrary Procedures Established Unilaterally by Thailand

18. Thailand's concerns regarding the confidentiality of the information in its possession could have been met by other means already provided in the DSU and intended to respect the rights of all parties involved.

19. Article 18.2 DSU expressly regulates the situation encountered in the present case. As already mentioned, it establishes a duty of confidentiality to be respected by all Members of the WTO, as well as any person that a Member selects to act as its representative, counsel or consultant, during panel and Appellate Body proceedings. It also regulates the case in which the party having submitted confidential information is asked to produce a non-confidential summary of this information to be disclosed to the public. It is the principle of fair and transparent procedure applied to its fullest extent.

20. But the WTO dispute settlement system goes even beyond and acknowledges also the case that a party may not consider Article 18.2 DSU sufficient to secure the protection of its confidential information. If that was the case, Thailand could have followed the well established practice to propose to the panel the adoption of more stringent rules as part of its Working Procedures. The Panel in *Indonesia - Cars* expresses this possibility with great clarity:

"In this respect, we note that the parties agree that the complainants alleging serious prejudice must demonstrate its existence by positive evidence. If the United States considers that the information in question is necessary in order to meet that burden, and if it believes that Article 18.2 is inadequate, the United States may propose to the Panel in writing, at the earliest possible moment, a procedure that it considers sufficient to protect the information in question."⁶

⁶ Report by the Panel on *Indonesia Cars*, cited above, *supra*, footnote 4, at para. 14.7.

1.5 The Communication of Information only to the Panel Amounts to an Ex Parte Communication Prohibited by Article 18 DSU

21. Finally, no doubt can be cast on the fact that Thailand's submission of certain exhibits only to the panellists constitutes an *ex parte* communication prohibited by Article 18.1, which explicitly states

"There shall be no *ex parte* communications with the panel or Appellate Body concerning matters under consideration by the panel or Appellate Body."

1.6 Conclusions

22. In conclusion, the EC urges the Panel to declare the initiative of Thailand to withhold information from the other parties to this dispute as inadmissible. Thailand should be invited to make its submission and all its attachments available to the parties to the present dispute. If Thailand were to refuse, the submission and the attachments that were withheld from the other parties to the dispute should be removed from the Panel's files and be handed back to Thailand.

ANNEX 4-5

FAX FROM SECRETARIAT CONCERNING
CONFIDENTIAL INFORMATION
(21 February 2000)

Having received the communications from the parties concerning Thailand's intention to submit certain confidential information in this dispute, the Panel draws Poland's attention to p. 4 of Thailand's communication of 17 February 2000. There, Thailand outlines the following "compromise" that Thailand considers "could provide a mutually acceptable solution regarding how to treat confidential exhibits":

"1. Thailand will disclose Exhibits THAILAND-11, THAILAND-18, THAILAND-29, THAILAND-31, THAILAND-38, THAILAND-42, and THAILAND-43 upon receipt of written authorization from Huta Katowice and Stalexport waiving all rights to maintain the confidentiality of their data in this panel proceeding. Thailand requests that Poland obtain the requisite authorization from both Polish companies.

2. Based on express authorisation from the petitioner, Siam Yamato Steel Co. Ltd. ("SYS"), Thailand will disclose Exhibits THAILAND-20 and THAILAND-44 to the Panel and to the other Parties. However, these exhibits will not contain information on the cost of production. SYS has not authorised Thailand to disclose cost of production information either to the Panel or to the other Parties."

We also note that Thailand asks the Panel to remind parties of their obligation under Article 18.2 of the DSU not to disclose confidential information obtained during the course of the Panel's proceedings. Article 18.2 of the DSU states:

"2. Written submissions to the panel or the Appellate Body shall be treated as confidential, but shall be made available to the parties to the dispute. Nothing in this Understanding shall preclude a party to a dispute from disclosing statements of its own positions to the public. Members shall treat as confidential information submitted by another Member to the panel or the Appellate Body which that Member has designated as confidential. A party to a dispute shall also, upon request of a Member, provide a non-confidential summary of the information contained in its written submissions that could be disclosed to the public."

The Panel notes that this provision obligates all "Members" to treat as confidential information submitted by another Member to the panel which that Member has designated as confidential. Therefore, this obligation applies not only to parties but also to third parties to a dispute.

The Panel wishes to have Poland's reaction to the above arrangement proposed by Thailand *by close of business on Wednesday 23 February 2000*. The Panel notes in this context that Article 12 of the DSU states, in part:

- "1. Panels shall follow the Working Procedures in Appendix 3 unless the panel decides otherwise after consulting the parties to the dispute.
2. Panel procedures should provide sufficient flexibility so as to ensure high-quality panel reports, while not unduly delaying the panel process."

ANNEX 4-6

LETTER FROM POLAND TO THE PANEL CONCERNING
CONFIDENTIAL INFORMATION
(23 February 2000)

We are in receipt of your facsimile of 22 February 2000 regarding Thailand's proposed "compromise" on the issue of confidentiality in this proceeding. For the reasons outlined below, this proposal is unacceptable to the Polish side.

In its 17 February 2000 submission, Thailand states that it is willing to provide certain "confidential" data to Poland and the third parties in this proceeding *only* if the Polish firms subject to Thai anti-dumping duty orders waive rights to confidentiality on their own company-specific data. Thailand further states that certain other information will be disclosed to the parties, but it shall not include cost of production information.

As set forth in our 16 February 2000 letter, we believe that there is no basis under the Dispute Settlement Understanding or the Anti-Dumping Agreement for the Panel to accept *ex parte* communications of any sort from a party to a proceeding or otherwise to allow a party to make less-complete submissions to other parties or third parties than to the Panel itself. Likewise, there is no basis for "pressuring" other Members into waiving applicable confidentiality protections simply in order to obtain information to which they are, in our view, plainly entitled in the first place.

My Government's views on this matter are rather simple. Thailand has no choice under applicable WTO rules. It must provide all "confidential" information to Poland and the third parties, if it wishes such information to be considered by the Panel. Otherwise, the Panel shall return such information to Thailand, and the Panel shall consider only the "non-confidential" information properly submitted by the Parties.

ANNEX 4-7

**FAX FROM THE SECRETARIAT TO THE PARTIES CONCERNING THE
OUTCOME OF THE 25 FEBRUARY 2000 MEETING**

(25 February 2000)

The Panel has asked me to send the following summary of the outcome of this morning's meeting concerning the submission by Thailand to the Panel and to Poland and third parties of certain confidential information.

First, no later than Monday, 28 February 2000, Poland will confirm to the Panel in writing, with a copy to Thailand, its final position concerning the proposal by Thailand, to which Poland preliminarily agreed at the meeting. The Panel understands that, assuming that Poland confirms its acceptance of the proposal, Poland intends in the same communication to indicate that it has obtained the requested authorization from the Polish companies for Thailand to submit the information contained in Exhibits Thailand-11, -18, -29, -31, -38, -42, and -43.

Upon receipt of this communication from Poland, the Panel will immediately communicate to the parties and third parties an addition to its working procedures reflecting the agreed procedures concerning all of the confidential information at issue (i.e., the above listed exhibits as well as Exhibits Thailand-20 and -44).

Upon receipt of this addition to the Panel's working procedures, Thailand will immediately submit the information to the Panel (in eight copies), to Poland and to the third parties.

ANNEX 4-8

**LETTER FROM POLAND TO THE SECRETARIAT CONCERNING
CONFIDENTIAL INFORMATION**

(28 February 2000)

With reference to your fax of 25 February 2000 summing up the meeting with the Panel (Thailand - Anti-Dumping Duties on Steel from Poland (WT/DS122)) that took place on the same day, I am pleased to inform you of Poland's position with regard to the proposal of Thailand according to its understanding by the Panel. The position reads as follows:

1. Poland does not have any problem to grant the authorization for Thailand to submit to the Panel and to the parties involved, confidential information in Thailand's possession concerning Polish companies involved in the dispute. The authorization may be granted at any time after revealing by Thailand confidential information concerning SYS company.
2. Nevertheless, Poland considers delayed submission of SYS confidential data, which we did not have the chance to acquaint with at any previous stage, as an infringement of our due process especially in the light of the fact that the Thai side already has the access to Polish confidential data. Submission of Thai data in the middle/end of the current week will effectively reduce the time for the Polish side to review Thailand's position from three weeks to 1-2 working days.

ANNEX 4-9

LETTER FROM POLAND TO THE PANEL CONCERNING
CONFIDENTIAL INFORMATION

(1 March 2000)

1. Poland herein grants the authorization for Thailand to submit to the Panel and to the parties involved, confidential information in Thailand's possession concerning Polish companies involved in the dispute providing that simultaneously Thailand will submit confidential information concerning SYS company.

2. Poland requests prompt clarification from the Panel as to whether the Panel does in fact intend to hold its first substantive meeting next week and, if so, whether the Panel intends to have parties address all issues that have been raised in this matter. We respectfully submit that Poland's interest in this dispute appears at risk of being prejudiced, if the issues on which "confidential data" is apparently to be submitted - i.e. dumping and injury - are indeed to be argued in full next week.

A Panel has broad discretion, of course, to request and receive data from a party at any time. But the Dispute Settlement Understanding cannot be fairly read to allow a Member to make untimely submission of the most fundamental of data, where other parties' rights to see, evaluate, brief, and discuss that data are abridged as a result.

Therefore, rather than shoot a moving target, we respectfully suggest that the Panel hearing next week be limited to all issues raised by the parties *other than* those under Articles 2 and 3 of the Anti-Dumping Agreement. We do not believe it would be advisable to expend one of what may well be only two meetings with the Panel formulating arguments concerning issues of injury and dumping, when facts herein at issue appear once again likely to change, due to no fault of our own.

We would therefore expect that the issues of injury and dumping will be the subject of subsequent meetings of the Panel and that the Panel will insure that Poland is given satisfactory opportunity to review the new Thai data in advance of the second meeting of the Panel.

ANNEX 4-10

**COMMENTS BY JAPAN ON THAILAND'S FAILURE TO PROVIDE
CERTAIN INFORMATION TO THE OTHER PARTIES AND TO
THE THIRD PARTIES**

(1 March 2000)

**I. GENERAL PRINCIPLE UNDERLYING THE DISPUTE
SETTLEMENT PROCEDURE**

The fairness of panel deliberation is ascertained through ensuring that the parties to a dispute have equal access to, and knowledge of, the assertions presented before the panel. The complaining parties, defending parties as well as third parties therefore must submit their submissions which contain their respective assertions and evidence in accordance with the set of rules stipulated in the Understanding on Rules and Procedures Governing the Settlement of Dispute (hereinafter "DSU"), without prejudicing any particular party to the dispute. In observance of such a fundamental principle for ensuring a deliberation fair to all parties, it must be ensured that the parties have equal access to all the information submitted to the panel, including the information designated as confidential by the submitting party. Article 18.2 of the DSU clearly embodies this principle. Absent such equal access to all the information submitted, the panel deliberation would become severely impaired and its conclusion void of credibility. In such a case, the objectiveness and fairness of the WTO dispute settlement mechanism would be severely compromised.

**II. INTERPRETATION OF ARTICLE 17.7 OF THE AGREEMENT ON
IMPLEMENTATION OF ARTICLE VI OF THE GATT 1994
(HEREINAFTER "ADA") IN RELATION TO THE DSU**

1. Thailand and the United States assume that Article 17.7 of the ADA applies to the information provided to the panel by the parties. The United States does not explain sufficiently the basis of its assumption other than the simple statement that it is plain (see paragraph 25 of the US submission). Both Thailand and the United States argue that there exists a difference or conflict between Article 17.7 of the ADA and Article 18.2 of the DSU and insist that Article 17.7 of the ADA prevails over Article 18.2 of the DSU.

2. Japan disagrees. Article 17.7 of the ADA does not regulate the treatment of information contained in the submission from the parties to the panel. Rather, Japan considers that Article 17.7 of the ADA is a supplement to Article 13.1 of the DSU, which addresses the issue of confidentiality for information that is provided to a panel under its discretionary authority to seek information and technical advice from any individual or body it may consider appropriate. For this reason, Japan considers that no such alleged conflict between Article 17.7 of the ADA and the DSU exists. Japan supports the view of the EC regarding this point.

3. Additional rules and procedures are contained in Article 17.7 of the ADA other than those contained in 13.1 of the DSU, that is, Article 17.7 provides a more

detailed set of rules for non-confidential summary of the information, given the importance of transparency in the area of anti-dumping.

The reasons why Japan considers that Article 17.7 of the ADA supplements Article 13.1 of the DSU are as follows:

- Article 17.7 of the ADA includes the language "where such information is requested from the panel", which presupposes an act of the panel seeking certain information or technical advice, prior to the application of this Article. Such an act of the panel seeking certain information, is stipulated in Article 13.1 of the DSU.
- If Article 17.7 of the ADA were to be applied to the information contained in the submission from the parties, the only entity that has the right to authorize the disclosure of the information would be the parties themselves that submitted the information and not the "person", "body" nor "authority" as stipulated in Article 17.7. Inclusion of the phrase "the person, body or authority" is only to build upon the provision in Article 13.1 of the DSU, and in no way establishes any rule independent of Article 13.1 of the DSU.

III. INTERPRETATION BY THAILAND AND THE UNITED STATES OF ARTICLE 17.7 OF ADA RUNS COUNTER TO DUE PROCESS AND FAIRNESS OF THE WTO DISPUTE SETTLEMENT MECHANISM

If one adopts an interpretation of Article 17.7 of the ADA as permitting the parties to submit confidential information only to the panel, a party could withhold any information to the other parties simply by claiming it is confidential. If such a practice is permitted, the fairness of the panel deliberation would be severely impaired as the other parties would be placed at a disadvantage of having to assert themselves without the full knowledge of the argument and evidence presented to the panel by the party submitting such "confidential" information. Japan believes such an interpretation egregiously comprises due process and fairness of the panel proceedings.

IV. THAILAND HAS NOT FULFILLED ITS OBLIGATION FOR AN OBJECTIVE AND FAIR DELIBERATION OF THE PANEL

In the case before us, the Thai investigating authorities collected information on dumping from only one Polish producer (and one Polish exporter) and collected information on injury only from one Thai producer. This might be an unusual case, but nevertheless Japan considers that in so far as Thailand fails to supply to all the parties concerned the information submitted to the panel, Thailand presents a serious obstacle for an objective and fair deliberation by the panel, for such an act deprives the other parties of the opportunity to defend their interests based on the full knowledge of the assertions and evidence submitted to the panel.

V. CONCLUSION

Japan requests the panel to rule that all written submissions to the panel, including attachments, from any party shall be made available to all the parties to the dispute in accordance with Article 18.2 of the DSU and that all written submissions to the first meeting of the panel shall also be made available to all the third parties in accordance with Article 10.3 of the DSU. Japan, as well as other third parties, will treat submissions as confidential in accordance with Article 18.2 of the DSU. If Thailand fails to make available to all the parties concerned the submissions and their attachments, the panel should exclude from the scope of its examination the submissions and attachments not made available to the other parties.

ANNEX 4-11**LETTER OF THE EUROPEAN COMMUNITIES CONCERNING
CONFIDENTIAL INFORMATION**

(2 March 2000)

I refer to the letter sent by Poland to the Panel on 2 March 2000, a copy of which has been made available by Poland to the EC.

In the above-mentioned letter, Poland expresses its concern that its interest in the dispute might be prejudiced if the issues relating to injury and dumping, on which confidential data by Thailand may be submitted, are to be argued in full next week without sufficient time to review these data. Therefore, Poland suggests to the Panel that in the hearing next week the issues relating to Articles 2 and 3 of the Anti-Dumping Agreement be not discussed.

The EC shares Poland's concern. At the same time, however, the EC would like to repeat that, as a third party to this dispute, it is entitled, in accordance with Articles 10.3 and 18.2 DSU, to receive a complete version of Thailand's first written submission, including all the exhibits attached thereto, and that, in accordance with Article 10.2 DSU, it shall have an opportunity to be heard by the Panel.

Therefore, it is a right of the EC and the other third parties to receive all the data that Thailand may submit with regard to the issues relating to injury and dumping. Equally, it is a right of the EC and the other third parties to be given the opportunity to be heard by the Panel on these issues, which are at the very core of this dispute and represent the main aspects of this case of interest to the EC.

On the basis of the agreed Working Procedure of this Panel, third parties are invited to participate only at the first substantive meeting of the Panel. Therefore, if Poland's request were accepted, the EC and the other third parties to this dispute would not have an opportunity to be heard by the Panel on all issues, thus prejudicing the rights that they derive from the DSU.

In conclusion, the EC respectfully asks the Panel either to postpone the first substantive meeting of the parties and third parties, so as to give all parties sufficient time to consider all information submitted by Thailand, or to schedule a second meeting in which parties as well as third parties are given the opportunity to be heard by the Panel on issues relating to Articles 2 and 3 of the Anti-Dumping Agreement.

ANNEX 4-12

FAX FROM THE SECRETARIAT TO THE PARTIES CONCERNING
CONFIDENTIAL INFORMATION
(2 March 2000)

The Panel has asked me to communicate the following to the parties to the above dispute:

The Panel is in receipt of Poland's letters dated 28 February and 1 March 2000. The Panel understands from these letters that Poland has obtained the necessary authorization for Thailand to submit to the Panel and to Poland/third parties confidential information pertaining to the Polish companies contained in Exhibits Thailand-11, -18, -29, -31, -38, -42, and -43. On this basis, the Panel has now established working procedures concerning the submission and treatment of the confidential information at issue. These supplemental procedures concerning certain business confidential information are attached. [See Annex 5-1]

The parties will note that in accordance with these procedures Thailand shall *simultaneously* submit to the Panel (with copies to Poland and third parties) all of the exhibits pertaining to SYS *and* to the Polish companies. That is, Thailand shall submit, all at the same time, Exhibits Thailand-11, -18, -20, -29, -31, -38, -42, -43, and -44, to the Panel and to Poland/third parties. The Panel recalls that Thailand indicated that it would need a maximum of 24 hours to provide these exhibits once it received the supplemental working procedures from the Panel, (which would be until noon tomorrow, 3 March).

In answer to Poland's question, the Panel confirms that its first meeting will be held on 7-8 March 2000, as scheduled. The meeting will be held in Room B and will commence at 10 AM on 7 March.

The Panel takes note of Poland's concern that given the nearness of the Panel's first meeting, it will not be possible for the information in the exhibits that Thailand will submit to be fully addressed at that meeting. The Panel wishes to assure the parties that they will be given full opportunity to raise and address all issues that they wish during the remainder of the Panel's proceedings. That is, there will be no limitations on parties' ability to raise arguments concerning this information after the first meeting (i.e., in rebuttal submissions, at the second meeting of the Panel, and in questions and answers). Concerning the first meeting, it is for each party to decide which issues it will address and how it will address them.

ANNEX 5-1

2 March 2000

**SUPPLEMENTAL WORKING PROCEDURES OF THE PANEL
CONCERNING CERTAIN CONFIDENTIAL INFORMATION**

- (1) Thailand shall submit to the Panel simultaneously all of the following exhibits: Exhibits Thailand-11, -18, -20, -29, -31, -38, -42, -43, and -44 (in eight copies). At the same time, Thailand shall provide all of these exhibits to Poland and to the third parties.
- (2) The above-listed exhibits shall be clearly marked "**Confidential**".
- (3) As required by Article 18.2 of the DSU, all Members to which the above-listed exhibits are provided by Thailand shall treat them as confidential, i.e., shall not disclose the information contained therein without the formal authorization of the parties. The parties and third parties shall have the responsibility for all members of their delegations, and in particular shall ensure that all members of their delegations maintain the confidentiality of the information contained in the above-listed exhibits.
- (4) Any party or third party referring in its written submissions or oral statements to any information that has been designated as confidential shall clearly identify all such information in those submissions and statements.
- (5) The Panel shall not disclose any information submitted to it which has been designated as confidential without formal authorization of the parties. The Panel may, however, make statements of conclusion drawn from such information.

ANNEX 5-2

**SUPPLEMENTAL WORKING PROCEDURES OF THE PANEL CONCERNING
CERTAIN CONFIDENTIAL INFORMATION**

(25 April 2000)

Addendum

The Supplemental Working Procedures of the Panel Concerning Certain Confidential Information, adopted on 2 March 2000, are hereby amended such that paragraphs (2)-(5) apply to Exhibits Thailand-52, -55, -64, -66, -67, -68, and -69, in addition to the exhibits listed in paragraph (1).

**EUROPEAN COMMUNITIES - MEASURES AFFECTING
ASBESTOS AND ASBESTOS-CONTAINING PRODUCTS**

Report of the Appellate Body
WT/DS135/AB/R

Adopted by the Dispute Settlement Body on 5 April 2001

Canada, *Appellant/Appellee*
European Communities,
Appellant/Appellee
Brazil, *Third Participant*
United States, *Third Participant*

Present:
Feliciano, Presiding Member
Bacchus, Member
Ehlermann, Member

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I. INTRODUCTION

1. Canada appeals certain issues of law and legal interpretations developed in the Panel Report in *European Communities - Measures Affecting Asbestos and Asbestos-Containing Products* (the "Panel Report").¹ The Panel was established to consider claims made by Canada regarding French Decree No. 96-1133 concerning asbestos and products containing asbestos (*décret no. 96-1133 relatif à l'interdiction de l'amiante, pris en application du code de travail et du code de la consommation*) ("the Decree"), which entered into force on 1 January 1997.²

2. Articles 1 and 2 of the Decree set forth prohibitions on asbestos and on products containing asbestos fibres, followed by certain limited and temporary exceptions from those prohibitions:

Article 1

- I. For the purpose of protecting workers, and pursuant to Article L. 231-7 of the Labour Code, the manufacture, processing, sale, im-

¹ WT/DS135/R, 18 September 2000.

² Journal officiel, 26 December 1996.

port, placing on the domestic market and transfer under any title whatsoever of all varieties of asbestos fibres shall be prohibited, regardless of whether these substances have been incorporated into materials, products or devices.

II. For the purpose of protecting consumers, and pursuant to Article L. 221.3 of the Consumer Code, the manufacture, import, domestic marketing, exportation, possession for sale, offer, sale and transfer under any title whatsoever of all varieties of asbestos fibres or any product containing asbestos fibres shall be prohibited.

III. The bans instituted under Articles I and II shall not prevent fulfilment of the obligations arising from legislation on the elimination of wastes.

Article 2

I. On an exceptional and temporary basis, the bans instituted under Article 1 shall not apply to certain existing materials, products or devices containing chrysotile fibre when, to perform an equivalent function, no substitute for that fibre is available which:

- On the one hand, in the present state of scientific knowledge, poses a lesser occupational health risk than chrysotile fibre to workers handling those materials, products or devices;
- on the other, provides all technical guarantees of safety corresponding to the ultimate purpose of the use thereof.

II. The scope of application of paragraph I of this Article shall cover only the materials, products or devices falling within the categories shown in an exhaustive list decreed by the Ministers for Labour, Consumption, the Environment, Industry, Agriculture and Transport. To ascertain the justification for maintaining these exceptions, the list shall be re-examined on an annual basis, after which the Senior Council for the Prevention of Occupational Hazards and the National Commission for Occupational Health and Safety in Agriculture shall be consulted.

The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4), the imposition of penalties for violation of the prohibition in Article 1 (Article 5), and the temporary exclusion of certain "vehicles" and "agricultural and forestry machinery" from aspects of the prohibition (Article 7). Further factual aspects of this dispute are set forth in paragraphs 2.1 - 2.7 of the Panel Report, and the Decree is reproduced in its entirety as Annex I in the Addendum to the Panel Report.³

³ WT/DS135/R/Add.1, pp. 3-6.

3. Canada claimed that the Decree is inconsistent with a number of obligations of the European Communities under Article 2 of the *Agreement on Technical Barriers to Trade* (the "TBT Agreement"), Articles III and XI of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994"), and that, under Article XXIII:1(b) of the GATT 1994, the Decree nullified or impaired advantages accruing to Canada directly or indirectly under the *Marrakesh Agreement Establishing the World Trade Organization* (the "WTO Agreement"), or impeded the attainment of an objective of that Agreement.⁴

4. In the Panel Report, circulated to WTO Members on 18 September 2000, the Panel concluded that:

- (a) ... the "prohibition" part of the Decree does not fall within the scope of the TBT Agreement. The part of the Decree relating to "exceptions" does fall within the scope of the TBT Agreement. However, as Canada has not made any claim concerning the compatibility with the TBT Agreement of the part of the Decree relating to exceptions, the Panel refrains from reaching any conclusion with regard to the latter.
- (b) ... chrysotile asbestos fibres as such and fibres that can be substituted for them as such are like products within the meaning of Article III:4 of the GATT 1994. Similarly, the Panel concludes that the asbestos-cement products and the fibro-cement products for which sufficient information has been submitted to the Panel are like products within the meaning of Article III:4 of the GATT 1994.
- (c) With respect to the products found to be like, the Panel concludes that the Decree violates Article III:4 of the GATT 1994.
- (d) However, ... the Decree, insofar as it introduces a treatment of these products that is discriminatory under Article III:4, is justified as such and in its implementation by the provisions of paragraph (b) and the introductory clause of Article XX of the GATT 1994.
- (e) Finally, ... Canada has not established that it suffered non-violation nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994.⁵

5. Having found that the Decree is subject to, and inconsistent with, the obligations set forth in Article III:4 of the GATT 1994, the Panel did not deem it necessary to examine the claims of Canada under Article XI of the GATT 1994.⁶

⁴ Panel Report, paras. 1.1 and 1.2. In its request for the establishment of a panel (WT/DS/135/3, 9 October 1998), Canada also claimed that the Decree is inconsistent with the obligations of the European Communities under Articles 2 and 5 of the Agreement on the Application of Sanitary and Phytosanitary Measures (the "SPS Agreement"). However, Canada did not pursue this claim in its written or oral arguments before the Panel.

⁵ Panel Report, para. 9.1.

⁶ *Ibid.*, para. 8.159.

6. On 23 October 2000, Canada notified the Dispute Settlement Body (the "DSB") of its decision to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel, pursuant to Article 16.4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the "DSU"), and filed a Notice of Appeal with the Appellate Body pursuant to Rule 20 of the *Working Procedures for Appellate Review* (the "*Working Procedures*").⁷ On 16 November 2000, Canada filed an appellant's submission.⁸ On 21 November 2000, the European Communities filed an other appellant's submission.⁹ On 1 December 2000, Canada and the European Communities each filed an appellee's submission.¹⁰ On the same day, Brazil and the United States each filed a third participant's submission.¹¹

7. On 21 November 2000, the Appellate Body received a letter from Zimbabwe indicating its interest in attending the oral hearing in this appeal. Zimbabwe participated in the proceedings before the Panel as a third party which had notified its interest to the DSB under Article 10.2 of the DSU, but it did not file a third participant's submission in the appeal. No participant or third participant objected to Zimbabwe's request. On 15 December 2000, the Members of the Division hearing this appeal informed Zimbabwe, the participants and third participants, that Zimbabwe would be allowed to attend the oral hearing as a passive observer.

8. On 20 December 2000, the Appellate Body informed the DSB that, due to the exceptional workload of the Appellate Body, and in light of the agreement of the participants, Canada and the European Communities, the Appellate Body Report in this appeal would be circulated to WTO Members no later than Monday, 12 March 2001.¹²

9. The oral hearing in the appeal was held on 17 and 18 January 2001.¹³ The participants and the third participants presented oral arguments and responded to questions put to them by Members of the Division hearing the appeal.

II. ARGUMENTS OF THE PARTICIPANTS AND THE THIRD PARTICIPANTS

A. *Claims of Error by Canada - Appellant*

1. *TBT Agreement*

10. Canada requests that the Appellate Body reverse the Panel's findings and conclusions on the definition of the term "technical regulation", hold that the Decree as a whole falls within the scope of the *TBT Agreement*, and find that the Decree is inconsistent with paragraphs 1, 2, 4 and 8 of Article 2 of the *TBT Agreement*.

⁷ WT/DS135/8, 23 October 2000.

⁸ Pursuant to Rule 21(1) of the Working Procedures.

⁹ Pursuant to Rule 23(1) of the Working Procedures.

¹⁰ Pursuant to Rules 22 and 23(3) of the Working Procedures.

¹¹ Pursuant to Rule 24 of the Working Procedures.

¹² WT/DS135/10, 20 December 2000.

¹³ Pursuant to Rule 27 of the Working Procedures.

11. Canada asserts that the Panel erred in law in failing to examine Canada's allegations under the *TBT Agreement*. The Panel wrongly split the Decree into two and considered the prohibitions and exceptions in the Decree to be separate measures for the purposes of determining whether the Decree is a technical regulation within the meaning of the *TBT Agreement*. Canada believes that the Panel's analysis is arbitrary, contrary to the internal coherence of the Decree, and allows the applicability of the *TBT Agreement* to be determined by the way in which a Member drafts its legislation.

12. Canada argues that the Panel also erred in its interpretation of the definition of "technical regulation" in Annex 1 to the *TBT Agreement*, in particular, in articulating two criteria that must be satisfied before a measure can be a "technical regulation": (i) the measure must concern identifiable products; and (ii) the measure must identify the technical characteristics that products must have to be marketed in the territory of the Member taking the measure. This interpretation adds requirements to the definition of "technical regulation" that have no basis in the text of the *TBT Agreement*, and are inconsistent with the object and purpose of that Agreement, namely to restrain non-tariff barriers to trade that may be disguised as technical regulations. In addition, with respect to the first criterion, requiring a measure to relate to identifiable products to constitute a technical regulation could lead to arbitrary results in practice. As for the second criterion, Canada alleges that it is too narrow and would exclude from characterization as "technical regulations", and thereby insulate from the disciplines of the *TBT Agreement*, measures regulating activities other than the marketing of products, such as measures relating to transportation of products, disposal of hazardous waste, and use of special equipment to repair certain products.

13. Canada challenges the Panel's conclusion that the *TBT Agreement* does not apply to a general prohibition like the one in the Decree. The Panel relied on a false distinction between general prohibitions, which it considered fall exclusively under the GATT 1994, and technical regulations, which are subject to the disciplines of the *TBT Agreement*. In fact, a technical regulation can have the effect on trade of a general prohibition.

14. Canada maintains that, had the Panel viewed the Decree as a unified measure, and correctly interpreted the term "technical regulation", the Panel would have concluded that the Decree is a technical regulation within the meaning of the *TBT Agreement*. However, even if the general prohibition contained in the Decree were not characterized as a technical regulation, the Panel nevertheless erred in failing to examine Canada's claims under the *TBT Agreement*, given that the Panel also found that the *TBT Agreement* applies to the part of the Decree concerning exceptions, and that Canada's claims related to the Decree as a whole. Canada therefore requests the Appellate Body to reverse the Panel's conclusions on the applicability of the *TBT Agreement* to the Decree, and to assess the compatibility of the Decree with that Agreement. Canada argues that, as in *United States - Import Prohibition of Certain Shrimp and Shrimp Products* ("*United States - Shrimp*"), "the

facts on the record of the panel proceedings" allow the Appellate Body "to undertake the completion of the analysis required to resolve this dispute."¹⁴

15. Canada argues that the Decree is inconsistent with Article 2.1 of the *TBT Agreement*. Since the principle of national treatment in Article 2.1 is a specific, particular expression of Article III:4 of the GATT 1994, the interpretation of the words "like products" in Article 2.1 must be identical to the interpretation of the same words in Article III:4. The meaning of "like products" in Article III:4 is relevant context and, in the view of Canada, both Article III:4 of the GATT 1994 and Article 2.1 of the *TBT Agreement* have the same object and purpose, namely to avoid protectionism and to provide equality of competitive conditions for imported products in relation to domestic products. Thus, Canada maintains, the findings of "likeness", and of less favourable treatment, made by the Panel pursuant to Article III:4 of the GATT 1994 must be extended to Article 2.1 of the *TBT Agreement*.

16. In Canada's view, the Decree is inconsistent with Article 2.2 of the *TBT Agreement*. Canada insists, first, that there is no rational connection between the Decree and France's objective of protecting human health since: (i) it is friable materials containing amphiboles which pose a risk to human health; (ii) the manipulation of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres does not pose a danger to human health; and (iii) the Decree exposes the French public to substitute fibres, the health risks of which are still poorly understood. Canada adds, second, that the Decree has effects that are more trade-restrictive than necessary to achieve its objective, in particular, because: (i) the manipulation of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres does not create a risk to human health; and (ii) there is a less trade-restrictive alternative that protects human health, namely the "controlled use" of chrysotile-cement products and other high-density products containing chrysotile asbestos fibres. What must be demonstrated under Article 2.2 of the *TBT Agreement* is the same as what must be demonstrated under Article XX(b) of the GATT 1994. In this regard, according to Canada, the reports of the panel and the Appellate Body in *United States – Standards for Reformulated and Conventional Gasoline* ("*United States - Gasoline*") establish that a less trade-restrictive alternative can only be ruled out if it is shown to be impossible to implement.¹⁵ However, France did not demonstrate, and the Panel did not find, that it is impossible to implement "controlled use". Furthermore, Canada contends, it would be less trade-restrictive to ban products containing chrysotile asbestos fibres on the basis of a product-by-product demonstration of the ineffectiveness and unfeasibility of "controlled use", rather than on the basis of the existence of substitute products.

17. Canada also argues that the Decree is inconsistent with Article 2.4 of the *TBT Agreement*, because there are relevant international standards on the "controlled use" of chrysotile, which constitute an effective and appropriate means to achieve France's objective of protecting human health. In any event, the French government

¹⁴ Appellate Body Report, WT/DS58/AB/R, adopted 6 November 1998, DSR 1998:VII, 2755, para. 124.

¹⁵ Panel Report, WT/DS2/R, adopted 20 May 1996, as modified by the Appellate Body Report, WT/DS2/AB/R, DSR 1996:I, 29.

acted inconsistently with Article 2.4 because it did not use international standards as a basis for the Decree. Lastly, Canada considers that the Decree is inconsistent with Article 2.8 of the *TBT Agreement* because it institutes a prohibition based on the descriptive characteristics of products, rather than on requirements in terms of performance.

2. *Article XX(b) of the GATT 1994 and Article 11 of the DSU*

18. Canada requests that the Appellate Body reverse the Panel's findings and conclusions under Article XX(b) of the GATT 1994 and find that the Decree is not justified under that provision. Canada also asks the Appellate Body to find that the Panel did not make an "objective assessment of the matter", as required under Article 11 of the DSU, because it failed to assess the scientific data in accordance with the principle of the balance of probabilities, and failed to assess the facts objectively.

19. Canada argues that the Panel erred in finding that there is a risk to human health associated with the manipulation of chrysotile-cement products. Canada identifies seven factors it claims the Panel mistakenly relied on in reaching this conclusion: (i) a statement by Dr. Henderson that "building workers now count among those most exposed to chrysotile fibres and hence to the risk of mesothelioma"¹⁶; (ii) an "anecdotal" statement by Dr. Henderson concerning "cases of mesothelioma in patients who had been only incidentally exposed, without any relation to their occupational activity"¹⁷; (iii) the opinion of experts that it has not been established that there is a threshold below which exposure does not constitute a risk for mesothelioma or lung cancer; (iv) the "Charleston study"¹⁸; (v) "statistical data" adduced by Dr. Henderson, which, according to the Panel, confirmed "the impact of chrysotile on mechanics exposed to that material in a car brake maintenance context" despite a contrary study on automobile brake maintenance relied on by Canada¹⁹; (vi) the use of the no-threshold linear relationship model as a basis for concluding that there is a "real risk" and "an undeniable public health risk" associated with exposure to chrysotile asbestos fibres at low or intermittent levels²⁰; and (vii) data supplied by the European Communities concerning intermittent manipulation and a reference by Dr. Henderson to a Japanese study as a basis for concluding that the manipulation of chrysotile-cement using inappropriate tools could cause exposure levels above statutory limits.²¹ Canada sets forth detailed explanations as to why none of these factors supports the Panel's conclusion.

20. Canada also contends that the Panel erred in its application of the test of "necessity" under Article XX(b) of the GATT 1994. Canada accepts the Panel's view that the extent of the risk to human health is relevant to the assessment of "necessity". However, Canada disputes that there is any risk involved in the manipulation of such products, highlights that the evidence relied on by the Panel certainly could not

¹⁶ Panel Report, para. 8.191.

¹⁷ *Ibid.*, para. 8.191 and footnote 147.

¹⁸ Panel Report, paras. 8.192 and 8.193.

¹⁹ *Ibid.*, para. 8.192 and footnote 154.

²⁰ *Ibid.*, paras. 8.202 and 8.203.

²¹ *Ibid.*, para. 8.191.

form the basis for a finding that the health risk was so high that it could justify strict measures, and argues that the Panel failed to comply with its obligation to quantify this type of risk. In Canada's view, these errors distorted the Panel's analysis of the test of necessity and led it to take a much too restrictive approach to its consideration of reasonably available alternatives to the Decree.

21. Canada asserts that, in its examination of whether less restrictive international trade alternatives can achieve the level of protection inherent in the Decree, the Panel erred in accepting that such level of protection is a halt to the spread of the risk associated with chrysotile asbestos fibres. This premise does not take account of the risk associated with the use of substitute fibres, of the absence in France of any regulatory framework for "controlled use" of such fibres, or of the false sense of security created among the French public due to the absence of such a framework. The Panel also erred in law in finding that there was no reasonably available alternative to the Decree that is consistent or less inconsistent with the GATT 1994. In this regard, Canada makes the same arguments that it made above with respect to Article 2.2 of the *TBT Agreement*, and emphasizes that the Panel was overly strict in its examination of the alternatives, considering that France could have adopted a measure establishing bans on specific products containing chrysotile asbestos fibres, based on demonstrations of the ineffectiveness and unfeasibility of the "controlled use" of each product.

22. Canada submits that the Panel failed to discharge its responsibility to make an objective assessment of the matter when it declined to take a position on the opinions expressed by the scientific community. For Canada, the principle of the balance of probabilities, or the preponderance of evidence, requires the trier of fact to take a position as to the respective weight of the evidence. Had the Panel properly applied this principle, it would not have been able to conclude that the Decree was justified under Article XX(b) of the GATT 1994, in view of the multiple studies submitted by Canada showing, for example, that there is no increased risk among garage and brake mechanics, or among construction workers, resulting from the manipulation of chrysotile asbestos. Canada adds that the Panel also failed to make an objective assessment of the matter before it because, in its determinations on the "controlled use" of chrysotile, it relied extensively on the opinions of the experts consulted, who in fact did not possess expertise in the area of "controlled use".

B. Arguments of the European Communities - Appellee

1. TBT Agreement

23. The European Communities urges the Appellate Body to reject Canada's appeal on the *TBT Agreement*. The Panel correctly concluded that the "prohibition part" of the Decree is not a technical regulation within the meaning of Annex 1.1 to the *TBT Agreement*. Canada's arguments with respect to the "exceptions part" of the Decree are legally irrelevant, since it would be impossible for the Appellate Body to complete the legal analysis due to the lack of sufficient and undisputed facts. The European Communities adds that the claims made by Canada under the *TBT Agreement* should, in any event, be denied.

24. The European Communities sees no error in the Panel's separation of the prohibitions part of the Decree from the exceptions part. The exceptions are ancillary to the prohibitions, and separating the two parts for the purpose of their legal charac-

terization under the *TBT Agreement* in no way affects the internal coherence of the Decree. In this case, the issue before the Panel was whether the prohibitions laid down in the Decree constitute a technical regulation, *not* whether, in the abstract, a general ban may be a technical regulation. The European Communities also considers that the Panel correctly interpreted the term "technical regulation", and that the interpretation suggested by Canada would deprive other GATT 1994 provisions, such as Article XI, of effect.

25. The European Communities agrees with the Panel's treatment of the exceptions part of the Decree, and insists that, having made no specific violation claim regarding the narrowness of the exceptions throughout these proceedings, Canada cannot now argue that the exceptions violate the *TBT Agreement*. The European Communities argues that the Appellate Body is in any case prevented from addressing Canada's claims under the *TBT Agreement* because to do so would require the Appellate Body to make findings of a factual and technical nature which, in the absence of undisputed facts and findings in the record, it cannot do on appeal. The Appellate Body could not simply use the findings of the Panel under Articles III:4 and XX of the GATT 1994 as a basis for an analysis under the *TBT Agreement*. While the two sets of rules are related, they are not "part of a logical continuum"²², and are not sufficiently closely related as to allow the Appellate Body to extrapolate the findings of the Panel under Article III:4 and Article XX(b) of the GATT 1994 into the sphere of the *TBT Agreement*. Should the Appellate Body examine Canada's claims under the *TBT Agreement*, the European Communities argues that these claims should be dismissed and refers, in this regard, to its arguments with respect to Article XX(b) of the GATT 1994, and to the arguments it made before the Panel with regard to Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*.

2. *Article XX(b) of the GATT 1994 and Article 11 of the DSU*

26. The European Communities submits that the Panel's finding that the violation of Article III:4 is justified under Article XX(b) of the GATT 1994 is legally sound and correct. Canada's arguments on this issue amount to a request that the Appellate Body make new factual and scientific findings on appeal, contrary to the limits on the scope of appellate review set out in Article 17.6 of the DSU.

27. The European Communities believes that the Panel concluded that the ban on asbestos was "necessary" based on a series of objective and verifiable findings, made after a detailed and careful evaluation of the factual and scientific evidence presented. In assessing whether the ban was "necessary", the Panel was not obliged to undertake a "quantitative" assessment of the identified risk. Neither the ordinary meaning of the terms "necessary to protect" in Article XX(b) nor the concept of risk assessment mandate such an approach. An assessment of risk may be made either in quantitative or qualitative terms. The European Communities adds that the Panel correctly found that, after the European Communities had established a *prima facie* case for the existence of a health risk in connection with the use of chrysotile, Canada bore the burden of refuting that case by showing the absence of such a health risk.

²² European Communities' appellee's submission, para. 43.

28. On the issue of whether another measure was reasonably available, the European Communities submits that Canada cannot, on appeal, make arguments based on the health risks associated with the substitute products for asbestos, or on the safety of the "controlled use" of asbestos, as both arguments seek to have the Appellate Body revisit factual findings made by the Panel on the basis of the evidence submitted and the opinions advanced by the experts consulted.

29. With respect to the alleged inconsistency with Article 11 of the DSU, the European Communities considers that Canada's claim that the Panel committed a fundamental error in its appreciation of the facts seems to be based solely on the fact that the Panel based itself exclusively on the opinions of the experts consulted in this case. In this regard, the European Communities emphasizes that Canada did not object to the selection of the experts by the Panel, that Canada proposed one of those experts itself, and that the experts themselves answered a question on "controlled use" rather than professing a lack of expertise on the issue. As for Canada's argument that the Panel erred in law in failing to evaluate the scientific evidence in accordance with the principle of preponderance of the evidence, the Panel's approach does not seem inconsistent with such a principle and, in any case, the principle of preponderance of the evidence is inapposite in the context of risk assessment since such an approach would preclude Members from basing their regulatory decisions on diverging scientific opinions. The European Communities refuses to accept that the evidence relied on by the Panel - representing the unanimous views of the four experts consulted and of all international institutions that have evaluated asbestos - reflects, as Canada seems to suggest, a divergent, minority scientific point of view on asbestos.

C. Claims of Error by the European Communities - Appellant

1. "Like Products" in Article III:4 of the GATT 1994

30. The European Communities requests the Appellate Body to reverse the Panel's findings that chrysotile asbestos fibres are "like" polyvinyl alcohol ("PVA"), cellulose and glass fibres, and that chrysotile-cement products are "like" fibro-cement products, as well as the Panel's consequent finding that, with respect to the products found to be "like", the Decree violates Article III:4 of the GATT 1994.

31. The Panel's interpretation of the term "like products" in Article III:4, is of serious concern to the European Communities; is contrary to the ordinary meaning of Article III:4, read in context and in light of its object and purpose; and is inconsistent with established case law. As the Appellate Body has previously found, the first paragraph of Article III defines the object and purpose of the whole of Article III, namely, to provide equality of competitive conditions for imported products in relation to domestic products. In the view of the European Communities, the Panel, however, erroneously analyzed the term "like products" in light of the objective of ensuring market access for products, and, in so doing, adopted an exclusively commercial approach to the comparison of "like" products and erroneously expanded the scope of application of Article III:4.

32. The European Communities submits that this erroneous focus on market access led the Panel to exclude from its "like" product analysis the very reason why the Decree singles out asbestos fibres, namely, the fact that asbestos fibres are carcinogenic. While Article III:4 protects expectations concerning the competitive relation-

ship between imported and domestic products, the impact of a measure on such expectations is not relevant in determining "likeness", but only later in the Article III:4 analysis, for the purposes of establishing whether the measure discriminates between imported and domestic products. For the European Communities, the decisive criterion for determining the "likeness" of products must be whether the basis for the regulatory distinction between products denies to imported products the treatment accorded to domestic products that are the subject of the relevant measure.

33. The European Communities contends that, because the Panel ignored the basis for the regulatory treatment set forth in the Decree, it compared the wrong products in its analysis of "likeness". The Decree prohibits *all carcinogenic asbestos fibres*, and it denies competitive opportunities to all such fibres equally. Thus, the prohibited carcinogenic asbestos fibres are not "like" the three substitute fibres because the application of the French regulatory distinction between them does not alter or affect the competitive opportunities of those substitute fibres. The European Communities concludes that, instead of comparing the products claimed by Canada to be "like" products (PVA, cellulose and glass fibres) with the category of products prohibited by the French Decree at issue (all carcinogenic asbestos fibres), the Panel erroneously compared the allegedly "like" products with an arbitrary third category of products, namely "fibres with certain industrial applications".²³

34. The European Communities challenges the Panel's conclusion that, in view of the relationship between Articles III and XX(b) of the GATT 1994, it is not appropriate to take the "risk" criterion into account either when examining the properties, nature and quality of the product, or when examining other criteria of "likeness".²⁴ The Panel found that the health, safety or other concerns that lead regulators to apply different treatment to products may *only* be taken into account in the analysis under Article XX, *not* in the analysis under Article III:4 of the GATT 1994. The Panel's approach misconstrues the relationship between Articles III:4 and XX of the GATT 1994, requires the "likeness" of two products to be determined solely on the basis of commercial factors and, in the view of the European Communities, entails a serious curtailment of national regulatory autonomy. If non-commercial considerations may only be considered at the Article XX stage of the analysis, then the list of policy purposes for which regulators may distinguish between products is unduly limited to the categories listed in Article XX. The application of a "risk" criterion in the analysis of "likeness" under Article III would not, as the Panel suggests, make the other criteria of "likeness" "totally redundant"²⁵, since all relevant criteria, including the "risk" criterion, must be considered in the assessment of "likeness".

35. The European Communities contends that the Panel committed a number of errors in its application of the four criteria used to assess "likeness", and placed excessive importance on the criterion of end-use. The Panel failed to follow the approach used in previous case law, and ignored the fact that Article III:4 of the GATT 1994, unlike Article III:2 and its accompanying Interpretive Note, does not contain the phrase "directly competitive or substitutable" products. The Panel's analysis of

²³ European Communities' other appellant's submission, para. 29.

²⁴ Panel Report, para. 8.132.

²⁵ Panel Report, para. 8.131.

"end-use" is inadequately reasoned, in particular since the Panel failed to identify the small number of identical or similar end-uses for chrysotile asbestos, PVA, cellulose and glass fibres and ignored that, overall, the end-uses for asbestos and its substitutes are very different. The European Communities adds that the Panel relied on its conclusions on end-use in its analysis of the properties, nature and quality of the products, as well as their tariff classification, and, in effect disregarded these other criteria.

2. Article XXIII:1(b) of the GATT 1994

36. The European Communities appeals the Panel's findings on Article XXIII:1(b) of the GATT 1994 in paragraphs 8.262, 8.264, 8.273 and 8.274 of the Panel Report, but not the Panel's conclusion that Canada did not establish nullification or impairment of a benefit within the meaning of Article XXIII:1(b). The Panel's reasoning is inconsistent with the proper interpretation of the GATT 1994, past practice, and relevant case law. Historically, the non-violation remedy was conceived as a legal instrument designed to prevent the circumvention of tariff concessions. Only three non-violation complaints have succeeded. All previous non-violation complaints have related to measures imposed for commercial purposes, and all such complaints would today most likely be resolved as violation complaints under the expanded WTO competence, reflected in the covered agreements. The European Communities urges the Appellate Body to accept that the concept of non-violation nullification and impairment is an exceptional one, as WTO Members have recognized, and should be applied with utmost circumspection.

37. The European Communities challenges, in particular, the Panel's conclusion that "Article XXIII:1(b) applies to a measure whether it is consistent with the GATT because the GATT does not apply to it or is justified by Article XX."²⁶ In so finding, the Panel wrongly implied that Article XXIII:1(b) of the GATT 1994 protects the expectation that, once a tariff concession has been made for a product, the regulatory framework applicable to that product will not be adapted in response to new scientific knowledge concerning health risks. In the view of the European Communities, the Panel's interpretation wrongly expanded the coverage of Article XXIII:1(b) in a manner that has grave systemic implications.

38. The European Communities urges the Appellate Body to reject, as a matter of legal principle, the possibility of finding nullification or impairment under Article XXIII:1(b) with respect to health and safety regulations, or with respect to measures that fall under any of the other grounds listed in Article XX, or under provisions such as Articles XIX and XXI of the GATT 1994. Article XXIII:1(b) cannot apply in cases involving health measures, since the legitimacy of an exporting Member's expectation that the health measure will not be taken cannot be assessed without examining the health measure itself and the balance of interests underlying that law. The participants in the Uruguay Round knew that the value of the concessions negotiated in that Round could be adversely affected by measures taken to protect, *inter alia*, human, animal or plant life or health, or a national security interest. Therefore, the European Communities concludes, if a Member takes a measure that is consistent

²⁶ *Ibid.*, para. 8.264.

with the GATT 1994, it does not disturb the balance of rights and obligations under the GATT 1994, and no redress is available under Article XXIII:1(b).

D. Arguments of Canada - Appellee

1. "Like Products" in Article III:4 of the GATT 1994

39. Canada requests the Appellate Body to dismiss the European Communities' appeal relating to Article III:4 of the GATT 1994. Canada is of the view that the Panel correctly separated the analysis of "likeness" from the issue of whether the competitive opportunities afforded to imports on the domestic market have been upset. In its appeal, the European Communities confounds these two distinct questions and attaches undue significance to the Panel's statement regarding the importance of "market access" under Article III:4 of the GATT 1994.

40. Canada considers that the Panel properly applied the criteria set out in the case law for determining whether products are "like". The European Communities appears to confuse the concept of "likeness" under Article III:4 of the GATT 1994 with "likeness" under Article III:2. "Likeness", however, under Article III:4 is different from, and broader than, "likeness" under the first sentence of Article III:2, and the Panel's approach properly reflects this distinction. In assessing the "likeness" of the fibres, the Panel recognized that the criteria of "properties" and "end-use" are interdependent, and analyzed them accordingly. Canada does not accept that the Panel created a hierarchy among the traditional "likeness" criteria, but, even so, this would not be an error of law, since "likeness" must be approached on a case-by-case basis, and it is within a panel's discretion to establish a hierarchy among the criteria in any given case. Finally, Canada notes, the appeal of the European Communities focuses on the Panel's conclusion that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and the criticisms that the European Communities makes of this conclusion cannot be extended to the Panel's separate conclusion that chrysotile-cement products are "like" fibro-cement products.

41. Canada submits that the Panel correctly decided that the "dangerousness" of a product is not a factor to be considered in determining "likeness" and that to introduce a criterion of this nature into the analysis of "likeness" would nullify the effect of Article XX(b) of the GATT 1994. The object and purpose of Article III of the GATT 1994 is to provide equality of competitive conditions for imported and domestic products, and the four traditional criteria of "likeness" all relate to the state of *commercial* competition between such products. The "dangerousness" of products is unrelated to such commercial competition. Furthermore, to introduce such factors into the analysis of "likeness" under Article III:4 would lead to unpredictability as to the scope of that provision, and imply that determining the "likeness" of products requires complex scientific analysis for which panels have no special expertise. Canada adds that even if the "dangerousness" of a product were relevant to the determination of "likeness", it would not necessarily follow that chrysotile asbestos fibres are not "like" the substitute fibres. Since Article XX of the GATT 1994 was specially designed to balance the interest of promoting international trade with legitimate societal interests, it is a more appropriate framework than Article III for taking account of these types of considerations. Canada also stresses that, contrary to the argument of the European Communities, such an approach does not lead to a curtailment of

national regulatory autonomy, because the list in Article XX covers a broad range of interests on the basis of which a Member may justify a measure.

42. Canada also submits that, in its appeal, the European Communities errs in asserting that the examination of "likeness" must be done on the basis of the regulatory distinction in question, and in claiming that the Panel should only have compared chrysotile asbestos fibres with carcinogenic fibres, rather than with other fibres that serve similar industrial uses. Such an approach is inconsistent with the proper interpretation of Article III:4. In seeking to focus the analysis on the reason for any given regulatory distinction, the European Communities would allow national regulatory authorities to predetermine the scope of Article III:4 through the distinctions they choose to make. Such an approach is also inconsistent with the object and purpose of Article III:4, which aims to discipline measures that have trade-restrictive effects, even when those measures are not aimed at restricting trade. Finally, in Canada's view, the Panel correctly compared chrysotile asbestos fibres with the fibres with which they compete in certain industrial applications, since such a comparison is consistent with the aim of providing equality of competitive conditions, and since the Decree itself makes no reference to carcinogenic fibres.

2. *Article XXIII:1(b) of the GATT 1994*

43. Canada requests the Appellate Body to reject the European Communities' appeal with respect to Article XXIII:1(b) of the GATT 1994. Canada suggests, first, that the Appellate Body should apply the principle of judicial economy and refrain from ruling on these grounds of appeal. Canada argues that a ruling by the Appellate Body in respect of Article XXIII:1(b) of the GATT 1994 would not further the objective of dispute settlement, as set forth in Article 3.7 of the DSU, namely to secure a positive solution to a dispute. There is no dispute concerning Article XXIII:1(b) because neither party has appealed the Panel's conclusions on this issue. Canada also refers to Article 3.2 of the DSU and cautions the Appellate Body against "making law" by clarifying provisions of the *WTO Agreement* outside the context of resolving a particular dispute.²⁷

44. Should the Appellate Body address the interpretation of Article XXIII:1(b) of the GATT 1994, Canada invites it to affirm the Panel's reasoning, in particular the Panel's recognition that there may be particularly exceptional cases in which a measure justified under Article XX(b) would nonetheless nullify or impair benefits within the meaning of Article XXIII:1(b). Article XX(b) and XXIII:1(b) may be applied simultaneously, since Article 26.1 of the DSU does not require the withdrawal of a measure that nullifies or impairs benefits within the meaning of Article XXIII:1(b). As regards the concept of legitimate expectations, Canada rejects as artificial, and without any textual basis, the distinction that the European Communities seeks to draw between pure trade measures and measures linked to the protection of health.

²⁷ Appellate Body Report, United States - Measure Affecting Imports of Woven Wool Shirts and Blouses from India, WT/DS33/AB/R, adopted 23 May 1997, DSR 1997:I, 323, at 340.

E. Arguments of the Third Participants

1. Brazil

(a) TBT Agreement

45. Brazil believes that the Panel erred in its findings regarding the scope of the *TBT Agreement*. Brazil argues that the Panel erred in dividing the Decree into two separate parts in determining whether the *TBT Agreement* applies to the Decree. This division was arbitrary and inconsistent with the logic and objectives of the Decree, which deals with the same products in both the prohibition and the exception parts. Furthermore, Brazil is particularly concerned by the findings of the Panel in paragraphs 8.38, 8.39, 8.43, 8.49, 8.57, 8.60, 8.61 and 8.71 of the Panel Report, and by the serious systemic implications of the finding that a general prohibition does not constitute a technical regulation within the meaning of Annex 1.1 of the *TBT Agreement*. Contrary to the Panel's interpretation, nothing in the *TBT Agreement* specifies that a product must be "identifiable", or that a measure must relate to one, or more than one product, in order to be a technical regulation. Such a narrow interpretation unduly excludes from the scope of the *TBT Agreement* a wide range of measures affecting products that could potentially represent barriers to trade. Brazil also contests the Panel's finding that a technical regulation must include specifications to be met in order for a product to be authorized for *marketing*. Brazil adds that, in its view, both France and the European Communities conceded, when they notified the Decree under the *TBT Agreement*, that the measure is a technical regulation.

2. United States

(a) TBT Agreement

46. The United States argues that the Panel erred in its interpretation of the phrase "technical regulation" in Annex 1 to the *TBT Agreement*, and, in consequence, improperly excluded from the scope of the *TBT Agreement* technical regulations that apply generally to products. Specifically, the United States contends that the Panel erred in finding that the phrase "product characteristics" in the definition of "technical regulation" refers to characteristics of "one or more given products", rather than characteristics of products generally.

47. Should the Appellate Body find that the *TBT Agreement* applies to the Decree and decide to complete the analysis of Canada's claims under that Agreement, the United States submits that the Appellate Body should find that the Decree is consistent with the *TBT Agreement*. Asbestos and asbestos-containing products, on the one hand, and substitute fibres and asbestos-free products, on the other, are not "like products" within the meaning of Article 2.1 of the *TBT Agreement* for the same reasons that they are not "like products" for the purposes of Article III:4 of the GATT 1994. The test to be applied under Article 2.2 of the *TBT Agreement* is very similar to the test to be applied under Article XX(b) and the introductory clause to Article XX. However, unlike Article XX of the GATT 1994, where the burden was on the European Communities to present a *prima facie* case that the Decree was justified, under Article 2.2 of the *TBT Agreement*, it is for Canada to make a *prima facie* case that the Decree creates an unnecessary barrier to trade, and it has

not done so. The Decree is also consistent with Article 2.4 of the *TBT Agreement*, since the international standards identified by Canada are neither relevant to, nor an effective or appropriate means of achieving, France's public health objective. Lastly, the United States argues that the Decree is consistent with Article 2.8 of the *TBT Agreement*, since it would be inappropriate to express the technical regulation in any way other than as a prohibition on the use of asbestos.

(b) "Like Products" in Article III:4 of the GATT 1994

48. The United States submits that the Panel erred in concluding that asbestos fibres and substitute fibres are "like products" under Article III:4 of the GATT 1994. The Panel erred in law in concluding that, in examining the properties, nature and quality of asbestos, it could not take into account the fact that asbestos differs from other fibres because it splits longitudinally into narrow, or thin, fibres, and has a high potential to release particles that possess certain characteristics, and in concluding that, in examining consumer tastes and habits, it could not take account of the proven carcinogenic nature of asbestos. In so proceeding, the Panel ignored the single most important distinguishing feature between asbestos and its substitutes. The Panel also wrongly inflated the significance of another factor - the end uses of products concerned. In the view of the United States, the application of a proper "like product" analysis should lead the Appellate Body to find that asbestos is not "like" its substitute fibres, and that asbestos-containing products are not "like" asbestos-free products and, therefore, conclude that the Decree does not violate Article III:4 of the GATT 1994.

(c) Article XX(b) of the GATT 1994 and Article 11 of the DSU

49. Should the Appellate Body resort to Article XX(b) of the GATT 1994, the United States urges the Appellate Body to find that the Decree is permissible under Article XX(b). Canada's appeal on this issue is based on criticism of the Panel's findings with respect to the scientific information before it, and that Canada erroneously asserts that Article 11 of the DSU requires the Panel to decide which scientific view is the correct one. However, the role of a panel, under Article 11 of the DSU, is to make an objective assessment of the facts before it, and to evaluate whether there is a rational or objective relationship between the measure at issue and the scientific basis asserted for the measure. The United States argues that the Panel acted consistently with this mandate in finding that the Decree is necessary to protect human health, and the Appellate Body should not disturb this finding.

III. PRELIMINARY PROCEDURAL MATTER

50. On 27 October 2000, we wrote to the parties and the third parties indicating that we were mindful that, in the proceedings before the Panel in this case, the Panel received five written submissions from non-governmental organizations, two of which the Panel decided to take into account.²⁸ In our letter, we recognized the pos-

²⁸ Panel Report, paras. 6.1-6.4 and 8.12-8.14.

sibility that we might receive submissions in this appeal from persons other than the parties and the third parties to this dispute, and stated that we were of the view that the fair and orderly conduct of this appeal could be facilitated by the adoption of appropriate procedures, for the purposes of this appeal only, pursuant to Rule 16(1) of the *Working Procedures*, to deal with any possible submissions received from such persons. To this end, we invited the parties and the third parties in this appeal to submit their comments on a number of questions. These related to: whether we should adopt a "request for leave" procedure; what procedures would be needed to ensure that the parties and third parties would have a full and adequate opportunity to respond to submissions that might be received; and whether we should take any other points into consideration if we decided to adopt a "request for leave" procedure. On 3 November 2000, all of the parties and third parties responded in writing to our letter of 27 October. Canada, the European Communities and Brazil considered that issues pertaining to any such procedure should be dealt with by the WTO Members themselves. The United States welcomed adoption of a request for leave procedure, and Zimbabwe indicated that it had no specific reasons to oppose adoption of a request for leave procedure. Without prejudice to their positions, Canada, the European Communities and the United States each made a number of suggestions regarding any such procedure that might be adopted.

51. On 7 November 2000, and after consultations among all seven Members of the Appellate Body, we adopted, pursuant to Rule 16(1) of the *Working Procedures*, an additional procedure, *for the purposes of this appeal only*, to deal with written submissions received from persons other than the parties and third parties to this dispute (the "Additional Procedure"). The Additional Procedure was communicated to the parties and third parties in this appeal on 7 November 2000. On 8 November 2000, the Chairman of the Appellate Body informed the Chairman of the Dispute Settlement Body, in writing, of the Additional Procedure adopted, and this letter was circulated, for information, as a dispute settlement document to the Members of the WTO.²⁹ In that communication, the Chairman of the Appellate Body stated that:

... This additional procedure has been adopted by the Division hearing this appeal for the purposes of this appeal only pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and is *not* a new working procedure drawn up by the Appellate Body pursuant to paragraph 9 of Article 17 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*. (original emphasis)

The Additional Procedure was posted on the WTO website on 8 November 2000.

52. The Additional Procedure provided:

1. In the interests of fairness and orderly procedure in the conduct of this appeal, the Division hearing this appeal has decided to adopt, pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*, and after consultations with the parties and third parties to this dispute, the following additional procedure for purposes of this appeal only.

²⁹ WT/DS135/9, 8 November 2000.

2. Any person, whether natural or legal, other than a party or a third party to this dispute, wishing to file a written brief with the Appellate Body, must apply for leave to file such a brief from the Appellate Body *by noon on Thursday, 16 November 2000.*
3. An application for leave to file such a written brief shall:
 - (a) be made in writing, be dated and signed by the applicant, and include the address and other contact details of the applicant;
 - (b) be in no case longer than three typed pages;
 - (c) contain a description of the applicant, including a statement of the membership and legal status of the applicant, the general objectives pursued by the applicant, the nature of the activities of the applicant, and the sources of financing of the applicant;
 - (d) specify the nature of the interest the applicant has in this appeal;
 - (e) identify the specific issues of law covered in the Panel Report and legal interpretations developed by the Panel that are the subject of this appeal, as set forth in the Notice of Appeal (WT/DS135/8) dated 23 October 2000, which the applicant intends to address in its written brief;
 - (f) state why it would be desirable, in the interests of achieving a satisfactory settlement of the matter at issue, in accordance with the rights and obligations of WTO Members under the DSU and the other covered agreements, for the Appellate Body to grant the applicant leave to file a written brief in this appeal; and indicate, in particular, in what way the applicant will make a contribution to the resolution of this dispute that is not likely to be repetitive of what has been already submitted by a party or third party to this dispute; and
 - (g) contain a statement disclosing whether the applicant has any relationship, direct or indirect, with any party or any third party to this dispute, as well as whether it has, or will, receive any assistance, financial or otherwise, from a party or a third party to this dispute in the preparation of its application for leave or its written brief.
4. The Appellate Body will review and consider each application for leave to file a written brief and will, without delay, render a decision whether to grant or deny such leave.
5. The grant of leave to file a brief by the Appellate Body does not imply that the Appellate Body will address, in its Report, the legal arguments made in such a brief.

6. Any person, other than a party or a third party to this dispute, granted leave to file a written brief with the Appellate Body, must file its brief with the Appellate Body Secretariat *by noon on Monday, 27 November 2000*.

7. A written brief filed with the Appellate Body by an applicant granted leave to file such a brief shall:

- (a) be dated and signed by the person filing the brief;
- (b) be concise and in no case longer than 20 typed pages, including any appendices; and
- (c) set out a precise statement, strictly limited to legal arguments, supporting the applicant's legal position on the issues of law or legal interpretations in the Panel Report with respect to which the applicant has been granted leave to file a written brief.

8. An applicant granted leave shall, in addition to filing its written brief with the Appellate Body Secretariat, also serve a copy of its brief on all the parties and third parties to the dispute *by noon on Monday, 27 November 2000*.

9. The parties and the third parties to this dispute will be given a full and adequate opportunity by the Appellate Body to comment on and respond to any written brief filed with the Appellate Body by an applicant granted leave under this procedure. (original emphasis)

53. The Appellate Body received 13 written submissions from non-governmental organizations relating to this appeal that were not submitted in accordance with the Additional Procedure.³⁰ Several of these were received while we were considering the possible adoption of an additional procedure. After the adoption of the Additional Procedure, each of these 13 submissions was returned to its sender, along with a letter informing the sender of the procedure adopted by the Division hearing this appeal and a copy of the Additional Procedure. Only one of these associations, the Korea Asbestos Association, subsequently submitted a request for leave in accordance with the Additional Procedure.

54. By letter dated 15 November 2000, Canada and the European Communities jointly requested that they be provided with copies of all applications filed pursuant to the Additional Procedure, and of the decision taken by the Appellate Body in respect of each such application. All such documents were subsequently provided to the parties and third parties in this dispute.

³⁰ Such submissions were received from: Asbestos Information Association (United States); HVL Asbestos (Swaziland) Limited (Bulembu Mine); South African Asbestos Producers Advisory Committee (South Africa); J & S Bridle Associates (United Kingdom); Associação das Indústrias de Produtos de Amianto Crisótilo (Portugal); Asbestos Cement Industries Limited (Sri Lanka); The Federation of Thai Industries, Roofing and Accessories Club (Thailand); Korea Asbestos Association (Korea); Senac (Senegal); Syndicat des Métaux (Canada); Duralita de Centroamerica, S.A. de C.V. (El Salvador); Asociación Colombiana de Fibras (Colombia); and Japan Asbestos Association (Japan).

55. Pursuant to the Additional Procedure, the Appellate Body received 17 applications requesting leave to file a written brief in this appeal. Six of these 17 applications were received after the deadline specified in paragraph 2 of the Additional Procedure and, for this reason, leave to file a written brief was denied to these six applicants.³¹ Each such applicant was sent a copy of our decision denying its application for leave because the application was not filed in a timely manner.

56. The Appellate Body received 11 applications for leave to file a written brief in this appeal within the time limits specified in paragraph 2 of the Additional Procedure.³² We carefully reviewed and considered each of these applications in accordance with the Additional Procedure and, in each case, decided to deny leave to file a written brief. Each applicant was sent a copy of our decision denying its application for leave for failure to comply sufficiently with all the requirements set forth in paragraph 3 of the Additional Procedure.

57. We received a written brief from the Foundation for International Environmental Law and Development, on its behalf and on behalf of Ban Asbestos (International and Virtual) Network, Greenpeace International, International Ban Asbestos Secretariat, and World Wide Fund for Nature, International, dated 6 February 2001. As we had already denied, in accordance with the Additional Procedure, an application from these organizations for leave to file a written brief in this appeal³³, we did not accept this brief.

IV. ISSUES RAISED IN THIS APPEAL

58. This appeal raises the following issues:

- (a) whether the Panel erred in its interpretation of the term "technical regulation" in Annex 1.1 of the *TBT Agreement* in finding, in para-

³¹ Applications from the following persons were received by the Division after the deadline specified in the Additional Procedure for receipt of such applications: Association of Personal Injury Lawyers (United Kingdom); All India A.C. Pressure Pipe Manufacturer's Association (India); International Confederation of Free Trade Unions/European Trade Union Confederation (Belgium); Maharashtra Asbestos Cement Pipe Manufacturers' Association (India); Roofit Industries Ltd. (India); and Society for Occupational and Environmental Health (United States).

³² Applications from the following persons were received by the Division within the deadline specified in the Additional Procedure for receipt of such applications: Professor Robert Lloyd Howse (United States); Occupational & Environmental Diseases Association (United Kingdom); American Public Health Association (United States); Centro de Estudios Comunitarios de la Universidad Nacional de Rosario (Argentina); Only Nature Endures (India); Korea Asbestos Association (Korea); International Council on Metals and the Environment and American Chemistry Council (United States); European Chemical Industry Council (Belgium); Australian Centre for Environmental Law at the Australian National University (Australia); Associate Professor Jan McDonald and Mr. Don Anton (Australia); and a joint application from Foundation for Environmental Law and Development (United Kingdom), Center for International Environmental Law (Switzerland), International Ban Asbestos Secretariat (United Kingdom), Ban Asbestos International and Virtual Network (France), Greenpeace International (The Netherlands), World Wide Fund for Nature, International (Switzerland), and Lutheran World Federation (Switzerland).

³³ These organizations, together with the Center for International Environmental Law and the Lutheran World Federation, filed a joint application for leave to file a written brief. We decided to deny leave to these applicants to file a written brief. See *supra*, para. 56 and footnote 32.

- graph 8.72(a) of the Panel Report, that "the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products" does not constitute a "technical regulation";
- (b) whether the Panel erred in its interpretation and application of the term "like products" in Article III:4 of the GATT 1994 in finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres are "like" PVA, cellulose and glass fibres, and in finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing polyvinyl alcohol, cellulose and glass fibres;
 - (c) whether the Panel erred in finding that the measure at issue is "necessary to protect human ... life or health" under Article XX(b) of the GATT 1994, and whether, in carrying out its examination under Article XX(b) of the GATT 1994, the Panel failed to make an objective assessment of the matter under Article 11 of the DSU; and
 - (d) whether the Panel erred in its interpretation of Article XXIII:1(b) of the GATT 1994 in finding that that provision applies to a measure which falls within the scope of application of other provisions of the GATT 1994, and in finding that Article XXIII:1(b) applies to measures which pursue health objectives.

V. TBT AGREEMENT

59. Before the Panel, Canada claimed that the measure at issue is inconsistent with Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. Each of these provisions applies solely to "technical regulations". Thus, a threshold issue in the examination of Canada's claims under the *TBT Agreement* is whether the measure at issue is a "technical regulation".

60. In addressing this threshold issue, the Panel examined the nature and structure of the measure to assess how the *TBT Agreement* might apply to it. For this examination, the Panel decided that it would be appropriate to examine the measure in two stages. First, the Panel examined "the part of the Decree prohibiting the marketing of asbestos and asbestos-containing products"; next, the Panel analyzed the "exceptions" in the Decree.³⁴ The Panel concluded that the part of the Decree containing the prohibitions is *not* a "technical regulation", and that, therefore, the *TBT Agreement* does not apply to this part of the Decree.³⁵ However, the Panel also concluded that the part of the Decree containing the exceptions does constitute a "technical regulation", and that, therefore, the *TBT Agreement* applies to that part of the Decree. On this basis, the Panel decided not to examine Canada's claims under the *TBT Agreement* because, it said, those claims relate solely to the part of the Decree containing the prohibitions, which, in the Panel's view, does not constitute a "technical regulation", and, therefore, the *TBT Agreement* does not apply.³⁶

³⁴ Panel Report, heading (a) on p. 404 and heading (b) on p. 411.

³⁵ *Ibid.*, para. 8.72(a).

³⁶ *Ibid.*, para. 8.72.

61. In concluding that the part of the Decree containing the prohibitions is not a "technical regulation", the Panel found that:

a measure constitutes a "technical regulation" if:

- (a) the measure affects one or more given products;
- (b) the measure specifies the technical characteristics of the product(s) which allow them to be marketed in the Member that took the measure;
- (c) compliance is mandatory.³⁷

62. Canada appeals the Panel's finding that the *TBT Agreement* does not apply to the part of the Decree relating to the prohibitions on imports of asbestos and asbestos-containing products. According to Canada, the Panel erred in considering the part of the Decree relating to those prohibitions *separately* from the part of the Decree relating to the exceptions to those prohibitions, and, therefore, the Panel should have examined the Decree as a *single*, unified measure. Furthermore, Canada argues that the Panel erred in its interpretation of a "technical regulation", as defined in Annex 1.1 to the *TBT Agreement*, because, in Canada's view, a general prohibition can be a "technical regulation".

63. We start with the measure at issue. It is clear from Canada's request for the establishment of a panel that Canada's complaint concerns Decree 96-1133 as a whole.³⁸ The Decree, in essence, consists of prohibitions on asbestos fibres and on products containing asbestos fibres (Article 1), coupled with limited and temporary exceptions from the prohibitions for certain "existing materials, products or devices containing chrysotile fibre" (Article 2). The remaining operative provisions of the Decree contain additional rules governing the grant of an exception (Articles 3 and 4) and the imposition of penalties for violation of the prohibitions in Article 1 (Article 5). Furthermore, certain used "vehicles" and "agricultural and forestry machinery" are entirely excluded, until 31 December 2001, from certain aspects of the prohibitions in Article 1, namely, from the prohibitions on "possession for sale, offering for sale and transfer under any title" (Article 7).³⁹

64. In our view, the proper legal character of the measure at issue cannot be determined unless the measure is examined as a whole. Article 1 of the Decree contains broad, general prohibitions on asbestos and products containing asbestos. However, the scope and generality of those prohibitions can only be understood in light of the

³⁷ *Ibid.*, para. 8.57.

³⁸ WT/DS135/3. In its request for the establishment of a panel, Canada stated:
... the Government of Canada requested consultations with the European Communities concerning certain measures taken by France prohibiting asbestos and products containing asbestos, and concerning the general asbestos regulations in force in France. These measures and regulations include, but are not limited to, Decree No. 96-1133 ... (emphasis added)

Canada requested that the Panel "find that Decree No. 96-1133" is inconsistent with the European Communities' WTO obligations. (emphasis added) See, further, Canada's request for consultations, WT/DS135/1, G/SPS/GEN/72, G/TBT/D/15, which also identifies the measure at issue as Decree No. 96-1133.

³⁹ The full text of the Decree is reproduced in Annex I in the Addendum to the Panel Report. Articles 1 and 2 of the Decree are reproduced in para. 2 of this Report.

exceptions to it which, albeit for a limited period, *permit, inter alia*, the use of certain products containing asbestos and, principally, products containing chrysotile asbestos fibres. The measure is, therefore, *not* a *total* prohibition on asbestos fibres, because it also includes provisions that *permit*, for a limited duration, the use of asbestos in certain situations. Thus, to characterize the measure simply as a general prohibition, and to examine it as such, overlooks the complexities of the measure, which include both prohibitive and permissive elements. In addition, we observe that the exceptions in the measure would have no autonomous legal significance in the absence of the prohibitions. We, therefore, conclude that the measure at issue is to be examined as an integrated whole, taking into account, as appropriate, the prohibitive and the permissive elements that are part of it.

65. Accordingly, we reverse the Panel's two-stage interpretive approach of examining, first, the application of the *TBT Agreement* to the prohibitions contained in the measure and, second and separately, its application to the exceptions contained in the measure.

66. We turn now to the term "technical regulation" and to the considerations that must go into interpreting the term. Article 1.2 of the *TBT Agreement* provides that, for the purposes of this Agreement, the meanings given in Annex 1 apply. Annex 1.1 of the *TBT Agreement* defines a "technical regulation" as a:

Document which lays down *product characteristics* or their related processes and production methods, including the *applicable administrative provisions*, with which *compliance is mandatory*. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method. (emphasis added)

67. The heart of the definition of a "technical regulation" is that a "document" must "lay down" - that is, set forth, stipulate or provide - "product *characteristics*". The word "characteristic" has a number of synonyms that are helpful in understanding the ordinary meaning of that word, in this context. Thus, the "characteristics" of a product include, in our view, any objectively definable "features", "qualities", "attributes", or other "distinguishing mark" of a product. Such "characteristics" might relate, *inter alia*, to a product's composition, size, shape, colour, texture, hardness, tensile strength, flammability, conductivity, density, or viscosity. In the definition of a "technical regulation" in Annex 1.1, the *TBT Agreement* itself gives certain examples of "product characteristics" - "terminology, symbols, packaging, marking or labelling requirements". These examples indicate that "product characteristics" include, not only features and qualities intrinsic to the product itself, but also related "characteristics", such as the means of identification, the presentation and the appearance of a product. In addition, according to the definition in Annex 1.1 of the *TBT Agreement*, a "technical regulation" may set forth the "applicable administrative provisions" for products which have certain "characteristics". Further, we note that the definition of a "technical regulation" provides that such a regulation "may also include or deal *exclusively* with terminology, symbols, packaging, marking *or* labelling requirements". (emphasis added) The use here of the word "exclusively" and the disjunctive word "or" indicates that a "technical regulation" may be confined to laying down only one or a few "product characteristics".

68. The definition of a "technical regulation" in Annex 1.1 of the *TBT Agreement* also states that "*compliance*" with the "product characteristics" laid down in the

"document" must be *mandatory*. A "technical regulation" must, in other words, regulate the "characteristics" of products in a binding or compulsory fashion. It follows that, with respect to products, a "technical regulation" has the effect of *prescribing* or *imposing* one or more "characteristics" - "features", "qualities", "attributes", or other "distinguishing mark".

69. "Product characteristics" may, in our view, be prescribed or imposed with respect to products in either a positive or a negative form. That is, the document may provide, positively, that products *must possess* certain "characteristics", or the document may require, negatively, that products *must not possess* certain "characteristics". In both cases, the legal result is the same: the document "lays down" certain binding "characteristics" for products, in one case affirmatively, and in the other by negative implication.

70. A "technical regulation" must, of course, be applicable to an *identifiable* product, or group of products. Otherwise, enforcement of the regulation will, in practical terms, be impossible. This consideration also underlies the formal obligation, in Article 2.9.2 of the *TBT Agreement*, for Members to notify other Members, through the WTO Secretariat, "of the *products to be covered*" by a proposed "technical regulation". (emphasis added) Clearly, compliance with this obligation requires identification of the product coverage of a technical regulation. However, in contrast to what the Panel suggested, this does not mean that a "technical regulation" must apply to "*given*" products which are actually *named, identified* or *specified* in the regulation.⁴⁰ (emphasis added) Although the *TBT Agreement* clearly applies to "products" generally, nothing in the text of that Agreement suggests that those products need be named or otherwise *expressly* identified in a "technical regulation". Moreover, there may be perfectly sound administrative reasons for formulating a "technical regulation" in a way that does *not* expressly identify products by name, but simply makes them identifiable - for instance, through the "characteristic" that is the subject of regulation.

71. With these considerations in mind, we examine whether the measure at issue is a "technical regulation". Decree 96-1133 aims primarily at the regulation of a named product, asbestos. The first and second paragraphs of Article 1 of the Decree impose a prohibition on asbestos *fibres*, as such. This prohibition on these *fibres* does not, *in itself*, prescribe or impose any "characteristics" on asbestos fibres, but simply bans them in their natural state. Accordingly, if this measure consisted *only* of a prohibition on asbestos *fibres*, it might not constitute a "technical regulation".

72. There is, however, more to the measure than this prohibition on asbestos *fibres*. It is not contested that asbestos fibres have no known use in their raw mineral

⁴⁰ Panel Report, para. 8.57. We note that the Panel stated that a "technical regulation" must apply to "identifiable" products (Panel Report, para. 8.38; emphasis added). However, the Panel went on to state that a "technical regulation" must apply to "given" products (Panel Report, para. 8.57; emphasis added). The Panel also noted that the measure does not "identify by name nor even by function or category" the products covered by the measure (Panel Report, para. 8.40; emphasis added). Thus, in parts of the Panel Report, the Panel appears to require that a "technical regulation" apply to given products rather than identifiable products.

form.⁴¹ Thus, the regulation of asbestos can *only* be achieved through the regulation of *products that contain asbestos fibres*. This, too, is addressed by the Decree before us. An integral and essential aspect of the measure is the regulation of "*products containing asbestos fibres*", which are also prohibited by Article 1, paragraphs I and II of the Decree. It is important to note here that, although formulated *negatively* - products containing asbestos are prohibited - the measure, in this respect, effectively prescribes or imposes certain objective features, qualities or "characteristics" on *all* products. That is, in effect, the measure provides that *all* products must *not* contain asbestos fibres. Although this prohibition against products containing asbestos applies to a large number of products, and although it is, indeed, true that the products to which this prohibition applies cannot be determined from the terms of the measure itself, it seems to us that the products covered by the measure are *identifiable*: all products must be asbestos free; any products containing asbestos are prohibited. We also observe that compliance with the prohibition against products containing asbestos is mandatory and is, indeed, enforceable through criminal sanctions.⁴²

73. Articles 2, 3 and 4 of the Decree also contain certain exceptions to the prohibitions found in Article 1 of the Decree. As we have already noted, these exceptions would have no meaning in the absence of the rest of the measure because they define the scope of the prohibitions in the measure. The nature of these exceptions is to *permit* the use of certain products containing chrysotile asbestos fibres, subject to compliance with strict administrative requirements. The scope of the exceptions is determined by an "exhaustive list" of products that are permitted to contain chrysotile asbestos fibres, which is promulgated and reviewed annually by a government Minister.⁴³ The inclusion of a product in the list of exceptions depends on the absence of an acceptable alternative fibre for incorporation into a particular product, and the demonstrable provision of "all technical guarantees of safety".⁴⁴ Any person seeking to avail himself of these limited exceptions must provide a detailed justification to the authorities, complete with necessary supporting documentation concerning "the state of scientific and technological progress".⁴⁵ Compliance with these administrative requirements is mandatory.⁴⁶

74. Like the Panel, we consider that, through these exceptions, the measure sets out the "applicable administrative provisions, with which compliance is mandatory" for products with certain objective "characteristics".⁴⁷ The exceptions apply to a narrowly defined group of products with particular "characteristics". Although these products are not named, the measure provides criteria which permit their identifica-

⁴¹ Canada asserted that "chrysotile fibre has no use in its raw form; it serves as an input in the production of chrysotile materials" (Panel Report, paras. 3.418 and 3.439). This assertion is not contested by the European Communities.

⁴² Article 5 of the Decree characterizes a contravention of any aspect of Articles 1.I or 1.II as a "5th class offence".

⁴³ Article 2.II of the Decree.

⁴⁴ Article 2.I of the Decree.

⁴⁵ Article 3.I of the Decree.

⁴⁶ Article 3.II of the Decree limits the benefit of the exception to activities that have been the subject of the necessary formalities.

⁴⁷ Panel Report, para. 8.69.

tion, both by reference to the qualities the excepted products must possess and by reference to the list promulgated by the Minister.

75. Viewing the measure as an integrated whole, we see that it lays down "characteristics" for all products that might contain asbestos, and we see also that it lays down the "applicable administrative provisions" for certain products containing chrysotile asbestos fibres which are excluded from the prohibitions in the measure. Accordingly, we find that the measure is a "document" which "lays down product characteristics ... including the applicable administrative provisions, with which compliance is mandatory." For these reasons, we conclude that the measure constitutes a "technical regulation" under the *TBT Agreement*.

76. We, therefore, reverse the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the meaning of Annex 1.1 to the TBT Agreement."

77. We note, however - and we emphasize - that this does not mean that *all* internal measures covered by Article III:4 of the GATT 1994 "affecting" the "sale, offering for sale, purchase, transportation, distribution or use" of a product are, necessarily, "technical regulations" under the *TBT Agreement*. Rather, we rule only that this particular measure, the Decree at stake, falls within the definition of a "technical regulation" given in Annex 1.1 of that Agreement.

78. As we have reached a different conclusion from the Panel's regarding the applicability of the *TBT Agreement* to the measure, we now consider whether it is appropriate for us to rule on the claims made by Canada relating to the *TBT Agreement*. In previous appeals, we have, on occasion, completed the legal analysis with a view to facilitating the prompt settlement of the dispute, pursuant to Article 3.3 of the DSU.⁴⁸ However, we have insisted that we can do so only if the

⁴⁸ See, for instance, Appellate Body Report, United States - Gasoline, *supra*, footnote 15, at 18 ff; Appellate Body Report, Canada - Certain Measures Concerning Periodicals ("Canada - Periodicals"), WT/DS31/AB/R, adopted 30 July 1997, DSR 1997:I, 449, at 469 ff; Appellate Body Report, EC Measures Concerning Meat and Meat Products (Hormones) ("European Communities - Hormones"), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, 135, paras. 222 ff; Appellate Body Report, European Communities - Measures Affecting the Importation of Certain Poultry Products, WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, 2031, paras. 156 ff; Appellate Body Report, Australia - Measures Affecting Importation of Salmon ("Australia - Salmon"), WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VII, 3327, paras. 117 ff, 193 ff and 227 ff; Appellate Body Report, United States - Shrimp, *supra*, footnote 14, paras. 123 ff; Appellate Body Report, Japan - Measures Affecting Agricultural Products, WT/DS76/AB/R, adopted 19 March 1999, DSR 1999:I, 277, paras. 112 ff; Appellate Body Report, United States - Tax Treatment for "Foreign Sales Corporations", WT/DS108/AB/R, adopted 20 March 2000, DSR 2000:III, 1619, paras. 133 ff; Appellate Body Report, Canada - Measures Affecting the Export of Civilian Aircraft, Recourse by Brazil to Article 21.5 of the DSU, WT/DS70/AB/RW, adopted 4 August 2000, DSR 2000:IX, 7299, paras. 43 ff; and Appellate Body Report, United States - Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities ("United States - Wheat Gluten"), WT/DS166/AB/R, adopted 19 January 2001, paras. 80 ff and 127 ff.

In addition, after modifying the panel's reasoning, we have, on occasion, applied our interpretation of the legal provisions at issue to the facts of the case (see, for instance, Appellate Body Report, Argentina - Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items, WT/DS56/AB/R,

factual findings of the panel and the undisputed facts in the panel record provide us with a sufficient basis for our own analysis. If that has not been the case, we have not completed the analysis.⁴⁹

79. The need for sufficient facts is not the only limit on our ability to complete the legal analysis in any given case. In *Canada - Periodicals*, we reversed the panel's conclusion that the measure at issue was inconsistent with Article III:2, first sentence, of the GATT 1994, and we then proceeded to examine the United States' claims under Article III:2, second sentence, which the panel had not examined at all. However, in embarking there on an analysis of a provision that the panel had not considered, we emphasized that "the first and second sentences of Article III:2 are *closely related*" and that those two sentences are "part of a *logical continuum*."⁵⁰ (emphasis added)

80. In this appeal, Canada's outstanding claims were made under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement*. We observe that, although the *TBT Agreement* is intended to "further the objectives of GATT 1994", it does so through a specialized legal regime that applies solely to a limited class of measures. For these measures, the *TBT Agreement* imposes obligations on Members that seem to be *different* from, and *additional* to, the obligations imposed on Members under the GATT 1994.

81. As the Panel decided not to examine Canada's four claims under the *TBT Agreement*, it made no findings, at all, regarding any of these claims. Moreover, the meaning of the different obligations in the *TBT Agreement* has not previously been the subject of any interpretation or application by either panels or the Appellate Body. Similarly, the provisions of the Tokyo Round *Agreement on Technical Barriers to Trade*, which preceded the *TBT Agreement* and which contained obligations similar to those in the *TBT Agreement*, were also never the subject of even a single ruling by a panel.

82. In light of their novel character, we consider that Canada's claims under the *TBT Agreement* have not been explored before us in depth. As the Panel did not address these claims, there are no "issues of law" or "legal interpretations" regarding them to be analyzed by the parties, and reviewed by us under Article 17.6 of the DSU. We also observe that the sufficiency of the facts on the record depends on the reach of the provisions of the *TBT Agreement* claimed to apply - a reach that has yet to be determined.

adopted 22 April 1998, DSR 1998:III, 1003, paras. 48 ff; Appellate Body Report, *Canada - Measures Affecting the Importation of Milk and the Exportation of Dairy Products*, WT/DS103/AB/R, WT/DS113/AB/R, adopted 27 October 1999, DSR 1999:V, 2057, paras. 138 ff; Appellate Body Report, *Argentina - Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paras. 109 ff), DSR 2000:I, 515.

⁴⁹ See Appellate Body Report, *Australia - Salmon*, *supra*, footnote 48, paras. 209 ff, 241 ff and 255; Appellate Body Report, *Korea - Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, 3, paras. 91 ff and 102 ff; Appellate Body Report, *Canada - Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, adopted 19 June 2000, DSR 2000:VI, 2995, paras. 133 ff and 144 ff; Appellate Body Report, *Korea - Measures Affecting Imports of Fresh, Chilled and Frozen Beef ("Korea - Beef")*, WT/DS161/AB/R, WT/DS169/AB/R, adopted 10 January 2001, paras. 128 ff.

⁵⁰ *Supra*, footnote 48, at 469.

83. With this particular collection of circumstances in mind, we consider that we do not have an adequate basis properly to examine Canada's claims under Articles 2.1, 2.2, 2.4 and 2.8 of the *TBT Agreement* and, accordingly, we refrain from so doing.

VI. "LIKE PRODUCTS" IN ARTICLE III:4 OF THE GATT 1994

A. Background

84. In addressing Canada's claims under Article III:4 of the GATT 1994, the Panel examined whether two different sets of products are "like".⁵¹ First, the Panel examined whether *chrysotile asbestos fibres* are "like" certain other fibres, namely *polyvinyl alcohol fibres* ("PVA"), *cellulose and glass fibres* (PVA, cellulose and glass fibres are all collectively referred to, in the remainder of this Report, as "PCG fibres"). The Panel concluded that chrysotile asbestos and PCG fibres are all "like products" under Article III:4.⁵² The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing one of the PCG fibres*. The Panel also concluded that all these cement-based products are "like".⁵³

85. In examining the "likeness" of these two sets of products, the Panel adopted an approach based on the Report of the Working Party on *Border Tax Adjustments*.⁵⁴ Under that approach, the Panel employed four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and, (iv) the tariff classification of the products. The Panel declined to apply "a criterion on the risk of a product", "neither in the criterion relating to the properties, nature and quality of the product, nor in the other likeness criteria ...".⁵⁵

86. On appeal, the European Communities requests that we reverse the Panel's findings that the two sets of products examined by the Panel are "like products" under Article III:4 of the GATT 1994, and requests, in consequence, that we reverse the Panel's finding that the measure is inconsistent with Article III:4 of the GATT 1994. The European Communities contends that the Panel erred in its interpretation and application of the concept of "like products", in particular, in excluding from its analysis consideration of the health risks associated with chrysotile asbestos fibres. According to the European Communities, in this case, Article III:4 calls for an analysis of the health objective of the regulatory distinction made in the measure between asbestos fibres, and between products containing asbestos fibres, and all other products. The European Communities argues that, under Article III:4, products should not be regarded as "like" unless the regulatory distinction drawn between them "entails [a] shift in the competitive opportunities" in favour of domestic products.⁵⁶

⁵¹ The Panel's approach is set forth in para. 8.111 of the Panel Report.

⁵² Panel Report, para. 8.144.

⁵³ *Ibid.*, para. 8.150.

⁵⁴ Working Party Report, *Border Tax Adjustments*, adopted 2 December 1970, BISD 18S/97.

⁵⁵ Panel Report, paras. 8.130 and 8.132.

⁵⁶ European Communities' other appellant's submission, para. 45.

B. Meaning of the Term "Like Products" in Article III:4 of the GATT 1994

87. Article III:4 of the GATT 1994 reads, in relevant part:

The products of the territory of any Member imported into the territory of any other Member shall be accorded treatment no less favourable than that accorded to *like products* of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. ... (emphasis added)

88. The European Communities' appeal on this point turns on the interpretation of the word "like" in the term "like products" in Article III:4 of the GATT 1994. Thus, this appeal provides us with our first occasion to examine the meaning of the word "like" in *Article III:4* of the GATT 1994.⁵⁷ Yet, this appeal is, of course, not the first time that the term "like products" has been addressed in GATT or WTO dispute settlement proceedings.⁵⁸ Indeed, the term "like product" appears in many dif-

⁵⁷ We have already had occasion to interpret other aspects of Article III:4 of the GATT 1994 in two other appeals, but in neither appeal were we asked to address the meaning of the term "like products" (see Appellate Body Report, *European Communities - Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, adopted 25 September 1997, and Appellate Body Report, *Korea - Beef*, *supra*, footnote 49).

⁵⁸ See, for instance, Working Party Report, *Brazilian Internal Taxes*, adopted 30 June 1949, BISD II/181, (Article III:2 of the GATT 1947); Working Party Report, *The Australian Subsidy on Ammonium Sulphate ("Australia - Ammonium Sulphate")*, adopted 3 April 1950, BISD II/188 (Articles I and III:4 of the GATT 1947); Panel Report, *Treatment by Germany of Imports of Sardines ("Germany - Sardines")*, adopted 31 October 1952, BISD 1S/53 (Articles I and XIII of the GATT 1947); Working Party Report, *Border Tax Adjustments*, *supra*, footnote 54 (Articles II, III and XVI of the GATT 1947); Panel Report, *EEC - Measures on Animal Feed Proteins ("EEC - Animal Feed")*, adopted 14 March 1978, BISD 25S/49 (Articles I, III:2 and III:4 of the GATT 1947); Panel Report, *Spain - Tariff Treatment of Unroasted Coffee*, adopted 11 June 1981, BISD 28S/102 (Article I:1 of the GATT 1947); Panel Report, *Spain - Measures Concerning Domestic Sale of Soyabean Oil ("Spain - Soyabean")*, L/5142, 17 June 1981, unadopted (Article III:4 of the GATT 1947); Panel Report, *Canada - Measures Affecting the Sale of Gold Coins*, L/5863, 17 September 1985, unadopted (Article III:2 of the GATT 1947); Panel Report, *United States - Taxes on Petroleum and Certain Imported Substances*, adopted 17 June 1987, BISD 34S/136 (Article III:2 of the GATT 1947); Panel Report, *Japan - Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages ("1987 Japan - Alcoholic Beverages")*, adopted 10 November 1987, BISD 34S/83 (Article III:2 of the GATT 1947); Panel Report, *Canada/Japan - Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, adopted 19 July 1989, BISD 36S/167 (Article I:1 of the GATT 1947); Panel Report, *United States - Definition of Industry Concerning Wine and Grape Products*, adopted 28 April 1992, BISD 39S/436 (Article VI of the GATT 1947); Panel Report, *United States - Denial of Most-favoured-nation Treatment as to Non-rubber Footwear from Brazil*, adopted 19 June 1992, BISD 39S/128 (Article I:1 of the GATT 1947); Panel Report, *United States - Measures Affecting Alcoholic and Malt Beverages*, adopted 19 June 1992, BISD 39S/206 (Article III:2 and III:4 of the GATT 1947); Panel Report, *United States - Taxes on Automobiles*, DS31/R, 11 October 1994, unadopted (Article III:2 and III:4 of the GATT 1947); Panel Report, *United States - Gasoline*, *supra*, footnote 15 (Article III:4 of the GATT 1994); Panel Report, *Japan - Taxes on Alcoholic Beverages ("Japan - Alcoholic Beverages")*, WT/DS8/R, WT/DS10/R, WT/DS11/R, adopted 1 November 1996, as modified by the Appellate Body Report, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, DSR 1996:I, 125 (Article III:2 of the GATT 1994); Appellate Body Report, *Japan - Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, adopted 1 November 1996, DSR 1996:I, 97 (Article III:2 of the GATT 1994); Panel Report, *Canada - Periodi-*

ferent provisions of the covered agreements, for example, in Articles I:1, II:2, III:2, III:4, VI:1, IX:1, XI:2(c), XIII:1, XVI:4 and XIX:1 of the GATT 1994.⁵⁹ The term is also a key concept in the *Agreement on Subsidies and Countervailing Measures*, the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the "Anti-Dumping Agreement"), the *Agreement on Safeguards* and other covered agreements. In some cases, such as in Article 2.6 of the *Anti-Dumping Agreement*, the term is given a specific meaning to be used "[t]hroughout [the] Agreement", while in others, it is not. In each of the provisions where the term "like products" is used, the term must be interpreted in light of the context, and of the object and purpose, of the provision at issue, and of the object and purpose of the covered agreement in which the provision appears. Accordingly, and as we observed in an earlier case concerning Article III:2 of the GATT 1994:

... there can be *no one precise and absolute definition of what is "like"*. The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. *The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.* ...⁶⁰ (emphasis added)

89. It follows that, while the meaning attributed to the term "like products" in other provisions of the GATT 1994, or in other covered agreements, may be relevant context in interpreting Article III:4 of the GATT 1994, the interpretation of "like products" in Article III:4 need not be identical, in all respects, to those other meanings.

90. Bearing these considerations in mind, we turn now to the ordinary meaning of the word "like" in the term "like products" in Article III:4. According to one dictionary, "like" means:

cal. WT/DS31/R, adopted 30 July 1997, as modified by the Appellate Body Report, WT/DS31/AB/R, DSR 1997:I, 481 (Articles III:2 and III:4 of the GATT 1994); Appellate Body Report, Canada - Periodicals; *supra*, footnote 48 (Article III:2 of the GATT 1994); Panel Report, Indonesia - Certain Measures Affecting the Automobile Industry, WT/DS54/R, WT/DS55/R, WT/DS59/R, WT/DS64/R, adopted 23 July 1998 (Articles I:1 and III:2 of the GATT 1994), DSR 1998:V, 2201; Panel Report, Korea - Taxes on Alcoholic Beverages ("Korea - Alcoholic Beverages"), WT/DS75/R, WT/DS84/R, adopted 17 February 1999, as modified by the Appellate Body Report, WT/DS75/AB/R, WT/DS84/AB/R (Article III:2 of the GATT 1994), DSR 1999:I, 3; Appellate Body Report, Korea - Alcoholic Beverages, WT/DS75/AB/R, WT/DS84/AB/R, adopted 17 February 1999 (Article III:2 of the GATT 1994); Panel Report, Chile - Taxes on Alcoholic Beverages, WT/DS87/R, WT/DS110/R, adopted 12 January 2000, as modified by the Appellate Body Report, WT/DS87/AB/R, WT/DS110/AB/R (Article III:2 of the GATT 1994), DSR 2000:I, 281.

⁵⁹ In addition, the term "like commodity" appears in Article VI:7 and the term "like merchandise" is used in Article VII:2 of the GATT 1994.

⁶⁰ Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 114. We also cautioned against the automatic transposition of the interpretation of "likeness" under the first sentence of Article III:2 to other provisions where the phrase "like products" is used (p. 113).

Having the same characteristics or qualities as some other ... thing; of approximately identical shape, size, etc., with something else; similar.⁶¹

91. This meaning suggests that "like" products are products that share a number of identical or similar characteristics or qualities. The reference to "similar" as a synonym of "like" also echoes the language of the French version of Article III:4, "*produits similaires*", and the Spanish version, "*productos similares*", which, together with the English version, are equally authentic.⁶²

92. However, as we have previously observed, "dictionary meanings leave many interpretive questions open."⁶³ In particular, this definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third, this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.

93. To begin to resolve these issues, we turn to the relevant context of Article III:4 of the GATT 1994. In that respect, we observe that Article III:2 of the GATT 1994, which deals with the internal tax treatment of imported and domestic products, prevents Members, through its first sentence, from imposing internal taxes on imported products "in excess of those applied ... to *like* domestic products." (emphasis added) In previous Reports, we have held that the scope of "like" products in this sentence is to be construed "narrowly".⁶⁴ This reading of "like" in Article III:2 might be taken to suggest a similarly narrow reading of "like" in Article III:4, since both provisions form part of the same Article. However, both of these paragraphs of Article III constitute specific expressions of the overarching, "general principle", set forth in Article III:1 of the GATT 1994.⁶⁵ As we have previously said, the "general principle" set forth in Article III:1 "informs" the rest of Article III and

⁶¹ The New Shorter Oxford English Dictionary, Lesley Brown (ed.) (Clarendon Press, 1993), Vol. I, p. 1588.

⁶² WTO Agreement, final, authenticating clause. See, also, Article 33(1) of the Vienna Convention of the Law of the Treaties, done at Vienna, 23 May 1969, 1155 U.N.T.S. 331; 8 International Legal Materials 679.

⁶³ Appellate Body Report, Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, adopted 20 August 1999, DSR 1999:III, 1377, para. 153.

⁶⁴ Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 112 and 113. See, also, Appellate Body Report, Canada - Periodicals, *supra*, footnote 48, at 473.

⁶⁵ Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 111.

acts "as a guide to understanding and interpreting the specific obligations contained" in the other paragraphs of Article III, including paragraph 4.⁶⁶ Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the "general principle" pursued by that provision. Accordingly, in interpreting the term "like products" in Article III:4, we must turn, first, to the "general principle" in Article III:1, rather than to the term "like products" in Article III:2.

94. In addition, we observe that, although the obligations in Articles III:2 and III:4 both apply to "like products", the text of Article III:2 differs in one important respect from the text of Article III:4. Article III:2 contains *two separate* sentences, each imposing *distinct* obligations: the first lays down obligations in respect of "like products", while the second lays down obligations in respect of "directly competitive or substitutable" products.⁶⁷ By contrast, Article III:4 applies only to "like products" and does not include a provision equivalent to the second sentence of Article III:2. We note that, in this dispute, the Panel did not examine, at all, the significance of this textual difference between paragraphs 2 and 4 of Article III.

95. For us, this textual difference between paragraphs 2 and 4 of Article III has considerable implications for the meaning of the term "like products" in these two provisions. In *Japan - Alcoholic Beverages*, we concluded, in construing Article III:2, that the two separate obligations in the two sentences of Article III:2 must be interpreted in a harmonious manner that gives meaning to *both* sentences in that provision. We observed there that the interpretation of one of the sentences necessarily affects the interpretation of the other. Thus, the scope of the term "like products" in the first sentence of Article III:2 affects, and is affected by, the scope of the phrase "directly competitive or substitutable" products in the second sentence of that provision. We said in *Japan - Alcoholic Beverages*:

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.⁶⁸

96. In construing Article III:4, the same interpretive considerations do not arise, because the "general principle" articulated in Article III:1 is expressed in Article III:4, not through two distinct obligations, as in the two sentences in Article III:2, but instead through a single obligation that applies solely to "like products". Therefore, the harmony that we have attributed to the two sentences of Article III:2 need not and, indeed, cannot be replicated in interpreting Article III:4. Thus, we conclude

⁶⁶ *Ibid.*

⁶⁷ The meaning of the second sentence of Article III:2 is elaborated upon in the Interpretative Note to that provision. This note indicates that the second sentence of Article III:2 applies to "directly competitive or substitutable product[s]".

⁶⁸ *Supra*, footnote 58, at 112 and 113.

that, given the textual difference between Articles III:2 and III:4, the "accordion" of "likeness" stretches in a different way in Article III:4.

97. We have previously described the "general principle" articulated in Article III:1 as follows:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported and domestic products so as to afford protection to domestic production'". Toward this end, Article III obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products*. ... Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. ...⁶⁹ (emphasis added)

98. As we have said, although this "general principle" is not explicitly invoked in Article III:4, nevertheless, it "informs" that provision.⁷⁰ Therefore, the term "like product" in Article III:4 must be interpreted to give proper scope and meaning to this principle. In short, there must be consonance between the objective pursued by Article III, as enunciated in the "general principle" articulated in Article III:1, and the interpretation of the specific expression of this principle in the text of Article III:4. This interpretation must, therefore, reflect that, in endeavouring to ensure "equality of competitive conditions", the "general principle" in Article III seeks to prevent Members from applying internal taxes and regulations in a manner which affects the competitive relationship, in the marketplace, *between the domestic and imported products involved*, "so as to afford protection to domestic production."

99. As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* "less favourable" than the treatment accorded to *domestic* products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. In saying this, we are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 of the GATT 1994 falls. We are not saying that *all* products which are in *some* competitive relationship are "like products" under Article III:4. In ruling on the measure at issue, we also do not attempt to define the precise scope of the word "like" in Article III:4. Nor do we wish to decide if the scope of "like products" in Article III:4 is co-extensive with the combined scope of "like" and "directly competitive or substitutable" products in Article III:2. However, we recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve

⁶⁹ Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 109 and 110.

⁷⁰ *Ibid.*, at 111.

the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation - for instance, fiscal - to protect domestic production of certain products, but were able to use another form of regulation - for instance, non-fiscal - to achieve those ends. This would frustrate a consistent application of the "general principle" in Article III:1. For these reasons, we conclude that the scope of "like" in Article III:4 is broader than the scope of "like" in Article III:2, first sentence. Nonetheless, we note, once more, that Article III:2 extends not only to "like products", but also to products which are "directly competitive or substitutable", and that Article III:4 extends only to "like products". In view of this different language, and although we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined* product scope of the *two* sentences of Article III:2 of the GATT 1994.

100. We recognize that, by interpreting the term "like products" in Article III:4 in this way, we give that provision a relatively broad product scope - although no broader than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established before a measure can be held to be inconsistent with Article III:4. Thus, even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" *imported* products "less favourable treatment" than it accords to the group of "like" *domestic* products. The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" *imported* products "less favourable treatment" than that accorded to the group of "like" *domestic* products. In this case, we do not examine further the interpretation of the term "treatment no less favourable" in Article III:4, as the Panel's findings on this issue have not been appealed or, indeed, argued before us.

C. *Examining the "Likeness" of Products under Article III:4 of the GATT 1994*

101. We turn to consideration of how a treaty interpreter should proceed in determining whether products are "like" under Article III:4. As in Article III:2, in this determination, "[n]o one approach ... will be appropriate for all cases."⁷¹ Rather, an assessment utilizing "an unavoidable element of individual, discretionary judgement"⁷² has to be made on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing "likeness" that has been

⁷¹ Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 114.

⁷² Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 113.

followed and developed since by several panels and the Appellate Body.⁷³ This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits - more comprehensively termed consumers' perceptions and behaviour - in respect of the products; and (iv) the tariff classification of the products.⁷⁴ We note that these four criteria comprise four categories of "characteristics" that the products involved might share: (i) the physical properties of the products; (ii) the extent to which the products are capable of serving the same or similar end-uses; (iii) the extent to which consumers perceive and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international classification of the products for tariff purposes.

102. These general criteria, or groupings of potentially shared characteristics, provide a framework for analyzing the "likeness" of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence - modify or even render obsolete - traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.

103. The kind of evidence to be examined in assessing the "likeness" of products will, necessarily, depend upon the particular products and the legal provision at issue. When all the relevant evidence has been examined, panels must determine whether that evidence, as a whole, indicates that the products in question are "like" in terms of the legal provision at issue. We have noted that, under Article III:4 of the GATT 1994, the term "like products" is concerned with competitive relationships between and among products. Accordingly, whether the *Border Tax Adjustments* framework is adopted or not, it is important under Article III:4 to take account of evidence which indicates whether, and to what extent, the products involved are - or could be - in a competitive relationship in the marketplace.

⁷³ See, further, Appellate Body Report, Japan - Alcoholic Beverages, *supra*, footnote 58, at 113 and, in particular, footnote 46. See, also, Panel Report, United States - Gasoline, *supra*, footnote 15, para. 6.8, where the approach set forth in the Border Tax Adjustment case was adopted in a dispute concerning Article III:4 of the GATT 1994 by a panel. This point was not appealed in that case.

⁷⁴ The fourth criterion, tariff classification, was not mentioned by the Working Party on Border Tax Adjustments, but was included by subsequent panels (see, for instance, EEC - Animal Feed, *supra*, footnote 58, para. 4.2, and 1987 Japan - Alcoholic Beverages, *supra*, footnote 58, para. 5.6).

D. *The Panel's Findings and Conclusions on "Likeness" under Article III:4 of the GATT 1994*

1. *Overview*

104. In this case, the European Communities argues that the Panel erred in its consideration of "likeness", in particular, because it adopted an exclusively "commercial or market access approach" to the comparison of allegedly "like products"; placed excessive reliance on a single criterion, namely, end-use; and failed to include consideration of the health "risk" factors relating to asbestos.⁷⁵

105. Before considering these arguments, we think it helpful to summarize the way in which the Panel assessed the "likeness" of *chrysotile asbestos fibres*, on the one hand, and the *PCG fibres* - PVA, cellulose and glass fibres - on the other. It will be recalled that the Panel adopted the approach in the *Border Tax Adjustments* report, using the four general criteria mentioned above.⁷⁶ After reviewing the *first* criterion, "properties, nature and quality of the products", the Panel "conclude[d] that ... chrysotile fibres *are like* PVA, cellulose and glass fibres."⁷⁷ (emphasis added) In reaching this "conclusion", the Panel found that it was not decisive that the products "do not have the same structure or chemical composition", nor that asbestos is "unique". Instead, the Panel focused on "market access" and whether the products have the "same applications" and can "replace" each other for some industrial uses.⁷⁸ The Panel also declined to "[i]ntroduce a criterion on the risk of a product".⁷⁹

106. Under the second criterion, "end-use", the Panel stated that it had already found, under the first criterion, that the products have "certain identical or at least similar end-uses" and that it did not, therefore, consider it necessary to elaborate further on this criterion.⁸⁰ The Panel declined to "take a position" on "consumers' tastes and habits", the third criterion, "[b]ecause this criterion would not provide clear results".⁸¹ The Panel observed that consumers' tastes and habits are "very varied".⁸² Finally, the Panel did not regard as "decisive" the different "tariff classification" of the fibres.⁸³

107. Based on this reasoning, the Panel concluded that *chrysotile asbestos fibres* and *PCG fibres* are "like products" under Article III:4 of the GATT 1994.⁸⁴

108. The Panel next examined whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres*.⁸⁵ Applying the reasoning from its findings on fibres, and noting that the individual cement-based products have the same tariff classification, irrespective of their fibre

⁷⁵ European Communities' other appellant's submission, para. 33.

⁷⁶ Panel Report, paras. 8.114 and 8.115.

⁷⁷ *Ibid.*, para. 8.126.

⁷⁸ *Ibid.*, paras. 8.123, 8.124 and 8.126.

⁷⁹ *Ibid.*, para. 8.130.

⁸⁰ *Ibid.*, para. 8.136.

⁸¹ Panel Report, para. 8.139.

⁸² *Ibid.*

⁸³ *Ibid.*, para. 8.143.

⁸⁴ *Ibid.*, para. 8.144.

⁸⁵ *Ibid.*

content, the Panel concluded that these cement-based products are also "like" under Article III:4.⁸⁶

2. *Chrysotile and PCG Fibres*

109. In our analysis of this issue on appeal, we begin with the Panel's findings on the "likeness" of *chrysotile asbestos and PCG fibres* and, in particular, with the Panel's overall approach to examining the "likeness" of these fibres. It is our view that, having adopted an approach based on the four criteria set forth in *Border Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then, weighed *all* of that evidence, along with any other relevant evidence, in making an *overall* determination of whether the products at issue could be characterized as "like". Yet, the Panel expressed a "conclusion" that the products were "like" after examining only the *first* of the four criteria. The Panel then repeated that conclusion under the second criterion - without further analysis - before dismissing altogether the relevance of the third criterion and also before rejecting the differing tariff classifications under the fourth criterion. In our view, it was inappropriate for the Panel to express a "conclusion" after examining only one of the four criteria.⁸⁷ By reaching a "conclusion" without examining all of the criteria it had decided to examine, the Panel, in reality, expressed a conclusion after examining only some of the evidence. Yet, a determination on the "likeness" of products cannot be made on the basis of a partial analysis of the evidence, after examination of just one of the criteria the Panel said it would examine. For this reason, we doubt whether the Panel's overall approach has allowed the Panel to make a proper characterization of the "likeness" of the fibres at issue.

110. We must next examine more closely the Panel's treatment of the four individual criteria. We see the first criterion, "properties, nature and quality", as intended to cover the physical qualities and characteristics of the products. In analyzing the "properties" of the products, the Panel said that, "because of its physical and chemical characteristics, *asbestos is a unique product*."⁸⁸ (emphasis added) The Panel expressly acknowledged that, based on physical properties alone, "[i]t could ... be concluded that [the fibres] are *not* like products."⁸⁹ (emphasis added) However, to overcome that fact, the Panel adopted a "market access" approach to this first criterion.⁹⁰ Thus, in the course of its examination of "*properties*", the Panel went on to rely on "*end-uses*" - the second criterion - and on the fact that, in a "small number" of cases, the products have the "same applications" and can "replace" each other.⁹¹ The Panel then stated:

⁸⁶ Panel Report, para. 8.150. The Panel devoted six paras. to the "likeness" of the cement-based products, whereas it devoted 27 paras. to the "likeness" of chrysotile asbestos and PCG fibres.

⁸⁷ *Ibid.*, para. 8.126.

⁸⁸ Panel Report, para. 8.123.

⁸⁹ *Ibid.*, para. 8.121.

⁹⁰ *Ibid.*, paras. 8.122 and 8.124.

⁹¹ *Ibid.*, paras. 8.123 and 8.125.

We therefore conclude that, taking into account the properties criterion, chrysotile fibres are like PVA, cellulose and glass fibres.⁹²

111. We believe that physical properties deserve a separate examination that should not be confused with the examination of end-uses. Although not decisive, the extent to which products share common physical properties may be a useful indicator of "likeness". Furthermore, the physical properties of a product may also influence how the product can be used, consumer attitudes about the product, and tariff classification. It is, therefore, important for a panel to examine fully the physical character of a product. We are also concerned that it will be difficult for a panel to draw the appropriate conclusions from the evidence examined under each criterion if a panel's approach does not clearly address each criterion separately, but rather entwines different, and distinct, elements of the analysis along the way.

112. In addition, we do not share the Panel's conviction that when two products can be used for the same end-use, their "*properties*" are then *equivalent*, if not identical."⁹³ (emphasis added) Products with quite different physical properties may, in some situations, be capable of performing similar or identical end-uses. Although the *end-uses* are then "*equivalent*", the physical properties of the products are not thereby altered; they remain different. Thus, the physical "uniqueness" of asbestos that the Panel noted does not change depending on the particular use that is made of asbestos.

113. The European Communities argues that the inquiry into the physical properties of products must include a consideration of the risks posed by the product to human health. In examining the physical properties of the product at issue in this dispute, the Panel found that "it was not appropriate to apply the 'risk' criterion proposed by the EC".⁹⁴ The Panel said that to do so "would largely nullify the effect of Article XX(b)" of the GATT 1994.⁹⁵ In reviewing this finding by the Panel, we note that neither the text of Article III:4 nor the practice of panels and the Appellate Body suggest that any evidence should be excluded *a priori* from a panel's examination of "likeness". Moreover, as we have said, in examining the "likeness" of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4 of the GATT 1994. We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibres need be examined under a *separate* criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers' tastes and habits, to which we will come below.

114. Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In the case of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chry-

⁹² Panel Report, para. 8.126.

⁹³ *Ibid.*, para. 8.125.

⁹⁴ Panel Report, para. 8.132.

⁹⁵ *Ibid.*, para. 8.130.

sotile asbestos fibres are carcinogenic in humans, following inhalation. In this respect, we observe that, at paragraph 8.188 of its Report, the Panel made the following statements regarding chrysotile asbestos fibres:

... we note that the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies.¹³⁵ This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. Moreover, in the light of the comments made by one of the experts, the doubts expressed by Canada with respect to the direct effects of chrysotile on mesotheliomas and lung cancers are not sufficient to conclude that an official responsible for public health policy would find that there was not enough evidence of the existence of a public health risk.

¹³⁵Since 1977 by the IARC (see List of Agents Carcinogenic to Humans, Overall Evaluations of Carcinogenicity to Humans, Monographs of the International Agency for Research on Cancer, Volumes 1-63), see also WHO, IPCS Environmental Health Criteria (203) on Chrysotile, Geneva (1998), cited in para. 5.584 above. On the development of knowledge of the risks associated with asbestos, see Dr. Henderson, para. 5.595.

This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibres. The evidence indicates that PCG fibres, in contrast, do not share these properties, at least to the same extent.⁹⁶ We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4 of the GATT 1994.

115. We do not agree with the Panel that considering evidence relating to the health risks associated with a product, under Article III:4, nullifies the effect of Article XX(b) of the GATT 1994. Article XX(b) allows a Member to "adopt and enforce" a measure, *inter alia*, necessary to protect human life or health, even though that measure is inconsistent with another provision of the GATT 1994. Article III:4 and Article XX(b) are distinct and independent provisions of the GATT 1994 each to be interpreted on its own. The scope and meaning of Article III:4 should not be broadened or restricted beyond what is required by the normal customary international law rules of treaty interpretation, simply because Article XX(b) exists and may be available to justify measures inconsistent with Article III:4. The fact that an interpretation of Article III:4, under those rules, implies a less frequent recourse to Article XX(b) does not deprive the exception in Article XX(b) of *effet utile*. Article XX(b) would only be deprived of *effet utile* if that provision could *not* serve to

⁹⁶ Panel Report, para. 8.220.

allow a Member to "adopt and enforce" measures "necessary to protect human ... life or health". Evaluating evidence relating to the health risks arising from the physical properties of a product does not prevent a measure which is inconsistent with Article III:4 from being justified under Article XX(b). We note, in this regard, that, different inquiries occur under these two very different Articles. Under Article III:4, evidence relating to health risks may be relevant in assessing the *competitive relationship in the marketplace* between allegedly "like" products. The same, or similar, evidence serves a different purpose under Article XX(b), namely, that of assessing whether a *Member* has a sufficient basis for "adopting or enforcing" a WTO-inconsistent measure on the grounds of human health.

116. We, therefore, find that the Panel erred, in paragraph 8.132 of the Panel Report, in excluding the health risks associated with chrysotile asbestos fibres from its examination of the physical properties of that product.

117. Before examining the Panel's findings under the second and third criteria, we note that these two criteria involve certain of the key elements relating to the competitive relationship between products: first, the extent to which products are capable of performing the same, or similar, functions (end-uses), and, second, the extent to which consumers are willing to use the products to perform these functions (consumers' tastes and habits). Evidence of this type is of particular importance under Article III of the GATT 1994, precisely because that provision is concerned with competitive relationships in the marketplace. If there is - or could be - *no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production. Thus, evidence about the extent to which products can serve the same end-uses, and the extent to which consumers are - or would be - willing to choose one product instead of another to perform those end-uses, is highly relevant evidence in assessing the "likeness" of those products under Article III:4 of the GATT 1994.

118. We consider this to be especially so in cases where the evidence relating to properties establishes that the products at issue are physically quite different. In such cases, in order to overcome this indication that products are *not* "like", a higher burden is placed on complaining Members to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994. In this case, where it is clear that the fibres have very different properties, in particular, because chrysotile is a known carcinogen, a very heavy burden is placed on Canada to show, under the second and third criteria, that the chrysotile asbestos and PCG fibres are in such a competitive relationship.

119. With this in mind, we turn to the Panel's evaluation of the second criterion, end-uses. The Panel's evaluation of this criterion is far from comprehensive. First, as we have said, the Panel entwined its analysis of "end-uses" with its analysis of "physical properties" and, in purporting to examine "end-uses" as a distinct criterion, essentially referred to its analysis of "properties".⁹⁷ This makes it difficult to assess precisely how the Panel evaluated the end-uses criterion. Second, the Panel's analysis

⁹⁷ Panel Report, para. 8.136.

of end-uses is based on a "small number of applications" for which the products are substitutable. Indeed, the Panel stated that "[i]t suffices that, for a *given utilization*, the properties are the same to the extent that one product can replace the other."⁹⁸ (emphasis added) Although we agree that it is certainly relevant that products have similar end-uses for a "small number of ... applications", or even for a "given utilization", we think that a panel must also examine the other, *different* end-uses for products.⁹⁹ It is only by forming a complete picture of the various end-uses of a product that a panel can assess the significance of the fact that products share a limited number of end-uses. In this case, the Panel did not provide such a complete picture of the various end-uses of the different fibres. The Panel did not explain, or elaborate in any way on, the "small number of ... applications" for which the various fibres have similar end-uses. Nor did the Panel examine the end-uses for these products which were not similar. In these circumstances, we believe that the Panel did not adequately examine the evidence relating to end-uses.

120. The Panel declined to examine or make any findings relating to the third criterion, consumers' tastes and habits, "[b]ecause this criterion would not provide clear results".¹⁰⁰ There will be few situations where the evidence on the "likeness" of products will lend itself to "clear results". In many cases, the evidence will give conflicting indications, possibly within each of the four criteria. For instance, there may be some evidence of similar physical properties and some evidence of differing physical properties. Or the physical properties may differ completely, yet there may be strong evidence of similar end-uses and a high degree of substitutability of the products from the perspective of the consumer. A panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be "clear" or, for that matter, because the parties agree that certain evidence is not relevant.¹⁰¹ In any event, we have difficulty seeing how the Panel could conclude that an examination of consumers' tastes and habits "would not provide clear results", given that the Panel did not examine *any* evidence relating to this criterion.

121. Furthermore, in a case such as this, where the fibres are physically very different, a panel *cannot* conclude that they are "like products" if it *does not examine* evidence relating to consumers' tastes and habits. In such a situation, if there is *no* inquiry into this aspect of the nature and extent of the competitive relationship between the products, there is no basis for overcoming the inference, drawn from the different physical properties of the products, that the products are not "like".

122. In this case especially, we are also persuaded that evidence relating to consumers' tastes and habits would establish that the health risks associated with chrysotile asbestos fibres influence consumers' behaviour with respect to the different fibres at issue.¹⁰² We observe that, as regards *chrysotile asbestos and PCG fibres*, the

⁹⁸ *Ibid.*, para. 8.124.

⁹⁹ *Ibid.*, paras. 8.124 and 8.125.

¹⁰⁰ *Ibid.*, para. 8.139.

¹⁰¹ In that respect, we note that, at the oral hearing before us, Canada stated that it believed that the parties were in agreement that consideration of consumers' tastes and habits "would add nothing" to the determination of "likeness".

¹⁰² We have already noted the health risks associated with chrysotile asbestos fibres in our consideration of properties (*supra*, para. 114).

consumer of the fibres is a *manufacturer* who incorporates the fibres into another product, such as cement-based products or brake linings. We do not wish to speculate on what the evidence regarding these consumers would have indicated; rather, we wish to highlight that consumers' tastes and habits regarding *fibres*, even in the case of commercial parties, such as manufacturers, are very likely to be shaped by the health risks associated with a product which is known to be highly carcinogenic.¹⁰³ A manufacturer cannot, for instance, ignore the preferences of the ultimate consumer of its products. If the risks posed by a particular product are sufficiently great, the ultimate consumer may simply cease to buy that product. This would, undoubtedly, affect a manufacturer's decisions in the marketplace. Moreover, in the case of products posing risks to human health, we think it likely that manufacturers' decisions will be influenced by other factors, such as the potential civil liability that might flow from marketing products posing a health risk to the ultimate consumer, or the additional costs associated with safety procedures required to use such products in the manufacturing process.

123. Finally, we note that, although we consider consumers' tastes and habits significant in determining "likeness" in this dispute, at the oral hearing, Canada indicated that it considers this criterion to be *irrelevant*, in this dispute, because the existence of the measure has disturbed normal conditions of competition between the products. In our Report in *Korea - Alcoholic Beverages*, we observed that, "[p]articularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand" for a product.¹⁰⁴ We noted that, in such situations, "it may be highly relevant to examine latent demand" that is suppressed by regulatory barriers.¹⁰⁵ In addition, we said that "evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or to competition."¹⁰⁶ We, therefore, do not accept Canada's contention that, in markets where normal conditions of competition have been disturbed by regulatory or fiscal barriers, consumers' tastes and habits cease to be relevant. In such situations, a Member may submit evidence of latent, or suppressed, consumer demand in that market, or it may submit evidence of substitutability from some relevant third market. In making this point, we do not wish to be taken to suggest that there *is* latent demand for chrysotile asbestos fibres. Our point is simply that the existence of the measure does not render consumers' tastes and habits irrelevant, as Canada contends.

124. We observe also that the Panel did not regard as decisive the different tariff classifications of the chrysotile asbestos, PVA, cellulose and glass fibres, each of which is classified under a different tariff heading.¹⁰⁷ In the absence of a full analy-

¹⁰³ We recognize that consumers' reactions to products posing a risk to human health vary considerably depending on the product, and on the consumer. Some dangerous products, such as tobacco, are widely used, despite the known health risks. The influence known dangers have on consumers' tastes and habits is, therefore, unlikely to be uniform or entirely predictable.

¹⁰⁴ *Supra*, footnote 58, para. 115.

¹⁰⁵ *Ibid.*, para. 120. We added that "studies of cross-price elasticity ... involve an assessment of latent demand" (para. 121).

¹⁰⁶ *Supra*, footnote 58, para. 137.

¹⁰⁷ Panel Report, para. 8.143.

sis, by the Panel, of the other three criteria addressed, we cannot determine what importance should be attached to the different tariff classifications of the fibres.

125. In sum, in our view, the Panel reached the conclusion that *chrysotile asbestos and PCG fibres* are "like products" under Article III:4 of the GATT 1994 on the following basis: the Panel disregarded the quite different "properties, nature and quality" of chrysotile asbestos and PCG fibres, as well as the different tariff classification of these fibres; it considered no evidence on consumers' tastes and habits; and it found that, for a "small number" of the many applications of these fibres, they are substitutable, but it did not consider the many other end-uses for the fibres that are different. Thus, the only evidence supporting the Panel's finding of "likeness" is the "small number" of shared end-uses of the fibres.

126. For the reasons we have given, we find this insufficient to justify the conclusion that the chrysotile asbestos and PCG fibres are "like products" and we, therefore, reverse the Panel's conclusion, in paragraph 8.144 of the Panel Report, "that chrysotile fibres, on the one hand, and PVA, cellulose and glass fibres, on the other, are 'like products' within the meaning of Article III:4 of the GATT 1994."

3. *Cement-Based Products Containing Chrysotile and PCG Fibres*

127. Having reversed the Panel's finding on the "likeness" of the *fibres*, we now examine the Panel's findings regarding the "likeness" of *cement-based products containing chrysotile asbestos fibres* and *cement-based products containing PCG fibres*. In examining the "likeness" of these cement-based products, the Panel stated that, physically, the only difference between these products is the incorporation of a different fibre.¹⁰⁸ In this respect, the Panel indicated that "many of the arguments put forward in relation to chrysotile asbestos, PVA, cellulose and glass fibres are applicable *mutatis mutandis* to products containing those fibres."¹⁰⁹ The Panel noted that, for any given cement-based product, the tariff classification is the same, irrespective of the fibre incorporated into the product.¹¹⁰ The Panel declined to examine the "risk" criterion advanced by the European Communities, and also considered it unnecessary to analyze consumers' tastes and habits.¹¹¹ On this basis, the Panel concluded that "chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994."¹¹²

128. As the Panel said, the primary physical difference between cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres lies in the particular fibre incorporated into the product. This difference is important because, as we have said in our examination of fibres, we believe that the health risks associated with a product may be relevant to the inquiry into the physical properties of a product when making a determination of "likeness" under Article III:4

¹⁰⁸ Panel Report, para. 8.145.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*, para. 8.148.

¹¹¹ *Ibid.*, para. 8.149.

¹¹² *Ibid.*, para. 8.150.

of the GATT 1994.¹¹³ This is also true for cement-based products containing the different fibres. In examining the *physical properties* of the two sets of cement-based products, it cannot be ignored that one set of products contains a fibre known to be highly carcinogenic, while the other does not.¹¹⁴ In this respect, we recall that the Panel concluded that "there is an undeniable public health risk in relation to chrysotile contained in high-density chrysotile-cement products."¹¹⁵ We, therefore, reverse the Panel's finding, in paragraph 8.149 of the Panel Report, that these health risks are not relevant in examining the "likeness" of the cement-based products.

129. Furthermore, the Panel did not indicate whether or to what extent the incorporation of one type of fibre, instead of another, affects other physical properties of a particular cement-based product and, consequently, affects the suitability of that product for a specific *end-use*. The Panel noted that the fibres give the products their specific function - "mechanical strength, resistance to heat, compression, etc." - but the Panel did not examine the extent to which the presence of a particular fibre affects the ability of a cement-based product to perform one or more of these functions efficiently.¹¹⁶

130. In addition, even if the cement-based products were functionally interchangeable, we consider it likely that the presence of a known carcinogen in one of the products would have an influence on *consumers' tastes and habits* regarding that product. We believe this to be true irrespective of whether the consumer of the *cement-based* products is a commercial party, such as a construction company, or is an individual, for instance, a do-it-yourself ("DIY") enthusiast or someone who owns or lives or works in a building. This influence may well vary, but the possibility of such an influence should not be overlooked by a panel when considering the "likeness" of products containing chrysotile asbestos. In the absence of an examination of consumers' tastes and habits, we do not see how the Panel could reach a conclusion on the "likeness" of the cement-based products at issue.¹¹⁷

131. For all of these reasons, we reverse the Panel's conclusion, in paragraph 8.150 of the Panel Report, "that chrysotile-fibre products and fibro-cement products are like products within the meaning of Article III:4 of the GATT 1994."

132. As we have reversed the Panel's findings that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994, and also the Panel's findings that cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres are "like products" under that provision, we also reverse, in consequence, the Panel's conclusion, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994 as this finding rests, in part, on the Panel's findings that the two sets of products are "like".

¹¹³ *Supra*, para. 113.

¹¹⁴ *Supra*, para. 114.

¹¹⁵ Panel Report, para. 8.203.

¹¹⁶ Panel Report, para. 8.145.

¹¹⁷ See, further, *supra*, paras. 117 and 118. See, also, *supra*, paras. 121 and 122.

E. Completing the "Like Product" Analysis under Article III:4 of the GATT 1994

133. As we have reversed both of the Panel's conclusions on "likeness" under Article III:4 of the GATT 1994, we think it appropriate to complete the analysis, on the basis of the factual findings of the Panel and of the undisputed facts in the Panel record. We have already examined the meaning of the term "like products", and we have also approved the approach for inquiring into "likeness" that is based on the Report of the Working Party in *Border Tax Adjustments* and that was also approved, though not entirely followed, by the Panel in this case. Under that approach, the evidence is to be examined under four criteria: physical properties; end-uses; consumers' tastes and habits; and tariff classification.

1. Chrysotile and PCG Fibres

134. We address first the "likeness" of *chrysotile asbestos fibres* and *PCG fibres*. As regards the physical properties of these fibres, we recall that the Panel stated that:

The Panel notes that no party contests that the structure of chrysotile fibres is unique by nature and in comparison with artificial fibres that can replace chrysotile asbestos. The parties agree that none of the substitute fibres mentioned by Canada in connection with Article III:4 has the same structure, either in terms of its form, its diameter, its length or its potential to release particles that possess certain characteristics. Moreover, they do not have the same chemical composition, which means that, in purely physical terms, none of them has the same nature or quality. ...¹¹⁸

135. We also see it as important to take into account that, since 1977, chrysotile asbestos fibres have been recognized internationally as a known carcinogen because of the particular combination of their molecular structure, chemical composition, and fibrillation capacity.¹¹⁹ In that respect, the Panel noted that:

... the carcinogenicity of chrysotile fibres has been acknowledged for some time by international bodies. This carcinogenicity was confirmed by the experts consulted by the Panel, with respect to both lung cancers and mesotheliomas, even though the experts appear to acknowledge that chrysotile is less likely to cause mesotheliomas than amphiboles. We also note that the experts confirmed that the types of cancer concerned had a mortality rate of close to 100 per cent. We therefore consider that we have sufficient evidence that there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres. ...¹²⁰

In contrast, the Panel found that the PCG fibres "are not classified by the WHO at the same level of risk as chrysotile."¹²¹ The experts also confirmed, as the Panel re-

¹¹⁸ Panel Report, para. 8.121.

¹¹⁹ *Supra*, para. 114.

¹²⁰ Panel Report, para. 8.188.

¹²¹ *Ibid.*, para. 8.220.

ported, that current scientific evidence indicates that PCG fibres do "not present the same risk to health as chrysotile" asbestos fibres.¹²²

136. It follows that the evidence relating to properties indicates that, physically, chrysotile asbestos and PCG fibres are very different. As we said earlier, in such cases, in order to overcome this indication that products are *not* "like", a high burden is imposed on a complaining Member to establish that, despite the pronounced physical differences, there is a competitive relationship between the products such that, *all* of the evidence, taken together, demonstrates that the products are "like" under Article III:4 of the GATT 1994.

137. The Panel observed that the end-uses of chrysotile asbestos and PCG fibres are the same "for a small number" of applications.¹²³ The Panel simply adverted to these overlapping end-uses and offered no elaboration on their nature and character. We note that Canada argued before the Panel that there are some 3,000 commercial applications for asbestos fibres.¹²⁴ Canada and the European Communities indicated that the most important end-uses for asbestos fibres include, in no particular order, incorporation into: cement-based products; insulation; and various forms of friction lining.¹²⁵ Canada noted that 90 percent, by quantity, of French imports of chrysotile asbestos were used in the production of cement-based products.¹²⁶ This evidence suggests that chrysotile asbestos and PCG fibres share a small number of similar end-uses and, that, as Canada asserted, for chrysotile asbestos, these overlapping end-uses represent an important proportion of the end-uses made of chrysotile asbestos, measured in terms of quantity.

138. There is, however, no evidence on the record regarding the nature and extent of the many end-uses for chrysotile asbestos and PCG fibres which are *not* overlapping. Thus, we do not know what proportion of all end-uses for chrysotile asbestos and PCG fibres overlap. Where products have a wide range of end-uses, only some of which overlap, we do not believe that it is sufficient to rely solely on evidence regarding the overlapping end-uses, without also examining evidence of the nature and importance of these end-uses in relation to all of the other possible end-uses for the products. In the absence of such evidence, we cannot determine the significance of the fact that chrysotile asbestos and PCG fibres share a small number of similar end-uses.

139. As we have already stated, Canada took the view, both before the Panel and before us, that consumers' tastes and habits have no relevance to the inquiry into the "likeness" of the fibres.¹²⁷ We have already addressed, and dismissed, the arguments advanced by Canada in support of this contention.¹²⁸ We have also stated that, in a case such as this one, where the physical properties of the fibres are very different, an

¹²² Panel Report, para. 8.220.

¹²³ Panel Report, para. 8.125.

¹²⁴ *Ibid.*, para. 3.21.

¹²⁵ *Ibid.*, paras. 3.21 (Canada) and 3.23 (European Communities). The lists of important uses given by the parties is not identical in all respects and we have distilled from each list the common elements.

¹²⁶ Panel Report, para. 3.21, footnote 7.

¹²⁷ *Supra*, paras. 120 and 123.

¹²⁸ *Ibid.*

examination of the evidence relating to consumers' tastes and habits is an indispensable - although not, on its own, sufficient - aspect of any determination that products are "like" under Article III:4 of the GATT 1994.¹²⁹ If there is no evidence on this aspect of the nature and extent of the competitive relationship between the fibres, there is no basis for overcoming the inference, drawn from the different physical properties, that the products are not "like". However, in keeping with its argument that this criterion is irrelevant, Canada presented *no* evidence on consumers' tastes and habits regarding chrysotile asbestos and PCG fibres.¹³⁰

140. Finally, we note that chrysotile asbestos fibres and the various PCG fibres all have different tariff classifications. While this element is not, on its own, decisive, it does tend to indicate that chrysotile and PCG fibres are not "like products" under Article III:4 of the GATT 1994.

141. Taken together, in our view, all of this evidence is certainly far from sufficient to satisfy Canada's burden of proving that chrysotile asbestos fibres are "like" PCG fibres under Article III:4 of the GATT 1994. Indeed, this evidence rather tends to suggest that these products are not "like products" for the purposes of Article III:4 of the GATT 1994.

2. *Cement-Based Products Containing Chrysotile and PCG Fibres*

142. We turn next to consider whether *cement-based products containing chrysotile asbestos fibres* are "like" *cement-based products containing PCG fibres* under Article III:4 of the GATT 1994. We begin, once again, with physical properties. In terms of composition, the physical properties of the different cement-based products appear to be relatively similar. Yet, there is one principal and significant difference between these products: one set of cement-based products contains a known carcinogenic fibre, while the other does not. The Panel concluded that the presence of chrysotile asbestos fibres in cement-based products poses "an undeniable public health risk".¹³¹

143. The Panel stated that the fibres give the cement-based products their specific function - "mechanical strength, resistance to heat, compression, etc."¹³² These functions are clearly based on the physical properties of the products. There is no evidence of record to indicate whether the presence of chrysotile asbestos fibres, rather than PCG fibres, in a particular cement-based product, affects these particular physical properties of the products. For instance, a tile incorporating chrysotile asbestos fibres may be more heat resistant than a tile incorporating a PCG fibre.

144. In addition, there is no evidence to indicate to what extent the incorporation of one type of fibre, instead of another, affects the suitability of a particular cement-

¹²⁹ Our reasons for reaching this conclusion are set forth, *supra*, in paras. 117, 118, 121 and 122.

¹³⁰ Canada did present evidence that the impact of the Decree was to reduce demand for chrysotile (Panel Report, paras. 3.20 and 3.422). However, as Canada recognized, this is a necessary consequence of the prohibition on chrysotile and is not evidence of consumers' attitudes and choices regarding the products at issue. As we have said, regulatory measures may suppress latent consumer demand for a product (*supra*, para. 123).

¹³¹ Panel Report, para. 8.203.

¹³² *Ibid.*, para. 8.145.

based product for a specific end-use.¹³³ Once again, it may be that tiles containing chrysotile asbestos fibres perform some end-uses, such as resistance to heat, more efficiently than tiles containing a PCG fibre. Thus, while we accept that the two different types of cement-based products may perform largely similar end-uses, in the absence of evidence, we cannot determine whether each type of cement-based product can perform, with *equal* efficiency, *all* of the functions performed by the other type of cement-based product.

145. As with the fibres, Canada contends that evidence on consumers' tastes and habits concerning cement-based products is irrelevant. Accordingly, Canada submitted no such evidence to the Panel. We have dismissed Canada's arguments in support of this contention.¹³⁴ We have also indicated that it is of particular importance, under Article III of the GATT 1994, to examine evidence relating to competitive relationships in the marketplace.¹³⁵ We consider it likely that the presence of a known carcinogen in one of the products will have an influence on consumers' tastes and habits regarding that product.¹³⁶ It may be, for instance, that, although cement-based products containing chrysotile asbestos fibres are capable of performing the same functions as other cement-based products, consumers are, to a greater or lesser extent, not willing to use products containing chrysotile asbestos fibres because of the health risks associated with them. Yet, this is only speculation; the point is, there is no evidence. We are of the view that a determination on the "likeness" of the cement-based products cannot be made, under Article III:4, in the absence of an examination of evidence on consumers' tastes and habits. And, in this case, no such evidence has been submitted.

146. As regards tariff classification, we observe that, for any given cement-based product, the tariff classification of the product is the same.¹³⁷ However, this indication of "likeness" cannot, on its own, be decisive.

147. Thus, we find that, in particular, in the absence of any evidence concerning consumers' tastes and habits, Canada has not satisfied its burden of proving that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres, under Article III:4 of the GATT 1994.

148. As Canada has not demonstrated either that chrysotile asbestos fibres are "like" PCG fibres, or that cement-based products containing chrysotile asbestos fibres are "like" cement-based products containing PCG fibres, we conclude that Canada has not succeeded in establishing that the measure at issue is inconsistent with Article III:4 of the GATT 1994.

149. One Member of the Division hearing this appeal wishes to make a concurring statement. At the outset, I would like to make it abundantly clear that I agree with the findings and conclusions reached, and the reasoning set out in support thereof, by the Division, in: Section V (*TBT Agreement*); Section VII (Article XX(b) of the GATT 1994 and Article 11 of the DSU); Section VIII (Article XXIII:1(b) of the GATT 1994); and Section IX (Findings and Conclusions) of the Report. This concurring

¹³³ *Supra*, para. 129.

¹³⁴ *Supra*, paras. 120 and 123.

¹³⁵ *Supra*, para. 117.

¹³⁶ *Supra*, para. 130.

¹³⁷ Panel Report, para. 8.148.

statement, in other words, relates only to Section VI ("Like Products" in Article III:4 of the GATT 1994) of the Report.

150. More particularly, in respect of Section VI of the Report, I join in the findings and conclusions set out in: paragraphs 116, 126, 128, 131, 132, 141, 147 and 148. I am bound to say that, in truth, I agree with a great deal more than just the bare findings and conclusions contained in these eight paragraphs of the Report. It is, however, as a practical matter, not feasible to sort out and identify which part of which paragraph, of the sixty-odd paragraphs comprising Section VI of our Report in which I join. Nor is it feasible to offer a detailed statement with respect to the portions that would then remain. Accordingly, I set out only two related matters below.

151. In paragraph 113 of the Report, we state that "[w]e are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of 'likeness' under Article III:4 of the GATT 1994." We also point out, in paragraph 114, that "[p]anels must examine fully the physical properties of products. In particular, ... those physical properties of products that are likely to influence the competitive relationship between products in the market place. In the cases of chrysotile asbestos fibres, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibres are carcinogenic in humans, following inhalation." This carcinogenicity we describe as "a defining aspect of the physical properties of chrysotile asbestos fibres"¹³⁸, which property is not shared by the PCG fibres, "at least to the same extent."¹³⁹ We express our inability to "see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of 'likeness' under Article III:4 of the GATT 1994."¹⁴⁰ (emphasis in the original) We observe also that the Panel, after noting that the carcinogenicity of chrysotile asbestos fibres has been acknowledged by international bodies and confirmed by the experts the Panel consulted, ruled that it "[has] sufficient evidence that *there is in fact a serious carcinogenic risk associated with the inhalation of chrysotile fibres.*"¹⁴¹ (emphasis added) In fact, the scientific evidence of record for this finding of carcinogenicity of chrysotile asbestos fibres is so clear, voluminous, and is confirmed, a number of times, by a variety of international organizations, as to be practically overwhelming.

152. In the present appeal, considering the nature and quantum of the scientific evidence showing that the physical properties and qualities of chrysotile asbestos fibres include or result in carcinogenicity, my submission is that there is ample basis for a definitive characterization, on completion of the legal analysis, of such fibres as *not* "like" PCG fibres. PCG fibres, it may be recalled, have not been shown by Canada to have the same lethal properties as chrysotile asbestos fibres. That definitive characterization, it is further submitted, may and should be made even in the absence of evidence concerning the other two *Border Tax Adjustments* criteria (categories of "potentially shared characteristics") of end-uses and consumers' tastes and habits. It is difficult for me to imagine what evidence relating to economic competitive rela-

¹³⁸ *Supra*, para. 114.

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ Panel Report, para. 8.188. See, *supra*, para. 114.

tionships as reflected in end-uses and consumers' tastes and habits could outweigh and set at naught the undisputed deadly nature of chrysotile asbestos fibres, compared with PCG fibres, when inhaled by humans, and thereby compel a characterization of "likeness" of chrysotile asbestos and PCG fibres.

153. The suggestion I make is not that *any* kind or degree of health risk, associated with a particular product, would *a priori* negate a finding of the "likeness" of that product with another product, under Article III:4 of the GATT 1994. The suggestion is a very narrow one, limited only to the circumstances of this case, and confined to chrysotile asbestos fibres as compared with PCG fibres. To hold that these fibres are not "like" one another in view of the undisputed carcinogenic nature of chrysotile asbestos fibres appears to me to be but a small and modest step forward from mere reversal of the Panel's ruling that chrysotile asbestos and PCG fibres are "like", especially since our holding in completing the analysis is that Canada failed to satisfy a complainant's burden of proving that PCG fibres are "like" chrysotile asbestos fibres under Article III:4. That small step, however, the other Members of the Division feel unable to take because of their conception of the "fundamental", perhaps decisive, role of economic competitive relationships in the determination of the "likeness" of products under Article III:4.

154. My second point is that the necessity or appropriateness of adopting a "fundamentally" economic interpretation of the "likeness" of products under Article III:4 of the GATT 1994 does not appear to me to be free from substantial doubt. Moreover, in future concrete contexts, the line between a "fundamentally" and "exclusively" economic view of "like products" under Article III:4 may well prove very difficult, as a practical matter, to identify. It seems to me the better part of valour to reserve one's opinion on such an important, indeed, philosophical matter, which may have unforeseeable implications, and to leave that matter for another appeal and another day, or perhaps other appeals and other days. I so reserve my opinion on this matter.

VII. ARTICLE XX(B) OF THE GATT 1994 AND ARTICLE 11 OF THE DSU

155. Under Article XX(b) of the GATT 1994, the Panel examined, first, whether the use of chrysotile-cement products poses a risk to human health and, second, whether the measure at issue is "necessary to protect human ... life or health". Canada contends that the Panel erred in law in its findings on both these issues. We will examine these two issues in turn before addressing Canada's appeal that the Panel failed to make an "objective assessment", under Article 11 of the DSU, in reaching its conclusions under Article XX(b) of the GATT 1994.

156. We recall that Article XX(b) of the GATT 1994 reads:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of *measures*:

...

(b) *necessary to protect human, animal or plant life or health*; (emphasis added)

...

A. *"To Protect Human Life or Health"*

157. On the issue of whether the use of chrysotile-cement products poses a risk to human health sufficient to enable the measure to fall within the scope of application of the phrase "to protect human ... life or health" in Article XX(b), the Panel stated that it "considers that the evidence before it *tends to show* that handling chrysotile-cement products constitutes a risk to health rather than the opposite."¹⁴² (emphasis added) On the basis of this assessment of the evidence, the Panel concluded that:

... the EC has made a prima facie case for the existence of a health risk in connection with the use of chrysotile, in particular as regards lung cancer and mesothelioma in the occupational sectors downstream of production and processing and for the public in general in relation to chrysotile-cement products. This prima facie case has not been rebutted by Canada. Moreover, the Panel considers that the comments by the experts confirm the health risk associated with exposure to chrysotile in its various uses. *The Panel therefore considers that the EC have shown that the policy of prohibiting chrysotile asbestos implemented by the Decree falls within the range of policies designed to protect human life or health. ...*¹⁴³ (emphasis added)

Thus, the Panel found that the measure falls within the category of measures embraced by Article XX(b) of the GATT 1994.

158. According to Canada, the Panel deduced that there was a risk to human life or health associated with manipulation of chrysotile-cement products from seven factors.¹⁴⁴ These seven factors all relate to the scientific evidence which was before the Panel, including the opinion of the scientific experts. Canada argues that the Panel erred in law by deducing from these seven factors that chrysotile-cement products pose a risk to human life or health.¹⁴⁵

159. Although Canada does not base its arguments about these seven factors on Article 11 of the DSU, we bear in mind the discretion that is enjoyed by panels as the trier of facts. In *United States - Wheat Gluten*, we said:

... in view of the distinction between the respective roles of the Appellate Body and panels, we have taken care to emphasize that a panel's appreciation of the evidence falls, in principle, "within the *scope of the panel's discretion as the trier of facts*". (emphasis added)
In assessing the panel's appreciation of the evidence, we cannot base a finding of inconsistency under Article 11 simply on the conclusion

¹⁴² Panel Report, para. 8.193.

¹⁴³ Panel Report, para. 8.194.

¹⁴⁴ Canada's appellant's submission, para. 170. The seven factors Canada relies upon are identified in para. 19 of this Report.

¹⁴⁵ Canada's appellant's submission, para. 171.

that we might have reached a different factual finding from the one the panel reached. Rather, we must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, we will not interfere lightly with the panel's exercise of its discretion.¹⁴⁶

160. In *Korea - Alcoholic Beverages*, we were faced with arguments that sought to cast doubt on certain studies relied on by the panel in that case. We stated:

The Panel's examination and weighing of the evidence submitted fall, in principle, within the scope of the Panel's discretion as the trier of facts and, accordingly, outside the scope of appellate review. This is true, for instance, with respect to the Panel's treatment of the Dodwell Study, the Sofres Report and the Nielsen Study. *We cannot second-guess the Panel in appreciating either the evidentiary value of such studies or the consequences, if any, of alleged defects in those studies.* Similarly, it is not for us to review the relative weight ascribed to evidence on such matters as marketing studies ...¹⁴⁷ (emphasis added)

161. The same holds true in this case. The Panel enjoyed a margin of discretion in assessing the value of the evidence, and the weight to be ascribed to that evidence. The Panel was entitled, in the exercise of its discretion, to determine that certain elements of evidence should be accorded more weight than other elements - that is the essence of the task of appreciating the evidence.

162. With this in mind, we have examined the seven factors on which Canada relies in asserting that the Panel erred in concluding that there exists a human health risk associated with the manipulation of chrysotile-cement products. We see Canada's appeal on this point as, in reality, a challenge to the Panel's assessment of the credibility and weight to be ascribed to the scientific evidence before it. Canada contests the conclusions that the Panel drew both from the evidence of the scientific experts and from scientific reports before it. As we have noted, we will interfere with the Panel's appreciation of the evidence only when we are "satisfied that the panel has *exceeded the bounds of its discretion*, as the trier of facts, in its appreciation of the evidence."¹⁴⁸ (emphasis added) In this case, nothing suggests that the Panel exceeded the bounds of its lawful discretion. To the contrary, all four of the scientific experts consulted by the Panel concurred that chrysotile asbestos fibres, and chrysotile-cement products, constitute a risk to human health, and the Panel's conclusions on this point are faithful to the views expressed by the four scientists. In addition, the Panel noted that the carcinogenic nature of chrysotile asbestos fibres has been acknowledged since 1977 by international bodies, such as the International Agency for Research on Cancer and the World Health Organization.¹⁴⁹ In these circumstances, we find that the Panel remained well within the bounds of its discretion in finding that chrysotile-cement products pose a risk to human life or health.

¹⁴⁶ *Supra*, footnote 48, para. 151.

¹⁴⁷ *Supra*, footnote 58, para. 161.

¹⁴⁸ Appellate Body Report, United States - Wheat Gluten, *supra*, footnote 48, para. 151.

¹⁴⁹ Panel Report, para. 8.188.

163. Accordingly, we uphold the Panel's finding, in paragraph 8.194 of the Panel Report, that the measure "protect[s] human ... life or health", within the meaning of Article XX(b) of the GATT 1994.

B. "Necessary"

164. On the issue of whether the measure at issue is "necessary" to protect public health within the meaning of Article XX(b), the Panel stated:

In the light of France's public health objectives as presented by the European Communities, the Panel concludes that the EC has made a prima facie case for the non-existence of a reasonably available alternative to the banning of chrysotile and chrysotile-cement products and recourse to substitute products. Canada has not rebutted the presumption established by the EC. We also consider that the EC's position is confirmed by the comments of the experts consulted in the course of this proceeding.¹⁵⁰

165. Canada argues that the Panel erred in applying the "necessity" test under Article XX(b) of the GATT 1994 "by stating that there is a high enough risk associated with the manipulation of chrysotile-cement products that it could in principle justify strict measures such as the Decree."¹⁵¹ Canada advances four arguments in support of this part of its appeal. First, Canada argues that the Panel erred in finding, on the basis of the scientific evidence before it, that chrysotile-cement products pose a risk to human health.¹⁵² Second, Canada contends that the Panel had an obligation to "quantify" itself the risk associated with chrysotile-cement products and that it could not simply "rely" on the "hypotheses" of the French authorities.¹⁵³ Third, Canada asserts that the Panel erred by postulating that the level of protection of health inherent in the Decree is a halt to the spread of asbestos-related health risks. According to Canada, this "premise is false because it does not take into account the risk associated with the use of substitute products without a framework for controlled use."¹⁵⁴ Fourth, and finally, Canada claims that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree.

166. With respect to Canada's first argument, we note simply that we have already dismissed Canada's contention that the evidence before the Panel did not support the Panel's findings.¹⁵⁵ We are satisfied that the Panel had a more than sufficient basis to conclude that chrysotile-cement products do pose a significant risk to human life or health.

167. As for Canada's second argument, relating to "quantification" of the risk, we consider that, as with the *SPS Agreement*, there is no requirement under Article XX(b) of the GATT 1994 to *quantify*, as such, the risk to human life or health.¹⁵⁶

¹⁵⁰ Panel Report, para. 8.222.

¹⁵¹ Canada's appellant's submission, para. 187.

¹⁵² *Ibid.*, paras. 188 and 189.

¹⁵³ *Ibid.*, para. 193.

¹⁵⁴ *Ibid.*, para. 195.

¹⁵⁵ *Supra*, paras. 159-163.

¹⁵⁶ Appellate Body Report, *European Communities - Hormones*, *supra*, footnote 48, para. 186.

A risk may be evaluated either in quantitative or qualitative terms. In this case, contrary to what is suggested by Canada, the Panel assessed the nature and the character of the risk posed by chrysotile-cement products. The Panel found, on the basis of the scientific evidence, that "no minimum threshold of level of exposure or duration of exposure has been identified with regard to the risk of pathologies associated with chrysotile, except for asbestosis."¹⁵⁷ The pathologies which the Panel identified as being associated with chrysotile are of a very serious nature, namely lung cancer and mesothelioma, which is also a form of cancer.¹⁵⁸ Therefore, we do not agree with Canada that the Panel merely relied on the French authorities' "hypotheses" of the risk.

168. As to Canada's third argument, relating to the level of protection, we note that it is undisputed that WTO Members have the right to determine the level of protection of health that they consider appropriate in a given situation. France has determined, and the Panel accepted¹⁵⁹, that the chosen level of health protection by France is a "halt" to the spread of *asbestos*-related health risks. By prohibiting all forms of amphibole asbestos, and by severely restricting the use of chrysotile asbestos, the measure at issue is clearly designed and apt to achieve that level of health protection. Our conclusion is not altered by the fact that PCG fibres might pose a risk to health. The scientific evidence before the Panel indicated that the risk posed by the PCG fibres is, in any case, *less* than the risk posed by chrysotile asbestos fibres¹⁶⁰, although that evidence did *not* indicate that the risk posed by PCG fibres is non-existent. Accordingly, it seems to us perfectly legitimate for a Member to seek to halt the spread of a highly risky product while allowing the use of a less risky product in its place. In short, we do not agree with Canada's third argument.

169. In its fourth argument, Canada asserts that the Panel erred in finding that "controlled use" is not a reasonably available alternative to the Decree. This last argument is based on Canada's assertion that, in *United States - Gasoline*, both we and the panel held that an alternative measure "can only be ruled out if it is shown to be impossible to implement."¹⁶¹ We understand Canada to mean by this that an alternative measure is only excluded as a "reasonably available" alternative if implementation of that measure is "impossible". We certainly agree with Canada that an alternative measure which is impossible to implement is not "reasonably available". But we do not agree with Canada's reading of either the panel report or our report in *United States - Gasoline*. In *United States - Gasoline*, the panel held, in essence, that an alternative measure did not *cease* to be "reasonably" available simply because the alternative measure involved *administrative difficulties* for a Member.¹⁶² The panel's findings on this point were not appealed, and, thus, we did not address this issue in that case.

¹⁵⁷ Panel Report, para. 8.202.

¹⁵⁸ *Ibid.*, para. 8.188. See Panel Report, para. 5.29, for a description of mesothelioma given by Dr. Henderson.

¹⁵⁹ *Ibid.*, para. 8.204.

¹⁶⁰ *Ibid.*, para. 8.220.

¹⁶¹ Canada's appellant's submission, para. 202, referring to, inter alia, para. 130 of that submission.

¹⁶² See Panel Report, *United States - Gasoline*, *supra*, footnote 15, paras. 6.26 and 6.28.

170. Looking at this issue now, we believe that, in determining whether a suggested alternative measure is "reasonably available", several factors must be taken into account, besides the difficulty of implementation. In *Thailand - Restrictions on Importation of and Internal Taxes on Cigarettes*, the panel made the following observations on the applicable standard for evaluating whether a measure is "necessary" under Article XX(b):

The import restrictions imposed by Thailand could be considered to be "necessary" in terms of Article XX(b) only if there were no alternative measure consistent with the General Agreement, or less inconsistent with it, which Thailand could *reasonably be expected to employ to achieve its health policy objectives*.¹⁶³ (emphasis added)

171. In our Report in *Korea - Beef*, we addressed the issue of "necessity" under Article XX(d) of the GATT 1994.¹⁶⁴ In that appeal, we found that the panel was correct in following the standard set forth by the panel in *United States - Section 337 of the Tariff Act of 1930*:

It was clear to the Panel that a contracting party cannot justify a measure inconsistent with another GATT provision as "necessary" in terms of Article XX(d) if an alternative measure which it could reasonably be expected to employ and which is not inconsistent with other GATT provisions is available to it. By the same token, in cases where a measure consistent with other GATT provisions is not reasonably available, a contracting party is bound to use, among the measures reasonably available to it, that which entails the least degree of inconsistency with other GATT provisions.¹⁶⁵

172. We indicated in *Korea - Beef* that one aspect of the "weighing and balancing process ... comprehended in the determination of whether a WTO-consistent alternative measure" is reasonably available is the extent to which the alternative measure "contributes to the realization of the end pursued".¹⁶⁶ In addition, we observed, in that case, that "[t]he more vital or important [the] common interests or values" pursued, the easier it would be to accept as "necessary" measures designed to achieve those ends.¹⁶⁷ In this case, the objective pursued by the measure is the preservation of human life and health through the elimination, or reduction, of the well-known, and life-threatening, health risks posed by asbestos fibres. The value pursued is both vital and important in the highest degree. The remaining question, then, is whether there is an alternative measure that would achieve the same end and that is less restrictive of trade than a prohibition.

173. Canada asserts that "controlled use" represents a "reasonably available" measure that would serve the same end. The issue is, thus, whether France could reasonably be expected to employ "controlled use" practices to achieve its chosen level of health protection - a halt in the spread of asbestos-related health risks.

¹⁶³ Adopted 20 February 1990, BISD 37S/200, para. 75.

¹⁶⁴ *Supra*, footnote 49, paras. 159 ff.

¹⁶⁵ Adopted 7 November 1989, BISD 36S/345, para. 5.26; we expressly affirmed this standard in our Report in *Korea - Beef*, *supra*, footnote 49, para. 166.

¹⁶⁶ Appellate Body Report, *Korea - Beef*, *supra*, footnote 49, paras. 166 and 163.

¹⁶⁷ *Ibid.*, para. 162.

174. In our view, France could not reasonably be expected to employ *any* alternative measure if that measure would involve a continuation of the very risk that the Decree seeks to "halt". Such an alternative measure would, in effect, prevent France from achieving its chosen level of health protection. On the basis of the scientific evidence before it, the Panel found that, in general, the efficacy of "controlled use" remains to be demonstrated.¹⁶⁸ Moreover, even in cases where "controlled use" practices are applied "with greater certainty", the scientific evidence suggests that the level of exposure can, in some circumstances, still be high enough for there to be a "significant residual risk of developing asbestos-related diseases."¹⁶⁹ The Panel found too that the efficacy of "controlled use" is particularly doubtful for the building industry and for DIY enthusiasts, which are the most important users of cement-based products containing chrysotile asbestos.¹⁷⁰ Given these factual findings by the Panel, we believe that "controlled use" would not allow France to achieve its chosen level of health protection by halting the spread of asbestos-related health risks. "Controlled use" would, thus, not be an alternative measure that would achieve the end sought by France.

175. For these reasons, we uphold the Panel's finding, in paragraph 8.222 of the Panel Report, that the European Communities has demonstrated a *prima facie* case that there was no "reasonably available alternative" to the prohibition inherent in the Decree. As a result, we also uphold the Panel's conclusion, in paragraph 8.223 of the Panel Report, that the Decree is "necessary to protect human ... life or health" within the meaning of Article XX(b) of the GATT 1994.

C. Article 11 of the DSU

176. As part of its argument that the Panel erred in finding that the measure is justified under Article XX(b) of the GATT 1994, Canada also asserts that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU. According to Canada, the requirement imposed on panels by Article 11 to make an objective assessment of the matter implies "that scientific data must be assessed in accordance with the principle of the balance of probabilities."¹⁷¹ In particular, Canada asserts that, where the evidence is divergent or contradictory, the "principle of the preponderance of evidence" implies that a panel must take a position as to the respective weight of the evidence.¹⁷² Canada also contends that the Panel failed to assess the facts objectively because the Panel accepted "the opinions of experts on the controlled use of chrysotile, when those experts had no controlled-use expertise."¹⁷³

177. These arguments by Canada on the "balance of probabilities" and the "preponderance of evidence" concern the credibility and weight that the Panel ascribed to

¹⁶⁸ Panel Report, para. 8.209.

¹⁶⁹ *Ibid.*, paras. 8.209 and 8.211.

¹⁷⁰ *Ibid.*, paras. 8.213 and 8.214.

¹⁷¹ Canada's appellant's submission, para. 204.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*, para. 209.

different elements of evidence.¹⁷⁴ In essence, Canada argues that the Panel has not taken sufficient account of certain evidence and that the Panel has placed too much weight on certain other evidence. Thus, Canada is challenging the Panel's exercise of discretion in assessing and weighing the evidence. As we have already noted, "[w]e cannot second-guess the Panel in appreciating either the evidentiary value of ... studies or the consequences, if any, of alleged defects in [the evidence]".¹⁷⁵ And, as we have already said, in this case, the Panel's appreciation of the evidence remained well within the bounds of its discretion as the trier of facts.

178. In addition, in the context of the *SPS Agreement*, we have said previously, in *European Communities - Hormones*, that "responsible and representative governments may act in good faith on the basis of what, at a given time, may be a *divergent* opinion coming from qualified and respected sources."¹⁷⁶ (emphasis added) In justifying a measure under Article XX(b) of the GATT 1994, a Member may also rely, in good faith, on scientific sources which, at that time, may represent a divergent, but qualified and respected, opinion. A Member is not obliged, in setting health policy, automatically to follow what, at a given time, may constitute a majority scientific opinion. Therefore, a panel need not, necessarily, reach a decision under Article XX(b) of the GATT 1994 on the basis of the "preponderant" weight of the evidence.

179. With regard to Canada's argument that certain of the experts lacked expertise in "controlled use", we note that, from the beginning of the process for the selection of experts, the Panel made clear that it wished to consult experts on the "effectiveness of the controlled use of chrysotile."¹⁷⁷ The selection of the experts was the subject of a rigorous procedure which involved the consultation of five institutions with experience in this field and also of the parties.¹⁷⁸ At no stage did Canada object to the selection of any of the experts, nor indicate that any of them was unqualified to deal with issues relating to "controlled use".¹⁷⁹ We also note that the experts were instructed by the Panel to answer only those questions that fell within their area of expertise.¹⁸⁰ As Canada indicates, several experts indicated that particular questions, or parts of questions, posed to them went beyond their area of expertise.¹⁸¹

180. In these circumstances, we have serious difficulty accepting that the Panel failed to make an objective assessment by relying on experts who had no expertise. The Panel was entitled to assume that the experts possessed the necessary expertise to answer the questions, or parts of questions, they chose to answer. In other words, it was not incumbent on the Panel expressly to confirm, with respect to every opinion expressed by each expert, that the expert possessed the necessary expertise to give

¹⁷⁴ Canada's appellant's submission, para. 204.

¹⁷⁵ Appellate Body Report, *Korea - Alcoholic Beverages*, *supra*, footnote 58, para. 161. See, *supra*, para. 160.

¹⁷⁶ *Supra*, footnote 48, para. 194.

¹⁷⁷ Panel Report, para. 5.1.

¹⁷⁸ *Ibid.*, para. 5.20.

¹⁷⁹ *Ibid.*

¹⁸⁰ *Ibid.*, para. 5.22.

¹⁸¹ Canada's appellant's submission, para. 211, footnote 219, referring to Panel Report, paras. 5.335, 5.345, 5.346, 5.353, 5.363, 5.364, 5.370, 5.371, and 5.374, and to Annex VI of the Panel Report, para. 222.

that particular opinion. If Canada thought that one of the experts did not possess the expertise necessary to answer certain questions posed to him, Canada should have raised those concerns, either with the expert, at the meeting the Panel held with the parties and the experts on 17 January 2000, or with the Panel at some other time. We observe, finally, that, where an expert declined to answer a specific question, or part of a question, because of a professed lack of expertise, the Panel had no opinion from that expert on which to rely.

181. For these reasons, we decline Canada's appeal on Article 11 of the DSU.

VIII. ARTICLE XXIII:1(B) OF THE GATT 1994

182. Before the Panel, Canada claimed, under Article XXIII:1(b) of the GATT 1994, that the application of the measure at issue nullified or impaired benefits accruing to Canada. The European Communities raised preliminary objections, arguing on two grounds that the measure falls outside the scope of application of Article XXIII:1(b). First, the European Communities contended that Article XXIII:1(b) only applies to measures which *do not otherwise fall* under other provisions of the GATT 1994.¹⁸² Second, the European Communities argued that, while it may be possible to have "legitimate expectations" in connection with a purely "commercial" measure, it is not possible to claim "legitimate expectations" with respect to a measure taken to protect human life or health, which can be justified under Article XX(b) of the GATT 1994. Such measures are, the European Communities asserted, excluded from the scope of Article XXIII:1(b).¹⁸³

183. Before examining the substance of Canada's claim under Article XXIII:1(b) of the GATT 1994, the Panel first considered, and rejected, both of these preliminary objections raised by the European Communities, and found, as a consequence, that Canada could invoke Article XXIII:1(b) in respect of the measure.¹⁸⁴ The European Communities appeals the Panel's findings and conclusions relating to the two preliminary objections.

184. Before considering this aspect of the appeal, we note that the Panel went on to examine the substance of Canada's claim under Article XXIII:1(b) and concluded that Canada had not established "the existence of nullification or impairment of a benefit within the meaning of Article XXIII:1(b) of the GATT 1994 as a result of the application of the measure".¹⁸⁵ We note also that this ultimate conclusion by the Panel has not been appealed by either party. Accordingly, we address only the two narrow issues that have been appealed by the European Communities, and we will not address any other aspects of the Panel's findings under Article XXIII:1(b) of the GATT 1994.

185. This appeal is our first occasion to examine Article XXIII:1(b) of the GATT 1994. For this reason, before turning to the appeal by the European Communities, it seems to us useful to make certain preliminary observations about the relationship between Articles XXIII:1(a) and XXIII:1(b) of the GATT 1994. Arti-

¹⁸² Panel Report, para. 8.255.

¹⁸³ *Ibid.*, para. 8.257.

¹⁸⁴ *Ibid.*, paras. 8.265 and 8.274.

¹⁸⁵ *Ibid.*, para. 8.304.

cle XXIII:1(a) sets forth a cause of action for a claim that a Member has failed to carry out one or more of its obligations under the GATT 1994. A claim under Article XXIII:1(a), therefore, lies when a Member is alleged to have acted inconsistently with a provision of the GATT 1994. Article XXIII:1(b) sets forth a separate cause of action for a claim that, through the application of a measure, a Member has "nullified or impaired" "benefits" accruing to another Member, "whether or not that measure conflicts with the provisions" of the GATT 1994. Thus, it is not necessary, under Article XXIII:1(b), to establish that the measure involved is inconsistent with, or violates, a provision of the GATT 1994. Cases under Article XXIII:1(b) are, for this reason, sometimes described as "non-violation" cases; we note, though, that the word "non-violation" does not appear in this provision. The purpose of this rather unusual remedy was described by the panel in *European Economic Community - Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins* ("*EEC - Oilseeds*") in the following terms:

The idea underlying [the provisions of Article XXIII:1(b)] is that the improved competitive opportunities that can legitimately be expected from a tariff concession can be frustrated not only by measures proscribed by the General Agreement but also by measures consistent with that Agreement. In order to encourage contracting parties to make tariff concessions they must therefore be given a right of redress when a reciprocal concession is impaired by another contracting party as a result of the application of any measure, whether or not it conflicts with the General Agreement.¹⁸⁶ (emphasis added)

186. Like the panel in *Japan - Measures Affecting Consumer Photographic Film and Paper* ("*Japan - Film*"), we consider that the remedy in Article XXIII:1(b) "should be approached with caution and should remain an exceptional remedy".¹⁸⁷ That panel stated:

Although the non-violation remedy is an important and accepted tool of WTO/GATT dispute settlement and has been "on the books" for almost 50 years, we note that there have only been eight cases in which panels or working parties have substantively considered Article XXIII:1(b) claims. This suggests that both the GATT contracting parties and WTO Members have approached this remedy with caution and, indeed, have treated it as an exceptional instrument of dispute settlement. We note in this regard that both the European Communities and the United States in the *EEC - Oilseeds* case, and the two parties in this case, have confirmed that *the non-violation nullification or impairment remedy should be approached with caution and treated as an exceptional concept*. The reason for this caution is straightforward. *Members negotiate the rules that they agree to follow and only*

¹⁸⁶ Adopted 25 January 1990, BISD 37S/86, para. 144.

¹⁸⁷ Adopted 22 April 1998, WT/DS44/R, DSR 1998:IV, 1179, para. 10.37.

*exceptionally would expect to be challenged for actions not in contravention of those rules.*¹⁸⁸ (emphasis added)

187. Against this background, we turn now to the European Communities' argument that Article XXIII:1(b) does not apply to measures that fall within the scope of application of other provisions of the GATT 1994. The text of Article XXIII:1(b) stipulates that a claim under that provision arises when a "benefit" is being "nullified or impaired" through the "application ... of any measure, *whether or not it conflicts with the provisions of this Agreement*". (emphasis added) The wording of the provision, therefore, clearly states that a claim may succeed, under Article XXIII:1(b), *even if the measure "conflicts" with some substantive provisions of the GATT 1994*. It follows that a measure may, *at one and the same time*, be inconsistent with, or in breach of, a provision of the GATT 1994 *and*, nonetheless, give rise to a cause of action under Article XXIII:1(b). Of course, if a measure "conflicts" with a provision of the GATT 1994, that measure must actually fall within the scope of application of that provision of the GATT 1994. We agree with the Panel that this reading of Article XXIII:1(b) is consistent with the panel reports in *Japan - Film* and *EEC - Oilseeds*, which both support the view that Article XXIII:1(b) applies to measures which simultaneously fall within the scope of application of other provisions of the GATT 1994.¹⁸⁹ Accordingly, we decline the European Communities' first ground of appeal under Article XXIII:1(b) of the GATT 1994.

¹⁸⁸ *Supra*, footnote 187, para. 10.36. Claims under Article XXIII:1(b) have been considered in the following reports: Working Party Report, Australia - Ammonium Sulphate, *supra*, footnote 58; Panel Report, Germany - Sardines, *supra*, footnote 58; Panel Report, Uruguayan Recourse to Article XXIII, adopted 16 November 1962, BISD 11S/95; Panel Report, Spain - Soyabean, *supra*, footnote 58; Panel Report, European Community - Tariff Treatment on Imports of Citrus Products from Certain Countries in the Mediterranean Region ("EC - Citrus Products"), L/5776, 7 February 1985, unadopted; Panel Report, European Economic Community - Production Aids Granted on Canned Peaches, Canned Pears, Canned Fruit Cocktail and Dried Grapes ("EEC - Canned Fruit"), L/5778, 20 February 1985, unadopted; Panel Report, Japan - Trade in Semi-Conductors, adopted 4 May 1988, BISD 35S/116; Panel Report, United States - Trade Measures Affecting Nicaragua, L/6053, 13 October 1986, unadopted; Panel Report, EEC - Oilseeds, *supra*, footnote 186; Panel Report, United States - Restrictions on the Importation of Sugar and Sugar-Containing Products Applied under the 1955 Waiver and under the Headnote to the Schedule of Tariff Concessions, adopted 7 November 1990, BISD 37S/228; Panel Report, Japan - Film, *supra*, footnote 187; Panel Report, Korea - Measures Affecting Government Procurement, WT/DS163/R, adopted 19 June 2000, DSR 2000:VIII, 3541. We note that claims under Article XXIII:1(b) of the GATT 1947 were also examined in the Panel Report, European Economic Community - Follow-up on the Panel Report, Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins ("EEC - Oilseeds II"), 31 March 1992, BISD 39S/91, unadopted.

Including EEC - Oilseeds II, and the present dispute, there have, therefore, been 14 cases in which a claim under Article XXIII:1(b) has been considered by working parties, panels, and, now, the Appellate Body. In six of these cases, the claim under Article XXIII:1(b) was successful and, on three of these occasions, the report was adopted. The successful claims were made in: Australia - Ammonium Sulphate (adopted 3 April 1950), Germany - Sardines (adopted 31 October 1952), EC - Citrus Products (unadopted), EEC - Canned Fruit (unadopted), EEC - Oilseeds (adopted 25 January 1990) and EEC - Oilseeds II (unadopted).

¹⁸⁹ See Panel Report, para. 8.263, which refers to the Panel Report in *Japan - Film*, *supra*, footnote 187, para. 10.50, and footnote 1214; and EEC - Oilseeds, *supra*, footnote 186, para. 144.

188. The European Communities also contends that the Panel erred in finding that Article XXIII:1(b) applies to measures which pursue health, rather than commercial, objectives and which can, therefore, be justified under Article XX(b) of the GATT 1994. Once again, we look to the text of Article XXIII:1(b), which provides that "the application by another Member of *any measure*" may give rise to a cause of action under that provision. The use of the word "any" suggests that measures of all types may give rise to such a cause of action. The text does not distinguish between, or exclude, certain types of measure. Clearly, therefore, the text of Article XXIII:1(b) contradicts the European Communities' argument that certain types of measure, namely, those with health objectives, are excluded from the scope of application of Article XXIII:1(b).

189. In any event, an attempt to draw the distinction suggested by the European Communities between so-called health and commercial measures would be very difficult in practice. By definition, measures which affect trade in goods, and which are subject to the disciplines of the GATT 1994, have a commercial impact. At the same time, the health objectives of many measures may be attainable only by means of commercial regulation. Thus, in practice, clear distinctions between health and commercial measures may be very difficult to establish. Nor do we see merit in the argument that, previously, only "commercial" measures have been the subject of Article XXIII:1(b) claims, as that does not establish that a claim *cannot* be made under Article XXIII:1(b) regarding a "non-commercial" measure.

190. An important aspect of the European Communities' argument is that a Member cannot have reasonable expectations of continued market access for products which are shown to pose a serious risk to human life or health. However, the paragraphs of the Panel Report appealed by the European Communities involve *exclusively* the Panel's findings on the threshold issues of the scope of application of Article XXIII:1(b). This particular argument of the European Communities, important as it is, simply does not relate to those threshold issues. Rather, the European Communities' argument relates to the substance of a claim that has been determined to fall within the scope of application of Article XXIII:1(b) and, in particular, concerns the issue whether a "benefit" has been "nullified or impaired" by a measure restricting market access for products posing a health risk. Here, we emphasize that the European Communities does *not* appeal the Panel's findings relating to the "nullification or impairment" of a "benefit" through the frustration of reasonable expectations by application of the measure at issue. We do not, therefore, find it necessary to examine the European Communities' argument relating to reasonable expectations.

191. For these reasons, we dismiss the European Communities' appeal under Article XXIII:1(b) of the GATT 1994 and uphold the Panel's finding that Article XXIII:1(b) applies to measures which fall within the scope of application of other provisions of the GATT 1994 and which pursue health objectives.

IX. FINDINGS AND CONCLUSIONS

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

- (a) reverses the Panel's finding, in paragraph 8.72(a) of the Panel Report, that the *TBT Agreement* "does not apply to the part of the Decree relating to the ban on imports of asbestos and asbestos-containing products because that part does not constitute a 'technical regulation' within the

- meaning of Annex 1.1 to the TBT Agreement", and finds that the measure, viewed as an integrated whole, does constitute a "technical regulation" under the *TBT Agreement*;
- (b) reverses the Panel's findings, in paragraphs 8.132 and 8.149 of the Panel Report, that "it is not appropriate" to take into consideration the health risks associated with chrysotile asbestos fibres in examining the "likeness", under Article III:4 of the GATT 1994, of those fibres and PCG fibres, and, also, in examining the "likeness", under that provision, of cement-based products containing chrysotile asbestos fibres or PCG fibres;
 - (c) reverses the Panel's finding, in paragraph 8.144 of the Panel Report, that chrysotile asbestos fibres and PCG fibres are "like products" under Article III:4 of the GATT 1994; and finds that Canada has not satisfied its burden of proving that these fibres are "like products" under that provision;
 - (d) reverses the Panel's finding, in paragraph 8.150 of the Panel Report, that cement-based products containing chrysotile asbestos fibres and cement-based products containing PCG fibres are "like products" under Article III:4 of the GATT 1994; and finds that Canada has not satisfied its burden of proving that these cement-based products are "like products" under Article III:4 of the GATT 1994;
 - (e) reverses, in consequence, the Panel's finding, in paragraph 8.158 of the Panel Report, that the measure is inconsistent with Article III:4 of the GATT 1994;
 - (f) upholds the Panel's finding, in paragraphs 8.194, 8.222 and 8.223 of the Panel Report, that the measure at issue is "necessary to protect human ... life or health", within the meaning of Article XX(b) of the GATT 1994; and, finds that the Panel acted consistently with Article 11 of the DSU in reaching this conclusion;
 - (g) upholds the Panel's finding, in paragraphs 8.265 and 8.274 of the Panel Report, that the measure may give rise to a cause of action under Article XXIII:1(b) of the GATT 1994.

193. It follows from our findings that Canada has not succeeded in establishing that the measure at issue is inconsistent with the obligations of the European Communities under the covered agreements and, accordingly, we do not make any recommendations to the DSB under Article 19.1 of the DSU.