WORLD TRADE ORGANIZATION

WT/DS122/R
28 September 2000

(00-3717)

Original: English

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

Report of the Panel

The report of the Panel on Thailand-Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland is being circulated to all Members, pursuant to the DSU. The report is being circulated as an unrestricted document from 28 September 2000 pursuant to the Procedures for the Circulation and Derestriction of WTO Documents (WT/L/160/Rev.1). Members are reminded that in accordance with the DSU only parties to the dispute may appeal a panel report. An appeal shall be limited to issues of law covered in the Panel report and legal interpretations developed by the Panel. There shall be no *ex parte* communications with the Panel or Appellate Body concerning matters under consideration by the Panel or Appellate Body.

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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 Poland[1]. Poland and Thailand held 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 matter[2].

1.3 At its meeting on 19 November 1999, the Dispute Settlement Body ("the DSB") established a Panel in accordance with Poland's request[3]. 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 anothers' 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 Poland[4].

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

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[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.

[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.

on, *inter alia*, H-beams originating in Poland.[5] On 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 Poland[8] 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 effect[9]. On 20 January 1997, Thailand forwarded to the Polish respondent companies -- Huta Katowice ("HK") and Stalexport[10] notifications concerning the preliminary determinations of dumping and injury, as well as the notice of provisional anti-dumping duties[11].

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 information[12]. 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 companies[14]. On 13 March, the DFT conducted a hearing for interested parties to present their views. Verification of questionnaire responses was conducted in Poland by Thai officials during 16-18 April 1997.

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[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 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.

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 injury[15]. The DFT also transmitted to HK confidential disclosure of dumping findings[16]. On 13 May 1997, the Polish respondent companies (through their legal counsel) submitted comments on the proposed final determinations[17] and on 19 May 1997, the DFT responded[18].

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 injury[19] 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 information[20]. On 7 July 1997, the DFT responded to the Polish respondent companies[21] 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.

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.

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[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.

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 information[22], which Thailand indicated that it did not intend to provide to Poland or to the third parties[23]. 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 dispute[24]. 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

[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".

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 delegations, 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 submission[25]. 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 anothers' requests for interim review.

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.

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

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 submission[26], 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 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 meeting[28], 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

[26] Annex 2-1, paras. 5-8.

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

[28] Annex 2-4, para. 8.

and methodologies."[29] Thailand suspects third parties and other potential third parties had similar problems.[30] Thailand further submits that, because 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. 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

[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 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] *Id.*

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

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 Antidumping 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]

(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

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[34] Poland's response to Panel Question 5(b), Annex 1-5.
[35] WT/DS122/2.

out in Article 6.2 DSU[36] 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 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."[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.

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[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, 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, para. 142.

[38] Appellate Body Report, *Korea-Dairy Safeguard*, *supra*., note 27.

[39] *Id*, para. 124.

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

(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.

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 authorities[44] and with Thailand at the WTO.[45] In addition, although the

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

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

[43] Appellate Body Report, *Korea-Dairy Safeguard*, *supra*, note 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).

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 address whether the bilateral consultations[49] 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.

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[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").

[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-paragraphs 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, 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.

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.

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 5[54], 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 note[56], 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 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

[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.

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.

(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 above[62], 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.

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[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] *Id.*

[60] *Id.*

[61] *Id.*

[62] *Supra*, para. 7.14.

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 raised during the course of the investigation the precise issue which Poland raises in this dispute under Article 2.2[65], 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 consultations[66] 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 injury[68], 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.

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[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.

[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 paragraph 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 meeting[69], 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 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

[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.

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 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

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[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.

[74] Appellate Body Report, *European Communities – Bananas*, *supra*, note 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.

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 above[81] the issue of sufficiency of the panel request with respect to the claim of violation of Article 3 in terms 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.

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[78] Appellate Body Report, *European-Communities-Bananas*, *supra*, note 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.

[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*, note 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."

(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.

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 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

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[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, p. 14.

[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, 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, para. 198.

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

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 defence[93], 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 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 below[96], in our examination under Article 3.

[92] Appellate Body Report, *Korea-Dairy Safeguard*, *supra*, note 27, para. 149.

[93] Appellate Body Report, *Canada-Aircraft*, *supra*, note 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, 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, para. 7.95. We note that this panel report was not appealed to the Appellate Body.

[96] *Infra*, Section VII.C.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 above[97], 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 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]

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[97] *Supra*, Section V.
[98] *Infra*, Section VII.C.3.a.

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 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 investigation[101]: the confidential and non-confidential versions of the application[102], the letter from DBE to HK transmitting the public notice of initiation[103], the letter from DFT to HK transmitting the notice of initiation and

[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.

questionnaire[104], a pre-application letter from SYS to the Thai Minister of Commerce[105], an internal DBE document providing a preliminary assessment of the application and requesting further information[106], 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.

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 5.2[108], 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]

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[104] Exhibit Thailand-5.

[105] Exhibit Thailand-51.

[106] Exhibit Thailand-54.

[107] Exhibit Thailand-55.

[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.

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-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 invoked only the first sentence of the chapeau of Article 5.2

[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 Question 11, Annex 1-

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.

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.

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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*, note 95, para. 7.76.

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

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 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 meeting[121], 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

[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.

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:

> "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 contested[122], 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.

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[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.

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

[123] Exhibit Thailand-56.

[124] Exhibit Thailand-56.

7.86 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.

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 application[126] 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

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[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.

before proceeding to initiate an investigation, the authorities shall notify the government of the exporting Member concerned".[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 note[130] 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, 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.

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[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.

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 specifications[133] ("JIS H-beams") and those produced to DIN specifications[134] ("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 Thailand[135]. 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 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

[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] *Id*. at section C, "Like product comparisons".
[138] *Id*. at section 7, "Allowances".
[139] *Id*. 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*).

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 '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

[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).

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]

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-beams, the result would have been essentially the same as the final dumping margin established on the basis of constructed normal value[148, 149].

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[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 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).

[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

(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 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)

(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)

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-beams[150].

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 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

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

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 cap[151]. 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

[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".

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 producers. 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 product[152]. 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.

(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]

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

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

[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.

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 K*orea - Anti-Dumping Duties on Imports of Polyacetal 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.

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

[156] *Id.*

[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] *Id.*

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-44[161], "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 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

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[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.

[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*, note 95, paras. 7.118- 7.119.

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.

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 below[167], 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

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[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).

the authorities must be discernible from those documents.[169] As we discuss below[170], 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 determination[171] 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 dispute[172], 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 Thailand states includes the non-confidential "essential

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[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*, note 157, in particular, paras. 208-213, 225-228; *United States - Imports of Anti-Dumping Duties on Imports of fresh and Chilled 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.

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 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

[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*, note 157, paras. 208-213.

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

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

> 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."

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 statements 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.

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[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.

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 above[178], we conduct this examination on the basis of the final determination and the other documents forming the basis for our review.[179]

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.

[178] *Supra*, paras. 7.139-7.151.

[179] *Supra*, para. 7.146.

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

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 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 determination[182] 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)

[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.

In addition, the draft final[183] 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.

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 data[186] 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".

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[183] Exhibit Thailand-37 at para. 4.

[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.

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 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 period[188], 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 submits[190] 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 market[191]. 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 period[192]) 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 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."

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

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 provision[193].

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 counsel[195], 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 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 determination[196] 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:

[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.
[196] Exhibit Thailand 37, Table 1.

Table 1						
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
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 investigation[197] 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.

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 data[198] and Thailand's response to certain questions from Poland[199], 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]

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[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.

[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

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 above[201], 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 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

(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.

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]

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

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[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.)

[204] Exhibit Thailand-46, para. 2.5.

[205] Exhibit Thailand-37, para. 7.

[206] Exhibit Thailand-40, p. 3.

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 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 imports[208], 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 quarter[211] 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 necessary adjustments to the CIF import prices and the average SYS prices included in this table and referred to in the final determination.[214]

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[207] Exhibit Thailand-41, p.2.

[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". *Id.*

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

[211] *Id*

[212] Exhibit Thailand-67.

[213] Exhibit Thailand-44 at para. 4.3.

[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).

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 Panel[217], 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 markets[220] because, as stated in the draft final determination "SYS can sell [its] exports at the price 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

[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.
[221] Exhibit Thailand 37, para. 10.
[222] Response by Thailand to additional question 8 of Poland, Annex 2-7.

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 above[223], 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 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 particulars[225]. 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

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[223] *Supra*, paras. 7.139-7.151.

[224] *Supra*, para. 7.146.

[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.

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 documents[226], 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 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.

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[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.

(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 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 authorities[230], 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]

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[227]Poland cites the panel report in *Mexico – HFCS*, *supra*, note 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.

[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.

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 <u>all</u> factors would have 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.

<u>Is the list of factors in Article 3.4 mandatory?</u>

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 Antidumping 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.

7.227 Poland argues in answer to a Panel question[236] 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

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[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] *Id*.

[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, 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*.

[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.

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]

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]

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[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 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, para. 136 and Panel Report, *Argentina-Safeguard Measures on Imports of Footwear*, WT/DS121/R, adopted 12 January 2000, 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.

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 stated[240]:

> "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] "
>
> 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

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[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.

[241] With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146.

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 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 3.4[243], 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 above[244], 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 below[245], 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.

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[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.

[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,* 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.

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 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 Poland[246] 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 request[248] 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 record[252] 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 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

[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] *Id.*

[251] Exhibit Thailand-46, para. 2.5.

[252] Exhibit Thailand-44, para. 4.8.

[253] Thailand's second oral statement, Annex 2-9, para. 61.

[254] *Id.*

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 above[257], 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 authorities 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

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[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.

imports, resluting [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 purposes"[261] and "cannot be the sole indicators 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 authorities[263] 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 found[264] 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

[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.

[262] Exhibit Thailand-46.

[263] Exhibit Thailand-46, para. 2.5.

[264] *Supra*, para. 7.214.

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 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 IP[267], 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 above[268], 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 factors[269], 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

[265] Thailand-46.

[266] Exhibit Thailand-46.

[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.

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.

(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,

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[270] *Supra*, para. 7.255.
[271] *Supra*, paras. 7.214, 7.256.

developments in technology and the export performance and productivity of the domestic industry."

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 above[274] 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.

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.

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[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.

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 alleges[275] 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 investigation.[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

[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.
[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.

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 the authority not to attribute to dumped imports injury caused by such other factors. In accordance with our approach outlined above[282], 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 documents[283], 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

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[279] The panel in *United States – Salmon, supra,* note 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.

[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.

demand)[285], potential trade restrictive practices of and competition between domestic and foreign producers[286], the influence of non-Polish imports[287], the nature of SYS' entry into the H-beam market[288] 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 "Thailand's "secret data" indicates that its authorities were clearly aware of the impact of changes in the global steel market on its domestic industry"[293], 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 determination[295] 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,

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[285] See Exhibit Thailand-41.
[286] *Id*
[287] *Id*
[288] *Id*
[289] *Id*
[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.
[293] Poland's second oral statement, Annex 1-6. para. 79. Poland refers in this context to Exhibit Thailand-44.
[294] *Id*
[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.

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 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 3.1[299]; and (ii) their findings concerning injury, which we have already found to be inconsistent with Articles 3.4 and 3.1[300], 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 clarity[301], 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.

[297] Exhibit Thailand-46, para. 2-4.
[298] Exhibit Thailand-44.
[299] *Supra*, para. 7.214.
[300] *Supra*, para. 7.256.
[301] *Supra*, paras. 7.27-7.31, 7.47.

8.3 In light of the findings above, and based on the documents forming the basis for our review[302], 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 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.

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.

[302] With respect to the documents forming the basis of our review, see *supra*, paras 7.139-7.151, in particular, para. 7.146.