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Argentina – Ceramic Tiles Argentina – Definitive Anti-dumping Measures on Imports of Ceramic Floor Tiles from Italy*

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1 Introduction: general considerations on Anti-dumping and WTO law and summary of the legal issues in this case

The WTO rules on dumping and anti-dumping reflect a political bargain, negotiated in the context of a fundamental normative dissensus as to whether dumping is a "wrong" practice and why.

In the GATT, there is an *apparently* strong statement against dumping, which can be defined as the sale of a product in the country of importation at a lower price than in the country of exportation, or at below cost. Dumping, the GATT says, is to be "condemned." However, this is immediately followed by the qualification "*if* it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic injury"(Article VI.1: emphasis added).

Even though dumping with these injurious effects is to be "condemned," the GATT contracting parties obviously did not agree on making dumping illegal in the GATT. Thus, there is no prohibition on dumping in the GATT, however much it may be "condemned," and no remedy available under Article XXIII against dumping. Instead, the GATT permits the unilateral imposition of anti-dumping duties against the dumped products, as long as these do not exceed the margin of dumping.

It is extremely unclear, on any plausible normative theory of multilateral trade liberalization, why price discrimination of the kind "condemned" as dumping undermines the gains from bargained trade concessions. One sort of behavior that is covered by the idea of dumping

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is predatory pricing, where goods are priced so low as to drive domestic incumbents out of business, thus paving the way for the firm engaged in predation to become a monopolist. Standard economic accounts of anti-trust law consider predation to be welfare-reducing. However, the GATT bargain does not contain a requirement that Contracting Parties ensure that anti-trust rules apply to the behavior of their firms in world markets. This is simply not part of the kind of bargained cooperative equilibrium implied by the GATT, and therefore, even if dumping *were* a good surrogate for predation, which it is not,[1] there would be no conceptual reason for condemning dumping.

Theories have been advanced, for instance by Jorge Miranda (Miranda, 1996) that "dumping" may reflect other kinds of behavior inconsistent with the GATT cooperative equilibrium, such as the "exportation" of recession or cyclical economic decline to other States. In a recession it might make sense for a producer to sell above marginal cost but below average cost, in order to recoup as much of its fixed costs as possible in a situation of depressed demand. To the extent that such a strategy can capture a greater part of market share abroad, it could reduce demand for domestic products in those markets, and thus theoretically externalize some of the "costs" of recession. However, there is no consensus that such externalization is incompatible with the GATT cooperative equilibrium. To infer such incompatibility would be tantamount to inferring an implicit obligation on the part of Contracting Parties to adopt appropriate counter-cyclical policies, so as to avoid such externalization. However, the GATT clearly leaves the problem of negative externalities from inappropriate macroeconomic policies for the International Monetary Fund (IMF).

Finally, one may understand the function of anti-dumping duties as that of providing some kind of limited reneging from bargained concessions in the face of economic and political pressures. It is arguable that without such a possibility for reneging, far fewer concessions would be made in negotiations, and that the pressures in question might even lead to the collapse of the whole bargain. In other words, there is nothing inherently wrong about dumping, but anti-dumping duties provide a necessary "safety valve" (Dam, 2001). While there is an explicit "safety

[1] See the empirical work of Hutton and Trebilcock, who examined a large number of anti-dumping cases in the Canadian context and found that in virtually no case was there even the possibility of predation in the facts on the basis of which "dumping" was found (Hutton and Trebilcock, 1990).

valve" in the GATT, that of safeguards or emergency action, it is often viewed as having conditions attached to it that impede its functioning (such as the requirement of compensation, under many circumstances, as well as the application of the duties on a Most-Favored-Nation basis).

Set against these controversies at the conceptual level about dumping and anti-dumping, the special legal rules that have evolved through the Tokyo Round Code and which are now reflected in the WTO Anti-Dumping Agreement pose particular problems for a treaty interpreter. Treaty provisions, the Vienna Convention on the Law of Treaties (VCLT) tells us, have to be interpreted in light of purpose and object (Article 31). Many WTO treaties balance multiple purposes, as the Appellate Body acknowledged with respect to the WTO Agreement on Sanitary and Phytosanitary Measures (SPS) in the *EC-Hormones* decision.[2] However, if we take an Agreement like SPS, one can imagine a consensus among WTO Members that all of the purposes are legitimate if not important, including facilitating trade liberalization as well as allowing Members to protect the health of their citizens. There may be disagreement about how such goals should be balanced where they come into conflict in particular situations, but that is a different kind of disagreement.

In the case of anti-dumping, there is no consensus about what purposes anti-dumping duties serve nor which, if *any*, of these are legitimate. A striking contrast between the Anti-dumping Agreement and almost every other major WTO Agreement (except the Subsidies and Countervailing Duties Agreement, which is plagued by similar dissensus about legitimate purposes) is that the Anti-dumping Agreement lacks *any* preamble whatsoever, setting out its purposes and objectives.

In sum, the rules in the Anti-dumping Agreement reflect a bargain or compromise that lacks any Archimedean point of principle as regards the substantive normativity of anti-dumping. Not surprisingly then, many of the rules, including the ones that are at issue in the *Argentina – Ceramic Tiles* case, are of a procedural nature; they purport to ensure that certain evidence is considered by agencies making determinations of dumping and injury, that reasons are provided for decisions, and that the decisions are based on the full available record of pertinent facts.

Proceduralism is often a response to fundamental dissensus about substance. But it is not a solution. Indeed, proceduralism itself may well

[2] *EC – Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appellate Body, WT/DS26/AB/R, WT/DS48/AB/R, January 16, 1998, para. 177.

be entangled in complex ways with elements of substantive normativity (Habermas, 1996).

By virtue of the rules in the WTO Anti-dumping Agreement, WTO panels are put in the position of reviewing the decisions of domestic regulatory agencies, with a strong emphasis on the adequacy of procedures. How does one make sense of such a role? If one takes the point of view that anti-dumping is illegitimate, and that its permissibility represents a power-based political compromise lacking normative coherence, then procedural review could be considered as a kind of remote second best; the assumption is that even a substantively unjust regime will cause less injustice when it is applied in a manner consistent with due process and the rule of law.[3] Procedural review is a proper tool to be used, to hem in the effect of rules that owe their existence to power not right.[4]

By contrast, if one believes that anti-dumping constitutes a response to a practice that is unfair in some relevant normative sense, then while on the one hand one will want to make sure that the agency makes positive findings only in cases where there is proof of unfair behavior, one will also not want to overly burden the agency, such that it becomes ineffective in rooting out and addressing the unfair practice in question.

If, to take yet one other possibility, one sees anti-dumping duties as a real-world instrument for constrained reneging from trade liberalization commitments in response to political and economic pressures, even though *dumping itself is not "unfair,"* then one will regard the rules in the Anti-dumping Agreement as simply a bargained dividing line between system-maintaining and/or enhancing reneging and system-threatening reneging. Here, a too rigorous proceduralism, and an especially too rigorous test for administrative rationality, may unduly hinder the agency's discretion to channel the most relief to industries capable of generating the kind of political and economic pressures that justify having a "safety valve" in the first place.[5]

Moreover, a too onerous view of procedural requirements may lead to unnecessary costs in terms of rent-seeking activity. If anti-dumping duties are simply a real world response to political and economic pressures of a certain kind, which the GATT/WTO bargain tolerates in part at least

[3] See Dyzenhaus (1991) on the value of the rule of law in Apartheid South Africa.

[4] In the context of review of agency decisions under domestic US administrative law, Cass Sunstein notes the existence of a principle that "[c]ourts should narrowly construe statutes that serve no plausible public purpose and amount merely to interest-group transfers" (Sunstein, 1990, p. 185).

[5] See Sykes (1995) for reflections on the political function of anti-dumping duties.

for good reasons ("a safety valve" that assists regime maintenance and/or development), then it would be desirable to avoid unnecessary costs in the effectuation of the wealth transfer in question – such costs (lawyers, economists, accountants, civil servants, etc.) represent a deadweight loss to the economy. Here, there are equity as well as welfare issues embedded, however. The stricter the interpretation of procedural requirements the more disproportionate burden on Members of the WTO who do not have longstanding administrative and public law frameworks for the application of anti-dumping law, which are mostly developing countries or post-communist countries that are new in the anti-dumping game. Onerous procedural requirements most effectively protect deep pocket defendants, who can afford the legal help necessary to take advantage of them.

Thus, even taking a proceduralist view of the requirements in the WTO Anti-dumping Agreement, one could imagine quite different approaches to standard of review depending on one's view of the meaning and purpose of WTO anti-dumping law. The proceduralist orientation does not solve the problem of a dissensus about what are the legitimate purposes of anti-dumping, and in turn the purposes of regulating the use of anti-dumping.

In these circumstances, the *in dubio mitius* principle applied by the Appellate Body in *EC – Hormones* (para. 165 and accompanying footnote) would suggest that the appropriate standard of review is the most deferential of *any* of the standards suggested by *any* of the plausible theories of the rules. This would represent an overlapping consensus. No Member would have a standard of review applied to its determinations that would be higher, or more restrictive of sovereignty, than that implied by any of the plausible theories of the purpose of anti-dumping law that the Member might hold. This constructed common denominator could also be supplemented by reference to the actual common denominator contained in the negotiating history, where this is discernable. In other words, the negotiating history in some cases may reveal where there is an overlapping consensus about a meaning to a provision, and where the Members simply agreed to disagree, thus requiring that the treaty interpreter resort to the kind of constructed overlapping consensus, described above, which is a minimalist standard of review (Esserman and Howse, 2003).

Article 17.6 of the Anti-dumping Agreement seems aimed at something like this minimalist approach. Article 17.6(i) requires the panel to defer to the agency's establishment and evaluation of the facts if the establishment was "proper" and the evaluation was "unbiased and objective"

even though the panel "might have reached a different conclusion". Article 17.6(ii) requires the panel to defer to the agency's interpretation of relevant provisions of the Anti-dumping Agreement as long as that interpretation is one "permissible" reading of the provisions in question. "Permissible" here means permissible under the Vienna Convention rules, which are explicitly referred to in 17.6(ii). Thus, the fundamental question a panel should be asking about an agency's interpretation of provisions of the Anti-dumping Agreement is whether in making the interpretation it has violated any of the rules of treaty interpretation in the Vienna Convention. If the agency has not violated any of those rules, then the reading of the treaty on which it bases its conduct must stand as "permissible."

As a general matter, the Panels and the Appellate Body of the WTO have not applied in any kind of serious or consistent fashion this standard of review.[6] The accustomed role of an adjudicator in an international treaty regime is to make findings of fact and law to determine whether provisions of the treaty have been violated. In the anti-dumping cases, the Panels and Appellate Body have continued to do just this, despite 17.6. They have proceeded to analyze whether, on the law and the facts, the defending Member has violated a given provision of the Agreement.

It is thus not surprising that when the panels and the AB have referred to 17.6, such references appear as obscure or superfluous or both. Given that the panels and the AB have been unable to shift their position from the normal treaty adjudication posture, they have, generally speaking, ended up not knowing what to do with 17.6. (The other dumping case on which we are reporting, *Mexico – Corn Syrup*, is something of an exception: in that case the 21.5 panel and the AB seem to have grasped something at least of the approach that Article 17.6 requires the agency to review.)

In fact, what Article 17.6 does is to ask a different kind of question, or impose a different kind of inquiry. In reviewing agency determinations, the treaty adjudicator is not asked to determine whether the Member or its agency has violated a given provision of the Agreement, but instead whether the reading of the facts by the agency is unbiased, objective, and proper and whether the agency's reading of the WTO anti-dumping law violates the Vienna Convention rules of treaty interpretation. One way of looking at this is affirming that 17.6 constitutes a special rule of State responsibility: in respect of agency determinations (as opposed to the actual contents of its domestic anti-dumping legislation), a Member's responsibility is not *pacta sunt servanda* as such; its responsibility is to

[6] For a comprehensive and persuasive review, see Tarullo (2002).

ensure that, in applying the law, the agency's analysis of the facts and law reaches a certain minimum standard of administrative rationality and fairness.

Argentina – Ceramic Tiles is an example of the failure to apply the kind of standard of review suggested by 17.6; the panel ends up flailing about, lacking guidance in how it should approach agency discretion, either from the purpose and object of the treaty (which as we suggest are not agreed), or from the negotiating history. In the end, willy nilly the Panel ends up imposing a maximalist rather than minimalist standard of administrative rationality and fairness, one that is probably consistent with only one view of the purpose of WTO anti-dumping rules – the view that they are a second best to the prohibition of anti-dumping law, which is normatively justified but politically infeasible.

There are four main issues that the panel ruling in *Argentina – Ceramic Tiles* addresses, most of which have a procedural character. First, the EC challenged the decision of the Argentinian agency to rely in its determination on price information supplied by the petitioners, "facts available," and to ignore that provided by the respondents. Second, the EC argued that the Argentinian agency had failed to meet the obligation imposed in Article 6.10 of the Anti-dumping Agreement to calculate an individual margin of dumping for each exporter, even taking into account the limits of that obligation. Third, the EC argued that the agency had not taken into account differences in physical characteristics between products in making its price comparison in order to determine whether imports were being sold in the export market at lower prices than in the home market, as was required by Article 2.4 of the Anti-dumping Agreement. Finally, the EC claimed that in failing to indicate that it was going to rely on facts available, the agency violated its obligation in Article 6.9 to provide to the parties, prior to a final determination, disclosure of any essential facts upon which it relies.

2 "Facts available": Article 6.8 of the Anti-dumping Agreement

The EC challenged the decision of the Argentinian agency to rely in its determination on price information supplied by the petitioners and to ignore the information provided by the respondents. Under Article 6.8, an agency may rely on "facts available" where "any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation . . ." This is subject, however, to the requirement in Annex II(6) that, where information

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is not accepted, the supplying party has to be informed of the reasons "forthwith" and have an opportunity to provide "further explanations within a reasonable period."

Argentina provided four reasons why the respondents' information was rejected and the determination was based instead on "facts available": (1) the failure of respondents to provide adequate non-confidential summaries of confidential information; (2) the lack of supporting documentary evidence provided by the respondents; (3) the failure to comply with the formal requirements of the agency's questionnaire; (4) and some of the information provided by the respondents was not provided in a timely fashion.

The Panel's analysis of the consistency of the agency's actions with Article 6.8 illustrates virtually a complete confusion about the meaning of standard of review in the Anti-dumping Agreement. The Panel began with the fantastical jurisprudential step of turning Article 17.6, which compels *deference*, into a new, additional *obligation* on the agency. Thus, in paragraph 6.24, the Panel interprets Article 17.6 as if it impose, beyond any other provision in the Anti-dumping Agreement, a requirement on an agency to give reasons in its determination to rely on "facts available" and to ignore information supplied by the petitioner.

The Panel thus uses Article 17.6 to read into Article 6.8 a requirement that 6.8, or Annex II, does not impose on the agency. Moreover, now that it has turned the deference clause against the agency to make its burden heavier, the Panel interprets the requirement of giving reasons in a non-deferential way. Even though the main factors that led to the agency's decisions to rely on available facts *were explicitly mentioned* in its final determination, in particular the absence of non-confidential summaries and of supporting documentation, this does not suffice to meet the Panel's conception of the requirement to give reasons.

Moreover, in using 17.6 to impose procedural obligations to provide reasons in excess of those contained in Article 6, the Panel simply flouted the AB ruling in *Thailand – H Beams*, where the AB made it clear that 17.6 was not to be used in this manner. There the AB stated: "The aim of 17.6.(i) is to prevent a Panel from 'second-guessing' a determination of a national authority . . . Whether evidence or reasoning is disclosed or made discernible to interested parties by the final determination is a matter of procedure and due process . . . comprehensively dealt with in other provisions, notably Articles 6 and 12 . . ." (paragraph 117). The Panel used as an excuse for flouting this ruling the notion that it referred to final determinations, whereas the concern of the Panel was whether

reasons for the agency's decisions were recorded in any document. But the AB's *general* point was of course that 17.6 is simply not *about* imposing additional procedural obligations on the agency – *tout au contraire*.

The Panel went on to consider whether the Argentinian agency's actions were consistent with 6.8. Having used 17.6 to impose a new burden on the agency, it naturally ignored 17.6 in examining the agency's conduct against 6.8, and thus showed the agency no deference.

With regard to the absence of non-confidential summaries, the Panel summarily rejected this concern as a ground for ignoring the respondent's information. The reasoning of the Panel is another good illustration of utter confusion about what is involved in review of agency decision making under the Anti-dumping Agreement. The Panel pointed to provisions of the Anti-dumping Agreement that permit an agency to make determinations based on confidential information, in order to make the argument that it was not reasonable for the agency to reject information because it was not in such a form as was appropriate for a public process. But, of course, the fact that the Agreement *permits* a Member's agency to rely on confidential information does not in the least mean that it should be read so as to frustrate the *domestic* administrative law framework of a Member, where that framework requires or implies the requirement of publicity. Assuming that the agency was acting in a manner consistent with Argentine public law values, it should have been accorded deference, under 17.6, when it decided that it could not use information that could not be properly presented publicly as a basis for its findings.

One of the considerations that led the Panel astray is that the WTO Anti-dumping Agreement itself requires that non-confidential summaries be provided of certain confidential information (6.5.1). The Panel opined that this requirement is aimed not at the possibility of public justification (not at the values of administrative democracy) but rather at ensuring that interested parties can defend themselves adequately (paragraph 6.38). That may well be true, but because the non-confidential summaries provided by the respondent may be adequate for these purposes, it does not follow that it was unreasonable for the agency to consider them inadequate for the legitimate purposes of publicity in Argentinian public law. Under an appropriate standard of deference, necessary information surely includes information that is necessary to conduct agency decision making in a manner consistent with domestic public law values.

With respect to the agency's second concern about lack of supporting documentary evidence, the agency questionnaire clearly stated that the respondent must reply "as precisely as possible, attaching supporting

documents for its replies . . .” (quoted by the Panel at paragraph 6.60). A further instruction to the respondent in the questionnaire states explicitly that information must be given with regard to sources used and corresponding documentation attached. Furthermore, Argentina provided evidence that supporting documents were requested at later points in the process, by means of a letter to the petitioner.

The Panel, astonishingly, concluded that this language was not sufficiently clear to constitute notice to the respondent that supporting documentation was required, and therefore, if not provided, it could result in rejection of the information in the petitioners’ answers in the questionnaire.

By what twisted reasoning did the Panel arrive at such an absurd conclusion? The Panel affirmed that “the exporters were never informed that in the absence of a certain number of supporting documents their information was going to be rejected . . .” The petitioners are presumably adults, represented by lawyers. It is an obvious inference that when an agency requests supporting documentation as an answer to its question, the consequence of being unable to support the answer with documentation is that the agency *may* ignore the answer. The language used in the questionnaire did not say that it would be nice if the respondent provided the supporting documentation, or helpful. It made supporting documentation a *requirement* with respect to every answer, where documentation was available.

A further notion invoked by the Panel in coming to its conclusion was that under the Anti-dumping Agreement the burden is on the agency to verify the information provided by interested parties (Article 6.6). The implication of this burden is not, as the Panel suggests, a presumption that a respondent’s information will be relied on without supporting documentation, but just the reverse! The Panel suggests that it was *open* to the agency to engage in verification by on-site inspection of documents at the premises of the respondent in Europe. But the existence of such a possibility could hardly create a reasonable expectation that the agency would not reject answers in a questionnaire unsupported by documentation clearly requested. At its discretion an agency might reasonably choose to address the problem by conducting on-site verification. But agency resources are limited.

There is nothing in the Anti-dumping Agreement to suggest that the agency must cure the failure of the petitioner to provide requested documentation to support its answers. The Panel’s suggestion (paragraph 6.6) that the request in the questionnaire for documentation was vague,

because it did not specify what kind of supporting documents were required in light of the agency's methodology, is utterly tendentious. The questions being asked are obviously those concerning prices and sales. Any half-competent lawyer or accountant would be able to figure out what sort of invoices, etc., would constitute supporting documentation in such circumstances.

With respect to Argentina's third concern, namely, the failure to comply with formal requirements of the questionnaire, at one level the failures in question seem trivial, such as not providing certain figures in US dollars, or not translating balance sheets. Certain of the respondent's firms simply did not answer one or other questions on the questionnaire as well.

The Panel is right when affirming that these defects would not justify an agency in disregarding all relevant information submitted by the respondent. But the Panel fails to place these defects in the context of Argentina's other concerns and to consider the possibility that, cumulatively, the shortcomings in the respondent's provision of information suggest a lack of diligence and serious responsiveness to the agency's concerns that, given scarce agency resources, might justify a recourse to alternative sources of information. The same could be said about Argentina's fourth concern, late submission of information. Here, the conduct of the respondent does not seem egregious, when taken in isolation. But, cumulated with the other examples of lack of diligence and responsiveness, it lends support to the notion that the agency was not exercising its discretion unreasonably in coming to an overall implicit judgment that the respondent was inadequately cooperative and forthcoming, thus justifying recourse to other sources of information.

3 Failure to calculate individual margins of dumping

Article 6.10 of the Anti-dumping Agreement provides that: "The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation." However, where the number of exporters is too large to make such individual determinations practicable, the agency may limit itself to a "reasonable number of exporters," using samples that are statistically valid.

Again, here, the Panel used Article 17.6 to impose on the agency a requirement of giving reasons not contained in the relevant provisions of the Anti-dumping Agreement. Thus, there is nothing in Article 6.10

that requires an agency to provide a reasoned justification for its decision that the number of exporters is too large. The correct approach would be to assess whether under 17.6 the agency's decision not to calculate individual margins was based on the relevant facts, i.e. a large number of exporters making individual calculations impracticable. Obviously, this impracticability standard itself implies some sort of deference. An agency will assess practicability on the basis of its knowledge of its resources, the complexity of the individual case, and so forth. As for any appropriate understanding of deference, it would ill behoove a panel to second guess such a judgment, unless it appears manifestly unreasonable and arbitrary.

But the Panel could not leave its reading into the Anti-Dumping Agreement of obligations that do not exist in the Agreement as just being non-existent. The Panel also read into the Agreement an obligation, when using a sample instead of making determinations of margins for all exporters, to make an individual determination of margins for each exporter in the sample. But no such requirement is contained in the language of 6.10, which sets out two procedures, the preferred method of making individual determinations of dumping margins for *all* exporters, and the alternative of constructing a single margin for *all* exporters.

Such an interpretation is unsupported by the text of 6.10, and it leads to inequity in the treatment of different respondents. Some respondents will be able to have individual margins of dumping applied to them, by virtue of the contingency of being singled out as part of a statistical sample, whereas others will have margins applied to them that are constructed based on the information from the sample group.

But even if the Panel's interpretation is not explicitly *contradicted* by 6.10, and even if *arguendo* this was allowed under the Vienna Convention, it would still surely be a case where 17.6.(ii) would apply such as to also render the agency's reading "permissible," since there is no text in 6.10 that explicitly imposes a requirement that when a sample is used, individual margins of dumping be attributed to those respondents in the sample.

4 Adjustments for differences in physical characteristics

Article 2.4 of the Anti-dumping Agreement provides that: "A fair comparison shall be made between the export price and the normal value . . . Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including . . . physical characteristics." The Panel found that while the agency identified and took into consideration some physical characteristics that could affect price comparability,

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it did not take into consideration other characteristics such as tile quality. Argentina had argued that there was a very large variety of tile models with many variances and different properties, and that the information provided by the respondents was inadequate for purposes of identifying differences for purposes of a fair price comparison.

The Panel's rejection of this explanation is based on the language in the final sentence of Article 2.4, which requires the agency to "indicate to the parties in question what information is necessary to ensure a fair comparison . . ." The Panel also noted that in its final determination, the agency acknowledged that there were significant price differences depending on the model of tile, not just the size category. Here the Panel's ruling appears sound. The agency was aware, and indeed any competent agency should be aware, that a factor like quality, as well as size, will affect price comparability; to the extent that the information supplied was inadequate for purposes of its analysis, 2.4 clearly provided the agency with the means to obtain the precise information needed from the parties.

5 Article 6.9: requirement of disclosure of facts on which the agency relies

Article 6.9 of the Anti-dumping Agreement provides 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."

The Panel interprets this provision in such a way as to find that the agency violated it by not disclosing to the respondents that it would be relying, in its determination, on facts other than those provided in the respondents' questionnaires.

This seems an obvious misreading of Article 6.9, which does not require disclosure of the agency's interpretation of the facts, or its approach to them, but disclosure by the agency of the facts themselves. In this instance, the facts on which the agency relied were made aware to the respondents – they formed part of the record. Respondents were not told, however, that, in terms of the entire record, the agency was going to base its determination on these facts, as opposed to other assertions *on the record*. All that 6.9 requires is that, if a fact is going to be used as a basis for the determination, it needs to be disclosed. An agency could hardly be expected to tell the parties in advance which

sub-sets of facts on the record it was going to use to make which set of findings.

In addition to having no textual basis, the thrust of the Panel's interpretation may have negative incentive effects. The Panel is basically affirming that a respondent may fail to provide information clearly requested, but that the respondent nevertheless has a right to be put on notice that the failure may result in reliance on other sources. If this were so, then respondents would have incentives to be unforthcoming where doing so might advantage them or frustrate the investigation, knowing that they can avoid any prejudice to their case from lack of disclosure at the last minute, so to speak, since the agency will have to let them know if their behavior is going to result in reliance on alternative sources.

6 Conclusion

From a legal perspective, we have argued that the panel's treatment of the legal issues displays a failure to understand and apply properly the deferential standard of review in Article 17.6 of the Anti-dumping Agreement, as well as a misreading of certain specific operative provisions of the Agreement. More generally, the panel's approach displays lack of sensitivity to the challenges faced by an administrative agency seeking the best evidence but at the expense of reasonable administrative costs, and within a limited time period.

From an economic perspective, since anti-dumping is generally not an efficient instrument, either for addressing anti-trust concerns such as predation (were they to exist), or for dealing with adjustment costs, an intrusive approach such as that adopted here by the panel could enhance efficiency, if it discourages the award of anti-dumping duties. However, if the micromanagement of agency procedures exemplified by this decision does not result in fewer or lower anti-dumping duties being levied, its effect may simply be to increase the deadweight losses involved in administering protection (legal costs, and agency resources, etc.).

If we adopt a political economy perspective, and see the relative ease of anti-dumping as providing a safety valve that allows WTO Members to make greater concessions in negotiations, and reduces pressures to renege in more fundamental ways on treaty commitments, then an interpretation such as that of the panel in this case which makes imposition of anti-dumping duties more costly or difficult than the text of the Anti-dumping

Agreement would seem to require might well be undesirable from an economic perspective.

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