1 ARTICLE 6 4
1.1 Text of Article 6 4
1.2 Article 6.1 7
1.2.1 General: due process rights 7
1.2.2 "notice of the information which the authorities require" 7
1.2.3 "ample opportunity to present … evidence" 7
1.2.4 Scope of Article 6.1 9
1.2.5 Article 6.1.1 12
1.2.5.1 "questionnaires": Scope of Article 6.1.1 12
1.2.5.2 Failure to issue a questionnaire 14
1.2.5.3 Deadlines 14
1.2.5.4 Article 6.1.1, footnote 15 16
1.2.6 Article 6.1.2 17
1.2.6.1 "evidence presented … by one party shall be made available promptly to other interested parties" 17
1.2.6.2 "interested parties participating in the investigation" 19
1.2.6.3 "subject to the requirement to protect confidential information" 20
1.2.7 Article 6.1.3 21
1.2.7.1 "full text of the written application" 22
1.2.8 Relationship with other paragraphs of Article 6 23
1.3 Article 6.2 24
1.3.1 "shall have a full opportunity for the defence of their interests" 24
1.3.1.1 Article 6.2, first sentence as a fundamental due process provision 24
1.3.1.2 Nature and extent of obligations under Article 6.2 25
1.3.2 Relationship with other provisions of the Anti-Dumping Agreement 28
1.4 Article 6.4 29
1.4.1 General 29
1.4.2 "information" that must be disclosed under Article 6.4 30
1.4.2.1 General 30
1.4.2.2 "information … relevant to the presentation of their cases" and "used by the authorities" 31
1.4.2.3 Information gathered during the verification visits 36
1.4.2.4 Information already available to the interested parties 36
1.4.3 "timely opportunities for all interested parties to see all information" 37
1.4.4 No independent disclosure obligation 39
1.4.5 Confidentiality 40
1.4.6 Relationship with other paragraphs of Article 6 41
1.5 Article 6.5 42
1.5.1 General 42
1.5.2 "Any information which is by its nature confidential" 43
1.5.2.1 Nature of confidential information protected 43

WTO - Internal

1.5.2.2 Scope of information protected under Article 6.5 44
1.5.3 "upon good cause shown" 45
1.5.3.1 Scope of "good cause" 45
1.5.3.2 Requirement for "good cause" to be shown 48
1.5.4 "Such information shall not be disclosed without specific permission" 56
1.5.5 Non-confidential summaries (Article 6.5.1) 56
1.5.5.1 General 56
1.5.5.2 Disclosure of confidential information under protective order 65
1.5.6 When the authority finds that confidential treatment is not warranted (Article 6.5.2) 66
1.5.7 Relationship with other paragraphs of Article 6 66
1.6 Article 6.6 67
1.6.1 "satisfy themselves as to the accuracy of the information" 67
1.6.2 Burden on the investigating authorities 67
1.7 Article 6.7 and Annex I 67
1.7.1 Relationship between Article 6.7 and Annex I 67
1.7.2 On-the-spot verifications as an option 68
1.7.3 Information verifiable on-the-spot 70
1.7.4 Requirement to "advise the firms concerned of … the information to be verified" 71
1.7.5 Disclosure of results of on-the-spot verifications 71
1.7.6 Participation of non-governmental experts in the on-the-spot verification 74
1.7.7 Relationship with other paragraphs of Article 6 75
1.8 Article 6.8 and Annex II: "facts available" 76
1.8.1 General 76
1.8.1.1 Identifying whether an investigating authority resorted to facts available under Article 6.8 76
1.8.1.2 Resort to facts available is permissive 76
1.8.1.3 Function of Article 6.8 and Annex II 77
1.8.1.4 Relationship between Article 6.8 and Annex II 82
1.8.1.5 Mandatory nature of Annex II provisions 83
1.8.2 Paragraph 1 of Annex II 83
1.8.2.1 Authorities' duty to "specify in detail the information required from an interested party" 87
1.8.2.2 "as soon as possible" 87
1.8.2.3 Failure to specify in detail the information required 88
1.8.3 When to resort to facts available 88
1.8.4 When not to resort to facts available 89
1.8.5 Paragraph 3 of Annex II 92
1.8.5.1 Information which is "verifiable" 92
1.8.5.1.1 General 92
1.8.5.1.2 When is information verifiable? 92

WTO - Internal

1.8.5.2 Relevance of good faith cooperation 93
1.8.5.3 Information "appropriately submitted so that it can be used in the investigation without undue difficulties" 93
1.8.5.4 Necessary information submitted in a timely fashion 95
1.8.5.4.1 Timeliness 95
1.8.5.5 "necessary information" 95
1.8.5.6 Information submitted after a deadline 100
1.8.5.7 "within a reasonable period" and "within reasonable time" 101
1.8.5.8 Information submitted in the medium or computer language requested 102
1.8.6 Non-cooperation: "refuse access to, or otherwise does not provide" 102
1.8.6.1 Meaning of cooperation 102
1.8.6.2 Justification for non-cooperation 103
1.8.6.3 Cooperation as a two-way process 103
1.8.7 Paragraph 5 of Annex II: degree of cooperation: "to the best of its ability" 103
1.8.8 Information used in case of resorting to facts available 107
1.8.8.1 "secondary source ... with special circumspection" 107
1.8.8.2 "Adverse" facts available 111
1.8.9 Authorities' duty to inform on reasons for disregarding information 111
1.8.10 No right to submit further information 112
1.8.11 Confidential *versus* non-confidential information 112
1.8.12 Scope of Panel's review: national authorities' justification at the time of its determination 113
1.8.13 Consistency of domestic legislation with Article 6.8 and Annex II 113
1.8.14 Relationship with other paragraphs of Article 6 114
1.8.15 Relationship with other provisions of the Anti-Dumping Agreement 114
1.8.15.1 Relationship with Article 5.3 114
1.9 Article 6.9 115
1.9.1 General 115
1.9.2 "shall, before a final determination is made, inform all interested parties of the essential facts under consideration" 116
1.9.2.1 Means to inform all interested parties of the essential facts 116
1.9.2.2 "the essential facts ... which form the basis for the decision whether to apply definitive measures" 116
1.9.2.3 Relevance of the fact that information is made available in the authorities' record 124
1.9.2.4 Failure to inform the changes in factual foundation from a preliminary determination to final determination 124
1.9.3 Relationship with other paragraphs of Article 6 127
1.10 Article 6.10 128
1.10.1 General 128
1.10.2 "shall, as a rule": nature of obligations under Article 6.10 129
1.10.3 "individual margin of dumping for each known exporter or producer" 130

WTO - Internal

1.10.3.1 "each … exporter or producer" 130
1.10.3.2 Treatment of distinct legal entities as a single exporter or producer.....131
1.10.3.3 "known exporter or producer".....134
1.10.4 "the authorities may limit their examination either to a reasonable number of interested parties or products": sampling and Article 6.10.....134
1.10.5 "the largest percentage of exports that could reasonably be investigated".....136
1.10.6 Relationship with Article 11.3 of the Anti-Dumping Agreement.....136
1.10.7 Article 6.10.2 137
1.11 Article 6.11 137
1.12 Article 6.13 138
1.12.1 Relationship with paragraphs 2 and 5 of Annex II 138
1.13 Relationship with other provisions of the Anti-Dumping Agreement and other WTO Agreements.....138
1.13.1 Article 1, 9 and 18 and Article VI of the GATT 1994.....138
1.13.2 Article 2.....138
1.13.3 Article 3.....138
1.13.4 Article 5.....139
1.13.5 Article 9.....139
1.13.6 Article 12.....139

WTO - Internal

1 ARTICLE 6

1.1 Text of Article 6

Article 6

Evidence

6.1 All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question.

6.1.1 Exporters or foreign producers receiving questionnaires used in an anti-dumping investigation shall be given at least 30 days for reply.[15] Due consideration should be given to any request for an extension of the 30-day period and, upon cause shown, such an extension should be granted whenever practicable.

(*footnote original*)[15] As a general rule, the time-limit for exporters shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent to the respondent or transmitted to the appropriate diplomatic representative of the exporting Member or, in the case of a separate customs territory Member of the WTO, an official representative of the exporting territory.

6.1.2 Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

6.1.3 As soon as an investigation has been initiated, the authorities shall provide the full text of the written application received under paragraph 1 of Article 5 to the known exporters[16] and to the authorities of the exporting Member and

shall make it available, upon request, to other interested parties involved. Due regard shall be paid to the requirement for the protection of confidential information, as provided for in paragraph 5.

(*footnote original*)[16] It being understood that, where the number of exporters involved is particularly high, the full text of the written application should instead be provided only to the authorities of the exporting Member or to the relevant trade association.

6.2 Throughout the anti-dumping investigation all interested parties shall have a full opportunity for the defence of their interests. To this end, the authorities shall, on request, provide opportunities for all interested parties to meet those parties with adverse interests, so that opposing views may be presented and rebuttal arguments offered. Provision of such opportunities must take account of the need to preserve confidentiality and of the convenience to the parties. There shall be no obligation on any party to attend a meeting, and failure to do so shall not be prejudicial to that party's case. Interested parties shall also have the right, on justification, to present other information orally.

6.3 Oral information provided under paragraph 2 shall be taken into account by the authorities only in so far as it is subsequently reproduced in writing and made available to other interested parties, as provided for in subparagraph 1.2.

6.4 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.

6.5 Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.17

(*footnote original*)[17] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

6.5.1 The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

6.5.2 If the authorities find that a request for confidentiality is not warranted and if the supplier of the information is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard such information unless it can be demonstrated to their satisfaction from appropriate sources that the information is correct.[18]

(*footnote original*)[18] Members agree that requests for confidentiality should not be arbitrarily rejected.

6.6 Except in circumstances provided for in paragraph 8, the authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.

6.7 In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members.

WTO - Internal

Subject to the requirement to protect confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.

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

6.9 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.

6.10 The authorities shall, as a rule, determine an individual margin of dumping for each known exporter or producer concerned of the product under investigation. In cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable, the authorities may limit their examination either to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection, or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.

6.10.1 Any selection of exporters, producers, importers or types of products made under this paragraph shall preferably be chosen in consultation with and with the consent of the exporters, producers or importers concerned.

6.10.2 In cases where the authorities have limited their examination, as provided for in this paragraph, they shall nevertheless determine an individual margin of dumping for any exporter or producer not initially selected who submits the necessary information in time for that information to be considered during the course of the investigation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome to the authorities and prevent the timely completion of the investigation. Voluntary responses shall not be discouraged.

WTO - Internal

6.11 For the purposes of this Agreement, "interested parties" shall include:

(i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;

(ii) the government of the exporting Member; and

(iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

6.12 The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality.

6.13 The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable.

6.14 The procedures set out above are not intended to prevent the authorities of a Member from proceeding expeditiously with regard to initiating an investigation, reaching preliminary or final determinations, whether affirmative or negative, or from applying provisional or final measures, in accordance with relevant provisions of this Agreement.

1.2 Article 6.1

1.2.1 General: due process rights

1. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* held as follows regarding Articles 6.1 and 6.2:

> "These provisions set out the fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews. Articles 6.1 and 6.2 require that the opportunities afforded interested parties for presentation of evidence and defence of their interests be 'ample' and 'full', respectively. In the context of these provisions, these two adjectives suggest there should be liberal opportunities for respondents to defend their interests. Nevertheless, we agree with the United States that Articles 6.1 and 6.2 do not provide for 'indefinite' rights, so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose."[1]

2. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 - Argentina)* noted that while Articles 6.1 and 6.2 "set out the fundamental due process rights", that did not mean that claims raised under those provisions could prevail without showing "the specific instances of violation" of those rights.[2]

1.2.2 "notice of the information which the authorities require"

3. In *Argentina – Ceramic Tiles*, the Panel, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, concluded that an investigating authority could not fault an interested party for not providing information it was not clearly requested to submit:

> "Article 6.1 of the *AD Agreement* thus requires that interested parties be given notice of the information which the authorities require. In our view, it follows that, independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[3]

1.2.3 "ample opportunity to present ... evidence"

4. In *Guatemala – Cement II*, Mexico argued that Guatemala's investigating authority had violated Article 6.1 by failing to set a time-limit for the presentation of arguments and evidence during the final stage of the investigation while it had fixed a time-limit for the submission of arguments and evidence for the early part of the investigation. The Panel rejected this argument:

> "In our view, Article 6.1 of the *AD Agreement* does not require investigating authorities to set time-limits for the presentation of arguments and evidence during the final stage of the investigation. The only time-limit provided for in Article 6.1 is that contained in Article 6.1.1, whereby exporters shall be given at least 30 days for replying to questionnaires.
>
> Article 6.1 requires investigating authorities to provide interested parties 'ample opportunity' to present in writing certain evidence. Article 6.1 does not explicitly require an investigating authority to set time limits for the submission of arguments and

[1] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 241.
[2] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 - Argentina)*, para. 7.120.
[3] Panel Report, *Argentina – Ceramic Tiles*, para. 6.54.

WTO - Internal

> evidence during the final stage of an investigation.[4] Article 6.1 simply requires that interested parties shall have 'ample' opportunity to present evidence and 'full' opportunity to defend their interests. Interested parties may have such opportunity without the investigating authority setting time limits for the submission of evidence. In other words, these provisions impose substantive obligations, without requiring those obligations to be met through any particular form (except as provided for in sub-paragraphs 1 through 3 of Article 6.1). What counts is whether, in practice, sufficient opportunity was provided, not whether time limits for the submission of evidence were set. Thus, even if the Ministry had failed to set time-limits for the submission of arguments and evidence during the final stage of the investigation, this would not *ipso facto* constitute a violation of Article 6.1 of the *AD Agreement*."[5]

5. The Panel further rejected Mexico's argument that "the Ministry's public notice of initiation granted interested parties 30 days in which to defend their interests, whereas no such time-limit was included in the public notice concerning the imposition of a provisional measure"[6]:

> "We would note that Article 12.1.1(vi) explicitly provides that a public notice of the initiation of an investigation shall include adequate information on the 'time-limits allowed to interested parties for making their views known'. No such obligation is included in Article 12.2.1, concerning the contents of public notices on the imposition of provisional measures. We consider that Article 12.2.1 constitutes useful context when examining Mexico's claim under Article 6.1. In particular, the fact that there is no requirement for investigating authorities to include time-limits for the submission of evidence in the public notice of their preliminary determinations confirms the conclusion set forth in the preceding paragraph."[7]

6. In *EC – Fasteners (China)*, China brought a claim under Article 6.1.1 concerning the "MET/IT Claim Form" used by the EU to determine whether a respondent in a non-market economy can obtain "Market Economy Treatment" and/or "Individual Treatment". The EU investigating authorities attached this form to a notification transmitted to Chinese exporters, with a response deadline of 15 days from the date of publication of the notice of initiation of the investigation. The Panel and the Appellate Body both rejected China's claim because they determined that the form at issue was not a "questionnaire" in the sense of Article 6.1.1 (see paragraphs 20-22 below). However, the Appellate Body opined:

> "We recall that Article 6.1 of the *Anti-Dumping Agreement* requires investigating authorities to give all interested parties 'ample opportunity' to submit evidence that they consider relevant to the investigation, and that this obligation applies also to information requests that cannot be considered 'questionnaires'. In our view, the determinations made regarding MET and IT treatment are important for NME exporters and foreign producers. The MET/IT Claim Form was the first request for information received by the Chinese exporters in the fasteners investigation, and their responses were subject to verification. While much of the information requested would seem to be readily accessible to the responding party, the form requests certain production and sales data for 'the product concerned' that may need to be collected and reported in a form that is not regularly kept by the company, and could therefore involve a certain amount of time and effort for completion. Given the consequences of MET/IT status for exporters and foreign producers, and the amount of information solicited in the MET/IT Claim Form, we consider that, under the requirements of Article 6.1, a deadline of 15 days from the date of publication of the Notice of Initiation was too short and did not provide parties with 'ample opportunity' to submit all evidence in support of their requests for MET or IT treatment. However, China has not invoked Article 6.1 in this case."[8]

WTO - Internal

---

[4] *(footnote original)* This does not, of course, preclude an authority from establishing such limits, so long as the basic requirements (such as "ample opportunity", or 30 days in respect of questionnaire replies) are respected.

[5] Panel Report, *Guatemala – Cement II*, paras. 8.118-8.119.

[6] Panel Report, *Guatemala – Cement II*, para. 8.120.

[7] Panel Report, *Guatemala – Cement II*, para. 8.120.

[8] Appellate Body Report, *EC – Fasteners (China)*, para. 615.

1.2.4 Scope of Article 6.1

7. In *Guatemala – Cement II*, Mexico argued that because Guatemala's authority extended the period of investigation during the investigation procedure, and did not respond to requests for information from a Mexican producer concerning the extension, the Mexican producer was unable to defend its interests in respect of the extension of the period of investigation contrary to Articles 6.1 and 6.2. The Panel rejected this argument, stating:

> "[W]e consider that Mexico's interpretation of that provision is too expansive. The plain language of Article 6.1 merely requires that interested parties be given (1) notice of the information which the authorities require, and (2) ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation. First, we note that Cruz Azul [the Mexican producer] was given two weeks in which to present data concerning the extended POI. Cruz Azul therefore had two weeks' notice of the information required by the Ministry in respect of the extended POI. Second, Mexico has made no claim to the effect that Cruz Azul was prevented from adducing written 'evidence' concerning the extended POI. Whereas Mexico claims that Cruz Azul was denied any opportunity to comment on the extension of the POI *per se*, Article 6.1 does not explicitly require the provision of opportunities for interested parties to comment on decisions taken by the investigating authority in respect of the information it requires."[9]

8. In *Guatemala – Cement II*, the Panel examined Mexico's argument that Guatemala's authority acted inconsistently with Articles 6.1, 6.2 and 6.4 by failing to allow a Mexican producer "proper access" to the information submitted by a Guatemalan domestic producer at the public hearing it held. Noting that it had found a violation of Articles 6.1.2 and 6.4 on the same factual foundation, as referenced in paragraphs 31-32 below, the Panel stated:

> "Since we consider [Articles 6.1.2 and 6.4] to be the specific provisions of the *AD Agreement* governing an interested party's right to information submitted by another interested party, we do not consider it necessary to address Mexico's claims under Articles 6.1 and 6.2. These provisions do not specifically address an interested party's right of access to information submitted by another interested party."[10]

WTO - Internal

9. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority had acted inconsistently with Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing a Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Referring to Article 12.2, the Panel first made the following general observation:

> "We do not consider that an investigating authority need inform interested parties in advance when, having issued a preliminary affirmative determination on the basis of threat of material injury, it subsequently makes a final determination of actual material injury. No provision of the *AD Agreement* requires an investigating authority to inform interested parties, during the course of the investigation, that it has changed the legal basis for its injury determination. Investigating authorities are instead required to forward to interested parties a public notice, or a separate report, setting forth 'in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities', consistent with Article 12.2 of the *AD Agreement*. If decisions on issues of law had to be disclosed to interested parties during the course of the investigation, there would be little need for interested parties to receive the notice provided for in Article 12.2. Furthermore, to the extent that there is any difference between the preliminary determination of injury and the final determination of injury, that change will be apparent to interested parties comparing the public notice of the investigating authority's preliminary determination with the public notice of its final determination."[11]

---

[9] Panel Report, *Guatemala – Cement II*, para. 8.178.
[10] Panel Report, *Guatemala – Cement II*, para. 8.216.
[11] Panel Report, *Guatemala – Cement II*, para. 8.237.

10. The Panel in *Guatemala – Cement II* then went on to draw a distinction, in regard to Article 6.1, between "information", "evidence" and "essential facts" on the one hand and "legal determinations" on the other:

> "We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of 'information', 'evidence' and 'essential facts'. However, Mexico's claim does not concern interested parties' right to have access to certain factual information during the course of an investigation. Mexico's claim concerns interested parties' alleged right to be informed of an investigating authority's legal determinations during the course of an investigation."[12]

11. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* did not consider that a "failure to issue supplemental questionnaires or a preliminary determination" would necessarily constitute a violation of Article 6.1 or Article 6.2 given that those Articles did not contain "such specific obligations":

> "We are cognizant that issuing supplemental questionnaires or deficiency letters and/or a preliminary determination may be the common practice of some WTO Members, and may be highly commendable. The fact remains, however, that neither Article 6.1 nor 6.2 requires that an investigating authority do so. Nor can a mere allegation regarding the failure to establish a schedule that would allow interested parties to submit comments violate these provisions. Argentina has not explained with sufficient clarity how the timetable applied by the USDOC violated Article 6.1 or 6.2."[13]

12. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* examined the text of Articles 12.1 and 6.1, as well as context provided to Article 6.1 in Article 6.1.3, which all refer to interested parties "known" to the investigating authority. Based on this language, the Appellate Body concluded that the notification requirements therein apply only to interested parties for which the investigating authority had "actual knowledge,"[14] and do not cover those for which the authority merely could have obtained knowledge.[15] The Appellate Body reversed the Panel's findings that, with respect to the exporters that Economía did not investigate, Mexico acted inconsistently with Articles 6.1 and 12.1 because Economía sent questionnaires to all companies of which it had actual knowledge and thus did not violate Articles 12.1 or 6.1.

WTO - Internal

13. The Panel in *China – Broiler Products (Article 21.5 – US)* held that "all" in the text of Article 6.1 means that the procedural rights provided for therein should be granted to all interested parties in an investigation.[16]

14. The Panel in *China – Broiler Products (Article 21.5 – US)* provided the following guidance regarding the nature, timing and form of the notice requirement under Article 6.1:

> "First, Articles 6.1 and 12.1 require an investigating authority to actively provide something (in this instance 'notice of the information which the authorities require') to all interested parties. This obligation entails reaching out and making all interested parties aware of the information in question. Thus, it cannot be satisfied by merely providing access to something that conveys the required notice.
>
> Second, Articles 6.1 and 12.1 do not set out a specific time-frame for the giving of notice, but they do link the notice requirement with the obligation to give 'ample opportunity' to present relevant written evidence. The timing of 'notice' must, therefore, be understood in that specific context: sufficiently 'in advance' that an interested parties will be able to prepare and present written evidence <u>within the deadlines set by the</u>

[12] Panel Report, *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.2 and 6.9, see the excerpts referenced in paras. 9, 62 and 388 of this document.
[13] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.116.
[14] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 247.
[15] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 251.
[16] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.221-7.223.

> investigating authority for submission of written evidence on, *inter alia*, the matters as to which information was sought.[17]
>
> Third, Articles 6.1 and 12.1 do not set out specific requirements for the form of the notice or the modalities by which notice is to be given. Form and modalities remain within the discretion of the investigating authority. There might be any number of ways for an investigating authority to give notice. In this regard, we are conscious of the concerns raised in respect of the administrative burden associated with giving notice of the information required to all interested parties. However, our interpretation does not require that an investigating authority give that notice immediately, or in individual communications to all other interested parties in each instance. An investigating authority may choose a manner of giving the required notice that imposes less of an administrative burden."[18]

15. The Panel in *China – Broiler Products (Article 21.5 – US)* explained the content of the notice that is required under Article 6.1, as follows:

> "The required content of the notice follows from the requirement that notice is to be given 'of the information which the authorities require', read in the light of the second half of the provision. The particular information that an investigating authority requires from interested parties thus will determine what the notice must convey, and will vary with the circumstances. At a minimum, a notice must convey an understanding of what information is required in order to enable all interested parties to prepare and submit relevant written evidence regarding the matters as to which information is sought.
>
> The obligation is to give notice of the information required; it is not an obligation to disclose the information request itself. Thus, an outline or description of the information required may well suffice to give the requisite notice. If an investigating authority issues a questionnaire to a particular interested party, sending or making available (to the extent this is made known to all other interested parties) this questionnaire to all other interested parties would certainly be one way of giving notice of the information the investigating authority requires. It is not, however, what the provisions necessarily require: nothing in Articles 6.1 and 12.1 specifically requires an investigating authority to provide to all other interested parties the actual questions or requests issued to a particular interested party, although this might be effective and good practice in this context.
>
> Articles 6.1 and 12.1 require notice of the information required by the investigating authority to enable interested parties to prepare and submit relevant written evidence. For this reason, a notice that informs other interested parties of the information actually submitted by the responding interested party(ies) does not, without more, constitute notice within the meaning of these provisions."[19]

16. The Panel in *China – Broiler Products (Article 21.5 – US)* noted that Article 6.1 does not specify the means that investigating authorities must use to give the required notice.[20] According to the Panel:

> "An investigating authority may give notice to all interested parties either individually in each instance that information is required or through more generalized means; properly worded and transmitted, a notice of initiation or verification letters might, singly or together, constitute 'notice' within the meaning of Article 6.1 of the Anti-Dumping Agreement and Article 12.1 of the SCM Agreement."[21]

WTO - Internal

---

[17] *(footnote original)* In respect of the party from whom information is required, the notice of the information required is given through the information request itself. The notice to all other interested parties from whom information is not required might be given later, possibly even as late as after the information is received, if this is sufficiently early to allow other interested parties enough time to submit written evidence.

[18] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.229-7.231.

[19] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.232-7.234.

[20] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.251.

[21] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.251.

17. Turning to the investigation at issue, the Panel in *China – Broiler Products (Article 21.5 – US)* found that the fact that MOFCOM mentioned, in the notice of initiation, that public information about the investigation would be made available at a particular location, and subsequently made available at that location a document that purported to specify the information required, did not suffice to satisfy the notice requirement of Article 6.1. The Panel reasoned:

> "MOFCOM did not inform interested parties of the placing of the document allegedly conveying the notice of the information required in the public reading room. Rather, interested parties were expected 'to avail themselves of the public reading room to review themselves the public record' and thus to identify on their own the fact that a notice of the information required of Chinese producers had been given. However, under Articles 6.1 and 12.1 it is for MOFCOM to 'give' the interested parties notice – an obligation to give notice cannot be satisfied by expecting the interested parties to monitor the investigating authority to ensure they remain informed when the interested parties are not informed that that is the mechanism by which such notice will be given to them. China's position reduces the notice requirement to an obligation to make a general statement that interested parties may consult information in the public information room. The notice requirement would be stripped of its link to the information required; it would no longer be 'of the information which authorities require'. Such 'notice' would fall short of the due process function of Articles 6.1 and 12.1. A panel may not adopt an interpretation that would render a treaty provision, or part of it, ineffective, and we do not do so in this instance."[22]

1.2.5 Article 6.1.1

1.2.5.1 "questionnaires": Scope of Article 6.1.1

18. In *Egypt – Steel Rebar*, the Panel addressed the question of whether "questionnaires" as referred to in Article 6.1.1 are only the original questionnaires in an investigation, or whether this term would also include all other requests for information, or certain types of requests, including follow-up requests or supplemental requests.[23] The Panel noted that the term "questionnaire" is not defined anywhere in the Agreement, and considered that Article 6.1.1 refers only to the original questionnaires sent to interested parties at the outset of an investigation:

> "The term 'questionnaire' as used in Article 6.1.1 is not defined in the *AD Agreement*, and in fact, this term only appears in Article 6.1.1, and in paragraphs 6 and 7 of Annex I. In our view, the references in Annex I, paragraphs 6 and 7 provide strong contextual support for interpreting the term 'questionnaires' in Article 6.1.1 as referring only to the original questionnaires sent to interested parties at the outset of an investigation. In particular, both of these provisions refer to 'the questionnaire' in the singular, implying that there is only one document that constitutes a 'questionnaire' in a dumping investigation, namely the initial questionnaire, at least as far as the foreign companies (producers and exporters) that might be visited are concerned. Paragraph 6 refers to visits by an investigating authority to the territory of an exporting Member 'to explain *the questionnaire*'. Paragraph 7 provides that 'on-the-spot investigation … should be carried out after the response to *the questionnaire* has been received…'
>
> If any requests for information other than the initial questionnaire were to be considered 'questionnaires' in the sense of Article 6.1.1, a number of operational and logistical problems would arise in respect of other obligations under the *AD Agreement*. First, there is no basis in the *AD Agreement* on which to determine that some, but not all, information requests other than the initial questionnaire also would constitute 'questionnaires'. Thus, even if an investigating authority was not obligated to provide the minimum time-period in Article 6.1.1 in respect of every request for information, it would not be able to determine from the Agreement which of its requests were and were not subject to that time-period. On the other hand, if all requests for information in an investigation were 'questionnaires' in the sense of Article 6.1.1, this could make it impossible for an investigation to be completed within the maximum one year (or exceptionally, 18 months) allowed by the *AD Agreement* in Article 5.10. Moreover, a

[22] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.252.
[23] Panel Report, *Egypt – Steel Rebar*, para. 7.275.

WTO - Internal

> 30- or 37-day deadline for requests for information made in the context of an on-the-spot verification -- i.e., the 'obtain[ing of] further details' explicitly referred to in Article 6.7 to as one of the purposes of such verifications -- obviously would be completely illogical as well as unworkable. Finally, such an interpretation would render superfluous the requirement in Annex II, paragraph 6 to allow a 'reasonable period …' for the provision of any explanations concerning identified deficiencies in submitted information."[24]

19. In *Mexico – Anti-Dumping Measures on Rice,* the Appellate Body found:

> "[T]he due process rights in Article 6 of the Anti-Dumping Agreement—which include the right to 30 days for reply to a questionnaire—'cannot extend indefinitely' but, instead, are limited by the investigating authority's need 'to 'control the conduct' of its inquiry and to 'carry out the multiple steps' required to reach a timely completion' of the proceeding. As such, the time-limits for completing an investigation serve to circumscribe the obligation in Article 6.1.1 to provide all interested parties 30 days to reply to a questionnaire."[25]

20. In *EC – Fasteners (China)*, China argued that the European Union acted inconsistently with Article 6.1.1 in relation to the "MET/IT Claim Form" used to determine whether a respondent in a non-market economy can obtain "Market Economy Treatment" and/or "Individual Treatment". The investigating authorities attached this form to a notification transmitted to Chinese exporters, with a response deadline of 15 days from the date of publication of the notice of initiation of the investigation. The Appellate Body agreed with the Panel that the 30-day period stipulated in Article 6.1.1 applies only to "questionnaires", which the Appellate Body defined as "a particular type of document containing substantial requests for information, distributed early in an investigation, and through which the investigating authority solicits a substantial amount of information relating to the key aspects of the investigation that is to be conducted by the authority (that is, dumping, injury, and causation)".[26] The Appellate Body started its assessment by underlining the due process function of Article 6.1.1 with regard to exporters as well as the importance of completing the investigations in a timely manner:

> "The interpretation of Article 6.1.1 requires that the provision be read in its proper context, in particular Article 6.1. …
>
> … Domestic producers can control the timing of the submission of a request for initiation of an anti-dumping investigation because it is their complaint that triggers the authority's investigative process. The complaining producers therefore have an opportunity to gather much of the evidence necessary to support their complaint in advance. The responding parties, on the other hand, typically receive no notice until the initiation of the investigation. Article 6.1.1 protects exporters and foreign producers by requiring investigating authorities to provide them with at least 30 days to reply to 'questionnaires', and by allowing that extensions should be granted whenever practicable, upon cause shown. This indicates to us that the specific due process interest of exporters and foreign producers to be afforded an ample opportunity to respond has been expressly provided for.[27]
>
> The proper interpretation of Article 6.1.1 must also take into considerations the interests of investigating authorities in controlling their investigative process and bringing investigations to a close within a stipulated period of time. Article 5.10 of the *Anti-Dumping Agreement* requires that investigations be completed within 12 months or, in special circumstances, no more than 18 months. In this vein, Article 6.14 of the *Anti-Dumping Agreement* states that none of the procedures set out under Article 6 is

[24] Panel Report, *Egypt – Steel Rebar*, paras. 7.276-7.277.

[25] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 282. See also Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 241-242; *US – Hot-Rolled Steel*, para. 73.

[26] Appellate Body Report, *EC – Fasteners (China)*, para. 613. See also Panel Report, *EC – Fasteners (China)*, para. 7.574.

[27] *(footnote original)* Footnote 15 of Article 6.1.1 ensures that foreign exporters receive a full 30 days for completion and submission of the questionnaires, by specifying that this period "shall be counted from the date of receipt of the questionnaire, which for this purpose shall be deemed to have been received one week from the date on which it was sent".

WTO - Internal

> intended 'to prevent the authorities of a Member from proceeding expeditiously' in reaching their determinations."[28]

21. The Appellate Body in *EC – Fasteners (China)* distinguished questionnaires from other requests for information in the course of an investigation, before coming to a conclusion on the interpretation of Article 6.1.1:

> "[W]hile Article 6.1.1 captures a specific due process concern as indicated above, the 'questionnaires' referred to in that Article do not refer to every request for information made by an investigating authority to exporters or foreign producers. Rather, the 'questionnaires' must be substantial requests, distributed early in the investigation, when a 30-day timeframe for the response would not lead to a delay in the completion of the investigation. They afford the investigating authority an early opportunity to solicit relevant information from exporters and foreign producers on key aspects of the investigation that is to be conducted by the authority.
>
> Based on these considerations, we conclude that the meaning and scope of the term 'questionnaires' in Article 6.1.1 of the *Anti-Dumping Agreement*, and its application to specific kinds of documents, must reflect a balance between the due process requirement to provide parties with an 'ample opportunity' to submit all information they consider responsive to a questionnaire request in an anti-dumping investigation, and the overall timeframe imposed on the investigation under Article 5.10, along with the need for authorities to proceed expeditiously as contemplated in Article 6.14. We therefore find that the 'questionnaires' referred to in Article 6.1.1 are a particular type of document containing substantial requests for information, distributed early in an investigation, and through which the investigating authority solicits a substantial amount of information relating to the key aspects of the investigation that is to be conducted by the authority (that is, dumping, injury, and causation). While in many investigations one 'questionnaire' may be employed to solicit such information on these aspects of the investigation, we consider that, depending on how different Members organize the conduct of the investigation process, a party may receive several substantial requests soliciting such comprehensive information that are 'questionnaires' within the meaning of Article 6.1.1."[29]

WTO - Internal

22. The Appellate Body then agreed with the Panel that the MET/IT Claim Form was not a "questionnaire" within the meaning of Article 6.1.1 because it was not "an information request soliciting from the Chinese exporters and producers a substantial amount of information upon which the Commission would base its determinations regarding the key aspects of an anti-dumping investigation."[30] The Appellate Body then opined that if China had invoked Article 6.1, it would have found that the 15-day deadline was inconsistent with Article 6.1; see under Article 6.1 above.[31]

1.2.5.2 Failure to issue a questionnaire

23. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that Article 6.1.1 does not address whether an injury questionnaire must be sent to exporters. According to the Panel, the first sentence of Article 6.1.1 means "that <u>if</u> questionnaires are sent to exporters or foreign producers, they shall be given at least 30 days for reply … the failure to send a particular questionnaire to exporters or foreign producers does not constitute a violation of Article 6.1.1."[32]

1.2.5.3 Deadlines

24. In *US – Hot-Rolled Steel*, the United States' authorities had rejected certain information provided by two Japanese exporters which was submitted beyond the deadlines for responses to the questionnaires and thus applied "facts available" in the calculation of the dumping margins. The United States interpreted Article 6.8 as permitting investigating authorities to rely upon

---

[28] Appellate Body Report, *EC – Fasteners (China)*, paras. 609-611.
[29] Appellate Body Report, *EC – Fasteners (China)*, paras. 612-613. See also Panel Report, *EU – Footwear (China)*, paras. 7.549-7.554.
[30] Appellate Body Report, *EC – Fasteners (China)*, para. 623.
[31] Appellate Body Report, *EC – Fasteners (China)*, para. 615.
[32] Panel Report, *Argentina - Poultry Anti-Dumping Duties*, para. 7.145.

reasonable, pre-established deadlines for the submission of data and argued that such an interpretation is supported by Article 6.1.1. The Appellate Body agreed with the Panel that "in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines".[33] It further considered that those deadlines are "*not* necessarily absolute and immutable":

> "We observe that Article 6.1.1 does not explicitly use the word 'deadlines'. However, the *first* sentence of Article 6.1.1 clearly contemplates that investigating authorities may impose appropriate time-limits on interested parties for responses to questionnaires. That first sentence also prescribes an absolute minimum of 30 days for the initial response to a questionnaire. Article 6.1.1, therefore, recognizes that it is fully consistent with the *Anti-Dumping Agreement* for investigating authorities to impose time-limits for the submission of questionnaire responses. Investigating authorities must be able to control the conduct of their investigation and to carry out the multiple steps in an investigation required to reach a final determination. Indeed, in the absence of time-limits, authorities would effectively cede control of investigations to the interested parties, and could find themselves unable to complete their investigations within the time-limits mandated under the *Anti-Dumping Agreement*. We note, in that respect, that Article 5.10 of the *Anti-Dumping Agreement* stipulates that anti-dumping investigations shall normally be completed within one year, and in any event in no longer than 18 months, after initiation. Furthermore, Article 6.14 provides generally that the procedures set out in Article 6 'are not intended to prevent the authorities of a Member from proceeding *expeditiously* '. (emphasis added) We, therefore, agree with the Panel that 'in the interest of orderly administration investigating authorities do, and indeed must establish such deadlines.'
>
> While the United States stresses the significance of the *first* sentence of Article 6.1.1, we believe that importance must also be attached to the *second* sentence of that provision. According to the express wording of the second sentence of Article 6.1.1, investigating authorities must extend the time-limit for responses to questionnaires 'upon *cause shown* ', where granting such an extension is '*practicable* '. (emphasis added) This second sentence, therefore, indicates that the time-limits imposed by investigating authorities for responses to questionnaires are *not* necessarily absolute and immutable."[34]

WTO - Internal

25. The Panel in *US – Corrosion-Resistant Steel Sunset Review* stated that "the right of interested parties to submit information in a sunset review cannot be unlimited. One of the important limitations that can legitimately be imposed on that right is deadlines for the submission of information."[35] The Panel considered that by virtue of the cross-reference in Article 11.4, the requirements of Article 6.1 and 6.2 also applied in the case of sunset reviews.[36] According to the Panel, in a sunset review as well, "there must be a balance struck between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account".[37]

26. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* also considered that Articles 6.1 and 6.2 do not provide for indefinite rights so as to enable respondents to submit relevant evidence, attend hearings, or participate in the inquiry as and when they choose:

> "Therefore, the 'ample' and 'full' opportunities guaranteed by Articles 6.1 and 6.2, respectively, cannot extend indefinitely and must, at some point, legitimately cease to exist. This point must be determined by reference to the right of investigating authorities to rely on deadlines in the conduct of their investigations and reviews. Where the continued granting of opportunities to present evidence and attend hearings would impinge on an investigating authority's ability to 'control the conduct' of its inquiry

[33] Panel Report, *US – Hot-Rolled Steel*, para. 7.54; Appellate Body Report, *US – Hot-Rolled Steel*, para. 73.
[34] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 73-74.
[35] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.258.
[36] Panel Report, *US – Corrosion-Resistant Steel Sunset Review,* paras. 7.254-7.255.
[37] Panel Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 7.258. See also Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 152.

> and to 'carry out the multiple steps' required to reach a timely completion of the sunset review, a respondent will have reached the limit of the 'ample' and 'full' opportunities provided for in Articles 6.1 and 6.2 of the *Anti-Dumping Agreement*."[38]

27. The Appellate Body in *US – Oil Country Tubular Goods Sunset Reviews* was of the view that the right to present evidence and request a hearing cannot be said to have been "denied" to a respondent that is given an opportunity to submit an initial response to the notice of initiation simply because it must do so by a deadline that is conceded to be reasonable:

> "We do not see it as an unreasonable burden on respondents to require them to file a timely submission in order to preserve their rights for the remainder of the sunset review. Indeed, even an incomplete submission will serve to preserve those rights. Accordingly, we are of the view that, if a respondent decides not to undertake the necessary initial steps to avail itself of the 'ample' and 'full' opportunities available for the defence of its interests, the fault lies with the respondent, and not with the deemed waiver provision."[39]

28. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice*, having examined Article 6.1.1 of the Anti-Dumping Agreement and Article 12.1.1 of the SCM Agreement, noted that these provisions explicitly require that an investigating authority provide at least 30 days for reply to *all* exporters and foreign producers receiving a questionnaire, to be counted, '[a]s a general rule,' from the date of receipt of the questionnaire. The Appellate Body clarified that Article 6.1 of the Anti-Dumping Agreement provides for *all* interested parties in an anti-dumping investigation to receive a questionnaire from the investigating authority, which includes "not only those referred to in the petition for anti-dumping duties, as Mexico argues, but also those that made themselves known to the investigating authority – further to the issuance of a public notice of initiation or otherwise – and those that the investigating authority might identify as a result of some inquiry of its own":

> "[T]he period of at least 30 days to reply to questionnaires, provided for in Article 6.1.1 of the *Anti-Dumping Agreement* and Article 12.1.1 of the *SCM Agreement*, must be extended to all such exporters and foreign producers, whether known to the investigating authority at the outset of the investigation or at some point thereafter."[40]

29. The Panel in *EU – Footwear (China)* rejected China's claim that "the extent and degree of detail and complexity of the information requested in the MET/IT claim form is such that a 15-day deadline to respond deprives Chinese exporting producers of a full opportunity to defend their interests, as provided for in Article 6.1 of the Anti-Dumping Agreement, and mentioned in Paragraph 151 of China's Accession Working Party Report, resulting in a violation of Paragraph 15(a)(i) of the Protocol."[41]

1.2.5.4 Article 6.1.1, footnote 15

30. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* stated that footnote 15 does not provide any indication as to whether it is incumbent on the government of the exporting country to make the relevant exporters or producers aware of the investigation:

> "[W]e cannot deduce from footnote 15 to Article 6.1.1, alone, an obligation for diplomatic authorities of the exporting Member to make their exporters or producers aware of the investigation."[42]

[38] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 237.
[39] Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 252.
[40] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 280.
[41] Panel Report, *EU – Footwear (China)*, paras. 7.556-7.560.
[42] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 263.

WTO - Internal

1.2.6 Article 6.1.2

1.2.6.1 "evidence presented … by one party shall be made available promptly to other interested parties"

31. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority violated Articles 6.1.2, 6.2, and 6.4 by (a) refusing a Mexican producer access to the file at a certain date during the investigation, and (b) failing to promptly provide the producer with a copy of a submission made by the applicant. In examining this claim, the Panel juxtaposed the notion of "access to the file" on the one hand and, on the other hand, the requirements that evidence presented by one interested party be "made available promptly" and that parties shall have "timely opportunities" to see all relevant information:

> "Article 6.1.2 of the *AD Agreement* provides that evidence presented by one interested party shall be 'made available promptly' to other interested parties. Article 6.4 provides that an interested party shall have 'timely opportunities' to see all information that is relevant to the presentation of its case. On their face, neither Article 6.1.2 nor Article 6.4 necessarily require access to the file. For example, if an investigating authority required each interested party to serve its submissions on all other interested parties, or if the investigating authority itself undertook to provide copies of each interested party's submission to other interested parties, there may be no need for interested parties to have access to the file. If, however, there is no service of evidence by interested parties, or no provision of copies by the investigating authority, access to the file may be the only practical means by which evidence presented by one interested party could be 'made available promptly' to other interested parties (consistent with Article 6.1.2), or by which interested parties could have 'timely opportunities' to see information relevant to the presentation of their cases (consistent with Article 6.4). Assuming access to the file is the only practical means of complying with Articles 6.1.2 and 6.4, access to the file need not necessarily be unlimited. Nor need the file be made available on demand. Provided access to the file is regular and routine, we consider that the requirements of Articles 6.1.2 and 6.4 would be satisfied."[43]

32. The Panel in *Guatemala – Cement II* then stated that "[i]n principle, … a 20-day delay is inconsistent with … Article 6.1.2 obligation [of Guatemala's authority] to make [the subject] submission available to [other interested parties] 'promptly'."[44]

33. In *EU – Footwear (China)*, the Panel reasoned that "promptly" within the meaning of Article 6.1.2 does not necessarily mean "immediately", and that whether evidence has been made available promptly should be assessed in the context of the proceeding in question.

> "The word 'promptly' is defined as 'in a prompt manner, without delay' and '[i]n a prompt manner; readily, quickly; at once, without delay; directly, forthwith, there and then'. In our view, these definitions do not support the conclusion that information must be made available immediately in order to comply with Article 6.1.2. We consider that to make evidence available promptly must be understood in the context of the proceeding in question. In the context of a proceeding lasting months, where there are numerous opportunities for the parties to participate in the investigation after the evidence has been made available, we consider that the delays in this case do not establish a violation of Article 6.1.2, and we therefore reject China's claim with respect to Companies B, C and G."[45]

34. With regard to the investigation at issue *EU – Footwear (China)*, the Panel did not fault the investigating authority for a few days of delay in disclosing certain information, noting that the delay was due to the fact that the information could not be disclosed in the form in which it had been received from the submitting interested party:

> "China considers that the European Union should be held responsible for the entire delay, from the original date of submission of an unusable version of Company H's

[43] Panel Report, *Guatemala – Cement II*, para. 8.133.
[44] Panel Report, *Guatemala – Cement II*, para. 8.142.
[45] Panel Report, *EU – Footwear (China)*, para. 7.583.

WTO - Internal

> questionnaire response until 9 December 2009. We do not agree. We consider that Article 6.1.2 cannot be understood as requiring an investigating authority to make available evidence which it does not have in a usable form, as in this case, Company H's questionnaire response which could not be read or printed until 5 December 2008. Therefore, the only delay with respect to making Company H's questionnaire response available was from Friday, 5 December until Tuesday, 9 December, or 4 days, including a weekend. In the context of this proceeding, where there are numerous opportunities for the parties to participate in the investigation after the evidence has been made available, we consider that this 4-day delay does not establish a violation of Article 6.1.2, and we therefore reject China's claim with respect to Company H."[46]

35. In *EU – Cost Adjustment Methodologies II (Russia)*, the Panel examined Russia's claims that, on four occasions, representatives of Russian exporters were confronted with excessive delays when requesting access to evidence provided by the domestic industry.[47] Russia claimed that such delays on the part of the European Commission failed to make evidence available "promptly" to other interested parties in accordance with Article 6.1.2 of the Anti-Dumping Agreement. Russia also claimed that the European Commission did not provide "timely opportunities", in accordance with Article 6.4 of the Anti-Dumping Agreement, for the representatives of Russian exporters to see all information relevant to the presentation of their cases and to prepare presentations on the basis of this information.[48]

36. The Panel considered that, in general, delays caused by interested parties would not give rise to an inconsistency with Articles 6.1.2 and 6.4 of the Anti-Dumping Agreement, but that the particular delays challenged by Russia could be attributed to the European Commission:

> "We agree with the European Union that delays originating in the sole conduct of the interested parties cannot give rise to an inconsistency with Articles 6.1.2 and 6.4 of the Anti-Dumping Agreement. We note however that, based on the evidence on the record, the alleged delays challenged by Russia can be attributed to the European Commission: they concern the placement of evidence on the non-confidential file as well as the granting of access to the file (in the form of a DVD-Rom provided to the representatives of the parties)."[49]

37. The Panel subsequently referred to the statements of the panel in *Guatemala – Cement II*, reproduced below in paragraph 44. By way of reference to these statements, the Panel noted that access to a non-confidential file must be "regular and routine".[50] The Panel's reference to these statements also highlighted that a determination by an investigating authority that certain evidence may possibly be confidential should not allow for the circumvention of the specific requirement of Article 6.1.2 to make evidence available "promptly" to other interested parties:

> "The Article 6.1.2 proviso regarding the 'requirement to protect confidential information', when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility – which is unsubstantiated by any request for confidential treatment from the party submitting the evidence – that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be 'made available promptly' to interested parties)."[51]

38. Having analogized this reasoning by the panel in *Guatemala – Cement II*, the Panel in *EU – Cost Adjustment Methodologies II (Russia)*, considered that the European Commission created a

[46] Panel Report, *EU – Footwear (China)*, para. 7.585.
[47] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.602.
[48] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.603.
[49] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.609.
[50] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.610.
[51] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.610.

WTO - Internal

delay in granting access to a file or in allowing an update to a file without having provided a convincing explanation for doing so. For the Panel, this resulted in an inconsistency with the obligation to make evidence available "promptly":

> "The four instances criticized by Russia show that it took the European Commission two to three weeks to grant access to the file or to update the file after a submission had been made. In two instances, the interested party requesting access had to renew its request (on 26 March in the first instance and on 12 June in the second instance). Under these circumstances and in the absence of any convincing explanation from the European Union justifying such delays, we consider that the time taken by the European Commission to make the evidence available to the requesting party is not consistent with the obligation to make the evidence available 'promptly'."[52]

39. In response to the European Union's argument that Articles 6.1.2 and 6.4 do not concern "access to the file" in the abstract, but "evidence" and "information", the Panel considered the obligation in Article 6.1.2 to refer to "evidence presented in writing by one interested party". The Panel considered that this obligation does not specify in what form an authority must give access to this evidence.[53]

40. The Panel then reproduced an excerpt from the panel report in *Guatemala – Cement II*, set forth in paragraph 31 above. This excerpt noted, *inter alia*, that where the service of evidence presented by an interested party, or the provision of copies of the evidence by the investigating authority, does not occur, access granted by the investigating authority to the file may be the only practical means to "ma[k]e [such evidence] available promptly" to other interested parties (consistent with Article 6.1.2). Access to the file may also be the only practical means by which interested parties could have "timely opportunities" to see information relevant to the presentation of their cases (consistent with Article 6.4).[54]

41. The Panel concluded that, absent any indication that the evidence from one interested party was served on other interested parties, or that the investigating authority had provided copies of it, the investigating authority was required to provide regular and routine access to the file:

> "In the present case, the European Union does not argue that the evidence was available to representatives of Russian exporters in any other way than by requesting access to the file. Neither does the European Union argue that the European Commission routinely informs interested parties that a specific piece of evidence has been placed on the non-confidential file. Therefore, it is only through a regular and routine access to the non-confidential file that RFPA may learn which evidence has been placed on the file. It is thus only by granting regular and routine access to the file that the European Union could, in the circumstances of this case, fulfil its obligation to make the evidence available promptly."[55]

42. The Panel thus considered that the European Union, in the four instances raised by Russia, had not complied with the obligation contained, *inter alia*, in Article 6.1.2 (and Article 11.4) to make the evidence available promptly. Having found a breach of Article 6.1.2 of the Anti-Dumping Agreement, the Panel found it unnecessary to examine Russia's claim under Article 6.4.[56]

1.2.6.2 "interested parties participating in the investigation"

43. The Panel in *Argentina – Poultry Anti-Dumping Duties* underlined that Article 6.1.2 does not refer to "interested parties" but to "interested parties participating in the investigation". It thus considered that had the drafters intended to extend the obligation imposed by Article 6.1.2 to all interested parties as defined in Article 6.11 of the *AD Agreement*, they would not have included the term "participating". According to the Panel the term "participating" suggests that, a party must undertake some action. In the view of the Panel, "the mere knowledge by an interested party of an ongoing investigation does not make that party an interested party "participating in the

[52] Panel Report, *EU - Cost Adjustment Methodologies II (Russia)*, para. 7.611.
[53] Panel Report, *EU - Cost Adjustment Methodologies II (Russia)*, para. 7.613.
[54] Panel Report, *EU - Cost Adjustment Methodologies II (Russia)*, para. 7.613.
[55] Panel Report, *EU - Cost Adjustment Methodologies II (Russia)*, para. 7.614.
[56] Panel Report, *EU - Cost Adjustment Methodologies II (Russia)*, paras. 7.615-7.616.

WTO - Internal

investigation" within the meaning of Article 6.1.2 unless it actively takes part in the investigation".[57] According to the Panel, an investigating authority is not required to promptly make evidence presented in writing by other interested parties available to exporters which were not even aware of the investigation such that they could participate in it.[58] The Panel also expressed the view that "a violation of Article 12.1 does not automatically entail a violation of Article 6.1.2" as the "beneficiaries of the obligations" under this provision are different.[59]

1.2.6.3 "subject to the requirement to protect confidential information"

44. With respect to the claim by Mexico that the failure to make a submission available to a Mexican producer was inconsistent with Article 6.1.2, the Panel in *Guatemala – Cement II* rejected Guatemala's argument that the failure was justified because the submission contained confidential information:

> "In this regard, we note that the obligation in Article 6.1.2 is qualified by the words '[s]ubject to the requirement to protect confidential information'. In principle, therefore, evidence presented by one interested party need not be made available 'promptly' to other interested parties if it is 'confidential'. However, insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. We examine Article 6.5 in detail … below. We have noted that Article 6.5 reserves special treatment for 'confidential' information only 'upon good cause shown', and we have determined that the requisite 'good cause' must be shown by the interested party which submitted the information at issue. Guatemala has not demonstrated, or even argued, that Cementos Progreso [the applicant] requested confidential treatment for its … submission, or that 'good cause' for confidential treatment was otherwise shown. The Article 6.1.2 proviso regarding the 'requirement to protect confidential information', when read in the context of Article 6.5, cannot be interpreted to allow an investigating authority to delay making available evidence submitted by one interested party to another interested party for 20 days simply because of the possibility – which is unsubstantiated by any request for confidential treatment from the party submitting the evidence - that the evidence contains confidential information. We do not believe that the specific requirement of Article 6.1.2 may be circumvented simply by an investigating authority determining that there is a possibility that the evidence at issue contains confidential information. Such an interpretation could undermine the purpose of Article 6.1.2, since in principle there is a possibility that any evidence could contain confidential information (and therefore not be 'made available promptly' to interested parties). Accordingly, we find that the Ministry violated Article 6.1.2 of the *AD Agreement* by failing to make Cementos Progreso's 19 December 1996 submission available to Cruz Azul until 8 January 1997."[60]

45. In *EU – Footwear (China)*, the Panel rejected a claim of an alleged violation of Article 6.1.2 because of the delay in the investigating authority making certain information available to interested parties, noting that the delay was caused by the investigating authority's efforts to ascertain the confidentiality of the information before disclosing it:

> "We recall that the obligation to make evidence available 'promptly' in Article 6.1.2 is 'subject to' the requirement to protect confidential information. In this case, the European Union has explained that the Commission delayed the release of the 'non-confidential' questionnaire responses of the producers concerned in order to ensure that it did not disclose information concerning their identities which had been granted confidential treatment. We see nothing in the AD Agreement, including in Article 6.1.2, that would preclude an investigating authority from seeking to ascertain the confidential status of information submitted by an interested party in order to ensure that the investigating authority does not violate Article 6.5 by disclosing information it has a justified reason to believe may be confidential. In this case, we agree with the European Union that, having granted confidential treatment to the identities of EU producers, when the Commission received questionnaire responses which appeared to

[57] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.153.
[58] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.153.
[59] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, fn 128.
[60] Panel Report, *Guatemala – Cement II*, para. 8.143.

WTO - Internal

> contain information which, if made available to interested parties, would disclose the identities of the producers submitting the information, the Commission was entitled to ascertain the facts to avoid itself violating Article 6.5. We note in this regard that we have found that the European Union's grant of confidential treatment to this information was not inconsistent with Article 6.5 of the AD Agreement. In these circumstances, we reject China's arguments in this regard."[61]

1.2.7 Article 6.1.3

46. In *Guatemala – Cement II*, the Panel found that Guatemala violated Article 6.1.3 because the investigating authority provided the full text of the anti-dumping application only 18 days or more after initiation of the investigation. The Panel focused on the phrase "as soon as an investigation has been initiated":

> "We note that Article 6.1.3 does not specify the number of days within which the text of the application shall be provided. What it does specify is that the text of the application be provided 'as soon as' the investigation has been initiated. In this regard, the term 'as soon as' conveys a sense of substantial urgency. In fact, the terms 'immediately' and 'as soon as' are considered to be interchangeable. We do not consider that providing the text of the application 24 or even 18 days after the date of initiation fulfils the requirement of Article 6.1.3 that the text be provided 'as soon as an investigation has been initiated.'
>
> We further consider that the timeliness of the provision of the text of the application should be evaluated in the context of its purpose and function. Timely access to the application is important for the exporters to enable preparation of the arguments in defence of their interests before the investigating authorities. Moreover, once the investigation has been initiated the timetable of the investigation commences and the timing for many events in the proceeding are counted from initiation including the 12 or 18 months total for completion of the investigation provided for in Article 5.10. Since deadlines in the timetable of the investigation are counted from the date of initiation it is critical that the investigating authority provide the text of the application 'as soon as an investigation has been initiated', for the exporter to be able to devise a strategy to defend the allegations it is being confronted with. Also, Article 7.3 of the *AD Agreement* allows a Member to impose provisional measures as early as sixty days after the date of initiation of an investigation. Access to the text of the application is crucial for the exporter to prepare its defence, and even more so if the authorities are likely to consider applying a provisional measure which may come as early as 60 days after initiation."[62]

47. The Panel in *Argentina – Poultry Anti-Dumping Duties* addressed the meaning of the term "to provide" in the first sentence of Article 6.1.3. The Panel considered that:

> "[T]he term 'provide' would require a positive action on the part of the investigating authority akin to that of furnishing or supplying something (i.e., the full text of the application) to someone (i.e., known exporters and authorities of the exporting Member). Therefore, we cannot agree with Argentina that the term 'provide' in the English text of the *AD Agreement* or 'facilitar' in its Spanish text can be interpreted as meaning 'permitting access'. In our view, an investigating authority cannot comply with the obligation to 'provide the … application … to the known exporters and to the authorities of the exporting Member' simply by permitting them access to that application."[63]

48. The Panel distinguished between the obligation to "provide" the application to the known exporters and to the authorities of the exporting Member, and the obligation to "make available" the application to other interested parties upon request. According to the Panel:

> "[W]ith the use of different verbs in the first sentence of Article 6.1.3, "provide" on the one hand and 'make available' on the other, the drafters intended to impose different

[61] Panel Report, *EU – Footwear (China)*, para. 7.580.
[62] Panel Report, *Guatemala – Cement II*, paras. 8.101-8.102.
[63] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.169.

WTO - Internal

> obligations on investigating authorities depending on the party concerned. The first obligation requires a positive action on the part of the investigating authority, while the second envisages only a passive act".[64]

49. In *Guatemala – Cement II*, the Panel also rejected Guatemala's argument that the actions of its investigating authority under Articles 5.5, 12.1.1 and 6.1.3, even if the Panel were to find that they constituted violations of the Anti-Dumping Agreement, had not affected the course of the investigation, and thus: (a) the alleged violations were not harmful according to the principle of "harmless error"; (b) Mexico "convalidated" the alleged violations by not objecting immediately after their occurrence; and (c) the alleged violations did not cause nullification or impairment of benefits accruing to Mexico under the Anti-Dumping Agreement. See the Sections on Articles 5 and 12 of the Anti-Dumping Agreement.

50. In *EU – Cost Adjustment Methodologies II (Russia)*, the Panel addressed Russia's claim under, *inter alia*, Articles 6.1.3 and 11.4 of the Anti-Dumping Agreement, that an interested party did not obtain a petition filed by domestic producers until after the expiry review was completed and the EU Ombudsman made a recommendation to provide the relevant document.[65] The Panel addressed the question of whether the European Commission's decision to grant access to a "consolidated" version of the petition upon initiation of the expiry review was sufficient to "provide the full text of the written application received" under Article 6.1.3.[66]

51. The Panel noted that the notice of initiation of the expiry review referenced the original petition of 28 March 2013 as the basis for initiating the investigation, not the consolidated petition. The Panel also noted that the text of the consolidated petition was different from the text of the original petition, and that Article 6.1.3 refers specifically to the "*full text* of the written application received".[67] For these reasons, the Panel concluded that the European Union had not complied with its obligation to make the full text of the petition available to the interested parties upon initiation of the expiry review, and therefore, was in breach of Article 6.1.3 (and Article 11.4) of the Anti-Dumping Agreement.[68]

WTO - Internal

1.2.7.1 "full text of the written application"

52. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* rejected Costa Rica's argument that the term "text" in Article 6.1.3 refers only to the text of the application, and not to the information provided in annexes or forms:

> "As we discuss above, based on the terms set out in Article 6.1.3, the application to be provided is the 'full text of the written application' submitted in accordance with Article 5.1 of the Anti-Dumping Agreement: in other words, the 'written application' for initiation of an investigation submitted by (or on behalf of) the domestic industry. At the same time, we note that, except in cases related to confidential information, there is nothing in Article 6.1.3 that limits or circumscribes the provision of this application to, for example, certain documents or document types only, or that limits the nature of the written information contained in the documents submitted. On the contrary, we note that Article 6.1.3 clearly requires the 'full' text of the written application received to be provided. … Therefore, the use of the adjective "full" in the context of Article 6.1.3 indicates that the written application that must be provided in accordance with this provision includes all of the written documents or submissions that form part of the application or that are necessary for the purposes of applying for the initiation of an investigation. Under such circumstances, we do not see any textual basis in the provision in question for excluding information or evidence that an applicant has supplied as part of their application in annexes, forms or other written documents."[69]

53. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* also rejected the Dominican Republic's argument that the absence of a reference in Article 6.1.3 to Article 5.2

[64] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.170.
[65] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.617.
[66] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.623.
[67] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.624.
[68] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.625.
[69] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.375.

indicates that evidence submitted in the annexes of an application does not have to be provided under Article 6.1.3:

> "As context relevant to the interpretation of the expression 'full text of the written application', we also note that Article 5.2 of the Anti-Dumping Agreement lays down the content to be included in the 'application under [Article 5.1]', that is, the application also referred to in Article 6.1.3. In particular, in our view, the reference in Article 6.1.3 to the application received in accordance with Article 5.1 and the requirements in Article 5.2, which specify the evidence and information to be included in this application, clearly establish an explicit link between these three provisions. We therefore reject the Dominican Republic's argument that the fact that Article 6.1.3 refers only to Article 5.1, and not to Article 5.2 in which reference is made to the evidence to be submitted together 'with' the application, means that the evidence contained in the annexes does not need to be provided under Article 6.1.3."[70]

54. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* also disagreed with the Dominican Republic's reliance on Articles 6.2 and 6.4 of the Anti-Dumping Agreement in support of its interpretation of Article 6.1.3:

> "The Dominican Republic maintains that its interpretation of the 'full text' of the application does not 'undermine' the 'transparency' requirement, as Articles 6.2 and 6.4 of the Anti-Dumping Agreement '[would] continue' to enable interested parties to have the opportunity to examine all the relevant non-confidential information that the authorities use in the investigation. However, in our view, the obligations laid down in these provisions and, as a result, the rights of the interested parties covered by them, are, by their nature, different from the obligations and rights under Article 6.1.3. Specifically, we recall that Article 6.1.3 establishes the obligation for the investigating authority to 'provide', 'as soon' as the investigation has been initiated, 'the full text of the written application' received.
>
> Moreover, we note that Article 6.2 does not lay down any obligations concerning the disclosure of, or access to, information. Similarly, although Article 6.4 allows for 'interested parties to see all information that is relevant to the presentation of their cases, that is not confidential', we note that the obligation in Article 6.4, which applies throughout the investigation, concerns information that is 'used' by the authorities in the investigation and does not require this information to be actively disclosed. Accordingly, in our view, while the information and evidence submitted as part of an application could be provided over the course of an investigation (assuming that it is information and evidence used by the authorities), we do not see how providing this information and evidence could constitute an alternative way of guaranteeing the inherent procedural rights of transparency and due process enjoyed by the parties under Article 6.1.3. In other words, access – through its 'provision' by the authorities– to the 'full text of the written application' received 'as soon' as the investigation has been initiated. We therefore reject the Dominican Republic's argument that its interpretation that the 'full text' of the application alone would not undermine the 'transparency' requirement, since Articles 6.2 and 6.4 would continue to enable the interested parties to see the information."[71]

1.2.8 Relationship with other paragraphs of Article 6

55. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8, and Annex II(5) and (6) of the Anti-Dumping Agreement by rejecting certain technical accounting evidence submitted by a Mexican interested party one day before the public hearing held by Guatemala's authority. The Panel considered it unnecessary to address this claim, on the ground that the claim was dependent on the issue of whether the cancellation by the authority of its verification visit to the Mexican producer was inconsistent with Article 6.8, and the Panel had already found the cancellation in violation of Article 6.8.[72]

[70] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.377.
[71] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, paras. 7.381-7.382.
[72] Panel Report, *Guatemala – Cement II*, para. 8.125.

WTO - Internal

56. The Panel in *Argentina – Ceramic Tiles,* when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, referred to Article 6.1 to support its conclusion that the investigating authorities could not do so when they did not clearly request the relevant information from the party in question. See paragraphs 3 above and 277 below. The Appellate Body in *US – Hot-Rolled Steel* further analysed the relationship of Article 6.8 and Annex II with Article 6.1.1. See paragraphs 24 above and 300 below.

57. The Panel in *Guatemala – Cement II* further referred to Article 6.5 in interpreting Article 6.1.2. See paragraph 44 above.

58. See paragraph 54 above.

59. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in violation of Article 6.9, as referenced in paragraphs 385, 386 and 388 below, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.[73]

60. The Panel in *China – GOES* pointed to the parallel between the requirements of paragraph 1 of Annex II and Article 6.1 of the Anti-Dumping Agreement.[74]

1.3 Article 6.2

1.3.1 "shall have a full opportunity for the defence of their interests"

1.3.1.1 Article 6.2, first sentence as a fundamental due process provision

61. In *Guatemala – Cement II*, Mexico argued that because Guatemala's authority extended the period of investigation during the investigation procedure, and did not respond to requests for information from a Mexican producer concerning the extension, the Mexican producer was not given any opportunity to comment on the applicant's request for extension of the period of investigation contrary to Article 6.2. The Panel, which agreed with this argument, interpreted the first sentence of Article 6.2 "as a fundamental due process provision":

> "We interpret the first sentence of Article 6.2 of the *AD Agreement* as a fundamental due process provision. In our view, when a request for an extension of the POI comes from one interested party, due process requires that the investigating authority seeks the views of other interested parties before acting on that request. Failure to respect the requirements of due process would conflict with the requirement to provide interested parties with 'a full opportunity for the defence of their interests', consistent with Article 6.2.[75] Clearly, an interested party is not able to defend <u>its</u> interests if it is prevented from commenting on requests made by other interested parties in pursuit of <u>their</u> interests. In the present case, Cementos Progreso's request for extension of the POI was made on 1 October 1996. The Ministry's decision to extend the POI was made on 4 October 1996, only three days after Cementos Progreso's request. There is no evidence to suggest that the Ministry sought the views of Cruz Azul [the Mexican producer], or other interested parties, before deciding to extend the POI. Accordingly, we find that by extending the POI pursuant to a request from Cementos Progreso without seeking the views of other interested parties in respect of that request, the

[73] Panel Report, Guatemala – Cement II, para. 8.232.
[74] Panel Report, *China – GOES*, para. 7.385.
[75] *(footnote original)* We do not consider that the obligation in the first sentence of Article 6.2 is qualified by the second sentence of that provision. Thus, we do not consider that the obligation in the first sentence of Article 6.2 is concerned exclusively with "providing opportunities for all interested parties to meet those parties with adverse interests…". Although the words "[t]o this end" at the beginning of the second sentence suggest that such meetings are one way in which the obligation of the first sentence can be fulfilled, it does not follow that such meetings provide the only means by which the obligation of the first sentence may be fulfilled. If that were the case, there would be no need for the first sentence of Article 6.2.

WTO - Internal

> Ministry failed to provide Cruz Azul with 'a full opportunity for the defence of [its] interests', contrary to Guatemala's obligations under Article 6.2 of the *AD Agreement*."[76]

1.3.1.2 Nature and extent of obligations under Article 6.2

62. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority was in violation of Articles 6.1, 6.2, and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing the Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. Following the observation based upon Article 12.2, quoted the Panel explained that the first sentence of Article 6.2 is very general in nature:

> "As for Article 6.2, we note that the first sentence of that provision is very general in nature. We are unable to interpret such a general sentence in a way that would impose a specific obligation on investigating authorities to inform interested parties of the legal basis for its final determination on injury during the course of an investigation, when the express wording of Article 12.2 only imposes such a specific obligation on investigating authorities at the end of the investigation."[77]

63. In *Egypt – Steel Rebar*, the Panel emphasized that "the language of the provision at issue creates an obligation on the [investigating authorities] to *provide opportunities* for interested parties to defend their interests." The Panel further considered that the "[f]ailure by respondents to take the initiative to defend their own interests in an investigation cannot be equated, through WTO dispute settlement, with failure by an investigating authority to provide opportunities for interested parties to defend their interests".[78]

64. The Panel in *Korea –Certain Paper (Article 21.5 – Indonesia),* noted that Article 6.2, interpreted in conjunction with Article 6.1, required authorities to provide interested parties in anti-dumping proceedings with "liberal opportunities … to defend their interests."[79] In this case it was "undisputed that the KTC's injury re-determination was based solely on the information collected in the original investigation."[80] Korea argued that because the injury re-determination was based solely on the information from the original investigation, the KTC did not have to provide an additional opportunity to make comments on its injury analysis. Indonesia, on the other hand, argued that because the implementation proceedings at issue constituted a "new proceeding" the interested party the Sinar Mas Group was entitled to make comments on the evaluation of the Article 3.4 injury factors in such proceedings.[81] The Panel held that the Sinar Mas Group was entitled to defend its interests as provided for in Article 6.2:

> "[B]ecause the implementation proceedings at issue were the continuation of the original investigation, the procedural obligations imposed on the KTC relate to this combined process. It follows that a procedural obligation that had been fulfilled in the original investigation had to be observed again in the implementation proceedings only if the steps taken in such proceedings made it necessary. We therefore do not agree with Indonesia's contention that the KTC had to give the Sinar Mas Group an additional opportunity to comment on its injury re-determination simply because the implementation proceedings constituted a new proceeding. Nor do we agree with Korea's assertion that because the injury re-determination was based on the information collected in the original investigation the Sinar Mas Group did not have the right to make comments on the KTC's injury analysis in the implementation proceedings. We cannot assume that the same factual basis would in all cases lead to the same analysis regarding the impact of dumped imports on the domestic industry

WTO - Internal

[76] Panel Report, *Guatemala – Cement II*, para. 8.179. See also para. 7 above with respect to the same issue in the context of Article 6.1.

[77] Panel Report, *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.1 and 6.9, see the excerpts referenced in paras. 9 above and 388 below. See also Panel Report, *Egypt – Steel Rebar*, paras. 7.77-7.96.

[78] Panel Report, *Egypt – Steel Rebar,* para. 7.88.

[79] Panel Report, *Korea – Certain Paper (Article 21.5 –Indonesia)*, para. 6.76 (quoting the Appellate Body Report, *United States – Oil Country Tubular Goods Sunset Reviews*, para. 241.)

[80] Panel Report, *Korea – Certain Paper* (*Article 21.5 – Indonesia)*, para. 6.79.

[81] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.79.

> under Article 3.4 of the Agreement. It was, in our view, entirely possible, if not to be expected, that in the implementation proceedings at issue the KTC would have engaged in an analysis that in some respects would differ. This new analysis, in turn, could have led to a different conclusion regarding the impact of dumped imports on the domestic industry under Article 3.4. The opposite proposition would suggest that notwithstanding our finding of inconsistency under Article 3.4 in the original panel proceedings the KTC would necessarily reach the same conclusion regarding the impact of dumped imports on the domestic industry, and would imply that our finding was devoid of any potential impact on the implementation proceedings. This cannot be the case. We therefore consider that the KTC should have allowed the Sinar Mas Group to comment on the evaluation of the injury factors under Article 3.4 of the Agreement."[82]

65. The Panel in *EU – Footwear (China)* pointed out that "while interested parties must be provided with liberal opportunities to defend their interests, this right does not entitle them to participate in the investigation as and when they choose".[83]

66. The Panel in *EC – Fasteners (China)* considered claims under Articles 6.4 and 6.2 in regard to the investigating authority's failure to provide information on how normal value was established until very late in the investigation. The Panel found a violation of Article 6.4 (see paragraph 114 below) and went on to find an additional violation of Article 6.2:

> "[W]hile in general we might not consider it necessary to go on to address China's claim under Article 6.2, in this case, we consider that the discussion above is also relevant to a proper application of the obligation to ensure all interested parties a 'full opportunity for the defence of their interests'. In our view, the Chinese exporters could not defend their interests in this investigation because the Commission only provided information concerning the product types used in the determination of the normal value at a very late stage of the proceedings, when it was no longer feasible for them to request that adjustments be made in order to ensure a fair comparison, which until that time they reasonably considered were not necessary. We therefore conclude that the European Union acted inconsistently with Article 6.2."[84]

WTO - Internal

67. The Appellate Body in *EC – Fasteners (China)* confirmed the Panel's finding under Article 6.2, holding that the finding was "consistent with the Appellate Body's interpretation, in *EC – Tube or Pipe Fittings*, that the 'presentations' referred to in Article 6.4 'logically are the principal mechanisms through which an exporter subject to an anti-dumping investigation can defend its interests' within the meaning of Article 6.2."[85]

68. The Panel in *EU – Footwear (China)* pointed out that:

> "Article 6.2 does not establish any specific obligations with respect to disclosure of or access to information. Thus, to the extent China is asserting a delay in 'disclosure' of information, we see no basis for its claim in Article 6.2 and reject it."[86]

69. The Panel in *EU – Footwear (China)* disagreed with the point of view that every failure to provide information to an interested party necessarily lead to a violation of Article 6.2:

> "Certainly, one can posit that any failure to provide information to interested parties means that certain arguments may not be made. This does not, however, in our view mean that any failure in this regard establishes a violation of Article 6.2. To so conclude would be to impose on investigating authorities a standard of perfection in the conduct of investigations that we consider unwarranted."[87]

70. The Panel in *China – Broiler Products* noted that there was no evidence supporting China's assertion that no hearing was held despite the US Government's request because other interested

---

[82] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.79.
[83] Panel Report, *EU – Footwear (China)*, para. 7.640.
[84] Panel Report, *EC – Fasteners (China)*, para. 7.495.
[85] Appellate Body Report, *EC – Fasteners (China)*, para. 507.
[86] Panel Report, *EU – Footwear (China)*, para. 7.621.
[87] Panel Report, *EU – Footwear (China)*, para. 7.656.

parties with adverse interests declined to attend such a meeting, and found that China acted inconsistently with Article 6.2.[88]

71. The Panel in *Pakistan – BOPP Film (UAE)* indicated that Article 6.2 provides for opportunities for respondents to defend their rights, but not "indefinite rights" or rights to participate "as and when they choose":

> "By providing that interested parties be given a full opportunity for the defence of their interests, Article 6.2 sets forth one of the 'fundamental due process rights to which interested parties are entitled in anti-dumping investigations and reviews'. It provides for 'liberal opportunities for respondents to defend their interests'; however, it does not provide 'for 'indefinite' rights' and does not give parties the right to make submissions or otherwise participate 'as and when they choose'."[89]

72. The Panel then set out to determine whether Article 6.2 applies outside of the scope of original investigations and interim and sunset reviews.[90] The Panel considered that not every step taken by an investigating authority would trigger an obligation for the authority to give parties an opportunity to submit their views:

> "As fundamental due process rights, the rights set forth in Article 6.2 must be available in any process leading to the imposition of anti-dumping measures by a Member. However, not every step taken by an investigating authority will trigger an obligation for the authority to give parties an opportunity to submit their views."[91]

73. The Panel agreed with the approach taken by the panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* in its finding that "the extent to which 'a procedural obligation set forth under Article 6' applied anew to the compliance redetermination depended on 'the steps taken' by the domestic authority in the redetermination."[92] In particular, the performance of a new analysis by an investigating authority could constitute steps that would make the application of Article 6 necessary:

> "The panel in *Korea – Certain Paper (Article 21.5 – Indonesia)* relied on the fact that, in compliance proceedings, the original determination and the compliance redetermination form part of a continuum of events. That panel observed that when a procedural obligation under Article 6 had already been complied with in the original proceedings, ruling that it had to be 're-observed' in the implementation proceedings would have meant the panel was imposing on the respondent 'procedural obligations that had no … connection with the implementation of the DSB recommendations and rulings at issue', '*unless the steps taken by the [investigating authority of the respondent] made it necessary*'. This would be the case, for example, where the investigating authority had to perform a *new analysis*, even if that analysis was based on the same facts already relied upon in the original proceedings."[93]

74. The Panel also noted that, while the panel's finding in *Korea – Certain Paper (Article 21.5 – Indonesia)* was specific to compliance redeterminations, certain commonalities existed with the situation before it:

> "[A] 'first' final determination had already been adopted; it was either not contested that the authority had complied with Article 6.2 (in our case), or the complainant had not established otherwise (in the original proceedings in *Korea – Certain Paper*); a "second" final determination was then adopted, replacing the former, and the question was to what extent the authority had to take steps in adopting the second determination to ensure that parties had a full opportunity for the defence of their interests under Article 6.2. In such circumstances, we consider that also when a determination is remanded to the domestic authority as a result of domestic judicial proceedings rather

WTO - Internal

[88] Panel Report, *China – Broiler Products*, paras. 7.21-7.24.
[89] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.524.
[90] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.525.
[91] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.526.
[92] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.527 (quoting *Korea – Certain Paper (Article 21.5 – Indonesia*), para. 6.74).
[93] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.528. (emphasis original)

> than as a result of WTO dispute settlement, the question under Article 6.2 is whether *the steps taken* on remand *by the investigating authority* make it necessary to give parties a further opportunity to make their views known."[94]

75. Applying its understanding of Article 6.2 to the facts, the Panel addressed whether the adoption of a 9 April 2015 determination, formally identical to the 4 February 2013 determination set aside by Pakistan's upper court, triggered the obligation in Article 6.2:

> "As set out in discussing the requirements of Article 6.2 of the Anti-Dumping Agreement above, the question is whether, under this provision, the adoption of the 9 April 2015 determination in lieu of the 4 February 2013 determination triggered an obligation on the part of Pakistan to afford interested parties an additional opportunity for the defence of their interests, and specifically whether it required Pakistan to give notice of the impending adoption of a new determination and opportunities for the parties to make their views known."[95]

76. In examining the facts, the Panel considered that, in the redetermination, the NTC did not reopen the investigative record, and it merely "ratified" the findings of the previous final determination. Because the NTC merely readopted its February 2013 final determination, the Panel considered that Pakistan was not required to give parties a new opportunity to make their views known before the adoption of the April 2015 determination:

> "The Report on final determination of 9 April 2015 states that the NTC 're-considered, re-appreciated and re-appraised the facts of the investigation'. Despite this language, the NTC not only did not reopen the record of the investigation, but also it carried out absolutely no new or further analysis of the facts already on the record. Instead, the NTC observed that the determination of February 2013 had been annulled solely on the basis of a formal defect in the composition of the NTC ('only on the issue of quorum'), and that 'only the final determination' had been set aside. Therefore, the now 'properly constituted' NTC considered that only the last step of adopting a final determination had to be repeated, and it therefore 'ratified' the earlier findings and the consequent imposition of duties.
>
> Thus, on the face of the determination, what the NTC did in April 2015 was to readopt a determination that was identical to that of February 2013, but whereas in February 2013 one member of the NTC had overstayed its mandate under domestic law, in April 2015 the composition of the NTC was proper under domestic law."[96]

77. On this basis, the Panel found that Article 6.2 did not require the NTC to give parties a new opportunity to make their views known before the adoption of the April 2015 determination:

> "On this basis, we do not consider that the United Arab Emirates has demonstrated that Article 6.2 of the Anti-Dumping Agreement required Pakistan to give parties a new opportunity to make their views know before the adoption of the 2015 determination, additional to the opportunities provided in the process that led to the adoption of the 2013 determination. We therefore find that the United Arab Emirates has not demonstrated that Pakistan acted inconsistently with Article 6.2 of the Anti-Dumping Agreement."[97]

1.3.2 Relationship with other provisions of the Anti-Dumping Agreement

78. Addressing a claim under Article 6.2, the Panel in *Guatemala – Cement II* decided to exercise judicial economy because it had already made findings concerning that issue under other, more specific provisions of the Agreement:

> "Whereas this provision clearly imposes a general duty on investigating authorities to ensure that interested parties have a full opportunity throughout an anti-dumping

[94] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.529.
[95] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.532.
[96] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.533-7.534.
[97] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.535.

WTO - Internal

> investigation for the defence of their interests, it provides no specific guidance as to what steps investigating authorities must take in practice. By contrast, other more specific provisions apply to the facts at hand, in respect of which Mexico has also made claims. Although there may be cases in which a panel will nevertheless need to address claims under Article 6.2, we do not consider it necessary for us to do when we have already made findings concerning the conduct allegedly violating Article 6.2 under other, more specific provisions of the *AD Agreement*."[98]

79. In *Guatemala – Cement II*, Mexico made a number of claims under Articles 6.1 and 6.2 in conjunction with claims under more specific provisions of Article 6, and the Panel resolved the claims under the more specific provisions. For instance, regarding Guatemala's failure to allow Mexican producer "proper access" to the information submitted by the Guatemalan domestic producer at the public hearing it held, the Panel noted that it had found a violation of Articles 6.1.2 and 6.4, and declined to address Mexico's claims under Articles 6.1 and 6.2; see paragraph 8 above. Concerning Guatemala's failure to disclose the "essential facts" forming the basis of its final determination, the Panel found a violation of Article 6.9 and declined to rule on claims under Articles 6.1 and 6.2: see paragraphs 385- 388 below.

80. In *Guatemala – Cement II*, Mexico claimed that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the Anti-Dumping Agreement by rejecting certain technical accounting evidence submitted by a Mexican producer one day before the public hearing held by Guatemala's authority. The Panel considered it unnecessary to address this claim, on the grounds that the claim was dependent on the issue of whether the cancellation by the authority of its verification visit to the Mexican producer was inconsistent with Article 6.8, and the Panel had found the cancellation in violation of Article 6.8.[99]

81. In *EU – Footwear (China)*, the Panel explained the relationship between Article 6.2 and other paragraphs of Article 6 as follows:

> "Finally, in our view, there is nothing in the text of Article 6.2 that would require investigating authorities to actively disclose information to interested parties. Indeed, there is nothing specific in the text of Article 6.2 that relates to 'information' at all. The only specific proscription concerning the 'full opportunity' for parties' defence of their interests is the obligation for investigating authorities to, on request, provide opportunities for parties to meet other parties with adverse interests. It is clear that the obligation to provide for such meetings does not exhaust the scope of parties' rights under Article 6.2. However, while a 'full opportunity' for the defence of a party's interests may well include, conceptually, the notion of access to information, in our view, the more specific provisions of Article 6, including Articles 6.1.2, 6.4, and 6.9, establish the obligations on investigating authorities in this regard. In our view, Article 6.2 does not add anything specific to the obligations on investigating authorities with respect to interested parties' ability to see or receive information in the hands of the investigating authorities established in other provisions of Article 6. Thus, while a failure to comply with one of the more specific provisions of Article 6 concerning access to or disclosure of information may establish a violation of Article 6.2, we find it difficult to imagine a situation where the more specific provision is complied with, but Article 6.2 is nonetheless violated as a result of an investigating authority's actions in connection with access to or disclosure of information to interested parties."[100]

1.4 Article 6.4

1.4.1 General

82. The Panel in *China – Broiler Products (Article 21.5 – US)* underlined the interlinkage between the two obligations found in Article 6.4:

> "The two obligations in Articles 6.4 and 12.3 are distinct, yet related. In particular, the second obligation concerns providing opportunities to prepare presentations 'on the

[98] Panel Report, *Guatemala – Cement II*, para. 8.162.
[99] Panel Report, *Guatemala – Cement II*, para. 8.125.
[100] Panel Report, *EU – Footwear (China)*, para. 7.604.

WTO - Internal

> basis of this information' – that is, the information that interested parties must be given timely opportunities to see. Where an investigating authority has not provided any opportunity to see relevant and non-confidential information that is used by it, it perforce cannot provide any opportunity to prepare presentations on the basis of this information. However, where an opportunity to see information is provided, it may be found to be insufficient if it is not provided in sufficient time to allow the interested parties seeing the information to prepare presentations based on it."[101]

83. The Panel in *China – Broiler Products (Article 21.5 – US)* rejected China's argument that unless interested parties request to see information, Article 6.4 does not impose any obligation on the investigating authorities:

> "The fact that the 'relevance' of the information must be assessed from the perspective of the interested party does not detract from our understanding that investigating authorities must provide opportunities irrespective of a request to see the information being made. Interested parties that are not aware of the existence of certain information before the investigating authority obviously cannot make a request to see that information. Such interested parties may well be most in need of the due process protection afforded by Articles 6.4 and 12.3. Yet, a requirement for a request would render void their right to have an opportunity to see information of which they are unaware. Attributing such a meaning to a treaty provision would lead to an unreasonable result."[102]

84. However, the Panel also referred to evidentiary difficulties in proving a violation of Article 6.4, and stated:

> "The failure to provide opportunities to see certain information is a violation by omission. There are evidentiary challenges associated with a claim based on an alleged omission. It may be difficult to prove the absence of an opportunity to see information. From an evidentiary perspective, it is therefore useful if a complainant can demonstrate, by reference to record evidence, that an interested party requested to see information that the investigating authority then failed to make available. But the absence of a request by an interested party in itself does not, as a matter of law or fact, mean that an investigating authority has satisfied its obligation to provide timely opportunities to see information under Articles 6.4 and 12.3. Viewed in context, the quotation from *EC – Fasteners (China)* relied on by China does not support its position to the contrary. The panel in that case had already observed that Article 6.4 did not require an investigating authority to 'actively disclose' information, and was addressing China's argument that 'the investigating authorities were under the obligation to provide' information even in the absence of a request. The panel rejected the view that there was any obligation to actively disclose information under Article 6.4. In this context, the statement that a 'violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information' in our view reflects that one way of demonstrating a violation of Article 6.4 would be to show that a request to see information was denied. This does not, however, mean that such a request (and denial) are necessary in order to demonstrate a violation of Articles 6.4 and 12.3."[103]

WTO - Internal

1.4.2 "information" that must be disclosed under Article 6.4

1.4.2.1 General

85. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* underlined the wide scope of the obligation contained in Article 6.4, as follows:

> "We recall that the 'information' that an investigating authority will provide timely opportunities to see is 'all' information that is 'relevant' and 'not confidential' that is 'used' by the investigating authorities. In our view, this clearly indicates that the term 'information' within the meaning of Article 6.4 does not in any way limit the type or

[101] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.287.
[102] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.291.
[103] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.292.

> nature of information that an interested party is entitled to see under that provision. Accordingly, 'all' information that is relevant and used by the investigating authority, with the exception of confidential information, may be seen by interested parties in the investigation."[104]

1.4.2.2 "information … relevant to the presentation of their cases" and "used by the authorities"

86. The Appellate Body in *EC – Tube or Pipe Fittings,* examining what information must be disclosed by the authorities under Article 6.4, stated that this must be examined from the perspective of *the interested parties*. It thus reversed the Panel's finding in this case that the investigating authority was not obliged to disclose certain information that *the investigating authority* considered not relevant to its conclusions:

> "Article 6.4 refers to 'provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their* cases'. (emphasis added) The possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'. The investigating authorities are not mentioned in Article 6.4 until later in the sentence, when the provision refers to the additional requirement that the information be 'used by the authorities'. Thus, whether or not the investigating authorities regarded the information in Exhibit EC-12 to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4."[105]

87. The Appellate Body in *EC – Tube or Pipe Fittings* also found that information relating to the Article 3.4 injury factors is necessarily "relevant" information which is to be disclosed under Article 6.4:

> "This conclusion is supported by our reasoning in *US – Hot Rolled Steel*, where we explained that 'Article 3.4 lists certain factors *which are deemed to be relevant in every investigation* and which must always be evaluated by the investigating authorities.' Thus, because Exhibit EC-12 contains information on some of the injury factors listed in Article 3.4, and the injury factors listed in that provision 'are deemed to be relevant in every investigation', Exhibit EC-12 must be considered to contain information that is relevant to the investigation carried out by the European Commission. As such, the information in Exhibit EC-12 was necessarily relevant to the presentation of the interested parties' cases and is, therefore, 'relevant' for purposes of Article 6.4."[106]

88. The Panel in *EC – Salmon (Norway)* explained that if information forms part of the information relevant to an issue before the investigating authority at the time it makes its determination, that information is "used" by the investigating authorities (and must be disclosed under Article 6.4):

> "[W]hether particular information is relevant is not determined from the investigating authorities' perspective, but with reference to the issues to be considered by the investigating authority under the AD Agreement. Thus, information which relates to issues which the investigating authority is required to consider under the AD Agreement, or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation, presumptively falls within the scope of Article 6.4. … Finally, the question of whether information is "used" by the investigating authority cannot, in our view, be assessed from the perspective of whether the information is specifically referred to or relied upon by the investigating authority in its determination. If the investigating authority evaluates a question of fact or an issue of law in the course of an anti-dumping investigation, then, in our view, all information relevant to that question or issue that is before the investigating authority must necessarily be considered by the investigating authority, in order to make an objective and unbiased decision. Consequently, it seems clear to us that whether information is

[104] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.401.
[105] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145.
[106] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 146.

WTO - Internal

> "used" by the investigating authority must be assessed by reference to whether it forms part of the information relevant to a particular issue that is before the investigating authority at the time it makes its determination. "[107]

89. Accordingly, the Panel in *EC – Salmon (Norway)* found that all such information in the investigating authorities' files would be subject to timely disclosure:

> "In our view, unless information submitted to the investigating authority is rejected, that information must remain in the investigating authorities' files, and if it is relevant, not confidential, and used by the investigating authority, as discussed above, interested parties must be given timely opportunities to see it."[108]

90. The Appellate Body in *EC – Fasteners (China)* summed up past decisions on the scope of information that must be disclosed under Article 6.4:

> "The Appellate Body has found that Article 6.4 refers to 'provid[ing] timely opportunities for all interested parties to see all information that is relevant to the presentation of *their* cases', and that the possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'. Therefore, it is the interested parties, rather than the authority, who determine whether the information is in fact 'relevant' for the purposes of Article 6.4. Moreover, according to the Appellate Body, whether the information was 'used' by the authority does not depend on whether the authority specifically relied on that information. Rather, it depends on whether the information is related to 'a required step in the anti-dumping investigation'. Thus, Article 6.4 concerns information relating to 'issues which the investigating authority is required to consider under the [*Anti-Dumping Agreement*], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation.'
>
> The interested parties' right under Article 6.4, therefore, is to see *all* non-confidential information relevant to the presentation of their cases and used by the investigating authority. Article 6.4 thus applies to a broad range of information that is used by an investigating authority for purposes of carrying out a required step in an anti-dumping investigation.
>
> …
>
> In sum, under Article 6.4 of the *Anti-Dumping Agreement*, what information is considered 'relevant to the presentation of [the interested parties'] cases' and 'used by the authorities' would depend on the specific 'step' of the anti-dumping investigation and the particular issue before the investigating authority."[109]

91. The Appellate Body in *EC – Fasteners (China)* pointed out that the information subject to disclosure under Article 6.4 is not limited to facts and raw data, although it does not include the investigating authority's detailed analysis of the information:

> "We note the European Union's view that the term 'information' in Article 6.4 'concerns facts and raw data rather than factual determinations and conclusions by the investigating authorities'. In our view, there is no textual basis in Article 6.4 for limiting information 'relevant to the presentation of [parties'] cases' and 'used by the authorities' to facts or raw data unprocessed by the authorities. Indeed, the broad range of information subject to the obligation under Article 6.4 may take various forms, including data submitted by the interested parties, and information that has been processed, organized, or summarized by the authority. We do not see why only facts and raw data would be relevant to the parties' presentation of their cases. A proper interpretation of Article 6.4 does not mean, however, that an investigating authority's reasoning or internal deliberation in reaching its final determination is also subject to the obligation under Article 6.4. Article 6.4 concerns the information that is used by an authority,

WTO - Internal

[107] Panel Report, *EC – Salmon (Norway)*, para. 7.769.
[108] Panel Report, *EC – Salmon (Norway)*, para. 7.771.
[109] Appellate Body Report, *EC – Fasteners (China)*, paras. 479-480, and 485.

rather than an authority's detailed analysis of the information, or the determination it reaches based on such information."[110]

92. In *EC – Fasteners (China)*, the Appellate Body drew a connection between the duty to disclose under Article 6.4 and the investigating authority's duty to ensure a fair comparison:

> "In our view, as a starting point for the dialogue between the investigating authority and the interested parties to ensure a fair comparison, the authority must, at a minimum, inform the parties of the product groups with regard to which it will conduct the price comparisons. For example, the authority may choose to make comparisons of transaction prices for a number of groups of goods within the like product that share common characteristics, thus minimizing the need for adjustments, or it may choose to make adjustments for each difference affecting price comparability to either the normal value or the export price of each transaction to be compared. Without knowing which particular method the authority will use to categorize the products for purposes of price comparison, it would not be possible for the interested parties to know what information will be necessary for purposes of ensuring a fair comparison, and to request adjustments accordingly. Thus, as the Panel correctly found in its analysis of China's claim under Article 6.4 of the *Anti-Dumping Agreement*:
>
> > Ensuring that the comparison of normal value and export price is based on comparable goods is, as provided for in Article 2.4, an obligation on investigating authorities. Foreign producers have a role in that process, by requesting due allowance for differences demonstrated to affect price comparability. In order to fulfil their role, and thus ensure that their interest in a fair comparison is protected, however, it is necessary that they know the basis on which the investigating authority undertakes to make the comparison of normal value and export price, and in sufficient time to allow the exporters to make and substantiate requests for due allowance."[111]

93. In *EC – Fasteners (China)*, the Appellate Body pointed out the particular importance of disclosure under Article 6.4 to ensure a fair comparison in anti-dumping investigations of imports from NMEs, where normal value is established on the basis of domestic sales in an analogue country:

> "[I]n an anti-dumping investigation of imports from NMEs, where the normal value is not established on the basis of the foreign producers' domestic sales, but is established on the basis of the domestic sales in an analogue country, the investigating authority's obligation to inform the interested parties of the basis of the price comparison is even more pertinent for ensuring a fair comparison. This is because foreign producers are unlikely to have knowledge of the specific products and pricing practices of the producer in an analogue country. Unless the foreign producers under investigation are informed of the specific products with regard to which the normal value is determined, they will not be in a position to request adjustments they deem necessary."[112]

94. In *EU – Footwear (China)*, the Panel held that the fact that questionnaires were sent to certain interested parties was not covered by the scope of the obligation set forth in Article 6.4:

> "In our view, however, the mere fact that information 'relates' to a particular issue that is before the investigating authority does not establish that the information was 'used' by the authority in making its determination. In this instance, moreover, we fail to see how the 'sending of the questionnaires' or 'requests to complete questionnaire responses' could have constituted information *per se* that was 'used' by Commission in the selection of the sample, which we understand to be the relevant determination. We do not see the relevance of the dates on which questionnaires were sent to the substantive issues involved in selecting the sample. Indeed, we see nothing in the evidence before us that would indicate that the Commission 'used' the fact that the anti-dumping questionnaires were sent to the sampled EU producers on 10 October 2008 in any way in the sample determination. Moreover, in our view, the fact that eight

[110] Appellate Body Report, *EC – Fasteners (China)*, para. 480.
[111] Appellate Body Report, *EC – Fasteners (China)*, para. 480.
[112] Appellate Body Report, *EC – Fasteners (China)*, para. 491.

WTO - Internal

> producers had been sent questionnaires on that date at most suggests that they had been, at least preliminarily, selected for the sample, and thus would be a preliminary conclusion reached by the Commission with respect to the sample selection, rather than information *per se*. We recall that Article 6.4 requires 'timely opportunities' to see 'information', and not the analysis and conclusions of the investigating authority. Thus, we consider that the 'information' at issue is not covered by the obligation in Article 6.4 and therefore reject China's arguments in this regard."[113]

95. In *EU – Footwear (China)*, the Panel also held that "Article 6.4 does not apply to the methodology used by or determinations of the investigating authorities, and does not require investigating authorities to provide opportunities for interested parties to 'see' such methodologies and determinations."[114]

96. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body agreed with the Panel's finding that in the investigation at issue the information requested by the Chinese interested parties was "relevant" within the meaning of Article 6.4:

> "Turning to our analysis, we consider, first, the European Union's argument that, in finding that the information at issue was, for the purposes of Article 6.4, 'relevant' to the presentation of the Chinese producers' cases, the Panel erred by relying on the fact that the Chinese producers had repeatedly requested the information at issue from the Commission. We recall that Article 6.4 stipulates that an authority must provide 'timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases'. As China correctly notes, the Appellate Body confirmed in the original proceedings that the 'possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'.' Therefore, whether an investigating authority 'regarded the information … to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4'. Accordingly, we do not consider that the Panel erred in its analysis by considering whether the information requested by the Chinese producers was, from the perspective of these producers, 'relevant' to the presentation of their cases within the meaning of Article 6.4."[115]

97. In this regard, the Appellate Body rejected the European Union's argument that the Panel's finding could lead to the scope of the obligation under Article 6.4 being determined unilaterally by interested parties in investigations:

> "We note that the European Union cautions that, under the Panel's approach, the scope of Article 6.4 would be determined unilaterally by any interested party, rather than by an objective concept of what is 'relevant'. This would mean, according to the European Union, that 'irrelevant requests' for information by interested parties that are not answered by authorities would be considered as triggering a violation of Article 6.4. In the European Union's view, this would not be a reasonable interpretation of Article 6.4. However, the scope of Article 6.4 is not determined *solely* by reference to whether information is 'relevant' to the presentation of an interested party's case. In order for information to be subject to the obligation under Article 6.4, such information must also 'not be confidential within the meaning of [Article 6.5]', and must have been 'used' by the investigating authority in the sense that it relates to 'a required step in the anti-dumping investigation'. Information that is 'relevant' from the perspective of the interested party requesting such information may not be subject to the obligation under Article 6.4 if such information was not 'used' by the investigating authority – i.e. the information does not relate to a required step in the anti-dumping investigation. Similarly, although certain information may be relevant from the perspective of the interested party requesting it, such information may not fall within the scope of Article 6.4 if it has been accorded confidential treatment in accordance with the requirements of Article 6.5."[116]

WTO - Internal

[113] Panel Report, *EU – Footwear (China)*, para. 7.612.
[114] Panel Report, *EU – Footwear (China)*, para. 7.618.
[115] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.107.
[116] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.108.

98. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body did not find an error in the Panel's finding that information about the list and characteristics of an exporter's products was "used" within the meaning of Article 6.4 even though the authority had not used the entirety of that information in its determinations:

> "We recall that, in the original proceedings, the Appellate Body confirmed that whether information was 'used' by the authority, within the meaning of Article 6.4, does not depend on whether the authority specifically relied on that information. Instead, 'it depends on whether the information is related to 'a required step in the anti-dumping investigation'.' Thus, Article 6.4 concerns information relating to 'issues which the investigating authority is required to consider under the [*Anti-Dumping Agreement*], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation'.
>
> We consider that the European Union puts forward a very narrow reading of the term 'used', within the meaning of Article 6.4, which does not comport with the Appellate Body's interpretation of that term in the original proceedings. Although all of the specific data provided by Pooja Forge concerning its products and their characteristics may not have been specifically relied on by the Commission in its determinations, the Commission extracted as much as possible from all of Pooja Forge's data in order to group the products at issue in accordance with the revised PCNs, and calculated dumping margins for the Chinese producers on this basis. As such, all of the information concerning the products sold by Pooja Forge and their characteristics was 'used' by the Commission, within the meaning of Article 6.4, because it related to a 'required step' in the investigation, i.e. the calculation of dumping margins."[117]

99. The Panel in *US – OCTG (Korea)* distinguished between information and an investigating authority's procedural decisions to accept or use certain information, and found that the latter does not fall within the scope of the obligation set forth in Article 6.4:

> "We see nothing in Article 6.4 that would suggest that an investigating authority must 'inform' interested parties of procedural decisions to accept and/or use certain information in the anti-dumping investigation. In any event, we fail to see how a procedural decision to accept and/or use certain information itself would constitute 'information that is relevant to the presentation' of an interested party's case."[118]

100. Regarding the scope of the obligation set forth in Article 6.4, the Panel in *China – Broiler Products (Article 21.5 – US)* stated that:

> "[I]nformation 'used' within the meaning of Articles 6.4 of the Anti-Dumping Agreement and 12.3 of the SCM Agreement can be broader than facts or data relating to issues which the investigating authority is required to consider, or which it does, in fact, consider in the course of an anti-dumping or countervailing duty investigation. Whether a particular item of information is one that is 'used' by the authorities in a broader sense will depend on the facts and circumstances of each case."[119]

101. The Panel in *China – Broiler Products (Article 21.5 – US)* pointed out that an investigating authority's request for information from an interested party constitutes "information" within the meaning of Article 6.4, even if made orally.[120]

102. The Panel in *China – Broiler Products (Article 21.5 – US)* rejected the United States' argument that the Chinese investigating authority had violated Article 6.4 by failing to provide the interested parties with timely opportunities to see what the United States called the "context" of certain pricing information, such as the product types for which price information was requested and whether such information was based on a single sale or quarterly/annual sales.[121]

---

[117] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.117-5.118.
[118] Panel Report, *US – OCTG (Korea)*, para. 7.225.
[119] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.286.
[120] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.310-7.311.
[121] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.316-7.317.

WTO - Internal

1.4.2.3 Information gathered during the verification visits

103. In *Dominican Republic – AD on Steel Bars (Costa Rica),* the Panel rejected the Dominican Republic's argument that the documents received by the investigation authority during the verification visit did not qualify as "information" within the meaning of Article 6.4:

> "We recall that the 'information' that an investigating authority will provide timely opportunities to see is 'all' information that is 'relevant' and 'not confidential' that is 'used' by the investigating authorities. In our view, this clearly indicates that the term 'information' within the meaning of Article 6.4 does not in any way limit the type or nature of information that an interested party is entitled to see under that provision. Accordingly, 'all' information that is relevant and used by the investigating authority, with the exception of confidential information, may be seen by interested parties in the investigation."[122]

104. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* then proceeded to examine whether the information received during the verification visit in the investigation at issue met the conditions set out in Article 6.4. In this context, the Panel rejected the Dominican Republic's argument that the mentioned information was not "relevant" within the meaning of Article 6.4 because it merely constituted "documentary evidence" supporting the documents provided in the applicant's questionnaire response.[123] According to the Panel, the relevance of information within the meaning of Article 6.4 does not depend on whether an interested party requested to see the information during the investigation at issue.[124] As to whether the information at issue had been "used" withing the meaning of Article 6.4, the Panel stated:

> "With regard to whether the information gathered at the time of the verification was used by the CDC, we note that, as we have pointed out, this information made it possible to confirm the veracity and accuracy of the information previously provided by the applicant. Thus, given that the information submitted by the applicant was considered relevant information and was verified by the CDC, it is understood that the information gathered during the verification is of the same nature, recalling that the purpose of the verification was to confirm the veracity and accuracy of the information previously provided[.]"[125]

WTO - Internal

1.4.2.4 Information already available to the interested parties

105. The Panel in *EC – Tube or Pipe Fittings* distinguished between information already in the possession of an interested party and information that must be available to interested parties within the meaning of Article 6.4:

> "We do not view information that is already in the possession of an interested party and that has been submitted by an interested party to an investigating authority in the course of an anti-dumping proceeding as information that an investigating authority must provide opportunities for that same interested parties to see within the meaning of Article 6.4. This provision relates to information that would not initially be in the possession of an interested party and would therefore be unknown or unfamiliar to an interested party if it were not disclosed to that party in the course of an investigation."[126]

106. The Panel in *EC – Fasteners (China)* rejected a claim under Article 6.4 in respect of information available on a website and in a non-confidential annex in the investigation, as "the Chinese producers had adequate opportunities to see that information."[127]

---

[122] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.401.
[123] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.402.
[124] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.404.
[125] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.405.
[126] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.208.
[127] Panel Report, *EC – Fasteners (China)*, para. 7.535.

1.4.3 "timely opportunities for all interested parties to see all information"

107. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority violated Articles 6.1.2, 6.2 and 6.4 by refusing the Mexican producer access to the file on a certain date during the investigation; and by failing to promptly provide the producer with a copy of a submission made by the applicant for the investigation. Mexico also claimed that Guatemala's investigating authority violated Article 6.4 by failing to provide the Mexican producer with copies of the file; and by failing to provide the producer with a full record of a public hearing held by the authority. In examining these claims, the Panel explained the scope and precise meaning of the relevant provisions. See paragraph 31 above.

108. In *Guatemala – Cement II*, in response to Mexico's claim that in violation of Article 6.4, Guatemala's authority did not provide copies of the file to the Mexican producer, Guatemala argued that it was justified in doing so because the producer had not paid the required fee. The Panel found a violation of Article 6.4 because the Mexican producer had offered to pay for the copies it requested. In so doing, the Panel noted that "[t]here are various ways in which an investigating authority could satisfy the Article 6.4 obligation to provide 'whenever practicable … timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases'."[128]

109. In *Guatemala – Cement II*, Mexico argued that Guatemala's authority had acted inconsistently with Article 6.4 by not providing the Mexican producer with a complete copy of the record of its public hearing. The copy of the record of the public hearing as transmitted was missing two identified individual pages, so that the words at the beginning of one page did not follow on from the phrase at the end of the immediately preceding page. Guatemala argued that even if the copy was incomplete, the Mexican producer could have requested a complete copy as soon as it realized that an omission had occurred. The Panel did not find a violation of Article 6.4:

> "Despite the factual accuracy of Mexico's argument, we do not consider that [the Ministry's action] amounts to a violation of Article 6.4 of the *AD Agreement*, as Mexico has failed to adduce any evidence that the Ministry's failure to provide a full copy of its record of the public hearing was anything other than inadvertent. Although we consider that an interested party is entitled to see a full version of the investigating authority's record of any public hearing, it is not inconceivable that an investigating authority which chooses to provide interested parties with a copy of the record could inadvertently fail to provide a complete copy. In our view, such an inadvertent omission on the part of an investigating authority does not constitute a violation of Article 6.4. Although a violation could arise if an investigating authority failed to correct its omission after having been informed of that omission by an interested party, there is no evidence that Cruz Azul informed the Ministry of its omission in the present case."[129]

110. With regard to its finding in paragraph 109 above, the Panel in *Guatemala – Cement II* emphasized that it was not finding a "harmless error", an argument put forward previously by Guatemala in a different context:

> "In order to avoid any uncertainty, we wish to emphasize that we do not consider that the inadvertent nature of the Ministry's omission renders that omission 'harmless', in the sense of being a defence to a violation of Article 6.4 of the *AD Agreement*. … Our position is not that there was a violation of Article 6.4, but that such violation should be disregarded because it was 'harmless'. Rather, our position is that the factual circumstances before us do not amount to a violation. The question of whether or not any violation is 'harmless' therefore does not arise."[130]

111. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)* outlined its understanding of the obligations in Article 6.4:

[128] Panel Report, *Guatemala – Cement II*, para. 8.151.
[129] Panel Report, *Guatemala – Cement II*, para. 8.157.
[130] Panel Report, *Guatemala – Cement II*, para. 8.158.

WTO - Internal

> "Article 6.4 requires the investigating authorities to allow the interested parties in investigations and sunset reviews, whenever practicable, timely opportunities to see the *information* that is relevant to the presentation of their case. …
>
> The text of Article 6.4 makes it clear that it does not apply to the reasoning of the investigating authorities."[131]

112. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* following an examination of various memoranda Argentina claimed were not shown to Argentine exporters, found that the United States had indeed acted inconsistently with Article 6.4. The Panel did not accept the argument of the United States that limited time available to make a new sunset determination was a consideration to be taken into account in assessing consistency with Article 6.4.[132]

113. The Panel in *EC – Fasteners (China),* summing up the case-law on Article 6.4, noted that

> "Article 6.4 generally stipulates that the authorities shall give interested parties 'opportunities' to see all information used by the investigating authorities in an anti-dumping investigation. This right, however, is not unlimited. First, it applies to information which is <u>used</u> by the authorities. Second, the information must be <u>relevant</u> to the presentation of the interested parties' cases. Third, this right does not apply to <u>confidential</u> information. Fourth, the investigating authorities have to provide these opportunities '<u>whenever practicable</u>', and on a 'timely' basis.
>
> In addition, … Article 6.4 does not obligate the investigating authorities to actively disclose information to interested parties. … In our view, a violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential."[133]

114. The Appellate Body in *EC – Fasteners (China)* confirmed the Panel's finding that the EU authority violated Article 6.4 "by not providing a timely opportunity for Chinese producers to see information regarding the product types on the basis of which normal value was established".[134] In the underlying investigation, the Commission provided the information only one working day before the last opportunity for interested parties to present arguments with respect to the investigation. As the Panel described it, "Chinese producers were informed very late in the proceedings of the product types that formed the basis of the comparisons underlying the Commission's dumping determinations. Two of them requested information pertaining to those product types, but were not given a timely opportunity to see the relevant information by the Commission.[135]"[136]

115. The Appellate Body *EC – Fasteners (China)* also agreed that the product types used by the Commission for purposes of comparing the export price and normal value in the fasteners investigation constituted "information relevant to the presentation" of the Chinese parties' case, because, without such information, "it would be difficult if not impossible, for foreign producers to request adjustments that they consider necessary in order to ensure a fair comparison."[137]

WTO - Internal

---

[131] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.123 7-7.124.

[132] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, paras. 7.129-7.130.

[133] Panel Report, *EC – Fasteners (China)*, paras. 7.479-7.480.

[134] Appellate Body Report, *EC – Fasteners (China)*, para. 505 (citing Panel Report, *EC – Fasteners (China)*, para. 7.494).

[135] *(footnote original)* We note, in this context, that an opportunity to "see" information may obviously be satisfied by an active provision of that information, in a letter or other communication. This is different, however, from an affirmative obligation to actively disclose information.

[136] Panel Report, *EC – Fasteners (China)*, para. 7.492.

[137] Appellate Body Report, *EC – Fasteners (China),* para. 505 (citing Panel Report, *EC – Fasteners (China),* para. 7.491).

116. The Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* held that whether "timely opportunities" were provided within the meaning of Article 6.4 must be considered on a case-by-case basis:

> "We further consider that the issue of whether 'timely opportunities', within the meaning of Article 6.4, have been provided to interested parties to see information that falls within the scope of that provision must be determined on a case-by-case basis. Article 6.4 requires investigating authorities, 'whenever practicable', to provide interested parties 'timely opportunities' to see 'all information' that is relevant to the presentation of their cases, that is not confidential for the purposes of Article 6.5, and that is used by the authority in the sense that it relates to a required step in the anti-dumping investigation. Thus, the obligation in Article 6.4 applies to a broad range of information that may relate to several required steps in an anti-dumping investigation. Hence, whether 'timely opportunities' have been provided to see information for the purposes of Article 6.4 must be considered in the light of the circumstances of each case, taking into account the specific information at issue, the step of the investigation to which such information relates, the practicability of disclosure at certain points of the investigation vis-a-vis other points, and the stage of the investigation at which interested parties have made a request to see the information at issue. Thus, we disagree with the proposition that providing three weeks to exporters to comment on information within the scope of the obligation under Article 6.4 is insufficient, in all cases, to satisfy the requirement to provide 'timely opportunities' to see such information."[138]

117. The Panel in *China – Broiler Products (Article 21.5 – US)* noted that Article 6.4 does not prescribe a particular method for providing timely opportunities to see all information, and pointed out that "[a]n investigating authority may proceed in any number of ways, including by making available the information in a physical or electronic reading room."[139]

1.4.4 No independent disclosure obligation

118. The Panel in *Korea - Certain Paper (Article 21.5 - Indonesia)* noted that Article 6.4 did not impose an independent disclosure obligation on the authorities – that is, there was no requirement on the authorities to disclose information to the interested parties where there was no request to that effect.[140]

119. In *EU – Footwear (China)*, the Panel refused to find a violation of Article 6.4, noting that the exporter concerned had not made a request to see the information at issue.[141]

120. The Panel in *EC – Fasteners (China)* also considered a claim under Articles 6.2 and 6.4 regarding deficiencies in disclosure to the Chinese producers, as reflected in the General and Individual Disclosure Documents. The Panel rejected the claim because Articles 6.4 and 6.2 do not impose any affirmative disclosure obligations on the investigating authorities.[142] As the Panel stated:

> "Article 6.4 does not obligate the investigating authorities to actively disclose information to interested parties. … In our view, a violation of Article 6.4 would normally require a showing that the investigating authorities denied an interested party's request to see information used by the authorities, which was relevant to the presentation of that interested party's case and which was not confidential."[143]

121. The Panel in *EC – Fasteners (China)* rejected a claim under Articles 6.4 and 6.2 regarding inadequate explanation on the comparisons made in the investigation, stating that "we see nothing

[138] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.122.
[139] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.278.
[140] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.87. See also Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.395.
[141] Panel Report, *EU – Footwear (China)*, paras. 7.648 and 7.650.
[142] Panel Report, *EC – Fasteners (China)*, para. 7.497.
[143] Panel Report, *EC – Fasteners (China)*, para. 7.480.

WTO - Internal

in the text of either Article 6.4 or Article 6.2 that requires an investigating authority to give any explanation at all with respect to the information it makes available to the parties.[144]"[145]

1.4.5 Confidentiality

122. The Panel in *Korea – Certain Paper* interpreted the reference in Article 6.4 to "information … that is not confidential as defined in paragraph 5":

> "Article 6.4 precludes the IA from disclosing confidential information to the interested parties. However, that provision cannot, in our view, possibly be interpreted to deny an interested party access to its own confidential information. That is, confidentiality cannot be used as the basis for denying access to information against the company which submitted the information. The notion of confidentiality, as elaborated upon in Article 6.5 of the Agreement, is about preserving confidentiality of information that concerns one interested party *vis-à-vis* the other interested parties."[146]

123. The Panel in *EC – Fasteners (China) (Article 21.5 – China)* considered as not being confidential within the meaning of Article 6.4 certain information that had been wrongly treated as confidential by the investigating authority:

> "We have already found that there was no evidence before the Commission justifying confidential treatment of the information on the list and characteristics of Pooja Forge's products and thus that the Commission acted inconsistently with Article 6.5 of the Agreement in according confidential treatment to that information. Accordingly, for purposes of the present claim, we treat that information as not confidential within the meaning of Article 6.5. This means that the second condition is met."[147]

124. On appeal, the Appellate Body approved the Panel's approach, and rejected the European Union's contention that the Panel should have conducted its own analysis of whether the information at issue was confidential within the meaning of Article 6.5:

> "At issue here is the meaning of the reference in Article 6.4 to information 'that is not confidential as defined in paragraph 5'.As we have explained above, Article 6.5 prescribes a showing of 'good cause' by the party requesting confidential treatment of its information as a condition precedent for an investigating authority to accord such treatment. The treatment of information as confidential is, therefore, the legal consequence that flows from the establishment of good cause, as determined pursuant to an objective assessment by the authority reviewing a party's request for the confidential treatment of its information. Hence, in the absence of good cause being shown by the party submitting information, as determined pursuant to an objective assessment by the authority, there is no legal basis for the authority to accord confidential treatment to that information. In the light of our interpretation of Article 6.5, we consider that the reference in Article 6.4 to information 'that is not confidential as defined in paragraph 5' is properly to be understood as excluding from the scope of Article 6.4 information that has been accorded confidential treatment *in accordance with* Article 6.5 – i.e. information for which good cause has been shown by the submitting party for confidential treatment, as determined pursuant to an objective assessment by the investigating authority. Conversely, if information has been accorded confidential treatment under Article 6.5 in a manner that does not conform to the requirements of that provision, there is no legal basis for according confidential treatment and such information would, for the purposes of Article 6.4, be considered as information 'that is not confidential as defined in paragraph 5'.

WTO - Internal

[144] *(footnote original)* Other provisions do require the investigating authority to explain its analysis and conclusions with respect to that information, including Article 12.2 of the AD Agreement, which requires that an investigating authority set forth, "in sufficient detail the findings and conclusion reached on all issues of fact and law considered material".

[145] Panel Report, *EC – Fasteners (China)*, para. 7.501.

[146] Panel Report, *Korea – Certain Paper*, para. 7.201.

[147] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.88.

> We do not agree with the European Union that, for the purposes of conducting an analysis under Article 6.4 of the Anti-Dumping Agreement, a panel must 'carefully and separately' undertake an examination of the information at issue in order to determine whether such information is confidential within the meaning of Article 6.5. Article 6.5 requires an investigating authority to determine, pursuant to an objective assessment, whether the reasons furnished by the submitting party as to why its information should be accorded confidential treatment constitute 'good cause' for the confidential treatment of that information. Thus, it is not the role of a panel to conduct a *de novo* review in order to determine for itself whether there is a legal basis for according confidential treatment to information submitted to an authority. In particular, we do not see a basis for converting an obligation imposed on investigating authorities, under Article 6.5, into an obligation on a panel conducting an analysis under Article 6.4. Instead, as stated above, if information has been accorded confidential treatment under Article 6.5 in a manner that does not comport with the requirements of that provision, there would be no legal basis for according confidential treatment to that information, and such information would, for the purposes of Article 6.4, be considered as information 'that is not confidential as defined in paragraph 5'."[148]

1.4.6 Relationship with other paragraphs of Article 6

125. In *Guatemala – Cement II*, Mexico made a number of claims under Article 6.4 in conjunction with claims under more specific provisions of Article 6, and the Panel resolved the claims under the more specific provisions. Regarding Guatemala's failure to require the domestic producer to provide reasons why certain information could not be made public, the Panel found a violation of Article 6.5.1 and declined to rule on other grounds including Article 6.4 . Regarding Guatemala's failure to allow the Mexican producer "proper access" to the information submitted by the Guatemalan domestic producer at the public hearing it held, the Panel found a violation of Articles 6.1.2 and 6.4 and declined to rule under Articles 6.1 and 6.2, see paragraph 8 above. Regarding Guatemala's delay in making a submission by the applicant available to the Mexican producer, the Panel found a violation of Article 6.1.2, and declined to rule on Article 6.4.[149]

126. The Panel in *Guatemala – Cement II* also discussed the relationship between the obligations under Articles 6.4 and 6.9. See paragraph 386 below.[150]

127. The Appellate Body in *EC – Tube or Pipe Fittings* expressed the view that a finding of violation in that case under Article 6.4 would necessarily entail a violation of Article 6.2.[151]

128. The Panel in *EC – Fasteners (China)*, considering claims brought under Article 6.5, 6.4 and 6.2 in respect of the decision in paragraph 143 below, noted that "both Articles 6.4 and 6.2 exempt confidential information from the scope of the rights that they confer upon interested parties in an investigation … the rights of interested parties set forth in these two provisions do not apply to confidential information. It follows that to find a violation of Articles 6.4 and 6.2, we necessarily have to find a violation of Article 6.5, which would mean that the identity of the complainants and the supporters should not have been treated as confidential information. It is only if that information was wrongly treated as confidential that we can engage in a substantive analysis of China's claims under Articles 6.4 and 6.2."[152] The Panel found that there was no violation of Article 6.5, and consequently no violation of Article 6.4 or 6.2.

129. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* pointed out that a claim that certain information was erroneously treated as confidential by an investigating authority should be made under Article 6.5 of the Anti-Dumping Agreement, and not under Article 6.4.[153]

WTO - Internal

[148] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.101-5.102.
[149] Panel Report, *Guatemala – Cement II*, para. 8.145.
[150] See also Panel Report, *China — AD on Stainless Steel (Japan)*, paras. 7.329 and 7.361.
[151] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 149.
[152] Panel Report, *EC – Fasteners (China)*, para. 7.447.
[153] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.408.

1.5 Article 6.5

1.5.1 General

130. The Panel in *Russia – Commercial Vehicles* pointed out that good cause has to be shown for general categories of information, and not for each item of such information. The Panel stated that "Article 6.5 does not require a showing of good cause in respect of each item of such information. Rather, depending on the information and the documents in question, good cause may be shown in respect of general categories of information."[154]

131. The Appellate Body in *Korea – Pneumatic Valves (Japan)* concluded that the Panel had not committed any legal error in its articulation of the standard under Article 6.5 by failing to "pronounce on the specific manner in which investigating authorities should specify that 'good cause' was shown when granting confidential treatment to certain information"[155]. According to the Appellate Body:

> "[W]hile interested parties must make a 'good cause' showing that certain information should be treated as confidential, it is ultimately for the investigating authority to conduct an 'objective assessment' of this issue to determine whether the request for confidential treatment has been sufficiently substantiated such that confidential treatment should be granted. Article 6.5 does *not* prescribe the *particular steps* that investigating authorities should take in order to assess and determine whether 'good cause' has been 'shown'. However, in the context of WTO dispute settlement, a panel may be asked to examine a claim under Article 6.5 as to whether an investigating authority properly examined and determined that 'good cause' had been shown in granting confidential treatment to certain information. This examination by a panel should be based on the investigating authority's 'published report and its related supporting documents' in which the assessment of 'good cause' must be discernible."[156]

132. In *China — AD on Stainless Steel (Japan)*, the Panel stated that, to comply with Article 6.5, an investigating authority is not necessarily required to explain its determination regarding a showing of "good cause":

> "MOFCOM accepted the applicant's request for confidential treatment on the grounds set out in the application without explanation or giving reasons. MOFCOM's conduct suggests that it *implicitly* accepted that the reasons given by the applicant demonstrated there was 'good cause' to treat the relevant information confidentially. In our view, the mere fact that MOFCOM did not make an explicit finding with respect to the merits of the request for confidential treatment does not necessarily mean that it acted inconsistently with Article 6.5. As we read it, Article 6.5 does not impose a specific requirement on an investigating authority to set out a reasoned decision in its published report with respect to an interested party's claim of 'good cause' *in every factual situation*. Just as Article 6.5 does not prescribe how an interested party must establish good cause, so too is it silent about how an investigating authority must objectively determine whether a request for confidential treatment is warranted. Given the multitude of facts and data presented during an investigation, we cannot exclude that there may be situations when, in the light of the information at issue, and the good cause alleged by the interested party, an investigating authority may be found to have objectively examined good cause *by implication*, simply by accepting into the record and making available a redacted submission which contains a sufficient explanation of the alleged good cause. Such conduct would signal that the investigating authority had accepted and adopted the stated reasons for the confidential treatment of information as its own. In our view, an investigating authority acting in this way would not have acted inconsistently with Article 6.5 if the objective basis of its decision to accept the request for confidential treatment without further explanation, is apparent from the interested party's explanation of good cause."[157]

WTO - Internal

[154] Panel Report, *Russia – Commercial Vehicles*, para. 7.241.
[155] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.402.
[156] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.399.
[157] Panel Report, *China — AD on Stainless Steel (Japan)*, para. 7.274.

1.5.2 "Any information which is by its nature confidential"

1.5.2.1 Nature of confidential information protected

133. In *Guatemala – Cement II*, the Panel discussed the scope of Article 6.5:

> "The text of Article 6.5 distinguishes between two types of confidential information: (1) 'information which is by nature confidential', and (2) information 'which is provided on a confidential basis'. Article 6.5 then provides that the provision of confidential treatment is conditional on 'good cause' being shown. Logically, one might expect that 'good cause' for confidential treatment of information which is 'by nature confidential' could be presumed, and that 'good cause' need only be shown for information which is not 'by nature confidential' (but for which confidential treatment is nonetheless sought). It is presumably for this reason that, in rejecting Mexico's claim, Guatemala argues that the relevant information was 'clearly of a confidential nature'. While we have some sympathy for Guatemala's argument, given the logical appeal of such an interpretation of Article 6.5, we note that Article 6.5 is not drafted in a way which suggests this approach. Instead, the requirement to show 'good cause' appears to apply for both types of confidential information, such that even information 'which is by nature confidential' cannot be afforded confidential treatment unless 'good cause' has been shown.[158]"[159]

134. The Panel in *Korea – Certain Paper* considered a similar claim regarding confidential treatment accorded to information in the domestic industry's application. Noting that the phrase "upon good cause shown" is preceded by both types of confidentiality in the text of Article 6.5, the Panel found that "the text of Article 6.5 makes it clear that the good cause requirement applies to both types of confidential information. That is, some showing of good cause is necessary for the confidential treatment of information that is by nature confidential. The degree of that requirement may, however, depend on the type of information concerned."[160]

135. The Panel in *EC – Fasteners (China)* noted that "it is now well established that the good cause requirement for confidential treatment applies both to information that is by nature confidential and to information submitted on a confidential basis. Thus, whether the identity of the complainants and the supporters was by nature confidential or was submitted on a confidential basis is not relevant to our analysis."[161]

136. The Panel in *EC – Fasteners (China)* also observed that "information that is publicly available is not confidential within the meaning of Article 6.5" and found that by treating information that was available from the Eurostat website as confidential information, without good cause shown, the investigating authority had violated Article 6.5; the fact that the information was available in the public domain was not an excuse for disregarding the requirements of Article 6.5.[162]

137. The Appellate Body in *EC – Fasteners (China)* remarked regarding the nature of confidential information:

> "The question of whether information is 'by nature' confidential depends on the *content* of the information. Information that is 'provided on a confidential basis' is not necessarily confidential by reason of its content, but rather, confidentiality arises from the circumstances in which it is provided to the authorities. These two categories may, in practice, overlap."[163]

WTO - Internal

[158] *(footnote original)* Although we will now consider who must show "good cause", we make no findings as to how "good cause" may be shown in respect of information which is "by nature" confidential.
[159] Panel Report, *Guatemala – Cement II*, para. 8.219.
[160] Panel Report, *Korea – Certain Paper*, para. 7.335.
[161] Panel Report, *EC – Fasteners (China),* para. 7.452.
[162] Panel Report, *EC – Fasteners (China)*, para. 7.534.
[163] Appellate Body Report, *EC – Fasteners (China)*, para. 536.

138. The Panel in *EU – Footwear (China)* rejected the European Union's argument that "the good cause requirement for information that is by nature confidential, such as sales price information, is satisfied by establishing that the information falls within that category[]"[164] and pointed out:

> "We recall that good cause must be established for information which is confidential by nature and information which is submitted on a confidential basis. In this case, while we do not disagree that sales price data may, in principle, constitute information 'by nature confidential', we see nothing in the evidence before us that would indicate, nor does the European Union argue, that its legislation, or its practice, defines in advance the categories of information that the Commission will treat as 'by nature confidential,' so that simply because the information falls within that category will suffice to satisfy the good cause requirement. In the absence of any indication that the submitters of this information even asserted that the information met the criteria defining information which may be considered by nature confidential, we therefore conclude that the European Union acted inconsistently with Article 6.5 by treating this information as confidential."[165]

1.5.2.2 Scope of information protected under Article 6.5

139. The Appellate Body in *EC – Fasteners (China)*, discussing obligations under Article 6.5 generally, considered which parties' information is protected under Article 6.5, finding *inter alia* that such protection extends to all parties taking part in an investigation, including analogue country producers in an investigation of non-market economy producers:

> "In examining the scope of Article 6.5, we note that it extends the need to request confidential treatment to information submitted by 'parties to an investigation' rather than those in the specifically defined group of 'interested parties'. As such, Article 6.5 does not limit the protection afforded to sensitive information to the 'interested parties' expressly listed under Article 6.11 of the *Anti-Dumping Agreement.* In our view, the term 'parties to an investigation' refers to any person who takes part or is implicated in the investigation. Moreover, Article 6.11 does not contain an exhaustive list of 'interested parties', but states that 'interested parties' shall *include'* the persons or groups listed in that Article. In our view, the persons expressly listed in Article 6.11 are those who are in every case considered to be 'interested parties', but are not the only persons who may be considered 'interested parties' in a particular investigation. We do not believe that an investigating authority is relieved of its obligations under Article 6.5 merely because a participant in the investigation does not appear on the list of 'interested parties' in Article 6.11.[166] Rather, once 'good cause' is shown, confidential treatment of sensitive information must be afforded to any party who takes part or is implicated in the investigation or in the provision of information to an authority. Pursuant to Article 6.5 such parties include persons supplying information, persons from whom confidential information is acquired, and parties to an investigation."[167]

140. The Panel in *EU – Footwear (China)* rejected a narrow interpretation of the word "information" in Article 6.5, and held that such information also covered names of companies involved in an investigation.[168]

WTO - Internal

---

[164] Panel Report, *EU – Footwear (China)*, para. 7.744.
[165] Panel Report, *EU – Footwear (China)*, para. 7.744.
[166] *(footnote original)* We note, in this respect, the European Union's argument that the "good cause" requirement for confidential treatment of information in Article 6.5 does not apply to analogue country producers like Pooja Forge, because they do not fall within the definition of "interested parties" under Article 6.11[.] … In the fasteners investigation, the Commission did not determine normal value on the basis of the information from Chinese producers and exporters, and decided to seek information from analogue country producers. … the decision by the Commission to determine normal value based on information from an analogue country producer, and the participation of Pooja Forge in the investigation, require that Pooja Forge be afforded the protection of sensitive information upon "good cause" shown and the obligations of both Articles 6.5 and 6.5.1 apply.
[167] Appellate Body Report, *EC – Fasteners (China)*, para. 540.
[168] Panel Report, *EU – Footwear (China)*, para. 7.671.

141. The Panel in *EU – Footwear (China)* held that "the fact that the name of the submitter of information (or of the person from whom the submitter acquired the information) is unknown does not necessarily mean that the information may not be treated as confidential".[169]

142. The Panel in *EU – Footwear (China)* also found that "an investigating authority may treat as confidential information for which confidential treatment is not specifically sought, if it is necessary in order to maintain the confidentiality of information accorded such treatment".[170]

1.5.3 "upon good cause shown"

1.5.3.1 Scope of "good cause"

143. The Appellate Body in *EC – Fasteners (China)* commented generally on "good cause" in Article 6.5:

> "The 'good cause' alleged must constitute a reason sufficient to justify the withholding of information from both the public and from the other parties interested in the investigation, who would otherwise have a right to view this information under Article 6 of the *Anti-Dumping Agreement*. Put another way, 'good cause' must demonstrate the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information. 'Good cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party.
>
> We find that the examples provided in Article 6.5 in the context of information that is 'by nature' confidential are helpful in interpreting 'good cause' generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved. Article 6.5 states that the disclosure of such information 'would be of significant competitive advantage to a competitor' or 'would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information'. These examples suggest that a 'good cause' which could justify the non-disclosure of confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired. These examples are only illustrative, however, and we consider that a wide range of other reasons could constitute 'good cause' justifying the treatment of information as confidential under Article 6.5.
>
> In practice, a party seeking confidential treatment for information must make its 'good cause' showing to the investigating authority upon submission of the information. The authority must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. In making its assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information[171] with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests. The type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular 'good cause' alleged. The obligation remains with the investigating authority to examine objectively the justification given for the need for confidential treatment. If information is treated as confidential by an authority without such a 'good cause' showing having been made, the authority would be acting inconsistently with its obligations under Article 6.5 to grant such treatment only 'upon good cause shown'."[172]

WTO - Internal

[169] Panel Report, *EU – Footwear (China)*, para. 7.726. See also ibid. para. 7.741.
[170] Panel Report, *EU – Footwear (China)*, para. 7.742.
[171] *(footnote original)* Where necessary, the authority must also consider the submitting party's relationship with the source of the confidential information.
[172] Appellate Body Report, *EC – Fasteners (China)*, paras. 537-539.

144. In the investigation underlying the dispute in *EC – Fasteners (China)*, the complainants and supporters of the complaint requested the investigating authority to treat their identities as confidential in order "to avoid a potential retaliation which could be carried out by some of their Customers who also buy products directly from P.R. China".[173] The complainants alleged that, if these customers knew which European producers had requested or supported the initiation of this investigation, they might discontinue purchasing fasteners from those producers. The investigating authority accepted this request and conveyed its decision to the foreign producers who had questioned the authority on the complainants' identity.[174] The Panel rejected a claim by China that this decision violated Article 6.5. The Panel observed:

> "Article 6.5 does not … explain what 'good cause' means. In our view, this is something that has to be assessed by the investigating authorities in light of the circumstances of each investigation and each request for confidential treatment. We also consider that what constitutes 'good cause' will depend on the nature of the information at issue for which confidential treatment is sought. The 'good cause' alleged to exist, in turn, will determine the kind of supporting evidence that may be needed in order to demonstrate the existence of such 'good cause'.
>
> [I]n this dispute the core of the disagreement between the parties is whether 'potential commercial retaliation' constitutes good cause to justify confidential treatment of the identity of the complainants and the supporters of the complaint. On its face, we see nothing in Article 6.5 that would exclude potential commercial retaliation from constituting good cause for the confidential treatment of any information, including the identity of the complainants. … We recall that in elucidating what may constitute information that is by nature confidential, Article 6.5 refers to, *inter alia*, situations where the disclosure of the information 'would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information'. We can certainly see that 'potential commercial retaliation' from the complainants' customers who, in addition to buying the subject product from the complainants, also purchase imports from the country subject to the complaint, might have a 'significantly adverse effect' upon the complainants."[175]

145. The Appellate Body upheld the Panel's finding that the potential commercial retaliation alleged by the complainants satisfied the "good cause" requirement of Article 6.5:

> "[W]e do not understand China to argue that 'commercial retaliation' may not constitute a 'good cause' justification for confidential treatment. In this respect, we agree with the Panel that 'nothing in Article 6.5 … would exclude potential commercial retaliation from constituting good cause for the confidential treatment of any information, including the identity of complainants', and China does not challenge this finding."[176]

146. With regard to the type of evidence to be presented to support a claim of confidentiality based on potential retaliation by competitors, the Panel in *EU – Footwear (China)* held:

> "In this case, the complaint asserted a risk of retaliation if the names of the complainants and supporters of the complaint were disclosed. There is no indication on the evidence before us, nor does the European Union argue, that specific evidence to support the alleged risk of retaliation was submitted. In our view, however, this lack of evidence does not preclude the alleged fear of retaliation from constituting good cause for the treatment of the identities of the producers concerned as confidential. As discussed above, the nature of the good cause alleged is relevant in determining the kind of evidence that will be sufficient to demonstrate its existence. In this regard, we consider that direct or concrete evidence substantiating concerns about potential retaliatory actions by customers is not likely to be obtainable. Thus, these concerns may well be evidenced only by the testimony of the submitter of the information for which confidential treatment is sought. Therefore, in our view, unless there is some reason to believe that the alleged risk of retaliation was unreasonable, unfounded, or untrue, the

[173] Panel Report, *EC – Fasteners (China)*, para. 7.448.
[174] Panel Report, *EC – Fasteners (China)*, para. 7.449.
[175] Panel Report, *EC – Fasteners (China)*, paras. 7.451-7.452. See also ibid. fn 941.
[176] Appellate Body Report, *EC – Fasteners (China)*, para. 584.

WTO - Internal

> absence of more concrete evidence supporting the alleged risk of retaliation does not, by itself, preclude the concern for possible retaliation from being good cause within the meaning of Article 6.5."[177]

147. In *EU – Cost Adjustment Methodologies II (Russia)*, the Panel addressed Russia's claim that the investigating authority had granted confidential treatment to certain information without any showing of good cause, amounting to a violation of Articles 6.5 and 11.4 of the Anti-Dumping Agreement. Russia argued that the European Commission did not request a particular company to show good cause for confidential treatment of the information that it had submitted, and thus, the European Union had failed to carry out an objective assessment as to whether such confidential treatment was warranted.[178]

148. In reviewing Russia's claim, the Panel took note of the European Union's response that the separate correspondence between a particular expert and the European Commission had explained in detail why the expert's identity could not be disclosed. The Panel also took note of the argument by the European Union that a risk of retaliation had been considered in a past dispute as good cause for providing confidential treatment under Article 6.5 of the Anti-Dumping Agreement.[179]

149. In reviewing the legal standard applicable to the facts, the Panel referred to the panel's statements in the same dispute, *EU – Footwear (China)*[180] (fully excerpted above in paragraph 146).

150. Specifically, the Panel agreed with the *EU – Footwear (China)* panel that unless the alleged risk of retaliation is unreasonable, unfounded, or untrue, the absence of more concrete evidence, by itself, does not preclude the concern for possible retaliation from constituting "good cause":

> "[D]irect or concrete evidence substantiating concerns about potential retaliatory actions by customers is not likely to be obtainable. Thus, these concerns may well be evidenced only by the testimony of the submitter of the information for which confidential treatment is sought. Therefore, [in the panel's view] unless there is some reason to believe that the alleged risk of retaliation was unreasonable, unfounded or untrue, the absence of more concrete evidence supporting the alleged risk of retaliation does not, by itself, preclude the concern for possible retaliation from being good cause within the meaning of Article 6.5."[181]

WTO - Internal

151. The Panel also agreed with the same panel that direct or concrete evidence to substantiate concerns about potential retaliatory actions by customers is not always likely to be obtained:

> "Like the panel in *EU – Footwear (China)*, we believe that 'direct or concrete evidence substantiating concerns about potential retaliatory actions by customers is not likely to be obtainable' and that the absence of more concrete evidence supporting the alleged risk of retaliation does not, by itself, preclude the concern for possible retaliation from being good cause within the meaning of Article 6.5.
>
> It is well established that good cause must be assessed and determined objectively by the investigating authority and cannot be determined merely based on the subjective concerns of the submitting party. In making that assessment, the investigating authority must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that the non-disclosure of the information may have on the transparency and due process interests of other parties involved in the investigation to present their cases and defend their interests."[182]

152. On the basis of the legal guidance above, the documents on the record, and the reasons given by the submitting party for requesting confidential treatment, the Panel ultimately considered

---

[177] Panel Report, *EU – Footwear (China)*, para. 7.685. See also ibid. para. 7.760
[178] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.630.
[179] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.639.
[180] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.640.
[181] Panel Report, *EU – Footwear (China)*, para. 7.685.
[182] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.641-7.642.

that the investigating authority assessed and determined objectively that the disclosure of the confidential information would have been detrimental to the person that supplied it:

> "In view of the documents on the record and of the reasons given by the submitting party in Exhibit EU-25, we are of the view that the European Commission has assessed and determined objectively that the disclosure of the identity of the authors of the expert report attached to the submission of 20 March 2014 would be detrimental to the person supplying the information and that 'good cause' for confidential treatment had been shown to exist in this case."[183]

153. Thus, the Panel concluded that Russia had failed to demonstrate that the European Union acted inconsistently with Article 6.5 in relation to the information receiving confidential treatment.[184]

154. The Panel in *Colombia – Frozen Fries* noted that "[t]he text of Article 6.5 provides limited illustrative guidance on what constitutes 'good cause'[185] as well as the manner in which such good cause is to be 'shown'".[186]

1.5.3.2 Requirement for "good cause" to be shown

155. In *Guatemala – Cement II*, the Panel agreed that Guatemala's investigating authority violated Articles 6.5, 6.5.1 and 6.5.2 by providing confidential treatment to a submission from the domestic producer on its own initiative, i.e. without "good cause" having been shown by the producer:

> "In our view, the requisite 'good cause' must be shown by the interested party submitting the confidential information at issue. We do not consider that Article 6.5 envisages 'good cause' being shown by the investigating authority itself, since - with respect to information that is not 'by nature confidential' in particular - the investigating authority may not even know whether or why there is cause to provide confidential treatment."[187]

156. In *EC – Fasteners (China)*, China argued that when the investigating authority decided to keep the complainants' identities confidential as discussed in paragraph 143 above, it violated Article 6.5 by relying on the allegations in the complaint and not requiring evidence showing the existence of the alleged commercial retaliation. In a finding upheld by the Appellate Body, the Panel did not consider this to be a "fatal lack of evidence" in part because it was unlikely that evidence of potential commercial retaliation would be obtainable:

> "[U]nless there is some reason to believe that the fear of retaliation is unreasonable, unfounded, or untrue – and China has proffered none – we consider that the allegation of the complainants in this case is a sufficient basis for the Commission's conclusion. We note in this regard that, in our view, the purpose of granting confidential treatment as provided for in Article 6.5 is precisely to make sure that a feared adverse effect, in

WTO - Internal

[183] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.643.
[184] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.646.b.
[185] (*footnote original*) Article 6.5 provides examples of information that is "by nature" confidential, including information that is sensitive "because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information". We agree with prior DSB findings that these examples "are helpful in interpreting 'good cause' generally, because they illustrate the type of harm that might result from the disclosure of sensitive information, and the protectable interests involved". Specifically, these illustrative examples suggest that "a 'good cause' which could justify the non-disclosure of confidential information might include an advantage being bestowed on a competitor, or the experience of an adverse effect on the submitting party or the party from which it was acquired." We also agree that the "confidentiality of information that is 'by nature' confidential will often be readily apparent" and that one such type of information is "commercially sensitive information not typically disclosed in the normal course of business, and which would likely be regularly treated as confidential in anti-dumping investigations", including for example, "certain profit or cost data or proprietary customer information". (Appellate Body Report, EC – Fasteners (China), paras. 536 and 538, and fn 775). We note that a prior DSB report likewise considered that "sales price data may, in principle, constitute information 'by nature confidential'". (Panel Report, EU – Footwear (China), para. 7.744).
[186] Panel Report, *Colombia – Frozen Fries*, para. 7.116.
[187] Panel Report, *Guatemala – Cement II*, para. 8.220.

> this case 'potential commercial retaliation', remains hypothetical, and does not actually materialize. Second, … by stating that their customers were also themselves importers of the subject product from China, the complainants substantiated their assertion to a certain degree by explaining the circumstances which they thought showed that commercial retaliation could happen. We therefore disagree with China's contention that the 'potential commercial retaliation' alleged by complainants did not constitute good cause within the meaning of Article 6.5."[188]

157. The Panel in *EC – Fasteners (China)* also found that "the fact that the names of the companies that made up the sample for purposes of the injury analysis were disclosed does not affect the analysis with respect to the confidential treatment of the names of the complainants and supporters. The sampled companies can clearly be identified as cooperating, otherwise they would not have been included in the sample, but this is not necessarily the same as being identified as complainants themselves, and thus might not cause the same concerns for those companies."[189]

158. The Panel in *EU – Footwear (China)* found that a showing of good cause by a trade association made on behalf of its members would satisfy the requirements of Article 6.5.[190] In this Panel's view, there is "no requirement, in the context of a complaint filed by a trade association on behalf of producers, for individual requests for confidential treatment and showings of good cause therefor."[191] Further, the Panel saw no violation of Article 6.5 because the names of domestic producers not supporting the complaint were not disclosed in order to protect the confidentiality of the names of producers supporting the complaint.[192] In the same vein, the Panel concluded that the EU investigating authority did not violate Article 6.5 by keeping as confidential the individual production data of the EU producers, on the ground that disclosing such data would reveal the identity of such producers, which identity was confidential information within the meaning of Article 6.5.[193]

159. The Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* described the task of a WTO panel in reviewing whether an investigating authority objectively assessed the good cause alleged by an interested party:

> "As we see it, a panel tasked with reviewing whether an investigating authority has objectively assessed the 'good cause' alleged by a party must examine this issue on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment. The type of evidence and the extent of substantiation the investigating authority must require will depend on the nature of the information at issue and the particular 'good cause' alleged. In reviewing whether an investigating authority has assessed and determined objectively that 'good cause' for confidential treatment has been shown to exist, it is not for a panel to engage in a *de novo* review of the record of the investigation and determine for itself whether the existence of 'good cause' has been sufficiently substantiated by the submitting party."[194]

160. Turning to the investigation at issue, the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* found no error in the Panel's finding that, without evidence on the record regarding MOFCOM's assessment of the alleged good cause, the Panel had no basis to conclude that MOFCOM had undertaken an objective assessment of this matter. In the view of the Appellate Body, the Panel would not have complied with the applicable standard of review had it engaged in a *de novo* review and determined for itself whether the alleged good cause existed:

> "Therefore, we see no error in the Panel's finding that, in the absence of *any evidence* that MOFCOM objectively assessed the 'good cause' alleged, it had no basis to conclude that MOFCOM undertook an objective assessment and properly determined that the

[188] Panel Report, *EC – Fasteners (China)*, para. 7.453.
[189] Panel Report, *EC – Fasteners (China)*, para. 7.454.
[190] Panel Report, *EU – Footwear (China)*, paras. 7.694 and 7.760.
[191] Panel Report, *EU – Footwear (China)*, para. 7.696.
[192] Panel Report, *EU – Footwear (China)*, paras. 7.698 and 7.760.
[193] Panel Report, *EU – Footwear (China)*, para. 7.706.
[194] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.97.

WTO - Internal

> petitioners had shown 'good cause' for their requests for confidential treatment. In these circumstances, we also see no error in the Panel's conclusion that there was no basis for it to find that 'MOFCOM properly determined that the petitioners had shown 'good cause' for their requests for confidential treatment from the fact that MOFCOM ultimately granted their request for confidential treatment.'
>
> …
>
> We do not consider that the Panel would have complied with the applicable standard of review if, in the absence of any evidence of an objective assessment by MOFCOM of the 'good cause' alleged, it had engaged in a *de novo* review of evidence on the record of the investigation and determined for itself, or on the basis of subjective concerns of the petitioners, whether the request for confidential treatment was sufficiently substantiated and that 'good cause' for such treatment objectively existed. … We fail to see how the Panel, having found that there was no evidence that MOFCOM objectively assessed the 'good cause' alleged, and that MOFCOM had instead only summarized the petitioners' requests and arguments for confidential treatment, could have concluded that MOFCOM undertook an objective assessment and properly determined that the petitioners had shown 'good cause' for their requests for confidential treatment."[195]

161. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body rejected the European Union's challenge to a Panel conclusion that the European Union had acted inconsistently with Article 6.5 of the Anti-Dumping Agreement. According to the European Union, the Panel so concluded because it found, without a proper analysis, that the information at issue was not confidential.[196] The Appellate Body first noted that, contrary to the European Union's argument, the Panel had not made such a finding. It had simply found that the EU Commission had not conducted an objective assessment of whether the information at issue was confidential.[197] The Appellate Body then held that were the Panel to engage in such an assessment it would have constituted a *de novo* review. In so finding, the Appellate Body described the distinct roles of interested parties in investigations, investigating authorities and WTO panels with regard to the showing of good cause:

> "We recall that it is for the party requesting confidential treatment for information that it considers to be confidential by nature, or that it submits on a confidential basis, to furnish reasons justifying such treatment. The role of the authority is to assess such reasons and determine, objectively, whether the submitting party has shown good cause for the confidential treatment of its information. In the event of a claim of violation of Article 6.5, a panel, tasked with reviewing whether an authority has objectively assessed the good cause alleged by the party submitting information to that authority, must examine this issue on the basis of the investigating authority's published report and its related supporting documents, in the light of the nature of the information at issue, and the reasons given by the submitting party for its request for confidential treatment.
>
> The Panel, however, found that the Commission never conducted an objective assessment of whether the information at issue was confidential by nature or whether Pooja Forge had shown good cause on this basis for the confidential treatment of such information. Having made that finding, it was not for the Panel to conduct a *de novo* review of whether the information at issue was confidential by nature or whether good cause had been shown by Pooja Forge. Thus, we do not agree with the European Union that the Panel erred by not conducting its own analysis of the nature of the information at issue for the purposes of its assessment of China's claim under Article 6.5. We therefore see no merit in the European Union's claim in this regard."[198]

162. In *Korea – Pneumatic Valves (Japan)*, the Panel found no evidence on record to support Korea's assertion that its investigating authority had objectively assessed whether there was "good cause" for granting confidential treatment and, on that basis, could not conclude "that the Korean

[195] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.100 and 5.102.
[196] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.65.
[197] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.67 and 5.69.
[198] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.68-5.69. See also ibid. para. 5.54.

WTO - Internal

Investigating Authorities actually engaged in a consideration of whether the submitters of the information had shown good cause for confidential treatment of the information in question".[199]

163. The Appellate Body in *Korea – Pneumatic Valves (Japan)* rejected Korea's argument that the applicants had sufficiently evinced "good cause" in the underlying investigation "by 'implicitly' indicating that the redacted information fell within the categories of 'confidential information' set forth in the relevant Korean laws":

> "[W]e recall that 'a party seeking confidential treatment for information must make its 'good cause' showing to the investigating authority upon submission of the information.' We doubt that an 'implicit' indication by way of redacting certain information from a submission would suffice for establishing such a showing of good cause. In our view, the mere redaction of information does not establish, in and of itself, that such information falls within certain legal categories for confidential information, let alone that there is good cause for treating certain information as confidential. Thus, we share the Panel's view that, although Korea's relevant legislation sets out certain categories of information entitled to confidential treatment, a total absence of any indication in the underlying investigation as to how the information redacted from the submissions relates to the general categories of information set out in the law appears insufficient to demonstrate the showing of good cause by the interested parties."[200]

164. In *Korea – Stainless Steel Bars*, the Panel examined Japan's argument that the KIA had erred in granting confidential treatment to certain information because none of the applicants' submissions had contained an explicit mention of a "good cause" that would have justified confidential treatment of the redacted information. The Panel considered that Japan's argument was based on the premise that Article 6.5 requires the party seeking confidential treatment to furnish reasons justifying such treatment. The Panel considered that Article 6.5 did not support this proposition, however, as it does not specify the manner in which "good cause" is to be established. The Panel considered that the nature and degree of the requirement to show good cause depends on the information concerned, and in some cases, an "implicit assertion" could well suffice:

> "In this context, Japan argues that the KIA erred in granting confidential treatment to the information because 'there is no explicit mention in any of [the] submissions of a 'good cause' that would justify confidential treatment of the redacted information'. Japan's argument is based on the premise that under Article 6.5 the party seeking confidential treatment is 'required to furnish reasons justifying such treatment'. Japan's argument, however, is not supported by the text of Article 6.5. Article 6.5 of the Anti-Dumping Agreement simply provides that 'confidential information shall, upon good cause shown, be treated as such by the authorities'. Article 6.5 does not specify the manner in which 'good cause' is to be established. This lack of specificity necessarily means that the exact manner in which 'good cause' should be established is not prescribed.[201] Accordingly, we do not consider that an 'implicit assertion' of good cause through the submission of a redacted document in the context of the Enforcement Rule necessarily gives rise to an inconsistency with Article 6.5.[202] Rather, we agree with prior

WTO - Internal

[199] Panel Report, *Korea – Pneumatic Valves (Japan)*, para. 7.440.

[200] Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.411.

[201] *(footnote original)* As the panel in *EU – Footwear (China)* stated, "there is nothing in Article 6.5 which would require any particular form or means for showing good cause, or any particular type or degree of supporting evidence which must be provided" and "the nature of the showing that will be sufficient to satisfy the 'good cause' requirement will vary, depending on the nature of the information for which confidential treatment is sought". (Panel Report, *EU – Footwear (China)*, para. 7.728).

[202] *(footnote original)* The Appellate Body in *Korea – Pneumatic Valves (Japan)*, in response to a similar argument by Korea, stated that "[w]e doubt that an 'implicit' indication by way of redacting certain information from a submission would suffice for establishing such a showing of good cause". (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.411). The Appellate Body added that, in its view, "the mere redaction of information does not establish, in and of itself, that such information falls within certain legal categories for confidential information, let alone that there is good cause for treating certain information as confidential". (Appellate Body Report, *Korea – Pneumatic Valves (Japan)*, para. 5.411). We do not disagree with the Appellate Body. Rather, we likewise "doubt" that, in certain circumstances, the mere act of redacting certain information will be sufficient to convey the category for which confidential treatment is being sought and whether protection is warranted. As we understand it, the Appellate Body's "doubt" signalled that panels should be particularly circumspect when confronted with allegations of "good cause" being "shown" through "implicit assertions". However, the Appellate Body was not confronted with an "as such" challenge to the

> panels that the nature and the degree of the requirement to show good cause depends on the information concerned. For some types of information, it may be self-evident that the information falls within one of the categories in the Enforcement Rule and that its disclosure would cause commercial harm. For such information, an 'implicit assertion' could well suffice."[203]

165. The Panel noted that Japan's concern appeared to be that, given the general nature of the categories of confidential information listed in Article 15 of Korea's Enforcement Rule of the Customs Act, the mere indication of a particular category may not be enough to show good cause under Article 6.5 of the Anti-Dumping Agreement:

> "In that regard, we recall that Japan has not challenged the Enforcement Rule on an 'as such' basis. Instead, Japan accepts that 'Article 15 of the Enforcement Rules of the Customs Act of Korea could potentially be applied in a manner that is consistent with Article 6.5'. Japan's concern is that the categories in the Enforcement Rule are 'so general' that 'merely indicating one of those categories may not be enough to show good cause under Article 6.5', and therefore the lack of an explicit showing by the submitting party as to which category was being invoked and the lack of 'a supplemental basis for good cause as to why such information should be regarded as confidential' amounts to an inconsistency with Article 6.5."[204]

166. The Panel considered that, in the absence of an "as such" challenge to the categories under the Enforcement Rule and the KIA's system for protecting confidential information, whether an "implicit assertion" falls short of the requirements of Article 6.5 can only be determined on the basis of a case-by-case evaluation of the piece of information concerned. Japan's claim was not premised on such a demonstration, but on the cross-cutting premise that the submitting party must furnish explicit reasons at the time of submission for the confidential treatment of a given piece of information, and that failure to do so gives rise to a violation of Article 6.5. The Panel considered this premise to be incorrect, as the text of Article 6.5 is not so prescriptive that it excludes the possibility of a showing of "good cause" through an "implicit assertion" by the submission of a redacted document in the context of the Enforcement Rule and the KIA's system, depending of course on the particular information at issue:

> "It may well be the case that, for a given piece of information, a submitting party needs to do more than 'implicitly assert' through a redaction that it falls within a given category under the Enforcement Rule and warrants protection as confidential. However, in the absence of an 'as such' challenge to the categories under the Enforcement Rule and the KIA's system for protecting confidential information, whether an 'implicit assertion' falls short of the requirements of Article 6.5 can only be determined on the basis of a case-by-case evaluation of the piece of information concerned. But Japan's claim is not premised on a case-by-case demonstration that each piece of challenged information falls short of the requirements of Article 6.5 in the context of the Enforcement Rule and the KIA's system. It is instead based on the cross-cutting premise that the submitting party must furnish explicit reasons at the time of submission for the confidential treatment of a given piece of information, and that the failure to do so gives rise to a violation of Article 6.5. This premise is incorrect. As we have explained, the text of Article 6.5 is not so prescriptive that it excludes the possibility of a showing of 'good cause' through an 'implicit assertion' by the submission of a redacted document in the context of the Enforcement Rule and the KIA's system, depending of course on the particular information at issue."[205]

167. The Panel considered that, contrary to Japan's contentions, Japan's case had consistently rested on the incorrect legal premise that Article 6.5 requires the submitting party to furnish explicit

WTO - Internal

KIA's system, and it is not apparent from our reading of the Appellate Body's findings that "implicit assertions" in the context of this system will always give rise to an inconsistency with Article 6.5. For some types of information, it will be self-evident that the information falls within one of the enumerated categories and would cause commercial harm if disclosed. Thus, whether such "implicit assertions" suffice depends on the information at issue in a given case.

[203] Panel Report, *Korea – Stainless Steel Bars*, para. 7.206. See also Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.434.

[204] Panel Report, *Korea – Stainless Steel Bars*, para. 7.207.

[205] Panel Report, *Korea – Stainless Steel Bars*, para. 7.208.

reasons at the time of submission justifying the confidential treatment of a given piece of information. The Panel stated that a corollary of this legal premise is that "implicit assertions" of good cause shown by the submitting party can never suffice under Article 6.5. Accordingly, the Panel declined to further consider Japan's argumentation:

> "Japan contends that it did not present a case-by-case demonstration of inconsistency with Article 6.5 for each piece of challenged information because it was unaware that Korea would rely upon a defence that the redactions reflected 'implicit assertions' for good cause shown under the Enforcement Rule. However, Japan's case has consistently rested on the incorrect legal premise that Article 6.5 requires the submitting party to furnish explicit reasons at the time of submission justifying the confidential treatment of a given piece of information. As we understand it, a corollary of this legal premise is that 'implicit assertions' of good cause shown by the submitting party can never suffice under Article 6.5. Accordingly, we do not consider that Japan's failure to present a case-by-case demonstration of inconsistency in its first written submission can be cured by an inability to anticipate Korea's rebuttal that good cause was shown through 'implicit assertions', or by the lack of publicly-available documentation as to the basis for which the submitting parties sought to show good cause."[206]

168. In the investigation at issue in *Colombia – Frozen Fries,* the investigating authority placed on the record a revised application for the initiation of an investigation, of which one section was redacted, without requesting the applicant to show good cause. The Panel found this to be inconsistent with Article 6.5. In so finding, the Panel was not convinced by Colombia's argument that the redacted information was available elsewhere on the record. According to the Panel:

> "Absent any clear indication suggesting that the content of the redacted information was made available elsewhere in the record, we cannot see how the 'reasonable' or 'joint' reading advocated by Colombia could have enabled other interested parties in the investigation to become aware about the availability of the redacted information elsewhere on the record. Moreover, the elements identified by Colombia are, in our view, not enough to demonstrate that the information at issue was the same."[207]

169. The Panel in *Colombia – Frozen Fries* also found unconvincing Colombia's argument that the applicant had not requested confidential treatment for the redacted information:

> "Finally, we turn to Colombia's argument that the premise of Article 6.5 is centred on information that has been granted confidential treatment, and given that the applicant never requested that the redacted information in the main text of the revised application be treated as confidential, MINCIT did not grant such treatment to this information, and therefore Article 6.5 does not apply. We are not convinced by Colombia's argument that no confidential treatment was granted to the redacted information in the main text of the revised application. Colombia has not pointed to any evidence indicating that MINCIT found that confidential treatment of this information was not warranted, let alone that it considered whether such treatment was justified. Moreover, the fact that the applicant did not request confidential treatment for the information in question says nothing about whether MINCIT did, in fact, afford confidential treatment to this information. To the contrary, in our view, the fact that the applicant submitted information on a redacted basis without a showing of 'good cause' – coupled with the fact that MINCIT treated this information confidentially – demonstrates a lack of compliance with Article 6.5. Colombia's argument would render ineffective the requirement of showing 'good cause' by allowing (a) interested parties to submit redacted information without a showing of 'good cause' for confidential treatment; and (b) investigating authorities to maintain confidentiality of such information without 'good cause' being shown. Accordingly, having received redacted information that was not accompanied by a showing of 'good cause', we find that MINCIT granted confidential treatment to such information inconsistently with Article 6.5."[208]

WTO - Internal

[206] Panel Report, *Korea – Stainless Steel Bars*, para. 7.209.
[207] Panel Report, *Colombia – Frozen Fries*, para. 7.125.
[208] Panel Report, *Colombia – Frozen Fries*, para. 7.126.

170. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator agreed with the Panel's approach, and added:

> "Article 6.5 states that a showing of good cause is required as soon as information was 'provided on a confidential basis' by a party to an investigation, and that it was 'treated as such' by the investigating authority. As we see it, the act of submitting information in both redacted and non-redacted forms indicates that such information was, in the language of Article 6.5, 'provided on a confidential basis'. Likewise, the fact that MINCIT allowed section d(i) of the revised application to remain on the public record in that redacted form indicates that such information was, in the language of Article 6.5, 'treated' as confidential by MINCIT. Because there was no showing of 'good cause' for the information to be treated as confidential, MINCIT has acted in a manner inconsistent with Article 6.5.
>
> …
>
> That the same information redacted in one document is available and disclosed in another document may mean that the applicant no longer considers that the information is truly kept 'confidential'. However, for the exporter and other interested parties, that is not necessarily the case. Interested parties must not only search and identify the exact place in the other document where the information can be found. In addition, they cannot be certain if the information provided in one document and that withheld in another is really the same. The applicant may know for certain; the exporter cannot be sure. On the contrary, the fact that the information was redacted in a later document could lead an interested party to believe that there must have been a change to that information justifying the difference in treatment from non-redacted to redacted."[209]

171. The Panel in *Colombia – Frozen Fries* rejected the European Union's argument that the Colombian investigating authority acted inconsistently with Article 6.5, noting that the European exporters had not requested confidential treatment for the information at issue:

> "We note that, irrespective of whether the information at issue is confidential 'by nature' or is 'submitted to authorities on a confidential basis', the granting of confidentiality is generally triggered by a party's request accompanied by a showing of 'good cause'. In this instance, however, the European Union has neither alleged nor demonstrated that the investigated exporters requested confidential treatment for any information that they provided to MINCIT that was allegedly similar to the domestic producers' annex 10 information. Given this important fact, we fail to see how the European Union's 'disparate treatment' argument is relevant to – or can support – its assertion that MINCIT did not objectively determine whether the explanation provided by the applicant constitutes a showing of 'good cause'."[210]

172. In *China — AD on Stainless Steel (Japan),* the applicant in the underlying investigation redacted the names of certain companies that had been excluded from the domestic industry. The Panel found no violation of Article 6.5 by MOFCOM, China's investigating authority, in treating the names of these companies as confidential.[211] When addressing the claim, the Panel assessed whether the investigating authority's decision was reasonable "at the time" the confidential treatment was granted:

> "Relying upon several news articles from the internet, Japan contends that the business activities of the relevant companies were public information at the time the application was filed. However, Japan clarifies that it is not arguing that 'MOFCOM by itself was required to have 'google-searched' the relevant news article … before its decision' to accept the confidential treatment requested by the applicant. Instead, Japan submits that it is for the party submitting the information to furnish reasons justifying such confidential treatment, and for the investigating authority to assess those reasons, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request. Japan argues that the reasons given in the

[209] Award of the Arbitrators, *Colombia – Frozen Fries*, paras. 4.43 and 4.46.
[210] Panel Report, *Colombia – Frozen Fries*, para. 7.141.
[211] Panel Report, *China — AD on Stainless Steel (Japan),* para. 7.278.

WTO - Internal

> application for the confidential treatment were insufficient for MOFCOM to find that there had been a showing of 'good cause'.
>
> …
>
> We do not see why the applicant should have redacted more information than it considered necessary to protect the relevant trade secrets, given that the redaction of company names was sufficient to achieve that objective. Considering, as Japan agrees, that the business activities of the companies in question may constitute confidential information, and that disclosure of the company names would have revealed the business activities of the specific companies, we do not see why the categorization of the redacted information (i.e. the company names) as a trade secret was unreasonable at the time MOFCOM accepted the request.[212]"[213]

173. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* disagreed with the complainant's argument that Article 6.5 requires an applicant requesting confidential treatment to provide the reasons that justify such treatment. The Panel reiterated that Article 6.5 does not prescribe how good cause is to be shown.[214]

174. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* disagreed with the complainant's argument that the investigating authority had violated Article 6.5 by not explaining why confidential treatment was granted to specific categories of information:

> "[W]e see nothing in Article 6.5 that requires or prohibits an assessment by category, and as such, we see no basis for requiring an investigating authority to specify, for each category of information granted confidential treatment, the reasons justifying the confidential treatment granted. Moreover, in our view, it is possible that for a set of information categories, the reasons justifying their confidentiality could be the same, and as such, the specification of these reasons for each category would be unnecessarily formalistic. In the present case, we further note that Costa Rica has not argued that the disclosure of the information at issue could not result in the injury identified by the CDC, and rather focuses its arguments on the alleged need for an assessment by category.
>
> … [T]he mere fact that the CDC had stated that it would evaluate all the confidentiality requests referred to in Resolution No. 005 'as a whole' does not exclude, nor does it demonstrate, that the CDC could not or did not in fact conduct a 'detailed analysis of the different information' as it indicated in its resolution."[215]

175. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* also rejected the complainant's argument that Article 6.5 requires an investigating to provide a "substantiated explanation" of its assessment of a showing of "good cause":

> "Article 6.5 does not set forth how an investigating authority must assess and determine whether good cause has been shown or how an investigating authority must indicate or explain its assessment and determination of a showing of such cause. We therefore see no legal basis under Article 6.5 to support Costa Rica's argument that the CDC was required to provide a 'substantiated explanation' of its assessment of a showing of good cause for the confidential treatment granted."[216]

WTO - Internal

[212] *(footnote original)* In reaching this conclusion, we have taken note that Japan's claim focuses on MOFCOM's initial treatment of the company names in the application, and that whether or not MOFCOM eventually disclosed the names to the Japanese respondents subsequently is irrelevant in finding whether MOFCOM failed to assess good cause at the time it granted confidential treatment. … We also note that Japan has not suggested that MOFCOM knew, or had any basis to know, at the time the application was made, that the business activities of these specific companies were public information.

[213] Panel Report, *China — AD on Stainless Steel (Japan),* paras. 7.269 and 7.277.

[214] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.433.

[215] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.447-7.448.

[216] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.441.

1.5.4 "Such information shall not be disclosed without specific permission"

176. The Panel in *EC – Fasteners (China)* found that the European Union violated Article 6.5 by disclosing the information reported in nine Chinese producers' MET/IT Claim Forms (discussed at paragraph 20 above) to all nine Chinese producers, to the Chinese authorities and to other interested parties including the complainants, without asking or receiving the submitters' permission for disclosure. The Panel noted that the forms were submitted on a confidential basis and labelled as confidential. The Panel further noted:

> "[I]n the circumstances of this case, we do not consider it necessary for us to determine whether or not the information in the MET/IT Claim Forms, or in the MET Disclosure Document, was properly treated as confidential under Article 6.5 … merely because a document is labelled as such does not demonstrate that the information it contains is confidential within the meaning of Article 6.5. It is clear that an investigating authority may conclude that information submitted as confidential does not merit such treatment. However, in such a case, Article 6.5.2 of the AD Agreement establishes certain requirements, not least of which is to give the supplier of the information an opportunity to make the information public or to authorize its disclosure in generalized or summary form. Moreover, even if the investigating authority concludes that a request for confidentiality is not warranted, Article 6.5.2 provides that if the supplier is unwilling to make the information public or to authorize its disclosure in generalized or summary form, the authorities may disregard the information. Article 6.5.2 does not, however, authorize the authorities to provide the information to other interested parties in the investigation. In any event, even assuming, as the European Union asserts, that the MET Disclosure Document does not contain any data on the volume, value, or unit price of sales, actual costs of the companies concerned, percentage or value of profits, value of any subsidy received, or the value of the assets of the companies examined, this does not, in our view, demonstrate that the document contains only non-confidential information. Information which may properly be treated as confidential under Article 6.5 is not necessarily limited to data of the types referred to by the European Union, but may include any type of information submitted on a confidential basis."[217]

1.5.5 Non-confidential summaries (Article 6.5.1)

1.5.5.1 General

177. While the requirement in the last sentence of Article 6.5.1 as to why summarization may not be possible is directed at the interested parties, in *Guatemala – Cement II*, the Panel found that Guatemala's investigating authority violated Article 6.5.1 by failing to require the domestic producer to provide reasons why certain information could not be summarized:

> "Although Article 6.5.1 does not explicitly provide that 'the authorities shall require' interested parties to provide a statement of the reasons why summarization is not possible, any meaningful interpretation of Article 6.5.1 must impose such an obligation on the investigating authorities. … [I]n our view Article 6.5.1 imposes an obligation on investigating authorities to require parties that indicate that information is not susceptible of summary to provide a statement of the reasons why summarization is not possible. … In making this finding, we attach no importance whatsoever to Guatemala's assertions concerning the alleged treatment of similar information by other WTO Members. Whether or not other WTO Members act in conformity with Article 6.5.1 is of no relevance to the present dispute, which concerns the issue of whether or not the Ministry acted in conformity with that provision."[218]

178. The Panel then considered it unnecessary to address Mexico's claim under Articles 6.1, 6.2, 6.4, 6.5, and 6.5.2 on the same factual ground, because "the need for a statement of the reasons why the information is not susceptible of summary is specifically addressed by Article 6.5.1."[219]

[217] Panel Report, *EC – Fasteners (China)*, para. 7.560.
[218] Panel Report, *Guatemala – Cement II*, para. 8.213.
[219] Panel Report, *Guatemala – Cement II*, para. 6.215.

WTO - Internal

179. In *Colombia – Frozen Fries*, the Panel pointed out that "Article 6.5.1 applies in respect of information properly treated as confidential under Article 6.5". Having found that Colombia acted inconsistently with Article 6.5 with respect to certain information provided by the applicant to the investigating authority, the Panel considered it unnecessary to make findings on the European Union's claim under Article 6.5.1 with regard to the same information.[220]

180. In *Argentina – Ceramic Tiles,* the Panel, while examining whether the authorities were allowed to rely on confidential information in their determination (see paragraph 350 below), considered that the purpose of the non-confidential summaries is to inform the interested parties so as to enable them to defend their interests:

> "Consistent with our view that authorities may rely on confidential information in making their determination, the purpose of the non-confidential summaries provided for in Article 6.5.1 is to inform the interested parties so as to enable them to defend their interests. We do not consider that the purpose of the non-confidential summaries is to enable the authorities to arrive at public conclusions, as Argentina contends. Thus, an authority would not in our view be justified in rejecting the exporters' responses simply because the information in the non-confidential summaries was not sufficient to allow the calculation of normal value, export price, and the margin of dumping."[221]

181. The panel in *Mexico – Steel Pipes and Tubes* set out its general analysis of Article 6.5.1:

> "We consider that the conditions set out in Article 6.5, chapeau, and 6.5.1 are of critical importance in preserving the balance between the interests of confidentiality and the ability of another interested party to defend its rights throughout an anti-dumping investigation. For precisely this reason, we consider it paramount for an investigating authority to ensure that the conditions in these provisions are fulfilled. We consider it equally important for a WTO Panel called upon to review an investigating authority's treatment of confidential information strictly to enforce these conditions, while remaining cognizant of the applicable standard of review."[222]

182. In *Mexico – Steel Pipes and Tubes,* Guatemala asserted that Mexico had violated Article 6.5 by failing to require the applicant to provide non-confidential summaries, to evaluate the sufficiency of the summaries, and to disclose properly information that was not shown upon good cause to be confidential, or, alternatively, to disclose non-confidential summaries of confidential information. The Panel did not consider that the obligations contained in Article 6.5 "set forth exactly how an investigating authority should or must evaluate a request for confidential treatment".[223] In this case, the Panel considered that Mexico had "adhered to the minimum threshold permitted by Article 6.5 and 6.5.1 in its treatment of the confidential information concerned."[224]

183. In *EC – Fasteners (China)*, the Appellate Body noted that whenever information is treated as confidential by the investigating authorities, due process concerns will arise:

> "Whenever information is treated as confidential, transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation. Due process requires that interested parties have a right to see the evidence submitted or gathered in an investigation, and have an adequate opportunity for the defence of their interests. As the Appellate Body has stated, 'that opportunity must be meaningful in terms of a party's ability to defend itself'."[225]

184. The Appellate Body in *EC – Fasteners (China)* then explained how such due process concerns are addressed under Articles 6.5 and 6.5.1:

[220] Panel Report, *Colombia – Frozen Fries*, para. 7.129.
[221] Panel Report, *Argentina – Ceramic Tiles*, para. 6.39.
[222] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.380.
[223] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.393.
[224] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.394.
[225] Appellate Body Report, *EC – Fasteners (China)*, para. 541

WTO - Internal

"Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information that is by nature confidential or is submitted on a confidential basis and upon 'good cause' shown, but establishing an alternative method for communicating its content so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information, and to defend their interests. As the Panel found, 'Article 6.5.1 serves to balance the goal of ensuring that the availability of confidential treatment does not undermine the transparency of the investigative process'. In respect of information treated as confidential under Article 6.5, Article 6.5.1 obliges the investigating authority to require that a non-confidential summary of the information be furnished, and to ensure that the summary contains 'sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence'. The sufficiency of the summary provided will therefore depend on the confidential information at issue, but it must permit a reasonable understanding of the substance of the information withheld in order to allow the other parties to the investigation an opportunity to respond and defend their interests.

Article 6.5.1 contemplates that in 'exceptional circumstances' confidential information may not be 'susceptible of summary'. In such exceptional circumstances, a party may indicate that it is not able to furnish a non-confidential summary of the information submitted in confidence, but it is nevertheless required to provide a 'statement of the reasons why summarization is not possible'. Article 6.5.1 relieves a party of its duty to provide a non-confidential summary of information submitted in confidence only if doing so 'is not possible'. It is not enough for a party simply to claim that providing a summary would be burdensome or costly. Summarization of information will not be possible where no alternative method of presenting that information can be developed that would not, either necessarily disclose the sensitive information, or necessarily fail to provide a sufficient level of detail to permit a reasonable understanding of the substance of the information submitted in confidence.

Where information is kept confidential upon 'good cause' shown, and it is not possible to provide a non-confidential summary of the information that permits a reasonable understanding of its substance, the balance struck under Articles 6.5 and 6.5.1 is altered, and the due process rights of other parties to the investigation are not fully respected. Therefore, when it is not possible to furnish a non-confidential summary, Article 6.5.1 requires a party to identify the exceptional circumstances and provide a statement explaining the reasons why summarization is not possible. For its part, the investigating authority must scrutinize such statements to determine whether they establish exceptional circumstances, and whether the reasons given appropriately explain why, under the circumstances, no summary that permits a reasonable understanding of the information's substance is possible.[226] As the Panel found, 'in the absence of scrutiny of non-confidential summaries or stated reasons why summarization is not possible by the investigating authority, the potential for abuse under Article 6.5.1 would be unchecked unless and until the matter were reviewed by a panel.' This 'would obviously defeat the goal of maintaining transparency during the course of the investigation itself that is one of the purposes of Article 6.5'. In sum, Article 6.5.1 imposes an obligation on the investigating authorities to ensure that sufficiently detailed non-confidential summaries are submitted to permit a reasonable understanding of the substance of the confidential information; and, in exceptional circumstances, to ensure that parties provide a statement appropriately explaining the reasons why particular pieces of confidential information are not susceptible of summary."[227]

185. In *EC – Fasteners (China)*, examining the non-confidential questionnaire responses of two domestic producers in the fasteners investigation, the Appellate Body upheld the Panel's findings that the investigating authority had failed to ensure the producers' compliance with the requirements

[226] *(footnote original)* We note that various methods of summarization are used by parties and investigating authorities in anti-dumping investigations, such as indexing data, providing trends analysis, and aggregating data from multiple producers. Where a certain method might be expected to be used for the specific type of information in question, it would be incumbent on the submitting party to explain, *inter alia*, why present circumstances prevent it from employing that method.

[227] Appellate Body Report, *EC – Fasteners (China)*, paras. 542-544.

WTO - Internal

of Article 6.5.1 and had itself acted inconsistently with Article 6.5.1.[228] The Appellate Body noted that in each instance, essential data and a non-confidential summary were missing, there was no appropriate statement of reasons why summarization was not possible, and the Panel record did not indicate that the investigating authority examined the producers' statements to evaluate their consistency with Article 6.5.1.[229] The Appellate Body commented further that the absence of sanctions on interested parties in the Anti-Dumping Agreement "does not derogate from the obligatory nature of the requirements. It does not mean, as the European Union argues, that an investigating authority must merely make best efforts to ensure that such summaries or statements of reasons are provided."[230]

186. In *EU – Footwear (China)*, the Panel found a violation of Article 6.5.1 because the EU authorities had not requested the submitter of certain confidential information to provide a non-confidential summary thereof:

> "In our view, the obligation to require submitters of confidential information to provide a non-confidential summary thereof is not satisfied by the investigating authority itself making available an aggregate figure which is not, on its face, a summary of the confidential information provided.[231] Thus, we consider that a non-confidential summary of the individual production data at issue was not provided. The European Union does not argue, and nothing in the evidence before us suggests, that the submitters of the production information at issue provided any explanation as to why summarization was not possible.
>
> We therefore find that the European Union acted inconsistently with Article 6.5.1 of the AD Agreement by failing to ensure that the producers submitting confidential production data supplied an adequate non-confidential summary thereof, or an explanation as to why summarization was not possible."[232]

187. In finding another violation of Article 6.5.1 because of the investigating authority's failure to ask an interested party to submit a non-confidential summary of certain information presented on a confidential basis, the Panel in *EU – Footwear (China)* disagreed with the view that "the passage of time excuses a Member from responding to the claims of another Member in dispute settlement."[233] The Panel further noted:

> "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. In this instance, the fact that the questionnaire response was received and not placed in the non-confidential file suffices, in our view, to make out a *prima facie* case that the information in that document was treated as confidential. There is no evidence that a showing of good cause for such treatment was ever made, as required by Article 6.5, and the European Union does not contend otherwise. We also consider that China has made out a *prima facie* case that neither an adequate summary of confidential information nor an explanation why summarization was not possible was provided. There is no evidence that these ever existed, and the European Union does not assert otherwise. In the absence of any substantive refutation by the European Union, we conclude that the European Union acted inconsistently with Articles 6.5 and 6.5.1 of the AD Agreement with regard to the missing questionnaire response."[234]

188. In *EU – Footwear (China)*, the Panel held that non-confidential summary does not have to be in the same format in which confidential information was presented to the investigating authority:

WTO - Internal

---

[228] Panel Report, *EC – Fasteners (China)*, paras. 7.516-7.517.
[229] Appellate Body Report, *EC – Fasteners (China)*, paras. 553-556.
[230] Appellate Body Report, *EC – Fasteners (China)*, para. 549.
[231] *(footnote original)* We need not and do not address the question whether an investigating authority may prepare non-confidential summaries of confidential information submitted by a party which fails to do so, and if so, whether this would be consistent with the requirements of Article 6.5.1.
[232] Panel Report, *EU – Footwear (China)*, paras. 7.708-7.709. See also ibid. paras. 7.709, 7.745, 7.763, and 7.796.
[233] Panel Report, *EU – Footwear (China)*, para. 7.717.
[234] Panel Report, *EU – Footwear (China)*, para. 7.718.

> "As we understand it, China's position is that indexed information on an annual basis cannot be an adequate non-confidential summary of quarterly information. We recall that Article 6.5.1 requires that non-confidential summaries of confidential information must 'permit a reasonable understanding of the substance of the information submitted in confidence'. Nothing in the text of the Article 6.5.1 requires that the summary of the confidential information must correspond exactly to the format in which the information was requested or provided on confidential basis. In this case, we see nothing that would indicate to us that only indexed data on quarterly basis could suffice to permit a reasonable understanding of the substance of the confidential information in question, the net unit sales price for each PCN produced for the period 1 July 2007 to 30 June 2008."[235]

189. Regarding when the non-confidential summary of confidential information presented to the investigating authority has to be prepared, the Panel in *China – GOES* found:

> "An issue in contention between the parties in the circumstances of this case is when the obligation to furnish a non-confidential summary arises … Given the Appellate Body's statement that Article 6.5.1 of the Anti-Dumping Agreement affords 'due process' to interested parties in an investigation, China's argument that non-confidential information submitted in the application can be summarized in the investigating authority's determination is problematic. In order to allow an interested party the opportunity to defend its interests, the summary of the confidential information needs to be provided before the investigating authority has reached its determination. Further, Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement expressly provide that the authorities shall require '*interested parties* providing confidential information to furnish non-confidential summaries thereof'. It is difficult to read this obligation as being fulfilled when an *investigating authority* produces a summary of information submitted to it."[236]

190. The Panel in *China – GOES* pointed out that the standard set forth in Article 6.5.1 regarding the contents of a non-confidential summary has to be met regardless of whether an interested party contests this issue during the investigation.[237]

191. The Panel in *China – GOES* rejected China's argument that "the adequacy of the non-confidential summaries should be assessed in the light of the 'exceptional circumstance' that there were only two Chinese producers of GOES, making it difficult for summaries of aggregate data adequately to protect the confidentiality of the information".[238] The Panel held that, regardless of this fact, it would assess the adequacy of the non-confidential summaries at issue by reference to the standard set forth in Article 6.5.1:

> "In considering China's argument in this regard, we note that Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement explicitly establish the standard by which the sufficiency of non-confidential summaries is to be assessed, namely by reference to whether the summaries 'permit a reasonable understanding of the substance of the information submitted in confidence'. If the information is not susceptible of summary, for example because it would not be possible to summarize the information while still preserving its confidentiality, the provisions allow for an exemption to the requirement to furnish a non-confidential summary. However, if this 'exceptional circumstance' exemption is not invoked, as in this case, there is no basis to conclude that purported 'exceptional circumstances' alter the standard that applies under Articles 12.4.1 and 6.5.1. Therefore, the Panel will assess the adequacy of the non-confidential summaries by reference to whether they 'permit a reasonable understanding of the information submitted in confidence'. If they do not, the fact that there were only two Chinese producers of GOES will not alter the conclusion that China acted inconsistently with Articles 12.4.1 and 6.5.1."[239]

[235] Panel Report, *EU – Footwear (China)*, para. 7.794.
[236] Panel Report, *China – GOES*, para. 7.190.
[237] Panel Report, *China – GOES*, para. 7.191. See also Panel Report, *China – Autos (US)*, para. 7.30.
[238] Panel Report, *China – GOES*, para. 7.192.
[239] Panel Report, *China – GOES*, para. 7.193.

WTO - Internal

192. The Panel in *China – GOES* rejected China's argument that Article 6.5.1 would be satisfied if a non-confidential summary revealed the main point of the underlying confidential information:

> "At the outset, we note certain problems with some of the summaries relied upon by China. In particular, in some instances, China's position is that a non-confidential summary has been furnished within the meaning of Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement when it is possible to infer the 'main point' of the confidential information from the context surrounding the redaction. In our view, this is not what is envisaged as a non-confidential summary under the SCM and Anti-Dumping Agreements. Articles 12.4.1 and 6.5.1 explicitly require the interested party furnishing the confidential information to provide a summary thereof, rather than requiring other interested parties to infer, derive and piece together a possible summary of the confidential information."[240]

193. The Panel in *China – GOES* stressed the importance to the interested parties' due process rights in investigations of the coherence in the preparation of non-confidential summaries:

> "On the one hand, the Panel notes that Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement do not include any requirements regarding the form a non-confidential summary must take. However, on the other hand, given the lack of cross-referencing and the mismatch between the redacted information and the purported non-confidential summaries, a respondent may be confused regarding whether the summary information is based on the same data source as the redacted information and thus represents the 'non-confidential' summary. In this sense, the due process objective of Articles 12.4.1 and 6.5.1 may be undermined, as an interested party may not be aware that the redacted information has in fact been summarized and can be contested."[241]

194. The Panel in *China – GOES* rejected the argument that based on the figures disclosed in a non-confidential summary, interested parties could derive much of the missing data:

> "However, in relation to China's argument that, based on the formulas and numbers disclosed, interested parties could derive much of the missing data, the Panel feels it necessary to comment that this kind of process is not what is envisaged by Articles 12.4.1 of the SCM Agreement and 6.5.1 of the Anti-Dumping Agreement. The Articles explicitly require parties to furnish non-confidential summaries of any information submitted in confidence. Where other interested parties are required to derive their own summary and make educated guesses about the substance of the redacted information, the requirements of Articles 6.5.1 and 12.4.1 are not met."[242]

195. In *China – X-Ray Equipment*, the Panel pointed out that compliance with the requirements of Article 6.5.1 does not depend on the interested parties' ability to work out for themselves what the substance of the underlying confidential information might be:

> "We accept the European Union's claim that simply designating the relevant models as 'Model 1' and 'Model 2' fails to provide any summary of the underlying confidential information. While such designation may provide a convenient label by which to refer to the models, it provides no insight into the substance of the confidential information regarding such matters as the characteristics of the models at issue. Regarding China's assertion that Smiths would have known which were the 'main' models at issue, as only four models were exported by Smiths in significant quantities, we consider that an investigating authority's compliance with Article 6.5.1 should not depend on an interested party's ability to work out for itself, on the basis of different factors, what the substance of the underlying confidential information might be."[243]

WTO - Internal

[240] Panel Report, *China – GOES*, para. 7.202.
[241] Panel Report, *China – GOES*, para. 7.213.
[242] Panel Report, *China – GOES*, para. 7.222.
[243] Panel Report, *China – X-Ray Equipment*, para. 7.332.

196. The Panel in *China – X-Ray Equipment* underlined that the requirements of Article 6.5.1 applied equally to the confidential information contained in an application for the initiation of an investigation:

> "In any event, the obligation set forth in the first sentence of Article 6.5.1 provides that the summary should provide a reasonable understanding of the substance of the underlying confidential information. This obligation is not qualified. The text of Article 6.5.1 does not suggest that, in the context of applications, the non-confidential summary need only provide a reasonable understanding of the application, or merely demonstrate that (consistent with Article 5.2(iii)) 'information on prices at which the product in question is sold when destined for consumption in the domestic markets of the country or countries of origin or export' was provided by the applicant. Even in the context of an application, Article 6.5.1 requires that the non-confidential summary should provide a reasonable understanding of the substance of the confidential information. Nuctech's non-confidential model designation fails to do this."[244]

197. The Panel in *China – X-Ray Equipment* held that the Article 6.5.1 requirements apply to all information designated as confidential, and that "where multiple types of information are designated as confidential, the substance of each type of confidential information must be summarized."[245] With regard to financial audit reports, the same Panel pointed out that simply indicating that the confidential information is composed of financial audit reports fails to meet the requirements of Article 6.5.1.[246]

198. The Panel in *China – X-Ray Equipment* reasoned that whether interested parties complained about the inadequacy of the non-confidential summaries or whether they provided extensive comments on the basis of the non-confidential summaries provided by the submitters of confidential information was irrelevant to whether the requirements of Article 6.5.1 were met in that investigation.[247]

199. The Panel in *China – X-Ray Equipment* held that a simple reference to the nature of the confidential information did not amount to showing the exceptional circumstances justifying the non-summarization of confidential information within the meaning of Article 6.5.1. In this regard, the Panel also found irrelevant the fact that the confidential information was sent by a government Agency in charge of public security:

> "We note that Article 6.5.1 only allows non-summarization of confidential information in 'exceptional' circumstances. In our view, a simple reference to the 'nature' of confidential information does not adequately explain why, exceptionally, that information cannot be summarized. The 'nature' of information could refer to a multitude of factors, not all of which would necessarily prevent summarization. China argues that because the relevant information was provided by an entity entitled the Public Security Bureau, the 'nature' of that information should be understood as pertaining to air transport safety. We are not persuaded by this argument, since the first sentence of the above written statement provides that the relevant information is 'commercial' in character. There is no reason why commercially sensitive information submitted by the Public Security Bureau should necessarily be understood to relate to air transport safety (as opposed, for example, to the terms on which the Public Security Bureau may have procured x-ray scanners). In any event, the mere fact that the information pertains to air transport safety would not necessarily preclude all possibility of summarization."[248]

200. The Panel in *China – X-Ray Equipment* held that where it is impossible to explain the reasons why confidential information cannot be summarized in a non-confidential form, such reasons should be disclosed to the interested parties because:

WTO - Internal

[244] Panel Report, *China – X-Ray Equipment*, para. 7.336.
[245] Panel Report, *China – X-Ray Equipment*, para. 7.341.
[246] Panel Report, *China – X-Ray Equipment*, para. 7.342.
[247] Panel Report, *China – X-Ray Equipment*, para. 7.363.
[248] Panel Report, *China – X-Ray Equipment*, para. 7.368.

> "[T]here would be no transparency if the reasons were to remain with the investigating authority. Furthermore, since the object and purpose of Article 6.5.1 is to ensure transparency, we would expect that any restriction on transparency would be expressly provided for. While the third and fourth sentences of Article 6.5.1 expressly provide for non-summarization of confidential information in exceptional circumstances, they do not provide that the reasons making summarization impossible do not need to be disclosed. For these reasons, we reject China's argument that MOFCOM was under no obligation to disclose the reasons why the relevant information could not be summarized."[249]

201. In the investigation at issue in *China – Broiler Products*, the non-confidential summaries provided by the petitioning industry association had redacted the individual production figures of the petitioning companies. The Panel concluded that the conclusory statement that the standing requirement had been met fell short of replacing the underlying confidential information because it did not provide interested parties with the means to challenge whether that confidential information indeed supported such a conclusion.[250]

202. The Panel in *China – Broiler Products* found that the non-confidential version of the information provided in the petition for certain injury factors did not provide a reasonable understanding of the underlying confidential information "because providing year-over-year changes in percentage terms without a non-confidential summary of what constitutes the baseline does not allow a reasonable understanding of the magnitude of the change."[251]

203. The Panel in *China – Autos (US)* pointed out that "the significance of the absolute change in the data being summarized is not a critical component of an adequate non-confidential summary[]", and agreed with the argument that providing percentage changes in data is similar to the use of indexes based on year-on-year changes.[252]

204. The Panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)* considered inadequate a non-confidential summary that simply explained the difficulties faced in the preparation of the underlying confidential information:

> "Concerning the methodology used in appendix V, we note China's reliance on the fact that the non-confidential version of this appendix states that '[t]o produce this statement, the organization had spent a great amount of time and resources into research, analysis, screening and consolidation of relevant facts and data'. We do not consider this statement to be a sufficiently detailed non-confidential summary to permit a reasonable understanding of or provide any insight into the type of methodology used to determine domestic demand. In addition, we note that the original, confidential version of appendix V briefly explains the methodology used to obtain data on domestic demand, and contains information on the source of the underlying evidence relied upon. In our view, this information is not sufficiently reflected in the non-confidential summary of appendix V."[253]

205. The Panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)* found that an explanation why the underlying confidential information deserved to be treated as confidential did not amount to an explanation why that information was not susceptible to summary within the meaning of Article 6.5.1:

> "In the present disputes, the petitioners repeatedly provided the following statement in respect of all of the remaining 32 appendices:
>
> > Concerns the company's business secrets and therefore confidential treatment is requested, cannot be disclosed. [as translated by China]

WTO - Internal

[249] Panel Report, *China – X-Ray Equipment*, para. 7.369.
[250] Panel Report, *China – Broiler Products*, paras. 7.55-7.57.
[251] Panel Report, *China – Broiler Products*, paras. 7.62-7.63.
[252] Panel Report, *China – Autos (US)*, para. 7.34.
[253] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.310. See also ibid. paras. 7.316 and 7.319.

> It concerns the company's business secrets and therefore we request confidential treatment and no disclosure is hereby made. [as translated by Japan and the European Union]
>
> …
>
> We are not persuaded by China's argument. The statement at issue only addresses the question of why confidential treatment should be provided. It does not provide the reasons why the particular information is not susceptible of summary. In addition, the statement does not relate to any specific information for which it was not possible to provide a non-confidential summary. Our understanding is supported by the fact that the exact same statement is repeatedly used with respect to a large number of different pieces of information. Guided by the Appellate Body's findings in *EC – Fasteners*, we do not consider that the repetition of this single statement can serve as a valid statement of the reasons why summarization of a number of different pieces of information is not possible."[254]

206. The Panel in *Russia – Commercial Vehicles* stated that the obligations under Article 6.5 apply to all information submitted by interested parties, regardless of whether the information is otherwise complete or used by the investigating authorities.[255] The Panel also pointed out that the summary has to provide a reasonable, not full, understanding of the confidential information, and that how such a summary may be prepared has to be assessed on a case-by-case basis:

> "In providing a summary, an interested party is not required to ensure a full understanding of the confidential information, but rather a reasonable understanding of the substance of that information. The Anti-Dumping Agreement does not provide any guidance on how summaries may be prepared. Accordingly, whether a summary meets the requirements of Article 6.5.1 must be determined on a case-by-case basis. We note that much of the confidential information provided to the DIMD consists of figures set out in tables. Such information may be summarised in a number of ways."[256]

207. In *Korea – Pneumatic Valves (Japan)*, the Panel found that the redacted versions of the submissions did not constitute sufficient "non-confidential summaries" and that the investigating authority therefore acted inconsistently with Article 6.5.1. In that case, Korea had argued that Article 6.5.1 does not require that a non-confidential summary must be provided for every piece of data included in a submission, that Japan had not claimed that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests, and that the authority provided descriptive narratives with respect to all of the information that Japan identified in its communications subsequent to the filing of the submissions, thereby ensuring a proper understanding of the substance of the information. The Panel was not convinced:

> "First, Article 6.5.1 requires that interested parties provide a non-confidential summary of confidential information they submit. In principle, all confidential information must be summarized (or, in exceptional circumstances, an explanation must be provided of why a summary is not possible). While we agree that this does not mean that there must be a non-confidential summary of, for instance, each individual data point reported in a table or chart, a non-confidential summary of the information must nonetheless be provided. Second, if an investigating authority fails to ensure that a non-confidential summary is submitted, there is no requirement under Article 6.5.1 for a complainant before the WTO to demonstrate that the due process rights of interested parties were violated or that interested parties did not have a sufficient opportunity to defend their interests, in order to establish a violation. Third, even assuming that the Korean Investigating Authorities subsequently provided descriptive narratives of the information treated as confidential, this would not resolve the issue of whether they required the submission of a non-confidential summary from the submitter of the information for which confidential treatment was sought. The subsequent provision of a non-confidential summary by the investigating

WTO - Internal

[254] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.324 and 7.326.
[255] Panel Report, *Russia – Commercial Vehicles*, para. 7.249.
[256] Panel Report, *Russia – Commercial Vehicles*, para. 7.249.

> authority does not absolve it of having failed to comply with Article 6.5.1 in the first instance.
>
> We do not exclude *a priori* that in some circumstances a redacted version of a document from which the submitting party has deleted certain information may in itself constitute the necessary non-confidential summary of information treated as confidential. Whether such a document satisfies the requirements in Article 6.5.1, and specifically whether it is in sufficient detail to 'permit a reasonable understanding of the substance of the information submitted in confidence', is something that would have to be determined on a case-by-case basis."[257]

208. In *China — AD on Stainless Steel (Japan),* the Panel found that the non-confidential summary of the application in the underlying investigation, which redacted the names of four domestic producers, satisfied the requirements of Article 6.5.1:

> "Considering the names of the companies were confidential, the non-confidential summary, in our view, was sufficient to permit the interested parties to develop a reasonable understanding of the substance of the information submitted in confidence, namely that four domestic producers were being excluded from the domestic industry in light of their business activities (as importers, or foreign producers of the product concerned)."[258]

1.5.5.2 Disclosure of confidential information under protective order

209. In *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, Argentina claimed that the USDOC acted inconsistently with Article 6.5 because it failed to require the "petitioners to submit a non-confidential summary of the confidential information that they submitted or because the non-confidential summary of the confidential information submitted by the petitioners did not provide a reasonable understanding of the substance of the information."[259] The United States argued that because US law allowed counsel for parties to access all confidential information on the record, there was no violation of Article 6.5.1. The Panel did not agree with the United States:

> "Article 6.5.1 protects the right of the interested parties generally to be reasonably informed about the substance of the confidential information that may be submitted by any other interested party. What matters for purposes of Article 6.5.1 is whether the interested parties themselves receive non-confidential summaries of the confidential information submitted to the investigating authorities."[260]

210. The Panel in *Mexico – Steel Pipes and Tubes* examined an argument that failure to provide non-confidential summaries had not prejudiced the Guatemalan exporter, as it could have had access to the confidential record under procedures provided by Mexico. The Panel found:

> "[W]hile such a system of limited disclosure is certainly envisaged by Article 6.5, and may certainly act as a supplement to a Member's fulfilment of its obligations under Article 6.5, we find no textual basis in Article 6.5 that would indicate to us that permitting limited access to the entire confidential record to individuals fulfilling certain conditions, provides a derogation from, or replaces, the obligations of an investigating authority under Article 6.5 to require justification for treatment of information as confidential and, if such treatment is justified, to require non-confidential summaries of the confidential information, or, alternatively, to require justification for the non-summarization of certain information."[261]

WTO - Internal

[257] Panel Report, *Korea – Pneumatic Valves (Japan)*, paras. 7.447-7.448.
[258] Panel Report, *China — AD on Stainless Steel (Japan),* para. 7.285.
[259] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.131.
[260] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.137.
[261] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.398.

1.5.6 When the authority finds that confidential treatment is not warranted (Article 6.5.2)

211. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority had violated Article 6.5.2 by agreeing to provide confidential treatment for certain information submitted during the verification visit at the domestic producer's premises. Mexico's claim of violation was based on the domestic producer's alleged failure to justify its request for confidential treatment. The Panel held:

> "Article 6.5.2 does not require any justification to be provided by the interested party requesting confidential treatment. If any such obligation exists, it derives from Article 6.5, not 6.5.2. Mexico has not based this claim on Article 6.5. Article 6.5.2 speaks only to events when 'the authorities find that a request for confidentiality is not warranted'."[262]

212. The Panel in *EU – Footwear (China)* clarified the scope of the obligation laid down in Article 6.5.2 as follows:

> "However, in our view, Article 6.5.2 does not impose any affirmative obligation on investigating authorities to examine whether or not confidential treatment is warranted. The determination of whether information may be treated as confidential falls under Article 6.5 chapeau. Article 6.5.2 addresses what actions investigating authorities may take if they 'find that a request for confidentiality is not warranted'. Thus, there is, in our view, no basis for a claim of violation of Article 6.5.2 in a situation where a request for confidential treatment was granted by the investigating authority – that is, in a case where it finds that the request for confidentiality **is** warranted."[263]

1.5.7 Relationship with other paragraphs of Article 6

WTO - Internal

213. The Panel, in *Argentina – Ceramic Tiles,* referred to Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement as support for its conclusion that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 350 below.

214. In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body highlighted the difference between the confidentiality of information submitted to an investigating authority in the context of an investigation and the BCI procedures that a WTO panel may adopt in a dispute settlement proceeding concerning such an investigation:

> "As we see it, in its reasoning, the Panel conflated: (i) the confidentiality obligations under the Anti-Dumping Agreement setting the framework for confidential treatment of information that is applicable in the context of *domestic* anti-dumping proceedings; and (ii) the confidentiality obligations applicable in *WTO* dispute settlement proceedings. In addition, the Panel also conflated: (i) confidentiality requirements generally applicable in WTO proceedings or in anti-dumping proceedings as foreseen in the above-mentioned provisions of the DSU and the Anti-Dumping Agreement; and (ii) the additional layer of protection of sensitive business information provided under special procedures adopted by a panel for the purposes of a particular dispute. Contrary to what the Panel appears to have suggested, whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI is to be determined in each case by the WTO panel."[264]

---

[262] Panel Report, *Guatemala – Cement II*, para. 8.209.
[263] Panel Report, *EU – Footwear (China)*, para. 7.675.
[264] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.316.

1.6 Article 6.6

1.6.1 "satisfy themselves as to the accuracy of the information"

215. In support of its opinion that the text of Article 6.6 does not explicitly require verification of all information relied upon, the Panel in *US – DRAMS* stated:

> "Article 6.6 simply requires Members to 'satisfy themselves as to the accuracy of the information'. In our view, Members could 'satisfy themselves as to the accuracy of the information' in a number of ways without proceeding to some type of formal verification, including for example reliance on the reputation of the original source of the information. Indeed, we consider that anti-dumping investigations would become totally unmanageable if investigating authorities were required to actually verify the accuracy of all information relied on.[265]"[266]

216. In *Guatemala – Cement II*, addressing Mexico's claim under Article 6.6, the Panel explained the nature of the obligation under this Article:

> "In our view, it is important to distinguish between the accuracy of information, and the substantive relevance of such information. Once an investigating authority has determined what information is of substantive relevance to its investigation, Article 6.6 requires the investigating authority to satisfy itself (except when 'best information available' is used) that the substantively relevant information is accurate. Thus, Article 6.6 applies once an initial determination has been made that the information is of substantive relevance to the investigation. Article 6.6 provides no guidance in respect of the initial determination of whether information is, or is not, of substantive relevance to the investigation."[267]

1.6.2 Burden on the investigating authorities

217. In *Argentina – Ceramic Tiles*, the Panel confirmed that "the burden of satisfying oneself of the accuracy of the information" is "on the investigating authority":

> "Article 6.6 of the *AD Agreement* thus places the burden of satisfying oneself of the accuracy of the information on the investigating authority. As a general rule, the exporters are therefore entitled to assume that unless otherwise indicated they are not required to also automatically and in all cases submit evidence to demonstrate the accuracy of the information they are supplying. … We believe that if no on-the-spot verification is going to take place but certain documents are required for verification purposes, the authorities should in a similar manner inform the exporters of the nature of the information for which they require such evidence and of any further documents they require."[268]

1.7 Article 6.7 and Annex I

1.7.1 Relationship between Article 6.7 and Annex I

218. As regards the relationship between Article 6.7 and Annex I, in *Egypt – Steel Rebar*, the Panel came to the same conclusion as with the relationship between Article 6.8 and Annex II (see paragraph 261 below), i.e. that Annex I is incorporated by reference into Article 6.7:

> "Concerning the relationship of Annex I to Article 6.7, we come to the same conclusion as in respect of Annex II and Article 6.8. In particular, we note Article 6.7's explicit cross-reference to Annex I: '[T]he procedures described in Annex I shall apply to investigations carried out in the territory of other Members'. This language thus

[265] *(footnote original)* For example, we query whether investigating authorities should be required to verify import statistics from a different government office. We also query whether investigating authorities should be required to verify "official" exchange rates obtained from a central bank.
[266] Panel Report, *US – DRAMS*, para. 6.78.
[267] Panel Report, *Guatemala – Cement II*, para. 8.172.
[268] Panel Report, *Argentina – Ceramic Tiles*, para. 6.57.

WTO - Internal

establishes that the specific parameters that must be respected in carrying out foreign verifications in compliance with Article 6.7 are found in Annex I."[269]

1.7.2 On-the-spot verifications as an option

219. The Panel in *Argentina – Ceramic Tiles,* indicated in a footnote that, although common practice, there is no requirement to carry out on-the-spot verifications:

> "There does not exist a requirement in the Agreement to carry out investigations in the territory of other Members for verification purposes. Article 6.7 of the *AD Agreement* merely provides for this possibility. While such on-site verification visits are common practice, the Agreement does not say that this is the only way or even the preferred way for an investigating authority to fulfil its obligation under Article 6.6 to satisfy itself as to the accuracy of the information supplied by interested parties on which its findings are based."[270]

220. The Panel in *EC – Tube or Pipe Fittings* rejected the argument that Article 2.4 required the investigating authority to base the adjustment on a visual/physical inspection of the working activities and practices in the packaging area at the company's premises. The Panel stated that it viewed verification as an essentially "documentary" exercise that may be supplemented by an actual on-site visit, which is not mandated by the Agreement. According to the Panel, "[a]n essentially documentary approach to verification – which focuses upon documented support for claims for adjustment – seems to us to be entirely consistent with the nature of an anti-dumping investigation.[271]"[272]

221. The Panel in *EU – Footwear (China)*, while acknowledging an investigating authority's general obligation under Article 6.6 of the Anti-Dumping Agreement to satisfy itself as to the accuracy of the information supplied by interested parties, underlined that verification was not a requirement under the Anti-Dumping Agreement:

> "'[V]erification' of information is not, in fact, a requirement under the AD Agreement. Article 6.6 of the AD Agreement, which is not at issue in this dispute, requires investigating authorities, except where they rely on facts available, to 'during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based.' While on-site verification is certainly one method by which an investigating authority may satisfy itself as to the accuracy of information, it is by no means the only method of doing so, and as noted above, is not required in any case."[273]

222. Similarly, the Panel in *EC – Fasteners (China) (Article 21.5 – China)* stated that "[o]n-the-spot verification is one but by no means the only way in which an IA may verify the accuracy of the information provided by interested parties."[274]

223. In the investigation at issue in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Chinese investigating authority, MOFCOM, had refused to take into account information provided by one exporter during the on-the-spot investigation, which rectified certain cost information that had already been submitted to the authority, merely because the company had not raised this matter before the on-the-spot investigation. The Panel noted that the information presented during the on-the-spot investigation had a "clear and direct connection" to the information that MOFCOM had expressly requested to be verified during the on-the-spot investigation. Recalling that the main purpose of an on-the-spot investigation is to verify information, the Panel considered that an

[269] Panel Report, *Egypt – Steel Rebar*, para. 7.325.
[270] Panel Report, *Argentina – Ceramic Tiles*, footnote 65. See also Panel Report, *Egypt – Steel Rebar*, paras. 7.326-7.327.
[271] (*footnote original*) Article 6.7 of the *Anti-Dumping Agreement*, which deals with verification visits, states that "authorities shall make the results of any such investigations available, or shall provide disclosure thereof … to the firms to which they pertain and may make such results available to the applicants." This supports our view that the nature of verification exercise is primarily documentary.
[272] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.192
[273] Panel Report, *EU – Footwear (China)*, para. 7.428.
[274] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.191.

WTO - Internal

investigating authority would normally welcome the rectification on information in those circumstances, and found that by not doing so "MOFCOM acted contrary to the main purpose of the on-the-spot investigation[.]"[275] On appeal, the Appellate Body agreed with the Panel. The Appellate Body noted that "Article 6 of the Anti-Dumping Agreement situates the conduct of on-the-spot investigations within a broader set of provisions regulating the process of identifying and gathering evidence for anti-dumping duty investigations[]"[276], including in particular Article 6.6 which requires an authority to satisfy itself as to the accuracy of the information supplied by interested parties. However, the Appellate Body held that such obligation does not necessarily require an investigating authority to accept and use all information submitted to it:

> "The requirement that investigating authorities 'satisfy themselves as to the accuracy of the information supplied by interested parties' does not mean that they are under an obligation to accept and use all information that is submitted to them. Circumstances will vary, and investigating authorities have some degree of latitude in deciding whether to accept and use information submitted by interested parties during on-the-spot investigations or thereafter. That latitude is limited, however, by the investigating authority's obligation under Article 6.6 to ensure that the information on which its findings are based is accurate, and by the legitimate due process interests of the parties to an investigation. An investigating authority must balance these due process interests with the need to control and expedite the investigating process. This balance between the due process interests of the parties and controlling and expediting the investigating process applies throughout the investigation, including during on-the-spot investigations."[277]

224. The Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* identified factors having a bearing on an investigating authority's discretion to accept or reject information during an on-the-spot investigation:

> "Depending on the particularities of each case, factors bearing upon the latitude of an investigating authority to accept or reject information submitted during an on-the-spot investigation may include, for example, the timing of the presentation of new information; whether the acceptance of new information would cause undue difficulties in the conduct of the investigation; whether the interested party has submitted voluminous amounts of information or merely seeks to have an arithmetical or clerical error corrected; whether the information at issue relates to facts that are 'essential' within the meaning of Article 6.9 of the Anti-Dumping Agreement; or whether the information supplied by an interested party relates to the information specifically requested by the investigating authority. We agree with the Panel that Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement do not contain an obligation for an investigating authority 'to accept *all* information presented to it during a verification visit'. We also agree with the Panel that an investigating authority does not necessarily 'have to accept voluminous amounts of corrected information'. At the same time, an investigating authority may accept information provided during the on-the-spot investigation or, in appropriate circumstances, even at a later stage."[278]

225. Turning to the investigation at issue, the Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* found that MOFCOM acted inconsistently with Article 6.7 and paragraph 7 of Annex I:

> "In refusing to take that information into account, MOFCOM did not reason that the acceptance of that information would have caused undue difficulties in the conduct of the investigation; that SMST would have submitted voluminous amounts of additional information to the investigating authority late in the proceedings; or impeded or delayed the conduct of the anti-dumping proceedings in some way. Instead, as the Panel found, MOFCOM rejected SMST's rectification request 'on the *sole ground* that SMST did not

WTO - Internal

[275] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.99.
[276] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.73.
[277] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.74.
[278] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.75.

raise this matter before the verification started'. China does not contest that this was the only reason for the rejection given by MOFCOM in the Final Determination.

In these circumstances, and in the absence of any further explanation by MOFCOM, we see no error in the Panel's finding that there seems to have been no valid reason why MOFCOM did not accept the corrected information provided by SMST. Moreover, contrary to what China suggests, the Panel did not find that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I because MOFCOM acted contrary to the main purpose of the verification visit. Instead, as we understand it, the Panel based its findings on the fact that, while MOFCOM expressly requested SMST to prepare certain information for the on-the-spot investigation, it then refused to take into account corrected information even though it had a 'clear and direct connection' to the information that had been requested. MOFCOM rejected the corrected information although it consisted of only 'one piece of information' regarding the financial expenses of SMST's headquarters, and did so solely on the basis that it was not provided prior to the verification visit, and without providing other reasons."[279]

226. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* rejected the complainant's claim of violation of Article 6.7 and Annex I based on the argument that the verification visit in the underlying investigation was an "ideal opportunity" for the investigating authority to seek certain information to ensure fair comparison within the meaning of Article 2.4 of the Anti-Dumping Agreement:

"We recall that Costa Rica based the claim made under Articles 2.1 and 2.4 of the Anti-Dumping Agreement on these same facts, and we found that the CDC acted inconsistently with Article 2.4, as it failed to make a comparison between the export price and normal value 'in respect of sales made at as nearly as possible the same time'.

Costa Rica's argument under Article 6.7 and Annex I is based on the fact that, according to Costa Rica, the verification visit was the 'ideal opportunity' for the CDC to express and meet its need to obtain certain information, with a view to ensuring a fair comparison. However, we consider that verification visits – which are not even mandatory – are not the only time or way for an investigating authority to satisfy itself as to the accuracy of the information supplied by interested parties or to request further information as part of the investigation. We therefore do not see how the verification visit was the 'ideal opportunity' for the CDC to request information on domestic sales made before the POI, nor do we see how the CDC could be required to advise the exporter that it needed to supply this information."[280]

1.7.3 Information verifiable on-the-spot

227. In *Guatemala – Cement II*, Mexico argued Guatemala's authority had acted inconsistently with Article 6.7 and paragraph 7 of Annex I by seeking to verify certain information that was not submitted by the Mexican producer subject to the investigation because it pertained to a period of investigation newly added during the course of the investigation. The Panel rejected this argument:

"Although Annex I(7) provides that the 'main purpose' of the verification visit is to verify information already provided, or to obtain further details in respect of that information, it also provides that an investigating authority may 'prior to the visit … advise the firms concerned … of any further information which needs to be provided'. Since there would be little point in advising a firm of 'further information … to be provided' in advance of the verification visit if the investigating authority were precluded from examining that 'further information' during the visit, we consider that the phrase 'further information … to be provided' refers to information to be provided during the course of the verification. Mexico's view that an investigating authority may only verify information submitted prior to the verification visit is not consistent with this interpretation of Annex I(7).

In response to a question from the Panel, Mexico argues that the phrase 'any further information … to be provided' refers to accounting information to be provided by the

[279] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 5.76-5.77.
[280] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.479-7.480.

WTO - Internal

verified company during verification in order to substantiate the information previously supplied to the investigating authority. We note, however, that the phrase does not read 'any further accounting information … to be provided'. The term 'information' is not qualified in any way by the express wording of Annex I(7), and there are no elements in the context which plead for such qualification.

Furthermore, we note that the last phrase of Annex I(7) refers to on-the-spot requests for further details to be provided in light of 'information obtained'. Thus, although it should be 'standard practice' to advise firms of additional information to be provided in advance of the verification visit, this does not preclude an investigating authority from requesting 'further details' during the course of the investigation, 'in light of the information obtained'. In our view, the reference to 'information obtained' cannot mean the information obtained from the exporter in advance of the verification visit, since (consistent with 'standard practice') requests regarding that information should be made prior to the visit, and not during the course of the investigation. Accordingly, the 'information obtained' must refer to information obtained during the course of the verification visit, since it is only information obtained during the course of a verification visit which may prompt a request for further details during the course of the verification visit. The last phrase of Annex I(7) therefore confirms our understanding that an investigating authority may seek new information during the course of the verification visit."[281]

1.7.4 Requirement to "advise the firms concerned of … the information to be verified"

228. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* stated that paragraph 7 of Annex I imposes an obligation on investigating authorities because of the word "shall" found in Article 6.7:

"[P]aragraph 7 of Annex I stipulates that it 'should' be standard practice, prior to the visit, to advise the firms of the 'general nature of the information to be verified and of any further information which needs to be provided'. This paragraph does not stipulate that firms 'shall be advised'. However, we find it relevant that Article 6.7 expressly stipulates that the procedures described in Annex I 'shall apply'. In our view, paragraph 7 of Annex I should therefore be interpreted in the mandatory sense, as not doing so would be inconsistent with Article 6.7. For these reasons, we reject the Dominican Republic's argument that the use of the term 'should' in paragraph 7 of Annex I 'does not impose obligations on Members'."[282]

229. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found that the investigating authority had complied with the requirement of paragraph 7 of Annex I by sending a letter to the foreign exporter indicating that "all documents concerning sales in the domestic market" would be verified. The Panel added that "Annex I, however, does not specify any obligation to advise the exporter in advance of the specific transactions to be verified".[283]

1.7.5 Disclosure of results of on-the-spot verifications

230. The Panel in *Korea – Certain Paper*, noting that Article 6.7 requires the investigating authority to inform the investigated exporters of the verification results,[284] found that it does not require written disclosure:

"It requires that the verification results be disclosed to the investigated exporters without specifying the format in which such disclosure is to be made...As long as it can be proved that the substantive requirements of that provision have been fulfilled, the format of the disclosure would not matter."[285]

[281] Panel Report, *Guatemala – Cement II*, paras. 8.203-8.205.
[282] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.476.
[283] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.478.
[284] Panel Report, *Korea – Certain*, para. 7.184.
[285] Panel Report, *Korea – Certain Paper*, para. 7.188

WTO - Internal

231. The Panel in *Korea – Certain Paper* noted that the purpose of the disclosure requirement under Article 6.7 is to make sure that exporters and other interested parties are informed of the verification results to be able to structure their cases for the rest of the investigation in light of those results. The Panel then went on to indicate that it is important that such disclosure contain adequate information regarding all aspects of the verification, including a description of the information which was not verified as well as of information which was verified successfully because, in its view, "information which was verified successfully, just as information which was not verified, could well be relevant to the presentation of the interested parties' cases."[286]

232. The Appellate Body in *EU – Fatty Alcohols (Indonesia)* stated that Article 6.7 contained an objective standard as to the scope of the disclosure obligation in relation to on-the-spot investigations, and that what the employees of the verified companies understood at the time of the verification was irrelevant:

> "Based on our analysis above, we consider that Article 6.7 imposes an objective standard to determine which 'results' have to be disclosed subsequent to verification. It does not call for an inquiry into what the employees of the firm subject to the verification visit understood at the time of that visit. In any event, we do not see that the Panel erred in considering that the EU authorities had not identified which elements of the information provided by the investigated firm in its questionnaire response they had sought to verify, which elements they had been able to verify successfully, and which elements they had been unable to verify. We have found above that the requirement to disclose the results of a verification visit requires that such information be provided to the investigated firm because the ability of all interested parties to defend fully their interests depends also on an understanding of what information the investigating authorities considered to have been verified."[287]

233. The Appellate Body in *EU – Fatty Alcohols (Indonesia)* stated that "the scope of on-the-spot investigations and the ensuing 'results' to be communicated to the investigated firms vary from case to case."[288] The Appellate Body outlined the scope of the disclosure obligation under Article 6.7 as follows:

> "In sum, on-the-spot investigations are one mechanism that investigating authorities may employ in satisfying their duty, under Article 6.6 of the Anti-Dumping Agreement, to ensure the accuracy of information supplied by interested parties. When on-the-spot investigations are conducted, Article 6.7 requires that the firms subject to such visits be provided with the 'results', or outcomes, of this verification process. The scope of the on-the-spot investigations and the ensuing results to be communicated to the investigated firms vary from case to case and are informed by the integral parts of the process of the on-the-spot investigations, which include the questions posed by the investigating authorities, the responses thereto, the scope of the advance notice, and the collection of any additional evidence during the on-the-spot investigations. The disclosure of the 'results' of the on-the-spot investigation must enable the firms to which they are communicated to discern the information that the authorities considered to have been successfully verified, as well as the information that could not be verified, and to be informed of the results in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation."[289]

234. The Panel in *EU – Fatty Alcohols (Indonesia)*, in a finding upheld by the Appellate Body, made the following finding with regard to the scope of the disclosure obligation under Article 6.7 as follows:

> "[O]n-the-spot verifications involve a specific means by which the authorities request the exporter to supply evidence of the accuracy of the information supplied by the entity or entities subject to verification. The 'results' of the verification should thus reflect the outcome of this process. At a minimum, the authorities should disclose the part of the

[286] Panel Report, *Korea – Certain Paper*, para. 7.192.
[287] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.161.
[288] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.153.
[289] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.140.

WTO - Internal

> questionnaire response or other information supplied for which supporting evidence was requested, whether any further information was requested, and whether documents were collected by the authorities. Further, the results of the verification should state whether the producer made available the evidence and additional information requested and indicate whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, *inter alia*, their questionnaire responses."[290]

235. The Panel in *EU – Fatty Alcohols (Indonesia)* stated that Article 6.7 did not require investigating authorities to address each argument or piece of evidence presented during verification visits, nor to prepare minutes of the verification:

> "We do not mean to suggest that investigating authorities must address each argument or each piece of evidence presented by the respondent during the verification. Nor do we mean to suggest that 'Article 6.7 require[s] the [investigating authorities] to prepare minutes of the verification … or to prepare lengthy explanations and descriptions on aspects of the verification which had no further consequences or to draft a document setting out the verification team's evaluation of the evidence and explanations that the company provided on the spot.' The results made available or disclosed must nevertheless be sufficiently specific for the interested parties to understand at a minimum those parts of the questionnaire response or other information supplied for which supporting evidence was requested and whether:
>
> a. any further information was requested;
>
> b. the producer made available the evidence and additional information requested;
>
> the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies, *inter alia* in their questionnaire response.
>
> Finally, we note that the disclosure obligation in Article 6.7 is unqualified and rests entirely on the investigating authorities. The fact that the exporter did not request access to the results of the investigation, or the absence of a demonstrated impact on the due process rights of the exporter, are irrelevant to an evaluation of whether the authorities have complied with Article 6.7. Compliance with the provisions of Article 6.7 must be assessed solely on the basis of actions taken by the investigating authorities to comply with this provision throughout the anti-dumping investigation."[291]

236. The Appellate Body in *EU – Fatty Alcohols (Indonesia)* rejected the argument that the reference to Article 6.9 in Article 6.7 limited the scope of the disclosure obligation under Article 6.7:

> "Like the Panel, we disagree with the European Union that the reference to Article 6.9 in Article 6.7 suggests that the scope of the 'results' of on-the-spot investigations to be disclosed is limited to results that are 'essential'. Article 6.7 identifies two ways in which investigating authorities may communicate the results of an on-the-spot investigation to the firms to which they pertain. The authorities shall either make the results of the investigation available, or they shall provide disclosure thereof to the firms to which they pertain pursuant to Article 6.9. In the latter case, the results of the on-the-spot investigation are disclosed to the firms to which they pertain along with the 'essential facts' under consideration, which form the basis for the imposition of the anti-dumping measure. Article 6.7 and Article 6.9 contain distinct obligations, each of which applies regardless of whether the 'results' of the on-the-spot investigations are disclosed around the same time as the 'essential facts' or separately. The fact that the 'results' of an on-the-spot investigation may be disclosed at the same time as the 'essential facts' has no bearing on the scope of the 'results' of the on-the-spot investigation to be disclosed."[292]

[290] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.224.
[291] Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.228-7.229.
[292] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.150.

WTO - Internal

237. The Panel in *EU – Fatty Alcohols (Indonesia)*, in a finding upheld by the Appellate Body, found that in the investigation at issue the EU Commission had acted inconsistently with Article 6.7 by failing to indicate the full extent of the verification visit conducted at the premises of an exporter:

> "We agree with the European Union that the corrections made to original response and the lists of exhibits collected on-the-spot are 'outcome[s]' of the verification visit. Taken together however, these documents do not comprise the full extent of the 'results' of the on-the-spot investigation, as they fail to put the investigated producer (PT Musim Mas) – and this Panel – in a position to understand in respect of which part of the questionnaire response or other information supplied supporting evidence was requested, whether any further information was requested, whether the exporter made available the evidence and additional information requested, and whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified producers in, *inter alia* their questionnaire responses. By looking at the 'List of electronic files' attached to the confidential company-specific disclosure one can understand that some of the original worksheets provided by PT Musim Mas were corrected during the verification visit. However, we are unable to relate the corrections made to any evidence that was verified or not verified by the EU authorities during on-the-spot verifications."[293]

1.7.6 Participation of non-governmental experts in the on-the-spot verification

238. In *Guatemala – Cement II*, Mexico claimed that a verification visit by Guatemala's authority to the Mexican producer's site was inconsistent with Article 6.7 and Annex I(2), (3), (7) and (8) because the authority included three non-governmental experts, two of whom the respondent considered to have a conflict of interest because they also represented the US cement industry in a US anti-dumping investigation of cement from Mexico. The Panel stated its view that an impartial and objective investigating authority would not include non-governmental experts with a conflict of interest in its verification team, but found that none of the provisions cited by Mexico explicitly prohibited such conduct.[294] The Panel also found that under these circumstances, it was entirely reasonable for the respondent producer to object to inclusion of these two experts in the verification team, and that the investigating authority could not argue that the Mexican producer's refusal to allow the verification meant that the producer was "significantly impeding" the investigation within the meaning of Article 6.8. See also paragraph 321 below.

WTO - Internal

239. In *Guatemala – Cement II*, the Panel considered that paragraph 2 of Annex I requires a national authority to directly inform the government of exporting Members of its intention to include non-governmental experts in the verification team for visit to foreign producers/exporters.[295] With respect to the burden of proof on this point, referring to a finding of the Panel in *US – Section 301 Trade Act*[296], the Panel stated:

> "In principle, Mexico bears the burden to prove that the Ministry failed to inform it of the inclusion of non-governmental experts in the Ministry's verification team. As a practical matter, this burden is impossible for Mexico to meet: one simply cannot prove that one was not informed of something. Although Mexico cannot establish definitively that it was not informed by the Ministry of the Ministry's intention to include non-governmental experts in its verification team, there is sufficient evidence before us to suggest strongly that it was not so informed. Although an investigating authority should normally be able to demonstrate that it complied with a formal requirement to inform the authorities of another Member, Guatemala has failed to rebut the strong suggestion that it failed to do so. In fact, Guatemala has simply referred to the very letter which suggests strongly that Mexico was *not* notified by Guatemala.[297] In these circumstances,

[293] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.235.
[294] Panel Report, *Guatemala – Cement II*, para. 8.189.
[295] Panel Report, *Guatemala – Cement II*, para. 8.193.
[296] Panel Report, *US – Section 301*, para. 7.14.
[297] (*footnote original*) The fact that the Mexican authorities knew of the inclusion of non-governmental experts in the Ministry's verification team (by virtue of Cruz Azul sending SECOFI a copy of the 26 November 1996 letter Cruz Azul had received from the Ministry) is not relevant to Mexico's claim. This is because Annex I(2) requires that the authorities of the exporting Member be "informed" of the inclusion of non-governmental experts. In our view, the obligation to "inform" is clearly on the authorities of the investigating

> we do not consider that the evidence and arguments of the parties 'remain in equipoise'. Accordingly, we find that the Ministry violated paragraph 2 of Annex I of the *AD Agreement* by failing to inform the Government of Mexico of the inclusion of non-governmental experts in the Ministry's verification team.[298] "[299]

240. In *Guatemala – Cement II*, the Panel did not accept Mexico's argument that under Annex I, paragraph 2, Guatemala's authority also should have informed the Government of Mexico of the exceptional circumstances justifying the participation of the non-governmental experts in the verification team. The Panel found that the "logical conclusion from the structure" of Annex I, paragraph 2 "is that the exporting Member need only be informed of the intention to include non-governmental experts in the investigating team. If the intention of the drafters had been to impose an obligation on authorities to inform exporting Members of the 'exceptional circumstances' at issue, presumably the first sentence of Annex I(2) would have been drafted in a manner that clearly provided for that obligation."[300]

1.7.7 Relationship with other paragraphs of Article 6

241. The Appellate Body in *EU – Fatty Alcohols (Indonesia)* stressed that, like other paragraphs of Article 6, Article 6.7 also served due process rights of interested parties in anti-dumping investigations:

> "In short, due process as set out in the various provisions of Article 6 requires affording an investigated firm a meaningful opportunity to defend its interests. This context supports the view that, under Article 6.7, investigated firms must be informed of the 'results' in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation."[301]

242. More specifically, the Appellate Body in *EU – Fatty Alcohols (Indonesia)* pointed out that Article 6.7 was linked to the general obligation under Article 6.6:

> "The first sentence of Article 6.7 indicates that this provision is concerned with two specific aspects of the treatment of evidence, namely, verifying information provided to the investigating authorities, and obtaining further information. In identifying the verification of information provided to the authorities as a purpose of on-the-spot investigations, Article 6.7 is linked to the general obligation in Article 6.6 for investigating authorities to 'satisfy themselves as to the accuracy of the information supplied by interested parties' upon which the findings of the authorities are based."[302]

WTO - Internal

Member. Those authorities cannot rely on exporters informing their own authorities of the inclusion of non-governmental experts in order to establish compliance with Annex I(2).

[298] (*footnote original*) Paragraph 2 of Annex I provides that exporting Members "should" be informed of the inclusion of non-governmental experts in a verification team. It does not provide that exporting Members "shall" be so informed. Although the word "should" is often used colloquially to imply an exhortation, it can also be used "to express a duty [or] obligation" (See The Concise Oxford English Dictionary, Clarendon Press, 1995, page 1283). Since Article 6.7 provides in relevant part that the provisions of Annex I "shall" apply, we see no reason why Annex I (2) should not be interpreted in the mandatory sense. In our view, a hortatory interpretation of the provisions of Annex I would be inconsistent with Article 6.7. Furthermore, Guatemala has not argued that paragraph 2 of Annex I is merely hortatory. Accordingly, we proceed on the basis that paragraph 2 of Annex I should be interpreted in a mandatory sense.

[299] Panel Report, *Guatemala – Cement II*, para. 8.196.

[300] Panel Report, *Guatemala – Cement II*, para. 8.198.

[301] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.138.

[302] Appellate Body Report, *EU – Fatty Alcohols (Indonesia)*, para. 5.130.

1.8 Article 6.8 and Annex II: "facts available"

1.8.1 General

1.8.1.1 Identifying whether an investigating authority resorted to facts available under Article 6.8

243. The Panel in *US – Shrimp II (Viet Nam)* held that the USDOC had not resorted to facts available merely because it used, in certain administrative reviews, dumping margins obtained in an earlier proceeding. The Panel held that using such margins did not constitute making a "determination" within the meaning of Article 6.8:

> "It follows from the language of Article 6.8 that it imposes disciplines with respect to when, and under what conditions, 'preliminary and final determinations, affirmative or negative may be made on the basis of facts available'. The evidence on the record shows that, in the fourth, fifth and sixth administrative reviews, the USDOC did not resort to facts available, i.e. it did not make any 'determination[], affirmative or negative … on the basis of the facts available'. While the USDOC continued to apply to the Viet Nam-wide entity 'the entity's current rate and only rate ever determined for the entity in this proceeding', which rate was initially determined on the basis of facts available, we cannot conclude that the USDOC's actions in the three administrative reviews at issue constitute 'preliminary and final determinations, affirmative or negative … made on the basis of facts available' within the meaning of Article 6.8 of the Anti-Dumping Agreement. In our view, continuing to apply a rate determined in an earlier proceeding is not the same as making a determination in the later proceeding, and, therefore, does not give rise to a possible violation of Article 6.8."[303]

244. In *Colombia – Frozen Fries*, the parties disagreed as to whether the Colombian investigating authority had resorted to facts available with regard to certain data.[304] The investigating authority had not made an explicit decision to resort to facts available.[305] The Panel reasoned that, depending on the circumstances, it may be considered that an investigating authority had a *de facto* recourse to facts available:

> "We accept that the absence of an explicit determination pursuant to the criteria in Article 6.8 and paragraph 3 of Annex II may be relevant in assessing whether an investigating authority had recourse to facts available. However, we do not consider that this fact alone is necessarily conclusive for our analysis. In fact, it would be inappropriate to define the nature of an investigating authority's conduct solely by reference to the fact that the authority did or did not expressly engage in the kind of evaluation that is required by Article 6.8 and paragraph 3 of Annex II. To do so would risk conflating the question of whether an authority resorted to facts available with the separate issue of the authority's alleged (non-)compliance with the substantive requirements for a proper use of facts available.
>
> In our view, therefore, a case-by-case analysis that takes into account all relevant circumstances is required to determine whether an investigating authority, in fact, used facts available. Depending on the circumstances, such analysis may indicate that an investigating authority had *de facto* recourse to the use of facts available, despite its omission to state so explicitly."[306]

1.8.1.2 Resort to facts available is permissive

245. The Panel in *EU – Footwear (China)* held that even if the conditions set forth in Article 6.8 for resorting to facts available are satisfied, an investigating authority is not required to do so:

> "Thus, it is clear on the face of this provision that in order for an investigating authority to make a preliminary or final determination on the basis of facts available, at least one

[303] Panel Report, *US – Shrimp II (Viet Nam)*, para. 7.233.
[304] Panel Report, *Colombia – Frozen Fries*, para. 7.165.
[305] Panel Report, *Colombia – Frozen Fries*, para. 7.180.
[306] Panel Report, *Colombia – Frozen Fries*, paras. 7.184-7.185.

WTO - Internal

of two conditions must be satisfied: (a) an interested party must refuse access to or fail to provide necessary information within a reasonable period of time, or (b) an interested party significantly impedes the investigation. Even if one or both of these conditions is satisfied, Article 6.8 merely **allows** the investigating authority to make determinations on the basis of facts available. We consider it evident that the use of the term 'may' in this provision precludes the view that an investigating authority is required to use facts available, even if the conditions in Article 6.8 are satisfied. We are of the view that, in light of the permissive language of Article 6.8, even assuming that the producers concerned supplied 'incorrect and misleading information' or impeded the investigation, Article 6.8 did not require the European Union to resort to facts available."[307]

1.8.1.3 Function of Article 6.8 and Annex II

246. In *US – Hot-Rolled Steel*, the Panel indicated that "[o]ne of the principle elements governing anti-dumping investigations that emerges from the whole of the *AD Agreement* is the goal of ensuring objective decision-making based on facts. Article 6.8 and Annex II advance that goal by ensuring that even where the investigating authority is unable to obtain the "first-best" information as the basis of its decision, it will nonetheless base its decision on facts, albeit perhaps "second-best" facts."[308]

247. In *Egypt – Steel Rebar*, the Panel stated that Article 6.8 "addresses the dilemma in which investigating authorities might find themselves – they must base their calculations of normal value and export price on some data, but the necessary information may not have been submitted". The Panel indicated that "Article 6.8 identifies the circumstances in which an [investigating authority] may overcome this lack of necessary information by relying on facts which are otherwise available to the investigating authority."[309] The Panel also concluded that it is clear that the provisions of Annex II that address what information can be used as facts available "have to do with ensuring the reliability of the information used by the investigating authority" and referred to the negotiating history of Annex II as confirmation of its conclusions:

> "It is clear that the provisions of Annex II that address what information can be used as facts available (which, along with the other provisions of Annex II, 'shall be observed') have to do with ensuring the reliability of the information used by the investigating authority. This view may further be confirmed, as foreseen in Article 32 of the Vienna Convention on the Law of Treaties, by the negotiating history of Annex II. In particular, this Annex was originally developed by the Tokyo Round Committee on Anti-Dumping Practices, which adopted it on 8 May 1984 as a 'Recommendation Concerning Best Information Available in Terms of Article 6:8'. During the Uruguay Round negotiations, the substantive provisions of the original recommendation were incorporated with almost no changes as Annex II to the *AD Agreement*. A preambular paragraph to the original recommendation, which was not retained when Annex II was created, in our view, provides some insight into the intentions of the drafters concerning its application. This paragraph reads as follows:
>
> > 'The authorities of the importing country have a right and an obligation to make decisions on the basis of the best information available during the investigation from whatever source, even where evidence has been supplied by the interested party. The Anti-Dumping Code recognizes the right of the importing country to base findings on the facts available when any interested party refuses access to or does not provide the necessary information within a reasonable period, or significantly impedes the investigation (Article 6:8). However, all reasonable steps should be taken by the authorities of the importing countries to avoid the use of information from unreliable sources.'
>
> To us, this preambular language conveys that the *full* package of provisions in the recommendation, applicable in implementing Article 6:8 of the Tokyo Round Anti-

[307] Panel Report, *EU – Footwear (China)*, para. 7.816.
[308] Panel Report, *US – Hot-Rolled Steel*, paras. 7.72 and 7.55.
[309] Panel Report, *Egypt – Steel Rebar*, para. 7.146.

WTO - Internal

> Dumping Code, was intended, *inter alia,* to ensure that in using facts available (i.e., in applying Article 6:8), information from unreliable sources would be avoided."[310]

248. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel considered that Korea's claims raised multiple interpretative issues under the covered agreements concerning an investigating authority's use of facts available in anti-dumping and countervailing duty investigations. The Panel thus began its analysis by reviewing the text of Article 6.8 and Annex II of the Anti-Dumping Agreement. The Panel focused, in particular, on interpretative considerations relating to an investigating authority's selection of replacement facts where an interested party has not provided requested facts during an investigation.[311]

249. In its review of the text, the Panel noted, as a general proposition, that Article 6.8 and Annex II of the Anti-Dumping Agreement represent a balance between the interests of investigating authorities in completing an investigation, on the one hand, and the rights of interested parties, on the other hand:

> "Article 6.8 and Annex II to the Anti-Dumping Agreement together reflect a carefully constructed and fine balance struck by the drafters between, on the one hand, the interests of investigating authorities in controlling and completing their investigations and, on the other hand, the due process and participatory rights of interested parties."[312]

250. The Panel further noted that Article 6.8 requires investigating authorities to base their determinations on facts available that "reasonably replace" the missing "necessary" information. In the Panel's consideration, the selection of such facts available cannot be aimed at punishing the party that did not provide the missing necessary information:

> "By its terms, Article 6.8 is 'not directed at mitigating the absence of 'any' or 'unnecessary' information, but is rather concerned with overcoming the absence of information required to complete a determination'. This suggests that 'the process of identifying the 'facts available' should be limited to identifying replacements for the 'necessary information' that is missing from the record'. In this sense, 'there has to be a connection between the 'necessary information' that is missing and the particular 'facts available' on which a determination … is based'. In our view, the text of Article 6.8 requires investigating authorities to base their determinations on those 'facts' that are 'available' and that 'reasonably replace' the missing 'necessary' information. The requirement that investigating authorities must select reasonable replacements for the missing 'necessary' information implies that such selection cannot be aimed at punishing a non-cooperating party."[313]

251. The Panel also considered that a panel's review of an investigating authority's selection of replacement facts should be conducted in the light of the information actually available to the investigating authority during the course of the investigation:

> "That said, given that an investigating authority may lack full and complete knowledge of the missing 'necessary' information when resorting to the use of facts available under Article 6.8, the search for such 'reasonable replacements' must be conducted in light of the specific facts and circumstances of each instance in which an investigating authority uses facts available. Importantly, a panel's review of an investigating authority's selection of the replacement facts should be conducted in light of the information that was actually available to the investigating authority during the course of the investigation. Whether an investigating authority selected reasonable replacements for the missing information is, therefore, not to be determined in the abstract, e.g. by reference to 'necessary' information that may subsequently be revealed or discovered outside the context of an investigation."[314]

WTO - Internal

[310] Panel Report, *Egypt – Steel Rebar*, para. 7.154.
[311] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.19-7.26.
[312] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.27.
[313] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.28.
[314] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.29.

252. In arriving at these interpretative conclusions, the Panel found Article 17.6(i) of the Anti-Dumping Agreement to provide important context. The Panel observed that Articles 6.8 and 17.6(i) both concern an investigating authority's "establishment" and "evaluation" of the facts. The Panel stated that, by requiring that an investigating authority's establishment of the facts be "proper" and that its evaluation of the facts be "unbiased and objective", Article 17.6(i) supports the view that the authority must select reasonable replacements for the missing information and must not be aimed at punishing the non-cooperating party:

> "Article 17.6(i) of the Anti-Dumping Agreement also provides relevant context for the interpretation of Article 6.8. Article 17.6(i) requires that, 'in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective'. As we have explained, although Article 17.6(i) speaks, in the first instance, to the task of WTO panels, 'the provision, at the same time, *in effect* defines when investigating authorities can be considered to have acted inconsistently with the Anti-Dumping Agreement in the course of their 'establishment' and 'evaluation' of the relevant facts'. Thus, Article 17.6(i) requires that an investigating authority's 'establishment of the facts' be 'proper' and that its 'evaluation of those facts' be 'unbiased and objective'. We note, in this regard, that Article 6.8 is also directed at an investigating authority's 'establishment' and 'evaluation' of 'facts', albeit those that are otherwise 'available' in the absence of the 'necessary' information. By requiring that an investigating authority's establishment of the facts is 'proper' and its evaluation of the facts that are available is 'unbiased and objective', Article 17.6(i) thus supports the view that the authority must select reasonable replacements for the missing information, and not be aimed at punishing the non-cooperating party."[315]

253. The Panel also considered that paragraph 3 of Annex II provides useful context for an investigating authority's selection of replacement facts under Article 6.8. In particular, for the Panel, paragraph 3 supports the interpretation that, in selecting the replacement "facts" for missing "necessary" information, an investigating authority is required to take into account *all* facts that are properly available to it:

> "The ordinary meaning of paragraph 3 requires investigating authorities to take into account all information that fulfils certain criteria 'when determinations are made'. We agree with prior panels and the Appellate Body that paragraph 3 serves as a touchstone for examining whether an investigating authority properly rejected information submitted by an interested party as a *precondition for resorting* to the use of facts available. However, we note that the scope of the first sentence is textually *not* limited to that issue. Rather, it applies 'when determinations are made', which includes the time at which replacement facts are selected to form the basis of a determination. Further, the first sentence speaks of 'all information', without limiting that to information submitted or supplied by a particular interested party, such as the allegedly non-cooperating exporter. Thus, besides conditioning an investigating authority's *resort* to facts available, paragraph 3 of Annex II, in our view, also provides useful context for an investigating authority's *selection* of the replacement facts under Article 6.8.
>
> In particular, paragraph 3 of Annex II provides useful context for the requirement under Article 6.8 that determinations be made on the basis of 'facts' that are 'available' to an investigating authority. The provision supports the interpretation that, in selecting the replacement 'facts' for the missing 'necessary' information, an investigating authority is required to take into account *all* facts that are properly available to it.[316]

254. The Panel concluded that Article 6.8 requires investigating authorities to select those facts available that constitute *reasonable replacements* for the missing "necessary" information in the specific facts and circumstances of a given case:

> "In sum, we consider that the terms of Article 6.8, interpreted in light of their context and object and purpose, require investigating authorities to select – in an unbiased and objective manner – those facts available that constitute *reasonable replacements* for

[315] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.32.
[316] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.33-7.34.

WTO - Internal

> the missing 'necessary' information in the specific facts and circumstances of a given case. In doing so, investigating authorities must take into account *all* facts that are properly available to them. In selecting the replacement facts, Article 6.8 does not require investigating authorities to select those facts that are most 'favourable' to the non-cooperating party. Investigating authorities may take into account the procedural circumstances in which information is missing, but Article 6.8 does not condone the selection of replacement facts for the purpose of punishing interested parties."[317]

255. Subsequently, the Panel addressed the parties' disagreement on whether an investigating authority must ensure that the information it uses for facts available is the *best* information available that *reasonably replaces* the alleged missing information to arrive at an *accurate* determination.[318] The Panel considered that, despite the use of the term "best information available" in the title of Annex II, neither Article 6.8 nor Annex II defines this term. The Panel considered that the goals of using the "best information available" and arriving at an "accurate" determination result, ultimately, from compliance with the obligations in Article 6.8 and Annex II in the specific facts and circumstances of a given case:

> "We consider these choices to be important because the drafters' ends must be distinguished from their chosen means. What constitutes the 'best information available' can only be determined in the specific facts and circumstances of a given case. The 'first-best' or most 'accurate' information is, under all circumstances, the information that is 'necessary'. In the absence of a reference point provided by actual knowledge of such information – as may be the case when an interested party refuses access to, or otherwise does not provide, 'necessary' information – it may be very difficult to ascertain whether information is 'second-best' or most 'accurate' in the abstract. Rather, the important, albeit general, goals of selecting the 'best information available' and arriving at an 'accurate' determination are operationalized and made effective through the very specific obligations under Article 6.8 and the provisions of Annex II that bear upon an investigating authority's conduct in a given case. The fact that, in selecting the replacements, investigating authorities are entitled to take into upon the 'procedural circumstances in which the information is missing' further supports the view that, within the realm of facts available, the 'best information available', or an 'accurate' determination, is simply one that *results from* complying with the obligations in Article 6.8 and Annex II in the specific facts and circumstances of a given case."[319]

WTO - Internal

256. The Panel also addressed the parties' disagreement on whether an investigating authority must conduct a "comparative evaluation" of all of the information that is available to it to ensure that it is using the "best information available".[320] The Panel considered that investigating authorities remain under an obligation to take into account all information that is properly before them with a view to selecting *reasonable replacements* for missing necessary information. Nevertheless, in the Panel's view, investigating authorities enjoy certain discretion in deciding how to discharge this obligation in the light of the specific facts and circumstances before them:

> "To the extent that Korea suggests that investigating authorities are always under an obligation to undertake a 'comparative evaluation' in all circumstances, we recall that the Appellate Body rejected a similar argument under Article 12.7 of the SCM Agreement in *US – Carbon Steel (India)*. Rejecting 'India's argument that Article 12.7 of the SCM Agreement requires a comparative evaluation of the 'facts available' in every case', the Appellate Body explained that 'the extent to which an 'evaluation' of the 'facts available' is required under Article 12.7, and the form it should take, depend on the particular circumstances of a given case, including the quantity and quality of the available facts on the record, and the types of determinations to be made in a given investigation'. Disagreeing with India's 'proposition that a 'comparative evaluation' is a necessary pre-requisite to making a determination in every instance in which an investigating authority has recourse to the 'facts available'', the Appellate Body

[317] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.36.
[318] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.42.
[319] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.44.
[320] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.45.

> explained that '[c]onceivably, there may be circumstances where the kind of 'comparative evaluation' envisaged by India is not practicable'.
>
> The treaty text does not require a comparative evaluation in all circumstances. As discussed, however, it does require investigating authorities to select reasonable replacements for the missing 'necessary' information. An examination of the 'reasonableness' of the replacement facts implies an evaluation and the exercise of judgment by an investigating authority, taking into account – in an objective and unbiased manner – all facts that are properly before it as well as the procedural circumstances in which the information is missing. In certain situations, it may well be that such an evaluative exercise would need to be comparative in nature. There may be other circumstances, however, in which there is no need to engage in a comparative evaluation or where another approach may be better suited. Although investigating authorities remain at all times under an obligation to take into account all information that is properly before them with a view to selecting reasonable replacements for the missing information, they enjoy a certain discretion in their choice of the means for discharging this obligation in light of the specific facts and circumstances of the case before them."[321]

257. Later in its report, the Panel found multiple instances of the US Department of Commerce's recourse to facts available to be inconsistent with Articles 6.8 and Annex II of the Anti-Dumping Agreement.[322] The Panel examined Korea's claims that this WTO-inconsistent use of facts available had led to the imposition and collection of an anti-dumping duty in excess of the margins of dumping in violation of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement.[323] The Panel found that, because Korea did not present any independent bases for the alleged breaches of the other provisions, and because the Panel had already found a violation of Article 6.8 and Annex II, it was unnecessary to rule on the other alleged breaches:

> "Korea does not present any independent bases for the alleged breaches of Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement; instead, its claims under these provisions are dependent entirely upon a finding that the United States acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement. In these circumstances – and having already found that the United States acted inconsistently with Article 6.8 and paragraph 3 of Annex II – we do not consider it necessary to rule upon Korea's claims under Articles 1, 9.3, and 18.1 of the Anti-Dumping Agreement in order to resolve the dispute before us."[324]

WTO - Internal

258. In *US – Anti-Dumping and Countervailing Duties (Korea)*, the Panel also considered that, while enjoying certain discretion in identifying the information they consider "necessary" for making their determinations, investigating authorities must act consistently with Article 6.8 and Annex II in their treatment of such information. The Panel pointed out that an investigating authority that does not request information from an interested party in accordance with paragraph 1 cannot subsequently fault the same interested party for failing to provide "necessary" information for resorting to facts available:

> "Although investigating authorities enjoy a certain discretion in identifying the information they consider 'necessary' for purposes of making their determinations, they must, at all times, act consistently with the provisions of Article 6.8 and Annex II in their treatment of such information. In particular, paragraph 1 of Annex II requires investigating authorities to 'specify in detail the information required from any interested party', '[a]s soon as possible after the initiation of the investigation'. Investigating authorities must 'also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available'. Paragraph 1 of Annex II serves as an additional 'precondition' for an investigating authority's valid resort to 'facts

[321] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.46-7.47.
[322] See e.g. Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, paras. 7.83, 7.171, and 7.186.
[323] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.187.
[324] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.189. See also ibid. paras. 7.87 and 7.230.

available'. An investigating authority that does not request information in accordance with paragraph 1 of Annex II cannot fault an interested party for failing to provide 'necessary' information for purposes of resorting to facts available."[325]

1.8.1.4 Relationship between Article 6.8 and Annex II

259. In *US – Hot-Rolled Steel*, the Appellate Body ruled that Annex II "is incorporated by reference into Article 6.8".[326]

260. In *US – Steel Plate*, the Panel explained the relationship between Article 6.8 and Annex II of the Anti-Dumping Agreement and concluded that the provisions of Annex II inform the investigating authority's evaluation whether necessary information has been provided and whether resort to facts available with respect to that element of information is justified:

> "In our view, the failure to provide necessary information, that is information which is requested by the investigating authority and which is relevant to the determination to be made[327], triggers the authority granted by Article 6.8 to make determinations on the basis of facts available. The provisions of Annex II, which set out conditions on the use of facts available, inform the question of whether necessary information has not been provided, by establishing considerations for when information submitted must be used by the investigating authority. Thus, the provisions of Annex II inform an investigating authority's evaluation whether necessary information, in the sense of Article 6.8, has been provided, and whether resort to facts available with respect to that element of information is justified. If, after considering the provisions of Annex II, and in particular the criteria of paragraph 3, the conclusion is that information provided satisfies the conditions therein, the investigating authority must use that information in its determinations, and may not resort to facts available with respect to that element of information. That is, the investigating authority may not conclude, with respect to that information, that 'necessary information' has not been provided."[328]

261. In *Egypt – Steel Rebar*, the Panel considered that the cross-reference in Article 6.8 to Annex II, "[t]he provisions of Annex II shall be observed in the application of this paragraph" indicates that Annex II applies to Article 6.8 in its entirety:

> "[W]e find significant the specific wording of that cross-reference: '[t]he provisions of Annex II *shall* be observed in the application *of this paragraph*' (emphasis added). In other words, the reference to 'this paragraph' indicates that Annex II applies to Article 6.8 in its entirety, and thus contains certain substantive parameters for the application of the individual elements of that article. The phrase 'shall be observed' indicates that these parameters, which address both when facts available can be used, and what information can be used as facts available, must be followed.
>
> Our view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is 'incorporated by reference' into Article 6.8, i.e., that it forms part of Article 6.8."[329]

WTO - Internal

[325] Panel Report, *US – Anti-Dumping and Countervailing Duties (Korea)*, para. 7.223.

[326] Appellate Body Report, *US – Hot-Rolled Steel,* para. 75. The Panel on *Egypt – Steel Rebar* indicated that its "view of the relationship of Annex II to Article 6.8 is consistent with that of the Appellate Body in *United States – Hot-Rolled Steel*. In that case, the Appellate Body stated that Annex II is "incorporated by reference" into Article 6.8, i.e., that it forms part of Article 6.8." Panel Report, *Egypt – Steel Rebar*, para. 7.153.

[327] (*footnote original*) We are not dealing here with the possibility that the investigating authority might request irrelevant information. Obviously, such information would not be "necessary" in the sense of Article 6.8. However, there is no suggestion in this case that the investigating authority requested information beyond that which was necessary to the determinations it had to make.

[328] Panel Report, *US – Steel Plate*, para. 7.55.

[329] Panel Report, *Egypt – Steel Rebar*, paras. 7.152-7.153.

1.8.1.5 Mandatory nature of Annex II provisions

262. In *US – Steel Plate*, the Panel considered that the wording of the Article 6.8 reference to Annex II provisions establishes that the provisions of Annex II are mandatory:

> "We note that there is disagreement between the parties as to whether the provisions of Annex II, which are largely phrased in the conditional tense ('should') are mandatory. We consider that Article 6.8 itself answers this question. Article 6.8. explicitly provides that 'The provisions of Annex II **shall** be observed in the application of this paragraph' (emphasis added). In our view, the use of the word 'shall' in this context establishes that the provisions of Annex II are mandatory. Indeed, this would seem a necessary conclusion. The alternative reading would mean that investigating authorities are required ('shall') to apply provisions which are not themselves required, an interpretation that makes no sense. Moreover, the provisions of Annex II, while worded in the conditional, give specific guidance to investigating authorities regarding certain aspects of their determinations which, without more, clearly establish the operational requirements. Thus, we consider that that the provisions of Annex II are mandatory, not because of the wording of those provisions themselves, but because of the obligation to observe them set out in Article 6.8."[330]

1.8.2 Paragraph 1 of Annex II

263. The Panel in *EC –Salmon (Norway)* explained the obligations in Paragraph 1 of Annex II:

> "Paragraph 1 of Annex II establishes two obligations on investigating authorities wanting to use 'facts available' in their determinations: First, they must inform any interested party of the information that must be supplied during the course of a proceeding; and secondly, the party must be made aware of the consequences of not submitting requested information, in particular, the possibility that 'facts available', including those presented in a complainant's application, could be applied."[331]

264. Drawing on the Appellate Body report in *Mexico – Anti-Dumping Measures on Rice,* the Panel in *EC – Salmon (Norway)* observed that "pursuant to paragraph 1 of Annex II, an interested party must not only be informed of the information required by an investigating authority for the purpose of its investigation, but it must also be given an opportunity to provide it <u>before</u> the investigating authority may resort to 'facts available' within the meaning of Article 6.8."[332] In this case, the Panel found that to the extent the investigating authority "applied 'facts available' for the purpose of establishing the margin of dumping of the 33 companies that did not receive a 'sampling questionnaire' … we find that it acted inconsistently with paragraph 1 of Annex II and therefore also Article 6.8 of the AD Agreement."[333]

265. The Panel in *China – GOES*, while recognizing that the Anti-Dumping Agreement does not prescribe a particular form for the notice required under paragraph 1 of Annex II, stated that posting a notice on internet or in a public place might not suffice:

> "The Anti-Dumping Agreement does not include explicit guidance regarding the form in which the notice required by Annex II must be provided to interested parties. However, paragraph 1 of Annex II provides that authorities should 'ensure that the party is aware' of the consequences of not supplying necessary information. Arguably, posting a notice in a public place or on the internet will not necessarily ensure this awareness in each interested party. In any event, in the circumstances of this case, it is not necessary for the Panel to resolve whether notice can ever be adequate if given through a public reading room or an internet posting. This is because the notice of initiation, relied upon by China as providing the requisite notification, did not specify in detail the information required of the interested parties for the purposes of the anti-dumping investigation. While the notice of initiation requested interested parties to provide some general information at the time of registering with MOFCOM, namely 'the volume and value of

[330] Panel Report, *US – Steel Plate*, para. 7.56.
[331] Panel Report, *EC – Salmon (Norway)*, para. 7.453.
[332] Panel Report, *EC – Salmon (Norway)*, para. 7.455.
[333] Panel Report, *EC – Salmon (Norway)*, para. 7.462.

WTO - Internal

> exports to China from March 2008 to February 2009', MOFCOM replaced more information than this with 'facts available' for the purposes of arriving at an 'all others' anti-dumping rate. Therefore, it is clear that MOFCOM should have provided detailed notice of this further required information, although the Panel does not comment on the form or manner in which this notice should have been conveyed. In the view of the Panel, paragraph 1 of Annex II and Article 6.1 place the notification obligation on investigating authorities and it is difficult to find in the terms of the Anti-Dumping Agreement any obligation on unknown exporters to come forward after a general public notice of initiation is published. Consequently, in the Panel's view, China's argument that the notice of initiation met the notification requirements embodied in paragraph 1 of Annex II and Article 6.1 cannot be sustained."[334]

266. The Panel in *China – GOES* held that the fact that there is a lacuna in the Anti-Dumping Agreement regarding the calculation of dumping margins for unknown exporters, that did not relieve the authorities from the obligations set forth in Article 6.8 and Annex II in the calculation of such margins:

> "While the Panel agrees that there is indeed a gap in the Anti-Dumping Agreement regarding how dumping margins should be calculated for unknown exporters, Article 6.8 and Annex II are very explicit regarding the conditions that must exist before an investigating authority may resort to facts available. The existence of a lacuna in the Anti-Dumping Agreement does not mean that the conditions should be ignored in order to fill the gap. Although the lack of guidance in the Anti-Dumping Agreement may leave investigating authorities with some discretion regarding the calculation of margins of dumping for unknown exporters, in our view, this discretion should not extend to acting inconsistently with the express terms of Article 6.8 and paragraph 1 of Annex II."[335]

267. The Panel in *China – Broiler Products* found the practice of imposing anti-dumping duties on unknown exporters to be consistent with the Anti-Dumping Agreement, on the following grounds:

> "We must interpret the text of Article 6.8 in context. In this respect, Article VI of the GATT 1994 as well as the Anti-Dumping Agreement permit the imposition of an anti-dumping duty with respect to all imports that are found to have been dumped and to have caused injury. In our view, the fact that injury is determined on the basis of an assessment of all imports of the subject product justifies the application of duties to all such imports. This includes imports from those producers/exporters who were not individually identified, for example due to their non-cooperation or the lack of information about them. In addition, Article 9.5 of the Anti-Dumping Agreement implicitly recognises that an anti-dumping duty may be applied even to the category of producers/exporters who did not exist, or did not export during the POI, until they request an individual rate through a new-shipper review."[336]

268. The Panel in *China – Broiler Products* found the investigating authorities' practice of issuing notices to the public in order to inform unknown interested parties of an investigation to be consistent with the Anti-Dumping Agreement:

> "It is generally recognised and accepted that the manner to inform unknown interested parties in an administrative or judicial proceeding is by way of public notices, including notices published in an official gazette or on the internet. A similar concept is reflected in Article X of the GATT 1994 (providing that certain laws, regulations, decisions, etc. of general application 'shall be published promptly in such a manner as to enable governments and traders to become acquainted with them') as well as in Article 12 of the Anti-Dumping Agreement, requiring the issuance of public notices of preliminary and final determinations. These provisions rely on the notion that the intended recipients will consult the relevant documents emanating from national authorities of the countries where they conduct business. An investigating authority which has no

[334] Panel Report, *China – GOES*, para. 7.386.
[335] Panel Report, *China – GOES*, para. 7.390.
[336] Panel Report, *China – Broiler Products*, para. 7.302. Similarly, the Panel in *China – Autos (US)* pointed out that what it called "residual duties" were permitted under the Anti-Dumping Agreement. Panel Report, *China – Autos (US)*, paras. 7.99-7.100.

WTO - Internal

> other, more direct, means of reaching certain producers/exporters, may have no choice but to similarly proceed through communications to the general public to request information from the parties it is unable to identify."[337]

269. In the view of the Panel in *China – Broiler Products*, the argument that a targeted communication is required to request information from unknown exporters "would make it difficult, if not impossible, for a Member to determine an appropriate anti-dumping duty rate for certain unknown producers/exporters and thus apply anti-dumping measures with respect to their imports."[338] On this basis, the Panel found no fault in the Chinese investigating authority posting a general notice on its website to communicate with, and seek information from, all exporters:

> "In the case at hand, MOFCOM posted on its website the Notice of Initiation and Registration Form, communicating the information required from interested parties, including producers/exporters. The Notice included a warning that facts available could be resorted to in the case of failure to register. The failure of certain producers/exporters to register and provide the required information meant that MOFCOM had no basis on which to determine their margin of dumping. In these circumstances, MOFCOM reasonably considered that the failure to register meant that an interested party failed to 'otherwise … provide … necessary information' within the meaning of Article 6.8. Furthermore, on the basis of the information before us, we have no reason to believe that MOFCOM knew of producers/exporters other than those who registered, and thus that it assigned a facts available rate to any producer/exporter which it could have contacted through other means.
>
> In light of the above facts, we consider that MOFCOM fulfilled the conditions set forth under Article 6.8 and Annex II, allowing it to resort to facts available for the calculation of the anti-dumping duty applied to US producers/exporters who failed to register."[339]

270. Similarly, the Panel in *China – Autos (US)* approved the use of a public notice in informing all exporters of an anti-dumping investigation:

> "In our view, a residual duty rate may be determined on the basis of facts available if the record of the investigation shows that the IA took all reasonable steps that might be expected from an objective and unbiased IA to specify in detail the information requested from unknown producers. We do not preclude that such specification may be made through a public notification. Indeed, it seems to us that, public notice may be one of the ways, if not the only way, in which an IA could specify to exporters unknown to it the information required of them, as well as inform them of the fact that if the information is not provided, determinations may be made on the basis of facts available."[340]

271. The Panel in *China – Broiler Products* stressed that the rate calculated for unknown exporters on the basis of facts available "must have a logical relationship with the facts on the record and be a result of an evaluative, comparative assessment of those facts." The Panel noted that, in the investigation at issue, the Chinese investigating authority had not properly explained the factual basis of its calculation of the all others rate, and found this to be inconsistent with Article 6.8.[341]

272. In the investigation at issue in *China – Autos (US)*, the Chinese investigating authority, MOFCOM, had posted the notice of initiation on its website, asking interested exporters to provide information regarding the quantity and value of their exports to China for a certain period. In calculating the residual duty rate for non-cooperating exporters, MOFCOM used the dumping margin alleged in the petition as facts available. The Panel found this problematic because the scope of the information requested in the notice of initiation did not correspond to that of the information used as facts available. In coming to this conclusion, the Panel rejected China's argument that failure to participate in the investigation despite the invitation in the form of a notice posted on the

[337] Panel Report, *China – Broiler Products*, para. 7.303.
[338] Panel Report, *China – Broiler Products*, para. 7.305.
[339] Panel Report, *China – Broiler Products*, paras. 7.306-7.307.
[340] Panel Report, *China – Autos (US)*, para. 7.130.
[341] Panel Report, *China – Broiler Products*, paras. 7.312-7.313.

WTO - Internal

investigating authority's website constituted non-cooperation and justified the calculation of duty rates on the basis of facts available:

> "First, we recall that Article 6.8 does not condition the use of facts available on a failure to cooperate by declining to participate in an investigation. Rather, it establishes that determinations may be made based on facts available if an interested party (1) refuses access to necessary information within a reasonable period, (2) otherwise does not provide necessary information within a reasonable period, or (3) significantly impedes the investigation. We do not accept that a failure to register in response to a notice of initiation necessarily establishes that any one of these prerequisites is satisfied, unless that notice specifies in detail the information requested from the respondents and such information is not submitted. China's position would mean that the IA decides at the outset of the process, before dispatching dumping questionnaires or otherwise specifying the information that will be necessary to make the determinations required for the imposition of an AD duty, which foreign producers will be found to have refused access to or otherwise not provided necessary information within a reasonable time, all without those producers having been made aware of what the necessary information is. Moreover, it results in certain producers being deprived of the opportunity to provide information very early in the investigation, without having been informed of the full extent of the information requested. In our view, this is not acceptable under Article 6.8 and Annex II.
>
> We are cognizant that a registration process, such as the one used by MOFCOM in this investigation, may help ensure an orderly investigative process by allowing the IA to identify interested parties which will participate in the investigation. There is nothing in the Anti-Dumping Agreement that would preclude the use of such a tool to help manage the process of investigation. However, the use of such a tool does not relieve an IA of its obligation to comply with the requirements of Article 6.8 and Annex II of the Anti-Dumping Agreement. Similarly, we see nothing to preclude an IA from using a public notice mechanism to make potential interested parties aware of the information that will be necessary for the determinations the IA will have to make, and of the consequences of a failure to provide that information. However, we conclude that the notice of initiation and registration form relied upon by MOFCOM in this case were insufficient in this respect because they did not specify in detail the information requested from the US respondents. As discussed above, the only information requested in the notice of initiation and the registration form concerned the identity of companies, and the volume and value of their exports to China of the subject products. This information is far from the type or scope of information necessary for purposes of determining dumping margins. We do not mean to suggest that an IA would necessarily have to publicly notify the dumping questionnaire in order to satisfy the requirements of Article 6.8 and paragraph 1 of Annex II, although such a step would obviously be sufficient. However, at a minimum a request for information in this context would have to be more specific as to the type and scope of the necessary information for purposes of determinations to be made by the IA. In addition, in our view, it would be preferable if the consequences of a failure to provide information were made known with more specificity, for instance, that AD duty rates may be determined based on facts available."[342]

273. The investigation at issue in *China – HP-SSST (Japan) / China – HP-SSST (EU)* displayed a slightly different factual pattern. In that investigation, MOFCOM published the exporter's questionnaire on its website, and announced this web address in the notice of initiation. The questionnaire mentioned that with regard to exporters that failed to provide a questionnaire response MOFCOM would make its determinations on the basis of best information available.[343] The Panel considered the publication of the questionnaire on MOFCOM's website to be and important factor, and found that this satisfied the requirement of paragraph 1 of Annex II "to specify in detail the information required":

> "We consider that the publication of MOFCOM's questionnaire on its website is an important factor, since it informed all exporters – even those unknown to MOFCOM – of

[342] Panel Report, *China – Autos (US)*, paras. 7.138-7.139.
[343] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.217.

WTO - Internal

> the necessary information that MOFCOM required them to provide. It also indicated that facts available would be used in the event that they failed to provide that information. In other words, unknown exporters were on notice of what information was required of them, and of what the consequences would be if they failed to provide that information. Thus, in our view, this action by MOFCOM satisfied the requirement of Annex II:1 to 'specify in detail the information required' of foreign producers and exporters, including those not known to MOFCOM, sufficiently to allow MOFCOM to conclude that the failure of such foreign producers or exporters to come forward constituted a failure to provide necessary information within the meaning of Article 6.8, and thus that the facts available could be used in making determinations with respect to such entities. In light of this additional, and important, factual element, we consider that there is no basis for a finding that 'unknown exporters were not notified of the 'necessary information' required of them', and therefore that the use of facts available was not justified.
>
> There may be more effective means through which MOFCOM could have informed interested parties that its questionnaire would be published on its website. However, the publication of MOFCOM's web address in the Notice of Initiation, and the subsequent positing of its questionnaire at that address, meant that it was not unduly difficult for interested parties that had not registered with MOFCOM to ascertain the information being sought by MOFCOM."[344]

1.8.2.1 Authorities' duty to "specify in detail the information required from an interested party"

1.8.2.2 "as soon as possible"

274. In *Guatemala – Cement II*, Mexico pointed out that paragraph 1 of Annex II requires "[a]s soon as possible after the initiation of the investigation" that the investigating authorities specify in detail the information required from interested parties. Mexico argued that, in the light of this requirement, investigating authorities are effectively precluded from extending the period of investigation during the course of the investigation. The Panel disagreed with Mexico's argument, agreeing with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation:

> "We are not persuaded that paragraph 1 of Annex II, or any other provision of the *AD Agreement*, prevents an investigating authority from extending the POI during the course of an investigation. We agree with Guatemala that there may be a number of circumstances in which the investigating authority will need updated information during the course of its investigation. In this regard, we would also note that the extension of a POI may in certain cases lead to negative findings of dumping and/or injury, to the benefit of exporters. The fact that the POI may be extended after the imposition of provisional measures is not necessarily problematic, since even without any extension of the POI there is no guarantee that the factual basis for the preliminary determination will be the same as that of the final determination. The factual basis may change, for example, if a preliminary affirmative determination of injury is made on the basis of data provided by the complainant, and if some (or all) of that data are shown to be erroneous during verification of the domestic industry. Indeed, in such cases differences in the factual bases of the preliminary and final determinations would normally be necessary in order to preserve the integrity of the investigation. Although Annex II(1) provides that interested parties should be informed of the information required by the investigating authority 'as soon as possible after the initiation of the investigation', this does not mean that information concerning a particular period of time may only be required if the request for that information is made immediately after initiation. We interpret the first sentence of paragraph 1 of Annex II to mean that any request for specific information should be communicated to interested parties 'as soon as possible'. Since Mexico has not advanced any argument that it was possible for the Ministry to have requested information concerning the extended POI before it actually

WTO - Internal

[344] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, paras. 7.218-7.219.

> did so, we reject Mexico's claim that the Ministry's extension of the POI violated Guatemala's obligations under paragraph 1 of Annex II of the *AD Agreement*."[345]

275. In *Egypt – Steel Rebar*, the Panel indicated that paragraph 1 of Annex II sets forth rules to be followed by the authority, in particular that it must specify the required information "in detail", "as soon as possible after the initiation of the investigation", and that it also must specify "the manner in which that information should be structured by the interested party in its response". Thus, in the Panel's view, "there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party".[346]

276. In *Egypt – Steel Rebar*, the investigating authorities had requested certain supplemental cost information as well as explanations concerning certain of the cost information originally submitted in response to the questionnaires. The Panel found "no basis on which to conclude that an investigating authority is precluded by paragraph 1 of Annex II or by any other provision from seeking additional information during the course of an investigation".[347]

1.8.2.3 Failure to specify in detail the information required

277. In *Argentina – Ceramic Tiles*, the Panel, when analysing whether the investigating authorities were entitled to resort to facts available because the alleged failure on a party to provide sufficient supporting documentation, considered that "a basic obligation concerning the evidence-gathering process is for the investigating authorities to indicate to the interested parties the information they require for their determination", as set forth in Article 6.1. The Panel concluded that, "independently of the purpose for which the information or documentation is requested, an investigating authority may not fault an interested party for not providing information it was not clearly requested to submit."[348] The Panel further stated that:

> "In our view, the inclusion, in an Annex relating specifically to the use of best information available under Article 6.8, of a requirement to specify in detail the information required, strongly implies that investigating authorities are *not* entitled to resort to best information available in a situation where a party does not provide certain information if the authorities failed to specify in detail the information which was required.
>
> …
>
> [W]e conclude that an investigating authority may not disregard information and resort to facts available under Article 6.8 on the grounds that a party has failed to provide sufficient supporting documentation in respect of information provided unless the investigating authority has clearly requested that the party provide such supporting documentation."[349]

1.8.3 When to resort to facts available

278. In *Argentina – Ceramic Tiles*, the Panel enunciated the conditions under which the investigating authorities may resort to facts available:

> "It is clear to us, and both parties agree, that an investigating authority may disregard the primary source information and resort to the facts available only under the specific conditions of Article 6.8 and Annex II of the *AD Agreement*. Thus, an investigating authority may resort to the facts available only where a party: (i) refuses access to necessary information; (ii) otherwise fails to provide necessary information within a reasonable period; or (iii) significantly impedes the investigation."[350]

WTO - Internal

---

[345] Panel Report, *Guatemala – Cement II*, para. 8.177.
[346] Panel Report, *Egypt – Steel Rebar*, para. 7.155.
[347] Panel Report, *Egypt – Steel Rebar*, para. 7.320.
[348] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.53-6.54.
[349] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.55 and 6.58.
[350] Panel Report, *Argentina – Ceramic Tiles*, para. 6.20. See also Panel Reports, *US – Steel Plate*, para. 7.55, in para. 260 of this document; and *Egypt – Steel Rebar*, para. 7.147.

279. In *Egypt – Steel Rebar*, the Panel explained that paragraphs 3 and 5 of Annex II "together … provide key elements of the substantive basis" for the investigating authority to determine whether it can resort to facts available.

> "These two paragraphs together thus provide key elements of the substantive basis for an IA to determine whether it can justify rejecting respondents' information and resorting to facts available in respect of some item, or items, of information, or whether instead, it must rely on the information submitted by respondents 'when determinations are made'. Some of the elements referred to in these paragraphs have to do with the inherent quality of the information itself, and some have to do with the nature and quality of the interested party's participation in the IA's information-gathering process. Where all of the mentioned elements are satisfied, resort to facts available is not justified under Article 6.8."[351]

280. In *Egypt – Steel Rebar*, the Panel reiterated that paragraph 3 of Annex II applies to an investigating authority's decision to use "facts available" in respect of certain elements of information and stressed that "it does not have to do with determining which particular facts available will be used for those elements of information once that decision has been made".[352]

281. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice*, while recognizing that the SCM Agreement does not contain the detailed rules found in the *AD Agreement*, stated that it would be "anomalous" if Article 12.7 were to permit the use of facts available in a manner "markedly different" from the *AD Agreement*. [353]

282. The Appellate Body in *Mexico – Anti-Dumping Duties on Rice*, noted that Article 6.8 of the Anti-Dumping Agreement directed agencies to engage in the "evaluative, comparative assessment" necessary in order to determine which facts are "best" to fill in the missing information.[354]

1.8.4 When not to resort to facts available

283. In *US – Hot-Rolled Steel*, the Appellate Body concluded that, according to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. These conditions are that the information is (i) verifiable, (ii) appropriately submitted so that it can be used in the investigation without undue difficulties, (iii) supplied in a timely fashion, and, where applicable, (iv) supplied in a medium or computer language requested by the authorities. The Appellate Body concluded that, in its view, "if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination".[355]

284. In *US – Steel Plate*, the Panel analysed the extent of the limitation that paragraph 3 of Annex II puts on investigating authorities' right to reject information submitted and instead resort to facts available. The Panel concluded that the "Members [do not] have an unlimited right to reject all information submitted in a case where some necessary information is not provided":

> "Paragraph 3 states that all information provided that satisfies the criteria set out in that paragraph is to be taken into account when determinations are made. We consider in this regard that the use of the final connector 'and' in the list of criteria makes it clear to us that an investigating authority, when making determinations, is only required to take into account information which satisfies all of the applicable criteria of paragraph 3. In order to assess the limitations this provision puts on the right of an investigating authority to reject information submitted and instead resort to facts available, we look to the ordinary meaning of the text, in its context and in light of its object and purpose. Paragraph 3 starts with the phrase 'all information'. 'All' means 'the whole amount, quantity, extent or compass of' and 'the entire number of, the individual constituents of, without exception…every'. To 'take into account' is defined as 'take into

[351] Panel Report, *Egypt – Steel Rebar*, para. 7.159.
[352] Panel Report, *Egypt – Steel Rebar*, para. 7.309.
[353] Appellate Body Report, *Mexico – Anti-Dumping Duties on Rice*, para. 295.
[354] Appellate Body Report, *Mexico – Anti-Dumping Duties on Rice*, para. 297.
[355] Appellate Body Report, *US – Hot-Rolled Steel*, para. 81. See also Panel Report, *US – Steel Plate*, para. 7.55, in paragraph 254 above.

WTO - Internal

consideration, notice'. Thus, a straightforward reading of paragraph 3 leads to the understanding that it requires that every element of information submitted which satisfies the criteria set out therein must be considered by the investigating authority when making its determinations. If information must be considered under paragraph 3, an investigating authority may not conclude, with respect to that information, that necessary information has not been provided, in the sense of Article 6.8. Consequently, we do not accept the United States' position that 'information' in Article 6.8 means all information, such that Members have an unlimited right to reject all information submitted in a case where some necessary information is not provided.

Of course, we do not mean to suggest that the investigating authority must, in every case, scrutinize each item of information submitted in order explicitly to determine whether it satisfies the criteria of paragraph 3 of Annex II before it uses it in its determination. Clearly, if the authority is satisfied with the information submitted, and concludes that an interested party has fully complied with the requests for information, there is no need to undertake any separate analysis under paragraph 3 of Annex II. However, to the extent the authority is not satisfied with the information submitted, it must examine those elements of information with which it is **not** satisfied, in light of the criteria of paragraph 3."[356]

285. In *US – Steel Plate*, the Panel further qualified its conclusions by stating that the investigating authorities were not obliged to judge each category of information separately. The Panel however indicated that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls:

"[W]e also do not accept India's view that each category of information submitted must be judged separately. India recognizes that there may be cases where a piece of information submitted which otherwise satisfies paragraph 3 is so minor an element of the information necessary to make determinations that it cannot be used in the investigation without undue difficulties, and that it is possible that so much of the information submitted in a particular 'category' fails to satisfy the criteria of paragraph 3, for instance, cannot be verified, that the entire category of information cannot be used without undue difficulty.

We consider in addition that the various elements, or categories, of information necessary to an anti-dumping determination are often interconnected, and a failure to provide certain information may have ramifications beyond the category into which it falls. For instance, a failure to provide cost of production information would leave the investigating authority unable to determine whether sales were in the ordinary course of trade, and further unable to calculate a constructed normal value. Thus, a failure to provide cost of production information might justify resort to facts available with respect to elements of the determination beyond just the calculation of cost of production. Moreover, without considering any particular 'categories' of information, it seems clear to us that if certain information is not submitted, and facts available are used instead, this may affect the relative ease or difficulty of using the information that has been submitted and which might, in isolation, satisfy the requirements of paragraph 3 of Annex II. However, to accept that view does not necessarily require the further conclusion, espoused by the United States, that in a case in which any 'essential' element of requested information is not provided in a timely fashion, the investigating authority may disregard all the information submitted and base its determination exclusively on facts available. To conclude otherwise would fly in the face of one of the fundamental goals of the *AD Agreement* as a whole, that of ensuring that objective determinations are made, based to the extent possible on facts.

… In a case in which some information is rejected and facts available used instead, the … question may arise whether the fact that some information submitted was rejected has consequences for the remainder of the information submitted. In particular, the investigating authority may need to consider whether the fact that some information is rejected results in other information failing to satisfy the criteria of paragraph 3. In this

[356] Panel Report, *US – Steel Plate*, paras. 7.57-7.58.

WTO - Internal

> context, we consider to be critical the question of whether information which itself may satisfy the criteria of paragraph 3 can be used without undue difficulties in light of its relationship to rejected information. "[357]

286. In *US – Steel Plate*, the Panel faced the question of whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3 of Annex II, and thus may be rejected, can in any case justify a decision to reject other information submitted which, in isolation, satisfies that criteria:

> "The more difficult question, presented in this dispute, is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information submitted which, if considered in isolation, would satisfy the criteria of paragraph 3. We consider that the answer to this question is yes, in some cases, but that the result in any given case will depend on the specific facts and circumstances of the investigation at hand."[358]

287. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* confirmed that an exporter shall be given the opportunity to provide the information required by the investigating authority before the latter resorts to facts available that can be adverse to the exporter's interests. Because an exporter that is unknown to the investigating authority is, therefore, not notified of the information required to be submitted is denied such an opportunity, the Appellate Body concluded:

> "[A]n investigating authority that uses the facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information the investigating authority requires, acts in a manner inconsistent with paragraph 1 of Annex II to the *Anti-Dumping Agreement* and, therefore, with Article 6.8 of that Agreement."[359]

288. The Panel in *EC - Salmon (Norway)* drew support from *US – Hot-Rolled Steel* and *US – Steel Plate* in rejecting the argument that Article 6.8 "envisages the possibility that an investigating authority may rely upon information other than that submitted by an interested party in response to a specific request for information, even when the conditions for disregarding that information and using "facts available" under Article 6.8 have *not* been established." In the Panel's view:

> "Such a view of how Article 6.8 and Annex II are intended to operate is misconceived. In our view, it is clear from the language of Article 6.8, when read in light of paragraphs 1 and 3 of Annex II, that whenever an interested party submits specific information that an investigating authority has requested for the purpose of making a determination, and the conditions for resorting to 'facts available' have not been established, the investigating authority will not be entitled to disregard the submitted information and use information from another source to make the determination."[360]

289. The Panel further stated:

> "Paragraph 3 of Annex II directs investigating authorities to take all submitted information into account for the purpose of its determinations when it is: (i) 'verifiable'; (ii) 'appropriately submitted so that it can be used in the investigation without undue difficulties'; (iii) 'supplied in a timely fashion'; and, where, applicable, (iv) 'supplied in a medium or computer language requested by the authorities'. Thus, paragraph 3 of Annex II calls upon investigating authorities to take into account all information that satisfies three, or sometimes four, cumulative conditions when making determinations. It follows that where *all* of the conditions are satisfied, an investigating authority will not be entitled to reject information submitted when making determinations."[361]

WTO - Internal

[357] Panel Report, *US – Steel Plate*, paras. 7.59-7.61.
[358] Panel Report, *US – Steel Plate*, para. 7.62.
[359] Appellate Body Report, *Mexico – Anti-Dumping Duties on Rice*, para. 259.
[360] Panel on *EC – Salmon (Norway)*, para. 7.347.
[361] Panel Report, *EC –Salmon (Norway)*, para. 7.355 (referring to Appellate Body Report, *US – Hot-Rolled Steel* and Panel Report, *US- Steel Plate*, para. 7.57).

290. The Panel in *Canada – Welded Pipe* found that the Canadian investigating authority had acted inconsistently with Article 6.8 by calculating duty rates for new product models or types of cooperating Chinese Taipei exporters on the basis of facts available:

> "The CBSA did not apply facts available on the basis of the conditions set forth in Article 6.8 or Annex II of the Anti-Dumping Agreement. Indeed, Canada acknowledges that these exporters 'fully cooperated in the original investigation'. Furthermore, Canada asserts that 'because the CBSA requires a model-specific normal value to assess duties, it uses facts available for product models it has yet to investigate'. Since the CBSA had 'yet to investigate' the new product models or types at issue, there could be no basis for any determination that the Chinese Taipei exporters failed to provide any necessary information requested by the CBSA in the investigation thereof. In these circumstances, the CBSA's use of facts available did not meet the requirements of Article 6.8 or Annex II of the Anti-Dumping Agreement."[362]

1.8.5 Paragraph 3 of Annex II

1.8.5.1 Information which is "verifiable"

1.8.5.1.1 General

291. In *Guatemala – Cement II*, the Panel indicated that recourse to "best information available" should not be had when information is "verifiable", and when "it can be used in the investigation without undue difficulties":

> "Furthermore, Annex II(3) provides that all information which is 'verifiable', and 'appropriately submitted so that it can be used in the investigation without undue difficulties', should be taken into account by the investigating authority when determinations are made. In other words, 'best information available' should not be used when information is 'verifiable', and when 'it can be used in the investigation without undue difficulties'. In our view, the information submitted by Cruz Azul was 'verifiable'. The fact that it was not actually verified as a result of the Ministry's response to reasonable concerns raised by Cruz Azul does not change this. In addition, there is nothing in the Ministry's final determination to suggest that the information submitted by Cruz Azul could not be used in the investigation 'without undue difficulties'. Since the information was 'verifiable', and since the Ministry did not demonstrate that it could not be used 'without undue difficulties', Annex II(3) provides strong contextual support for the above conclusion that the Ministry violated Article 6.8 in using the 'best information available' as a result of the cancelled verification visit."[363]

WTO - Internal

1.8.5.1.2 When is information verifiable?

292. In *US – Steel Plate*, the Panel considered that the information is "verifiable" when "the accuracy and reliability of the information can be assessed by an objective process of examination" and that this process does not require an on-the-spot verification. In a footnote to its report, the Panel stated:

> "While the parties have addressed this concept in terms of the 'on the spot' verification process provided for in Article 6.7 and Annex I of the Agreement, we note that such verification is not in fact required by the *AD Agreement*. Thus, the use of the term in paragraph 3 of Annex II is somewhat unclear. However, Article 6.6 establishes a general requirement that, unless they are proceeding under Article 6.8 by relying on facts available, the authorities shall 'satisfy themselves as to the accuracy supplied by interested parties upon which their findings are based'. 'Verify' is defined as 'ascertain or test the accuracy or correctness of, esp. by examination of by comparison of data etc.; check or establish by investigation'. New Shorter Oxford English Dictionary, Clarendon Press, Oxford, 1993. Thus, even in the absence of on-the-spot verification,

[362] Panel Report, *Canada – Welded Pipe*, para. 7.171.
[363] Panel Report, *Guatemala – Cement II*, para. 8.252.

> the authorities are, in a more general sense of assessing the accuracy of information relied upon, required to base their decisions on information which is 'verified'."[364]

293. The Panel in *EC –Salmon (Norway)* considered that "the possibility of undertaking on-the-spot investigations cannot alone be determinative of the question whether submitted information is 'verifiable' … in our view, this [whether information is verifiable or not] must be a conclusion reached on the basis of a case-by-case assessment of the particular facts at issue, including not only the nature of the information submitted but also the steps, if any, taken by the investigating authority to assess the accuracy and reliability of the information."[365]

294. The Panel in *Mexico – Steel Pipes and Tubes* considered arguments raised by Guatemala concerning both substantive and procedural points in relation to the use of facts available. One of the major issues in this case was whether, on the basis of the record evidence, an "unbiased and objective investigating authority could have reached the conclusion that the nature and number of problems encountered at verification were so significant that none of Tubac's data [the only identified exporter] … could be used."[366] Ultimately the Panel was not convinced that Mexico's investigating authority had complied with its substantive obligations under Article 6.8 and Annex II. See paragraphs 326-328 below.

1.8.5.2 Relevance of good faith cooperation

295. In *Egypt – Steel Rebar*, the Panel considered that, pursuant to paragraphs 3 and 5 of Annex II, if read together[367], "information that is of a very high quality, although not perfect, must not be considered unverifiable solely because of its minor flaws, so long as the submitter has acted to the best of its ability. That is, so long as the level of good faith cooperation by the interested party is high, slightly imperfect information should not be dismissed as unverifiable."[368]

1.8.5.3 Information "appropriately submitted so that it can be used in the investigation without undue difficulties"

296. In *US – Steel Plate*, the Panel considered that the question of whether information submitted can be used in the investigation "without undue difficulties" is a highly fact-specific issue. It thus concluded that the investigating authority must explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties:

> "The second criterion of paragraph 3 requires that the information be 'appropriately submitted so that it can be used in the investigation without undue difficulties.' In our view, 'appropriately' in this context has the sense of 'suitable for, proper, fitting'. That is, the information is suitable for the use of the investigating authority in terms of its form, is submitted to the correct authorities, etc. More difficult is the requirement that the information can be 'used without undue difficulties'. 'Undue' is defined as 'going beyond what is warranted or natural, excessive, disproportionate'. Thus, 'undue difficulties' are difficulties beyond what is otherwise the norm in an anti-dumping investigation. This recognizes that difficulties in using the information submitted in an anti-dumping investigation are not, in fact, unusual. This conclusion is hardly surprising, given that enterprises that become interested parties in an anti-dumping investigation and are asked to provide information are not likely to maintain their internal books and records in exactly the format and with precisely the items of information that are eventually requested in the course of an anti-dumping investigation. Thus, it is frequently necessary for parties submitting information to collect and organize raw data in a form that responds to the information request of the investigating authorities.

WTO - Internal

[364] Panel Report, *US – Steel Plate*, fn 67. See also paragraphs 218-240 above concerning on-the-spot verifications.
[365] Panel Report, *EC – Salmon (Norway)*, para. 7.360.
[366] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.111.
[367] See para.I.A.1(a)(i)279 of this document.
[368] (*footnote original)* We note that there is an interplay between the concepts of acting to the best of one's ability in Annex II, paragraph 5, and "refusing access to" necessary information or "significantly impeding" an investigation in Article 6.8. That is, the behaviour of the interested party is relevant to the right to use facts available in a given situation.

> Similarly, it is frequently necessary for the investigating authority to make adjustments of its own in order to be able to take into account information that does not fully comply with its request. This is part of the obligation on both sides to cooperate, recognized by the Appellate Body in the *US – Hot-Rolled Steel* case.
>
> …
>
> In our view, it is not possible to determine in the abstract what 'undue difficulties' might attach to an effort to use information submitted. We consider the question of whether information submitted can be used in the investigation 'without undue difficulties' is a highly fact-specific issue. Thus, we consider that it is imperative that the investigating authority explain, as required by paragraph 6 of Annex II, the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties."[369]

297. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that "the reference to the terms 'appropriately submitted' is designed to cover *inter alia* information which is submitted in accordance with relevant procedural provisions of WTO Members' domestic laws"[370]:

> "In our view, paragraph 3 of Annex II to the *AD Agreement* can be interpreted to mean that information not 'appropriately submitted' in accordance with relevant procedural provisions of WTO Members' domestic laws may be disregarded. In the circumstances of this case, we consider that information submitted by Catarinense was not 'appropriately submitted' within the meaning of paragraph 3 of Annex II to the *AD Agreement* because Catarinense had not complied with Argentina's accreditation requirements. Accordingly, the DCD was entitled to reject that information."[371]

298. The Panel in *EC – Salmon (Norway)* did not see how the "mere fact" that information submitted after an on-the-spot investigation would necessarily mean that the information could not be used without "undue difficulties". The Panel acknowledged that while the extent of the effort needed to assess the accuracy and reliability of information, especially if submitted at a late stage of the investigation, may play a role in determining whether it could be used, in the case before the Panel the facts indicated no efforts had been made on the part of the investigating authority to "attempt to even explore the feasibility and/or practicality of any other verification options."[372] Therefore, the Panel found there was an insufficient basis for the investigating authority to conclude that information submitted was not "appropriately submitted".[373]

WTO - Internal

299. The Panel in *China – Broiler Products (Article 21.5 – US)* found that, in the investigation at issue, MOFCOM had acted inconsistently with the requirements of paragraph 3 of Annex II by rejecting information submitted by one of the foreign producers:

> "MOFCOM, we recall, rejected Tyson's reported data because, in its view, Tyson had failed to provide 'actual pure' meat and processing cost data. But nowhere in the redetermination does MOFCOM explain in what way it 'observed', as required by Article 6.8, the criteria set out in paragraph 3 of Annex II in rejecting Tyson's data. As our questions to the parties made clear, we identified elements in the redetermination that might relate to the criteria of paragraph 3. Clearly, an investigating authority is not required to signpost its analysis and each of its findings by expressly linking them to specific obligations in the Anti-Dumping Agreement. In this instance, however, nothing in the redetermination demonstrates meaningful consideration by MOFCOM of the criteria in paragraph 3. Nor is there any link between those criteria and MOFCOM's ultimate decision to reject <u>all</u> of the reported data. Our view that MOFCOM failed to 'observe' the criteria set out in paragraph 3 is confirmed by China's arguments before us: throughout its submissions China linked MOFCOM's findings only to MOFCOM's alleged conclusion that Tyson had failed to act to the 'best of its ability' in

[369] Panel Report, *US – Steel Plate*, paras. 7.72 and 7.74. See also paragraph 313 below.
[370] Panel Report, *Argentina – Poultry Anti-Dumping Duties,* para. 7.191.
[371] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.191.
[372] Panel Report, *EC – Salmon (Norway)*, para. 7.367.
[373] Panel Report, *EC – Salmon (Norway)*, para. 7.367.

accordance with paragraph 5, not to Tyson's data failing any of the criteria in paragraph 3."[374]

1.8.5.4 Necessary information submitted in a timely fashion

1.8.5.4.1 Timeliness

300. The Appellate Body in *US – Hot-Rolled Steel* concluded that paragraph 3 of Annex II directs investigating authorities not to resort to reject information submitted by the parties if this is submitted "in a timely fashion" and interpreted this as a "reference to a "reasonable period" of Article 6.8 or a "reasonable time" of paragraph 1 of Annex II (see paragraphs 315-317 below). The Appellate Body also refers to Article 6.1.1, second sentence which requires investigating authorities to extend deadlines "upon cause shown", if "practicable":

> "[A]ccording to paragraph 3 of Annex II, investigating authorities are directed to use information if three, and, in some circumstances, four, conditions are satisfied. In our view, it follows that if these conditions are met, investigating authorities are *not* entitled to reject information submitted, when making a determination. One of these conditions is that information must be submitted 'in a *timely* fashion'.
>
> The text of paragraph 3 of Annex II of the *Anti-Dumping Agreement* is silent as to the appropriate measure of 'timeliness' under that provision. In our view, 'timeliness' under paragraph 3 of Annex II must be read in light of the collective requirements, in Articles 6.1.1 and 6.8, and in Annex II, relating to the submission of information by interested parties. Taken together, these provisions establish a coherent framework for the treatment, by investigating authorities, of information submitted by interested parties. Article 6.1.1 establishes that investigating authorities may fix time-limits for responses to questionnaires, but indicates that, 'upon cause shown', and if 'practicable', these time-limits are to be extended. Article 6.8 and paragraph 1 of Annex II provide that investigating authorities may use facts available only if information is not submitted within a reasonable period of time, which, in turn, indicates that information which *is* submitted in a reasonable period of time should be used by the investigating authorities.
>
> That being so, we consider that, under paragraph 3 of Annex II, investigating authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time. In other words, we see, 'in a timely fashion', in paragraph 3 of Annex II as a reference to a 'reasonable period' or a 'reasonable time'. This reading of 'timely' contributes to, and becomes part of, the coherent framework for fact-finding by investigating authorities. Investigating authorities *may* reject information under paragraph 3 of Annex II only in the same circumstances in which they are entitled to overcome the lack of this information through recourse to facts available, under Article 6.8 and paragraph 1 of Annex II of the *Anti-Dumping Agreement*. The coherence of this framework is also secured through the second sentence of Article 6.1.1, which requires investigating authorities to extend deadlines 'upon cause shown', if 'practicable'. In short, if the investigating authorities determine that information was submitted within a reasonable period of time, Article 6.1.1 calls for the extension of the time-limits for the submission of information."[375]

1.8.5.5 "necessary information"

301. In *Egypt – Steel Rebar*, the Panel examined the concept of "necessary information" in the sense of Article 6.8 and stressed that "Article 6.8 refers to 'necessary' information, and not to 'required' or 'requested' information". Since Article 6.8 itself does not define the concept of 'necessary' information, the Panel considered whether there is guidance on this point anywhere else in the Anti-Dumping Agreement, in particular in Annex II, given Article 6.8's explicit cross-reference to it.[376] The Panel concluded that, subject to the requirements of Annex II, paragraph 1, it is left to

[374] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.348.
[375] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 81-83. See also Panel Reports, *US – Steel Plate*, para. 7.76; and *Egypt – Steel Rebar*, para. 7.153.
[376] Panel Report, *Egypt – Steel Rebar*, paras. 7.150-7.151.

WTO - Internal

the discretion of the investigating authority to specify what information is "necessary" in the sense of Article 6.8:

> "On the question of the 'necessary' information, reading Article 6.8 in conjunction with Annex II, paragraph 1, it is apparent that it is left to the discretion of an investigating authority, in the first instance, to determine what information it deems necessary for the conduct of its investigation (for calculations, analysis, etc.), as the authority is charged by paragraph 1 to 'specify … the information required from any interested party'. This paragraph also sets forth rules to be followed by the authority, in particular that it must specify the required information 'in detail', 'as soon as possible after the initiation of the investigation', and that it also must specify 'the manner in which that information should be structured by the interested party in its response'. Thus, there is a clear burden on the authority to be both prompt and precise in identifying the information that it needs from a given interested party."[377]

302. In *Egypt – Steel Rebar*, Türkiye had claimed that because the basis for initially questioning and then rejecting Turkish respondents' costs was unfounded, resort to facts available by the investigating authorities was unjustified under Article 6.8 of the Agreement. Egypt argued that its investigating authority was not in a position to make this determination because the required information to enable it to make the determination was not submitted by the respondents in their responses to the initial questionnaire. The Panel considered that, "[o]n its face, this justification for seeking the detailed cost information appears plausible to us, given, as noted, that a below-cost test is explicitly provided for in Articles 2.2 and 2.2.1 of the *AD Agreement*". The Panel thus concluded that "the requested information would seem[ed] to be "necessary" in the sense of Article 6.8".[378]

303. In *Korea – Certain Paper*, the Panel considered what constitutes "necessary information" within the meaning of Article 6.8:

> "[T]he decision as to whether or not a given piece of information constitutes 'necessary information' within the meaning of Article 6.8 has to be made in light of the specific circumstances of each investigation, not in the abstract. A particular piece of information that may play a critical role in an investigation may not be equally relevant in another one."[379]

WTO - Internal

304. In *Korea – Stainless Steel Bars*, the Panel addressed Japan's claim that the investigating authority (KIA) had acted inconsistently with Article 6.8 and Annex II of the Anti-Dumping Agreement, made applicable to sunset reviews under Article 11.3 by virtue of Article 11.4 thereof. Specifically, Japan argued that the KIA had erroneously sought recourse to the "facts available" to determine the production and export capacity of the Japanese exporters. Korea responded that the KIA had not had such recourse to "facts available", as the Japanese exporters' production capacity data did not qualify as "'necessary' information" under Article 6.8.[380]

305. In considering whether the KIA had recourse to the "facts available" in the manner alleged by Japan, the Panel recalled that Article 6.8 pertains only to "necessary information". This term refers to information that is missing from the record and is possessed by an interested party, and that has therefore been requested by the authorities. This term also relates to information that the authorities require in order to make determinations, as, when the applicable conditions are satisfied, the authorities are permitted under Article 6.8 to make "determinations, affirmative or negative … on the basis of the facts available":

> "We begin by considering the initial matter of whether the KIA had recourse to the 'facts available' on this point, before turning to the substance of the parties' arguments and rebuttals under Articles 6.8 and 11.4 and paragraphs 3 and 7 of Annex II if necessary. From our understanding, it is uncontested between the parties that Article 6.8 pertains only to information that satisfies certain criteria. In particular, it pertains only to 'necessary information'. We understand 'necessary information' to mean information that is missing from the record and is possessed by an interested party, and that has

[377] Panel Report, *Egypt – Steel Rebar*, para. 7.155.
[378] Panel Report, *Egypt – Steel Rebar*, para. 7.217.
[379] Panel Report, *Korea – Certain Paper*, para. 7.43.
[380] Panel Report, *Korea – Stainless Steel Bars*, para. 7.184.

been therefore requested by the authorities. This is because Article 6.8 applies (*inter alia*) '[i]n cases in which any interested party refuses access to, or otherwise does not provide, necessary information'. Moreover, we understand that 'necessary information' relates to information that the authorities require in order to make such determinations. This is because, when the applicable conditions are satisfied, the authorities are permitted under Article 6.8 to make 'determinations, affirmative or negative … on the basis of the facts available'."[381]

306. The Panel then noted that, in the absence of additional context in the Anti-Dumping Agreement as to what comprises "necessary information", what is "necessary" will depend upon the nature of the assessment being undertaken by the authorities and the upon the circumstances of a given investigation. The Panel ultimately considered, in the light of the approach adopted by the investigating authority for undertaking its likelihood-of-injury assessment, the information on capacity utilization was clearly "necessary":

"Beyond those contextual elements of Article 6.8, there is no explicit guidance in the Anti-Dumping Agreement as to what comprises 'necessary information'. Rather, what is 'necessary' will depend upon the nature of the assessment being undertaken by the authorities and the circumstances of a given investigation. In that regard, we accept Korea's point that Article 11.3 of the Anti-Dumping Agreement does not specify that information on capacity utilization is 'necessary' for sunset reviews, and we accept that authorities have latitude under Article 11.3 to develop approaches and methodologies for determining whether the expiry of anti-dumping duties would be likely to lead to a recurrence of material injury. However, in the sunset review at issue in these proceedings, we consider that information on capacity utilization was clearly 'necessary' in light of the approach adopted by the KIA for undertaking its likelihood-of-injury assessment."[382]

307. In examining the facts of the dispute, the Panel noted that the KIA had conveyed to the Japanese exporters that a failure to provide the information requested in the questionnaire, which included production capacity data for the "product under investigation", would inevitably lead to the use of the facts available. The Panel highlighted that the KIA had emphasized the importance of the information requested in the questionnaire, not only with respect to dumping margin determinations, but in a general sense as well. The Panel further recalled its previous finding that the KIA's questionnaire was not limited to dumping, but also comprised the KIA's initial information request for production capacity data for the purposes of its injury investigation:

"The parties argue over the nature and source of what can comprise 'necessary information' for determining capacity utilization rates in sunset reviews. For instance, they dispute whether the 'necessary information' should be country-wide or exporter-specific, and whether it need be 'primary' information or can encompass 'secondary' materials. As we understand it, the KIA's preferred methodology for determining a capacity utilization rate was initially premised, with respect to the denominator, on the production capacity data concerning the 'product under investigation'. The questionnaires issued by the KIA to the Japanese exporters early in the review requested production capacity data for the purposes of deriving a capacity utilization rate, and specified that this data pertain to the 'product under investigation'. The covering letter indicated that 'questionnaire responses constitute a critical part of antidumping reviews, particularly with regard to dumping margin computation', and therefore the 'non-filing or late filing of questionnaire responses, inadequate or incomplete responses, and a lack of verification will inevitably lead to the use of facts available and may result in a less favourable dumping margin than if the respondents fully cooperate'. Thus, the KIA conveyed to the Japanese exporters that a failure to provide the information requested in the questionnaire, which included production capacity data for the 'product under investigation', would inevitably lead to the use of the facts available. Although the KIA emphasized the importance of information on dumping margins, the plain text of this covering letter indicates that its comment in this regard related to the information requested in the questionnaire generally, and not only to dumping margin determinations. Moreover, we recall our finding earlier that this

[381] Panel Report, *Korea – Stainless Steel Bars*, para. 7.185.
[382] Panel Report, *Korea – Stainless Steel Bars*, para. 7.186.

WTO - Internal

> questionnaire was not limited to dumping, but also comprised the KIA's initial information request for production capacity data for the purposes of its injury investigation.[383]

308. The Panel noted that what was missing from the investigative record, and what the KIA required in order to ascertain a capacity utilization rate — production capacity data for the "product under consideration" — had evolved during the sunset review as its preferred parameters for determining Japan's capacity utilization rate had changed. The Panel saw nothing in the Anti-Dumping Agreement to prevent an authority from adjusting its parameters or methodology for "necessary information" during a review. However, the Panel considered that an interested party could only be treated as failing to provide information under Article 6.8 if it is afforded the opportunity to respond to the new parameters or methodology, and to provide updated data where appropriate:

> "Initially, therefore, what was missing from the record – and what was requested from the Japanese exporters – pertained to production capacity data for the 'product under investigation'. … [W]e understand the KIA to have subsequently changed its preferred parameters for the production capacity data as the denominator for determining Japan's capacity utilization rate. Thus, what was missing from the record and what the KIA required in order to ascertain a capacity utilization rate evolved during the review. We see nothing in the Anti-Dumping Agreement to prevent an authority from adjusting its parameters or methodology for 'necessary information' during a review. However, an interested party could only be treated as failing to provide information under Article 6.8 if it is afforded the opportunity to respond to the new parameters or methodology, and to provide updated data where appropriate. If an interested party is not told of the new parameters or methodology, then it cannot plausibly be said to have 'refuse[d] access to, or otherwise … not provide[d], the necessary information' under Article 6.8. This is particularly so with respect to something as basic and fundamental as the product scope of the data being sought, which forms the foundation of subsequent analyses undertaken, or inferences drawn, on the basis of that data."[384]

309. The Panel disagreed with Korea's contention that, because the KIA had already possessed the International Stainless Steel Forum's (ISSF's) Japan-wide production capacity data, information on Japan's production capacity was not missing from the record and thus did not comprise "necessary information" under Article 6.8. The Panel noted that, when the KIA sent its initial questionnaires to the Japanese exporters, these questionnaires clearly showed that the KIA's preferred methodology concerned production capacity data on the "product under investigation", and that the failure to provide such information would have resulted in recourse to facts available. The Panel also noted that the ISSF production capacity data did not pertain to the "product under investigation", but to a broader product scope encompassing excluded products and other stainless steel products. On these matters, the Panel stated the following:

> "Korea contends that information on Japan's production capacity was not missing from the record and therefore did not comprise 'necessary information' under Article 6.8 because the KIA already possessed the ISSF's Japan-wide production capacity data. We disagree. At the point in time at which the KIA sent the initial questionnaires to the Japanese exporters, it is clear from those questionnaires that the KIA's preferred methodology – and what the KIA warned would result in recourse to the facts available if not provided – concerned production capacity data on the 'product under investigation'. The ISSF's production capacity data does not pertain to the 'product under investigation', but rather to a broader product scope encompassing excluded products and other stainless steel products. Thus, the presence of the ISSF data on the record at the time the initial questionnaires were sent to the Japanese exporters would not demonstrate that the relevant information was already on the record, and hence not 'missing' or 'necessary information' in the sense of Article 6.8. It would only be later in the review, once the KIA had opted for a broader product scope, that the ISSF data would accord with the KIA's preferred parameters for the 'necessary information'."[385]

[383] Panel Report, *Korea – Stainless Steel Bars*, para. 7.187.
[384] Panel Report, *Korea – Stainless Steel Bars*, para. 7.188.
[385] Panel Report, *Korea – Stainless Steel Bars*, para. 7.189.

WTO - Internal

310. In the Panel's view, the KIA could not generate a Japan-wide capacity utilization rate *without* the production capacity of the three participating Japanese exporters. The Panel consequently considered that, in the underlying sunset review, production capacity data from those exporters (regardless of the KIA's chosen methodology or preferred parameters for deriving that data) had comprised "necessary information" under Article 6.8 of the Anti-Dumping Agreement for the purposes of determining Japan's capacity utilization rate:

> "As already noted, a contested parameter for what was 'necessary' relates to whether the information at issue needed to be country-wide before qualifying as 'necessary', or whether exporter-specific data could be considered to be 'necessary' despite being alone insufficient to generate a Japan-wide capacity utilization rate. Korea, in particular, contends that producer-specific data could not be 'necessary' information in the context of a likelihood-of-injury determination in which the authorities seek to examine, as one of many factors, the availability of excess production and export capacity in a country of export as a whole. In our view, in the circumstances of the present case, such a distinction between country-wide and exporter-specific data is essentially irrelevant for the following reasons. The ISSF data relied upon by the KIA is an aggregation of company-specific figures, and the Japanese exporters comprised [[***]] of Japan's production capacity in the ISSF data. The figures submitted by both the Japanese exporters and the applicants during the review were premised on the assumption that the three Japanese exporters participating in the review comprised the overwhelming majority – if not the total – of the production capacity in question. Further, one of the KTC's Commissioners described 'data on production capacity and capacity utilization' from the three participating Japanese exporters as 'necessary' during the public hearing for the sunset review, and therefore asked them to provide that data. Against this background, it is clear to us that the KIA could not generate a Japan-wide capacity utilization rate *without* the production capacity of the three participating Japanese exporters. We consequently disagree with Korea. We consider that, in the circumstances of the present sunset review, production capacity data from those exporters (regardless of the KIA's chosen methodology or preferred parameters for deriving that data) comprised 'necessary information' under Article 6.8 of the Anti-Dumping Agreement for the purposes of determining Japan's capacity utilization rate."[386]

WTO - Internal

311. The Panel added that it was relevant that the KIA had sent each of the Japanese exporters a questionnaire early in the review requesting their respective company-specific production capacity data. The KIA had also warned the Japanese exporters that failure to respond to the questionnaire would result in recourse to facts available. The KIA then continually engaged with the Japanese exporters during the review on the matter of their production capacity after their initial response. In the Panel's view, this procedural context suggested that: (a) the Japanese exporters' production capacity data was viewed by the KIA as essential to arriving at a Japan-wide capacity utilization rate, and (b) the Japanese exporters were under the impression that their production capacity data had comprised "necessary information" in the sense of Article 6.8. The Panel stated the following with respect to these matters:

> "Japan further argues that there was no indication that countrywide evidence was the 'necessary' information sought by the KIA from the Japanese exporters. We agree with Japan that it is relevant that the KIA sent each of the Japanese exporters a questionnaire early in the review requesting their respective company-specific production capacity data. The KIA further warned the Japanese exporters that a failure to respond to the questionnaire would result in recourse to the facts available, and then continually engaged with the Japanese exporters during the review on the matter of their production capacity after their initial response. This procedural context suggests that the Japanese exporters' production capacity data was viewed by the KIA as essential to arriving at a Japan-wide capacity utilization rate. It also suggests that the Japanese exporters were under the impression that their production capacity data comprised 'necessary information' in the sense of Article 6.8. As Japan argues, in these circumstances it would have been reasonable for the Japanese exporters to assume that the KIA intended to aggregate the data from the individual responses received. Moreover, the KIA's description of its own analytical process indicates that it examined

[386] Panel Report, *Korea – Stainless Steel Bars*, para. 7.190.

> the Japanese exporters' data, found it to be lacking, and then '*[u]nder such circumstances*, the investigating authorities reviewed the data from the ISSF and used it'. None of this context supports Korea's assertion that the ISSF data was always the starting point for the KIA, and that the Japanese exporters' data did not comprise "necessary information" in the eyes of the KIA. Again, if the ISSF data with its broader product scope were the "starting point", then it would be nonsensical to send a questionnaire to the Japanese exporters at the outset of the review requesting data with a narrower product scope."[387]

312. The Panel therefore found that the production capacity of the three participating Japanese exporters comprised "necessary information" under Article 6.8 of the Anti-Dumping Agreement for the purposes of determining Japan's capacity utilization rate. The Panel reiterated that it saw nothing in the Anti-Dumping Agreement to prevent an authority from adjusting its approach with respect to "necessary information" during a review. Nevertheless, the Panel repeated that an interested party cannot be said to have refused access to such "necessary information" if the new parameters are not properly communicated. On these matters, the Panel stated the following.[388]

313. Turning to whether the KIA did, in fact, have recourse to the "facts available" under Article 6.8 in respect of this "necessary information", the Panel found in the affirmative. The Panel considered the evidence to show that the KIA had rejected the Japanese exporters' figures because those exporters had "failed to cooperate with the investigation, by repeatedly ignoring the repeated requests of the KTC to submit materials and providing only edited data", including with respect to production capacity. This rationale reflects one of the conditions under which an investigating authority may have recourse to the "facts available" under Article 6.8:

> "We turn now to whether the KIA had recourse to the 'facts available' under Article 6.8 in respect of this 'necessary information'. Korea argues that the KIA never in fact exercised discretion to have recourse to the 'facts available'. For other matters (e.g. dumping margins) Korea notes that the KIA explicitly invoked the 'facts available' under Article 6.8 of the Anti-Dumping Agreement and under its domestic legislation. In Japan's view, the KIA was obligated to comply with the requirements of Article 6.8 upon deciding not to rely on information from a primary source, i.e. the Japanese exporters' figures on their own production capacity. According to Japan, the KIA 'cannot circumvent the rules governing use of facts available by simply not explicitly declaring that they actually relied on facts available'.
>
> We consider that the KIA did, in fact, have recourse to the 'facts available' under Article 6.8. The evidence before us shows that the KIA rejected the Japanese exporters' figures because those exporters had 'failed to cooperate with the investigation, by repeatedly ignoring the repeated requests of the KTC to submit materials and providing only edited data', including with respect to production capacity. This rationale reflects one of the conditions under which an investigating authority may have recourse to the 'facts available' under Article 6.8. Given that we consider that the information in question comprises 'necessary information' under Article 6.8, we find that the KIA did, in fact, have recourse to the 'facts available' when rejecting the Japanese exporters' production capacity figures due to a failure to cooperate."[389]

WTO - Internal

1.8.5.6 Information submitted after a deadline

314. In *US – Hot-Rolled Steel*, the United States authorities had rejected certain information provided by two Japanese companies which was submitted beyond the deadlines for responses to the questionnaires and thus applied "facts available" in the calculation of the dumping margins. The United States interpreted Article 6.8 as permitting investigating authorities to rely upon reasonable, pre-established deadlines for the submission of data and that this is supported by Article 6.1.1. The Appellate Body, although it upheld the Panel's finding that the United States had infringed Article 6.8 by rejecting that information and applying best facts available, did so following a different line of reasoning.[390] As regards the Appellate Body's interpretation of Article 6.1.1 in this

[387] Panel Report, *Korea – Stainless Steel Bars*, para. 7.191.
[388] Panel Report, *Korea – Stainless Steel Bars*, para. 7.192.
[389] Panel Report, *Korea – Stainless Steel Bars*, paras. 7.193-7.194.
[390] Appellate Body Report, *US – Hot-Rolled Steel*, para. 90.

context, see paragraph 24 above. The Appellate Body considered that deadlines are indeed relevant in determining whether information had been submitted within a reasonable period of time but that a balance needs to be made between the rights of the investigating authorities to control and expedite the investigation and the legitimate interest of the parties to submit information and to have it taken into account:

> "In determining whether information is submitted within a reasonable period of time, it is proper for investigating authorities to attach importance to the time-limit fixed for questionnaire responses, and to the need to ensure the conduct of the investigation in an orderly fashion. Article 6.8 and paragraph 1 of Annex II are not a license for interested parties simply to disregard the time-limits fixed by investigating authorities. Instead, Articles 6.1.1 and 6.8, and Annex II of the *Anti-Dumping Agreement*, must be read together as striking and requiring a balance between the rights of the investigating authorities to control and expedite the investigating process, and the legitimate interests of the parties to submit information and to have that information taken into account."[391]

1.8.5.7 "within a reasonable period" and "within reasonable time"

315. In *US – Hot-Rolled Steel*, the Appellate Body looked into the issue of when investigating authorities are entitled to reject information submitted by the parties after a deadline established by the investigating authorities, and instead resort to facts available, as the United States did in this case. The Appellate Body considered that when information is provided "within a reasonable period of time" as mandated by Article 6.8, the investigating authorities cannot resort to best facts available:

> "Article 6.8 identifies the circumstances in which investigating authorities may overcome a lack of information, in the responses of the interested parties, by using 'facts' which are otherwise 'available' to the investigating authorities. According to Article 6.8, where the interested parties do not 'significantly impede' the investigation, recourse may be had to facts available only if an interested party fails to submit necessary information 'within a reasonable period'. Thus, if information is, in fact, supplied 'within a reasonable period', the investigating authorities *cannot* use facts available, but must use the information submitted by the interested party."[392]

WTO - Internal

316. The Appellate Body in *US – Hot-Rolled Steel* also drew from paragraph 1 of Annex II to support its conclusion that investigating authorities may resort to facts available only "if information is not supplied within a reasonable time":

> "Although … paragraph [1 of Annex II] is specifically concerned with ensuring that respondents receive proper notice of the rights of the investigating authorities to use facts available, it underscores that resort may be had to facts available only 'if information is not supplied within a reasonable time'. Like Article 6.8, paragraph 1 of Annex II indicates that determinations may *not* be based on facts available when information is supplied within a 'reasonable time' but should, instead, be based on the information submitted."[393]

317. As regards the meaning of "reasonable period" under Article 6.8 and "reasonable time" under paragraph 1 of Annex II, the Appellate Body in *US – Hot-Rolled Steel* considered that both concepts should be approached on a case-by-case basis "in the light of the specific circumstances of each investigation":

> "The word 'reasonable' implies a degree of flexibility that involves consideration of all of the circumstances of a particular case. What is 'reasonable' in one set of circumstances may prove to be less than 'reasonable' in different circumstances. This suggests that what constitutes a reasonable period or a reasonable time, under

[391] Appellate Body Report, *US – Hot-Rolled Steel*, para. 86.
[392] Appellate Body Report, *US – Hot-Rolled Steel*, para. 77.
[393] Appellate Body Report, *US – Hot-Rolled Steel*, para. 79.

> Article 6.8 and Annex II of the *Anti-Dumping Agreement*, should be defined on a case-by-case basis, in the light of the specific circumstances of each investigation.
>
> In sum, a 'reasonable period' must be interpreted consistently with the notions of flexibility and balance that are inherent in the concept of 'reasonableness', and in a manner that allows for account to be taken of the particular circumstances of each case. In considering whether information is submitted within a reasonable period of time, investigating authorities should consider, in the context of a particular case, factors such as: (i) the nature and quantity of the information submitted; (ii) the difficulties encountered by an investigated exporter in obtaining the information; (iii) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (iv) whether other interested parties are likely to be prejudiced if the information is used; (v) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (vi) the numbers of days by which the investigated exporter missed the applicable time-limit."[394]

318. The Panel in *Korea – Certain Paper* followed the approach above in examining the issue of "reasonable period" within the meaning of Article 6.8 and the relevance of missing a deadline for the submission of information in an anti-dumping investigation.[395]

1.8.5.8 Information submitted in the medium or computer language requested

319. In *US – Steel Plate*, the Panel referred to this fourth criterion of paragraph 3 of Annex II but it did not consider it further because it seemed to it to be straightforward and it was not in dispute in this case.[396]

1.8.6 Non-cooperation: "refuse access to, or otherwise does not provide"

1.8.6.1 Meaning of cooperation

320. In *US – Hot-Rolled Steel*, the United States authorities had resorted to "adverse"facts available to calculate the dumping margins of an exporter who had failed to cooperate by not providing certain data by failing to provide certain data as requested. The Appellate Body, which upheld the Panel's finding to the effect that the authorities' conclusion that the exporter failed to "cooperate" in the investigation "did not rest on a permissible interpretation of that word"[397], had looked into the meaning of cooperation under paragraph 7 of Annex II. The Appellate Body considered that cooperation is a process which is "in itself not determinative of the end result of the cooperation":

> "Paragraph 7 of Annex II indicates that a lack of 'cooperation' by an interested party may, by virtue of the use made of facts available, lead to a result that is 'less favourable' to the interested party than would have been the case had that interested party cooperated. We note that the Panel referred to the following dictionary meaning of 'cooperate': to 'work together for the same purpose or in the same task.' This meaning suggests that cooperation is a *process*, involving joint effort, whereby parties work together towards a common goal. In that respect, we note that parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation. Thus, investigating authorities should not arrive at a 'less favourable' outcome simply because an interested party fails to furnish requested information if, in fact, the interested party has 'cooperated' with the investigating authorities, within the meaning of paragraph 7 of Annex II of the *Anti-Dumping Agreement*."[398]

[394] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 84-85.
[395] Panel Report, *Korea – Certain Paper*, para. 7.49
[396] Panel Report, *US – Steel Plate*, para. 7.77.
[397] Panel Report, *US – Hot-Rolled Steel*, para. 8.1(b).
[398] Appellate Body Report, *US – Hot-Rolled Steel*, para. 99.

WTO - Internal

1.8.6.2 Justification for non-cooperation

321. In *Guatemala – Cement II*, the Panel examined whether Guatemala's authority had made recourse to the "best information available" in compliance with Article 6.8. In rejecting Guatemala's argument that the Mexican producer concerned significantly impeded the investigation of the authority by failing to cooperate with the authority's verification visit to its premises, the Panel found that the objection of the Mexican producer to the verification visit was reasonable:

> "[W]e do not consider that an objective and impartial investigating authority could properly have found that Cruz Azul significantly impeded its investigation by objecting to the inclusion of non-governmental experts with a conflict of interest in its verification team. We do not consider that a failure to cooperate necessarily constitutes significant impediment of an investigation, since in our view the *AD Agreement* does not require cooperation by interested parties at any cost. Although there are certain consequences (under Article 6.8) for interested parties if they fail to cooperate with an investigating authority, in our view such consequences only arise if the investigating authority itself has acted in a reasonable, objective and impartial manner. In light of the facts of this case, we find that the Ministry did not act in such a manner."[399]

1.8.6.3 Cooperation as a two-way process

322. The Appellate Body in *US – Hot-Rolled Steel* also considered that both paragraphs 2 and 5 of Annex II and Article 6.13 of the Anti-Dumping Agreement call for a "balance between the interests of investigating authorities and exporters" and therefore see "cooperation" as "a two-way process involving joint effort":

> "We, therefore, see paragraphs 2 and 5 of Annex II of the *Anti-Dumping Agreement* as reflecting a careful balance between the interests of investigating authorities and exporters. In order to complete their investigations, investigating authorities are entitled to expect a very significant degree of effort – to the 'best of their abilities' – from investigated exporters. At the same time, however, the investigating authorities are not entitled to insist upon *absolute* standards or impose *unreasonable* burdens upon those exporters.
>
> …
>
> Article 6.13 thus underscores that 'cooperation' is, indeed, a two-way process involving joint effort. This provision requires investigating authorities to make certain allowances for, or take action to assist, interested parties in supplying information. If the investigating authorities fail to 'take due account' of genuine 'difficulties' experienced by interested parties, and made known to the investigating authorities, they cannot, in our view, fault the interested parties concerned for a lack of cooperation." [400]

1.8.7 Paragraph 5 of Annex II: degree of cooperation: "to the best of its ability"

323. The Appellate Body in *US – Hot-Rolled Steel*, when analysing the concept of cooperation under paragraph 7 of Annex II, noted that this provision does not indicate the degree of cooperation which is expected from interested parties to avoid the possibility of the investigating authorities resorting to a "less favourable" result. The Appellate Body considered that, on the basis of the wording of paragraph 5 of Annex II, the degree of cooperation required is to cooperate to the "best" of their abilities". The Appellate Body also draws from paragraph 2 of Annex II that maintaining the principle of good faith requires a balance to be struck by the investigating authorities between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities:

> "Paragraph 7 of Annex II does not indicate what *degree* of 'cooperation' investigating authorities are entitled to expect from an interested party in order to preclude the

[399] Panel Report, *Guatemala – Cement II*, para. 8.251.
[400] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 102 and 104.

WTO - Internal

possibility of such a 'less favourable' outcome. To resolve this question we scrutinize the context found in Annex II. In this regard, we consider it relevant that paragraph 5 of Annex II prohibits investigating authorities from discarding information that is 'not ideal in all respects' if the interested party that supplied the information has, nevertheless, acted 'to the *best* of its ability'. (emphasis added) This provision suggests to us that the level of cooperation required of interested parties is a high one – interested parties must act to the 'best' of their abilities.

We note, however, that paragraph 2 of Annex II authorizes investigating authorities to request responses to questionnaires in a particular medium (for example, computer tape) but, at the same time, states that such a request should not be 'maintained' if complying with that request would impose an '*unreasonable extra burden*' on the interested party, that is, would 'entail *unreasonable additional cost and trouble*'. (emphasis added) This provision requires investigating authorities to strike a balance between the effort that they can expect interested parties to make in responding to questionnaires, and the practical ability of those interested parties to comply fully with all demands made of them by the investigating authorities. We see this provision as another detailed expression of the principle of good faith, which is, at once, a general principle of law and a principle of general international law, that informs the provisions of the *Anti-Dumping Agreement*, as well as the other covered agreements. This organic principle of good faith, in this particular context, restrains investigating authorities from imposing on exporters burdens which, in the circumstances, are not reasonable."[401]

324. In *US – Steel Plate*, India had argued that even if information submitted fails to satisfy the criteria of paragraph 3 of Annex II to some degree, if the party submitting that information acted to the best of its ability, the investigating authority is required under paragraph 5 of Annex II to make "more concerted efforts" to use it. The Panel did not agree with India:

"Paragraph 5 establishes that information provided which is not ideal is not to be disregarded if the party submitting it has acted to the best of its ability. As the Appellate Body found in *US – Hot-Rolled Steel*, the degree of effort demanded of interested parties by this provision is significant. We are somewhat troubled by the implications of India's view of this provision, which might be understood to require that information which fails to satisfy the criteria of paragraph 3, and therefore need not be taken into account when determinations are made, must nonetheless "not be disregarded" if the party submitting it has acted to the best of its ability. We find it difficult to conclude that an investigating authority must use information which is, for example, not verifiable, or not submitted in a timely fashion, or regardless of the difficulties incumbent upon its use, merely because the party supplying it has acted to the best of its ability. This would seem to undermine the recognition that the investigating authority must be able to complete its investigation and must make determinations based to the extent possible on facts, the accuracy of which has been established to the authority's satisfaction.

However, if we understand paragraph 5 to emphasize the obligation on the investigating authority to cooperate with interested parties, and particularly to actively make efforts to use information submitted if the interested party has acted to the best of its ability, we believe that it does not undo the framework for use of information submitted and resort to facts available set out in the *AD Agreement* overall. Similarly, paragraph 5 can be understood to highlight that information that satisfies the requirements of paragraph 3, but which is not perfect, must nonetheless not be disregarded."[402]

325. In *Egypt – Steel Rebar*, the Panel considered that the phrase "acted to the best of its ability" in paragraph 5 of Annex II does not exist in isolation, either from other paragraphs of Annex II or from Article 6.8 itself. The Panel indicated that "this is because an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted":

[401] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 100-101.
[402] Panel Report, *US – Steel Plate*, paras. 7.64-7.65.

WTO - Internal

> "[P]aragraph 5 [of Annex II] does not exist in isolation, either from other paragraphs of Annex II, or from Article 6.8 itself. Nor, *a fortiori*, does the phrase 'acted to the best of its ability'. In particular, even if, with the best possible intentions, an interested party has acted to the very best of its ability in seeking to comply with an investigating authority's requests for information, that fact, by itself, would not preclude the investigating authority from resorting to facts available in respect of the requested information. This is because an interested party's level of effort to submit certain information does not necessarily have anything to do with the substantive *quality* of the information submitted, and in any case is not the *only* determinant thereof. We recall that the Appellate Body, in *US – Hot-Rolled Steel*, recognized this principle (although in a slightly different context), stating that 'parties may very well 'cooperate' to a high degree, even though the requested information is, ultimately, not obtained. This is because the fact of 'cooperating' is in itself not determinative of the end result of the cooperation."[403]

326. The Panel in *Mexico – Steel Pipes and Tubes* took the same approach as the Panel in *Egypt – Steel Rebar* in considering that paragraphs 3 and 5 of Annex II together "set forth the substantive elements for a justified decision to reject a party's information and resort to facts available."[404] The Panel elaborated further on the jurisprudence in considering whether it was appropriate to use facts available:

> "We also note that the Appellate Body's ruling in US – Hot-Rolled Steel is consistent with that approach [i.e. paragraphs 3 and 5 of Annex II outline the substantive elements necessary to reject a party's information and resort to facts available], in that the Appellate Body ruled that investigating authorities 'are not entitled to reject information submitted' if that information meets the conditions in paragraph 3 of being 'verifiable', 'appropriately submitted so that it can be used without undue difficulties', and 'supplied in a timely fashion'. The Panel in US – Steel Plate considered that information is verifiable when 'the accuracy and reliability of the information can be assessed by an objective process of examination'. That Panel also found that the term 'undue difficulties' are difficulties 'beyond what is otherwise the norm in an anti-dumping investigation', and that an investigating authority is required by paragraph 6 of Annex II 'to explain the basis of a conclusion that information which is verifiable and timely submitted cannot be used in the investigation without undue difficulties.' Finally, we note in connection with this claim the Panel's characterization as a case-by-case question whether a conclusion that some information fails to satisfy the criteria of paragraph 3 and thus may be rejected can justify the rejection of other information that would, in isolation, have satisfied the criteria of paragraph 3, as we view this as an important element of Mexico's argument."[405]

WTO - Internal

327. The Panel in *Mexico – Steel Pipes and Tubes* considered the investigating authority's justification in resorting to facts available in light of the evidence on the record, and was not convinced by its arguments. The Panel's comments on product scope shed light on its overall view of the investigating authority's conduct of the investigation:

> "Concerning the <u>product scope of the data submitted</u> by Tubac, given our finding that the record indicates that Economía faulted Tubac for having provided data only on A-53 and BS-1387 pipe, we consider whether there is factual evidence that Economía ever specifically requested any pricing data from Tubac (such as would be necessary to calculate dumping margins) on products other than these, either in the questionnaire or at any point thereafter. We find no record evidence of any such request, nor does Mexico argue that any such request was made. In this context we emphasize that whatever issues there may have been at various points during the investigation regarding product scope (and we note Tubac's requests for clarification on this point from the very outset of the investigation), the facts of record show that Tubac was fully transparent throughout the investigation as to the scope of the products for which it

[403] Panel Report, *Egypt – Steel Rebar*, para. 7.242. See also Appellate Body Report, *US – Hot-Rolled Steel*, para. 320.
[404] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.164.
[405] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.164.

> reported data and its reasons for doing so. There is no evidence to the contrary, and indeed Mexico confirmed Tubac's transparency in this regard in response to questioning by the Panel. Nor did Economía, before the final phase of the investigation, raise any issue in this respect. To the contrary, Economía itself on numerous occasions confirmed the correctness of the scope of the data provided by Tubac, including during the technical meeting with Hylsa and at verification (where the verification team at several points identified Tubac's product codes that were covered by the investigation). Thus the evidence is unequivocal that Economía was fully aware of the product scope of the data provided by Tubac, and never identified to Tubac that there was any problem in this regard, or sought data on other products."[406]

328. The Panel in *Mexico – Steel Pipes and Tubes* concluded that the record evidence did not support a conclusion that the data submitted by Tubac [the only identified exporter] was unverifiable in the sense of paragraph 3 of Annex II.[407]

329. In *Egypt – Steel Rebar*, the Panel looked at the dictionary meaning of the phrase to the "best" of an interested party's ability:

> "Considering in more detail the concrete meaning of the phrase to the 'best' of an interested party's ability, we note that the *Concise Oxford Dictionary* defines the expression 'to the best of one's ability' as 'to the *highest level* of one's *capacity* to do something' (emphasis added). In similar vein, the *Shorter Oxford Dictionary* defines this phrase as 'to the *furthest extent* of one's *ability*; so far as one can do'. We note that in a legal context, the concept of 'best endeavours', is often juxtaposed with the concept of 'reasonable endeavours' in defining the degree of effort a party is expected to exert. In that context, 'best endeavours' connotes efforts going beyond those that would be considered 'reasonable' in the circumstances. We are of the opinion that the phrase the 'best' of a party's ability in paragraph 5 connotes a similarly high level of effort."[408]

330. The Panel in *Mexico – Steel Pipes and Tubes* found in favour of Guatemala's claim that the exporter in question, Tubac, had acted to the best of its ability and that the investigating authority in Mexico, in rejecting the information provided had acted inconsistently with paragraph 5 of Annex II. The Panel noted:

> "In short, Mexico's argument before us on this point seems to be a *post hoc* explanation of Economía's decision to reject Tubac's data, which neither appears in Economía's Final Determination nor finds factual support in the record evidence underlying that Determination. …
>
> As for the question of whether the record otherwise contains any evidence that Tubac acted in a deliberately misleading manner in terms of the data it provided in its questionnaire response, at verification, or at any other point, we see none, and Mexico points to none. Indeed, given that according to the verification report Tubac itself brought certain errors in its data base to the attention of the verification team, and otherwise is described in that report as providing all data and documentation requested by the verification team without delays or other problems, we consider that an unbiased and objective investigating authority could not conclude on the basis of the verification report that Tubac had failed to cooperate in the manner asserted by Mexico As a result, we also find no basis in the record for Mexico's assertion that Tubac significantly impeded the investigation."[409]

331. The Panel in *China – Broiler Products (Article 21.5 – US)* rejected the point of view that paragraph 5 of Annex II is an exception to paragraph 3. To the contrary, the Panel considered paragraph 5 to be supplementary to paragraph 3:

> "Turning to the text of that provision, nothing in its structure or actual wording suggests that paragraph 5 allows for the rejection of information that meets the criteria set forth

[406] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.169.
[407] Panel Report, *Mexico – Steel Pipes and Tubes*, para. 7.170.
[408] Panel Report, *Egypt – Steel Rebar*, para. 7.244.
[409] Panel Report, *Mexico – Steel Pipes and Tubes*, paras. 7.182-7.183.

WTO - Internal

> in paragraph 3 but is not ideal in all respects.[410] Rather, the provision establishes an obligation for an investigating authority to use such information provided the interested party submitting it acted to the best of its ability. As described above, paragraph 5 is properly understood as supplementing paragraph 3. Information that satisfies the requirements of paragraph 3, even if not 'ideal in all respects', may not be disregarded provided the interested party has acted to the best of its ability. It would turn paragraph 5 on its head to read it as a defence or exception entitling an investigating authority to reject submitted information and resort to facts available 'unless the party submitting that information has been acting 'to the best of its ability''. We therefore do not agree with China's understanding of paragraph 5."[411]

332. In *Morocco – Hot-Rolled Steel (Turkey)*, the Panel found that the investigating authority lacked a proper basis for having recourse to facts available. In so finding, the Panel underlined the investigating authority's obligation to act in a reasonable, objective, and impartial manner in resorting to facts available:

> "In our view, the MDCCE's inability to make an affirmative determination of under-reporting by the producers results from the MDCCE's failure to engage meaningfully with the producers on this issue. In this regard, we recall that the investigating authority and the interested party from whom information is requested must cooperate; such cooperation is a 'two-way process involving joint effort'. Failure by an interested party to cooperate only gives rise to the consequences envisaged by Article 6.8 if the investigating authority itself acted in a reasonable, objective, and impartial manner. Thus, where an investigating authority has legitimate concerns regarding the information provided, it must take reasonable steps to investigate and clarify. This is reflected in the Anti-Dumping Agreement itself. For example, under paragraph 3 of Annex II, an investigating authority must seek to determine whether this information is verifiable before rejecting submitted information, be that through on-the-spot verifications, further requests for information or other means. Pursuant to paragraph 6 of Annex II, if the investigating authority rejects evidence or information, it should inform the supplying interested party forthwith, give an opportunity to provide further explanations and consider those explanations.
>
> … According to paragraph 7 of Annex I of the Anti-Dumping Agreement, the main purpose of verifications is also 'to obtain further details'. This provision also envisages that there may be 'further information which needs to be provided' during verification. Verifications are therefore not limited to verifying previously reported information."[412]

1.8.8 Information used in case of resorting to facts available

1.8.8.1 "secondary source … with special circumspection"

333. In *Egypt – Steel Rebar*, Egypt resorted to facts available in the calculation of the cost of production and constructed value of a Turkish company concerned. In particular, Egypt had added 5 per cent for inflation to that company's reported costs when constructing its normal value. Türkiye claimed that the addition of 5 per cent was arbitrary and, as information from a "secondary source", should have been used with "special circumspection", and in particular, should have been "check[ed] … from other independent sources at [the investigating authority's] disposal". The Panel rejected Türkiye's claim and emphasized:

> "[A]pplying 'special circumspection' does not mean that only one outcome is possible on a given point in an investigation. Rather, even while using special circumspection, an investigating authority may have a number of equally credible options in respect of a given question. In our view, when no bias or lack of objectivity is identified in respect of the option selected by an investigating authority, the option preferred by the complaining Member cannot be preferred by a panel."[413]

[410] *(footnote original)* Paragraph 5 also neither requires an interested party to act to the "very" best of its ability, nor to provide information that is of "best quality".
[411] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.357.
[412] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.92-7.93.
[413] Panel Report, *Egypt – Steel Rebar*, para. 7.305.

WTO - Internal

334. Regarding the exercise by the investigating authority of special circumspection in light of paragraph 7 of Annex II, the Panel in *Korea – Certain Paper* recognized that an investigating authority is under the obligation to corroborate information obtained from secondary sources:

> "The fact remains, however, that KTC was under the obligation to take the procedural step, under paragraph 7 of Annex II, to confirm the reliability of that information for purposes of its determinations in the investigation."[414]

335. On the matter of exercise by the investigating authority of special circumspection in its use of information from secondary sources under paragraph 7 of Annex II, the Panel in *Korea – Certain Paper* explained that the investigation authority is not restricted in its use of information from a secondary source and that it would not be inconsistent with the IA's obligation to apply special circumspection if it decides to use information relating to another company, which KTC did in the context of calculating the normal values because it did not have information regarding financial and SG&A expenses for one of the investigated companies.[415] It further concluded that:

> "Notwithstanding our observation that the activities carried out by these two types of companies would normally be different from one another, we do not exclude the possibility that – in a given investigation – using the information relating to these companies for one another may be allowed provided that the reasons for that course of action are adequately explained in the IA's determinations."[416]

336. With respect to the facts that an agency may use when faced with missing information, the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* agreed with the Panel, explaining that:

> "[T]he agency's discretion is not unlimited. First, the facts to be employed are expected to be the 'best information available'. … Secondly, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it, where practicable, against information contained in other independent sources at its disposal, including material submitted by interested parties. Such an active approach is compelled by the obligation to treat data obtained from secondary sources 'with special circumspection'."[417]

WTO - Internal

337. In the compliance proceedings on *Korea –Certain Paper (Article 21.5 – Indonesia),* Indonesia argued that the investigating authority (KTC) failed to comply with its obligations under Article 6.8 and paragraph 7 of Annex II of the Anti-Dumping Agreement. It was undisputed that verification data of PT Cakrawala Mega Indah (CMI) (the trading company that sold Indonesia the subject product) was not allowed in the original investigation and that recourse to facts available was justified under Article 6.8. But, in this compliance proceeding the dispute was whether the KTC complied with the requirements of paragraph 7 of Annex II in its selection of information from secondary sources to replace the missing information.[418] The Panel in *Korea – Certain (Article 21.5 – Indonesia)* noted that the KTC's redetermination regarding CMIs financial expenses differed from the original determination in two main regards which it needed to assess for compliance with paragraph 7 of Annex II: (i) whether using the interest expenses of a manufacturer as proxy for CMI would be appropriate (the KTC concluded that it was); and (ii) whether it was proper that the KTC corroborated the interest rate used for CMI with the interest rates pertaining to certain other companies.[419] The KTC, after using RAK's interest rate (RAK was a subsidiary of April Fine, an Indonesian exporter) as proxy for CMI, compared it against various sources and concluded that the interest rate used for CMI was proper.

338. Regarding the first point, the Panel in *Korea –Certain (Article 21.5 – Indonesia)* found that the KTC's establishment of the facts regarding the scope of CMI's business was not proper. The Panel noted this finding of the KTC was made in the context of the broader issue of whether it would be appropriate to use a manufacturing company's interest expenses for CMI. The Panel therefore found

[414] Panel Report, *Korea – Certain Paper*, para. 7.125.
[415] Panel Report, *Korea – Certain Paper*, para. 7.111.
[416] Panel Report, *Korea – Certain Paper*, para. 7.110.
[417] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.
[418] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.27.
[419] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.29.

that the KTC had failed to exercise special circumspection within the meaning of paragraph 7 of Annex II.[420]

339. In relation to the second point, the Panel in *Korea –Certain Paper (Article 21.5 - Indonesia)* was concerned at the lack of an adequate explanation regarding the use of interest expenses, and concluded that the KTC had also acted inconsistently with Article 6.8 and paragraph 7 of Annex II in this regard:

> "We do not consider that there are strict rules that the investigating authorities have to follow in determining the financial expenses of different kinds of companies on the basis of facts available. In the circumstances of the implementation proceedings at issue, however, we find it noteworthy that the KTC used April Fine's data to determine all of CMI's SG&A expenses except interest expenses for which it used the data pertaining to RAK. We do not consider that this approach was inconsistent simply because the nature of CMI's and RAK's businesses were different. We note, however, that the KTC's Re-determination does not explain the reason for this dual approach regarding the secondary sources of information used to determine different elements of CMI's SG&A expenses. In our view, even if there was no difference between the nature of the businesses of CMI and April Fine on the one hand and RAK on the other, the special circumspection requirement of paragraph 7 of Annex II would call for an explanation as to why different sources have been used for different elements of CMI's SG&A expenses. Given the significant difference between the interest expenses of April Fine and RAK, the need for an explanation became, in our view, even more important in the circumstances of the proceedings at issue. As we mentioned in our original panel report, we do not exclude the possibility that a producing company's data may be used in the place of a trading company's data as long as the authorities' determination adequately explains the reason for such an approach. In this case, however, there is no such adequate explanation.
>
> …
>
> In our view, the issue is not whether the interest expenses used by the KTC for CMI were in line with the expenses of some other companies, but rather whether the KTC exercised special circumspection in deciding to use RAK's interest expenses as proxy for CMI. In this regard, we generally note that the KTC's Re-determination focuses on what is 'appropriate' or 'proper' in terms of representing CMI's interest expenses …, rather than showing in what ways, if at all, the KTC exercised special circumspection in the use of the information from the secondary source, RAK, from which such expenses were derived.
>
> In this connection, we would like to stress that we are not implying that the KTC should have used April Fine's interest expenses as proxy for CMI. Rather, it is the non-existence on the record of an adequate explanation as to why the KTC decided not to use April Fine's data for interest expenses although it used it for all other elements of CMI's SG&A expenses that, in our view, makes the KTC's determination fall short of the special circumspection requirement of paragraph 7 of Annex II."[421]

340. The Panel in *China – GOES* found that paragraph 7 of Annex II precludes investigating authorities from using facts available for the purpose of finding excessive dumping margins in order to encourage cooperation of interested parties:

> "However, paragraph 7 also provides that authorities should use 'special circumspection' when basing their findings on information from a secondary source. This suggests that the recourse to facts available is not intended to lead to excessive margins of dumping in order to encourage cooperation by interested parties. Rather, special care to attain as accurate a margin as possible must be used, with an acknowledgment that non-cooperation could nevertheless lead to a less favourable result compared with cooperation. … We note that the general rule expressed in Article 6.10 explicitly applies to each 'known' exporter or producer. It is not clear that Article 6.10 establishes a

[420] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, para. 6.44.
[421] Panel Report, *Korea – Certain Paper (Article 21.5 – Indonesia)*, paras. 6.47 and 6.50–6.51.

WTO - Internal

> general objective relating to unknown exporters. In any event, even if an overriding objective exists to encourage unknown exporters to participate in an investigation, so that individual margins of dumping can be applied to them, the achievement of this objective would not justify a violation of the express terms of Article 6.8 of the Anti-Dumping Agreement, which establishes clear conditions regarding when it is permissible to resort to the use of facts available."[422]

341. In the investigation at issue in *Canada – Welded Pipe*, the Canadian authorities had calculated the duty rate for "all other exporters" on the basis of the highest difference between the normal value and the export price on an individual transaction for a cooperating exporter.[423] The Panel noted that the investigation record did not contain any explanation for this approach and therefore found it to be inconsistent with Article 6.8 and paragraph 7 of Annex II:

> "The factors identified by Canada fail, individually or taken as a whole, to show that the CBSA conducted a comparative evaluation and assessment of all the facts on record when selecting facts available in respect of the margin of dumping and duty rate for 'all other exporters'. No element referred to by Canada expressly or implicitly addresses the issue of whether and, if so, how the CBSA evaluated and assessed the available information specifically with respect to and for purposes of determining the dumping margin and duty rate for 'all other exporters'. The investigative and procedural steps taken by the CBSA, also invoked by Canada as part of the three-step methodology, are entirely unrelated to the specific issue of the selection of facts available in respect of 'all other exporters'. They simply demonstrate that the CBSA collected and verified a large volume of data. Collecting data is not the same as undertaking a comparative and systematic evaluation and assessment of that data for the purpose of applying facts available. Nor does checking for anomalies, aberrations, or the need for adjustments equate to a comparative evaluation and assessment. Despite several specific requests from the Panel, Canada failed to provide any indication as to how the CBSA determined that the highest transaction-specific dumping margin from a cooperating exporter was appropriate, and even the best fitting information, for establishing dumping margins and duty rates for 'all other exporters'.
>
> In light of the above, we conclude that the CBSA applied facts available in respect of the margin of dumping and duty rate for 'all other exporters' without undertaking a comparative evaluation and assessment of all the available information on the record before applying facts available in respect of 'all other exporters'."[424]

342. The Panel in in *Canada – Welded Pipe*, while recognizing that determining duty rates for non-cooperating exporters based on facts available may serve to encourage cooperation and prevent circumvention of anti-dumping measures, stressed the importance of basing that determination on a comparative evaluation and assessment and explaining it in the investigating authority's decision:

> "Considering the above, we do not need to reach a definitive conclusion in respect of Chinese Taipei's argument that the CBSA used facts available to punish 'all other exporters' from Chinese Taipei. We observe, however, that both parties accept that any punitive use of facts available is inconsistent with the disciplines on facts available. They also share the view that duty rates for non-cooperating exporters – based on facts available – may serve to encourage cooperation and prevent anti-dumping duty circumvention. We do not disagree. There may be a fine line between, on the one hand, incentivizing cooperation and preventing circumvention and, on the other hand, punishing non-cooperating exporters. In the case at hand, it appears to us that by singling out the highest transaction-specific amount of dumping from a cooperative exporter without any comparative evaluation and assessment, and without any form of explanation, the CBSA went beyond what was appropriate and necessary to achieve the objectives of encouraging cooperation and preventing circumvention."[425]

WTO - Internal

[422] Panel Report, *China – GOES*, para. 7.391.
[423] Panel Report, *Canada – Welded Pipe*, para. 7.134.
[424] Panel Report, *Canada – Welded Pipe*, paras. 7.140-7.141.
[425] Panel Report, *Canada – Welded Pipe*, para. 7.143.

1.8.8.2 "Adverse" facts available

343. In *US – Hot-Rolled Steel*, the United States authorities had resorted to "adverse" facts available to calculate the dumping margins of an exporter because the exporter had not cooperated in providing certain requested data. In this case, Japan had not contested the possibility of resorting to "adverse" facts available in case of non-cooperation by a party. Its claim was that the Japanese exporter concerned had cooperated and thus the United States authorities should have not declared them non-cooperating parties and thus used "adverse" facts available. The Panel focused its analysis on whether or not the Japanese exporter had cooperated without entering into an analysis of the compatibility of resorting to "adverse" effects with the Anti-Dumping Agreement. The Panel held that the authorities' conclusion that the exporter failed to "cooperate" in the investigation "did not rest on a permissible interpretation of that word".[426] The Appellate Body, which upheld the Panel's finding, indicated in a footnote to its Report, that "the term "adverse" does not appear in the *Anti-Dumping Agreement* in connection with the use of facts available. Rather, the term appears in the provision of the United States Code that applies to the use of facts available".[427] It however indicated that it would not consider "whether, or to what extent, it is permissible, under the *Anti-Dumping Agreement*, for investigating authorities consciously to choose facts available that are *adverse* to the interests of the party concerned"[428] The Appellate Body stressed that its analysis was circumscribed to using the term "adverse" facts available simply to denote that the authorities had drawn "an inference that was adverse to the interests of the non-cooperating party 'in selecting among the facts otherwise available'".[429] For its analysis of the term non-cooperation, see paragraphs 320-322 above.

1.8.9 Authorities' duty to inform on reasons for disregarding information

344. In *Argentina – Ceramic Tiles*, the Panel considered that "Article 6.8, read in conjunction with paragraph 6 of Annex II, requires an investigating authority to inform the party supplying information of the reasons why evidence or information is not accepted, to provide an opportunity to provide further explanations within a reasonable period, and to give, in any published determinations, the reasons for the rejection of evidence or information".[430]

345. In *Egypt – Steel Rebar*, the Panel considered that "the fact that an investigating authority may request information in several tranches during an investigation cannot, however, relieve it of its Annex II, paragraph 6 obligations in respect of the second and later tranches, as that requirement applies to 'information and evidence' without temporal qualification.[431]" [432]

346. The Panel in *Korea – Certain Paper* noted that "paragraph 6 does not … set out a procedure through which the interested party has to be notified of … rejection".[433]

347. In *Mexico – Steel Pipes and Tubes,* Guatemala claimed that the investigating authority never informed Tubac [the only identified exporter] that it had decided to reject Tubac's data in its entirety, and never gave Tubac an opportunity to provide further explanations and therefore Mexico violated paragraph 6 of Annex II.[434] The Panel recalled the well settled obligation under paragraph 6 in Annex II:

WTO - Internal

[426] Panel Report, *US – Hot-Rolled Steel*, para. 8.1(b).
[427] Appellate Body Report, *US – Hot-Rolled Steel,* footnote 45. "
[428] Appellate Body Report, *US – Hot-Rolled Steel*, fn 45.
[429] Appellate Body Report, *US – Hot-Rolled Steel*, fn 60.
[430] Panel Report, *Argentina – Ceramic Tiles*, para. 6.21.
[431] (*footnote original*) We do not mean to imply here that an interested party can impose on an investigating authority an Annex II, paragraph 6 requirement simply by submitting new information *sua sponte* during an investigation. Rather, the role of paragraph 6 of Annex II, namely that it forms part of the basis for an eventual decision pursuant to Article 6.8 whether or not to use facts available, makes it clear that its requirements to inform interested parties that information is being rejected and to give them an opportunity to provide explanations, pertain to "necessary" information in the sense of Article 6.8. As discussed above, "necessary" information is left to the discretion of the investigating authority to specify, subject to certain requirements, notably those in Annex II, paragraph 1.
[432] Panel Report, *Egypt – Steel Rebar*, para. 7.262.
[433] Panel Report, *Korea – Certain Paper*, para. 7.75.
[434] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.185.

> "[W]e recall that paragraph 6 of Annex II requires that the party supplying information that 'is not accepted' by the investigating authority must be 'informed forthwith of the reasons therefore' and given 'an opportunity to provide further explanations within a reasonable period'. The nature of this obligation is well settled[435], and the parties to this dispute do not disagree in this regard. Rather, their disagreement centres on whether – as a factual matter – Economía provided the requisite notification and opportunity to submit further explanations within the meaning of Annex II."[436]

348. In short, the Panel in *Mexico –Steel Pipes and Tubes,* found that the verification report did not satisfy the requirement in paragraph 6 of Annex II to notify the interested party of the decision to reject its information and of the reasons for doing so, and therefore, "by definition also could not satisfy the requirement to provide the interested party an opportunity to submit further explanations following the decision."[437]

1.8.10 No right to submit further information

349. The Panel in *Korea – Certain Paper* considered that what paragraph 6 requires is:

> "[T]hat the IA has to give the interested party whose information is rejected the opportunity to explain to the IA why the information has to be taken into consideration. This, in turn, would give the IA a second chance to review its decision to reject that information. Paragraph 6 does not, however, give the interested party a second chance to submit information. If paragraph 6 is interpreted to mean that each time there is a defect in the submitted information the interested party concerned has the right to submit further information, the investigation might carry on indefinitely."[438]

1.8.11 Confidential *versus* non-confidential information

350. In *Argentina – Ceramic Tiles*, Argentina had argued that the failure to provide a non-confidential summary which is sufficiently detailed to permit the calculation of normal value, export price and the margin of dumping amounts to a refusal to provide access to information that is necessary for the authority in the determination of a dumping margin determination. The Panel disagreed with Argentina and supported its position by reference to Article 6.5 of the Anti-Dumping Agreement which requires an investigating authority to treat information which is by nature confidential or which is provided on a confidential basis as confidential information and prescribes that such information shall not be disclosed without specific permission of the party submitting it. The Panel considered that it would be contradictory to suggest that the Anti-Dumping Agreement creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. It further concluded that nothing in this Article authorises a Member to disregard confidential information solely on the basis that the non-confidential summary does not permit dumping calculations:

> "In our view, the presence in [Article 6.5] the *AD Agreement* of a requirement to protect confidential information indicates that investigating authorities might need to rely on such information in making the determinations required under the *AD Agreement*. The *AD Agreement* therefore contains a mechanism that allows parties to provide investigating authorities with such information for the purposes of making their determinations, while ensuring that the information is not used for other purposes. In accordance with the accepted principles of treaty interpretation, we are to give meaning to all the terms of the Agreement. It would be contradictory to suggest that the *AD Agreement* creates a mechanism for the protection of confidential information, but precludes investigating authorities from relying on such information in making its determinations. If that were the case, then there would be no reason for the investigating authority to seek such information in the first place.
>
> …

[435] Panel Reports, *Argentina – Ceramic Tiles*, e.g. para. 6.21; *Egypt – Steel Rebar*, e.g. para. 7.262.
[436] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.186.
[437] Panel Report, *Mexico –Steel Pipes and Tubes*, para. 7.189.
[438] Panel Report, *Korea – Certain Paper*, para. 7.85.

WTO - Internal

> We are aware that, for the purpose of transparency, Article 6.5.1 obliges an authority to require the parties providing confidential information to furnish non-confidential summaries which shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. We consider that this is an important element of the *AD Agreement* which reflects the balance struck by the Agreement between the need to protect the confidentiality of certain information, on the one hand, and the need to ensure that all parties have a full opportunity to defend their interests, on the other. However, we see nothing in Article 6.5.1, nor elsewhere in Article 6.5, that authorizes a Member to disregard confidential information solely on the basis that the non-confidential summary of that information contains insufficient detail to permit authorities to calculate normal value, export price and the margin of dumping."[439]

351. The Panel in *Argentina – Ceramic Tiles* further referred to Article 12 of the Anti-Dumping Agreement, which sets forth requirements regarding the contents of public notices in confirmation of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information:

> "Thus, the transparency requirement which obligates the authority to explain its determination in a public notice is subject to the need to have regard to the requirement for the protection of confidential information of Article 6.5 of the *AD Agreement*. Confidentiality of the information submitted therefore limits the manner in which the authority explains its decision and supports its determination in a public notice. In sum, Article 12 implies, to our mind, that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information."[440]

352. The Panel, in *Argentina – Ceramic Tiles,* also found support for its view on the Appellate Body decision in *Thailand – H-Beams,* which addressed the question of the use of confidential information by the investigating authorities as a basis for its final determinations under Article 3 of the Anti-Dumping Agreement.

WTO - Internal

1.8.12 Scope of Panel's review: national authorities' justification at the time of its determination

353. With respect to the use of "best information available", the Panel in *Guatemala – Cement II* restricted the scope of its examination to the reasoning provided by Guatemala's authority in its determination, citing the finding of the Panel in *Korea – Dairy*.[441] The Panel stated that "[e]ven if the additional factors identified by Guatemala before the Panel could justify the use of 'best information available', such *ex post* justification by Guatemala should not form part of our assessment of the conduct of the Ministry leading up to the imposition of the January 1997 definitive anti-dumping measure."[442] Subject to this limitation, however, the Panel stated that "[a]n impartial and objective investigating authority could not properly rely on 'best information available' sales data for the original [period of investigation], simply on the basis of [the] failure [of the subject Mexican producer] to provide sales data for the extended [period of investigation]."[443]

1.8.13 Consistency of domestic legislation with Article 6.8 and Annex II

354. In *US – Steel Plate*, the Panel was asked to consider the consistency of United States law with Article 6.8 and Annex II of the Anti-Dumping Agreement. In reference to the existing jurisprudence on mandatory *versus* discretionary legislation[444], the Panel considered that the question before it was whether the US statutory provision at issue *required* the US authorities to

[439] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.34 and 6.38.
[440] Panel Report, *Argentina – Ceramic Tiles*, para. 6.36.
[441] Panel Report, *Korea – Dairy*, para. 7.67.
[442] Panel Report, *Guatemala – Cement II*, para. 8.245.
[443] Panel Report, *Guatemala – Cement II*, para. 8.254.
[444] The Panel also indicated that it kept "in mind that it is a well-accepted principle of international law that for the purposes of international adjudication national law is to be considered as a fact. Our analysis of the consistency of the US statute with the *AD Agreement* takes into account, therefore, the principles of statutory interpretation applied by the administering agency and judicial authorities of the United States". Panel Report, *US – Steel Plate*, paras. 7.88-7.90.

resort to facts available in circumstances other than the circumstances in which Article 6.8 and paragraph 3 of Annex II permit resort to facts available.[445] The Panel found that the "practice" of the US authorities concerning the application of "total facts available" was not a measure which can give rise to an independent claim of violation of the Anti-Dumping Agreement.[446]

1.8.14 Relationship with other paragraphs of Article 6

355. In *Guatemala – Cement II*, the Panel addressed Mexico's claim that Guatemala's investigating authority violated Articles 6.1, 6.2, 6.8 and Annex II(5) and (6) of the Anti-Dumping Agreement by rejecting certain technical accounting evidence submitted by the Mexican producer one day before the public hearing held by Guatemala's authority. See paragraph 55 above.

356. In *US – Hot-Rolled Steel*, the Appellate Body referred to Article 6.13 as support for its view that paragraphs 2 and 5 of Annex II call for a balance between the interests of investigating authorities and exporters as regards cooperation in anti-dumping investigations. See paragraph 329 above.

357. The Panel in *Argentina – Ceramic Tiles*, the Panel, when examining whether the investigating authorities were entitled to resort to facts available pursuant to Article 6.8, referred to Article 6.1 to support its conclusion that the investigating authorities could not do so when they did not clearly request the relevant information to the party in question. See paragraphs 3 above and 277 above. The Appellate Body in *US – Hot-Rolled Steel* further analysed the relationship of Article 6.8 and Annex II with Article 6.1.1. See paragraphs 9, 300 and 314 above.

358. The Panel, in *Argentina – Ceramic Tiles*, referred to Article 6.5 of the Anti-Dumping Agreement as support of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 350 above.

1.8.15 Relationship with other provisions of the Anti-Dumping Agreement

1.8.15.1 Relationship with Article 5.3

359. The Panel in *Korea – Certain Paper* disagreed with Korea's contention that in certain cases, the fulfilment of the obligation under Article 5.3 may also suffice to meet the requirements of paragraph 7 of Annex II, concluding that:

> "[T]he obligations set forth under Article 5.3 and paragraph 7 of Annex II are different. Firstly, these two sets of obligations apply at different stages of an investigation: Article 5.3 concerns the quality of the evidence that would justify the initiation of an investigation whereas paragraph 7 of Annex II has to do with the evidence on which the IA's final determination may be based. Secondly, the standards of these two obligations are different. The standard under Article 5.3 is that evidence be 'adequate and accurate' so as to justify initiation whereas paragraph 7 of Annex II requires that information from secondary sources be compared against that from other independent sources. We therefore do not agree with the view that the fulfilment of the obligation under Article 5.3 of the Agreement may in some cases also satisfy the requirements of paragraph 7 of Annex II. It may be the case that the obligation to corroborate under paragraph 7 may entail little substantive analysis in addition to the analysis carried out under Article 5.3 at the initiation stage. However, that does not make these two obligations the same from a procedural and substantive point of view. They are two distinct obligations that have to be observed by the IA at different stages of an investigation."[447]

[445] Panel Report, *US – Steel Plate*, para. 7.92.
[446] Panel Report, *US – Steel Plate*, para. 8.3.
[447] Panel Report, *Korea – Certain Paper*, para. 7.124

WTO - Internal

1.9 Article 6.9

1.9.1 General

360. The Panel in *Russia – Commercial Vehicles* cautioned against unduly narrowing the scope of a claim brought under Article 6.9 on the ground that certain facts not known to the interested parties were not identified in the complainant's panel request:

> "It is in the nature of a claim under Article 6.9 that a complaining party may not know everything that the investigating authority did not disclose. Indeed, in certain instances a complaining party may only become aware of non-disclosure of certain essential facts in the course of WTO dispute settlement, when it has access to a less-redacted published report. For this reason, a panel should exercise caution in unduly narrowing the scope of a claim under Article 6.9 on the basis that specific facts known to the investigating authority but not to the complaining party were not identified as undisclosed essential facts by the complaining party early in the dispute. This does not mean that a complaining party may expand the scope of its Article 6.9 claims as the case develops or is excused from providing the evidentiary basis for establishing its case, only that if a claim regarding non-disclosure of essential facts is properly before it, a panel should not *ex ante* exclude certain evidence and argument from consideration.
>
> …
>
> We further note that:
>
> a. the Russian Federation has been aware of the full scope of the European Union's claims under Article 6.9 since 15 September 2014 and at the latest 20 April 2016;
>
> b. the European Union raised these matters at the earliest opportunity after the Russian Federation submitted a less-redacted version of the Investigation Report as an exhibit in this dispute;
>
> c. the Russian Federation has been in full possession of all the evidence at issue since the beginning of the case; and
>
> d. the Russian Federation has had ample opportunity to respond to the arguments of the European Union, and has done so in considerable detail.
>
> Accordingly, we do not consider these additional allegations of undisclosed essential facts to constitute 'new claims', and will address them in our findings."[448]

361. The Panel in *Russia – Commercial Vehicles* stressed that the disclosure obligation under Article 6.9 applied to all interested parties, including those found to be non-cooperating in the relevant investigation.[449] The Panel in *China – Broiler Products (Article 21.5 – US)* reiterated the same view, and added that:

> "The facts that are 'essential' may vary from interested party to interested party, but it is not the characterization of the particular interested party as cooperating or not that determines whether facts are 'essential', but the relevance of those facts to the determinations to be made by the investigating authority."[450]

WTO - Internal

[448] Panel Report, *Russia – Commercial Vehicles*, paras. 7.259 and 7.261.
[449] Panel Report, *Russia – Commercial Vehicles*, para. 7.275.
[450] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.400.

1.9.2 "shall, before a final determination is made, inform all interested parties of the essential facts under consideration"

1.9.2.1 Means to inform all interested parties of the essential facts

362. In *Argentina – Ceramic Tiles*, the Panel, further to noting that Article 6.9 does not prescribe the manner in which the investigating authority is to comply with the disclosure obligation, provided some examples of how investigating authorities may comply with this requirement:

> "We agree with Argentina that the requirement to inform all interested parties of the essential facts under consideration may be complied with in a number of ways. Article 6.9 of the *AD Agreement* does not prescribe the manner in which the authority is to comply with this disclosure obligation. The requirement to disclose the 'essential facts under consideration' may well be met, for example, by disclosing a specially prepared document summarizing the essential facts under consideration by the investigating authority or through the inclusion in the record of documents – such as verification reports, a preliminary determination, or correspondence exchanged between the investigating authorities and individual exporters – which actually disclose to the interested parties the essential facts which, being under consideration, are anticipated by the authorities as being those which will form the basis for the decision whether to apply definitive measures. This view is based on our understanding that Article 6.9 anticipates that a final determination will be made and that the authorities have identified and are considering the essential facts on which that decision is to be made. Under Article 6.9, these facts must be disclosed so that parties can defend their interests, for example by commenting on the completeness of the essential facts under consideration."[451]

363. In the dispute on *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina),* Argentina claimed that the USDOC had acted inconsistently with Article 6.9 by not disclosing to the Argentine exporters "the essential facts that formed the basis of its decision to continue the measure at issue". The United States contended that Argentina had not made a prima facie case because it had not proven this information "constituted essential facts within the meaning of Article 6.9."[452] The Panel agreed with the United States:

> "Given that the obligation under Article 6.9 applies to essential *facts* and that the two memoranda cited by Argentina contain the USDOC's reasoning regarding the data submitted by the Argentine exporters, we reject Argentina's claim under Article 6.9."[453]

364. The Panel in *China – Broiler Products (Article 21.5 – US)* noted that:

> "Article 6.9 does not set out rules or any guidance on how all interested parties are to be informed of the essential facts. In these circumstances, the investigating authority has a large margin of discretion."[454]

1.9.2.2 "the essential facts … which form the basis for the decision whether to apply definitive measures"

365. The Panel in *Argentina – Poultry Anti-Dumping Duties* stated that facts which do not form the basis for the decision whether to apply definitive measures cannot be considered to be "essential facts" within the meaning of Article 6.9 of the *AD Agreement.* The Panel was thus of the view that data which "is not going to be relied on in making a final determination is not a fact which forms the basis for the decision whether to apply definitive measures".[455] In other words, while the Panel accepted that normal value and export price data ultimately used in the final determination are

[451] Panel Report, *Argentina – Ceramic Tiles*, para. 6.125.
[452] Panel Report, *US– Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.149.
[453] Panel Report, *US - Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 7.150.
[454] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.370.
[455] Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.224.

WTO - Internal

essential facts which form the basis for the decision whether to apply definitive measures, "the fact that certain normal value and export price data is not going to be used is not".[456]

366. The Panel in *Argentina – Poultry Anti-Dumping Duties* further considered that the term "essential facts" refers to "factual information" rather than "reasoning". In the Panel's view, the failure to inform an interested party of the reasons why the authority failed to use certain data does not equate to a failure to inform an interested party of an essential fact:

> "We do not believe that the ordinary meaning of the word 'fact' would support a conclusion that Article 6.9, when using the term 'fact', refers not only to 'facts' in the sense of 'things which are known to have occurred, to exist or to be true', but also to 'motives, causes or justifications'."[457]

367. Noting that Article 6.9 requires the investigating authority to disclose the essential facts establishing the basis of its final determination whether to apply definitive measures in an investigation, the Panel in *Korea – Certain Paper* explained that "the obligation under Article 6.9 is one that requires the IA to make a one-time disclosure and that is before a final determination is made as to whether or not a definitive measure will be applied."[458] In the view of the Panel in *Korea – Certain Paper (Article 21.5 – Indonesia)*, Article 6.9 provided a one-time disclosure requirement that contained the "essential facts" under consideration regarding the authorities' decision on whether to apply definitive measures. The scope of the obligation excluded the reasoning of the authorities or their intention as to how certain determinations were made.[459]

368. The Appellate Body in *China – GOES* explained the difference between the disclosure obligation under Article 6.9 and the public notice obligation under Article 12.2.2 of the Anti-Dumping Agreement:

> "At the heart of Articles 6.9 and 12.8 is the requirement to disclose, before a final determination is made, the essential facts under consideration *which form the basis for* the decision whether or not to apply definitive measures. As to the type of information that must be disclosed, these provisions cover 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping and/or countervailing duties. We highlight that, unlike Articles 12.2.2 of the *Anti-Dumping Agreement* and 22.5 of the *SCM Agreement*, which govern the disclosure of matters of fact and law and reasons at the conclusion of anti-dumping and countervailing duty investigations, Articles 6.9 and 12.8 concern the disclosure of 'facts' in the course of such investigations 'before a final determination is made'."[460]

WTO - Internal

369. In *China – GOES*, the Appellate Body pointed out that the scope of the disclosure obligation under Article 6.9 is determined by the substantive determinations that an investigating authority has to make in order to impose a definitive anti-dumping measure:

> "Thus, we understand the 'essential facts' to refer to those facts that are significant in the process of reaching a decision as to whether or not to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome. An authority must disclose such facts, in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures. In our view, disclosing the essential facts under consideration pursuant to Articles 6.9 and 12.8 is paramount for ensuring the ability of the parties concerned to defend their interests.
>
> We agree with the Panel that, '[i]n order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link' between the dumping or subsidization and the injury to the domestic industry. What constitutes an 'essential fact' must

[456] Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.224.
[457] Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.225.
[458] Panel Report, *Korea – Certain Paper*, para. 7.204.
[459] Panel Report, *Korea – Certain Paper*, (*Article 21.5 – Indonesia)*, paras. 6.91-6.92.
[460] Appellate Body Report, *China – GOES*, para. 240.

> therefore be understood in the light of the content of the findings needed to satisfy the substantive obligations with respect to the application of definitive measures under the *Anti-Dumping Agreement* and the *SCM Agreement*, as well as the factual circumstances of each case."[461]

370. In *China – GOES*, the Panel found a violation of Article 6.9 because the investigating authority's failed to disclose the basis on which the "all others" dumping rate had been calculated. In so finding, the Panel also held that the disclosure obligation under Article 6.9 continued to apply even if the information at issue was of confidential nature:

> "Further, MOFCOM revealed that it relied upon certain facts submitted by the respondents in finding the existence of dumping by 'all other' exporters at a margin of 64.8%. However, MOFCOM did not disclose the particular information from the respondents upon which the dumping margin was based. In the circumstances of this case, some indication of the information from the respondents which formed the basis of the 'all others' dumping rate seems particularly important given the large disparity between the 'all others' rate and the rates for the respondents. It is certainly not self-evident how such a large disparity could have arisen, in circumstances where the rates were apparently based upon the same set of facts. In our view, some disclosure in this regard to allow the United States to defend its interests was required under Article 6.9 of the Anti-Dumping Agreement.
>
> Therefore, in our view, when information is both confidential but also part of the 'essential facts under consideration', the obligation to disclose the information is nevertheless binding. However, where the party submitting the confidential information does not give permission for the information to be disclosed, the investigating authority could meet its obligations under Article 6.9 through the use of non-confidential summaries of the 'essential' but confidential facts. Therefore, in our view, a non-confidential summary of the information from the respondents which formed the factual basis of the 'all others' dumping rate should have been prepared and disclosed for the purposes of Article 6.9 of the Anti-Dumping Agreement."[462]

371. The Panel in *China – Broiler Products* clarified what an Article 6.9 disclosure should convey with regard to dumping margins calculated on the basis of facts available:

> "Interpreting Article 6.9 in the light of Article 6.8, the 'essential facts' that MOFCOM was expected to disclose include: (i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information. In our view, the above information is facts under consideration in MOFCOM's determination to apply facts available. Furthermore, this information formed the basis for MOFCOM's determination, on the basis of facts available, of the 'all others' rate of 105.4%; therefore, it was essential for the interested parties to know whether the authority's application of facts available conformed to the requirements of Article 6.8 and to properly defend their interests in this regard."[463]

372. The Panel in *China – GOES* rejected the argument that Article 6.9 did not require further disclosure of a fact on which interested parties did not make comments following the preliminary determination:

> "At the outset, we recall China's argument that it did not need to provide further disclosure regarding non-subject imports following the preliminary determination because the interested parties made no further arguments on the issue. The Panel does not find this line of reasoning convincing. Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement are not a means by which authorities respond to arguments made by interested parties. Rather, the provisions allow interested parties

[461] Appellate Body Report, *China – GOES*, paras. 240-241.
[462] Panel Report, *China – GOES*, paras. 7.409-7.410. See also Panel Report, *Russia – Commercial Vehicles*, para. 7.268.
[463] Panel Report, *China – Broiler Products*, para. 7.317.

WTO - Internal

> to 'defend their interests' through review and response to the essential facts under consideration disclosed by the investigating authorities. Indeed, the ability of an interested party to submit arguments on the facts under consideration is dependent upon adequate disclosure of those facts. Consequently, if the requirement for an investigating authority to disclose information under Articles 12.8 and 6.9 were not triggered until interested parties submitted arguments, the provisions may become meaningless. Further, in relation to the argument that the interested parties could have consulted publicly available information regarding the non-subject imports of GOES into the Chinese market, the Panel notes that the obligations under Articles 12.8 and 6.9 fall upon investigating authorities and do not make any distinction between confidential and publicly available facts. It is not for a respondent to guess at and research the information being considered by an investigating authority.
>
> Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement require investigating authorities to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures'. In order to apply definitive measures at the conclusion of countervailing and anti-dumping investigations, an investigating authority must find dumping or subsidization, injury and a causal link. Therefore, the 'essential facts' underlying the findings and conclusions relating to these elements form the basis of the decision to apply definitive measures and should be disclosed."[464]

373. As to whether the disclosure obligation under Article 6.9 applies to essential facts that were actually under consideration by the investigating authority or to those that should have been considered by a reasonable investigating authority, the Panel in *China – GOES* held:

> "In considering the disclosure obligations under Articles 12.8 of the SCM Agreement and 6.9 of the Anti-Dumping Agreement, the question arises regarding whether the 'essential facts' are the facts that were actually under consideration by the investigating authority, or the facts that should have been considered by a reasonable investigating authority, depending upon the substantive obligations at issue. In this respect, the Panel interprets Articles 12.8 and 6.9 as requiring an investigating authority to disclose those facts that are actually under consideration by it (i.e. the body of facts before it). We find support for this in the text of the provisions, which state that the disclosure requirement applies to the 'essential facts under consideration', rather than the essential facts that should reasonably be considered in resolving a claim. If the standard were otherwise, claims under Articles 12.8 and 6.9 may be difficult to distinguish from substantive claims relating to the application of definitive measures. Finally, the purpose of the disclosure in Articles 12.8 and 6.9 is to allow parties to 'defend their interests'. In order for this to be meaningful, the actual facts under consideration are the relevant facts to be disclosed, so that omissions or the use of incorrect facts can be challenged."[465]

374. The Panel in *China – X-Ray Equipment* explained that whether a fact is an essential fact within the meaning of Article 6.9 depends on its role in the decision-making process of the investigating authority.[466] The Panel added that even if the substantive obligation under Article 3.2 of the Anti-Dumping Agreement is to "consider" the price effects of dumped imports, "the facts underlying that 'consideration' nevertheless constitute 'essential facts' within the meaning of Article 6.9 of the Anti-Dumping Agreement".[467] Similarly, the Panel pointed out that "the transaction-specific price and adjustment data that are developed and used by the investigating authority for the purpose of establishing a margin of dumping constitute 'essential facts' within the meaning of Article 6.9."[468] However, the Panel rejected the argument that Article 6.9 required an investigating to disclose the actual dumping calculations for exporting companies.[469]

WTO - Internal

[464] Panel Report, *China – GOES*, paras. 7.651-7.652.
[465] Panel Report, *China – GOES*, para. 7.653.
[466] Panel Report, *China – X-Ray Equipment*, para. 7.403.
[467] Panel Report, *China – X-Ray Equipment*, para. 7.406.
[468] Panel Report, *China – X-Ray Equipment*, para. 7.417.
[469] Panel Report, *China – X-Ray Equipment*, para. 7.420.

375. In *China – Broiler Products*, the Panel agreed with the point of view that Article 6.9 does not require the disclosure of all facts or the investigating authority's reasoning. The Panel stressed, however, that "'essential facts' are not simply the disclosure that a determination has been made, but rather the data that are the basis of the determination. Therefore, a declaration of the weighted-average dumping margin for a particular model will not suffice as a disclosure of essential facts under Article 6.9 without being accompanied by the data relied upon to reach that conclusion".[470] The Panel then went on to explain the kinds of information that an authority has to disclose pursuant to Article 6.9 in connection with its dumping determination:

> "Bearing in mind the requirements of Article 2, we find that in the context of the determination of dumping, the essential facts which must be disclosed include the underlying data for particular elements that ultimately comprise normal value (including the price in the ordinary course of trade of individual sales of the like product in the home market or, in the case of constructed normal value, the components that make up the total cost of production, selling and general expenses, and profit); export price (including any information used to construct export price under Article 2.3); the sales that were used in the comparisons between normal value and export price; and any adjustments for differences which affect price comparability. Such data form the basis for the calculation of the margin of dumping, and the margin established cannot be understood without such data. Furthermore, the comparison of home market and export sales that led to the conclusion that a particular model or the product as a whole was dumped, and how that comparison was made, would also have to be disclosed. In our view, a proper disclosure of the comparison would require not only identification of the home market and export sales being used[471], but also the formula being applied to compare them. What formula was applied is an essential element of a comparison of normal value to export price and is just as fundamental to an understanding of the establishment of the margin of dumping as the data reflecting the individual sales. The disclosure of the formulas applied is necessary to enable the respondent to comment on the completeness and correctness of the conclusions the investigating authority reached from the facts being considered, provide additional information or correct perceived errors, and comment on or make arguments as to the proper interpretation of those facts. Without these formulas, a respondent would have an insufficient understanding of what the authority has done with its information and how that information was being used to determine the dumping margin."[472]

WTO - Internal

376. The Panel in *China – Broiler Products* expressed disagreement with the finding of the panel in *China – X-Ray Equipment* to the extent the latter's finding "were to stand for the premise that the investigating authority does not have to disclose the formula used to make the calculations".[473] The Panel in *China – Broiler Products (Article 21.5 – US)* reiterated the view that Article 6.9 requires disclosure of the data and formulae underlying dumping calculations, but not the calculations themselves.[474]

377. The Panel in *China – Broiler Products* found that "where the essential facts the investigating authority is referring to are in the possession of the respondent in the form of their own questionnaire responses, a narrative description of what data was used from which sources cannot *ipso facto* be considered insufficient disclosure".[475] The Panel in *China – HP-SSST (Japan) / China – HP-SSST (EU)* agreed with this view:

> "Previous WTO dispute settlement proceedings have established that the basic data underlying an investigating authority's dumping determination constitute 'essential facts' within the meaning of Article 6.9. We agree. In addition, the panel in *China – Broiler Products* found that a narrative description of the data used cannot *ipso facto* be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the respondent. We agree. In cases where the relevant

[470] Panel Report, *China – Broiler Products*, para. 7.90.

[471] *(footnote original)* This identification could take the form of a spreadsheet or list containing the sales data or a narrative description that would enable the exporter to understand precisely which sales were used.

[472] Panel Report, *China – Broiler Products*, para. 7.91.

[473] Panel Report, *China – Broiler Products*, para. 7.92. See also Panel Report, *China – Autos (US)*, para. 7.73.

[474] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.376-7.378.

[475] Panel Report, *China – Broiler Products*, para. 7.95.

> essential facts are already in the possession of the respondents, we do not consider that Article 6.9 requires investigating authorities to prepare disclosures containing the entirety of the essential facts under consideration. In particular, we do not consider that the authority need necessarily disclose a spread sheet 'duly completed with the data actually relied on by the investigating authority', as suggested by the European Union. While this would be one way of complying with Article 6.9, a narrative description would also suffice in the appropriate circumstances, provided that such description does not leave uncertainty as to the essential facts under consideration."[476]

378. The Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, however, disagreed with this finding. In explaining its views on the scope of the disclosure obligation under Article 6.9 with regard to information already in the possession of interested parties, the Appellate Body stressed that this provision requires disclosure of essential facts that form the basis for the decision whether to apply definitive measures:

> "While the Panel's reading of the scope and meaning of Article 6.9 is not entirely clear, it appears to us that the Panel considered that a determination of whether an investigating authority has complied with its obligations under that provision hinges largely on whether the essential facts under consideration by the investigating authority were in the possession of an interested party affected by the determination. However, contrary to what the Panel stated, it does not suffice for an investigating authority to disclose 'the essential facts under consideration' but, rather, it must disclose the essential facts under consideration that '*form the basis for the decision* whether to apply definitive measures'. To the extent that the Panel suggested that a narrative description of the data used would constitute sufficient disclosure simply because the essential facts that the authority is referring to 'are in the possession of the respondent', we disagree. Instead, we agree with the European Union that, 'when the investigating authority has *selected* from amongst the facts originally provided by the interested party, [that] party has no way of knowing which facts have been selected.' We do not see how the mere fact that the investigating authority may be referring to data that are in the possession of an interested party would mean that it has disclosed the essential facts 'that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome … in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures', and to defend its interests."[477]

379. The Panel in *US – OCTG (Korea)* distinguished between information and an investigating authority's procedural decisions to accept or use certain information, and found that the latter does not fall within the scope of the Article 6.9 obligation:

> "We recall that what facts are essential is decided by reference to the determinations that must be made by the investigating authority. In the context of Article 2.2.2(iii), the essential facts were those that were under consideration as forming the basis for the USDOC's CV profit determination. While *data* which is used in the CV profit determination is substantively relevant to that determination, the fact of *acceptance of that data on the record* is not. This is because the fact of acceptance of data on the record, unlike the data itself, cannot be used in making the CV profit determination. The fact of acceptance of a submission on the record, even given that the submission contained the Tenaris profit data that was ultimately relied on, is not required to understand the basis for the USDOC's CV profit determination, because the fact of acceptance of the submission on the record has no substantive relevance to the CV profit determination. We do not consider that the fact of acceptance of the Tenaris profit data on the record was substantively relevant to the *content of the USDOC's findings* on the CV profit and therefore, to the content of its findings on the dumping margin. The fact of acceptance of the Tenaris profit data therefore did not *underlie* the USDOC's final findings and conclusions in respect of any of the three essential elements –

[476] Panel Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 7.235.
[477] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.133. See also Panel Report, *Russia – Commercial Vehicles*, para. 7.277.

WTO - Internal

> dumping, injury and causation – that must be present for application of definitive anti-dumping measures."[478]

380. The Panel in *Russia – Commercial Vehicles* noted that the process of reaching a decision in an anti-dumping investigation had three constituent elements, namely, dumping, material injury and causation, and stated that therefore the disclosure under Article 6.9 should contain all facts that are significant, important or salient in respect of these three elements. In the Panel's view, this included injury factors not cited in Article 3.4 but which were relevant to the injury determination in the relevant investigation:

> "A fact is essential if it is 'significant, important or salient' or 'indispensable' in the process of reaching a decision as to whether or not to apply definitive measures. That 'process' has three principal constituent elements: dumping, material injury and causation. Each of these constituent elements has, in turn, specific analytical and evidentiary requirements. A fact is essential where it is 'significant, important or salient' in respect of a requirement under any of the three elements. Accordingly, even if we were to agree with the Russian Federation that the facts at issue were not 'central to the conclusion of injury', that does not end the analysis as to whether they are 'essential facts' within the meaning of Article 6.9. In this instance, the Russian Federation does not dispute that **[***]** are required elements in evaluating the injury factors under Article 3.4. Facts that are 'significant, important or salient' in conducting required analyses are 'essential facts' whether or not they are 'central' to the final injury determination. For this reason, we find that the facts at issue, that is, the figures related to investments, the return on investments, the actual and potential negative effects on cash flow and the ability to raise capital or investments are essential facts subject to the disclosure requirements of Article 6.9.
>
> Finally, we agree with the Russian Federation that some of the **[***]** does not relate directly to the specific factors listed in Article 3.4. However, we recall that Article 3.4 requires an analysis of "all relevant economic factors and indices" including the listed fifteen specific factors. The information at issue is in our view salient to the analysis of relevant economic factors and therefore constitutes essential facts subject to the disclosure requirement of Article 6.9."[479]

WTO - Internal

381. In *Russia – Commercial Vehicles*, the Appellate Body considered several aspects of the Panel's analysis under Article 6.9, including the Panel's statement that Article 6.9 does not require the disclosure of methodologies because they do not constitute "facts" or "essential facts", and the Panel's finding that the source of information in itself and the source of information with respect to import volumes and values used by the DIMD in this case do not constitute essential facts. The Appellate Body disagreed with the Panel, and explained that whether or not a methodology and/or source of information constitute "essential facts" depends on the circumstances:

> "As we have noted, in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stated that, with respect to the determination of dumping, an investigating authority is expected 'to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, and the calculation methodology applied by the investigating authority to determine the margin of dumping.' The Appellate Body thus found that, in that dispute, the calculation methodology used by the investigating authority to determine the margin of dumping constituted an essential fact within the meaning of Article 6.9 of the Anti-Dumping Agreement. We note, in this respect, that disclosure of the data underlying a dumping determination alone may not enable an interested party to defend its interests, unless that interested party was also informed of the methodology applied by the investigating authority to determine the margin of dumping. At the same time, not all methodologies used by an investigating authority may constitute essential facts within the meaning of Article 6. Rather, only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests would be essential facts under Article 6.9. An assessment of whether a particular methodology constitutes an essential fact should therefore be made

[478] Panel Report, *US – OCTG (Korea)*, para. 7.238.
[479] Panel Report, *Russia – Commercial Vehicles*, paras. 7.263-7.264.

> on a case-by-case basis. Consequently, we disagree with the Panel's statement to the extent that the Panel considered that a methodology cannot constitute an 'essential fact' under Article 6.9 of the Anti-Dumping Agreement.
>
> …
>
> We recall that the scope of Article 6.9 'cover[s] 'facts under consideration', that is, those facts on the record that may be taken into account by an authority in reaching a decision as to whether or not to apply definitive anti-dumping … duties.' An assessment of whether a particular fact is essential will depend on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case. The Appellate Body has previously emphasized that the disclosure of essential facts should 'permit an interested party to understand the basis for the decision whether or not to apply definitive measures' and enable an interested party to defend itself. In certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. Thus, knowing the source of data may be pivotal to the ability of an interested party to defend itself. In particular, knowing the source of information may enable the party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources for that information. This may be particularly important in the circumstances where the investigating authority uses data that was not submitted by an interested party, but obtained from other sources (e.g. from a customs or statistical database)."[480]

382. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* stated that where an investigating authority resorts to facts available, its disclosure of essential facts under Article 6.9 of the Anti-Dumping Agreement should include:

> "(i) the precise basis for its decision to resort to facts available, such as the failure by an interested party to provide the information that was requested; (ii) the information which was requested from an interested party; and (iii) the facts which it used to replace the missing information."[481]

383. In *China — AD on Stainless Steel (Japan),* the Panel stated that the Article 6.9 disclosure obligation continues to apply where essential facts to be disclosed are confidential. In so finding, however, the Panel distinguished the obligation under Article 6.9 from the obligation under Article 6.4:

> "[I]n the absence of sufficient arguments from Japan challenging the confidential treatment of the expenses of the domestic production companies, we must presume that the expenses of these companies constituted confidential information that MOFCOM could not disclose. However, an investigating authority is not exempted from its disclosure obligations under Article 6.9 when the essential facts in question are confidential. Instead, an investigating authority may meet its disclosure obligations by providing non-confidential versions of the confidential information. But this does not mean that an investigating authority necessarily has to include, as part of its Article 6.9 disclosure, all evidence that was on the non-confidential file of the investigating authority (which interested parties had access to). Indeed, as we noted above, Article 6.9 is not meant to duplicate the requirements of Article 6.4, which requires that investigating authorities provide, whenever practicable, timely opportunities to interested parties to see information that is relevant to the presentation of their case."[482]

384. The Panel in *China — AD on Stainless Steel (Japan),* the Panel rejected Japan's argument that MOFCOM had not complied with Article 6.9 by failing to disclose separate data for billets (slabs), coils, and plates that comprised the product under consideration.[483] In reaching this conclusion, the

[480] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.218 and 5.220.
[481] Panel Report, *Morocco - Hot-Rolled Steel (Turkey)*, para. 7.115.
[482] Panel Report, *China — AD on Stainless Steel (Japan),* para. 7.361.
[483] Panel Report, *China — AD on Stainless Steel (Japan),* para. 7.370.

WTO - Internal

Panel noted that "there is no requirement in the Anti-Dumping Agreement to separately consider the production data of each constituent of the domestic like product".[484]

1.9.2.3 Relevance of the fact that information is made available in the authorities' record

385. In *Guatemala – Cement II*, the Panel considered that, although the essential facts under consideration may be available in the authorities' file, interested parties with access to that file will not know whether or which particular information in that file forms the basis of the authorities' determination. In the Panel's view, one purpose of Article 6.9 is to resolve this problem. Accordingly, the Panel rejected Guatemala's argument that interested parties had been informed that a certain directorate would make a technical study on the basis of the evidence in the file, and that copies of the file had been available. The Panel explained:

> "We note that an investigating authority's file is likely to contain vast amounts of information, some of which may not be relied on by the investigating authority in making its decision whether to apply definitive measures. For example, the file may contain information submitted by an interested party that was subsequently shown to be inaccurate upon verification. Although that information will remain in the file, it would not form the basis of the investigating authority's decision whether to apply definitive measures. The difficulty for an interested party with access to the file, however, is that it will not know whether particular information in the file forms the basis of the authority's final determination. One purpose of Article 6.9 is to resolve this difficulty for interested parties. … An interested party will not know whether a particular fact is 'important' or not unless the investigating authority has explicitly identified it as one of the 'essential facts' which form the basis of the authority's decision whether to impose definitive measures."[485]

386. In support of its rejection of Guatemala's argument that it had disclosed the facts forming the basis of its definitive determination by merely allowing access to the file, the Panel referred to Article 6.4 and found that if Guatemala's interpretation were accepted, there would be "little, if any, practical difference between Article 6.9 and Article 6.4":

> "Furthermore, if the disclosure of 'essential facts' under Article 6.9 could be undertaken simply by providing access to all information in the file, there would be little, if any, practical difference between Article 6.9 and Article 6.4. Guatemala is effectively arguing that it complied with Article 6.9 by complying with Article 6.4, *i.e.*, by providing 'timely opportunities for interested parties to see all information that is relevant to the presentation of their cases … and that is used by the authorities …'. We do not accept an interpretation of Article 6.9 that would effectively reduce its substantive requirements to those of Article 6.4. In our view, an investigating authority must do more than simply provide 'timely opportunities for interested parties to see all information that is relevant to the presentation of their cases … and that is used by the authorities …' in order to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures'."[486]

1.9.2.4 Failure to inform the changes in factual foundation from a preliminary determination to final determination

387. In *Guatemala – Cement II*, Mexico claimed that Guatemala's authority acted inconsistently with Article 6.9 by failing to inform the Mexican producer subject to investigation of the "essential facts under consideration". In response, Guatemala first argued that the "essential facts under consideration" had been disclosed to interested parties in a detailed report setting out its authority's preliminary determination. The Panel rejected Guatemala's argument, pointing out, among other things, that while the preliminary determination had been based on a threat of material injury, the final determination was based on actual material injury:

[484] Panel Report, *China — AD on Stainless Steel (Japan),* para. 7.370.
[485] Panel Report, *Guatemala – Cement II*, para. 8.229.
[486] Panel Report, *Guatemala – Cement II*, para. 8.230.

WTO - Internal

> "Article 6.9 provides explicitly for disclosure of the 'essential facts … which form the basis for the decision whether to apply *definitive* measures' (emphasis supplied). Disclosure of the 'essential facts' forming the basis of a preliminary determination is clearly inadequate in circumstances where the factual basis of the provisional measure is significantly different from the factual basis of the definitive measure. In the present case, the preliminary measure was based on a preliminary determination of *threat* of material injury, whereas the final determination was based on *actual* material injury. Furthermore, the Ministry's preliminary determination (16 August 1996) was based on a [period of investigation ('POI')] different from that used for its final determination, since the POI was extended on 4 October 1996. Indeed, Guatemala has cited the United States' assertion that '[i]n the course of an anti-dumping investigation, the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination'. If the bulk of the evidence which forms the basis of the final determination is generally gathered after the preliminary determination, we fail to see how disclosure of the 'essential facts' forming the basis of the preliminary determination could amount to disclosure of the 'essential facts' forming the basis of the final determination, since the 'bulk' of the 'essential facts' underlying the final determination would not yet have been gathered. In these circumstances, we do not consider that the Ministry could satisfy the Article 6.9 obligation to 'inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures' by providing disclosure of the essential facts forming the basis of its preliminary determination."[487]

388. In *Guatemala – Cement II*, the Panel rejected Mexico's claim that Guatemala's authority was in violation of Articles 6.1, 6.2 and 6.9 by changing its injury determination from a preliminary determination of threat of material injury to a final determination of actual material injury during the course of the investigation, without informing the Mexican producer of that change, and without giving the producer a full and ample opportunity to defend itself. After considering Article 12.2, the Panel explained with regard to Article 6.9, as follows:

> "We note that Articles 6.1 and 6.9 impose certain obligations on investigating authorities in respect of 'information', 'evidence' and 'essential facts'. However, Mexico's claim does not concern interested parties' right to have access to certain factual information during the course of an investigation. Mexico's claim concerns interested parties' alleged right to be informed of an investigating authority's legal determinations during the course of an investigation."[488]

389. The Panel in *EC – Salmon (Norway)* noted that a change in outcome did not trigger a requirement for any additional disclosure under Article 6.9:

> "How an investigating authority undertakes to disclose the essential facts does not change the nature of the obligations under Article 6.9. The second sentence of Article 6.9 makes clear that the disclosure of essential facts must be in sufficient time to allow parties to defend their interests. In our view, this must entail the possibility that, whatever decision may have possibly been foreseen or foreseeable at the time of disclosure, the ultimate decision may be a different one, based on the defence of parties' interests following that disclosure. Clearly, the investigating authority must, in making its decision whether to apply definitive measures, take into account whatever information or argument parties submit subsequent to disclosure to defend their interests. The alternative would render meaningless the right of parties to receive disclosure of essential facts in sufficient time to defend their interests. However, we do not consider that this possible change of outcome triggers a requirement for additional disclosure under Article 6.9. Thus, the fact that the EC undertakes disclosure by providing a draft definitive regulation does not mean that, should the investigating authority ultimately issue a determination that differs in some respect from the draft, an additional disclosure is required. Such a change in the ultimate determination is presumably what is envisioned by the right given to parties to defend their interests after the disclosure. The manner in which the EC chooses to provide disclosure does not

[487] Panel Report, *Guatemala – Cement II*, para. 8.228.

[488] Panel Report, *Guatemala – Cement II*, para. 8.238. In regard to the Panel's finding regarding the claims under Articles 6.1 and 6.2, see the excerpts quoted in paragraphs 9 and 62 above.

WTO - Internal

> limit the investigating authority's obligation to take into account comments and information submitted by interested parties after disclosure, and the concomitant possibility that the investigating authority may issue a definitive regulation that differs, even in material respects, from that provided in draft form as part of the Article 6.9 disclosure.
>
> …
>
> In our view, this sequence of events demonstrates precisely the purpose of Article 6.9. Following the definitive disclosure, the investigating authority received further information which prompted it to a re-consideration and adjustment of its views, resulting in a different determination that than indicated in the draft definitive regulation at the time of the Article 6.9 disclosure. Norway's argument would presumably require the investigating authority to disclose whatever new information was provided, on the premise that the different result demonstrates that the new information constituted 'essential facts' within the meaning of Article 6.9. Article 6.9 would then mandate a further opportunity for interested parties to defend their interests, and an endless stream of disclosures and comments could ensue. Norway's position would result in an impossible situation for investigating authorities, which must complete the investigation within the time limits set out in Article 5.10 of the AD Agreement. Norway suggests that this could only happen because the investigating authority decided that different facts were essential to its determination, and that disclosure of these previously undisclosed essential facts is required. … Norway's view confuses the essential facts with the facts supporting the decision.
>
> …
>
> We do not consider that every element of factual evidence considered by the investigating authority must be disclosed, or that every fact disclosed must be footnoted to the specific source information before the investigating authority. We can see nothing in Article 6.9 which would require any particular form of disclosure, or any particular degree of precision in tying facts to the information before the investigating authority. While it would certainly be useful for the investigating authority to indicate to interested parties the information before the investigating authority on which a disclosed essential fact is based, we cannot conclude that this is required."[489]

WTO - Internal

390. The Panel in *Ukraine – Ammonium Nitrate* considered that the sufficiency of the time that investigating authorities give to parties "to comment on the disclosure has to be assessed on a case-by-case basis considering, *inter alia*, the nature and complexity of the issues to which the parties have to respond in order to defend their interest".[490]

391. The Panel in *Morocco – Hot-Rolled Steel (Turkey)* declined to "determine in the abstract, based on a specific minimum number of days for giving comments, whether interested parties were afforded sufficient opportunity to defend their interests".[491] The Panel found that in the underlying investigation there was no violation of the "sufficient time" requirement of Article 6.9 of the Anti-Dumping Agreement, noting that "underlying documents were made available with only five working days to comment does not demonstrate that the producers could not comment on, challenge, or provide additional information in respect of the essential facts, such that they were unable to defend their interests".[492]

392. The Panel in *EU – Footwear (China)* held that the EU investigating authority was not required to provide sufficient time for comments under Article 6.9 for an additional disclosure conveying the recalculation of certain dumping margins:

> "Having reviewed the documents in question, we consider that the Additional Final Disclosure Document reflects that, having considered comments by the interested parties on the Final General Disclosure, the Commission reassessed facts and

[489] Panel on *EC – Salmon (Norway)*, paras. 7.799, 7.802, and 7.808.
[490] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.251
[491] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.135.
[492] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, para. 7.136.

arguments, revised calculations, and concluded that a different form and level of anti-dumping duties than that foreshadowed in the Final General Disclosure was appropriate. In these circumstances, we conclude that simply because the European Union chose to disclose the revised section of the proposed definitive regulation does not mean that it was required to do so, and therefore does not mean that the Additional Final Disclosure triggered the obligation to provide a sufficient time for comment under Article 6.9 of the AD Agreement.

China's position would require the investigating authority to disclose whatever specific information it took into consideration in revising the form and level of the measures proposed, on the premise that the different result demonstrates that 'new' information was taken into account which constituted 'essential facts' within the meaning of Article 6.9. Article 6.9 would then mandate a further opportunity for interested parties to defend their interests, and an endless stream of disclosures and 'sufficient time' for comments could ensue. This could well result in an impossible situation for investigating authorities, which must complete the investigation within the time limits set out in Article 5.10 of the AD Agreement. Like the panel in *EC – Salmon (Norway)*, we do not accept that this is an appropriate understanding of the requirements Article 6.9.

Finally, even assuming that the Additional Final Disclosure Document did constitute a disclosure of 'essential facts under consideration which form the basis for the decision whether to apply definitive measures', we recall that interested parties were, in fact, given an opportunity to submit comments. … While it may well be, as China asserts, that the Additional Final Disclosure Document contained complex calculations, there is no support for a conclusion that this document was more complex than the original disclosure, and China does not argue otherwise. China has made no other arguments suggesting that the time allowed for comments was insufficient. Given that the Additional Final Disclosure Document concerned only one aspect, albeit an important one, of the matters addressed in the Final General Disclosure Document, we do not agree with China's view that the period for comments provided was not sufficient for interested parties to defend their interests. This is particularly so since the cover letter made clear that extensions of time could be sought, and at least one interested party did submit comments, and did seek and receive a one-day extension of time to do so."[493]

WTO - Internal

1.9.3 Relationship with other paragraphs of Article 6

393. In *Guatemala – Cement II*, having found that Guatemala's failure to disclose the "essential facts" forming the basis of its final determination was in violation of Article 6.9, as referenced in paragraphs 385, 386 and 388 above, the Panel considered it unnecessary to examine whether it was also inconsistent with Articles 6.1 and 6.2.[494]

394. The Panel in *Guatemala – Cement II* touched on the relationship between the obligations under Articles 6.4 and 6.9. See paragraph 386 above.[495]

395. The Panel in *Russia – Commercial Vehicles* found that the Russian investigating authority failed to observe its disclosure obligation under Article 6.9 by failing to disclose information which had been treated as confidential inconsistently with the requirements of Article 6.5.[496] On appeal, the Appellate Body found that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement by considering that, where essential facts are not properly treated as confidential in accordance with Article 6.5, this automatically leads to an inconsistency with Article 6.9. In the course of its analysis, the Appellate Body offered the following observations on the relationship between Article 6.5 and Article 6.9:

"Articles 6.5 and 6.9 strike a balance between the duty imposed on the investigating authority to protect information as confidential upon a 'good cause' shown, on the one hand, and the duty to disclose the essential facts under consideration in order to ensure

[493] Panel Report, *EU – Footwear (China)*, paras. 7.831-7.833.
[494] Panel on *Guatemala – Cement II*, para. 8.232.
[495] See also Panel Report, *China — AD on Stainless Steel (Japan)*, paras. 7.329 and 7.361.
[496] Panel Report, *Russia – Commercial Vehicles*, paras. 7.269-7.270.

> transparency and due process rights, on the other hand. The text of these provisions does not suggest that a finding of inconsistency under Article 6.5 would automatically lead to a finding of inconsistency under Article 6.9. In particular, there is no indication in Article 6.9 of whether essential facts may or may not include information treated as confidential under Article 6.5 with or without a showing of 'good cause'. This suggests to us that essential facts may comprise information properly treated as confidential under Article 6.9 and information that does not qualify for such treatment. While the notions of essential facts under Article 6.9 and confidential information within the meaning of Article 6.5 may overlap, they are not co-extensive. Thus, not every piece of information that is treated as confidential under Article 6.5, with or without showing 'good cause', may constitute essential facts under Article 6.9. The question of what is 'salient' for the decision of whether or not to impose a measure is different from the question of what qualifies as 'good cause' for confidential treatment of certain information. Indeed, the content and scope of the obligations under Article 6.5 and Article 6.9 are different. An assessment under Article 6.5 focuses on whether confidential treatment was conferred to information on the investigation record upon a proper showing of 'good cause'. By contrast, an assessment under Article 6.9 concerns whether all essential facts have been disclosed in a timely manner so as to ensure the ability of interested parties to defend their interests. Accordingly, an inquiry under Article 6.9 is separate and distinct from an assessment under Article 6.5 of the Anti-Dumping Agreement.
>
> The treatment of information as confidential under Article 6.5 does not absolve the investigating authority from its obligation to disclose essential facts as required under Article 6.9. When information treated as confidential under Article 6.5 constitutes essential facts within the meaning of Article 6.9, 'the disclosure obligations under these provisions should be met by disclosing non-confidential summaries of those facts.' Given the relationship between Article 6.5 and Article 6.9, regardless of whether or not the essential facts at issue were properly treated as confidential under Article 6.5 – i.e. with or without showing 'good cause' - a panel must examine whether any disclosure made – including that made through non-confidential summaries pursuant to Article 6.5.1 – meets the legal standard under Article 6.9. Thus, an inconsistency with Article 6.5 in relation to information that constitutes essential facts may not be presumed to result in an inconsistency with Article 6.9."[497]

WTO - Internal

1.10 Article 6.10

1.10.1 General

396. The Panel in *EU – Footwear (China)* found that Article 6.10 does not contain any criteria or guidelines for sampling in the context of an injury determination.[498]

397. The Panel in *Canada – Welded Pipe* found that "nothing in the text of the first sentence of Article 6.10 precludes an investigating authority from determining – in addition to exporter-specific margins of dumping – a country-wide margin of dumping."[499]

398. The Panel in *US – OCTG (Korea)* rejected the argument that under Article 6.10 individual examination may be limited only in extraordinary circumstances, and that institutional resource constraints cannot be a ground to resort to limited examination:

> "Second, nothing in the text of Article 6.10 supports Korea's position that an investigating authority may limit individual examination only when 'extraordinary circumstances' exist. In our view, the text is clear that the trigger for limiting individual examination is the existence of a large number of exporters. Article 6.10 contains no mention of extraordinary circumstances as a relevant consideration, and we see no basis to read such a consideration into the text. Similarly, nothing in Article 6.10 suggests that examination of all exporters may only be found to be 'impracticable' for reasons that are unique to the investigation at issue. The text of Article 6.10 simply

[497] Appellate Body Report, *Russia – Commercial Vehicles*, paras. 5.182-5.183.
[498] Panel Report, *EU – Footwear (China)*, paras. 7.380-7.382.
[499] Panel Report, *Canada – Welded Pipe*, para. 7.44.

> does not support Korea's position that institutional resource constraints, of the kind cited by the USDOC, cannot be a ground for such limited examination.[500]"[501]

399. The Panel in *US – OCTG (Korea)* found that Article 6.10 does not require an investigating authority to explain why it would be impracticable to examine more than a certain number of exporters individually:

> "Finally, we see nothing in the first sentence of Article 6.10 that would impose an obligation on an investigating authority to specifically explain why it would be impracticable to examine more than a particular number of respondents, in this case two. The second sentence of Article 6.10 consists of two parts, with the first specifying the circumstances in which it may be impracticable to examine all known exporters (the number is 'so large'), and the second setting out the methods for choosing the exporters to be individually examined when not all are examined. We consider that the second part of the second sentence, rather than the first part, is relevant to the number of exporters to be selected for limited examination. If the investigating authority selects the exporters subject to individual examination in a manner consistent with the methods prescribed in the second part of the second sentence of Article 6.10, we do not see why that authority would have to provide a separate explanation of why it is practicable to examine only the number of exporters in the resulting pool. Therefore, we consider that the USDOC was not required to specifically explain why it was practicable to examine only two exporters, and not more."[502]

1.10.2 "shall, as a rule": nature of obligations under Article 6.10

400. In *Argentina – Ceramic Tiles,* the Panel explained the structure of the obligations set forth in Article 6.10 as follows:

> "The first sentence of Article 6.10 of the *AD Agreement* sets forth a general rule that the authorities determine an individual margin of dumping for each known exporter or producer of the product under investigation. The second sentence of Article 6.10 permits an investigating authority to deviate from the general rule by permitting the investigating authorities to 'limit their examination either to a reasonable number of interested parties or products by using samples … or to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated', in cases where the number of exporters, producers, importers or types of products involved is so large as to make such a determination impracticable."[503]

401. The Panel in *Argentina – Poultry Anti-Dumping Duties* agreed with the view that Article 6.10, first sentence, imposes a general obligation on investigating authorities to calculate individual margins of dumping for each known exporter or producer concerned of the product under investigation.[504]

402. The Appellate Body in *EC – Fasteners (China)* stated that the rule in the first sentence of Article 6.10 is mandatory, subject only to specifically provided exceptions: "The general rule, that is, the obligation to determine individual margins of dumping for each known exporter or producer, applies, unless derogation from it is provided for in the covered agreements."[505] In response to an EU argument that in practice, there are exceptions to the Article 6.10 rule that are not specified in the Agreement, the Appellate Body analysed the series of exceptions cited, and found that each involved situations that either do not constitute departures from the individual margins rule, or are provided for in Article 6.10 itself or in other provisions of the Agreement.[506] The Appellate Body

WTO - Internal

---

[500] *(footnote original)* Indeed, it would seem to us that this is the most likely reason for an investigating authority to consider examining all known exporters to be impracticable, given that an anti-dumping investigation is complex and must be completed within 12 months, as a rule, and no more than 18 months in any case, under Article 5.10.

[501] Panel Report, *US – OCTG (Korea)*, para. 7.269.

[502] Panel Report, *US – OCTG (Korea)*, para. 7.272.

[503] Panel Report, *Argentina – Ceramic Tiles*, para. 6.89.

[504] Panel Report, *Argentina – Poultry Anti-Dumping Duties*, para. 7.214.

[505] Appellate Body Report, *EC – Fasteners (China)*, para. 320.

[506] Appellate Body Report, *EC – Fasteners (China)*, paras. 320-327.

further found that this general rule applies also in respect of imports from non-market economies (NMEs):

> "[W]e do not find any provision in the covered agreements that would allow importing Members to depart from the obligation to determine individual dumping margins only in respect of imports from NMEs. We have explained above that Section 15 of China's Accession Protocol permits derogation in respect of the domestic price or normal value aspect of price comparability, but does not address the export price aspect of price comparability. It, therefore, has no entailment in respect of the obligation in Article 6.10 of the *Anti-Dumping Agreement* to determine individual dumping margins. In our view, therefore, Section 15 of China's Accession Protocol does not provide a legal basis for flexibility in respect of export prices and for justifying an exception to the requirement to determine individual dumping margins in Article 6.10 of the *Anti-Dumping Agreement*."[507]

403. The Panel in *EU – Footwear (China)* held that the use of sampling was allowed in determining whether market economy conditions prevail in a given industry within the meaning of Paragraph 15(a)(ii) of China's Accession Protocol. In doing so, the Panel found support in the panel findings in *EC – Salmon (Norway)*:

> "There is no dispute that Paragraph 15(a)(ii) of China's Accession Protocol does not specifically address the question of sampling for purposes of determining whether 'market economy conditions prevail' in the industry at issue. We do not agree with China's assumption that simply because Paragraph 15(a)(ii) does not explicitly authorize the use of sampling in making that determination means that sampling is prohibited, and if used, constitutes a violation of this Paragraph. … In our view, the same reasoning holds true with respect to the lack of a specific provision in China's Accession Protocol permitting the use of sampling in determining whether market economy conditions prevail in the exporting industry at issue in a particular investigation, and we reach the same conclusion here as did the panel in *EC – Salmon (Norway)*."[508]

WTO - Internal

1.10.3 "individual margin of dumping for each known exporter or producer"

1.10.3.1 "each … exporter or producer"

404. In *Argentina – Ceramic Tiles,* the Argentine authorities had established a dumping margin for three size categories of ceramic tile irrespective of the exporter. The Panel concluded that "[w]hile the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that <u>are</u> examined":[509]

> "In our view, the general rule in the first sentence of Article 6.10, that individual margins of dumping be determined for each known exporter or producer of the product under investigation, is fully applicable to exporters who are selected for examination under the second sentence of Article 6.10. While the second sentence of Article 6.10 allows an investigating authority to limit its examination to certain exporters or producers, it does not provide for a deviation from the general rule that individual margins be determined for those exporters or producers that <u>are</u> examined. To the contrary, Article 9.4 provides that, where the authorities limit their examination under Article 6.10, the anti-dumping duty for exporters or producers that <u>are not</u> examined shall not exceed a level determined on the basis of the results of the examination of those exporters or producers that were examined. That Article 9.4 does not provide any methodology for determining the level of duties applicable to exporters or producers that <u>are</u> examined

[507] Appellate Body Report, *EC – Fasteners (China)*, para. 328. For a similar discussion regarding Viet Nam's Protocol of Accession, see Panel Report, *US – Shrimp II (Viet Nam)*, paras. 7.175-7.181.
[508] Panel Report, *EU – Footwear (China)*, para. 7.197.
[509] The Panel acknowledged the "usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4" but indicated that this should not be confused with "the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole." Panel Report, *Argentina – Ceramic Tiles*, para. 6.99.

> in our view confirms that the general rule requiring individual margins remains applicable to those exporters or producers. We find further confirmation in Article 6.10.2, which requires that, in general, an individual margin of dumping must be calculated even for the producers/exporters not initially included in the sample, if they provide the necessary information and if to do so is not unduly burdensome. If even producers not included in the original sample are entitled to an individual margin calculation, then it follows that producers that were included in the original sample are so entitled as well. "[510]

405. The Panel in *Argentina – Poultry Anti-Dumping Duties* considered that Article 6.10 is purely procedural in nature, in the sense that it imposes a procedural obligation on the investigating agency to determine individual margins of dumping for each known exporter or producer concerned of the product under investigation. According to the Panel, "Article 6.10 is *not* concerned with substantive issues concerning the determination of individual margins, such as the availability of the relevant data. Such issues are addressed by provisions such as Articles 2 and 6.8 of the *AD Agreement*."[511] The Panel thus rejected the argument that for the requirement under Article 6.10 to apply, the exporter or producer concerned should supply the documentation needed to determine an individual margin of dumping.

1.10.3.2 Treatment of distinct legal entities as a single exporter or producer

406. In *Korea – Certain Paper*, the Panel considered that the KTC's decision to treat three companies as a single exporter or producer and assign a single margin was consistent with Article 6.10, because the three companies were majority owned by the same company, had common shareholdings and management and could shift production amongst themselves, harmonize commercial activity and corporate objectives, and make domestic sales through a single company.[512] Based on an analysis of Article 6.10 in light of its context, particularly Articles 9.5, 2.3, and 2.1, the Panel found that the term "exporter" in Article 6.10 should not be read in a way to require an individual margin of dumping for each independent legal entity under all circumstances.[513] In the Panel's view:

> "Article 6.10 does not necessarily preclude treating distinct legal entities as a single exporter or producer for purposes of dumping determinations in anti-dumping investigations. Having said that, however, we do not consider that Article 6.10 provides the IA with unlimited discretion to do so. … In our view, in order to properly treat multiple companies as a single exporter or producer in the context of its dumping determinations in an investigation, the IA has to determine that these companies are in a relationship close enough to support that treatment."[514]

407. The Panel and Appellate Body in *EC – Fasteners (China)* examined Article 9(5) of the EU's Basic Anti-Dumping Regulation, which presumed that "that all producers and exporters in an NME constitute a single entity together with the State."[515] Article 9(5) required NME producers to demonstrate their independence from state control in order to qualify for "individual treatment" (IT). For NME producers that fail the IT test, the Commission would calculate a single country-wide dumping margin and duty rate; for NME producers that pass the test, the Commission would compare the same normal value but use the producer's own export price.[516] The European Union argued that in the case of market economies (as in *Korea – Certain Paper)* the close relationship between separate legal entities has to be established by the investigating authority on a case-by-case basis; by contrast, in NMEs the presumption of State control is the general rule. The Appellate Body upheld the Panel's finding that the presumption in Article 9(5) violated Articles 6.10 and 9.2, and that Article 9(5) was not otherwise legally justifiable. The Appellate Body started out its assessment by underlining that identification of the known exporter, and whether there are grounds to treat multiple exporters as a single entity, was the investigating authority's responsibility:

[510] Panel Report, *Argentina – Ceramic Tiles*, para. 6.90.
[511] Panel Report, *Argentina – Poultry Anti-Dumping Duties,* para. 7.215.
[512] Panel Report, *Korea – Certain Paper*, para. 7.168.
[513] Panel Report, *Korea – Certain Paper*, para. 7.159.
[514] Panel Report, *Korea – Certain Paper*, para. 7.161.
[515] Appellate Body Report, *EC – Fasteners (China)*, para. 360.
[516] Panel Report, *EC – Fasteners (China)*, para. 7.81.

WTO - Internal

> "[U]nder Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* it is the investigating authority that is called upon to make an objective affirmative determination, on the basis of the evidence that has been submitted or that it has gathered in the investigation, as to who is the known exporter or producer of the product concerned. It is, therefore, the investigating authority that will determine whether one or more exporters have a relationship with the State such that they can be considered as a single entity and receive a single dumping margin and a single anti-dumping duty. In other words, where certain exporters or producers are separate legal entities, that evidence will be taken into account in treating them as separate exporters or producers for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. …
>
> … [P]lacing the burden on NME exporters to rebut a presumption that they are related to the State and to demonstrate that they are entitled to individual treatment runs counter to Article 6.10, which 'as a rule' requires that individual dumping margins be determined for *each known exporter or producer*, and is inconsistent with Article 9.2 that requires that individual duties be specified by *supplier*. Even accepting in principle that there may be circumstances where exporters and producers from NMEs may be considered as a single entity for purposes of Articles 6.10 and 9.2, such singularity cannot be presumed; it has to be determined by the investigating authorities on the basis of facts and evidence submitted or gathered in the investigation."[517]

408. The Appellate Body in *EC – Fasteners (China)* then pointed out that no other WTO rule provided justification for the presumption found in Article 9(5) of the EU's Basic AD Regulation:

> "We are also of the view that no other provision in the *Anti-Dumping Agreement* or in other covered agreements provides a legal basis for the European Union's presumption in Article 9(5) of its Basic AD Regulation that results in exporters and producers from NMEs having to demonstrate that they are unrelated to the State in order to qualify for individual treatment. In particular, we do not consider that there is a legal basis in the provisions of China's Accession Protocol. …
>
> It is true that paragraph 15(a) of China's Accession Protocol places the burden on Chinese exporters to "clearly show" that market economy conditions prevail in order for the importing WTO Members to be obliged to use Chinese domestic prices and costs in determining price comparability. However, this rule concerns only the normal value aspect of price comparability, and does not permit derogation from the disciplines of the *Anti-Dumping Agreement* regarding export price. …
>
> … [W]hether the European Union's presumption under Article 9(5) of its Basic AD Regulation that in NMEs the State and all exporters constitute a single entity is consistent with Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* is a legal question, not a factual one that depends on the economic structure of a particular WTO Member. Rather, the economic structure of a WTO Member may be used as evidence before an investigating authority to determine whether the State and a number of exporters or producers subject to an investigation are sufficiently related to constitute a single entity such that a single margin should be calculated and a single duty be imposed on them. It cannot, however, be used to imply a legal presumption that has not been written into the covered agreements."[518]

409. The Appellate Body further opined regarding the circumstances in a number of exporters owned by the State may be determined to constitute a single exporter for the purposes of Articles 6.10 and 9.2. The Panel noted:

> "[T]he criteria used for determining whether a single entity exists from a corporate perspective, while certainly relevant, will not necessarily capture all situations where the State controls or materially influences several exporters such that they could be

WTO - Internal

[517] Appellate Body Report, *EC – Fasteners (China)*, paras. 363-364.
[518] Appellate Body Report, *EC – Fasteners (China)*, paras. 365-367. See also Panel Report, *EU – Footwear (China)*, paras. 7.88-7.89.

> considered as a single entity for purposes of Articles 6.10 and 9.2 … and be assigned a single dumping margin and anti-dumping duty.
>
> …
>
> Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* do not preclude an investigating authority from determining a single dumping margin and a single anti-dumping duty for a number of exporters if it establishes that they constitute a single exporter for purposes of Articles 6.10 and 9.2 of the *Anti-Dumping Agreement*. Whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output. We note that the *Anti-Dumping Agreement* addresses pricing behaviour by exporters; if the State instructs or materially influences the behaviour of several exporters in respect of prices and output, they could be effectively regarded as one exporter for purposes of the *Anti-Dumping Agreement* and a single margin and duty could be assigned to that single exporter."[519]

410. The Appellate Body further explained that:

> "Criteria relating to corporate structure may in certain circumstances be relevant to the determination of whether the State and certain exporters constitute a single entity. In other circumstances, however, an investigating authority might have to take into account factors and positive evidence other than those establishing a corporate or commercial relationship in assessing whether the State and a number of exporters are a single entity and that, therefore, the State is the source of price discrimination. These, for instance, may include evidence of State control or instruction of, or material influence on, the behaviour of certain exporters in respect of pricing and output. These criteria could show that, even in the absence of formal structural links between the State and specific exporters, the State in fact determines and materially influences prices and output."[520]

411. The Appellate Body further found that the country-wide dumping margins and duties imposed under Article 9(5) of the EC Regulation were inconsistent with Articles 6.10 and 9.2:

> "[E]ven where it could be determined that particular exporters that are related constitute a single supplier, Articles 6.10 and 9.2 of the *Anti-Dumping Agreement* would nonetheless require the determination of an individual dumping margin for the single entity, which should be based on the average export prices of each individual exporter, and the imposition of a corresponding single anti-dumping duty. …
>
> In our view, only a dumping margin that is based on a weighted average of the export prices of each individual exporter that forms part of the single entity would be consistent with the obligation in Article 6.10 to determine an individual dumping margin for the single entity that is composed of several legally distinct exporters. We also do not consider that a country-wide duty imposed on a group of exporters could be considered as being 'collected in the appropriate amounts in each case' within the meaning of Article 9.2 of the *Anti-Dumping Agreement*, to the extent it is determined for the group of fully cooperating non-IT exporters on the basis of facts available because cooperating exporters account for significantly less than 100 per cent of all exports."[521]

WTO - Internal

[519] Appellate Body Report, *EC – Fasteners (China)*, paras. 380 and 376.
[520] Appellate Body Report, *EC – Fasteners (China)*, para. 381.
[521] Appellate Body Report, *EC – Fasteners (China)*, paras. 383-384.

412. The Panel in *US – Anti-Dumping Methodologies (China)* found a measure very similar to the one at issue in *EC – Fasteners (China)*, to be inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement, on the basis of the same legal reasoning.[522]

1.10.3.3 "known exporter or producer"

413. The Appellate Body in *Mexico – Anti-Dumping Measures on Rice* found that the word "known" in Article 6.10 refers to exporters/producers known to the investigating authority, and does not include ones which the authority "should have known."[523]

1.10.4 "the authorities may limit their examination either to a reasonable number of interested parties or products": sampling and Article 6.10

414. The Panel in *EC – Salmon (Norway)* considered that identifying the pool of known exporters or producers was central in selecting interested parties:

> "If there has been an error in the identification of the starting pool of 'known exporter[s] or producer[s] concerned' this would, in our view, invalidate the selection of interested parties."[524]

415. The Panel in *EC –Salmon (Norway)* noted that the ordinary meaning of the text in Article 6.10 suggested that Members could choose to focus their investigation on all known exporters, all known producers, or all known exporters and producers. The Panel concluded that the European Communities had not acted inconsistently with Article 6.10 by limiting the number of interested parties investigated, and excluding "all non-producing exporters".[525] In *EC – Salmon (Norway)*, the European Communities had selected ten interested parties, which Norway claimed was inconsistent with Article 6.10 as it excluded all non-producing exporters from being considered for selection. The Panel considered the text of Article 6.10, and particularly the use of the word "or", along with contextual support from Article 2.5:

> "[W]e find it particularly telling that the drafters of the AD Agreement chose to use the word 'or' and not the word 'and' in agreeing on the text of [Article 6.10]. This choice of language suggests the drafters intended that Members be left with discretion to choose the focus of their investigations.
>
> Thus, in our view, the ordinary meaning of the first sentence of Article 6.10 suggests that the 'known exporter[s] or producer[s]' that serve as the starting point for the selection of the interested parties investigated under either of the two limited investigation techniques described in the second sentence of Article 6.10, do not <u>always</u> have to be all known exporters *and* all known producers. We see no provision in the AD Agreement that would explicitly prohibit such interpretation of Article 6.10. …
>
> We also find contextual support for our reading of the text of the first sentence of Article 6.10 in Article 2.5 of the AD Agreement. We consider significant that the drafters of this provision of the AD Agreement made explicit allowance for the possibility that Members may, in certain situations, focus their investigation into the existence of dumping on the pricing behaviour of producers, notwithstanding the existence of known exporters responsible for making the export sales under investigation."[526]

416. In *US – Shrimp (Viet Nam)*, the Panel rejected a claim by Viet Nam that the limited examinations conducted by the US Department of Commerce, by failing to provide non-selected respondents with individual margins of dumping, violated Articles 9.3, 11.1, and 11.3. The Panel stated that "the use of limited examinations is governed exclusively by the second sentence of Article 6.10" and that "the exception provided for in the second sentence of Article 6.10 makes it

[522] Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.360-7.362.
[523] Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 255.
[524] Panel Report, *EC – Salmon (Norway)*, para. 7.163.
[525] Panel Report, *EC – Salmon (Norway)*, para. 7.181.
[526] Panel Report, *EC – Salmon (Norway)*, paras. 7.166, 7.168, and 7.175.

WTO - Internal

clear that, despite the general preference for individual margins, investigating authorities need not determine individual margins for all known exporters and producers in all cases."[527]

417. In *EU – Footwear (China)*, the Panel held that, under Article 6.10, an investigating authority was not required to re-consider the selection of a sample as a result of a change in the scope of the product under consideration in the course of the investigation:

> "While such a course of action is certainly not precluded, as a practical matter, it will not always be possible to do so, depending on the particular circumstances. To interpret Article 6.10 to require investigating authorities to, in all cases, adapt the sample selected for purposes of the dumping examination might well have the effect of delaying the investigation so as to prevent the investigating authority from completing its investigation in a timely fashion."[528]

418. The Panel in *EU – Footwear (China)* pointed to the difference between the two options provided for under Article 6.10, and held that the second option did not necessarily have to be representative of the exporters:

> "Moreover, while China focuses on the 'representativeness' of the sample selected after the change in the scope of the investigation, we see nothing in Article 6.10 that requires an investigating authority to consider whether the sample selected for the dumping determination pursuant to the second option in that provision is 'representative' of the exporters according to any measure, including the percentage of exports of the product under consideration for which they account. We recall that, while the parties refer to the second option in Article 6.10 as a 'sampling' provision, the text of Article 6.10 authorizes the investigating authorities to 'limit their examination' in one of two ways: (1) 'to a reasonable number of interested parties or products by using samples which are statistically valid on the basis of information available to the authorities at the time of the selection', or (2) 'to the largest percentage of the volume of the exports from the country in question which can reasonably be investigated.' While a statistically valid sample might be presumed to be representative of the universe of companies sampled, there is no indication that an investigating authority choosing to limit its examination in the second manner, that is, to the 'largest percentage of the volume … which can reasonably be investigated' must, having satisfied that criterion, in addition ensure that the exporters/producers accounting for that volume are representative of the industry in the exporting country, or that the percentage of the volume represented by the producers selected for the sample reaches some quantitative threshold. There is certainly no suggestion in Article 6.10 that any particular threshold percentage will demonstrate that the volume of exports accounted for by the selected producers is 'representative' of anything.[529]"[530]

419. The Panel in *EU – Footwear (China)* found that Article 6.10 did not preclude the consideration of criteria not specified in the text of Article 6.10 when selecting producers/exporters for a limited examination:

> "We do not agree that the specific requirement of Article 6.10 second sentence to select for limited examination producers/exporters accounting for the largest percentage of the volume of the exports from the country in question which can reasonably be investigated precludes the consideration of other criteria not specified in Article 6.10, so long as doing so does not result in a selection inconsistent with the criterion that is specified. China has not demonstrated that, by taking the additional criterion of domestic sales volume into account, the European Union failed to select producers

WTO - Internal

[527] Panel Report, *US – Shrimp (Viet Nam)*, paras. 7.166-7.167.
[528] Panel Report, *EU – Footwear (China)*, para. 7.215.
[529] *(footnote original)* This is by contrast to a statistically valid sample, which conceptually results in a sample that is representative of the entire population being sampled, but as a result, presumably requires good knowledge of and data regarding that entire population, in the case of Article 6.10 of the AD Agreement, the foreign exporters/producers being investigated, in order to ensure that the sample is "statistically valid".
[530] Panel Report, *EU – Footwear (China)*, para. 7.216.

> accounting for the largest percentage of the volume of exports that could reasonably be investigated."[531]

1.10.5 "the largest percentage of exports that could reasonably be investigated"

420. The Panel in *EC – Salmon (Norway)* had to consider the question whether an investigating authority acted inconsistently with the second sentence of Article 6.10 by not investigating two producers that allegedly exported a larger volume of salmon to the European Communities than several of the companies actually investigated. The Panel found that the investigating authority (i.e. the European Communities) acted inconsistently with Article 6.10 in one instance, but not in the other:

> "In our view, the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authorities own investigating capacity and resources."[532]

421. The Panel in *EC – Salmon (Norway)* continued that the second sentence of Article 6.10 concerned not the largest percentage of the volume of exports, but rather the largest percentage of the volume of exports that it would be reasonable for an investigating authority to investigate:

> "However, to the extent that it refers to the largest percentage of the volume of exports which can 'reasonably' be investigated, the text of the second sentence of Article 6.10 suggests that such an outcome was not intended. In particular, the word 'reasonably' implies that the objective of this limited examination technique is to identify the largest percentage of the volume of exports that it would be reasonable for an investigating authority to investigate.
>
> In our view, the volume of export sales that may be reasonable for an investigating authority to investigate is a question that must be assessed on a case-by-case basis, taking into account all relevant facts that are before the investigating authority, including the nature and type of interested parties, the products involved and the investigating authority's own investigating capacity and resource. We see no reason why this assessment might not also be informed by the matters raised during consultations pursuant to Article 6.10.1"[533]

WTO - Internal

1.10.6 Relationship with Article 11.3 of the Anti-Dumping Agreement

422. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* examined Russia's claim that the European Union had based its determination of the likelihood of recurrence of dumping on a finding of "dumped" prices and had relied on a sample of Russian exporting producers, as opposed to each such producer. Accordingly, Russia claimed that the European Union should have determined individual dumping margins for the Russia sampled producers in line with Article 6.10.[534]

423. The Panel noted that the European Commission had not relied on a dumping margin calculation in its determination of the likelihood of recurrence of dumping, and that it was not required to do so. Accordingly, the European Union was not required to calculate dumping margins for each individual sampled producer.[535] With respect to this last consideration, the Panel agreed with the Appellate Body that Article 6.10 does not require that the determination of the likelihood of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis:

> "We agree with the European Union that, given that the Commission did not rely on a dumping margin calculation in its determination of likelihood of recurrence of dumping, and was not required to do so, it was not required to calculate dumping margins for each individual sampled producer. As the European Union points out, the Appellate Body

[531] Panel Report, *EU – Footwear (China)*, para. 7.222.
[532] Panel Report, *EC – Salmon (Norway)*, para 7.188.
[533] Panel Report, *EC – Salmon (Norway)*, paras. 1.187-1.188.
[534] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.542.
[535] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.544.

> has previously agreed with the finding that 'the provisions of Article 6.10 concerning the calculation of individual margins of dumping in investigations do not require that the determination of *likelihood* of continuation or recurrence of dumping under Article 11.3 be made on a company-specific basis.' We agree with this understanding and see no reason why it would not apply here. Accordingly, we reject Russia's claim that the European Commission's determination of likelihood of recurrence of dumping was inconsistent with Article 6.10."[536]

1.10.7 Article 6.10.2

424. The Panel in *US – Shrimp (Viet Nam)*, examining claims by Viet Nam under Article 6.10.2, noted that "the application of the first sentence of Article 6.10.2 is only triggered if non-selected exporters or producers make so-called voluntary responses. If no such voluntary response is submitted, there is no obligation on the investigating authority to take any action under the first sentence of Article 6.10.2."[537]

425. The Panel in *US – OCTG (Korea)* reasoned that there may be an overlap between the circumstances justifying limited examination pursuant to Article 6.10 and those justifying rejection to individually examine voluntary respondents pursuant to Article 6.10.2:

> "However, Article 6.10.2 does not preclude that the factual circumstances making it impracticable to examine all known exporters may also affect whether it would be unduly burdensome to individually examine voluntary respondents. In both cases, an investigating authority deviates from the norm, which is to determine an individual margin of dumping for all known exporters. To us, it is not surprising that a justification for the second deviation, under Article 6.10.2, may overlap and share elements with the justification for the first deviation under Article 6.10. Thus, an investigating authority's explanation for why it would be unduly burdensome to examine voluntary responses will not be insufficient merely because of such similarities. Therefore, we consider that the fact that the USDOC's explanation for why it was unduly burdensome to individually examine any voluntary respondents also cited time and resource constraints, and thus was 'largely similar' to its explanation for why it was impracticable to individually examine all known exporters, does not establish any inconsistency with Article 6.10.2."[538]

WTO - Internal

1.11 Article 6.11

426. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body reversed the Panel's finding that an analogue country producer whose data was used by the EU Commission in determining normal value was not an interested party in the underlying investigation. In so finding, the Appellate Body pointed out that no formal declaration from the investigating authority was needed for a company to be considered as an interested party, and found that, by its actions in the investigation at issue, the EU Commission had treated this company as an interested party:

> "In considering whether the Commission allowed Pooja Forge to be an 'interested party' in the investigation, we find the following factors to be pertinent. First, Pooja Forge participated in the investigation at the request of the Commission. Second, the Commission selected Pooja Forge as the analogue country producer for the purposes of the investigation and used its data to determine normal values and calculate dumping margins for the Chinese producers. Third, the Commission treated Pooja Forge like an investigating authority is required to treat an 'interested party' in an investigation by, for example, requesting Pooja Forge to provide a non-confidential summary of information submitted in confidence, and verifying the information submitted by Pooja Forge. Hence, in the circumstances of this case, we do not agree with the Panel's statement that '[n]owhere in the record is it indicated that the Commission decided to include Pooja Forge as an 'interested party' in this investigation.' Although there was no evidence on the record of a *formal declaration* of the Commission deeming Pooja Forge to be an 'interested party' within the meaning of Article 6.11, the record of the

[536] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.544.
[537] Panel Report, *US – Shrimp (Viet Nam)*, para. 7.181.
[538] Panel Report, *US – OCTG (Korea)*, para. 7.287.

> investigation demonstrates that, by its actions in this particular case, the Commission treated Pooja Forge as an interested party in the review investigation at issue and, consequently, 'allow[ed]' Pooja Forge 'to be included as [an] interested part[y]', within the meaning of the residual clause of Article 6.11."[539]

1.12 Article 6.13

1.12.1 Relationship with paragraphs 2 and 5 of Annex II

427. In *US – Hot-Rolled Steel*, the Appellate Body referred to Article 6.13 as support for its view that paragraphs 2 and 5 of Annex II call for a balance between the interests of investigating authorities and exporters as regards cooperation in anti-dumping investigations. See paragraph 322 above.

1.13 Relationship with other provisions of the Anti-Dumping Agreement and other WTO Agreements

1.13.1 Article 1, 9 and 18 and Article VI of the GATT 1994

428. In *Guatemala – Cement II*, the Panel found that the subject anti-dumping duty order of Guatemala was inconsistent with several articles of the Anti-Dumping Agreement, including Article 7. The Panel then opined that Mexico's claims under Article 1, 9 and 18 of the Anti-Dumping Agreement, and Article VI of GATT 1994, were "dependent claims, in the sense that they depend entirely on findings that Guatemala has violated other provisions of the AD Agreement."[540] In light of this dependent nature of Mexico's claim, the Panel considered it not necessary to address these claims.

1.13.2 Article 2

429. In *US – Stainless Steel (Korea)*, the Panel considered that it was unnecessary to examine Korea's claim using Articles 6.1, 6.2 and 6.9 with respect to the United States' methodologies which the Panel had already found in violation of Article 2.[541]

430. With respect to the relationship between Article 6.8 and Articles 2.2 and 2.4, see the Section on Article 2 of the Anti-Dumping Agreement.

431. In *Argentina – Ceramic Tiles*, the Argentine authorities had established a dumping margin for three size categories of ceramic tiles irrespective of the exporter. The Panel, when analysing the compatibility of Argentina's measure with Article 6.10, acknowledged the "usefulness of grouping (by size, model, type) for the purpose of making a fair comparison under Article 2.4" but indicated that this should not be confused with "the requirement under Article 6.10 to determine an individual margin of dumping for the product as a whole."[542]

1.13.3 Article 3

432. In *Thailand – H-Beams*, the Appellate Body referred to Article 6 in interpreting Article 3.1. See the Section on Article 3 of the Anti-Dumping Agreement.

433. In *Morocco – Hot-Rolled Steel (Turkey)*, the Panel examined whether the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, which were not included in the request for consultations, could have evolved from the Article 3.1 claim:

> "We limit our examination to the text of the request for consultations without inquiring into the actual consultations that took place. Nevertheless, we observe that, in the facts of this case, Turkey would likely have been aware of the break-even threshold's significance and its confidential treatment by the MDCCE since the issuance of the preliminary determination on

[539] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.150.
[540] Panel Report, *Guatemala – Cement II*, para. 8.296.
[541] Panel Report, *US – Stainless Steel (Korea)*, para. 6.137.
[542] Panel Report, *Argentina – Ceramic Tiles*, para. 6.99.

WTO - Internal

> 30 October 2013, in which the break-even threshold was redacted. This was long before consultations took place on 18 and 28 November 2016. …
>
> In light of the above, the claims under Articles 6.5 and 6.5.1 in the panel request are not sufficiently closely and clearly connected with the claim under Article 3.1 in the request for consultations. Rather, these claims are distinct and unrelated in terms of the provisions, obligations, and factual circumstances at issue. Moreover, the additional claims under Articles 6.5 and 6.5.1 in fact modified the nature and substance of the dispute from one concerning the MDCCE's compliance with the substantive disciplines on injury determination to one that also encompasses a challenge to the MDCCE's procedural conduct.
>
> As a consequence, Turkey in its panel request introduced new claims under Articles 6.5 and 6.5.1 that expanded the scope of the dispute and changed its essence. Accordingly, these claims did not evolve from the claim under Article 3.1 subject to consultations. The claims under Articles 6.5 and 6.5.1 thus fall outside our terms of reference."[543]

1.13.4 Article 5

434. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found an "explicit link" between Articles 5.1, 5.2, and 6.1.3 of the Anti-Dumping Agreement:

> "As context relevant to the interpretation of the expression 'full text of the written application', we also note that Article 5.2 of the Anti-Dumping Agreement lays down the content to be included in the 'application under [Article 5.1]', that is, the application also referred to in Article 6.1.3. In particular, in our view, the reference in Article 6.1.3 to the application received in accordance with Article 5.1 and the requirements in Article 5.2, which specify the evidence and information to be included in this application, clearly establish an explicit link between these three provisions. We therefore reject the Dominican Republic's argument that the fact that Article 6.1.3 refers only to Article 5.1, and not to Article 5.2 in which reference is made to the evidence to be submitted together 'with' the application, means that the evidence contained in the annexes does not need to be provided under Article 6.1.3."[544]

WTO - Internal

1.13.5 Article 9

435. With respect to the relationship between Article 6.8 and Article 9.3 and 9.4, see the Section on Article 9 of the Anti-Dumping Agreement

1.13.6 Article 12

436. The Panel in *Argentina – Ceramic Tiles* referred to Article 12 of the Anti-Dumping Agreement as support of its conclusion above that an investigating authority may rely on confidential information in making determinations while respecting its obligation to protect the confidentiality of that information. See paragraph 351 above.

———

Current as of: June 2026

[543] Panel Report, *Morocco – Hot-Rolled Steel (Turkey)*, paras. 7.43-7.45.
[544] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.377.