DECLARATION FOR THE PhD THESIS

To be inserted as the first page of the thesis

The undersigned

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Thesis title:

STANDRAD OF REVIEW IN ANTI- DUMPING CASES

PhD in	INTERNATIONAL LAW AND ECONOMICS
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Candidate's tutor	PROF. GIOVANNA ADINOLFI
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STANDRAD OF REVIEW IN ANTI- DUMPING CASES
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STANDARD OF REVIEW IN ANTI- DUMPING CASES

I. PREFACE

While supporting trade liberalization, it is necessary to step up against certain types of imports through the use of trade remedies, e.g. safeguards, anti-dumping or countervailing measures. Dumping is bringing a product in the importing countries' market below a price the product is sold in the exporting country. If this is the case, injured companies in the importing country can ask the administrative agencies to carry out investigations. Such investigations have the scope to establish whether dumping occurs and whether it is the cause of the material injury suffered by the domestic industry of the exporting country. Only subsequent to this, is it possible to impose an anti-dumping duty on the exporting enterprises. Such enterprises have the right to seek for legal remedies available in the importing country against the administrative agency's decision. In this phase, exporters aim at obtaining the annulment of the anti-dumping authority's decision. If they are successful, their duty will be either diminished or withdrawn. Nevertheless, companies are not entitled to move their case at upper, i.e. international levels, as privates do not have standing in the World Trade Organization's (WTO or Organization) dispute settlement system.

International cooperation partially depends upon the willingness of sovereign States to constrain themselves by giving up to international tribunals some power to construe treaties and articulate international obligations. On the other hand, countries are willing to maintain control over governmental decisions.

The dispute settlement system of the World Trade Organization is in the heart of the multilateral trading system since it plays a crucial role in providing security and predictability to international trade. Only through a centralized judicial review, carried out by panels and the Appellate Body (AB), is it possible to provide a uniform interpretation of WTO law. This is necessary in order to avoid a "Tower of Legal Babel." The whole system of the disputes aims at maintaining the balance between the rights and duties of Member States, which have the right to seek for legal remedies if they consider that any of their benefits have been impaired. However, to what extent may 'WTO tribunals' invade domestic decisions depends on the sensitive issue of the standard of review. This legal concept delimits the not always clear borders between national sovereignty and supranational adjudication – the relationships between Member States and the organization – by guaranteeing the separation and balance of powers.

The standard of review is a method with the help of which an adjudicative body defines its roles in relation to the other actors of the system by defining its own limits and by respecting its duties to control the compliance with or the interpretation of the legal rules for which the adjudicative body has jurisdiction. In the context of the WTO, it defines the leeway of the panel or the AB concerning the possibility to change domestic decisions. It is not a clear,

'one-size-fits-all' standard, since it has been developed in relation to single disputes, on a case-by-case basis.

Hence, the standard of review is mainly part of the procedural law because its role consists of delimitating the powers of judicial authorities in reviewing administrative bodies' measures. The instrument does not only have a procedural function but it also expresses the allocation of powers between the authority taking the measure and the judicial organ reviewing it. In the same time, it does not delimit the powers of WTO organs in their relations to each other since their various functions are not separated in the Montesquieu-sense.

The political importance of the standard of review has increased in the WTO compared to that of the GATT 47 since this is one of the elements that delineate the relationships between national sovereignty and international interdependence. Considering the restricted sovereignty of WTO Members due to the creation of a rule-oriented multilateral trading system, the deference that "WTO tribunals" have to manifest towards national measures and laws become a sensitive issue. The review of the decisions can be either vertical, namely delimiting powers between panels and Member States' authorities or horizontal whereby it can refer to the relations between the Dispute Settlement Body and other WTO organs.

II. THE IMPORTANCE OF ANTI-DUMPING

II.1. The dumping phenomenon

The first *definition* of dumping was given by Jacob Viner who described it as "selling at a lower price in one national market than in another."[1] Since then dumping is considered as international price discrimination that can harm domestic producers that face "low cost" foreign exports. In other words, goods are dumped when the price that the exporters charge to the foreign costumers is less than the price they charge to the home market customers.

This practice is possible if conditions of competition are distorted, for instance in the presence of sanctuary, protected markets or because the exporting company is subsidized or in another manner protected by the government. This means that there is "asymmetry in market access"[2], hence importers have to face import barriers to the dumper's home country which is clearly not parity in conditions of competition between producers and/or traders. Accordingly, dumping causes trade deflection and it is considered as an *unfair* trade practice. Unfairness, however, does not amount to illegality and it is not outlawed by WTO norms but such behavior can be condemned by the injured State. Dumping is therefore not a forbidden or prohibited practice (since it stems from the acts of privates and not that of the State, addressees of WTO obligations) but it still can be counteracted if it causes injury to the

[1] VINER, Jacob, *Dumping as a Method of Competition in International Trade I.,* The Uni. J. of Business, Vol.1., No. 1. (Nov., 1922), p. 36
[2] MÜLLER Wolfgang, KHAN, Nicholas, SCHARF Tibor, EC and WTO anti-dumping law. A handbook. 2nd Ed. Oxford (2009), para. I.06.

domestic industry. The Anti-dumping Agreement (Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994, commonly used as 'Anti-dumping Agreement' or 'ADA') regulates the conditions under which WTO Members are entitled to react in order to counteract dumping.

Dumped exports may harm domestic producers that cannot compete with the foreign company with the same conditions hence the level-playing-field, so that the competitive market atmosphere should be restored. The harm of the domestic industry can be cured by the imposition of anti-dumping measures that comprise of provisional measures, definitive anti-dumping duties and undertakings. There is no other way to address dumping.[3] As far as the anti-dumping duties are concerned these are duties super-imposed on the bound duty and equal either to the dumping- or the injury margin.

In order to impose the anti-dumping duty, a complaint must be presented on behalf of the domestic industry and the anti-dumping authority shall conduct an investigation that has the purpose to establish the (1) the existence of dumping; (2) the existence of injury; and (3) causal link between them.

II.2. The spread of anti-dumping

The use of the anti-dumping instrument became more and more widespread and not just among traditional users but the so called new users as well recur to these trade control mechanism (see Tables 1 and 2). Traditional users of anti-dumping are those countries engaged in investigations since at least the nineteen-seventies, namely Australia, Canada, USA, EC and New Zealand. The 'new users' are those countries which started investigations in the nineteen-eightees. This category of countries consists of Mexico, Argentina, Brazil, China, India, Korea, South Africa and Turkey. As of 2005, developing countries had overtaken the traditional users in using the instrument.[4]

It is important to note that the target countries investigated by developed countries are divided almost equally between developing and developed countries, while developing countries tend to investigate developed countries[5] with an increasing trend to target other developing countries. This may be attributed to the increasingly intense South-South trade.[6]

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[3] United States – Continued Dumping and Subsidy and Offset Act of 2000 (US – Byrd Amendment), WT/DS217/AB/R, WT/DS234/AB/R, 16 January 2003, para. 269

[4] KUFUOR, K.O., The *growing problem of Intra-developing Country Anti-dumping Actions in World Trade*, in Debroy Bibeck, Anti-dumping: global abuse of a trade policy instrument, New Delhi Academic Foundation in Association with Liberty Institute, (2007) p. 87

[5] MIRANDA, J.;TORRES, R.A. Torres; RUIZ M., the International Use of Anti-dumping: 1987-1997, J. of World Trade; Vol. 32 No. 5, (Oct. 1998), p. 8

[6] KUFUOR K.O., *The growing problem of Intra-Developing Country Anti-dumping Actions in World Trade*, in Debroy Bibeck, Anti-dumping: global abuse of a trade policy instrument, New Delhi Academic Foundation in Association with Liberty Institute, (2007), p. 92

Reporting Member	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Total
Canada	7	0	7	10	10	14	19	0	5	8	4	0	3	3	**90**
China	0	0	0	0	0	0	0	5	33	14	16	24	12	4	**108**
Korea	0	5	10	8	0	5	0	1	4	10	3	8	0	12	**66**
Brazil	2	6	2	14	5	9	13	5	2	5	3	0	9	11	**86**
EU	15	23	23	28	18	41	13	25	2	10	21	12	12	15	**258**
India	7	2	8	22	23	52	38	64	52	29	17	16	25	31	**386**
Australia	1	1	1	17	6	5	10	9	10	4	3	4	1	3	**75**
Argentina	13	20	11	12	9	15	16	22	19	1	8	5	10	6	**167**
USA	33	12	20	12	24	31	33	26	12	14	18	5	5	23	**268**
South Africa	0	8	18	14	35	13	5	15	1	4	0	7	1	3	**124**

Table 1. *AD measures imposed by Member States.* Source: WTO

Reporting Member	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	Totals
Korea,	4	13	15	3	6	2	4	9	18	3	4	7	15	5	**108**
Canada	11	5	14	8	18	21	25	5	15	11	1	7	1	3	**145**
China	0	0	0	0	0	6	14	30	22	27	24	10	4	14	**151**
Brazil	5	18	11	18	16	11	17	8	4	8	6	12	13	23	**170**
Australia	5	17	42	13	24	15	23	16	8	9	7	10	2	6	**197**
South Africa	16	33	23	41	16	21	6	4	8	6	23	3	5	1	**206**
Argentina	27	22	14	8	23	43	27	14	1	12	12	11	8	19	**241**
EU	33	25	41	22	65	32	28	20	7	30	25	35	9	19	**391**
USA	14	22	15	36	47	47	75	35	37	26	12	8	28	16	**418**
India	6	21	13	28	64	41	79	81	46	21	28	35	47	54	**564**

Table 2. *AD initiations of investigations by Member State.* Source: WTO

In general, the increased use is due to various factors. At first, anti-dumping allows for targeted protection, since it is imposed on a discriminatory basis and can hit a specific

country. Secondly, the provisions on the calculation of dumping are quite favorable to the investigating authority since they are allowed to construct the normal value.[7] Thirdly, the special standard of review under Article 17.6. of the ADA, is more deferential to the determinations of the investigating authorities than the general standard of overview provided for under Article 11 of the Dispute Settlement Understanding.[8] Fourthly, an increasing number of countries enacted anti-dumping laws that motivated both the executives and private actors to invoke the instrument.

Globalization is also a contributing, "framework-factor" to the extensive use of this trade control mechanism. This phenomenon involves increasingly intense commercial relations between States which causes inter-connection and enhanced dependence among them. This process was possible through extensive trade liberalization, mostly in the framework of the GATT. Cross-border liberalization of goods, services and capital inflows entailed greater international competition between domestic and foreign producers and traders. Consequently, domestic producers have to face more intense competitive pressure from abroad and they pay more attention on the origins of these advantages.

The comparative advantage, that underlies the whole international trading system, is affected by public (e.g. toleration of cartels in the exporting country, subsidization) and private (i.e. restrictive business practices, such as predatory pricing in the importing country) choices. These choices raise both policy challenges and cross-border competition problems in an interconnected world where it is more and more difficult to manage relations among a variety of economies. That is why – as the case with two computers – an *'interface mechanism'* [9] is needed to mediate between the two systems, between two economies. This interface mechanism consists of three types of trade control instruments, the so called TDIs: (1) antidumping and (2) countervailing measures and (3) safeguards. The first two instruments tackle unfair trade practices, namely international price discrimination and illegal or countervailable subsidies; the third consists of an action against fairly imported goods when a rapid surge in importations does not permit the domestic industry to adapt itself to a suddenly more competitive environment.

In the light of the intense use of the anti-dumping instrument, it is crucial to keep under control the acts of Member States in which the special standard of review provided for by the ADA has a central role. This method is particularly important in anti-dumping cases since this is one of those fields of WTO law where States are still eager to maintain some discretion, on the one hand, and they also fight against an anti-competitive behavior of another Member State by counteracting unfair trade practices.

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[7] In order to determine the existence of dumping (necessary in addition to the determination of injury and causal link) the export price and the normal value shall be established. This last is "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." (Article 2.1. of the ADA)

[8] MAVROIDIS, Petros, Trade in goods, Oxford Uni. Press (2007), p. 341

[9] JACKSON, John H., The World Trading System, Law and Policy of International Economic Relations, 2nd ed., MIT, (1997), p. 248

II.3. Roots of the first anti-dumping laws and their expansion

There is also little in history to suggest that anti-dumping ever had a scope beyond protecting home producers from import competition.[10] Yet, anti-dumping measures are only the second best solutions since they do not eradicate the roots of the anti-competitive behavior of the exporters but at the current international situation we have no better answer to the problem.[11]

The protection of the domestic industry was firstly mentioned in the16th century, when an English man charged foreigners with selling paper at a loss to smother the infant paper industry in England. Specific laws on protection of national producers were passed only at the beginning of the 20th century. These very first anti-dumping laws were the children of necessity, replies to 'evil' foreign competition. This is the age of the birth of anti-dumping laws twined with competition laws.

The first laws were enacted in Canada and in the USA but the two countries had different approaches. While Canada's approach was more similar to how anti-dumping is tackled in the present and its law permitted the executive and administrative branches to apply a selective protection against foreign exporters; in the USA protection of producers was resolved through an extension of the antitrust legislation. Since the law was not able to cope with the core problem – namely to block unfair imports – American producers pushed to change it. As a result, in 1916 the US adopted its first anti-dumping law, based on the Canadian model and which mainly addressed the issue of foreign predatory pricing.

The anti-dumping legislation wave reached other countries: New Zealand enacted its first trade defense law in 1905, Australia in 1906, South Africa in 1914 and Great Britain in 1921. The import policy of these countries soon started to heavily rely on anti-dumping administrative actions and on rulings on tariff classification. In the pre- GATT (General

[10] J.M. Finger, *The Origins and Evolution of Antidumping Regulation, Policy, Research and External Affairs Working Papers* WPS 783; Country Economics Department; The World Bank; Oct. 1991, p. 2; or see in *The Origins and Evolution of Antidumping Regulation* in Ann Arabor, *Anti-dumping. How it works and who gets hurt.* Edited by M. J. Finger, University of Michigan Press, 1993, p. 13

[11] There were attempts to make anti – dumping more competition friendly (see e.g. B. Hoekman, *Free Trade and Deep Integration. Antidumping and Antitrust in Regional Agreements,* The World Bank, Policy Research Working Paper No. 1950 or B.M. Hoekman, P.C. Mavroidis, *Dumping, Antidumping and Antitrust,* J. of World Trade, Vol. 30, No. 1, 1996)
and several proposals have been made to change or abolish this instrument (see e.g. G. Marceau, *The Full Potential of the Europe Agreements*: *Trade and Competition Issues*, World Comp. Vol. 19, No.2, Dec. 1995) but up to date no serious efforts have been made. There are good examples for the elimination of anti-dumping protection in the framework of bilateral treaties (BTs, such as the ANZERTA, the Australia – New Zealand Closer Economic Relations Trade Agreement or the Canada - Chile 'Cease Fire Agreement') or regional agreements (RTAs, such as the European Union) subject to certain conditions. Attempts have been made in the framework of the WTO to substitute trade remedies with antitrust instruments but actually there is no will from the Member States to continue to go through this path and as a result, the WTO's Working Group on the Interaction between Trade and Competition Policy (WGTCP) was suspended in 2004. ('July Decision' of 2004, WT/L/579, 2 August 2004)

Agreement on Trade and Tariffs of 1947, referred as 'GATT' or 'GATT47' or 'General Agreement') period these countries (except Great Britain) were the most significant users of the anti-dumping instrument.

In the GATT, anti-dumping became a multilaterally agreed instrument. Article VI of the General Agreement contained the definition of dumping, i.e. the introduction of "products of one country into the commerce of another country at less than a normal value." In addition to this, the basic requirements to act against dumping practices were laid down. Albeit, the Article was not mandatory for all GATT Contracting Parties since the provision was subject to the "grandfather clause" that permitted States to maintain in force their already existing laws even if inconsistent with the provisions of the General Agreement. The problem of lack of binding rules was tackled in the Kennedy Round (1964 -67), the framework of which the first "Anti-dumping Code," the "Agreement on Implementation of Article VI" was negotiated. The Code laid down the basic procedural rules and detailed criteria to invoke anti-dumping actions, on the other hand it did not deal with important issues such as the definition of the domestic industry and the causal link between dumping and injury.

The Anti-dumping Code was revised in the Tokyo Round (1973-79) and entered into force in 1979. The major achievement of the Code was to revise the issue of injury determination, the causality and the rules on the acceptance of undertakings. It restricted the application of retroactive duties as well.[12]

Under both Codes, those Contracting Parties that accepted as binding these agreements, arranged to bring in line their legislation with the provisions of the above treaties. Hence, recourse to anti-dumping was a "privilege" of a restricted number of countries, a clearly unsatisfactory solution. Moreover, the 1979 AD Code left unresolved a number of problems and ambiguities that resulted in divergent, inconsistent anti-dumping practices and procedures around the world.

The major breakthrough was reached in the Uruguay Round (1986-1994) when WTO Members agreed to redact a new anti-dumping agreement binding on all Member States. The Tokyo Round Anti-dumping Code was replaced by the Agreement on Implementation of Article VI of the 1994 General Agreement on Tariffs and trade, but it in fact substantially modified and completed the former Code on various issues. For example, determination of dumping and injury, new provisions on currency conversion and cumulation were inserted, minimum standards for the admissibility of AD complaints were established and authorities were also required to examine them. In addition, the new ADA (such as other multilateral "covered agreements") does not allow the recourse to the "grandfather clause." Consequently, Article 18.4 of the Anti-dumping Agreement requires each Member State to "take all necessary steps, of a general or particular character, to ensure […] the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement […]."

[12] TREBILCOCK Michael J., HOWSE Robert, The Regulation of International Trade, Routledge (1995), p. 98-99

The importance of the well codified administrative protection cannot be underestimated. The new ADA not just simply codified more precise anti-dumping procedures and rules, but by making them mandatory, enhanced the transparency and the legal security and predictability for parties to such procedures and significantly reduced the risk of protectionist application of this trade contingency instrument. These positive effects have been reinforced by the mandatory acceptance of the WTO dispute settlement system where countries *de facto* have a right to bring a claim if they believe that a provision of the ADA has been violated.

III.THE ROLE OF THE COURTS IN A NEW ECONOMIC ORDER AND THE IMPORTANCE OF THE WTO DISPUTE SETTLEMENT SYSTEM

In the 18th century Montesquieu elaborated the theory of separation of powers that is the division of legislative, executive and judiciary branches upon which modern constitutionalism is based upon. In this tripartite system, judicial functions are separated from the governmental and legislative roles. However, by time, courts were increasingly addressed to settle disputes not only between private parties but they were called to control both the government and the administration. In addition, courts assumed essential functions in the process of rule-making.[13] Notwithstanding (traditionally), judicial review of foreign policy-related decisions is often excluded or subject to limited overview. On the other hand, the process of regionalization and globalization does not allow any more clear distinctions between domestic and international law: issues formally concerning national law may affect foreign relations as much as external relations may have influence on domestic law.[14] This interaction between international and national law is inevitable and complex and one can ask whether it makes much sense to distinguish between domestic and external economic relations. At the same time the overlap between the two areas is not comprehensively addressed either by international treaties or by constitutions. Problems arise at two levels: firstly, at an *international level*, where relationships between international and domestic law shall be addressed both in general and in the framework of the WTO dispute settlement system; secondly the question has to be tackled in a *domestic context* as well through the application of judicial principles and techniques such as direct effect and the principle of consistent interpretation with treaty previsions.[15] As a consequence, it is of crucial importance to properly define and assess the role of the courts in a globalized economy. The following questions need to be better understood:

[13] COTTIER, Thomas, *The Judge in International Economic Relations*. In Economic Law and justice in times of globalization, ed. by Mario Monti, Nikolaus von und zu Lichtenstein, Bo Vesterdorf, Jay Westbrook, Luzius Wildhaber, Nomos, Verlag Oesterreich, (2007), p. 100

[14] COTTIER, Thomas, *The Judge in International Economic Relations*. In Economic Law and justice in times of globalization, ed. by Mario Monti, Nikolaus von und zu Lichtenstein, Bo Vesterdorf, Jay Westbrook, Luzius Wildhaber, Nomos, Verlag Oesterreich, (2007), p. 102

[15] COTTIER, Thomas, *The Relationship Between World Trade Organization Law, National and Regional Law*, in The challenge of WTO law: Collected essays, Cameron May, (2007), p. 261

(1) prerogatives of *foreign policies* that still rely on national states;
(2) define the *roles of privates*, in particular MNEs (multi-national enterprises);
(3) develop appropriate doctrines of judicial overview, such as the *standard of review*;
(4) the *process of the WTO rule-making*, e.g. because of the possibility of the direct effect of WTO rules it is only feasible if the norms enjoy a strong legitimacy.[16]

The World Trade Organization plays a central role in influencing the legal nature of international economic relations. From former politics/ diplomacy and economic power oriented trade relations the WTO pushed towards a rule-oriented, increasingly legalized multilateral system in which a central tribunal controls the respect of the common rules. Yet, the structure itself has a value for "creating greater predictability, redressing unfair power imbalances, and preventing escalating international tensions. In some instances it is more important that international disputes be settled quietly and peacefully than that they conform to all correct economic policy goals."[17]

The Organization has the characteristics of highly legalized institutions since its "rules are *obligatory* on parties through links to the established rules and principles of international law, in which rules are *precise* (or can be made precise through the exercise of delegated authority), and in which authority to interpret and apply the rules has been *delegated* to third parties acting under the constraint of rules." [18] In other words, these norms are agreed, accepted and binding on all the Member States and in case of their violation the allegedly injured State can sue another Member at the Dispute Settlement Body.[19] It is straightforward then that strengthening and the compulsory character of the Dispute Settlement System (DSS) made the difference during the Uruguay Round negotiations and it became the heart, the "crown jewel" of the whole WTO system. It is particularly important in the light of the GATT history: while in the GATT the resolution of disputes was diplomacy-driven and the establishment of the panel would not be taken for granted, in the WTO the establishment of the panel is a *de facto* right of the claimant Member State and adoption of panel reports is almost automatic. In addition, a standing body (Appellate Body) has been created in order to review panel decisions in relation to questions of law.

The Singapore Ministerial conference described the importance of the DSS in the following way: "The Dispute Settlement Understanding (DSU) offers a means for the settlement of

[16] COTTIER, Thomas, *The Relationship Between World Trade Organization Law, National and Regional Law*, in The challenge of WTO law: Collected essays, Cameron May, (2007), p. 306 – 307
[17] JACKSON, John H., The World Trading System. Law and Policy of International Economic Relations, 2nd Ed., MIT Press (2000), p. 340
[18] More about legalization see: ZLEPTNIG, Stefan, *The Standard of Review in WTO Law: An Analysis of Law, Legitimacy and the Distribution of Legal and Political Authority*, European Integration online Papers, Vol. 6. , (2002), No. 17., http://eiop.or.at/eiop/texte/2002-017a.htm p. 8 and K. W. Abbott, R. O. Keohane, A. Moravcsik, A. -M. Slaughter, and D. Snidal, The Concept of Legalization, International Organization Vol.54, (2000), p. 401
[19] More scholars argued (e.g. J. H. Jackson, D. Cass) about the phenomenon of " trade constitution" that is composed of the interplay of both national and international norms, institutions and policies. In addition, the Appellate Body's norm-creating role has also contributed to the development of the trade constitution.

disputes among Members that is unique in international agreements. We consider its impartial and transparent operation to be of fundamental importance in assuring the resolution of trade disputes, and in fostering the implementation and application of the WTO agreements. The Understanding, with its predictable procedures, including the possibility of appeal of panel decisions to an Appellate Body and provisions on implementation of recommendations, has improved Members' means of resolving their differences. We believe that the DSU has worked effectively during its first two years. We also note the role that several WTO bodies have played in helping to avoid disputes. We renew our determination to abide by the rules and procedures of the DSU and other WTO agreements in the conduct of our trade relations and the settlement of disputes. We are confident that longer experience with the DSU, including the implementation of panel and appellate recommendations, will further enhance the effectiveness and credibility of the dispute settlement system."[20]

Above all, what matters is that all of these characteristics of the 'WTO tribunals' ensure the functioning and the credibility of the global trading system which is not based any more on the economic and political power of the States but on enforceable rules. Since the multilateral system does not belong any more to the hegemony of any State, the wide-spread support of the organization can be assured. Like this, the WTO system today constitutes "the common institutional framework of the contemporary world trading system"[21] and it creates an additional layer of economic governance at a global level[22] due to the effective resolution of international trade disputes.

It is also important to note that in the WTO there is no separation of powers in the aforementioned Montesquieu -sense, however there is no univocal opinion on it amongst academics. For instance, José Alvarez speaks about "WTO's judicial branch"[23] and in Joost Pauwelyn's view, the "WTO panels and the Appellate Body are not simply organs created by, and subject to the control of, political WTO bodies. They lead a separate existence as the judicial branch of the WTO."[24]

Technically, the mix of the three above functions is exercised in one body. The WTO's main organ is the Ministerial Council that is both a sort of legislative- interpretative and judiciary body, since in this framework treaties are negotiated, signed, authentically construed and the decisions of the panels and the AB are approved. This particularity and the fact that Member States jealously try to defend their sovereignty make it extremely important to define the powers of international courts – as it is the case of the WTO panels and the Appellate Body.

[20] Singapore Ministerial Declaration, WT/MIN(96)/DEC, 13 Dec. 1996
[21] WEISS, Friedl, *The WTO and the Progressive Development of International Trade Law,* Netherlands Yearbook of International Law, Vol. 29 (1998), p. 72
[22] COTTIER, Thomas, *International Trade Law: The Impact of Justiciability and Separation of Powers in EC Law*, NCCR Trade Regulation, Working Paper No. 2009/18, (April, 2009), p. 19
[23] ALVAREZ Josè, A., *Trade and the Environment: Implications for Global Governance. How Not to Link: Institutional Conundrums of an Expanded Trade Regime,* Widener Law Symposium, Vol.7., No.1.,(Spring, 2001), p. 7
[24] PAUWELYN, Joost, *The Use of Experts in WTO Dispute Settlement*, Int'l. and Comparative Law Quarterly, Vol. 51. No.2., (April, 2002), p. 338

For this purpose, courts have developed various doctrines of judicial review, such as (1) the doctrine of direct effect that operates both in international and national law and foreign relations; (2) the doctrines of standards of review; (3) the distinction of law and facts; (4) the doctrine of consistent interpretation (e.g. in the European law or the Charming Betsy doctrine in the USA); (5) the doctrine of political questions and finally (6) the concept of administrative and legislative discretion.[25] All of these are employed to outline the roles of tribunals in protecting the rights and obligations of individuals but some of them are used at international courts as well. In the WTO context, the standard of review has the utmost importance because it is in a close relationship with global international trade governance as it defines the limits between national policies and international trade law jurisprudence.[26]

IV. HISTORICAL OVERVIEW OF THE STANDARD OF REVIEW

In the GATT 47 the consensus was considered as the most suitable method to settle conflicts between the Contracting Parties and the agreement lacked of detailed procedural rules. Conflicts were resolved more in a "settlement"-style (that is mainly through diplomatic negotiations and mutually acceptable solutions) than through "litigation" that was more of a "balanced accommodation of interests rather than of vindication of rights in a 'victory versus defeat' pattern."[27] It is not surprising then that there was no express provision on the standard of review however it has been employed occasionally in panel proceedings, in particular in trade remedy cases. This review usually referred to the overview of facts and it was developed by the panels on a case-by-case basis. The more widespread use of the instrument can be observed only in the late GATT 47 years that coincide with the increasing juridification of the dispute settlement. It was argued, that the panels should respect the determinations of domestic entities up to a certain point.

The Uruguay Round brought a revolution into the international trading and GATT-system and the establishment of the dispute settlement mechanism – as part of the single undertaking approach. This can be considered the biggest achievement of the round. The Dispute Settlement Understanding (DSU) provides for a compulsory resolution of disputes between Member States of the WTO, based upon principles such as rule of law, legal security and predictability. Therefore, the approach of the panels and the Appellate Body (hereinafter, AB) is essentially legalistic. This vocation is supported by the fact that (1) the establishment of the panel, based on Art. 6 DSU, is a right of the Member State; that (2) the DSU provides for the possibility to appeal at a permanent organ, the Appellate Body[28]; and (3) the same agreement

[25] COTTIER, Thomas, *The Judge in International Economic Relations*. In Economic Law and justice in times of globalization, ed. by Mario Monti, Nikolaus von und zu Lichtenstein, Bo Vesterdorf, Jay Westbrook, Luzius Wildhaber, Pub.: Nomos, Verlag Oesterreich, (2007), p. 112

[26] RAJU, K. D., WTO Agreement on Antidumping: a GATT/ WTO and Indian jurisprudence, Kluwer Law and Business, (2008), p. 176

[27] WEISS, Friedl, Improving WTO Dispute Settlement Procedures. Issues and Lessons from the Practice of Other International Courts and Tribunals, Cameron May, (2000), p. 19

[28] Art. 17 DSU

de facto provides for the automatic adaptation of the reports of the panel and the AB, unless negative consensus is achieved.[29]

Although the DSU includes detailed procedural rules it does not deal explicitly with the issue of the standard of review. This might be attributed to the fact that countries were not able to negotiate a general standard of review that could have governed all the disputes. Negotiating parties routinely suggested the introduction of deferential methods of treaty interpretation in favor of state sovereignty and regulatory autonomy because they were afraid of eroding their powers. For instance, the USA negotiators proposed in November, 1992 a narrow standard of review to be included in the Anti-dumping Agreement. The proposal had the following restrictive elements:

(1) There could be no violation of the Agreement as long as the investigating authority's actions were consistent with the reasonable interpretation of the treaty;
(2) Factual issues could have been reviewed only to consider whether there was no interpretation of the factual data before the investigating authority that could support its findings, and the burden of persuasion was on the complaining party to so demonstrate;
(3) The panel could not consider arguments that were inconsistent with those raised by that party's nationals to the investigating authority or that had not been raised by that party's nationals.[30]

Moreover, the USA also wanted to restrict the review of the record developed by the administrative authorities during the investigation.

In October 1993 the United States put forward notes to the Article 11 of the DSU. The approach of the USA was somewhat different compared to the former one since the narrow type standard of review was suggested to be applied to all WTO dispute resolution rather than only to anti-dumping and countervailing duties. Although this suggestion was withdrawn, a Ministerial Declaration provides for the review of the standard whether it is capable of being applied in every dispute settlement.[31]

In November 1993 the USA made a new, more relaxed proposal compared to that of 1992. The United States wanted to introduce the so called *reasonableness standard* which stems from the American administrative law jurisprudence, basically from the Chevron doctrine and

[29] Art. 16 and 17.14 DSU. According to the second, "[a]n Appellate Body report shall be adopted by the DSB and unconditionally accepted by the parties to the dispute unless the DSB decides by consensus not to adopt the Appellate Body report within 30 days following its circulation to the Members."
[30] HORLICK, Gary, CLARKE, Peggy A., S*tandards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst-Ulrich Petersmann, International trade law and the GATT/WTO dispute settlement system, Kluwer Law Int'l., Vol.11., (1991), p. 317
[31] Decision on Review of Article 17.6 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994

it calls for the "objective assessment" of the facts. The standard on legal issues also called for the objective assessment of the application of the Agreement to the measure.[32]

In an administrative review, US courts show deference to administrative actions by the executive branch of the government, if those actions are based on a "reasonable interpretation" of a statue. Therefore, US high-level diplomats suggested the introduction of judicial restraint upon panels and AB from ruling against the defendant country if its approach was "reasonable." In other words, the application of this standard in an international context would have meant that a panel or the Appellate Body should have deferred to the decisions of the executive as long as they reasonably interpret and act in conformity with the international agreements. The panel could have determined whether the authority's action was "outside the range of actions consistent with that obligation "only if the relevant proviso of the Agreement was either ambiguous or did not specify how the obligation was to be performed. [33]

The proposal triggered strong opposition of many States because according to them the provision would have given too much leeway to national governments and would have considerably constrained the panels and undermined the consistency of the WTO law by allowing different nations to develop different standards, consequently reducing the reciprocity and consistency of the multilateral trading system. In particular, developing nations favored broader standards of review to halt protectionist abuses of anti-dumping laws. For these countries, a broader standard of review meant that wide discretion attributed to domestic administrative agencies in anti-dumping cases could have been counter-balanced by more intrusive power of the panels. At last, there was a cluster of countries that worried about the criteria since it might have undermined the effectiveness of WTO rules (in particular in the IPR area) by constraining the panels too much.[34] As a consequence, the Dunkel draft[35] that embodied the results of the negotiations did not contain a specific provision on the standard of review in any WTO agreement.

Notwithstanding, at the end of the Round, the issue almost became a deal-breaker during the round. At the very end, in Marrakesh, a last minute compromise was reached only on the explicit, specific standard of review which was incorporated in the Anti-dumping Agreement. Rather than applying the reasonableness test, a panel shall determine whether the authority's establishment of the facts was proper and the evaluation of the facts was unbiased and objective, Moreover, instead of using the word "reasonable," diplomats replaced it by the term "permissible" with the aim of satisfying those countries opposed to a highly deferential

[32] HORLICK, Gary, CLARKE, Peggy A., *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst-Ulrich Petersmann, International trade law and the GATT/WTO dispute settlement system, Kluwer Law Int'l., Vol.11., (1991), p. 318 – 319

[33] HORLICK, Gary, CLARKE, Peggy A., *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst-Ulrich Petersmann, International trade law and the GATT/WTO dispute settlement system, Kluwer Law Int'l., Vol.11., (1991), p. 319

[34] JACKSON John H., CROLEY Steven P., WTO *Dispute Procedures, Standard of Review and Deference to National Governments*, The Am. J. of int'l. Law, Vol. 90., No.2., (Apr. 1996), p. 199

[35] Draft Final Act Embodying the Results of the Uruguay Round Multilateral Trade Negotiations, GATT Doc., MTN.TNC/W/FA, 20 Dec. 1991

standard. At last, a door for a general application in WTO dispute resolution of the special standard of review was left open because the negotiators decided that "[t]he standard of review in paragraph 6 of Article 17 of the Agreement on Implementation of Article VI of GATT 1994 shall be reviewed after a period of three years with a view to considering the question of whether it is capable of general application."[36] To date, no such review has taken place yet.

The outcome of the Uruguay Round is not satisfactory, first of all because there are no explicit references in the DSU concerning the standard of review, since diplomats were unable to agree on a generally applicable standard. Therefore, the definition of the panels' restraint or intrusiveness has been tacitly delegated to the daily work of the Dispute Settlement Body. Secondly, the language of Article 17.6 of the Anti-dumping Agreement is quite ambiguous. It is not clear how much deference panels and the Appellate Body should exercise between the two extremity of the "*de novo*" review and the "total deference." For instance, in the United States' view, the panel and the Appellate Body applied improperly Article 17.6. (ii) of the Anti-dumping Agreement in some cases mainly because the panels have not applied the Article in a way that allows for upholding multiple interpretations of WTO Members domestic agencies. The USA claims that the language of the Anti-dumping Agreement recognizes the possibility of multiple "permissible" interpretations, although this might be in conflict with the normal standards of treaty interpretation laid down in the VCLT.[37] However, in practice, panels arrive to only one interpretation which makes it less likely to consider alternative interpretations of national agencies.

The United States also argued that the final language of the ADA gave birth to a standard that is similar to that used by American courts in the review of anti-dumping decisions. If that was the case, the determinations would be subject to close scrutiny. Nonetheless, the US court decisions have not resulted in overwhelming deference to the authorities.[38] It is therefore somehow surprising that the GAO Report on the Standard of review and Impact of Trade Remedy Rulings[39] also criticized the panels and the Appellate Body stating that they did not apply the special standard of review in as deferential manner as the USA intended.

Although several proposals have been presented in the framework of the Doha Development talks[40] and it seems that there is a general dissatisfaction with the instrument, negotiations on the issue are deadlocked.

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[36] Decision on Review of Article 17 of the Agreement on Implementation of Article VI of the general Agreement on Tariffs and Trade1994

[37] HORLICK, Gary N.; SHEA Eleanor C., *The World Trade Organization Antidumping Agreement*, J. of World Trade, Vol. 29., No.1., (1995), p. 30

[38] HORLICK, Gary, CLARKE, Peggy A., *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst-Ulrich Petersmann, International trade law and the GATT/WTO dispute settlement system, Kluwer Law Int'l., Vol.11., (1991), p. 320

[39] GAO Report on the Standard of Overview and Impact of Trade Remedy Rulings, (July 2003) GAO-03-824, p.7.

[40] E.g. the Indian proposal is to suitably modify the special standard of overview of the Anti – dumping Agreement so that the general standard of review laid down in the WTO Dispute Settlement Mechanism, applies

V. WHAT IS A STANDARD OF REVIEW REALLY ABOUT?

V.1. The definition of the standard of review

The standard of review is a legal instrument of Anglo-Saxon origin that was transplanted into the WTO legal system, on the insistence of the USA, during the Uruguay Round negotiations. Its purpose is to define the limits of the adjudicative bodies' authority and to oblige them to control the interpretation of and the respect for the legal rules the bodies have been entrusted with jurisdiction.[41] In other words, it delimits the powers within which judges work:[42] it establishes "no go" areas for judges requiring them to respect the choices made by legislators or regulators. "Within these "no go" areas, the first decision-maker has discretion to make choices that the judge cannot consider. Beyond the "no go" areas, the judge has the authority to verify the legal – but not political – validity of the decision.

The standard of review is, therefore, an important part of the system of checks and balances in government, helping to ensure the accountability of decision-makers"[43] and it also allocates resources among different branches of the government. In this optic, the most important purpose of the test is to increase the quality and legitimacy of the governmental decision-making process. All these comprises that there are tensions between the three Montesquieu branches of power which are played out in the standard of review. These tensions reach another dimension when international tribunals review the laws and measures of sovereign states.

In the WTO context, the issue arises when the panels or the Appellate Body are required to review domestic authorities' decisions if they are in compliance with international trade rules.

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equally and totally to disputes in the anti-dumping area. http://www.indianembassy.org/policy/WTO/wto_india/anti_dumping_06_99.htm The USA is interested in tightening the instrument so that panels do not add to the obligations of, nor diminish the rights of, WTO Members. The USA in its submission (TN/RL/W/130, 20 June 2003) stated as it follows: "If Article 17.6 is observed and applied properly, in concert with Articles 3.2 and 19.2 of the Dispute Settlement Understanding, then that will help the WTO dispute settlement system to respect the balance of commitments inherent in the ADA and not operate so as to impose upon Members obligations to which they did not agree. However, in connection with aspects of several recent cases, the United States believes that panels and the Appellate Body have not accepted reasonable, permissible interpretations of the ADA. In some cases, these bodies have used general terms in the Agreement to extrapolate what the Agreement would have said about a particular issue if Members had explicitly considered it and agreed upon specific provisions to address the issue. […] Regardless of their position on the substantive issues, all Members should be concerned by dispute settlement findings that disregard provisions agreed to by Members during negotiations. Members should consider whether Article 17.6 should be addressed to ensure that panels and the Appellate Body properly apply it. Members should also consider whether a provision similar to Article 17.6 of the ADA should be included in the ASCM."

[41] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38., No.3., (2004), p. 509

[42] The standard of overview, however, is not the only way to define the extension of powers of courts. Another methodology is the allocation of burden of proof. For instance, when the burden is put on the party challenging the decision and when a high level of proof is required are other methods to shelter national agencies' decisions.

[43] EHLERMANN, Claus-Dieter, LOCKHART Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7., No.3., (2004) p. 493

This appraisal is not without limits because panels have to respect the administrative agencies' determinations up to a certain extent. For instance, Robert Howse argued that the standard of review strongly relies on the institutional sensitivity of the panels that evaluate the decisions of administrative agencies on a case-by-case basis, depending on the credibility and competence of these bodies.[44]

In other words, in a WTO litigation, the standard of review defines the intensity or the degree of the review, the degree within which the panel or the Appellate Body should "second-guess" the decision of a national authority concerning the alleged inconsistency with the WTO law. On the other hand, the standard of review does not restrict only WTO judges' discretion but also that of the national administrative bodies', which means that the letter have a limited *margin of appreciation* in their decision-making.

The standard of review is of a *hybrid* nature because it is a combination of procedural and substantive rules. The *procedural* rules are asserted to the panel and the Appellate Body that are obliged to *establish* the existence of certain conditions – in an affirmative case national administrative agencies are confirmed in their action. On the other hand, domestic authorities are addressees of *substantive* norms: if certain conditions *exist*, the administrative agency is entitled to act.

The *wide* definition of the standard of review does not exclusively relates to the degree of deference that panels and the Appellate Body have to manifest towards domestic economic measures and decisions but it also includes other criteria such as (1) procedural requirements for the enactment of trade-restrictive measures; (2) methods of interpretation; (3) panel activism or passivity in the process of fact-finding; (4) judicial activism or restraint in filling legislative gaps; and lastly (5) "issue-avoidance-techniques."[45] The *narrow* and technical definition of the instrument comprises the intensity of the review of factual findings and legal interpretations by the panel but it does not encompass substantive or procedural obligations of Member States. This second type of assessment is used in the WTO context.

V.2. Types of standard of review

As it has been described, the proper standard of review depends on the question of what authority and power the WTO has and what power remains with the Member States. Three main approaches can be distinguished:

(1) the *de novo* review that gives the widest liberty of overview to the courts;
(2) the *total deference* that ties the most the hands of tribunals and entitles with the widest discretion the administrative agency; and

[44] HOWSE, Robert, *Adjudicative Legitimacy and Treaty Interpretation in International Trade Law: The Early Years of WTO Jurisprudence*, in The EU, the WTO and the NAFTA. Towards a Common Law of International Trade, ed. J. H. H. Weiler, Oxford University Press (2000) p. 64.
[45] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 14

(3) the *deferential treatment* which is an intermediate standard of treatment of the national bodies' decisions. All of these standards are reflected in different issues that emerged in WTO disputes.

The first extremity is the ***de novo*** overview, according to which an adjudicative body is not bound by respecting the decisions of another entity and may substitute the decision of a lower body with its own since it has no limitations to re-investigate and re -examine domestic measures. This type of review is the strongest where sovereignty concerns are modest and neutrality is important, as it is the case in relation to purely legal matters.

The assurance of predictability, certainty and uniformity of the multilateral trading system is one of the goals of the WTO and its realization is devolved upon the panels and the Appellate Body as the highest experts of WTO law. This uniformity is possible only if the adjudicative bodies apply a *de novo review*, otherwise different WTO obligations would mean different things and they would be interpreted in different manners in different countries. To this end, 'WTO tribunals' shall strike the balance between the sovereignty of Member States and the benefits stemming from the uniformity and neutrality within the standard of review. [46]

There is a considerable amount of jurisprudence on the issue at stake. As the Appellate Body declared in the *US – Lamb*, "the phrase of "*de novo*" review should not be used loosely."[47] In addition, this also comprises that the panel could redo the investigations into the facts, already discovered by domestic authorities, and that the panel would have the "complete freedom" to substitute its own analysis and judgment for that of the national authority.[48] This means that the panel could do a new investigation without affording any deference to the original investigation. The Appellate Body in the *EC- Hormones* stated that "any panels have in the past refused to undertake *de novo* reviews, wisely, since under current practice and systems, they are in any case poorly suited to engage in such a review."[49] In addition, the Appellate Body in *US – Cotton Yarn* also affirmed that instead of engaging in a *de novo* review, the panel must "put itself in the place of that Member at the time it makes its determination. Consequently, a panel must not consider evidence which did not exist *at that point in time*."[50] As the Appellate Body further explained, this implies that panels should not seek to put themselves into the place of the national authorities with the aim of evaluating evidence that has not been presented during the original proceedings and panels also have to consider and respect the discretion of these domestic entities to a certain extent. On the contrary, WTO tribunals not respecting these parameters would engage themselves in *de novo* review. By the

[46] GUZMAN, Andrew T., *Determining the Appropriate Standard of Review in WTO Disputes*, Cornell Int'l. Law J., Vol. 42, (2009), p. 58 – 59

[47] United States – Safeguard Measures on Imports of Fresh, Chilled and Frozen Lamb Meat from New Zealand and Australia (US – Lamb), WT/DS177/AB/R, WT/DS178/AB/R, 1 May, 2001, para. 107

[48] EC Measures Concerning Meat and Meat Products (Hormones),(EC – Hormones) WT/DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998, para. 111

[49]EC Measures Concerning Meat and Meat Products (Hormones), (EC – Hormones) WT/DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998, para. 117

[50] United States – Transitional Safeguard Measure on Combed Cotton Yarn from Pakistan, (US – Cotton Yarn) WT/DS192/AB/R, 5 Nov. 2001, paras. 74 and 78

same token, panels also have to bear in mind not to reject the factual findings of the administrative agencies only because they would prefer another type of determination of facts. This also means that the panel's work shall respect the parameters of the national authority's own investigation. At last, in an overview-process it is assumed that there have been conducted investigations in the Member State otherwise the panel would not be able to put itself into the place of the domestic agency.

The exclusion of the *de novo* panel review makes sense since it is difficult to imagine how panels would make enquiries in the Member State. The latter are better equipped and they have an in - depth knowledge about the economic situation of the country, in addition, administrative agencies are specialized bodies with great expertise, hence they are well-prepared to conduct investigations and to draw their conclusions. "More importantly, in terms of separation and balance of powers, it would usurp the treaty-mandated role of the national authority for panels to conduct a fresh inquiry, imposing their own assessment of the facts."[51]

Panel reports – similarly to the classical judicial model – are increasingly perceived as a stage before the final review, since most of the decisions are appealed. From a political point of view, a party to the dispute – especially the losing one – is constrained to exhaust the remedy in order to satisfy the electors or other supporters. Legally, a party is invited to do so since the Appellate Body adopted policies of *de novo* review on issues of law.[52]

It is also interesting to point out that the Appellate Body has a proactive approach in reviewing panel decisions. It examines the findings of the first instance body upon a full and independent interpretation of questions of law and it frequently has a different reasoning than the panel, even though the operational conclusions of the latter often remain unaltered. In other words, the judicial restraint that panels should manifest towards the determination of national administrative agencies (namely whether the reasoning of the domestic authorities is consistent and permissible) is not applied at the appellate stage. As a consequence, the Body does not manifest an elevated level of deference towards the reasoning of the first instance. This attitude of the Appellate Body makes it clear that it considers its relationship to panels in a hierarchical order.

At last, it is necessary to mention the importance of the *de novo* review as a starting point in reviewing the executives' decisions. Once it is established that this type of overview is not applied, the issue of the standard of review and the level of deference becomes critical, since courts by definition shall manifest a certain degree of deference towards the administrative agencies' conclusions.

The other extreme standard is the ***total deference*** which requires the decision of the lower body to be respected if this had fulfilled certain procedural requirements in making its

[51] EHLERMANN, Claus-Dieter, LOCKHART, Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7. No. 3., (2004), p. 502
[52] COTTIER, Thomas, The Challenge of WTO Law: Collected Essays, Cameron May (2007), *The WTO Dispute Settlement System: New Horizons*, p. 194

decision. This in practice means that the panel shall not substantially review the domestic authorities' investigations.

At last, the ***deferential*** or ***intermediate*** standard of review which leaves the possibility to the upper body to revise only if certain conditions had not been fulfilled during the original decision-making procedure. It implies that a court will reverse a lower court's ruling only if the latter commits a serious error.[53] This intermediate review is necessary to permit administrative agencies to apply some discretion in their decision-making process, in the same time enables courts to oversee the decisions of these authorities.

Apart from Article 17.6 of the Anti-dumping Agreement there is no explicit general standard of review in the WTO covered agreements. Hence, not surprisingly, in defining the appropriate standard the panels and the Appellate Body described what is *not* a WTO standard of review.[54] However, the majority of the scholars agree that Article 3.2. of the Dispute Settlement Understanding, which sets forth the objectives of the WTO Dispute Settlement System, constitutes the general standard in reviewing the WTO-law together with Article 11 of the DSU, which calls for "an objective assessment of the matter." This last standard of review applies both to facts and questions of law and calls for a deferential treatment of facts (because panels are bad equipped to establish facts) but no deference in purely legal questions (for instance appellate review). As the Appellate Body noted in the landmark case *EC – Hormones*, the "so far as fact-finding by panels is concerned […] the applicable standard is neither *de novo* review as such, nor "total deference", but rather the "objective assessment of the facts."[55]

In practice, however, it is often difficult to delimit the boundaries between facts and legal categorization. Fact-finding aims at restructuring "what has happened" and it is essential in order to set legal assertions. This procedure is linked to the rules on the burden of proof and to the weighting of evidence. The standard of review referring to facts is twofold. It relates to both the process of fact-finding of "raw" evidence and the factual conclusion which is subsequently drawn from the "raw" evidence. "The former concerns the issue how meticulously a panel should examine the scope and appropriateness of the relevant factual evidence [… and] the latter focuses on the plausibility of the factual conclusions which is subsequently drawn from the facts on the record."[56]

As far as questions of law are concerned, it has to be stressed that the application of normative rules as they are construed is always applied in an abstract manner. Pursuant to Article 1 of the DSU, the Dispute Settlement Body has the jurisdiction to interpret the provisions and

[53] GUZMAN, Andrew T., *Determining the Appropriate Standard of Review in WTO Disputes*, Cornell Int'l. Law J., Vol. 42, (2009), p.45
[54] EHLERMANN, Claus-Dieter, LOCKHART, Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7. No. 3., (2004) p. 501
[55] EC Measures Concerning Meat and Meat Products (Hormones), (EC – Hormones) WT/DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998, V.
[56] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 18

decide in disputes arising from a complaint originating in one of the "covered agreements" listed under Annex 1 to the DSU and the Member State specific schedules specifying trade concessions. The panel and the Appellate Body overview not just these agreements but the domestic laws and non-statutory elements as well. It means that they have the authority to check the way how national laws are in practice applied.

V.3. Functions of the standard of review

Article 3.2. of the DSU sets forth the objectives of the WTO Dispute Settlement System. It states that the DSS "is a central element in providing security and predictability to the multilateral trading system" and that it aims at "preserving" the rights and obligations of Member States of the Organization. The importance of the stable and certain trading system is clear from this provision. In turn, these core goals influence the standard of review applied by panels and AB in scrutinizing national decisions; that overview must respect the discretion and prerogatives left by the WTO Agreement to the Member States. This argument is connected to the distribution of powers between Members and the Organization.

The standard of review plays an important role in the *allocation of powers* between the executive and the international organizations which constitutes an increasing problem for the future of the trading system due to the often conflicting interests and preferences between domestic policies and vocation of international institutions. The question of the appropriate standard of review is therefore closely related to the issue what power is transferred to an international organization, so to the WTO, and what powers stay with the Member States.

Consequently, distribution of powers is connected to the delicate issue of *sovereignty* of States. The sovereignty concept is still in the heart of international law therefore of the GATT – WTO system as well: States are eager to limit the powers of international institutions in order to avoid excessive intrusiveness. By the same token, WTO Members were and are willing to restraint panel and Appellate Body discretion since the too intensive examination of their national laws and measures might interfere with domestic policy goals and could be perceived as threatening their sovereignty. To this end, national agencies shall be left discretionary powers, because they are considered (both from a technical and democratic point of view) to be better assessed for this purpose. From a technical point of view, these bodies are the experts of certain fields where they operate, from a democratic point of view it seems to be the best solution to leave subjective decisions to those actors that enjoy direct democratic legitimization.[57] "The problem is how to formulate and articulate the necessary mediating principle or principles between the international policy values for which the dispute settlement is desired, on the one hand, and the remaining important policy values of preserving national "sovereign" authority both as check and balance against centralized

[57] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38., No.3., (2004), p. 515

power, and as a means to facilitate good government decisions to the constituencies affected, on the other hand."[58]

A number of features are designed to protect sovereignty of Member States of the Organization and to prevent excessive transfer of powers to the Dispute Settlement Body. These include (1) the obligation to comply with a dispute ruling; (2) the legal precedent effect of a dispute report; (3) the standard of review; and the (4) question of 'judicial activism' or worries about panels stretching interpretations to achieve policy results which they favor.[59]

However, it is obvious that this sovereignty is voluntarily restricted in the increasingly interdependent and globalized world. As it was underpinned by the Appellate Body in the *EC – Hormones* case, "the standard of review appropriately applicable in proceedings […] must reflect the balance established in that Agreement between the jurisdictional *competences* conceded by the Members to the WTO and the jurisdictional competences retained by the Members for themselves."[60] It is a balancing of the authority of panels and the Appellate Body against the sovereign rights of Member States to set their own policies.

The dilemma of the standard of review can be described as collusion between international trading rules and domestic preferences and priorities. On the one hand, the uniform non – discriminatory and even – handed application of the multilateral rules is necessary in order to ensure predictability and consistency in international trade and to discourage protectionist measures. On the other hand, national priorities and preferences shall be respected by the 'WTO tribunals' until a certain extent. The threshold of this respect is described in the level of deference that panels and the Appellate Body shall manifest towards the decision of domestic authorities which is in turn outlined by the standard of review.

In addition to this, the standard of review also decides on which *body* (national administrative agencies or the panel or Appellate Body) has the authority to decide on the trade matter at stake subject to WTO law. "[…] the tribunal finesses a conflict between national and international institutional authority, although it is done in a relatively genteel language of standard of review."[61]

This is a delicate balance of powers consequently excessive panel interference could destabilize the whole WTO system and the Dispute Settlement Mechanism. However, the WTO Agreement is a treaty and as such is a result of negotiations of Member States. Hence, as declared by the Appellate Body in the *Japan - Taxes on Alcoholic Beverages II* case "it is

[58] JACKSON John H., CROLEY Steven P., WTO *Dispute Procedures, Standard of Review and Deference to National Governments*, The Am. J. of int'l. Law, Vol. 90., No.2., (Apr. 1996), p. 212
[59] JACKSON John H., *The World Trade Organization. Constitution and Jurisprudence*, The Royal Institute of International Affairs, Chatman House Papers, (1998), p. 78
[60] WT/DS48/AB/R, EC measures concerning meat and meat products (Hormones), 16 Jan. 1998, V.
[61] CASS, Deborah Z., *The 'Constitutionalization' of International Trade Law: Judicial Norm-Generation as the Engine of Constitutional Development in International Trade*, European J. of Int'l Law, Vol. 12., No. 1 (2001), p. 58

self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to *exercise their sovereignty according to the commitments they have made in the WTO Agreement*."[62] From a policy perspective it means that panels have to find the right equilibrium between the objective of preserving the uniformity and consistent application of WTO law on the one hand and the legitimate interest of Member States to protect their sovereignty on the other hand.

The standard of review delimits institutional powers and it encompasses not just *vertical* relations between national authorities and judiciary of the WTO but it also refers to the *horizontal* relationships within the organization, which comprises relations between the panels and the other, special bodies and it also refers to the review of panel decision by the Appellate Body.[63] However, it shall be stressed that the aforementioned institution lacks an executive body and the separation of powers therefore means that there is no hierarchy between panels and special bodies. [64] If a particular issue is subject to both of the competence of the panels and special bodies, the question arises if the former has to defer to the latter's findings. There are two contradictory approaches: the first cluster of academics states that since these special bodies have different vocations and functions than panels, the latter shall defer to a certain extent the formers' conclusion. For instance, in Roessler's[65] view, panels should exercise deference in cases when their competence overlaps with that of the special "political organ" of the WTO, otherwise the WTO judiciary would move a political matter towards the legal sphere of the WTO, i.e. the Dispute Settlement Body, and like this it would endanger the institutional balance as agreed by the founders of the institution. The other group of scholars advocates that panels may decide not to defer to the acts of other WTO bodies but they might re – evaluate such issues based on their own and independent assessment. In this case no special doctrine of deference is needed. It has to be highlighted, that the vast majority of academics opposes to the particular treatment of the decisions of the above mentioned special bodies.

Finally, in exploring the standard of review, more considerations should be bore in mind. First, the panels' decision-making process involves making factual findings and to apply the facts to the law. This second activity is the most sophisticated since it comprises the weighing and appreciation of the facts and their characterization under the legal norms. Secondly, the review also changes with the subject – matter of the dispute. For example, a measure examined under the ADA is subject to a different kind of review than a measure under the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement). Thirdly, the process by which the contested measure was adopted at national

[62] Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p.16., F.
[63] There is no hierarchical relationship between panels and the standing Appellate Body, however, their relationship is perceived by the AB as hierarchical.
[64] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 33
[65] In OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 38

level may also influence the nature of review. For instance, the domestic measure that results from a process that stems from a treaty obligation might be reviewed differently from the measure that required no similar procedure.[66]

V.4. Review of facts and questions of law

According to Article 11 of the DSU, panels are obliged to make an "objective assessment of the matter" before them. The "matter" can be both legal and factual issue that stems from the contested measure. On the other hand, the language of the Article does not specifically describe the precise nature and the intensity of the review. Since this requisite does not specify what panels are expected to do in reviewing the measures or legislative acts of WTO Members, the underlying function of the standard of review comes into play.

Even though the standard of review is fundamentally a procedural instrument, it also has a role in the interpretative process: judges need to restrain themselves in controlling factual and legal issues of the case at stake. As it was said, panels are obliged to conduct an "objective assessment" of the matter before them but the intensity of the review differs according to different situations. The review of the facts, therefore, must be analyzed from the perspective of every single WTO agreement taking into account the structure and the specific obligations of the treaty in question.[67]

As far as ***factual*** matters are concerned it is important to pinpoint the difference between fact-finding and the standard of review of facts. The former refers to the process of collection and evaluation of the facts and the latter comes into play only after judges engage themselves in fact-finding. At this stage the question arises how meticulously should the judiciary body review the decision of the national authority and whether it is satisfied with the factual findings and the conclusions of the agency.

Concerning the factual issues it is well known that the specialized domestic agencies have the necessary powers and experience at their disposal to obtain data and factual information. They follow the *inquisitorial* method of fact-finding which means that they are entitled to seek positively information and engage in investigations. In addition, being specialized agencies, they have a greater expertise than panels in the field where they operate on a daily basis. To the contrary, international judiciary authorities have difficulties in collecting and establishing facts and this argument is valid for the Dispute Settlement Body too. These international organs are constrained to rely on the information provided by the parties and their assessment is based on this factual record. This is the so called *adversarial* fact-finding method that necessarily confers limited investigative powers upon international adjudicative bodies, consequently, the *de novo* type review appears to be impossible.

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[66] EHLERMANN, Claus-Dieter, LOCKHART Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7., No.3., (2004) p. 496

[67] EHLERMANN, Claus-Dieter, LOCKHART, Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7. No. 3., (2004) p. 503

The restricted power of the panel in establishing facts is underpinned by the WTO decisions (especially referring to trade remedy measures) when in the various cases brought before the WTO panel, extensive fact finding has already taken place before the national authorities or courts. In addition to this, the judicial restraint is particularly evident in highly technical or politically sensitive decisions when panels tend to defer to the domestic agency's conclusions since they are less familiar with the events that took place in the country and they are less skilled at evaluating political, cultural and other factors relevant to a decision. Certainly, the state knows more about its own economy than the panel or the Appellate Body and it has more time and greater resources than these two bodies.[68]

The ***legal*** aspect of the standard of review encompasses a close linkage with the process of interpretation that has the goal of establishing the meaning of a treaty. Legal questions arise in every dispute and often the panel and the Appellate Body is the first to interpret a relevant WTO provision, since administrative agencies apply national laws that in turn execute international treaties. Nonetheless, in the WTO context, generally valid, authentic and mandatory interpretations are provided by the political organs of the WTO, that is by the Ministerial Conference and by the General Council. Interpretations of the Dispute Settlement Body (so the panel and the Appellate Body) are not binding to all the Member States but only to interested parties involved in the dispute.
The legal standard of review has the scope to define the *extent* to which the panel or the Appellate Body should "second-guess" the administrative agencies' legal interpretation in the light of the WTO law and it does not relate to the rules of interpretation. The mechanism comes into play only *after* the interested parties to the dispute have already presented their readings and interpretation of a specific WTO provision.

A generally accepted and applied method of construction of international treaties is to use the customary rules of interpretation of public international law. This approach is reflected in Article 3.2. of the DSU, that provides for the clarification of the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law and under Article 17.6. (ii) of the Anti-dumping Agreement that requires panels to" interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law." This DSU chapeau can be understood as an implicit reference to the rules of interpretation laid down under Article 31-32 of the Vienna Convention on the Law of Treaties of 1980 (hereinafter, VCLT). The AB in *EC- Hormones* described that in so far as legal questions are concerned, a standard not found in an agreement "cannot absolve a panel (or the Appellate Body) from the duty to apply the customary rules of interpretation of public international law."[69] Moreover, the Appellate Body in the *US – Gasoline* case[70] stated that the general rule of interpretation has attained the status of a rule of

[68] GUZMAN, Andrew T., *Determining the Appropriate Standard of review in WTO Disputes*, Cornell Int'l. Law J., Vol. 42, (2009), p. 48
[69] EC Measures Concerning Meat and Meat Products (Hormones), (EC – Hormones) WT/DS26/AB/R, WT/DS48/AB/R, 16 Jan. 1998, V.
[70] United States - Standards for Reformulated and Conventional Gasoline, WT/DS2/AB/R, 29 April 1996, Art. 31.

customary or general international law and forms part of the customary rules of interpretation of public international law which the Appellate Body has been directed […] to apply in seeking to clarify the provisions of the […GATT] and the other covered agreements […]. That direction reflects a measure of recognition that the General Agreement is not to be read in clinical isolation from public international law." This is a sharp change after the GATT 47 that essentially was a self – contained system without being integrated into the wider body of international law and fed from its own legal text.

Article 31- 32 of the VCLT mainly provides for a two-step, inflexible, *textualist* or "text first" approach of treaty construction (that is interpretation must be based above all upon the text of the treaty) and it does not allow other methods to override the objective meaning of the text. However, also the teleological approach – so that the treaty construction in the object and the purpose of the agreement – has relevance. In this sense, it is in harmony with the provisions of Article 3.2. DSU that forbids the panels and Appellate Body to add or diminish rights and obligations of States provided under the covered agreements. This rigidity is necessary in a multilateral contractual system because it ensures the uniform interpretation of the covered agreements and it also increases the credibility, the reliability and legitimacy of the WTO dispute settlement mechanism.[71] However, in some cases the Appellate Body did not always obviously follow this approach of treaty construction. For instance, in the *Japan – Alcoholic Beverages II case*,[72] the Body stated as follows: "WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, […] "security and predictability" [will be achieved] sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system."

The *first step* is the general rule of treaty interpretation which shall be made to establishing the ordinary meaning of the words and terms in their context and in the light of its object and purpose of the international agreement. This guidance usually leads to one result of interpretation and it establishes a clear meaning of the provision in question. Was it not the case, namely if the meaning of the provision stays "ambiguous or obscure," or the construction leads to a "manifestly absurd or unreasonable" result, Article 32 comes into play. This *second step* is a supplementary means of interpretation that indicates the judge to rely on the *travaux preparatoires* of the treaty or to consider the circumstances of its conclusion. As a result of this construction-process judges shall arrive to a single, consistent interpretation of a treaty provision.

Article 31-32 of the VCLT provides for a more *textualist* and less for a teleological approach of treaty interpretation which does not permit much flexibility in the construction, therefore it cannot imply a deferential panel attitude but rather a *de novo* treatment of domestic decisions. Panels and the Appellate Body have declared several times that WTO rules have to be

[71] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 45
[72] Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 31

construed according to the customary rules of interpretation of public international law, consequently to interpret the relevant WTO provision independently from the understanding of the national authorities. Hence, judicial restraint towards legal construction shall be explicitly warranted by a treaty provision to this effect.

This is perhaps a severe interpretative method, it has to be born in mind that WTO treaties often intentionally use general terms and the agreements are full of loopholes as well. How these vague terms are interpreted depends on the national authorities and at last on the Dispute Settlement Body. As it has been stated, national agencies might act in considering domestic policies and priorities too, which is a legitimate concern. However the fact that panels may engage in *de novo* review does not suggest that judges do not take into account policy considerations and priorities. Indeed, panels are called upon to construe WTO provisions in ways that do not undermine national authority and state sovereignty. Such an approach could be termed as *state sovereignty conscious method* of treaty construction and it "ensures that the value of state sovereignty is respected through interpretation rather than through a deferential standard of review."[73] Accordingly, if a norm allows national authorities certain discretion, panels and the Appellate Body cannot reexamine the law or the measure unless the discretionary power is used in a non reasonable manner. Whereas the norm is open to uniform interpretation, it is to be construed according to the rules of the VCLT and consequently panels are entitled to conduct a *de novo* review.[74] Once again, if it is clear that no *de novo* approach should be applied, the question of the standard of review becomes critical.

[73] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 47

[74] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 48. It has to be pinpointed that the *de novo* review is applied in relation to legal questions and interpretations of WTO provisions *in general* but to the contrary, Article 17.6 (ii) of the ADA does not permit this type of overview in revising anti-dumping measures.

VI. JUDICIAL OVERVIEW NATIONAL AUTHORITIES' ANTI – DUMPING DECISIONS

VI.1. THE CASE OF THE EUROPEAN UNION

VI.1.1. Short introduction to the conditions of application of anti – dumping measures in the EU

The European Union is a Member of the World Trade Organization since its foundation, therefore it shall conform to the international obligations that it has committed itself to. Accordingly, the EU shall respect the provisions of the so called covered agreements that constitute the legal structure of the Organization. This commitment refers to the annexes of the WTO Agreement. The ECJ in its *Opinion 1/94* was clear, that the European Union is party not only to the Marrakesh Agreement Establishing the World Trade Organization but also to the agreements contained in annex A.[75] However, as far as TRIPS and the GATTS are concerned, the Court highlighted that the European Union is not subject to all of their obligations.[76]

Amongst the agreements that bind the EU, we can find the Anti – dumping Agreement that (as a novelty compared to the former Anti – dumping Codes) establishes more precise conditions on the ***imposition of anti – dumping measures*** and also obliges those Member States whose national legislation contains provisions on anti-dumping measures to "maintain judicial, arbitral or administrative tribunals or procedures for […] the prompt review of administrative actions relating to final [anti-dumping] determinations and reviews."[77] Such tribunals or procedures shall be independent of the investigating authorities, responsible for the determination or review in question.

The predominant majority of the WTO Members enacted anti-dumping laws mainly by transposing the ADA in the country's legal system. This is the case with the European Union as well, whose anti-dumping regulation (the so called Basic Regulation (BR) No. 1225/2009[78]) is founded on the ADA and it provides for both the substantive and procedural requirements for the imposition of anti-dumping measures.[79]

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[75] These are the so called multilateral agreements and are clustered into three groups: annex 1A refers to the multilateral agreements of trade in goods annex 1B to the services and annex C to the trade related aspects of intellectual property rights.

[76] The ECJ stated that in cases when internal, Community measures can be adopted autonomously, i.e. in the respect of eventual internal constraints, in that field fall within the Union's competence in matters of commercial policy. (Op. 1/94, XIII, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property).

[77] Art. 11 of the ADA

[78] Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Union. This regulation replaced previous EU anti-dumping regulations. The precedent Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community has been substantially amended several times.

[79] There are three types of anti-dumping measures: provisional anti-dumping duties, definitive anti-dumping duties and price undertakings.

In a nutshell, the anti-dumping proceeding starts either *ex officio* or by a complaint that is examined by the European Commission, DG Trade, Directorate H (Trade Defence) in 45 days from its reception. The Commission gives a notice of initiation of the anti-dumping procedure in the Official Journal of the European Union if in its view there is sufficient evidence that justifies the initiation of the ***procedure*** and starts with the investigations. During the investigation period, that usually lasts a year but not more than 15 months, the Commission officials gather information by sending out questionnaires, making on-the-spot verification visits and holding hearings. At the end of such a period and only if the substantive criteria have been satisfied, the Commission can propose to the Council the adoption of a regulation on the imposition of definitive anti-dumping duties.

As it has been said, an anti-dumping duty can be imposed subsequent to the anti-dumping authority ascertaining that certain ***substantive conditions*** have been satisfied. This means, that the Commission shall establish the occurrence of dumping, the injury caused to the European industry and the causal link between the two. Moreover, an ulterior criterion is that the imposition of the anti-dumping measure is in the interest of the European Union (so called "European interest test"). The ascertainment of the above mentioned mandatory factors is meticulously regulated by the BR. Briefly, the Commission shall establish the existence of *dumping*[80] that is determined by comparing the export price of the like product (so that the price at which the product is exported) and the normal value (namely, the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country). There is dumping when the export price is lower than the "domestic price" of the product concerned. Secondly, the existence of *injury*,[81] the threat with material injury or the material retardation of the establishment of an industry shall be determined through the objective examination of the (1) volume of the dumped imports; (2) the effect of the dumped imports; and (3) the consequent impact of these imports on domestic producers of such products. As a third step, it is necessary to establish whether there is *causation*[82] between the dumping and injury, so it shall be demonstrated that the dumped imports are causing injury. At last, the institution carries out the so called *"European interest test"*[83] in order to consider not just the interest of the European producers but that of the users and the consumers as well.

After the definitive anti-dumping duty has been imposed, the administrative (quasi-judicial) phase can be considered closed and eventually the ***judicial path*** can be opened. The unsatisfied exporter undertaking can file a complaint to the Court of First Instance seeking to obtain the annulment of the regulation in question. Interestingly, in the past, the *locus standi* of the exporters was denied since the anti-dumping duties are imposed in the form of a regulation. It has only been possible to bring cases before the European Courts, since the

[80] Art. 2 of the BR
[81] Art. 3 of the BR
[82] Art. 3.6 and 3.7 of the BR
[83] Art. 21.1 of the BR

judgments in the Japanese ball bearing cases.[84] The ECJ permitted the undertakings to have a standing since it considered that the legislative act imposing of an anti-dumping duty shall be examined according to its content and not its form.[85] Henceforth, even though the duty is imposed in the form of a regulation, it constitutes a decision since it might have direct and individual concern on the producers and their subsidiaries.[86] It is a right of individuals to seek for legal remedy and it is regulated at the highest level of European law. Article 263 of the Treaty on the Functioning of the European Union (TFEU) provides as follows: "[a]ny natural or legal person may, under [certain conditions], institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures."

In practice, the applicant undertakings seek to obtain the annulment of the anti-dumping regulation on the following commonly used arguments:

(1) they argue that the Commission violated the previsions of the Basic Anti-dumping regulation (both substantive and procedural errors);
(2) they claim that certain provisions of the Basic Regulation shall be reviewed in the light of the WTO Anti-dumping Agreement; and at last
(3) lastly, they assert that the decisions of the WTO's Dispute Settlement Body (DSB) shall be considered by the European Courts.

The second and third arguments are directly connected with the problem of the direct effect of WTO rules and decisions of the DSB that has been largely treated by the case law.

The procedure then takes place according to the ordinary Court rules with the particular character, that the judicial overview of an anti-dumping decision is not complete, *de novo* review since – subject to the satisfaction of certain conditions – the CFI/ ECJ shall defer and uphold the Council's anti-dumping regulation.

VI.1.2. The place of international treaties and the WTO Agreements in the European legal order

The European Union has international legal personality, it has the capacity to conclude international agreements that bind both the Union and its Member States[87] and to be member

[84] NTN Toyo Bearing Company Ltd and others v Council, case 113/77, paras 5-6; Import Standard Office (ISO) v Council, case 118/77; Nippon Seiko KK and others v Council, case 119/77; Koyo Seiko Co. Ltd. and others v Council, case 120/77**;** Nachi Fujikoshi Corporation and others v Council, case 121/77

[85] In addition, since the ECJ's judgment in *Fediol* (EEC Seed Crushers' and Oil Processors' Federation (Fediol) v Commission, case 187/85), the focus of the Court's admissibility test shifted from the nature of the contested measure to that of the *proceeding* leading to that measure. In BELLIS, Jean – François; *Judicial Review of EEC Anti-dumping and Anti–subsidy Determinations After Fediol: The Emergence of a New Admissibility Test*, C.M.L.R:, Vol.21 (1984), p. 549

[86] GREAVES, Rosa; *Judicial Review of Anti-dumping Cases by the European Court of Justice*, Eu. Comp. Law Review, London, Vol. 6., No. 2., (1985), p. 140

[87] Article 218 of the Treaty on the Functioning of the European Union, ex Article 300 of the TEC

in international organizations.[88] According to the *Haegaman – Kupferberg* jurisprudence, the agreements concluded by the EU "form an integral part of the Community legal system."[89] The latter, even though its origins go back to an international birth, is a separate legal order of international law.[90] The relation between the European law and international law is usually described in *monistic* terms. Therefore, once an international treaty makes part of the European legal order, it becomes potentially capable of producing rights and obligations towards natural and legal persons.

According to the common principle of primacy of international law, the above international agreements rank higher in the hierarchy of legal sources than secondary law in the European legal order. The European Court of Justice in the case between *Spain v. Commission* stated that: "[…] the primacy of international agreements concluded by the Community over provisions of secondary Community legislation means that such provisions must be interpreted in a manner consistent with those agreements. Similarly, in accordance with the *pacta sunt servanda maxim*, embodied in Article 26 of the Vienna Convention on the Law of Treaties, every international treaty in force is binding upon the parties to it and must be performed by them in good faith."[91] The responsibility for compliance with these international agreements burdens the European Commission, while the European Court of Justice and the Court of First Instance (CFI) (established in 1989) are accountable for ensuring the uniform application of the agreements through the whole European territory.[92]

International agreements are introduced into the European legal order by their simple ratification, since the system (based on Article 218 of the Treaty on the Functioning of the European Union, ex Article 300 of the TEC) is *monistic*. However, in relation to the WTO Agreements, Europe applies a de facto *dualism*. According to the latter approach, international norms can be implemented in the European legal order directly, so that through incorporation of the text of the provision or the agreement into the secondary legislation, or indirectly by indicating, usually in the preamble, that the legislation aims at complying with the EU's international obligations stemming from the agreement.

The relationships between the World Trade Organization and the European Union are twofold: on the one hand, WTO law penetrates into the European legal order, on the other hand, the institutional interaction shall be considered. This, in turn, implies that – even though they are closely linked – one must make difference between the penetration of *WTO rules* into the EU's legal order and the way in that the *rulings and recommendations of the DSB* are taken into account.

[88] The EU has member status only in few organizations, such as in the WTO, the FAO (Food and Agriculture Organization), EBRD (European Bank for Reconstruction and Development) and NAFO (Northwest Atlantic Fisheries Organization).
[89] Haegeman v. Belgian State, C – 181/73, para. 5, Hauptzollamt Mainz v. C.A. Kupferberg & Cie KG a.A., C-104/81, paras. 11- 13
[90] Van Gend & Loos, C – 26/62, II.B
[91] Kingdom of Spain v. Commission, C – 179/97, para. 11
[92] Commission v. Germany (Int'l. Dairy Agt.), C – 61/94, paras. 15 – 16

The European legal order is a *sui generis*, separate legal order of international – supranational law but it does not mean that it is autonomous: it takes from the national laws of its Member States and from international law, since the European Union is bound by the latter, notably by treaties to which the EU itself is a party, several other treaties and by customary international law. In this respect, the situation of the GATT is somehow particular, since only EU Member States were parties to the original agreement before the Union acquired its exclusive competence in the field of commercial policy. Nonetheless, based on the *doctrine of succession*, the European Court of Justice (ECJ or the Court) in the case of *International Fruit Company* held that the Community is bound by the GATT, since it had succeeded in the Member States' commercial policy powers and responsibilities.[93] It does not mean, however, that the provisions of GATT 47 rank higher than the founding treaties of the Union. It is the contrary. As clarified in the case *Italy v. Commission*, these treaties rank above the GATT.[94]

The case of the WTO Uruguay Round Agreements was different, since the European Union had exclusive competence in commercial policies. Nonetheless, the European Court of Justice has considered the WTO Agreements *"mixed agreements"* and for this reason they have been signed both by the European Union and the Member States. [95] This type of agreement is concluded when the EU has shared competencies (!) with the Member States and their form is typically a bilateral (BT) rather than multinational agreement (MNA). For this reason, both the European Union and its Member States sign the agreement on the one side and a third country is a signatory on the other side (it involves that the EU and the Member States act together in the settlement of disputes). Moreover, even though it usually neglects them, the "mixed agreements" are also typical instruments through which the European Union exports its *acquis communautaire* and can make part of the Regional Trade Agreements (RTAs).

The Commission is empowered to negotiate trade agreements and it has the power to agree with third countries as to what *effect* the provisions of the treaty have in the internal legal order of the contracting parties. Only if this question has not been settled, the courts of the signatories (in the EU's case the European Court of Justice) within their jurisdiction are entitled to decide on the matter.[96] In deciding, the European courts cannot ignore the political will regarding the implementation when expressed by the other EU institutions,[97] the international origins of the provisions shall be taken into account as well.[98]

Different types of international agreements have been interpreted differently by the European Court of Justice depending on the nature of the agreement in question. The ECJ has analyzed certain provisions of Association and Cooperation Agreements, Free Trade Agreements

[93] JACOBS, Francis G, *Court of Justice Review of Community Trade Measures*, in Annual proceedings of the Fordham Corporate Law Institute, 1994 (1995), p. 436
[94] Commission v. Italy, C- 10/61 [1962] ECR at p. 7
[95] Op. 1/94 (Opinion of the Court of 15 November 1994, Competence of the Community to conclude international agreements concerning services and the protection of intellectual property)
[96] Portugal v. Council, C- 149/96, para. 34
[97] BRONCKERS, Marco, *The Relationship of the EC Courts with other International Tribunals: Non-Committal, Respectful or Submissive?*, C.M.L.R. , Vol.44 (2007), p. 620
[98] Kupferberg, para. 17

(FTAs) and the GATT/ WTO multilateral agreements. Although inconsistent in its practice, the ECJ applies a two – step process: at first it examines the purpose and the nature of the agreement and then, at a second stage, analyses the wording of the agreement. Only as a first step of this second stage it is considered whether a provision can be retained as directly applicable, and as a second step, the Court determines the scope of its application. The last interpretative step (considered in isolation) is to analyze whether a directly effective provision, an international treaty can be construed on an identical manner to a similarly worded provision of the EC Treaty.[99]

Generally speaking, certain provisions of international treaties (in particular Free Trade Agreements (FTAs)[100]) concluded by the European Union can have ***direct effect*** (or using the American term, they are *self–executing norms*) that is they are capable of conferring rights upon individuals and they can be directly invoked by them. The direct effect serves as a pre-condition for judicial review of an international agreement in a direct action brought before the ECJ or the CFI. Whether an agreement is attributed this effect depends on the type of agreement: as one judge suggested, international agreements shall be viewed as a series of concentric circles around the Union. The closer the agreement is to the objectives of the EU, the more likely a direct effect will be found. T*out– court*, the farer the agreement is in content and effect from the EU's standpoint, it is less close to the EU, the less likely is that its provisions will be granted direct effect.[101] This could arise for two reasons: first, because it is more likely that the original intention of the parties is to attribute (or at least not to exclude) direct effect to the agreement; secondly "the need for uniform application within the Community legal system will be proportionately greater if the essential principles and purposes of the Community are not to be subverted or weakened by the operation of such international agreements."[102]

The direct effect is not to be confused with the broader notion of *direct applicability* that refers to the possibility to challenge the validity of actions by the EU institutions on the grounds of violation of international obligations binding to the Union.[103] The two are different, even though interconnected spheres: the direct effect operates in the relationship between national and European law and the direct applicability belongs to the relationship between international law and European law.[104] Within the European legal order the two

[99] OTT, Andrea, *Thirty Years of Case-Law by the European Court of Justice on International Law: A Pragmatic Approach Towards Its Integration*, in KRONENBERGER, V. The EU and International Legal Order: Discord or Harmony?, T.M.C. Asser Press, the Hague, The Netherlands (2001), p. 110 – 111

[100] Kupferberg, para. 10

[101] EVERLING, The law in the External Economic Relations of the European Community in HILF, JACOBS and PETERSMANN, The European Community and the GATT (1986) p. 87

[102] CHEYNE, Ilona, International Agreements and the European Community Legal System, European Law Review, Vol. 19, No. 6, 1994, p. 592

[103] CHEYNE, Ilona, International Agreements and the European Community Legal System, European Law Review Vol. 19, No. 6, 1994, p. 585, EVERLING, The law in the External Economic Relations of the European Community in HILF, JACOBS and PETERSMANN, The European Community and the GATT (1986) p. 95, 98

[104] ZONNEKEYN, Geert A., *The Latest on Indirect Effect of WTO Law in the EC Legal Order. The Nakajima Case Law Misjudged?,* J.I.E.L. (2001), p. 601. Clearly, according to the direct effect, European norms can be invoked by individuals in front of national courts. In the case of direct applicability, international norms cannot

terms overlap and essentially they have the same meaning. It also appears that the European Court of Justice itself does not make a distinction between the two terms.[105] Therefore, there are certain international norms that are directly applicable, to the condition that the treaty-obligations are clear and precise, and they are not subject to the adoption of subsequent measures. To put it differently, the wording of the norm must be *unconditional and sufficiently precise*.[106] The precision is essential since it is the element that deletes (or at least decreases) the degree of discretion to European institutions that is probably the main underlying reason of the denial of direct effect of WTO Agreements. The outcome of the direct effect is that international agreements supersede secondary Community legislation and other European acts, consequently the Community judge can use international law as a benchmark in its judicial review over the secondary law and discretionary administrative acts of European institutions. Hence, the direct effect of WTO Agreements serves as a pre-condition of a ground for judicial review in a direct action before the Court of Justice or the CFI.

In addition to the clarity of the provisions, it is also often argued that *reciprocity* is a necessary condition in order to grant direct effect to provisions of international treaties. The concept of reciprocity can be described as mutuality, so that both subjects are giving and taking with "the condition of some sort of equality, equivalence or proportion between […] obligations and benefits."[107] Formally, it is the basis of every international agreement as a logical consequence of sovereignty and legal equality of States but substantially it does not mean that parties to an agreement need to do exactly the same things and their mutual concessions shall be the same.[108] This is because parties do not necessarily need to do the same thing to fulfill their obligations – their obligations can be equivalent but not equal.

Various *types of reciprocity* can be distinguished, such as reciprocity (1) in creation of legal obligations; (2) in domestic legal effect of treaty obligations; (3) in the observance or performance of treaty obligations; and finally (4) in sanctioning. Contrary to the "common belief," the criterion of reciprocity is not an essential element to create direct effect to provisions but what counts is the "transcending factor based on the nature and objectives of the treaty."[109] This is particularly true if we consider that some asymmetrical agreements (i.e. when a treaty imposes unequal obligations) concluded between the European Union and

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be invoked by private parties in front of national courts due to their character that they operate in between European- and international law.

[105] CHEYNE, Ilona, International Agreements and the European Community Legal System, European Law Review, Vol. 19, No. 6, 1994, p. 585

[106] Kupferberg, C- 104/81, para. 23

[107] WILS, G., *The Concept of Reciprocity in EEC Law: An Exploration into these Realms*, C.M.L.R., Vol. 28 (1991), pp. 246 – 247

[108] WILS, G., KUIJLWIJK, K.J., *The European Court of Justice and the GATT Dilemma* (Nexed 1996), p.125, pp. 247 – 248 in VAN DEN BROEK, Naboth, *Legal Persuasion, Political Realism, and Legitimacy: the European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order*, J. of Int'l. Ec. Law, Vol.4., No.2, (June, 2001), pp. 419 – 420

[109] VAN DEN BROEK, Naboth, *Legal Persuasion, Political Realism, and Legitimacy: the European Court's Recent Treatment of the Effect of WTO Agreements in the EC Legal Order*, J. of Int'l. Ec. Law, Vol.4., No.2, (June, 2001), p. 418

developing countries, such as the Yaoundé Convention, an association agreement between the EU and the ASMM States (so that the African States, Mauritius and Madagascar) or the EC – Morocco Co-operation Agreement, were granted direct effect even though they are neither reciprocal, nor equal treaties. Consequently, an international agreement shall be more than merely creating mutual obligations between States in order to be granted direct effect. In addition, on the basis of the *Kupferberg* jurisprudence, no reciprocity in domestic measures is required for a treaty to have direct effect in the EU.[110]

The direct effect to provisions of ***GATT 1947*** has been consistently denied by the European Court of Justice based on the *flexible nature* of the agreement. [111] Already in *International Fruit III*, the Court rejected *in toto* the direct effect of a GATT 1947 provision and considered the characteristics of that agreement. In the Court's view the GATT was essentially based on its flexibility and the nature of the dispute settlement guided by diplomacy and on the ground that the agreement is based on negotiations governed by mutual advantages and the principle of reciprocity. Moreover, in the *Nederlandese Spoorwegen* case the ECJ held that the legal effects of GATT obligations shall be determined by reference to the Community legal system.[112] The Community legal system was evaluated in the light of the GATT 47 in several cases (such as *Goldstar, Matsushita and NMB*[113]), when the Court reviewed the compatibility of a Community regulation with the Anti-dumping Code.

The revolutionary changes of the Uruguay Round and the increasingly detailed ***WTO Agreements*** did not alter the Court's stance on the issue and it continued to reject the possibility to create direct effect to the above norms. The ECJ's argumentations are based on the traditional reasoning that the aforementioned agreements are characterized of great flexibility and are based on the principle of negotiations undertaken on the basis of reciprocal, mutually advantageous agreements.[114]

There is a waste jurisprudence on the denial of the direct effect of WTO rules based on the following long-established arguments:[115]

A. *relationship between the various European institutions*: the fact that the executive or the legislative power has some notion on direct effect does not matter since this effect has to be established on the basis of the treaty itself. In case the treaty is unambiguous, the Court should interpret the treaty provisions and verify whether they are of direct effect;

[110] Kupferberg, C – 104/81, para. 18 – 20; Port GmbH para 43; Cordi O & G para. 49
[111] Portugal v. Council, C- 149/96, paras. 40-47
[112] CASTILLO DE LA TORRE, *The Status of GATT in EEC Law. Some New Developments*, J. of World Trade, Vol. 26, No. 5 (1992) p. 37
[113] Goldstar Co. Ltd v. Council, C – 105/90; Matsushita v. Council, C- 175/78; NMB (Deutschland) GmbH, NMP Italia and NMB (UK) Ltd. v. Commission, C – 188/88
[114] International Fruit Co. N.V. et al. 21 – 24/72 (International Fruit), para. 21, Fediol, para. 20, Biret para 62 (CFI), para. 53 (ECJ); Port GmbH para. 43; Cordis O & G para. 48
[115] KUJPER, Pieter Jan, *WTO Law in the European Court of Justice*, C.M.L.R., Vol. 42 (2005), p. 1318

B. *lack of reciprocity:* is another, consistently repeated reason why the ECJ does not recognize the direct effect of WTO provisions and it is based on the assumption that in the EU's main commercial partners' (so that the United States) legal order these rules are with no direct effect. In addition, "[t]o accept that the role of ensuring that Community law complies with [WTO] rules devolves directly on the Community judicature would deprive the legislative or executive organs of the Community of the scope of manoeuvre enjoyed by their counterparts in the Community's trading partners."[116] Hence, the fact that no reciprocity exists in the domestic legal effect of WTO treaty obligations would deprive the EU institutions of their margin of manoeuvre and consequently, they would risk of creating unbalance in the observance of international obligations.

C. *existence of certain institutional aspects:* according to the Court, the WTO Agreements are still governed by the principle of negotiations, with a view to "entering into mutually advantageous agreements" and it is distinguished, from the viewpoint of the EU, from the agreements concluded between the European Union and non–member countries which introduce a certain balance of obligations or create special relations of integration with the Community.

The door for the direct effect was closed quite early after the establishment of the World Trade Organization.[117] The denial of this effect of WTO rules (but not DSB rulings) was sanctioned in 1996, in the landmark *Portugal v. Council* case, where the Court engaged itself in an in – depth examination of the issue the first time.[118] The judgment does not depart from the Court of Justice's former case law concerning the status of GATT 47 rules in the European legal order and it essentially upheld the former case law but partially based on new arguments.[119] The decision can be divided into two parts: the first analyses whether the WTO Agreement provides for (either implicitly nor explicitly) the direct effect of its provisions; the second part the ECJ examines whether that direct effect can flow from the application of autonomous principles of WTO law.[120] The Court found that there is nothing in WTO Agreements that mandates for a direct effect of its provisions and added that were they granted direct effect, it would be impossible to have recourse to temporary measures by the EU and individuals claim the illegality of a European measure, thereby placing a higher legal and financial burden on the European Union.

[116] Portugal v. Council, C- 149/96, para. 42; T. Port GmbH & Co. KG, T- 52/99, paras. 48 – 49

[117] Other cases on denial of direct effect see the "banana judgments" e.g. Cordis O &G paras. 46 and 53; Port GmbH para. 52; Fediol para. 19

[118] The Court in *International Fruit* did not make difference between analyzing the International agreement itself and making an autonomous EC law assessment. For that purpose see Op. 1/94, moreover for critics of the Portugal case, see GRILLER Stefan, *Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/06, Portugal v. Council*, J.I.E.L, Vol.3, No.3 (2000), pp. 441 – 472

[119] ZONNEKEYN, Geert A., *The Status of WTO Law in the EC Legal Order. The Final Curtain?*, J. of World Trade, Vol.34, No.3 (June, 2000), pp. 111- 112

[120] The reasoning of the first part is based on Op. 1/91 on the conclusion of the EEA Agreement while that of the second part is based on the Court's jurisprudence that attributed direct effect to certain international treaty provisions.

For the first time, the ECJ highlighted the different nature of WTO Agreements from other international agreements. The main cause of this divergence lies in the concept of reciprocity: WTO Agreements – like GATT 47 – are still governed by the principle of negotiations "based on reciprocity and mutual advantage."[121] Therefore, WTO Agreements do not create asymmetrical obligations or special relations of integration. Moreover, the policy – nature reasoning of the Court on sustaining the lack of reciprocity emerged in the fact that the EU's main trading partners' legal order (i.e. USA, Japan) does not recognize the direct effect of WTO norms. It is interesting to note that the same Court fourteen years before the judgment at hand, declared in *Kuperberg* that the lack of reciprocity is not an obstacle to granting direct effect to international norms. So why deny it from WTO Agreements? Clearly, in the WTO context, the ECJ links the direct effect and reciprocity since in its opinion the lack of reciprocity may lead to a disuniform application of the WTO rules.[122] The decisive point on the denial of direct effect is discretion: in the absence of reciprocity, giving the possibility to directly rely on the provisions of these treaties would deprive the institutions of the *margin of manoeuvre*[123] to the detriment of the negotiating positions of the Union.

The reasoning of the Court was extended to the nature of the WTO Dispute Settlement System as well. The ECJ recognized the changes occurred in the WTO compared to the GATT but still described the system as negotiation-driven, since it allows to reach mutually acceptable solutions and apply compensation and retaliation, even though on a temporary basis.

Then the ECJ laid down the well–known maxim according to which "[…] the WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the Community institutions."[124] In the refusal of granting direct effect to WTO norms reciprocity is indeed a cornerstone, however not the real reason. In Eeckhardt's view, "[r]ather it is the impact of direct effect on EU institutions. If direct effect were granted, those institutions would lose the scope for manoeuvre which they currently have as regards implementation of WTO law, particularly in case of disputes with other WTO Members. The hands of the institutions would be much more tied than the hands of their US, Japanese and other counterparts."[125]

[121] Portugal v. Council, C- 149/96, para. 36, recalled in Van Parys para. 42 and Cordis O&G para. 47 as well
[122] EECKHOUT, Piet, *Judicial Enforcement of WTO Law in the European Union – Some Further Reflections*, J.I.E.L., Vol. 5., No.1 (March, 2002), p. 95
[123] Portugal v. Council, C- 149/96, para. 46
[124] Portugal v. Council, C- 149/96, para. 47. The Court in *Petrotub* used a more precise language by stating that "the WTO Agreement and the agreements and the understandings annexed to it" in principal are not amongst the rules in the light of which the legality of Community measures can be reviewed. Petrotub SA and Republica SA v. Council C – 76/00 P, para. 53. Other judgments that quote the principle are e.g. Fruchthandelsgesellschaft para. 24 (order); Van Parys para. 39; Biret para. 61; Afrikanische FC pra 137; Beamglow para. 127; IKEA para. 29; Port GmbH para 50; Cordis O & G para. 50; Huvis Corp. v Council, T- 221/05, para. 71
[125] EECKHOUT, Piet, *Judicial Enforcement of WTO Law in the European Union – Some Further Reflections*, J.I.E.L., Vol. 5., No.1 (March, 2002), p. 96

The principle in *Portugal* has been religiously repeated by the Court.[126] Afterwards, the ECJ established two exceptions to this principle by adding that "[…] only where the Community intended to implement a particular obligation assumed in the context of the WTO, or where the Community measure refers expressly to the legality of the Community measure in question in the light of WTO rules."[127] These two exceptions are referred to as *Nakajima* – and *Fediol* exceptions[128] and they could be termed the *principle of implementation*.[129] The position taken by the Court was justified on the grounds of flexible nature of the GATT and WTO rules[130] and on the reciprocity argument.

It is not clear, why the Court mentions the two exceptions in the same breath since they fundamentally deal with two different questions. The *Nakajima* case tackles with an anti-dumping measure of the Council which was challenged in an action for annulment because it was considered to be in violation of the GATT Anti-dumping Code of 1979. The Court held that there was no direct effect in the case at hand but examined the plea of illegality, since the basic anti-dumping regulation was adopted specifically for the implementation of the GATT Anti-dumping Code. It stated that ever since the basic regulation was enacted, with the aim of complying with the international commitments of the European Community, the Court retained it necessary to review the contested provisions based on its task to supervise that the Community respects its GATT obligations.[131] In other words, the ECJ had to ensure that the GATT 47 and its implementing measures – including the Anti-dumping Code – were properly observed. For this reason, the ECJ had to determine whether the Council, in establishing the basic regulation, had gone beyond this legal framework. The underlying idea behind this approach is that the Community legislature, in adopting implementing legislation, can itself implicitly grant WTO law direct effect.[132] In a similar vein, it could be also said that the ECJ distinguishes between direct effect and the possibility to invoking international treaties when challenging EU acts – albeit, doubts remain about the goal of this difference. The conditions do not seem to be the same since the Court has constantly repeated that GATT has no direct effect, but no clues are given about the possible conditions.[133]

Furthermore, albeit the Basic Regulation states that it was adopted "in accordance with existing international obligations"[134] indicates that the Community legislator followed a dualistic approach that is in contradiction to the Court's reasoning that the legislative

[126] Petrotub, para. 53; Fruchthandelsgesellschaft, para. 24; Van Parys, para. 39; Biret, para. 61; Afrikanische FC, para. 137; Beamglow, para. 127; IKEA, para 29; Port GmbH para. 50; Cordic O & G, para. 50
[127] Portugal v. Council, C- 149/96, para. 49
[128] These exepctions have been recalled several times in decisions like: Petrotub para. 54; Van Parys para. 40; Biret para 52; Afrikanische FC para. 139; IKEA para. 131; Port GmbH para. 58; Cordis O & G para. 59
[129] EECKHOUT, Piet, *Judicial Enforcement of WTO Law in the European Union – Some Further Reflections*, J.I.E.L., Vol. 5., No.1 (March, 2002), p. 104
[130] International Fruit, para. 21
[131] Nakajima All Precision Co. Ltd. v Council, C – 69/89, paras. 28 – 31
[132] KUJPER, P.J., BRONCKERS, M., *WTO Law in the European Court of Justice*, C.M.L.R., Vol.42 (2005), p. 1325
[133] CASTILLO DE LA TORRE, Fernando; *Antidumping and Private Interest*, European Law Review, Vol. 17., No. 4., (Aug. 1994), p. 348
[134] Nakajima para. 30

implicitly wished to confer direct effect to GATT in relation to the implementing regulations. Like this, the ECJ created an exception within the system of international treaties in the EU legal order, which is for the rest monistic. In addition to this, the fact that the Anti-dumping Agreement expressly requires WTO Member States to impose anti-dumping duties in conformity with the agreement and to harmonize its anti-dumping legislation with the ADA[135] would be in contradiction with the desire to create direct effect to these norms.

The Nakajima case law has not been consistently applied by the European courts – it is also questionable whether the doctrine is applicable in practice.[136] A remarkable example is delivered by the Court in the *Italy v. Council* case, where the ECJ had the position that a regulation that has been adopted to implement agreements with third countries (agreements concluded in the framework of Article XXIV (6) of GATT 94 and the understanding on this provision) falls under the Nakajima doctrine.[137] However, in the ECJ's view, the fact that parties have reached an agreement, the requirement under Article XXIV (6) of GATT 94 to achieve "mutually satisfactory agreement" must be regarded as fulfilled therefore it cannot serve as a basis for examining the legality of the contested regulation.[138]

Another significant case on the confusing application of the Nakajima maxim was delivered by the Court in its *Petrotub* judgment in an anti-dumping case. The case at first sight seems to follow straightforward Nakajima precedence, since the structure of the judgment at first referred to the general principle of denial of direct effect laid down in *Portugal v. Council* then its two exceptions were recalled. Indeed, the Court recognized that Article 2 (11) of the Basic Regulation has been adopted with the aim at implementing the obligations of the Community under Article 2.4.2 of the Anti- dumping Agreement. Afterwards, the ECJ declared that it has the powers to review the contested regulation but – quite surprisingly – instead of referring to the Nakajima doctrine, it recalled the principle of *treaty consistent interpretation* according to which European law shall be construed in the light of international law, in particular if the former meant to implement the latter.[139] The following part of the judgment is more about the practical application of treaty consistent interpretation of Community law: the fact that Article 2 (11) of the Basic Regulation does not expressly impose the obligation to state reasons in case of recourse to the asymmetrical method of calculation of the dumping margin, does not mean that European institutions are exempted from this obligation. Instead, once Article 2.4.2 of the ADA has been transposed by the Community, the general requirement to state reasons becomes operative under the TFUE.[140]

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[135] Art. 18 of the ADA

[136] KUJPER, P.J., BRONCKERS, M., *WTO Law in the European Court of Justice*, C.M.L.R., Vol.42 (2005), p. 1326

[137] The doctrine was not expressly referred to by the Court under paragraph 20 where it stated that by adopting the regulation pursuant to agreements concluded with third countries on the basis of Art. XXIV (6) GATT 94, the "Community sought to implement a particular obligation entered into within the framework of GATT."

[138] Italy v. Council, C – 352/96, paras. 22 -23

[139] Bettati, C – 341/95, para. 20

[140] Treaty on the Functioning of the European Union (TFUE), Art. 296 (ex Art. 253 TEC) states "[l]egal acts shall state the reasons on which they are based and shall refer to any proposals, initiatives, recommendations, requests or opinions required by the Treaties."

So that Petrotub is no way the application of the Nakajima doctrine but more a shift towards the interpretation of the Community law in the light of WTO law, as originally launched in *Hermès.* This approach was confirmed by the Court of Justice in *Reliance Industries* when the Court – after having referred to the Portugal principle, recalled its judgment in Petrotub (!) – not the Nakajima/Fediol exceptions – and declared that the Basic Anti – dumping regulation is meant to implement obligations laid down in WTO Agreements. Consequently, the ECJ and the CFI are called upon to interpret the Basic Regulation, "in so far as is possible, in the light of the corresponding provisions of the WTO Anti – dumping […] Agreement."[141]

The picture with *Petrotub* was made more colorful, since the European Courts started to recall this instead of Nakajima. In *Huvis Corp.*, the CFI directly referred to *Petrotub, Biret* and *IKEA* (as the "new thunder" in the context) but – contrary to the above *Reliance Industries* judgment – it stated that a certain provision of the Basic Anti – dumping Regulation "intended to implement the particular obligations laid down in by Article 2.4 [of the ADA]" and then the court went to examine the question in the light of the Anti – dumping Agreement.[142]

The Anti-dumping Agreement *de facto* requires WTO Members to enact laws in order to implement its provisions, therefore it is not a novelty that the basic anti-dumping regulation explicitly states that it was adopted for this specific purpose. Nonetheless, Nakajima stayed dormant and its place was given to the interpretation of European norms in the light of international law. This solution is a slight adaptation of Nakajima that on the one hand ensures that international obligations are complied with and the international responsibility of the Union is avoided, on the other hand it also could resolve the problem of what measure can be considered as implementation of WTO law and avoids the risk of granting direct effect of certain WTO rules. The conclusion is inevitable that the Nakajima doctrine in its present form is unsustainable in a logical– legal sense and has actually not once been really applied.[143]

European Courts are not able to detach themselves from the historical Nakajima- style reasoning. For instance, the Court of First Instance (CFI) in the *Chiquita*[144] case simply distinguished between implementation of WTO rules by the adoption of the basic anti-dumping regulation from the implementation of the rulings of the Dispute Settlement Body. The CFI merely addressed the different nature of certain GATT provisions (that were qualified as "general") and those of the ADA and concluded that while Article 18.4 of the latter agreement[145] expressly requires to bring into conformity the domestic laws with the Anti-dumping Agreement, the relevant articles of the GATT listed in Chiquita that do not expressly require this. For the rest, the judgment does not address the criticism in Nakajima.

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[141] Reliance Industries Ltd. v. Council, T-45/06, paras. 89 – 91

[142] Huvis Copr. V. Council, T- 221/05, paras. 73 - 74

[143] KUJPER, P.J., BRONCKERS, M., *WTO Law in the European Court of Justice*, C.M.L.R., Vol.42 (2005), p. 1327

[144] Chiquita Brands International et al. v. Commission, T – 19/01, paras. 159 – 170

[145] The Article states as follows: " Each Member shall take all necessary steps, of a general or particular character, to ensure, not later than the date of entry into force of the WTO Agreement for it, the conformity of its laws, regulations and administrative procedures with the provisions of this Agreement as they may apply for the Member in question."

At last, the *Bocchi*[146] judgment brings the confirmation that one should distinguish between the implementation of WTO agreements and rules (of course comprised of the ADA) and the implementation of a panel or Appellate Body rulings.

The other exception from the Portugal v. Council maxim was laid down in the *Fediol* judgment, nonetheless it does not deal with the direct effect of WTO norms. The Court in the case at hand was called to review the decision of the Commission based on the trade barriers regulation (Reg. No 2641/84) in the light of the WTO norms. The regulation expressly confers rights on individuals to lodge a complaint about the illicit commercial practices of non-EU Member States that are perceived not to be in accordance with WTO rules; then the European Commission has the duty to determine whether these practices and behaviors are in breach with WTO rules. Against the decision of the Commission, individuals are entitled to request the ECJ to review the Commission's decision applying those provisions.[147] In cases when the Community measure is left unapplied, WTO rules are not being held to have direct effect. The question to examine is also whether the Commission had exceeded its discretionary powers hence the Court shall decide whether the institution could have reasonably come to that interpretation of law. If the Commission's decision is unreasonable, the Court shall come to the conclusion that the provisions of the trade barriers regulation have been violated. The judgment is a measure of "second – guessing" by the Court on the interpretation of certain WTO provisions given by the Commission where the logical – legal construction of Nakajima is not applied.

The principle of implementation (so that the Nakajima and Fediol exceptions) is regularly applied in the field of anti – dumping that partially gave birth to the exception. This was a natural development since the European Basic Regulation was enacted to give effect to the provisions of the Anti – dumping Agreement and fundamentally tails the provisions of its text. However, it is worth noting that in this area the stress is not on the implementation of a *particular* provision of a covered agreement but the *complete* accomplishment of general WTO texts.

A part of the academics and scholars maintain that it would be logical to attribute direct effect to WTO Agreements. The rebuttal of the traditional arguments on the refusal of direct effect of WTO rules was given by the opinion of Advocate General Alber in the *Biret* case[148] that can be wrapped up in the three following points:

1. *negation that the DSS is negotiation based*: in Alber's view concessions and compensations are not waivers since they are not alternatives to full compliance but merely temporary measures. Even though there is space for negotiations, WTO Members do not have alternatives just to conform to the WTO rules and DSB decisions;

[146] Bocchi, T – 30/99, paras. 63 – 64
[147] Fediol, C – 70/87, para. 22
[148] Opionion of AG Alber delivered on 15May 2003 in the Biret case, (Établissements Biret et Cie SA v. Council), C – 94/02 P, (1) paras.78 -81; (2) paras. 78 – 81, (3) paras. 102 -103

2. *denial of discretionary powers of EU institutions after a certain period of time*: the discretion of EU institutions is limited after the adoption of a DSB ruling because e.g. the suspension of concessions must be authorized by the DSB or the mutually satisfactory solution shall be anyway compatible with the WTO rules. For this reason, although a State has a certain margin of discretion in implementing panel or AB decisions, it cannot circumvent the obligation to comply with the rulings of the DSB;

3. *rebuttal of the reciprocity argument*: in the Advocate General's view, the bargaining powers of EU institutions would not be affected by acknowledging direct effect in the framework of an action for recovery of damages.

Although these arguments did not convince the Court of Justice and it has consistently denied to confer direct effect of WTO rules, the agreements concluded in the framework of the Organization are used as benchmarks in *treaty-consistent interpretation* of secondary legislation and other measures,[149] as well as the laws of the Member States of the European Union but not the founding treaties of the European Union. This, in practice means that the secondary Community provisions must be interpreted in a manner which is consistent with GATT and WTO agreements. The Court, in relation to the GATT 47 stated that "it can be considered to be relevant for the purposes of interpreting a Community instrument governing international trade."[150] In a similar vein, the Court of Justice in relation to the construction of a GATT 47 – related agreement stated that the secondary legislation should be interpreted so far as possible in a manner consistent with the international agreement.[151] Hence, the GATT (and WTO-consistent) interpretation theoretically could lead to the modification of the contents of the secondary legislation, while at the same time allowing the Court to deny the judicial control of the above agreements.

The obligation of the Court and the Court of First Instance (CFI) and the ECJ to construe the WTO Agreements and the GATT 47 in accordance of the above interpretative principle is founded on the need to place the country in a situation where its international responsibility emerges. This duty can be found in the US legal order as well, where the *Charming Betsy* canon governs the treaty – consistent interpretation of certain domestic norms, even though its application to WTO Agreements leaves some doubts. At this point, it would be also necessary to verify the depth and extent of the application of the canon, since (as in the case of the direct effect) it can raise questions of reciprocity and trans-Atlantic balance. Nonetheless, this methodology remains one of the most effective means of judicial enforcement in the European legal order.[152]

In conclusion, the Court of Justice in *Portugal* revealed the central issues of constitutionalism of WTO law. It is crystal clear that the judiciary branch does not intend to interfere with the

[149] Hèrmes, C- 53/96; Petrotub paras. 52, 57
[150] Werner, C – 70/94, para. 23
[151] Commission v. Germany (International Diary Agreement), C – 61/94, para 52
[152] GRILLER Stefan, *Judicial Enforceability of WTO Law in the European Union. Annotation to Case C-149/06, Portugal v. Council*, J.I.E.L, Vol.3, No.3 (2000), p. 468. Other ways of alternative enforcement mechanisms are the direct effect, extra – contractual liability and actions of Member States against the Union.

margin of manoeuvre of the executive in international commercial relations. Henceforth, the ECJ continues to refuse to grant direct effect to WTO norms, except in very circumscribed situations described in Nakajima and Fediol. These exceptions (so that the principle of implementation) combined with the principle of treaty – consistent interpretation are capable of recognizing some effects of WTO law.[153] Nonetheless, they have also created confusion.[154] Through Nakajima and Fediol, the ECJ has created a dualistic order, *ex novo* per WTO Agreements – within a system which for the rest is monistic, hence avoided to attribute direct effect to WTO norms and thereby it protected the validity of Community acts[155] besides, it makes perfect economic sense.[156] As Everling wrote: "[t]he respect above all upon the fact that each [parties, so that the EU, USA and Japan] can count upon the others' observing the agreement only if does so itself. Will the Community not be defenceless if its partners know that its conduct is dictated by its own courts?"[157]

VI.1.3. Judicial review in the EU

VI.1.3.1. Origins of Court review in the European Union

From its beginning, the European Union has been not only an economic and political but also a legal community. Even though the three treaties establishing the European Communities fundamentally dealt with economic questions, the founding fathers retained it necessary to give a *structural framework of a legal community*. The idea to establish a proper court in the structure of the European Communities goes back to German influences that demanded that there should be a proper court and system of judicial review at European level. The novelty of the new court was that it became a multitasking institution dealing with questions related to the context of civil – and administrative law and it also covers the role of a constitutional court.

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[153] The exceptions differ from the principle of consistent interpretation since they may be relied upon in case of conflict between a provision of EC legislation and a provision of WTO law consequently it is a more sensitive principle from considering the non recognition of direct effect of WTO law.

[154] They have problems with practical application as well, mainly because the applicant has to prove not just the *intention* of the European Union to implement a WTO obligation but it also has to present *evidence* that the European measure infringes the WTO rule of law which is not always a simple task. In addition to these difficulties, there is also the risk is that the narrowly interpreted Nakajima doctrine will further limit the possibilities to invoke WTO law as a standard for review. This statement is valid with regard to DSB rulings as well: based on a narrowly construed implementation exception, the ECJ /CFI can refuse to review the legality of a Community measure in the light of the WTO law. YOUNG, Margaret A., *WTO Undercurrents at the Court of Justice*, European Law Review, Vol. 30, No.5 (2005), p. 717

[155] The refusal to grant direct effect to WTO Agreements protects the validity of Community acts since the ECJ created a link between direct effect and invocability of international agreements. So that in the Court's view, individuals can challenge the validity of a Community act in the light of an international agreement only if the European legal act confers rights on citizens.

[156] In a globalised and interconnected world where politics are still power – based, the conflict of foreign policy discretion and the question of direct effect necessarily emerges. It is rational in a modern, realist world to leave the institutions, in particular to the executive, some discretion in shaping foreign – and trade policies.

[157] EVERLING, The law in the External Economic Relations of the European Community in HILF, JACOBS and PETERSMANN, The European Community and the GATT (1986) p. 97

The ECJ was heavily influenced by the French administrative court system and judicial review of administrative decisions as well. The European judicial review of administrative decisions follows the French model that is clear under ex Article 230 (2) Treaty Establishing the European Community (TEC) (now Article 263 (2) of the Treaty on the Functioning of the European Union (TFEU)), that provides for the grounds of review of the legality of legislative acts and the acts of Commission based on the following situations:

1) lack of competence;
2) infringement of an essential procedural requirement;
3) infringement of the Treaty or any rule of law relating to its application; and
4) misuse of powers.

In addition to the French influence, the impact of the common law can be observed after the accession of the United Kingdom to the European Community in 1973. The contribution of the common law to the evolution of the European jurisprudence was to fill the gaps within the statutory community law and bridge them through the use of the general principles of the law of the Member States.

The depth of the legal community depends to a large extent on the access to legal protection and the scope of judicial review. The latter is the means of safeguarding the balance of powers among the institutions of the Union and the Member States as well as the protection of the rights of individuals. To put it differently, it "provides a basic protection for individuals and prevents those exercising public functions from abusing with their powers to the disadvantage of the public"[158] by controlling the decision – making. By time, the courts became particularly wary of trying to control legislation in the foreign commercial area, due to a special reluctance to become involved in foreign affairs matters which comprises international trade that is a traditional prerogative of the executive.[159] It also should be stressed that foreign policy issues have become largely economic that require regulation by law. These regulations, in turn, shall be controlled by the judicial branch. The problem of the control exists in particular in relation to the trade policy that is not only economics but largely redistributive domestic economics and as such, it is inconsistent in principle.[160]

VI.1.3.2. Independent judicial review process and strengthening judicial review in WTO – related cases

The effectiveness of WTO law partially depends on the enforcement of its provisions that on the one hand is dependent upon the place of WTO rules in the legal system of its Member States, on the other hand upon the judicial review and the standard of review of domestic laws and measures. The role of national courts in the overview of WTO law was strengthened. This

[158] SCWARZE, Jürgen, *Judicial review in EC Law – Some Reflections on the Origins and the Actual Legal Situation*, I.C.L.Q., Vol.51 (Jan. 2002), p. 17

[159] HUDEC, Robert, *The Role of Judicial Review in Preserving Liberal Foreign Trade Policies*, in HILF, Meinhard, PETERSMANN, Ernst-Ulrich, National Constitutions and International Economic Law, Kluwer Law, Studies in Transnational Economic Law, Vol.8 (1993), p. 506

[160] The other type of laws concerning trade policies is made up by the laws on the implementation of free market approaches to economic regulation and it permits rational analysis.

reflects the "judicialization" of the GATT/WTO legal system[161] after the Uruguay Round. The "judicialization" is the most evident in the case of the court – like panel/ AB review process and the quasi automatic adoption of their rulings that cancel political blockages. The fact that the multilateral trading system is increasingly rule – based and "judicialized" constitutes an important element in order to recognize the supremacy of the WTO rules and rulings of the DSB. The effective Dispute Settlement System (that comprises the legalization of the dispute settlement procedures, the quasi – judicial appellate review procedure) enables to protect the legal primacy of the international trading rules and the quality of the legal reasoning of the DSB.

The WTO Agreement includes a number of requirements to strengthen judicial review at national level and other domestic dispute settlement procedures or remedies. (Empowering courts with judicial review of WTO law strengthen is important, since it reinforces the separation of powers at the national level by judicial review and protection of individual rights). For ensuring the effectiveness of the covered agreements some of them, such as the ADA, TRIPs, GATTS, SCM and AGP, provide for an independent review process at the domestic level. The practice is that domestic courts review the GATT/WTO law on the basis of the national laws.[162]

While domestic courts review national laws and various decisions, they remain within their own judicial policies that may be influenced by the legal systems but in general. In their review process, judicial self-restraint of national courts may be necessary because of domestic policy reasons (based on the principle of separation of powers, so that the judicial branch shall stay within its borders and not invade the powers and competencies of the other two branches) and due to foreign policy reasons (here, the principle of reciprocity and discretionary powers of the executive play an elevated role).

As far as the European Court of Justice's judicial restraint is concerned, it has already been observed that the Court adopts a divergent approach towards GATT/WTO Agreements than towards other international agreements binding on the European Union. The rationale of the difference in the Court's attitude has been highlighted in relation to the treatment of the above

[161] HUDEC, R. E., *The Judicialization of GATT Dispute Settlement* in PETERSMANN, Ernst – Ulrich: The GATT/WTO Dispute Settlement System, Kluwer Law Int'l. (1997) (Nijhoff Law Special Series), p. 195

[162] It is interesting to note, that contrary to international customary law, that follows more formalistic features than the new international trade law, GATT/WTO rules do not require the *exhaustion of local remedies* prior to lodging a complaint at the DSB. The underlying reason might be that the DSU provides for a more result-oriented approach.[162] For instance, Article 17 (4) of the Anti-dumping Agreement clearly follows this rule since it states that a Member State is entitled to recourse to the DSB if the administering authorities of the importing Member levied definitive anti-dumping duties or to accept price undertakings. In addition, also provisional measures can be challenged in front of the DSB. This provision grants direct access for governments to the WTO Dispute Settlement System that further on enforces the rule according to that WTO dispute settlement rules do not require the previous exhaustion of local remedies. However, in anti-dumping cases, the wording of Article 17 (4) implies that at least administrative procedures must be exhausted. Henceforth, it can be said that the conflict – prevention function of the rule of exhaustion of local remedies does not come into effect. See in KUYPER, Pieter – Jan, *The New WTO Dispute Settlement System: The Impact on the Community* in The Uruguay Round results: a European lawyer's perspective, ed. by BOURGEOIS, J.H.J., BERROD, F., GIPPINI, F.E., Collage of Europe, Brussels, European Interuniversity Press (1995), Bruges Conference Series 8, p. 110, 123

agreements. Clearly, the Court in the foreign policy area recognizes the executive's "foreign policy prerogatives" in the international trade area and seems to exercise a judicial restraint up to the point that the compliance with the GATT/WTO rules has been essentially left to the Commission and the Council.[163] On the other hand, judicial review is particularly important in areas such as international trade where the executive and the administrative agencies enjoy a wide margin of discretion and are exposed to "rent-seeking" pressures of various interest groups (e.g. to limit international competition by restricting foreign imports).

In the WTO – European Union context, judicial review is susceptible to improvements. This is possible, for instance, by improving the communication between the WTO panels/AB and the CFI/ECJ, since actually there is no direct communication between these judicial organs. This is particularly important since (despite their different goals) the WTO and the EU deal with the same subject matter on global and regional scale. According to Petersmann,[164] judicial review could be further strengthened by inserting ulterior procedural safeguards that may offer additional means of control of institutional powers. Moreover, domestic laws should be at least as precise as GATT/WTO rules; nonetheless the transposition of these norms is not automatic (since in this particular area not the monistic but dualist system is applied) and the rules are not granted direct effect. At last, the protectionist bias in international commerce is reinforced by the fact that modern trade is still based on mercantilist principles and the focus is more on the producers' interest (especially in the field of trade defense) rather than on the general interest of other subjects and consumers. This appeals for enhanced judicial review of individual rights, since actions of individuals are capable to reduce the one -sided focus on the protection of domestic/ European producers but they are also able to better protect the general interest.[165]

VI.1.3.3. The place of the panel and Appellate Body rulings in the European legal order[166]

In principle, the judicial review of domestic courts focuses on national laws and the overview of international tribunals on international law. It is rare that the latter considers domestic law in its review process. In a different vein, domestic courts – in the light of the principle of consistent interpretation – are required to take into account the provisions of international treaties: for instance, the WTO law also provides for domestic review procedures applying international law (so that provisions of the covered agreements). Consequently, it is true that the ECJ's and the CFI's judicial review focuses on the founding treaties, the European secondary law and the law of the Member States but they are also required to do it in the light

[163] The Lisbon Treaty brought changes in the EU's foreign policies, since the European Parliament's powers have been reinforced in the international trade area. E.g., the institution is required to give its consent to international trade agreements. (Art. 218 (6) (a) (v) TFEU)

[164] PETERSMANN, Ernst – Ulrich, The GATT/WTO Dispute Settlement System. *New Dispute Settlement System of the 1994 WTO Agreement*, Kluwer Law Int'l. (1997), Nijhoff Law Special Series (1997), pp. 244 – 247

[165] In the EU, the European interest test is used in anti-dumping cases, however in practice the interest of consumers and users is not considered since the object of the trade remedy instrument is to protect European producers.

[166] For the place of the GATT case-law in the EC legal order see MARESCEAU, Marc, *The GATT in the Case – law of the European Court of Justice,* in JACOBS, F.; MEINHARD, H.; PETERSMANN, E.U., The European Community and the GATT, Kluwer (1986), Studies in transnational economic law , pp. 107 – 126

of the international agreements. These questions refer to the role and place of international treaties in the Community legal order. However, not just international rules but also judgments of international tribunals are able to penetrate into the European case law. This automatically raises the question of detecting the relations between the international and the domestic tribunal – so that the DSB and the ECJ/CFI. In other words, it is necessary to analyze the influence of a DSB ruling and the judgments of the European Court of Justice and the Court of First Instance. These courts constitute different levels of judicial review, therefore various problems may emerge, which amongst others, include the possibility of linkage between the international and European procedures or whether these tribunals should apply the same standard of review.

The "classical legal relationship" is made of the interaction between the binding decisions of international organizations, which means that the decision of the international body is irrefutable but at the same time, the State decides under which conditions international law relates to the domestic legal system. It is the Member State of the organization too that determines how the decisions of the organization should be implemented. The above is valid for the European Union as well, however in its case, an additional layer is inserted between the organization and national law, so that the relations are shaped by the decision of the international organization, the Community law and the national law (so called "EC law transformed relationship").[167] The communitarization of decisions of international organizations mean that they become an integral part of the European legal order and their supremacy is ensured over the Community secondary law.

The automatic deferral to the decisions of international courts can have far-reaching consequences in the European legal order. Depending on the agreement, it could be able not just to ensure the supremacy of the rulings of an international tribunal but also capable to exclude the possibility of the ECJ to review the functioning of the tribunal.[168]

The role of international courts was clarified in *Op. 1/91* by the ECJ concerning the creation of the EEA (European Economic Area) Court. The European Court of Justice confirmed that the Community can enter into an international agreement that establishes a new judicial organization with the condition that the structure and the jurisdiction of the new organ are compatible with that European system. This means that the ECJ denies the jurisdiction of an international court if there is a risk that the two courts will make different interpretations, in particular if the agreements have different purposes. The Court has also clarified in which circumstances would consider itself bound by the decision of an international tribunal when stated that: "[w]here […] an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice, inter alia where the Court of Justice is called upon to rule on the interpretation of the international agreement, in

[167] LAVRANOS, Nikolaos, *The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law*, European Foreign Affairs Review, Vol.10 (2005), pp. 314 – 315

[168] BRONCKERS, Marco, *The relationship of the EC Courts with Other International Tribunals: Non – Committal, Respectful or Submissive?*, C.M.L.R., Vol. 44 (2007), p. 619

so far as that agreement is an integral part of the Community legal order."[169] The ECJ then added that an international treaty that provides for such a system of courts in principle compatible with Community law and continued that "[t]he Community's competence in the field of international relations and its capacity to conclude international agreements necessarily entails the power to submit to the decisions of a court which is created by such an agreement as regards the interpretation and application of its provisions."[170]

Hereby, the ECJ recognized the binding nature of the decision of the international "court – like" entity in cases when the ECJ is called upon to rule on the interpretation of the agreement. In addition, the ECJ has implicitly agreed that the direct effect of the provisions of such an agreement and the mandatory character of the decision are not connected.[171]

The GATT 47 system has never been treated as a court – like, quasi – judicial system but it has been rather considered as a diplomatic forum, a conciliatory body. The characteristics of the multilateral trading system have radically changed after the entry into force of the Marrakesh Agreements by the creation of clear rules, standing judicial body and a *de facto* automatic adoption of the rulings of the DSB. Accordingly, was the ECJ to maintain its reasoning of Op. 1/91, it should recognize the binding nature of the panel/ Appellate Body decisions.

The decisions of international organizations in the European Union are treated in the same way as agreements concluded by the Union –accordingly, if an international agreement was concluded by the EU or fall within its competence, from the moment of its entry in force form part of the Community legal order. Vis-à-vis, binding decisions of these international organizations form integral part of the EC legal order and enjoy primacy over Community secondary law and laws of the Member States.[172] However, this reasoning is not entirely correct, as the legal status of decisions emanating from judicial entities established by an international agreement, such as the Marrakesh Agreements, cannot be assimilated with the legal status of the agreement itself in so far as that agreement is binding for the EC and forms integral part of the EC legal order.[173]

As far as the communitarization of DSB rulings and recommendations is concerned, one of the most problematic issues stems from the lack of direct effect attributed to WTO rules. This question was raised in the banana regime – related *Atlanta* case in that the ECJ avoided deciding on the matter and argued that it should have been presented at an earlier stage. However, the ECJ argued that there is "an inescapable and direct link" between the DSB decision and the plea of breach of the provisions of GATT. According to the ECJ, "a decision [of the DSB] could only be taken into consideration if the Court of Justice had found GATT to have direct effect in the context of a plea alleging the invalidity of [… the Community

[169] Opinion 1/91, para. 3
[170] Opinion 1/91, para. 3
[171] For instance, the Court held that the EEA Agreement did not have direct effect in the CE legal order however the decisions of the EEC could be binding for the ECJ.
[172] LAVRANOS, Nikolaos, *The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law*, European Foreign Affairs Review, Vol.10 (2005), p. 317
[173] ZONNEKEYN, Geert A., *The legal Status of WTO Panel Reports in the EC Legal Order. Some Reflections on the Opinion of Advocate General Mischo in the Atlanta Case*, J.I.E.L., Vol.2, No.4 (Dec. 1999), p. 715

act]."[174] In other words, the ECJ linked the possibility to rely on the DSB ruling with the direct effect of the provisions in question.

Afterwards, the Court of First Instance faced the issue in various cases concerning the European Community's banana regime (*Bocchi, Cordis, T. Port*[175]). The applicants argued that the regulation on granting import quotas on bananas (that administers the basic banana regulation that was retained by the Appellate Body in violation of WTO rules) resulted in a continuous violation of WTO law and since they had been maintained in force, they constitute a new type of misuse of powers. Albeit, the CFI has rejected this argument and – after recalling the principle laid down in *Portugal* – it referred to the exception of the principle of implementation and stated that "[n]either the reports of the WTO Panel of 22 May 1997 nor the report of the WTO Standing Appellate Body of September 1997, which was adopted by the Dispute Settlement Body on the 25th of September 1997 included any special obligations which the Commission 'intended to implement', within the meaning of the case-law, in Regulation No 2362/98 […]. The regulation does not make express reference either to any specific obligations arising out of the reports of WTO Bodies, or to specific provisions of the agreements contained in the annexes to the WTO Agreement."[176]

This attitude was further confirmed in the *Biret* case,[177] in which the ECJ found that the CFI's analyses – that refused the possibility to invoke the WTO law as a standard for examining the validity of a Community act – is not satisfactory, but at the end it dismissed the claim based on technicalities. On the other hand, the Opinion of Advocate General Alber was revolutionary since he concluded that in cases where the EU is required to conform itself with the recommendations/ ruling of the DSB and where the period of time for implementation has elapsed, individuals should be entitled to invoke those reports to challenge Community legislation and to lodge a complaint for damages. The Court, however, relied on factual issues and did not retain it necessary to consider "those circumstances […] and what damage might be suffered by the individuals as the result of the Community's failure to implement a DSB decision finding a Community measure incompatible with WTO rules […]."[178] Hence, the ECJ left open the possibility that where there is a DSB decision and the implementation period has elapsed, legality review may be possible vis – à – vis WTO rules.[179]

The *Chiquita* case raised even more complex issues since the plaintiff did not invoke the DSB report but argued that the regulation at stake (Reg. 2362/98) was intended to implement an obligation provided by the WTO Agreements, i.e. asked for bringing the basic banana regulation in line with the rulings of the Dispute Settlement Body. To put it differently, the plaintiff claimed that the Nakajima doctrine was applicable for the case because the regulation at stake intended to implement a WTO obligation.

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[174] Atlanta AG and others v Commission and Council(Atlanta) C-104/97 P, paras. 19-20
[175] Bocchi Food Trade International GmbH v. Commission, T – 30/99; Cordis, T – 18/99; T. Port, T- 52/99
[176] Bocchi, paras. 63 – 64
[177] Biret, T -174/00 (CFI); T-210700 (ECJ)
[178] Biret, para. 64
[179] MENDEZ, Mario; *The impact of WTO rulings in the Community Legal Order*, Eu. Law Review, Vol 29., No. 4. (Aug. 2004), p. 524

In the judgment, the CFI affirmed that – although its origin goes back to the ADA – the Nakajima doctrine is applicable outside the anti-dumping context since the maxim "[…] is capable of being applied in other areas governed by provisions of the WTO Agreements where those agreements and the Community provisions whose legality is in question are comparable in nature and content to those just referred to above concerning the Anti-Dumping Codes of the GATT and the anti-dumping basic regulation, which transpose them into Community law."[180] Afterwards, the CFI examined whether the regulation at hand was adopted in order to implement a particular obligation within the meaning of the Nakajima/ Fediol exceptions, so it analyzed the characteristics of the Community measure and the relevant WTO rules. The CFI came to the conclusion that "[e]ven if the applicant's line of argument could be interpreted as seeking to rely on infringement by the Community of its obligation to implement the recommendations or rulings of the DSB, it cannot be accepted. Even though the Commission considers – having regard to international law – that the DSU requires the losing party to bring a measure declared incompatible by a DSB ruling into compliance with the WTO Agreements, that obligation to ensure the conformity of internal measures with international undertakings arising from the WTO Agreements is undoubtedly of a *general character*, which contrasts with the rules of the Anti-Dumping Codes. Therefore, it cannot be relied on for the purposes of applying the Nakajima case-law."[181] In order to sustain its decision, the court recalled the traditional reasons (importance of negotiations and lack of reciprocity) for the denial of direct effect of WTO rules in the context of DSB rulings and it stressed that "the DSU does not establish a mechanism for the judicial resolution of international disputes by means of decisions with binding effects comparable with those of a court decision in the internal legal systems of the Member States" since also after the expiry of the reasonable period of time for implementation, the parties to the dispute have the possibility to negotiate as to the means of compliance and to apply temporary measures (compensation, suspension of concessions, reach mutually satisfactory solutions).[182] The Court of Justice has held that "[…] the WTO Agreements do not prescribe the appropriate legal means for ensuring that they are applied in good faith in the legal order of the contracting parties."[183] At last, the CFI denied the review the challenged regulation on the basis that the dispute which gave rise to the DSB ruling of 25 September 1997 and the Panel Report of 6 April 1999, and then to the authorization to suspend concessions to the detriment of the Community, was still pending and on the DSB's agenda on the date when this action was brought" forward, and the Court "cannot […] review the legality of the Community measures in question without depriving Article 21.6 of the DSU of its effectiveness, particularly in the case of an action for compensation […] for as long as the question of implementing the recommendations or rulings of the DSB is not resolved, including, as

[180] Chiquita, para. 124
[181] Chiquita, para. 161
[182] The possibility to seek for temporary measures is in line with the international character of the legal obligations provided for by the WTO Agreements: implementation of WTO obligations is under public international law and whenever a dispute arises, the responsibility of the State under international law is occurred. It is not a surprise then that WTO Members often negotiate the implementation of WTO obligations. In EMCH, Adrian, *The Biret case: What Effects Do WTO Dispute Settlement Rulings Have In EU Law?,* Polo Europeo Jean Monnet, Istituto de Estudios Europeos, Madrid, (Feb., 2005), p. 8
[183] Chiquita, para. 162

provided in Article 22.8 of the DSU, 'those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations to bring a measure into conformity with the covered agreements have not been implemented'."

The reasoning of the CFI is not convincing. Firstly, the CFI's argumentation that the WTO Dispute Settlement System is not a (quasi-) judicial system that aims at resolving international trade disputes cannot be sustained. The amendments to the DSS were revolutionary in the Uruguay Round and the bodies established in its framework (so that the panel and the standing AB) emit binding decisions, independently from the interest and will of the Member States, since (contrary to other bi- or multilateral organizations) the panel or the AB have "will of its own" in issuing final decisions.[184] Secondly, it is true, that the DSS allows recourse to temporary measures (compensation, suspension of concessions, commonly referred as "mutually agreed solutions" (MAS)) and leaves a considerable space for negotiations also after the adoption of the ruling but it does not mean that the WTO Member is not required to respect its obligations under the covered agreements after the deadline for implementation has lapsed. Indeed, the recourse to these transitory measures is an implicit recognition of violation of WTO rules. Furthermore, one has to keep in mind that these measures are of transitory character and not alternatives to full compliance – after all, the purpose of the DSS is the withdrawal of the measure found in violation of WTO norms. The language of the DSU provides for mandatory performance of obligations and compliance is the preferred option.[185] Finally, the core question is why did the CFI claim that the regulation at hand did not intend to perform a WTO obligation? What other purpose could a new regulation have than implement the DSB's report? Once again, the CFI's underlying reason is based on the traditional European jurisprudence: lack of reciprocity and assurance of scope for manoeuvre of Community institutions.

Another remarkable case in this context is the ECJ's judgment in *Van Parys*[186] that refers to the Community banana regime. On the ground of traditional arguments (lack of reciprocity, discretion of European institutions), the ECJ refused the possibility to invoke, before a national court, the incompatibility of a Community act with certain WTO provisions, although the panel/AB have ruled on the incompatibility of the European measure with those rules. The

[184] SCHERMERS, Henry G.; BLOKKER, Niels M., International Institutional Law (2004), Nijjhof, 4th ed., p. 35. The "organ with a will of its own" should not be dependent on any particular State. This own will distinguishes organizations from bilateral or multilateral treaties, whereby parties lay down a common will, which remains their own and is not entrusted to a newly created body.

[185] ZONNEKEYN, Geert A., *The Status of WTO Law in the EC Legal Order. The Final Curtain?*, J. of World Trade, Vol.34, No.3 (June, 2000), p. 123. Compliance and to a certain extent mutually agreed solutions (MAS) are referred as "property rules" which captures the idea that a contract must *always* be preformed. Compensation and retaliation are "liability rules" which give the possibility to the parties to compensate instead of perform the contract. The DSU takes an unambiguous stance in favour of "property rules" so that towards compliance. E.g. even though compensation have been agreed but the illegality persists the author of the illegal measure may face new complaints by other WTO Members. (quoting Mavroidis) HUERTA – GOLDMAN, Jorge A., *Trade Remedies Disputes – Reciprocal Relationship between WTO and NAFTA Tribuanls* in Shaping rule of law through dialogue: international and supranational experiences ed. by FONTANELLI, Filippo; MARTINICO Giuseppe; CARROZZA, Paolo, Groningen, European Law (2010), p.325

[186] Lèon Van Parys NV v. Belgisch Interventie – en Restitutiebureau (BIRB), C – 377/02

core question was whether the DSB's reports are of binding character. In this regard, the ECJ stated that the time of expiry for implementation (reasonable period of time) does not imply that the EU has exhausted the possibilities to finding a solution to the resolution of the dispute under the DSU. In fact, the CFI/ECJ review of the challenged measure in these circumstances could weaken the Community's position to reach a "mutually acceptable" solution with the plaintiff.[187]

Advocate General Tizzano did not agree with this solution. In his view, the ECJ should support the principle of legality and recognize the binding effect of the panel/AB reports as a criterion of the legality of the Community conduct in cases when the Community intended to implement a particular obligation under a WTO provision. The Advocate General highlighted in his opinion[188] – by recalling Advocate General Alber's opinion in *Biret* – that there is no alternative for the EU but to conform to the decision of the Dispute Settlement Body, since it cannot be circumvented by negotiations between the parties. The fact that in principle, international law does not permit coercive measures, so that the decisions of the DSB are unenforceable, is not a valid reason to not comply with them, since non – performance is not a lawful option under international law.[189]

At last, the landmark judgment of the ECJ in *IKEA*[190] shall be mentioned. The case related to a special method of dumping calculation called "zeroing" that was declared by the Appellate Body in *Bed – linen* as contrary to the provisions of the Anti-dumping Agreement. Accordingly, the Council adopted a new regulation in order to conform to the DSB's recommendations. However, at the end the ECJ did not review the new regulation in the light of the ADA and the DSB ruling since it found that it was "clear from the subsequent regulations that the Community […] did not in any way intend to give effect to a specific obligation assumed in the context of the WTO." [191] The ECJ did not follow Advocate General Lèger's opinion[192] and in principle, considered the DSB rulings binding on the Court itself – nonetheless, it declared that in the case at hand the implementation exceptions were not applicable since the Community did not have the intention to execute a specific obligation. This might be considered as a shift from the previous stance of the ECJ given that the anti-dumping measures were considered special obligations compared to other general obligations under the covered agreements.

In a later case, *Ritek Corp.,* the CFI recalled the Appellate Body's ruling in Bed linen and clarified that the case at hand was not applicable since the WTO ruling referred to a particular type of zeroing, to the model-zeroing in the framework of the first symmetrical method of dumping margin calculation, while in Ritek the question referred to the dumping margin calculation through zeroing in the framework of the asymmetrical method.[193] Interestingly, the CFI denied to rule on the nature of DSB rulings in the European legal order, however, the

[187] Van Parys, paras. 50 – 51
[188] Op. A.G. Tizzano in Van Parys delivered on 18 November 2004, para. 57
[189] Op. A.G. Tizzano in Van Parys delivered on 18 November 2004, para. 64
[190] IKEA Wholesale Ltd v. Commissioners of Customs and Excise, C – 351/04
[191] IKEA, para. 34
[192] Op. A.G. Lèger in IKEA Wholesales delivered on 6 April, 2006
[193] Ritek Corp. & Prodisc Technoligy Inc. v. Council, T -274/02, para. 107

whole judgment is about using the AB's report as a benchmark in highlighting the differences between the two methodologies and to permit the use of zeroing in the framework of the asymmetrical method.

As it has been clarified, there is a clear link between the *Portugal* maxim and the principle of implementation also in relation to the execution of DSB rulings. Henceforth, once the Community decided to implement a particular WTO obligation, irrespective of its motives, the margin of discretion is no longer necessary because the EU has already decided to implement. Consequently, the Union could not use the non-implementation as a leverage to induce other WTO Member States to perform their obligations.[194] In the case of the DSB recommendations the scope for manoeuvre would be similarly reduced after the expiry of the deadline to conform to a panel/AB ruling. The difference between implementation exceptions is that, while in the context of WTO rules the scope of manoevrue is restricted by the own will of the Community, since it intended to conform itself with the rules of the Organization, and in the case of WTO rulings, the EU's discretions are reduced due to the emission of the WTO report.

The WTO panel and AB reports can be invoked in legal proceedings before the ECJ/CFI only in cases when the Dispute Settlement Body establishes the non-conformity of certain Community acts and requires to bring them into conformity with the relevant WTO rules. This attitude is logical in the light of the limited precedential character of DSB rulings that bound only parties to the dispute. It is unconceivable that a Member State that has not been party to the dispute would have the obligation to conform itself with the recommendations or rulings of the panel/ AB.

Nevertheless, even if the EU was party to the dispute, according to the current position of the European courts, the effectiveness of DSB reports is not ensured. On the one hand, the Court and the CFI in their judicial review denied granting direct effect to the panel/AB rulings by applying tout – court the well established principles laid down in Portugal and Nakajima/ Fediol case law which does not mean that the Court fails to respect such rulings – rather they are filtered by the ECJ and are incorporated in the interpretation of European law. Furthermore, whenever there is possibility for negotiations, the Court is unwilling to accept the review of legality of a Community act in the light of the WTO rules or the DSB's rulings. It is only in anti-dumping and subsidy cases where the EU formally recognizes the reports of the panel and the Appellate Body, consequently it accepts to bring in line European legislation with the decisions of the DSB.[195] As a result, the ECJ and the CFI refuse to – at least formally – follow the decisions of an international body that was established with the aim of resolving disputes between the Members of the WTO.

The question is not so much whether WTO provisions have direct effect but more whether the denial of access to justice by individuals (and EU Member States should not be forgotten) that are deprived of invoking WTO provisions in challenging the allegedly illegal Community act.

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[194] EMCH, Adrian, *The Biret case: What Effects Do WTO Dispute Settlement Rulings Have In EU Law?,* Polo Europeo Jean Monnet, Istituto de Estudios Europeos, Madrid, (Feb., 2005), p. 15

[195] LAVRANOS, Nikolaos, *The Communitarization of WTO Dispute Settlement Reports: An Exception to the Rule of Law*, European Foreign Affairs Review, Vol.10 (2005), p. 330

The failure to give the possibility of judicial review also raises the questions such as the lack of respect of the rule of law and it is contrary to the principle that ensures that *all* (!) Community acts should be fully reviewable. Doubts can also emerge with regard to whether fundamental human rights have been violated by this approach of European courts. The question is to be evaluated with attention, because the enhancement of the role of private economic operators would have economic implications in court cases such as in actions for damages but it is the best way to ensure proper implementation of international trade rules.[196]

VI.1.3.4. Control criteria and deference of the ECJ and CFI in anti – dumping cases

The Court of First Instance and the European Court of Justice review the Commission's or the Council's anti-dumping measure[197] in the light of the Basic Regulation, the Anti-dumping Agreement and *de facto* consider the reports of the WTO panels and the Appellate Body as well. The CFI and the ECJ's review, however, is not complete and in principle it does not go into great details because it maintains deference towards the decisions of the above institutions. The *rationale of this deferential treatment* of the decisions emitted by European institutions is manifold.

First of all, the European Commission is the key organ that has formed, and after the entry into force of the Lisbon Treaty, mainly shapes the Union's external policies – be it of a purely political nature (through DG RELEX) or of a commercial character (through DG TRADE).[198] In order to ensure the freedom to negotiate and effectively act in international trade relations, EU institutions are granted a certain level of *discretion*. The discretionary powers are attributed to these DGs since they dispose of the necessary expertise and specific knowledge in international political and trade matters. The Directorate General for External Trade disposes of *technical discretion,*[199] since it is able to evaluate complex economic, political and legal situations. This requires a great degree of evaluative judgment that the Court does not dispose of in relation to these questions[200] therefore, the judicial review is restricted. Moreover, the Court is reluctant to consider political questions since – by vocation and statute

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[196] MENGOZZI, Paolo, *The WTO Law: An Analysis of its First Practice*, Rivista di Diritto Europeo, Roma, Vol. 38, No. 1 (Jan. – March, 1998), p. 26

[197] In addition, the failure to adopt the proposal for a regulation imposing a definitive anti- dumping duty submitted by the Commission or a decision of the Commission or the Council of the Euroepan Union to close anti-dumping proceedings without imposing anti – dumping measures are also a reviewable acts. In Eurocoton and others v. Council, C-76/01 P, paras. 67 and 73

[198] It does so after having obtained a *mandate* from the Council. According to Article 218 of the TFEU, the following procedure applies: "[t]he Council shall authorize the opening of negotiations, adopt negotiating directives, authorize the signing of agreements and conclude them."

[199] Fritzsche distinguishes two types of discretion: (a) political discretion that is granted when an institution acts as a political body (e.g. emits guidelines of CE policies); (b) technical discretion that entitles institutions to act as an administrative body under the condition that it is necessary due to the complexity of economic, legal and political assessments to be made. FRITZSCHE, Alexander; *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, C.M.L.R., Vol. 47 (2010), p. 368

[200] Fediol, para. 26; Nachi Fujikoshi v. Council, C- 255/84, para. 21; IKEA, paras. 40 -41; Gestetener, para. 63; NTN Toyo, para. 19., Moser Baer India Ltd v. Council, C – 535/06 P, para. 85; Huvis Corp. para. 38, Shandong Reipu Biochemiclas Co. T- 413/03, para. 61; International Potash Company, T-87/98, para. 40, HEG Ltd and Graphite India Ltd v. Council, T-462/04, para. 68. However, the Court has never specified the meaning of "complex" not explained why it uses limited control criteria in its judicial review.

– it is rather concerned by legal questions and not so much the appraisal of the economic interest of the Community.[201] In fact, the ECJ is exposed to difficulties in ruling on administrative decisions concerning redistributive policies (so that in cases when the principle of free market access has to be balanced against conflicting interests).[202]

The discretionary powers of the Community institutions in anti-dumping investigations in the European courts review is determined with *broad terms*,[203] at a principle level and it is constantly repeated by the CFI/ECJ; on the other hand, these powers are clarified on a case-by-case basis, for instance when the Court declares that e.g. the European institutions have a wide discretion to determine the type of anti-dumping duty they consider most effective means of defense[204] or in relation to the injury assessment.[205] In some instances, the freedom of choice of the institutions might overrule the principle of legal certainty. Advocate General Lenz stated that "[i]f the Community authorities enjoy a wide margin of discretion, […] the parties concerned are not entitled to entertain an expectation that the method originally chosen, which may be changed by the institutions pursuant to their powers, will be maintained." [206]

It is fundamental to emphasizing the importance of the institutions' discretion:[207] Community bodies are the final decision-makers in assessing and evaluating commercial questions in order to ensure a level-playing-field with the European Union's main commercial partners. This freedom of choice is wide but it is not without limits: its perimeters are determined by the Court. The judicial review is then important not just because of enforcing Community rules but also for conserving the *institutional balance* between various EU bodies, so that to ensure the equilibrated horizontal relationship between the institutions. The observance of this general principle of European law means that "each of the institutions must exercise its powers with due regard for the powers of other institutions."[208] This, in turn, implies that

[201] Gestetner, C-156/87, para. 63

[202] HILF, Meinhard, *The Role of National Courts in International Trade Relations*, Michigan J. Int'l Law, Vol.18. (1996 -1997), p. 351

[203] The CFI/ ECJ use the expression that EU institutions enjoy a "*broad*" or "*wide*" discretion in the "sphere of measures to protect trade." (e.g. Huvis Corp., para. 38, Shandong Reipu Biochemiclas Co., para. 61)

[204] Cartorobica SpA v. Ministero delle Finanze dello Stato (preliminary ruling), C – 189/88, para 25; International Potash Company, T-87/98, para. 40, HEG Ltd, para. 68. The limits of the Commission's and Council's discretion in this case consists of the review by the CFI/ECJ whether the measures adopted are "manifestly inappropriate" having regard to the objective pursued.

[205] HEG v. Council, para. 120

[206] Opinion of Advocate General Lenz delivered on 5 December 1990 to Nakajima All Precision Co. Ltd v Council of the European Communities, para. 162

[207] It is interesting to note that in commercial policy related cases, this is the so called "classical discretion," namely where the relevant provision of a Treaty or secondary law states where certain conditions exist, the Commission *may* take certain action (primary discretion). Sometimes it is also provided how this should be exercises (secondary discretion). In CRAIG, Paul; EU Administrative law, European University Institute (EUI) (Florence), Academy of European Law, Oxford Uni. Press (2006), Series XVI/1, (chapter 13, *Law, Facts and Discretion*) pp. 433, 439 -440

[208] European Parliament v. Council, C-70/88; para. 22. It should be also added that in the European institutional structure does not exist the traditional separation of powers (traditional model of *trias politica*). The Community

European courts cannot substitute their own point of view for that of the institution having made the assessment, consequently, the CFI/ECJ are not empowered to decide on every aspect of the case and to decide on it with the highest authority.[209]

The Courts' supervision of institutional discretion can either refer to open-ended provisions that give only vague guidance by naming considerations that ought to be taken into account during the decision-making process or it can relate to the determination of whether the conditions to act are fulfilled in a specific situation.[210] The ECJ's *judicial control of European commercial policy measures* refers to the following issues:

A. whether the *procedural requirements* (e.g. imposition of anti-dumping duties) have been accurately observed;

B. whether the *facts* have been properly determined and evaluated;

C. whether there has been a *manifest error of appraisal* of the facts;

D. whether the competent authority *misused* its *discretionary powers*;

E. whether the authority's *reasoning* is *adequate*;

F. whether there was a *violation* of the applicable *substantive rules of law*.[211]

The Court in determining whether these factors have been satisfied does not have the highest authority of decision, which implies that it is required to defer to the decision of the EU institution and deprived to conduct a full, *de novo* review.[212] *Discretionary justice* of the ECJ is made of by respecting substantive rules (so that the case in which limited judicial review is required) and by following procedural rules (that establish the framework within which the recognition and control of discretionary powers is ensured).[213] The two types of rules are linked to each other, since the substantive judicial review applies in relation the questions of fact, law and discretion.

The Court's strategy for respecting discretionary powers has been to announce a standard of obviousness when dealing with potential infringements of the founding treaties or secondary law. It is particularly true referring to the *review of anti-dumping measures*, when the judicial review of the CFI/ECJ is restricted to verifying

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does not have an organic separation although functional distinctions can be made. For example, the Commission sometimes acts as an executive/administrator, sometimes also as legislator.

[209] However, in determining discretionary powers and its place in the institutional balance, the Court of Justice does so with highest authority as a "judge in its own case." FRITZSCHE, Alexander; *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, C.M.L.R., Vol. 47 (2010), p. 387

[210] FRITZSCHE, Alexander; *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, C.M.L.R., Vol. 47 (2010), pp. 363 – 364

[211] PETERSMANN, Ernst – Ulrich, The GATT/WTO Dispute Settlement System. *New Dispute Settlement System of the 1994 WTO Agreement*, Kluwer Law Int'l. (1997), Nijhoff Law Special Series (1997), p. 234

[212] "[…] [I]t is not for the Community judicature to substitute its assessment for that of the institutions which are responsible for [… the imposition of anti-dumping measures]." In Euralliages, Péchinery électrométallurgie, Vargön Alloys AB, Ferroatlàntica SL, T- 132/01, (*Euroalliages*), para. 50

[213] FRITZSCHE, Alexander; *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, C.M.L.R., Vol. 47 (2010), p. 365

A. whether the relevant *procedural rules* have been complied with;

B. whether the *facts* on which the choice is based have been *accurately stated*;

C. whether there has been a *manifest error of appraisal*;

D. whether there has been a *misuse of powers*.[214]

A. Respect of procedural rules

The first type of control criterion, the overview whether the relevant ***procedural rules*** have been complied with is of fundamental importance in the quasi-judicial anti-dumping proceedings, where the European institutions' powers are well-defined and it offers procedural safeguards to economic operators.

The enforcement of procedural rules becomes also more important, since the European Commission has the power of appraisal based on the necessity to evaluate complex economic and technical issues. Consequently, the Court has limited grounds for review that particularly focuses on the *control of procedural rights* based on the consideration that the observance of those rights enhances the possibility to take a correct decision. If the procedural steps have been complied with, it is deemed that the discretionary powers have been properly used – therefore, it is of upmost importance that the procedural guarantees have been scrupulously respected during the original anti-dumping proceeding. In *Technische Universität München*, (a preliminary reference concerning the importation of scientific and cultural materials but constantly invoked by the Courts anti- dumping cases) the ECJ ruled that "since an administrative procedure entailing complex technical evaluations is involved, the Commission must have the power of appraisal in order to be able to fulfill its tasks. However, where the Community institutions have such a power of appraisal, respect for the rights guaranteed by the Community legal order in administrative procedures is even of more fundamental importance"[215] as the provisions of the Basic Regulation "do not provide all the procedural guarantees for the protection of the individual which may exist in certain national legal systems."[216] Those guarantees comprise not only of procedural rights but also the duty of the EU institution to examine "carefully" and "impartially"[217] all the relevant aspects of the case.

The pertinent rights ensured by Community law include (1) the right to be heard, (2) the duty of the Commission to examine impartially and carefully the relevant aspects of the case and (3) the duty of the above institution to emit a reasoned decision. The first right is a procedural right in a strict sense, the other obligations refer to one of the control criteria (manifest error of appraisal) and to the general duty of the Community institutions to state reasons.

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[214] Moser Baer India Ltd v. Council, C – 535/06 P, para. 86; Aluminium Silicon Mill Products GmbH v. Council, T -107/04, paras. 43, 71; NTN Toyo Bearing Co. Ltd. and others v. Council, 240/84, para. 19;Gestetner Holdings plc v. Council, C -156/87, para. 63; Euroalliages, T- 132/01, para. 49; HEG v. Council, para. 120; Shanghai Excell M&E Enterprise Co. Ltd. et al. v. Council, T- 299/05, para. 80;EUroalliages, para. 67, EFMA v Council, T- 210/95, para 64; IKEA, para. 40

[215] Technische Universität München v. Hauptzollamt München, C – 269/90, para. 14

[216] Al- Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council, C-49/88, para. 16

[217] Shandong Reipu Biochemicals Co. v. Council, para. 63

The *right to a fair hearing* is a fundamental right that forms an integral part of the general principles of law and it aims at ensuring the fair nature of the proceedings. Its observance shall be guaranteed by the CFI/ECJ,[218] but it is also the Commission's obligation to act with due diligence for ensuring the effectiveness of these rights during the proceedings which may result in the imposition of penalties and also during the investigation. The purpose of the above right is to enable the undertakings to effectively defend their interest and it implies that the undertaking must be aware of the case against it and that it shall be given a reasonable opportunity to make its views known. In anti-dumping procedures this right implies two basic elements: the parties' *rights of access to information* and the *right to be heard*, so that the possibility of the parties to make their views on the correctness, truth and relevance of the facts and circumstances alleged.[219] This rule also requires that the undertaking be clearly informed, in good time of the essence of the decisions (or essential parts of it) of the institutions and must have the opportunity to make its observations.[220] However, this does not suggest that the institutions must automatically adopt all the arguments submitted by the undertaking.[221]

The content of the right to fair hearing was further explained by the ECJ in the *Al – Jubail Fertilizer* case and the judgment forms part of the trend of the Court to the further formalization of the procedures.[222] In essence, the right aims at placing the interested parties "in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented to the Commission in support of its allegation concerning the existence of dumping and the resultant injury."[223] The failure to respect the above right may result in the judgment of the CFI/ECJ declaring the regulation imposing an anti- dumping duty void.[224]

The *right of access to information* is connected to the right to a fair hearing. With this regard, the Commission's obligation to disclose the essential facts and considerations (Article 20 of the BR) and the provisions of Article 21 of the Basic Regulation have importance. With this regard, the CFI in *EFMA* pointed out that the failure to provide merely confirmatory information to the applicant did not form part of the statement of reasons therefore its non-disclosure made it unable to deprive the applicant of its right to a fair hearing.[225]

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[218] Al- Jubail Fertilizer Company (Samad) and Saudi Arabian Fertilizer Company (Safco) v. Council, C-49/88, (*Al – Jubail Fertlizer*), para. 16

[219] GIANNAKOPOULOS, Themistoklis, *The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti- dumping/ Anti-subsidies and state Aid Community Procedures*, World Competition, Vol. 24, No. 4 (2001), pp. 541 -542

[220] SCHWARZE, Jürgen; *Judicial Review of European Administrative Procedure*, Public Law (Spring, 2004) p.153

[221] Climax, para. 118

[222] CASTILLO DE LA TORRE, Fernando; *Antidumping and Private Interest*, European Law Review, Vol. 17., No. 4., (Aug. 1994), p. 346

[223] Al- Jubail Fertilizer, para. 17. Also in EFMA, para. 84 and Nakajima, para. 108

[224] Al- Jubail Fertilizer, para. 25

[225] EFMA, para. 87

The *rights of the defence* have a crucial importance in anti-dumping proceedings and during the investigation as well. As part of the fundamental principles of Community law, they shall be ensured by the European legal system and must be guaranteed even in the absence of any rules governing the anti-dumping proceedings. They require that the "addressees of the decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views"[226] on the correctness and relevance of the facts and circumstances alleged and evidence relied on by the Commission in relation to the determination of dumping and injury. What matters is that the undertaking shall be put in a position to enable it to defend itself. Accordingly, in the case of a procedural error, an applicant is not required to prove that the Commission's decision would have been different in content[227] but it shall establish that they would have been able to *better defend themselves*[228] in the absence of infringement of procedural rules or commitment of irregularities. In the event that the parties had been given a (even a slim) chance to the undertaking to express its view or provide information, the Commission might have reached different consequences and the procedure could have lead to a different result.[229] The significance to decide differently is highlighted in the Court's case law.

In the *Interpipe Nikopolsky* case, the European Commission transmitted a fax to the applicant undertakings after the office hours, a day before the contested regulation was adopted. Therefore, the undertakings had the opportunity to take cognisance of the document the day after and for this reason they were not in the position to express their view to the institution. According to the ECJ, in the absence of this procedural irregularity the applicants would have been able to put forward their arguments and they would have been better placed to defend themselves, and possibly, cause the administrative procedure to have a different outcome.[230]

The possibility that the procedure could result in a different outcome and whether the Commission was still able to alter its decision concerning the granting of the market-economy status (MES) to the applicant at a certain point during the anti-dumping proceeding had a crucial importance in the *Foshan* judgment. The case deserves a closer look since it deviates from the Court's former practice. Its central point is the violation of the rights of defense in relation to the disclosure. On 20 January 2007, the European Commission transmitted a general disclosure to the Advisory Committee that intended to grant market- economy treatment to the interested companies. On 2 March 2007, the companies made their observations in relation to that disclosure.[231] Subsequent to the analysis of this information, on 23 March 2007, the Commission transmitted a fax to the applicant informing them that will not advise to the Advisory Committee to grant MES to the interested undertakings. On the 29th of March 2007, the Commission submitted to the Council a proposal for definitive

[226] Foshan Shunde Yongjian Houswares & Hardware Co. Ltd. v. Council (*Foshan*), C-141/08, para. 83; see also Nakajima, para. 108; Nanjing Metalink International Co. Ltd v. Council, para. 56; HEG v. Council, para. 45
[227] Foshan, para. 94
[228] Interpipe Nikopolsky, para. 208
[229] Nakajima, para. 108; Foshan, para. 81; Nanjing Metalink, para. 56; Interpipe Nikopolsky, para. 208
[230] Interpipe Nikopolsky, paras. 205 – 211
[231] According to Article 20 (5) of the Basic Regulation, the undertaking has at least ten days subsequent to the disclosure to make its observations to the Commission.

measures based on the document of 23 March 2007. Notwithstanding, the time-limit for the companies to make known their view was 2 April 2007.

It is a matter of fact that the Commission failed to take into account a letter of the undertaking concerning, amongst others, whether it met the criteria to be granted MES. However, the content of the observation would not have influenced the final decision of the Commission on denying the attribution of the above mentioned treatment. Since considering the undertaking's observations would not have resulted in a different outcome as far as the non-attribution of the MES is concerned, the CFI upheld the Council's regulation. In short, in the CFI's opinion the breaches of the procedural rules did not have relevance because the substantive rules on anti-dumping were properly applied and even if the applicants' view would have been taken into account, the decision would have not been diverse. Consequently, it upheld the contested regulation.

The ECJ's view was different. Similarly to the CFI, it held that in failuring to respect the time limit of ten days,[232] the Commission committed a violation of the rights of defence. However, it maintained that as the institution was unaware of those observations before submitting its proposal to the Council to adopt definitive anti-dumping duties, its *room for manoeuvre* in its assessment of those measures *decreased* and it might have reached another conclusion regarding the market-economy status.[233] It is interesting to note, that the Court's construction of the rights of the defense have a double scope: they do not have the exclusive purpose to make sure that the undertakings' procedural rights are respected but they also aim at ensuring a greater margin of manoeuvre of the institutions.

The importance of *Foshan* is that it clearly shows the commitment of the ECJ to be the guardian in guaranteeing the respect of procedural rules. In the case at stake, the substantive criteria on granting MES were applied without violation of the relevant norms and the final outcome of the decision would have been unaltered. Nevertheless, the European Court of Justice annulled the Council's anti-dumping regulation exclusively on the grounds that the Commission failed to respect certain procedural rights, in particular the applicant undertaking's rights of defense. The *Foshan* case is an excellent example on the Court's strict approach in applying and ensuring the procedural guarantees, even though there is no possibility (!) that the anti-dumping procedure results in a different outcome.

B. Accurate statement of facts

The anti-dumping proceedings are a fact- and information intense procedures. Ever since the transmission of data and other documentation has a crucial importance in order to establish the existence of dumping, injury and the causal link between them, the collaborating parties have the interest to transmit the above documents to the Commission. However, undertakings (and in particular SMEs) face difficulties in transmitting such data and filling the questionnaires, they may also – inspite of their good-will – may miss deadlines. Therefore, the Court made it clear that (although setting deadlines is necessary to ensure the smooth

[232] Foshan, paras. 74-80
[233] Foshan, paras. 77-81, para. 102

running of the procedure) deadlines are not strict time-limits: information sent out of time cannot be regarded as improper [i]n so far as taking them into account is not liable to infringe the procedural rights of the other parties and does not have the effect of unduly prolonging the procedure […].”[234]

The determination of whether the *facts* on which the choice is based have been *accurately stated* constitutes the second type of review by the European courts. The ***establishment of the facts*** and their evaluation requires complex economic assessment in anti-dumping cases and involves the establishment of the factual background of a single case, causation and (in expiry reviews) hypothetical assessments too. With this regard, the CFI/ECJ have occasionally refused to overview whether the factual background relied upon has been adequately stated. For instance, the CFI in several cases deferred the decision of the Commission on whether to grant market economy status (MES) to a country involved in an anti-dumping investigation on the ground that the assessment involved complex factual situations of a legal, economical and political nature.[235] On the other hand, the European courts have never clarified the meaning of “complex economic facts.” What is sure is that one shall distinguish between the determination of the facts and their appraisal. The CFI/ECJ tends to grant discretion with respect the latter. Yet, the facts are established to the extent they are relevant in the light of the applicable law, in addition the line to be drawn between establishment and evaluation is not always an easy task.

The Basic Regulation establishes the conditions whose satisfaction is mandatory for imposing anti-dumping measures, consequently the evidence to be provided by the undertakings must be capable to prove the existence of these requirements (this is to so called the *standard of proof* that indicates the necessary level of factual establishment capable to convince the Commission to make its decision. In turn, the Court’s standard of review is limited to the establishment whether the institution met the standard of proof but it cannot come to different conclusions than the primary decision-making institution). So that the evidence supplied by the exporter must be sufficient to prove the criteria laid down in the relevant provisions of the BR.

First of all, it is necessary to verify the occurrence of dumping that is calculated on the basis of the normal value and the export price. The BR does not list what evidence shall be provided by the applicant and it mainly focuses on the ways of the determination and comparison of the two elements[236] that are essential to establish the existence of dumping. The Regulation only mentions proofs such as the records of the parties.[237]

Secondly, in the injury determination context, Article 3.5 of the Basic Regulation is precise on which *economic factors* should be taken into account in the impact assessment of dumped

[234] Euroalliages (sunset review), para. 81; Shandong Reipu Biochemicals Co. Ltd., para. 67

[235] Shanghai Excell M&E Enterprise Co. Ltd. et al. v. Council, T- 299/05, para. 79; Shanghai Teraoka Electronic Co. Ltd. v. Council, T – 35/01, para. 48; Climax Paper v. Council, T- 155/94; para. 98 and related case law cited; HEG v. Council, para. 120

[236] Contrary to the determination of injury, the adjustment according to Article 2.10 of the BR is considered in the light of factors that belong to the sphere of commerce, e.g. after-sale costs. Currency conversions, level of trade, discounts, rebates and quantities, packing and import charges and indirect taxes.

[237] Art. 2.5 of the BR

imports. Amongst others, these include information on whether an industry is still in the process of recovering from the effects of past dumping or subsidization; on the magnitude of the actual dumping margin, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilization of capacity; factors affecting Community prices; actual and potential effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

Thirdly, the Commission shall prove that the dumped imports and not others are causing the injury to the European industry (establishment of the causal link between dumping and injury). In particular, the investigating authority shall demonstrate that the volume and/or the price level are responsible for the negative impact on the European producers and that impact causes material injury to these producers.[238]

The *type of evidence* is related to the facts that the applicant wishes to prove. It is granted, that the interested parties receive a questionnaire from the Commission that shall be filled and resent to the institution. In addition to this, information can be transmitted in various forms, such as documents (e.g. accounting books), electronic files etc.

The evidence shall be able to prove what the undertaking asserts therefore the *quality of the proof* has to be considered as well. For instance, a single example cannot demonstrate a commercial practice.[239] Moreover, the proof must be *accurate* [240] and *representative*[241] that the Commission is asked to verify if it relies on it when making its conclusions. This requires evaluation and not merely observation. The evidence shall be *sufficient* and *adequate*[242] as well, and the information shall be as recent as possible.[243]

The *period of time to which the evidence refers* is of upmost importance. The proof must be transmitted and gathered by the Commission during the investigation and shall refer to the investigation period (IP). According to the Basic Regulation,[244] the information related to a period subsequent to the IP shall, normally, not be taken into account. That said, the Commission is required to consider only the information that is properly submitted to the Commission,[245] the ECJ specified[246] that it does not prevent the institution from taking into account other relevant information. The data transmitted subsequent to the IP can be either favorable or disadvantageous for the undertaking concerned. In the former case, the Commission is allowed but not required to take into account the information, unless it discloses new developments which make the proposed anti-dumping measure "manifestly inappropriate."[247] In the latter case, so that when the new factors justify the imposition or lead to an increase in the anti-dumping duty, the institutions are not entitled but obliged to take

[238] Art. 3.6 of the BR
[239] Huvis Corp., para. 89
[240] Shangdong Reipu Biochemicals Co. Ltd., paras. 87 and 108
[241] HEG v. Council, para. 73
[242] Huvis Corp. para. 97
[243] Nanjing Metalink Intrenational Co., para. 60
[244] Art. 6.1 of the BR
[245] Art. 21.5 of the BR
[246] Euroalliages (sunset review), para. 78
[247] HEG v. Council, para. 67

them into account.[248] These rules all aim to ensure that the results of the investigation are "representative and reliable" and the factors on which the dumping – and injury determination are based are not influenced by the conduct of the producers concerned and therefore, "the anti-dumping proceeding is appropriate to remedy effectively the injury caused by the dumping."[249]

Another important question is *when the proof was transmitted* to the Commission. In order to impose an anti – dumping duty (so that in original proceedings), the Council needs to base its decision on the facts as finally established and from which result that dumping occurred during the period of investigation that caused injury to the European industry. Henceforth, the Court in its review can refer only to the results obtained during the investigation process and *available at the time the measure was adopted*.[250] The situation is different in interim reviews (Article 11.3 of the BR) that aim to take into account the changes and new factors *after* the imposition of the anti – dumping duties and they require new investigations. It is no way intended to review the factors that gave rise to the imposition of the duties, if they are unchanged. For this purpose, the reopening of the original procedure is needed (so called "reinvestigation" according to Article 12 of the BR).

In the administrative such as in judicial procedures, the issue who bears the *burden of proof* has an elevated importance. The general principle, that the party who asserts something has the onus to prove the correctness of its affirmation, is valid in anti-dumping procedures as well. For instance, as far as the attribution of the MES is concerned, the burden of proof lies with the exporting producer wishing to claim the status.

Difference shall be made between the burden to provide the necessary and satisfactory information to the European Commission, so that in the original anti-dumping procedure and the judicial procedure in front of the CFI/ ECJ. *During the period of investigation (POI)*, the Commission is required to gather the information based on which it can decide whether or not to propose the imposition of anti-dumping measures. For this purpose, the institution sends out questionnaires to the interested undertakings in that it asks for specific data and information. Moreover, the Commission also carries out on the spot investigations and holds oral hearings.[251] The above mentioned questionnaires play a crucial role in gathering the necessary information to the decision. Therefore, it is also in the interest of the undertaking involved to provide the relevant and satisfactory data in order to enable the institution to take its conclusion e.g. on granting an adjustment. The questionnaires shall contain "specific instructions" [252] as regards the details which the exporters shall provide in order to make possible to the Commission to decide on the matter. This implies the need that the exporters co-operate with the investigating institution. If the undertaking does not provide or refuses to

[248] Nanjing Metalink International Co., para. 61
[249] Nanjing Metalink International Co., para. 59; HEG v. Council, para. 66
[250] Opinion of A.G. La Pergola in EFMA delivered on 11 November 1999, para. 15
[251] More about hearings and the role of the Hearing Officer introduced in 1992 in anti-dumping (and anti-subsidy) procedures in GIANNAKOPOULOS, Themistoklis, *The Right to be Orally Heard by the Commission in Antitrust, Merger, Anti-dumping/ Anti-subsidies and state Aid Community Procedures,* World Competition, Vol. 24, No. 4 (2001), pp. 558- 564
[252] Huvis Corp., para. 94

access to the necessary information or significantly impedes the investigation, the Commission is entitled to decide on the basis of the facts available.[253] Furthermore, a particularity shall be mentioned: in the case of adjustment, it is up to the Commission to justify its claim and where they consider to make such an adjustment, they need to base their decisions either on direct or on circumstantial evidence proving the existence of factors for which the adjustment was made and to determine the effect on price comparability.[254]

The Commission's way of acting is overviewed by the CFI/ECJ. In the *judicial proceeding*, in the context of whether the facts have been accurately stated, these courts for instance supervise whether the Commission obtained the adequate and "sufficiently convincing"[255] evidence, whether they imposed an *unreasonable* burden of proof. For instance, as far as the latter issue is concerned, the Court found it in its *Huvis Corp*. judgment, the Commission's request to prove the practice of a longer credit period than the usual was not unreasonably burdensome for the exporter, since the Commission did not ask for written agreements but to establish a link between the different payments and invoices.[256]

In addition, in the judicial proceeding, the applicant undertaking has the possibility and the onus to introduce evidence which could cast any doubt on the correctness of the anti-dumping regulation.[257]

C. Manifest error of appraisal[258]

The ***manifest error of appraisal (or assessment)*** constitutes a further ground for judicial review and it is qualified as an infringement of the founding treaties or any rule of law relating to its application. This control criterion is in close nexus with the former ground for judicial review, the establishment of the factual basis, since it is obvious that in the evaluation of those facts it is possible only after having gathered them. In its overview, the CFI/ECJ shall ascertain whether the contested matter at hand fully or partially belongs to the factual application of a legal concept to the circumstances of an individual case. If it does so, the attention of the Court will be focused on the factual and evidentiary basis of the Commission's decision and it will accord some margin of discretion to the institution when determining whether the application of the legal concept is justified by the facts.[259]

In particular, the Court essentially limits its overview in finding errors in the reasons given by the Commission and it does not engage itself in carrying out the re-examination of the

[253] Art. 18.1 of the BR

[254] Kundan Industries Ltd and Tata Int'l. Ltd v Council, T-88/98, para. 96; Interpipe Nikopolsky, paras. 180 and 184

[255] Interpipe Nikopolsky, para. 184

[256] Huvis Corp. para. 93

[257] Nanjing Metalink International Co., para. 64

[258] Another, separate issue is the deference that the ECJ maintains towards the factual assessment of the Court of First Instance. The former recognized several times (Foshan, para. 63; EFMA, para. 42) the CFI's freedom to accept evidence and its exclusive jurisdiction to establish the facts. Moreover, the evidence put before the CFI does not constitute (except where the evidence is clearly distorted) a point of law, subject to the ECJ's review. (EFMA, para. 43)

[259] CRAIG, Paul; EU Administrative law, European University Institute (EUI) (Florence), Academy of European Law, Oxford Uni. Press (2006), Series XVI/1, (chapter 13, *Law, Facts and Discretion*) p. 440

contested regulation but only decides whether the European institution's assessment was manifestly incorrect *at the time when the measure was adopted*.[260] The Court's benchmark is whether the institutions' conclusions are supported by "sufficiently convincing analysis"[261] and it must satisfy that "the institutions took account of all the relevant circumstances and that they appraised the facts of the matter with all due care, so that [the factors necessary to impose an anti–dumping duty] may be regarded as having been determined in an appropriate and not unreasonable manner."[262] The reasonableness or rational basis test (contrary to the correctness test) applied by the Court permits a greater latitude for the institutions' interpretation since the review of the CFI/ECJ is focused on the rationality of the decision rather than on the substitution of the judgment.[263] By definition, this entails a higher degree of judicial deference.

In challenging the Commission's evaluation, the complainants have the task to find methodological errors in the institution's appraisal and not to try to establish a new method of assessment. In addition, in order to rebut the Commission's affirmations, the documents provided by the undertaking shall call into question the *reasoning* of the institution.[264] With this regard, it is important to bear in mind that European institutions dispose of a wide margin of *discretion* in the evaluation of facts which also lies within the freedom of choice of the *appropriate economic methodology* to be applied and in the global determination reached on the basis of such a methodology. The latter is used as long as it is not in contradiction with facts and not obviously contrary to well – established methods of economic reasoning.[265] This last parameter can be well sustained based on the ECJ's judgment in *NTN Toyo*, in that the Court compared the practicalities and economic logic of two methods of dumping margin calculation. It stated that the transaction – by – transaction method makes it possible to deal with different pricing strategies able to disguise dumping, while the weighted average methodology would alter the negative dumping margin.[266] In another instant, the Court upheld the Council's decision since its method of calculation was "the most appropriate means" of offsetting the dumping margin and ensured the "fair treatment of imports at different prices."[267] However, there are cases, such as *Huvis* and *IKEA*, where the Courts did not defer to the methodology used by the Commission. In the former, the CFI did not approve the method used in a review process according to Article 11.9 of the Basic Regulation, since the Commission was not able to justify the change in the circumstances that would have entitled it to switch from the original calculation method.[268] In the landmark *IKEA* judgment (where the Court in practice deferred to the AB's report), the ECJ declared that the Commission

[260] EFMA, para. 60; Opinion of A.G. La Pergola in case EFMA v. Council deliver on 11 November 1999, para. 15
[261] HEG Ltd. and Graphite India Ltd. v. Council, T -462/04, para. 123
[262] Ferchimex, para. 67
[263] CRAIG, Paul; EU Administrative law, European University Institute (EUI) (Florence), Academy of European Law, Oxford Uni. Press (2006), Series XVI/1, (chapter 13, *Law, Facts and Discretion*) p. 437
[264] HEG v. Council, para. 131
[265] FRITZSCHE, Alexander; *Discretion, Scope of Judicial Review and Institutional Balance in European Law*, C.M.L.R., Vol. 47 (2010), p. 400
[266] NTN Toyo, para. 22
[267] Cartorobica SpA v. Ministero delle Finanze dello Stato (preliminary ruling), C- 189/88, para. 27
[268] Huvis Corp. ,para. 60

committed a manifest error of assessment by calculating the dumping margin by the zeroing calculation method.[269]

The other ground for a review can derive from the *quality of the information*. The applicant can claim that the information provided for the Commission has not been verified by the institution or it is defective or it has other deficiencies.[270] However, the undertaking shall prove that the information is defective and e.g. that the information was used or should have been used to calculate the relevant factors in order to impose an anti-dumping measure.

The *manifest error of assessment* can refer to any requirement necessary to impose an anti – dumping measure, e.g. to the calculation of the export price,[271] the normal value,[272] the comparison (adjustment) between the export price and the normal value,[273] the injury the European industry, the profit margin and the market share of the producers,[274] the causal link between dumping and injury etc. An illustrative, yet incomplete example can be given by mentioning the *Interpipe Nikopolsky* case, where the Commission had to calculate the normal value, therefore to establish whether the interested undertaking was a single economic entity. Consequently, the Court's role was to verify whether the institutions have proved, or at least adduced evidence that the functions of the undertaking in question were not those of an internal sales department but comparable to those of an agent working on a commission basis.[275] In the *HEG* judgment, the CFI's review, amongst others, referred to questions on injury determination and a causal link. The Court declared that, according to Article 3 (7) of the BR, European institutions are required to assess the effects of the known factors other than the dumped imports causing injury to the European Union with the aim of ensuring that the injury caused by these other factors (e.g. imports from third countries) is not attributed to the dumped imports (so called non attribution rule). The non attribution rules is applicable both at the stage of the injury determination and the establishment of the causal link.[276]

Finally, the "European interest test" is the very last criterion to impose anti-dumping duties and it aims at determining whether the imposition of those duties is in the overall interest of the Union considering the likely consequences of the measure and "it requires the interest of the various parties concerned to be balanced against the public interest and it is therefore based on choices of economic policy."[277] Not surprisingly, (even though the Court's review extends to the verification whether the institutions committed a manifest error of appraisal or

[269] IKEA, para. 56. It shall be stressed, that the underlying reasons of the lack of deference are different: le while in Huvis the Court did not approve the method used by the Commission since in its view it violated the Basic Regulation, the Court in IKEA implicitly respected a DSB report that declared the zeroing method contrary to the Anti – dumping Agreement.
[270] Shanghai Excell, paras. 209 and 214, respectively
[271] Interpipe Nikopolsky, paras. 161- 190
[272] IKEA, para. 47
[273] Interpipe Nikopolsky, paras. 193 -197
[274] Euroalliages, paras. 145 – 148
[275] Interpipe Nikopolsky, para. 181
[276] HEG v. Council, para. 146
[277] Euroalliages and Others v. Commssion, T – 132/01, para. 48

errors in the factual establishment) there are no cases where the CFI or the ECJ would not have deferred to the institutions' decision in this respect.[278]

Clearly, the institutions' margin of discretion (or margin of assessment) depends on the relevant provision of the Basic Regulation. The BR may require which factors shall be to be taken into account in order to impose an anti-dumping measure. If the list of factors is not exhaustive, only the *relevant* factors having a bearing[279] on the issue at hand (e.g. the state of the European industry in order to establish the dumping margin) are considered. In addition, the obvious shall be added, namely that the broader is the definition of error construed, the less is the degree of discretion of the Commission and the less level of deference is manifested by the CFI/ECJ.

The category of the *obvious error of assessment* is similar to the control criterion of manifest error of appraisal. The difference lies in the seriousness of the two above criteria in order to obtain the invalidation of the contested regulation. The obvious error can be maintained only in the stage of the provisional – but not at the stage of the definitive regulation. If the undertaking provided information related to the error, albeit late, the Commission is required to consider it because the institution is obliged to determine the factors on which its decision is based in a reasonable manner. The meaning of "reasonable" was explained by the case-law, as the examination of "all the relevant circumstances of the case with care and impartiality and to apprise the evidence on the file with all diligence required [… in order to determine the relevant factors] in a reasonable manner."[280] At last, if the initial decision was based on an obvious error, it implies that the institution's conclusions were not *accurate* and for this reason, also failed to make a diligent examination of the case.[281]

D. Misuse of powers

The last basis for judicial overview of anti-dumping decisions is based on the control criterion of ***misuse of powers.*** This ground for a review is often pleaded by the applicants, however – to my knowledge – with no success. A Community institution's decision is vitiated for this reason only in cases when "it was adopted with the exclusive or main purpose of achieving an end other that stated."[282] Since it is a serious allegation, the evidence to be provided by the exporter shall be objective, relevant and consistent. Therefore, the subject – matter of the review is the measure ifself and not much its content. The determination whether there was a misuse of power by the European institutions requires the evaluation of the scope and purpose of the Basic Regulation, since this is the legal basis of the contested anti-dumping measure.

The case-law is not rich since the applicants are not able to present strong arguments to sustain their case, consequently the Courts cannot rule on the substance. No surprise that – as it was mentioned above – the CFI/ECJ in none of these cases found that the Commission or

[278] See the judgments related to the anti – dumping measures imposed on plain paper photocopiers originating from Japan, Euroalliages, T – 132/01 and the Industrie des Poudres Sphériques v Council T-2/95.
[279] IKEA, para. 63; Op. AG Léger in IKEA, para198
[280] Shangdong Reipu Biochemicals, para. 108
[281] Shangdong Reipu Biochemicals, paras. 111 - 114
[282] Bocchi, para. 58

the Council abused their powers. Quoting some examples, the CFI in *Climax Paper* deferred to the European institutions' decision: it considered that the policy – as a result of which a single anti-dumping duty is imposed – pursued by such institutions was not contrary to the Basic Regulation, therefore there was no misuse of powers.[283] In the *Detlef Nölle* judgment, the Court of First Instance rejected the applicant's claim on the grounds that it has merely made an assertion, without demonstrating that it was well founded and without substantiating it with any argument or proof.

E. Statement of reasons, a general duty of European institutions

Although it is not an express control criterion to overview anti-dumping decisions, the ***duty to state reasons*** can be used[284] as a ground for annulment of an anti-dumping regulation since it is a general obligation that stems from the founding treaties and refers to all the European institutions: Article 296 of the Treaty on the Functioning of the European Union (TFU) provides that "legal acts shall state the reasons on which they are based." This means that these institutions shall show clearly and unequivocally their reasoning when they adopt a measure "so as to inform the persons concerned of the reasons given for the measure adopted and thus enable them to defend their rights and the [… European Courts] to exercise its power of review."[285] Clearly, it is a pre-condition to respect of the rights of the defense, since the undertakings involved in an anti-dumping procedure firstly shall be informed and only afterwards they are able to make their own views effectively and to defend their interest. Moreover, it also enables the CFI/ECJ to exercise its power of review,[286] its "supervisory jurisdiction."[287] Whether the institutions satisfied the requirement to state reasons, depends on the circumstances of each case, in particular (1) on the content of the measure in question; (2) the nature of the reasons given and (3) the interest which the addressees of the measure may have in obtaining explanations.[288]

In anti-dumping proceedings, the onus is on the Council or the Commission to provide the information to the interested undertakings but it does not mean that they shall list all the relevant factual and legal aspects of the case.[289] In fact, the reasoning of the institutions can be quite short and it does not have to go into all the relevant facts and legal questions. This approach was sanctioned by the ECJ in *Ferchimex* where it explained that the statement of reasons need not require "to give details of all relevant factual or legal aspects, and that the question whether it fulfills the applicable requirements must be assessed with particular regard to the context of the act and to all the legal rules governing the matter in question."[290]

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[283] Climax Paper, para. 119

[284] This ground for annulment is often used by the CFI/ECJ whenever this duty is not observed without further discussing the essentiality of the infringement. Nonetheless, this ground is rarely invoked in anti-dumping cases by the applicants whose focus is more on the four control criteria.

[285] International Potash Co. v. Council, para. 65; Interpipe Nikopolsky v. Council, para. 65

[286] Euroalliages and Others v. Commssion, T – 132/01, para. 48; Petrotub, paras. 81 and 89, Op. AG Jacobs delivered on 25 April 2002 in Petrotub, para. 104 in that AG Jacobs clarified that the absence of any explanation given by the institution makes impossible a judicial review.

[287] Nakajima, para. 14

[288] Petrotub, para. 81

[289] Interpipe Nikopolsky v. Council, paras. 65 and 146

[290] Ferchimex SA v. Council, T-164/94, para. 118

Accordingly, the institution did not infringe the duty to state reasons, if the information is excluded from the Commission's decision but only if it has no impact on the substance of it and its reasoning can be followed fully.[291] Moreover, the reasoning cannot be considered mistaken in cases when it is "clearly and intelligibly" shown in the anti-dumping measure, and all the figures on which the Community institutions based their reasoning were available for the applicant on the condition that it participated actively in the anti- dumping procedure could not reasonably have been mistaken as far as that reasoning is concerned.[292]

VI.1.4. Concluding remarks

For the Court's review of anti-dumping decisions, one of the essential conditions is to establish what role the WTO Anti-dumping Agreement has within the European legal order. The ECJ has consistently denied the direct effect of WTO rules, so the individuals' right to directly invoke those norms, but it did not exclude the direct applicability of the provisions of the covered agreements, therefore the possibility to challenge the validity of EU acts in the light of the GATT/WTO Agreements. In a similar vein, the Court did not rule out the possibility to invoke the relevant GATT provisions in anti-dumping cases since the Basic Regulation was adopted with the purpose to implementing the ADA. Although, the "implementation exception" has not been applied in practice and the ECJ pushed towards a softer but still efficient approach, the treaty consistent interpretation that ensures more freedom of evaluation for European Courts while enable them to consider and respect international obligations. This choice not just avoids the Union's international responsibility but it protects the validity of the European acts as well.

The judicial review is also dependent on the orientation of a court in relation to the decisions of other tribunals that calls into question the relationship between the panels/Appellate Body and the CFI/ECJ. Officially, the ECJ does not accord any legal value to decisions of the DSB and similar to the covered agreements. The direct effect of the Dispute Settlement Body rulings has been denied, and this clearly precluded the possibility to rely on a panel/AB report in a European judicial procedure. This does not mean, however, that the Court refuses *in toto* these decisions. To the contrary: it filters these rulings and tries to respect them, albeit from a certain distance.

It is clear from the above arguments that the core issue in the WTO case law of the European Courts is still about reciprocity. Based on the consideration that third countries, in particular the main commercial partners of the Community, deny the direct effect of both the WTO rules and DSB rulings, thereby preserving some degree of discretion in the formulation and execution of their commercial policies, the ECJ is not willing to recognize the direct effect of the above norms and decisions. It is understandable, since at present, commercial relations (although increasingly governed by common rules) are partially diplomacy-driven that requires a certain degree of freedom of evaluation and decision that can be ensured only if European Courts do not permit a quasi – automatic enforcement of WTO norms and decisions

[291] Euroalliages, para. 190
[292] Koyo Seiko Co. Ltd. v. Council, T- 166/94, para. 105

and if those courts' intrusiveness in judicial review is limited. On the other hand, the Union is committed to the well – functioning of the multi –lateral trading system and is willing to give effect to WTO rules and rulings but in a balanced framework of mutual judicial policies.

The European institutions' freedom in commercial relations is ensured in another efficient manner, through the restricted supervisory jurisdiction of the CFI/ECJ. The institutional decisions are seen through the optic of a limited standard of review: if certain conditions are satisfied, European Courts uphold the Commission's or Council's decision.

The case- law permits to deduce that the Court of First Instance and the European Court of Justice were not[293] and are not willing to impinge on the European institutions' discretionary powers but they have both been increasingly engaged in taking a closer look at the facts established by the Commission in order to decide whether the procedural guarantees and other control criteria have been meticulously respected. In the past, it was only where procedural guarantees were violated that regulations were annulled.[294] Nonetheless, the European Courts' approach has slightly changed. Even though the CFI and the ECJ still largely defer to the Commission's and Council's decisions, in particular as far as the factual establishment is concerned, their overview has became more invasive. There is a clear tendency to (partially of fully) annul regulations imposing anti-dumping duties, not just on the ground that procedural guarantees of the applicant exporter have been infringed by the Commission (such as the Foshan case from 2009), but also by stating that the Commission has committed a manifest error in assessing the facts. This gives greater possibilities of intrusiveness for the European Courts since it penetrates into the heart of the decisions. The table below[295] shows that this it has been the predominant cause of annulment over the last 15 years.

Year of decision	**Applicant**	**Case nr.**	**Control criterion on the ground of that the regulation is annulled**
1995	NTN Corporation and Koyo Seiko Co. Ltd.	Joined cases T-163/94 and T-165/94	Council's incomplete injury assessment on the ground that the institution's factual statements have not been complete
2000	Medici Grimm KG	T-7/99	Violation of the principle of legal certainty
2000	Starway Starway case Starway SA	T-80/97	Establishment of the facts
2006	Interpipe Nikopolsky	T – 249/06	Manifest error of assessment

[293] BRONCKERS, Marco; *WTO Implementation in the European Community. Antidumping, Safeguards and Intellectual Property*, Journal of World Trade, Vol. 29., No.5., (Oct, 1995), p. 82

[294] VANDER SCHUEREN, Paulette; *New Anti – dumping Rules and practice: Wide Discretion Held on a Tight Leash?*, C.M.L.R., Vol. 33, No. 2 (April, 1996), p. 275

[295] All the cases I checked have been decided after the Uruguay Round.

2006	Shangdong Reipu	T – 413/03	Manifest error of assessment
2007	Aluminium Silicon Mills	T -107/04	Manifest error of assessment
2007	IKEA Wholesale	C -351/04	Manifest error of assessment
2008	HUVIS Corp.	T -221/05	Manifest error of assessment
2009	Foshan Shunde Yongjian Housewares & Hardware Co. Ltd.	C- 141/08 P	Violation of procedural rules
2009	Zhejiang Xinan Chemical Industrial Group Co. Ltd.	T-498/04	Manifest error of assessment

Table 3. The control criteria on the basis of that the CFI/ECJ (partially or totally) annulled anti – dumping regulations in the past fifteen years. Source: Globefield Press

Clearly, the willingness of the Courts in terms of entering more into factual details increased in the last decade. This might be attributable to the more frequent use of the anti-dumping instrument and the improved knowledge and greater familiarity of the CFI/ECJ with these types of cases. However, the "holy rule" of deference towards institutional decisions is still highly respected – at the end, the anti- dumping instrument forms part of the Union's common commercial policy.

VI.2. Judicial review of anti-dumping orders in the USA

VI.2.1. General overview on the US trade remedy – and judicial system

The US legal order offers manifold possibilities on ***import protection***. The laws concerning international trade regulation are considered as part of the administrative law. The most important tools of import control are[296] the (1) anti-dumping and countervailing duty laws that aim at counterbalancing and eliminating unfair trade practices; (2) the "escape clause" (or safeguard) that has the purpose to give relief against increased imports that seriously injure the US industries; (3) Section 301 of the Trade Act of 1974 that -subject to certain conditions[297]- permits the President to impose import restrictions against unfair trade practices of other countries; lastly, (4) Section 337 of the Tariff Act that declares unlawful unfair methods of competition and unfair acts in the importation of articles into the United States and directs the International Trade Commission (ITC) to investigate if violations are found.

These laws are mainly implemented by two ***US bureaucracies***, by the Department of Commerce (DOC) –in particular by the International Trade Administration (ITA) – and by the US International Trade Commission (ITC or USITC or Commission[298]). The latter consists of six commissioners and it is an independent, quasi-judicial federal agency with wide investigative responsibilities on trade matters. The Commission (1) administers US trade remedy laws within its mandate in a fair and objective manner; (2) provides the president, USTR (United States Trade Representative) and Congress with independent analysis, information and support on matters of tariffs, international trade and US competitiveness; and (3) maintains the Harmonized Tariff Schedule (HTS) of the United States. Its task in anti-dumping investigations is to carry out the injury determinations so that to establish whether the US industry is materially injured or threatened with material injury due to the imports. Contrary to the USITC, the International Trade Administration[299] is an executive agency that ensures the rigorous enforcement of the US trade laws and agreements, assists companies with respect to them and develops and implements policies and programs aimed at countering foreign unfair trade practices. In particular, the ITA's Import Administration business unit administers trade remedy laws. Finally, in an anti – dumping proceeding, it is up to the agency to establish the occurrence of dumping, and if so, the dumping margin.

The detailed rules on ***anti-dumping investigation*** and on the imposition of an anti-dumping measure are laid down under Title VII of the Tariff Act of 1930 (Tariff Act), as amended. Under the provisions of this law, the US industry may petition the government for import

[296] PALMETER, N. David, *Regulation of imports in the United States: from Trade Policy to Trade Law*, International Trade Law and Practice (1987)

[297] The action of the USA is appropriate (A) to enforce rights of the USA under any trade agreement; or (B) to respond to any act, policy or practice that is (i) is inconsistent with the provisions of, or otherwise denies benefits to the US under any trade agreement; (ii) is unjustifiable, unreasonable or discriminatory and burdens or restricts United States commerce.

[298] www.usitc.gov

[299] http://ia.ita.doc.gov or http://trade.gov/about.asp. Hereinafter, the ITA is used interchangeably with the DOC as a body that carries out dumping investigations.

protection if the goods are sold at less than a fair value (LTFV), so when they are dumped. The US system is bifurcated (which means that there are two agencies responsible for the ascertainment of different aspects necessary for the imposition of an anti-dumping duty), the filing shall be simultaneous with the ITC and the DOC. According to the Tariff Act, the International Trade Administration ascertains whether dumping exists and if so, it establishes the margin of dumping. The International Trade Administration determines whether the dumped imports injure or threaten to injure the domestic industry. The injury investigation is carried out in the preliminary phase and in the final stage as well.

In 45 days from the receipt of the domestic industry's petition, the ITC's preliminary injury investigation must be completed. Based on the facts available at the time of the determination, the ITC ascertains whether there is a "reasonable indication" that the US industry is materially injured or threatened with the material injury due to the importation of dumped products. If the ITC's determination is affirmative, the DOC continues the investigation. The investigation is terminated if the Commission's determination is negative or if it finds that imports are negligible. 120 days subsequent to the preliminary affirmative determination by the Secretary of Commerce (or after 45 days from a final affirmative determination if the preliminary determination was negative) that imports are being or are likely to be sold at LTFV, the Commission conducts the final phase of the injury investigation. At the final stage, the ITC determines whether the US industry is "materially injured" or threatened with material injury by reasons of imports that the DOC has determined to be sold in the US at less than fair value. If the ITC's determination is affirmative, the Secretary of Commerce issues an anti-dumping order. If the ITC's assessment is negative, no anti-dumping duty order is emitted. The duties are collected by the US Customs Service.

As required by the Anti-dumping Agreement, legal remedies against the ITC's and DOC's determinations are available in the ***US judicial system***. The ITC injury assessment can be appealed to the *Court of International Trade (CIT)* which is a specialized court, established by the Customs Courts Act of 1980, in order to substitute the role of its predecessor, the United States Customs Court. The court is composed of nine judges, appointed for life and located in New York City but it can preside trials and hold hearings in the whole territory of the United States. The Court has exclusive jurisdiction over anti-dumping disputes that involve the USA. The CIT is granted a broad authority based on the necessity to give the same access to judicial protection to persons adversely affected by agency decisions arising out of import transactions that the US legal system makes available to other persons aggrieved by actions of other agencies.[300] The cases are decided by a single judge but in certain instances the chief judge may assign the case to a three-judge panel.[301] Appeal from final decisions of the CIT may be taken to the *Federal Circuit* and ultimately, to the *Supreme Court of the United States*. Contrary to the CIT, these courts are not specialized tribunals. The *Federal Circuit* was established in 1982 by the merger of the United States Court of Customs and Patent Appeals and the appellate division of the United States Court of Claims.

[300] www.cit.uscourts.gov/informational/about.htm

[301] The court has its own rules prescribing the practices before it. With certain limited exceptions, the Federal Rules of Evidence govern the trial cases before the court.

It is located in Washington, D.C. but it has nationwide jurisdiction in a variety of subject areas, including international trade.[302] The cases are decided by the panel of judges who emit their reasoned opinions.

The *Supreme Court of the United States* is the highest level court in the country. It has wide discretionary powers to decide which case to hear and its jurisdiction extends to constitutional issues, review of statues and disputes between States and the State and the Federal Government. The Supreme Court currently consists of the Chief Justice of the United States and eight Associate Justices. The power to nominate the Justices is vested in the President and appointments are made with the consent of the Senate.

The outcome of the judicial review could be to obtain relief from the anti-dumping duty in the form of revocation or reinstitution of the anti-dumping duty order, reduction or increase of the dumping margin.[303]

VI.2.2. The place and interpretation of international treaties, in particular the covered agreements in the US legal order

Foreign relations are of federal monopoly, hence they are conducted by the political branches of the federal government:[304] it is the Executive's *prerogative* to deal with the WTO in its diplomatic and policy-making roles.[305] As far as the commercial relations of the US are concerned, both the federal government and the states have the power to regulate trade, however the latter are not entitled to impose protectionist border measures. In particular, under the Commerce clause, the US Congress is entitled to manage external trade with third countries, hereby limits the powers of the states that have no authority to impose duties on exports or imports or discriminate against foreign or interstate trade.[306] These commercial relations are usually governed by treaties and international law that are binding upon the President, the Congress, the Executive and of course, the courts.

Pursuant to the Supremacy clause of the US Constitution, the Constitution, the laws of the United States and all the treaties made under the US authority shall be the supreme "Law of

[302] Moreover it has jurisdiction over government contracts, patents, trademarks, certain money claims against the United States government, federal personnel, veterans' benefits and public safety officers' benefits claims. Appeals to the court come from all federal district courts, the United States Court of Federal Claims, the United States Court of International Trade, and the United States Court of Appeals for Veterans Claims. The court also takes appeals of certain administrative agencies' decisions. Source: http://www.cafc.uscourts.gov/index.php?option=com_content&view=article&id=144&Itemid=27

[303] REEDER, Casey; *Zeroing in on Charming Betsy: How an Antidumping Controversy Threatens to Sink the Schooner;* Stetson L. Rev., Vol. 36 (2006); p. 263

[304] The Supreme Court in United States v. Pink (315 U.S. 203 (1942) stated that the conduct of foreign relations is committed by the Constitution to the political departments of the Federal Government.

[305] SNR Roulments v. US, Slip Op. 04-100, (CIT, 2004), p. 17

[306] LEEBRON, David W.; *Implementation of the Uryuguay Round Results in the United States*, in JACKSON, John. H., SYKES, Alan O., Implementing the Uruguay Round, Oxford, Clarendon Press (1997), p. 224

the Land." The courts are bound by this supreme law to the extent that "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[307]

As far as international treaties are concerned, different types exist in the US legal order. There are treaties that require advice and approval of two thirds of the Senate, Congressional Executive Agreements, Presidential Executive Agreements and Treaty Executive Agreements, where the treaty leaves open some issues of implementation to be considered and solved by the Executive at a later stage.[308] In order to give effect to a treaty provision, at least four questions shall be answered by a national court:

(1) if the agreement is *valid* under the US law;
(2) if the content of its provisions is precise enough to be considered as *self –executing*;
(3) if there are any limits set by national law on the *standing of private parties* to claim based on the international provision at hand; at last
(4) if the international provision is *consistent* or not with federal, state and constitutional *norms or provisions*.

First, one of the most important issues is to establish whether the treaty or a provision of it is of *self –executing nature*.[309] Self-executing treaties have provisions that are precise enough to not require a further act of implementation by the Congress and can therefore be used by a court to solve a case. Put it differently, they can be directly applied in domestic law. The difference between self-executing and non-self executing treaties was well-explained by Judge Marshall. He distinguished between the normal treaty that "operates of itself" and the exceptional treaty that promises "to perform a particular act." Both kinds of treaties contain "promises," undertakings of the US, binding under international law. "But the treaty that operates of itself, the undertaking by the United States automatically has the quality of law: the Executive and the courts are to give effect to the treaty undertaking without awaiting any act by Congress."[310] This treaty is denominated as "self-executing." In a similar vein, international treaties are in principle self-executing, by the US Constitution. The non-self executing provisions are exceptions into the Supremacy clause, the performance of the particular act is carried out by the political branch. Nonetheless, the self-executing nature of the treaty (or not) should not hinder the execution of its provisions, since in both cases they are binding on the United States. It is still the supreme law of the land – however, if the treaty is non-self-executing, it is not the "rule for the Court" since its provisions shall be transposed into the US legal order, they don't have automatic domestic force.

[307] Art. VI (2) US Constitution
[308] JACKSON, J.H., United States in The Effects of Treaties in Domestic Law, ed. JACOBS F.G., ROBERTS, S. (London, 1987), p. 141, 143
[309] More on self executing treaties see: BUERGENTHAL, Thomas; *Self-executing and non-self-executing treaties in national and international law*. Publications of the Hague Academy of International Law
[310] HENKIN, Louis; Foreign affairs and the United States Constitution, 2nd Ed., Oxford, Clarendon Press (1996), p. 199

The self-executing or non-self-executing nature of a treaty is determined by the judicial branch based on the treaty itself and Congressional intent. With this regard, the Congress has increasingly adopted the position that the treaties it approves are not self-executing. Nevertheless, even though the Houses of the Congress approve an international agreement or the Senate approves a treaty, that treaty or agreement might not have direct application in the United States.[311] It seems that whenever a treaty requires additional domestic legislation, or Congress declared a treaty non-self-executing, US courts have refused to implement it.[312]

The divergence between these two types of treaties can be explained by the *later-in-time principle* according to which international agreements – if non-self-executing – can be derogated by subsequent federal legislation. In a different vein, international agreements may supersede previous federal legislation, only if they are self-executing.[313]

The relevance of international agreements in the domestic legal order is also ensured by the *Charming Betsy doctrine*, a canon of statutory interpretation developed by the US courts. Pursuant to the canon, it is deemed that an act of the Congress is ought not to be construed to violate the law of nations, if any other possible interpretation remains.[314] Clearly, this doctrine comes into play in case of conflict between international and domestic law. If there is no scope for interpretation, the unambiguous statute should prevail over a conflicting international obligation.[315]Even if it is inconsistent with the international agreement, subject to the Congress' express and unambiguous intent. Put it differently, Charming Betsy does not oblige the courts to apply international law in violation of domestic norms since it is not the responsibility of the judicial branch to decide whether to apply or set aside provisions of international treaties. For instance, the CIT in the *Hyundai* judgment applied the Charming Betsy canon.[316] As a consequence, the Court based its decision on a provision of the Anti-dumping Agreement[317] and concluded that it entitles the WTO Member State with discretion in implementing international obligations. The CIT also added that based on the above agreement, the administrative agency has discretionary powers to determine whether revocation of an anti-dumping duty order is appropriate. It follows that in a sunset review, the agency also has the faculty to determine whether injurious dumping would be "likely" to occur in the future.

Due to the lack of approval by the Congress, the *legal status of GATT 1947* in the US was uncertain. Most of the courts assumed that the state laws in violation with GATT cannot be

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[311] LEEBRON, David W.; *Implementation of the Uryuguay Round Results in the United States*, in JACKSON, John. H., SYKES, Alan O., Implementing the Uruguay Round, Oxford, Clarendon Press (1997), pp. 186- 189

[312] COHEN, Amichai; *Bureaucratic Internalization: Domestic Governmental Agencies and the Legitimization of International Law*, Geo. J. of Int'l. Law Vol.36, No. 4, p. 1119

[313] HENKIN, Louis; Foreign affairs and the United States Constitution, 2nd Ed., Oxford, Clarendon Press (1996), p. 241

[314] Murray v.Schooner Charming Betsy, 2 Cranch 64, US 64, 2 L. Ed. 208 (1804)

[315] Federal – Mogul Corp. V. US, 63 F.3d 1572 (1995) p. 10

[316] Hyundai Electronics Co. Ltd. v. US, Slip op. 99-44, (CIT, 1999), p. 26

[317] Art. 11.2 of the ADA stating "[i]f […] the authorities determine that the antidumping duty is no longer warranted, it shall be terminated immediately."

applied. By contrast, courts have never held that GATT provisions prevail over inconsistent federal law.[318] The judicial branch, but also the ITC and the Commerce were reluctant to pay deference to the GATT Anti-dumping Code when interpreting US law.[319] In fact, the Federal Circuit in the often referred *Suramerica* case ruled that the GATT cannot supersede the domestic legislation and stated as follows: "[e]ven if we were convinced that Commerce's interpretation conflicts with the GATT, which we are not, the GATT is not controlling. While we acknowledge Congress's interest in complying with US responsibilities under the GATT, we are bound not by what we think Congress should or perhaps wanted to do, but by what Congress in fact did. *The GATT does not trump domestic legislation;* if the statutory provisions here are inconsistent with the GATT, it is a matter for Congress and not this court to decide and remedy."[320]

As far as the *WTO Agreements* in particular are concerned, it can be stated that their position in the US legal system (similar to the case of the EU) is unique. The covered agreements were approved by a federal statue, the Uruguay Round Agreement Act (URAA) and by Presidential Proclamation No. 6780, implementing provisions contained in the trade agreements approved under URAA.[321] The URAA was adopted to authorize the President to ratify and implement the WTO Agreement and annexes on the basis of the fast-track authority.[322] In addition, the Statement of Administrative Action (SAA) was adopted.

The *SAA* symbolizes the authoritative expression of the administration concerning its views on the interpretation and application of the agreements concluded in Marrakesh and it is intended to guide not only future administrative actions by the President and the executive branch and judicial interpretations of the URAA, but also the US' position regarding its international obligations under the Uruguay Round Agreements. The view of the administration as expressed in the SAA is to be considered in any judicial proceeding in that a question arises concerning such interpretation and application of the WTO agreements. Both the Federal Circuit and the CIT have recognized the "controlling nature" of the Act and used it as an "authoritative guide" in interpreting the Uruguay Round Agreements. Furthermore,

[318] LEEBRON, David W.; *Implementation of the Uryuguay Round Results in the United States*, in JACKSON, John. H., SYKES, Alan O., Implementing the Uruguay Round, oxford, Clarendon Press (1997), p. 188

[319] LEEBRON, D.W.; *Implementation of the Uruguay Round Results in the United States*, p. 217 in JACKSON, J.H., SYKES, A.O.; Implementing the Uruguay Round. Oxford (1997), p.217

[320] Suramerica de Aleaciones Laminadas C.A. v. United States, 966 F.2d 660, 668 (Fed.Cir. 1992), p. 7

[321] Proclamation 6780 – to Implement Certain provisions of Trade Agreements Resulting from the Uruguay Round of Multilateral Trade Negotiations and for Other Purposes, 60 Fed. Reg. 15,845 (23 March 1995)

[322] According to the fast-track authority (inaugurated in the 1974 Act which authorized the Tokyo Round negotiations) the President shall notify the Congress 90 or 120 days prior to signing an international agreement and consult some main congressional committees during this period. In turn, the Congress establishes the objectives of the trade negotiations and the process to be followed by the Executive through the negotiations but it also guaranteed the expedited approval and implementation of the agreement. The Uruguay Round Agreements were adopted by the fast-track process against which objections emerged based on the consideration that the process is undemocratic. Consequently, it was held that the WTO Agreements should have been presented as a treaty, requiring the approval of two thirds of the Senate rather than the majority of the Houses of Congress. Today, the instrument is largely perceived as essential to any complex trade negotiation with the USA.

the SAA made it clear that the Uruguay Round Agreements are not self-executing.[323] Nonetheless, the agencies are free to consider the consistency of any proposed action with the Uruguay Round Agreements in carrying out any action.[324]

The *URAA* is straightforward in stating that the WTO law is subordinate to domestic trade law. The Act has three important elements: at first, the limited interpretative authority of WTO law compared to US laws. According to Section 102 (a) of the URAA, nothing in the act shall be interpreted: (1) to amend or modify any law of the United States, including any law relating to the protection of human, animal and plant life or health, the protection of environment or worker safety; and (2) to limit the authority conferred under any law of the United States, including Section 301 of the Trade Act of 1974, unless specifically provided in the URAA. The Act hereby expressly bans conflicts between domestic statues and the WTO Agreements in the above fields. The second key aspect of the Act is that no state law or application of such a statue may be declared invalid on the ground that the provision or application is inconsistent with any of the Uruguay Round Agreements, unless the US federal government brings such an action for the purpose of declaring such law or application invalid.[325] The effect of this provision is to limit the extent to which the Act may be interpreted as altering any laws. At last, a further significant element is the US Administration's full control over any cause of action under the WTO Agreements and every challenge against action or inaction of the federal administration that is inconsistent with WTO law.[326] It follows that it is only the US Administration that has a cause of action or defense under any Uruguay Round Agreements, through the power of congressional approval of such an agreement and also through the power of challenging an action or inaction of any department, agency or other instrumentality of the US, on the grounds, amongst others, that such action or inaction is inconsistent with such agreements.[327] It seems then that the cases where the WTO law could be directly applied is limited to: (1) cases when the Federal Government relies upon a WTO obligation as a defense in an action against it; (2) an application lodged by the Federal Government to quash a state or local law or action on the basis of its inconsistency with a commitment undertaken by the USA under the WTO Agreements.[328]

It is important to highlight the *conflict between the URAA and the Charming Betsy doctrine*. The latter, as it has been described above, obliges courts not to construe an act of the Congress "to violate the law of nations if any other possible construction remains."[329] In a contrary vein, the URAA Supremacy Clause expressly forbade giving effect to provisions of

[323] SAA, at 14, 20
[324] SAA, at 20
[325] URAA, Section 102 (b) (2) (A), Relationships of Agreements to State Law
[326] URAA, Section 102 (c) (1) Effect of the Agreement with respect to Private Remedies. Limitations
[327] GATTINARA, Giacomo; *The Relevance of WTO Dispute Settlement Decisions in the US Legal Order*, Legal Issues of Economic Integration, Vol.36., No. 4 (2009), p. 291
[328] STEINBERG, R.H.; *Direct Application of Multilateral Trade Agreements, Regionalism and Multilaterlaism after the Uruguay Round*. Convergence, Divergence and Interaction, ed. DEMARET, P, BELLIS, J.F., (Brussels, 1997) p. 722
[329] Murray c. Schooner Charming Betsy, 6 U.S. (2 Cranch), 64, 118 (1804)

the Uruguay Round Agreements that are inconsistent with any law of the United States. Hence, by statutory provision, Charming Betsy is not applicable in relation to the covered agreements. The case-law makes this picture more colourful.

The Federal Circuit in *Corus Staal*[330] has expressly recognized the first time the barrier imposed by the URAA Supremacy Clause, however it did not enter into to resolve the canon's place. Putting it differently, it the CAFC acknowledged the primacy of the URAA Supremacy Clause over the Charming Betsy canon. On the other hand, the CIT in *Usinor I* highlighted the importance of the USA's willingness to fulfill international obligations. With regard to the URAA Supremacy Clause, at first it reaffirmed the standard laid down in *Fujitsu* according to where the statue is unambigous, it shall prevail over the conflicting international provision.[331] Secondly, the CIT made it clear that the International Trade Commission shall administer anti-dumping laws consistently with the international obligations of the US. At last, the Court went on to state that the Anti-dumping Agreement is an international obligation of the USA that the ITC must take into consideration.[332] Afterwards, the Court in *Usinor II*[333] noted that it was unnecessary to apply the Charming Betsy canon since the ITC was able to reconcile the provisions of the anti-dumping statue and with those of the Anti-dumping Agreement. The Federal Circuit avoided applying the URAA Supremacy Clause and harmonized the domestic law and the WTO ADA, using both statutory contortions and the persuasive rationale of the AB's decisions at stake.[334]

In the remarkable *Turtle Island Restoration Network v. Evans* judgment, the Federal Circuit had the opportunity to deal with the conflict between Charming Betsy and the URAA again, however it decided not to expressly address the question since the Court considered the issues raised entirely domestic.[335] The relevance of the URAA Supremacy Clause was captured only by judge Newman in her dissenting opinion, in which she highlighted that (1) due to the URAA and the SAA, WTO decisions do not control the laws of the United States; (2) it is for the Congress to decide whether and how to act in cases when a DSB decision recommends changes to the US legislation in order to bring the domestic statue in conformity with the WTO Agreements; (3) the URAA Supremacy Clause forecloses changes to the domestic laws despite any conflict with a WTO Agreement. The circuit judge's approach reflects the strict application of the URAA Supremacy Clause and the SAA. Lastly, by the same taken, the CAFC in its *Allegheny Ludlum Corp. v. US*[336] judgment applied the Charming Betsy canon and asserted that the conflict between domestic law and the US' international obligations could be avoided due to the narrower interpretation of the anti-dumping statue.

[330] Corus Staal BV v. United States, 395 F3d 1343 (Fed.Cir. 2005) p. 5
[331] Usinor v. United States (Usinor I), Slip Op. 02-70 (CIT, 2002), p. 14 citing Fujitsu and Federal Mogul
[332] Usinor I, p. 15
[333] Usinor II, Slip Op.04-65 (CIT,2004) p. 20, footnote 11
[334] DAVENPORT, Filicia; *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the Charming Betsy Standard with Respect to WTO Agreements*; Fed. Cir. B.J., Vol15., No. 279 (2005-2006), p. 307- 308
[335] Turtle Island Restoration Network v. Evans, 284 F.3d 1282, 1297 (Fed.Cir 2002), p. 38
[336] Allegheny Ludlum Corp. v. United States, 03-1189, -1248 (Fed.Cir.2004) p. 10

The conflict between charming Betsy and the URAA does not only refer to the conflict between statutory provisions and international norms, but also on the *locus standi* of the individuals. The URAA, under § 3512 (c) (1) –(2), does not give standing to private parties when it states that: "[…] No person other than the United States – (A) shall have any cause of action or defense under the Uruguay Round Agreements or by virtue of congressional approval of such agreements, or (B) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with such agreement." Then the provision goes further by stating that through the above paragraph, "it is the intention of the Congress […] to occupy the field with respect to any cause of action or defense under or in connection with any of the Uruguay Round Agreements […]."

The CIT in *SNR Roulements* faced the question of the issue of the standing since the DOC tried to preclude the claim of the plaintiff through the application of § 3512 (c) of the URAA. Nonetheless, the Court allowed to circumvent the plain language of the URAA by permitting the implicit use of the Charming Betsy canon and dismissed the contention as an "erroneous technical bar" to the lawsuit and instructed that the case proceed.[337] The applicant stated that the arms-length test used by the DOC in the anti-dumping review violated the international obligations of the USA. The Court, based on the second prong of the Chevron doctrine,[338] declared that the above test has been applied by the Commerce in a reasonable manner. Hereby, the CIT emphasized the relevance of the Charming Betsy standard in the statutory interpretation in the light of international obligations but it also pointed out the need to respect "Commerce's regulatory authority under the Charming Betsy doctrine."[339]

Likewise in *SNR Roulements*, this approach was based on the indirect use of the Charming Betsy rationale and did not mention the relevant URAA provisions. In addition, the court in *Timken*,[340] used the Charming Betsy canon for the claim construction, it therefore addressed the appeal of the party.

What is clear from the above is that the Courts try to apply the Charming Betsy doctrine until a certain extent, based on the consideration that the US should respect its multinational obligations. On the other hand, it is up to the Congress and not to the Courts to honor the obligations assumed in the WTO framework. The Congress legislated out the possibility to apply the WTO Agreements to litigants in US courts and provided for the application of the Supremacy Clause in relation to the above agreements. Consequently, they asked for the courts to give priority to the US statues. This means that – respecting an obvious and unambiguous congressional intent – the US courts should not apply Charming Betsy. The practice, however has been different since (contrary to the Congressional prohibition) standing has been given to litigants which can be considered reasonable by the courts, since

[337] SNR Roulements v. United States, Slip Op. 04-100 (CIT, 2004), pp. 11-12
[338] See under VI.2.3.
[339] SNR Roulements v. United States, Slip Op. 04-100 (CIT, 2004) p. 17
[340] Timken Co. v. United States, Slip Op. 02-106 (CIT, 2002), pp. 17-19

individuals can be directly concerned by administrative decisions, whose origins can be traced in a WTO Agreement. Moreover, the US Courts have implicitly considered and consulted WTO documents.[341]

VI.2.3. Doctrines applied by the US courts in the judicial overview of administrative decisions

The principles of administrative law fuse with the principles of constitutional law (such as the separation of powers) and with the political question doctrine (field of international affairs) in the judicial review of agency decisions.

As regards the judicial overview of administrative decisions, and in particular as far as the external trade-related determinations are concerned, various canons come into play. These are the Chevron doctrine, the Charming Betsy canon, the Skidmore doctrine, the Morton maxim and the Chenery standard.

The first and most commonly used maxim in judicial review of administrative decisions was laid down by the Supreme Court in the ***Chevron*** *USA Inc. v. Natural Resources Defense Counsel Inc.*[342] in 1984. The decision has largely expanded the circumstances in which the courts shall defer to the agencies' statutory construction: courts shall defer to reasonable agency interpretations, not only when Congress expressly delegated interpretative powers to the agency but also when the Congress was silent or the statue that the agency is called to administer is ambiguous. Not exclusively – Chevron shifted the judicial branch's discretionary deference towards a mandatory deferential treatment of agency decisions;[343] the agency is entitled to deference as a matter of right.[344]

The Supreme Court in Chevron set out the following test: "[w]hen a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, is always the question whether Congress has directly spoken the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines that Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[345]

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[341] The CIT in *Usinor II* stated that the Court's "opinions may be informed by WTO documents." Usinor v. US, Slip Op. 04-65, (CIT, 2004), p. 20

[342] Chevron USA Inc. v. Natural Resources Defense Counsel Inc., 467 US 837 (1984)

[343] It is an important shift, since in the pre-Chevron period the court manifested deference towards administrative decisions only when the Congress expressly delegated authority to the agency to define the statutory terms or prescribe a method of executing a statutory provision.

[344] MERRILL, Thomas W., HICKMAN, Kristin E.; *Chevron's Domain,* Geo. L.J., Vol. 89, (2000-2001) p. 856

[345] Chevron USA Inc. v. Natural Resources Defense Counsel Inc., 467 US 837 (1984) at 842-843

The court laid down the two-prong test in interpreting statues. As a general principle, and under Chevron step one, as far as legal matters are concerned, the plain meaning of the statue controls statutory interpretation if the provision directly assesses the issue at stake.[346] Then the question emerges when the reviewing court must answer is whether the statue specifically requires a particular interpretation. If it does, the courts must apply the statue as explicitly required. If the statue is ambiguous, the question is whether the agency's interpretation rests upon a permissible construction of the statue. If so, the court must defer, even if it would have come to a different outcome.[347] In doing so, the court shall not establish that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding. Clearly, the second prong of Chevron deference is an *ex ante* established deferential level so the court has tied hands in weighing the agency's interpretation.

The intention of the Congress has crucial importance in the Chevron test: in fact, the doctrine is based upon the *congressional intent theory*. The first prong of Chevron does not call for deference towards the administrative agency's determinations. To the contrary, the judiciary (as the final authority on issues of statutory construction) must reject administrative interpretation opposing to the clear intent of the Congress.[348] If the intention of the Congress is clear, "that intention is the law"[349] and courts must obey to this intent. The precondition to deference is an "implicit" congressional delegation of administrative authority.[350] If the Congress has explicitly left a gap for the agency to fill, "there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight, unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency."[351]

[346] SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 7

[347] PAM S.p.A. v. US, Slip Op.05-125 (CIT, 2005), p. 8 quoting *Koyo Seiko Co. v. United States*, 36 F.3d 1565, 1570 (Fed. Cir. 1994)

[348]Chevron citing also FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 117-118 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-746 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown, 380 U.S. 278, 291 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896).

[349] Chevron USA Inc. v. Natural Resources Defense Counsel Inc., 467 US 837 (1984)

[350] Adams Fruit Co. v. Barrett, 494 US 638, 649 (1990) "A precondition to deference under Chevron is a congressional delegation of administrative authority." The judgments also quotes Bowen v.Georgetown University Hospital, 488 U.S. 204, 208 (1988); NLRB v. Food and Commercial Workers, 484 U.S. 112, 123(1987)

[351] Chevron USA Inc. v. Natural Resources Defense Counsel Inc., 467 US 837 (1984)

The Chevron test is not restricted to agency interpretations but has been expanded generally to all aspects of the agencies' decision-making concerning unfair trade remedy proceedings.[352] Needless to say, that it is a cornerstone doctrine used in anti-dumping cases: "[i]n determining whether Commerce's interpretation and application of the antidumping statute is in accordance with law, this Court must consider "whether Congress has directly spoken to the precise question at issue," and if not, whether the agency's interpretation of the statute is reasonable."[353]

Whether the standard is applied depends also upon the procedure, through which the agency reached its conclusions. If it is obtained in the framework of a relatively formal proceeding, it is qualified for a Chevron approach, since it is more probable that the Congress would expect the agency's action to carry the force of law when the administrative body engages itself with an interpretative process.[354] In other words, statutory interpretations, when reached through rigorous regulatory promulgation procedures (so that we can talk about informed decision-making), limit the US courts' discretion and call for the Chevron deference. In order to warrant Chevron deference, the decision-making process must satisfy the following conditions: (1) delivery of a formal notice to the affected party of proposed governmental action; (2) give opportunity to interested parties to comment and the administrative agencies have the duty to consider it; (3) creation of a formal record and lastly, (4) an impartial adjudicator.[355]

The other deferential doctrine used by US courts in judicial review is the ***Skidmore*** standard that goes back to the '40s. It relies on a range of contextual factors to determine whether the agency has power to persuade. According to the doctrine "[t]he rulings, interpretations and opinions of [the administrative agency], while controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control."[356]

It is clear, that the Skidmore standard is less deferential than Chevron, since the agency is entitled to deference only if it earns it. In turn, this implies more discretion for the judges than

[352] RESTANI, Jane A.; BLOOM, Ira; *Interpreting International Trade Statues: Is the Charming Betsy Sinking?,* Fordham Int'l. L. J., Vol. 24, (2001) p. 1533

[353] E.g.: PAM S.p.A. v. US, p. 8; Timken v. US, p.20; Andaman Seafood v. US, Slip Op. 10-12 (CIT, 2010) p. 11; Corus Staal B.V. v. US, Slip Op. 03-25 (CIT, 2003), p. 42; SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 4; Andaman Seafood Co. Ltd. v. US, Slip Op. 10-12 (CIT, 2010), p. 11; QVD Food Co. Ltd. v. US, Slip Op. 10-101 (CIT, 2010), p.4

[354] US v. Mead Corp., pp. 12, 15; Christensen v. Harris County, 529 US 576, (Supreme Court, 2000). The Supreme Court in Christensen delimited the border-line between the deferential Chevron and the less deferential Skidmore doctrine (p. 576).

[355] RESTANI, Jane A.; BLOOM, Ira; *Interpreting International Trade Statues: Is the Charming Betsy Sinking?,* Fordham Int'l. L. J., Vol. 24, (2001) p. 1539

[356] Skidmore v. Swift & Co., 323 US 134 (1944), p. 4

in applying the Chevron standard. According to Skidmore, the court upholds the agency's interpretation to the extent it has the "power to persuade." Hence, the agency interpretations are not controlling upon the courts by reason of their authority. The outcome of the deferential treatment (contrary to Chevron) is not ensured since the Skidmore doctrine prescribes more a method by which the court should determine how much level of deference it intends to give to the agency determination. These persuasion factors that the courts examine are (1) the thoroughness evident in the interpretation's consideration; (2) the validity of the reasoning; (3) its consistency with earlier pronouncements; (4) the degree of agency's care; (5) its consistency; (6) formality; (7) relative expertness and (8) the persuasiveness of the agency's position. In the *Mead* judgment, the Court added to this check-list: thoroughness, logic, expertness and consistency with former interpretations.[357] These articulations can be distilled in *five key factors* of the Skidmore analysis: *thoroughness, validity, formality, consistency, agency expertise.*[358] They are considered by the reviewing court and the degree of deference varies according to the court's evaluation of the above factors. For this reason, the deference that the administrative agency's construction gets fluctuates along a sliding scale. In practice, as Hickman's and Kruger's study proves, the Skidmore standard is deferential in approximately 60 per cent of the cases.[359]

The courts at first evaluate the so called contextual factors, so that the *thoroughness, formality, consistency, agency expertise*, to gauge the level of deference that the interpretation deserves. Only after having determined how much leeway the agency earned, the *validity factor* is applied to decide whether the interpretation falls within that interval. Therefore, it is not surprising that the most frequently evaluated Skidmore factor[360] is the validity of the interpretation's reasoning, that includes both argumentations concerning the reasonableness and the plausibility of the interpretation itself.[361] It is a unique factor since it is a sole criterion that tests the agency's construction. The other criteria evaluate the interpretative context but not the merits.[362]

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[357] The first three criteria are laid down in Skidmore v. Swift & Co., the others added by the Mead judgment.

[358] HICKMAN, Kristin E., KRUEGER, Matthew D; *In Search of the Modern Skidmore Standard*, Columbia L. Rev. vol.107, No.6, (Oct., 2007), p. 1259

[359] HICKMAN, Kristin E., KRUEGER, Matthew D; *In Search of the Modern Skidmore Standard*, Columbia L. Rev. vol.107, No.6, (Oct., 2007), p. 1279

[360] According to Rossi's view, among the Skidmore factors, the *consistency* seems to be the most widely used by the US courts. It plays an important role in protecting the legitimacy of agency informal interpretations because it applies even where Skidmore is not used, suggesting that agencies must explain their different approach from previous positions. Agencies need to have a certain degree of flexibility to adapt interpretations, even through informal procedures. However, if an agency changes its legal interpretation through an informal procedure, it should be expected to *thoroughly* consider and explain its depart from previous positions. To put it differently, the agency may change its interpretative position subject to provide for a reasoned consideration, sufficient to override any inconsistency that might detract from the persuasive force of the agency's construction. See in ROSSI, Jim, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron,* William and Mary L. Rev., Vol. 42., No.4. (2001), p. 1144

[361] HICKMAN, Kristin E., KRUEGER, Matthew D; *In Search of the Modern Skidmore Standard*, Columbia L. Rev. vol.107, No.6, (Oct., 2007), p. 1285

[362] More about these factors see HICKMAN, Kristin E., KRUEGER, Matthew D; *In Search of the Modern Skidmore Standard*, Columbia L. Rev. vol.107, No.6, (Oct., 2007), pp. 1281 -1292

Although both of the deferential doctrines, Chevron and Skidmore control policy-making,[363] they *differ* along various dimensions.[364] At first, in order that the second step of Chevron come into force, the Congressional delegation of power to the agency is decisive. This does not matter in the Skidmore standards. Secondly, the Chevron deference is an all-or-nothing position: the court either holds that the statue is clear, so it conducts a *de novo* review or it finds that the statue is ambiguous, hence it checks whether the agency's interpretation is reasonable. In a contrary vein, Skidmore moves along a sliding scale: the court cannot ignore the agency's interpretation, but the weight attributed to them depends on the court's own assessment. In other words, the outcome of the Skidmore cannot be taken as granted. Thirdly, the contextual factors of Skidmore play little role, and only in the second prong, in the Chevron deference. At last, under the Chevron doctrine, the agency is entitled to deference as a matter of right subject to the "reasonable" or "permissible" agency construction. To the contrary, under Skidmore, the agency is entitled to deference only according to the court's evaluation. Not accidentally, in practice, the Chevron deference is used in anti-dumping (and other external trade related) cases.

In the sphere of deferential treatment of anti-dumping determinations not just the Chevron and Skidmore standards (as generally applied in judicial review of the executive's decisions) but also the ***Chenery doctrine*** come into play. According to Chenery, "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency," [the reviewing court may only adjudicate "the validity of the grounds upon which the [agency] itself based its action" and it is not permitted to make "a determination of policy judgment which the agency alone is authorized to make."[365] In addition, "When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position […]."[366] The doctrine, similar to Chevron, partially lies on the foundation that the agency expertise is the underlying logic of deference to agencies. However, it does not contain implied delegation from the Congress. Rather, the Chenery doctrine's core is the establishment of new policies through adjudication rather than rulemaking.[367]

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[363] MURPHY, Richard W.; *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretative Freedom*, Admin. Law Rev., Vol. 56., No.1., (2004) p.6

[364] MERILL, Thomas W., HICKMAN, Kristin E.; *Chevron's Domain*; Geo. L.J., Vol. 89, 833 (2000-2001), pp. 854-856

[365] SEC. v. Chenery Corp., 318 US 80, 88 (1943); Motor Vehicle Mfrs Ass'n v. State Farm Mut. Auto. Ins. Co., 463 US 29,43 (1983) in REED, Patrick, *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meet Domestic Reality*, Geo. J. of Int'l. Law, Vol.38.,No. 1 (Fall, 2006), p. 228

[366] US v. Mead Corp., 533 US (Supreme Court, 2001), p. 9

[367] KROTOSZYNSKI, Roland J., JR.; *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, Admin. L. Rev., Vol. 54, No. 2. (2002), p. 740

At last, the ***Charming Betsy*** canon shall be mentioned in this context again.[368] The standard stems from the separation of powers principle that prevents judicial intrusiveness into foreign affairs prerogatives of the Executive.[369] The doctrine refers to the statutory interpretation in the light of international obligations and it states that "an act of the Congress ought never be construed to violate the law of the nations of any other possible construction remains." To put it differently, Charming Betsy pushes domestic law to be interpreted consistently with American international obligations "to the degree possible."[370] The doctrine is not a substantive application of international law, rather an *interpretative tool*. The USA committed itself to conform to the WTO Anti-dumping Agreement, it has the duty to respect the rules provided for therein. Since Charming Betsy instructs the courts to construe the domestic laws in a manner that avoids international responsibility of the USA, the doctrine has relevance in the judicial overview of anti-dumping decisions. The standard's importance has been highlighted both in relation to both WTO rules (see above chap. VI.2.2.) and DSB rulings (see below chapter VI.2.4.). By and large, Charming Betsy's relation to international agreements can be summed up as follows: if the international treaty is clear but the domestic law is ambiguous, it is likely that the canon helps the Court in its statutory construction. On the other hand, if both the international and the domestic norms are unclear, deference is given to the administrative agency's interpretation.

The *relationship of Charming Betsy with the Chevron* doctrine is particularly relevant because the WTO obligations are almost always presented within the context of reviewing administrative decisions. As far as the statutory interpretation in the light of the WTO norms is concerned, several possibilities may emerge. By and large, *unambiguous statues* do not require the application of the Charming Betsy canon, for this reason both Charming Betsy and Chevron direct courts to give effect to clearly expressed Congressional intent. Once the clear meaning of the statue is established, the doctrine of *stare decisis* controls the court.[371] However, if the statue's interpretation is *consistent* with the USA's international obligations, the standard is used as a complementary tool to support the agency's decision. (In case when the unambiguous statue is *inconsistent* with the US international obligations, according to the Supremacy clause, the statue prevails for domestic purposes – so that the unambiguous Congressional intent overrides any contrary international obligation. In this case, however, the departure from the international obligation must be found on a clear and express Congressional intent[372]). The Chevron deference is not absolute: whenever the *statue is*

[368] More about Charming Betsy and the TRIPs see WEGNER, Harold C.; *Injunctive Relief: A Charming Betsy Boomerang*, Northwestern J. of technology and Intellectual Property, Vol.4., No. 2 (Spring, 2006) and Charming Betsy and customary international law, see *The Charming Betsy Canon, Separation of Powers, and Customary International Law,* in Harvard L. Rev.,Vol 121, p. 1215 (2007-2008)

[369] *The Charming Betsy Canon, Separation of Powers, and Customary International Law,* in Harvard L. Rev.,Vol 121, (2007-2008), p. 1216

[370] Adman Seafood Co., Ltd. v. US, Slip Op. 10-12 (CIT, 2010), p. 20 quoting also Norsk Hydro Canada, Inc. v. US, 472 F. 3d 1347, 1360 n.21 (Fed. Cir., 2006)

[371] DAME, Paul A.; *Stare Decisis, Chevron, and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?*; Wm. & Mary Law Rev., Vol. 44 (2002), p. 421

[372] ALFORD, Roger P., *Federal Courts, International Tribunals, and the Continuum of Deference*, Virginia J. of Int'l. Law, Vol. 43. (2003), p. 739

ambiguous, Charming Betsy shall be applied in concert with the Chevron doctrine.[373] In the second prong of the Chevron doctrine, Charming Betsy may come into play. The administrative agencies are entitled to establish the meaning and implement the legislation in any reasonable way. A federal court may apply Charming Betsy and construe the unclear statutory terms consistent with the international norms, using the decisions of the international court as an aid in the court's analysis of international law. (See Table 4. below)

Nevertheless, if the agency's action is in violation of international law, the courts may feel inclined to construe the Congress' implied intent to invalidate the agency's determinations. This approach has been changed by the *Corus Staal* judgment delivered in 2003. The CIT in the case at bar declared that when it is faced with "an ambiguous statue and ambiguous international agreement, the Court should defer to the Commerce's interpretation,"[374] even though it is inconsistent with the international obligation as interpreted by the WTO Appellate Body.

Charming Betsy provides for an extremely important mechanism for indirect recognition of international tribunal decisions.[375] Nonetheless, as an interpretative tool alone it is not enough and it shall be applied in concert with other doctrines. This makes the interpretations complex and may cause clashes between different maxims. In turn, the outcome of the case is dependent upon judicial policies and interpretative approaches that can vary time by time. In addition, the applicability of the Charming Betsy maxim has been questioned in relation to highly detailed and complex international agreements.[376] Since its inception, it has been used referring to broad principles of international law, in particular customary international law. The latter principles already belong to the *corpus* of US law – the same cannot be said by the WTO Agreements that have limited effects in the US legal order. Not surprisingly, most decisions do not either mention the doctrine or they merely refer to it as binding on the court, but without engaging in a deeper analysis.

[373] Timken Co. v. US, Slip Op. 02-106 (CIT, 2002) pp. 20-21; Hyundai Electronics Co. Ltd. v. US, Slip op. 99-44, (CIT, 1999), p. 26; citing DeBartolo Corp. v. Florida Gulf Coast Bldg. and Constr. Trades Council, 485 U.S. 568, 574-75 (1988); Usinor v. US, 26 CIT, Slip Op. 02 -70, p. 15; SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 13. In addition, it is important to stress that the Chevron deference (as a non absolute deferential doctrine) may yield to constitutional concerns. The Charming Betsy doctrine also brings up constitutional problems, such as the principle of separation of powers. Consequently, a court might invalidate an administrative decision despite the fact that it would have normally be entitled to Chevron deference.

[374] Corus Staal v. Dep't. of Commerce, Slip. Op. 03-25 (CIT, 2003), p. 42

[375] ALFORD, Roger P., *Federal Courts, International Tribunals, and the Continuum of Deference*, Virginia J. of Int'l. Law, Vol. 43. (2003), p. 742

[376] SEASTRUM, Elizabeth C; *Chevron Deference and The Charming Betsy: Is There a Place for the Schooner in the Standard of Review of Commerce Antidumping and Countervailing Duty Determinations?,* Fed. Cir. B.J., Vol.13, No. 2, p. 238

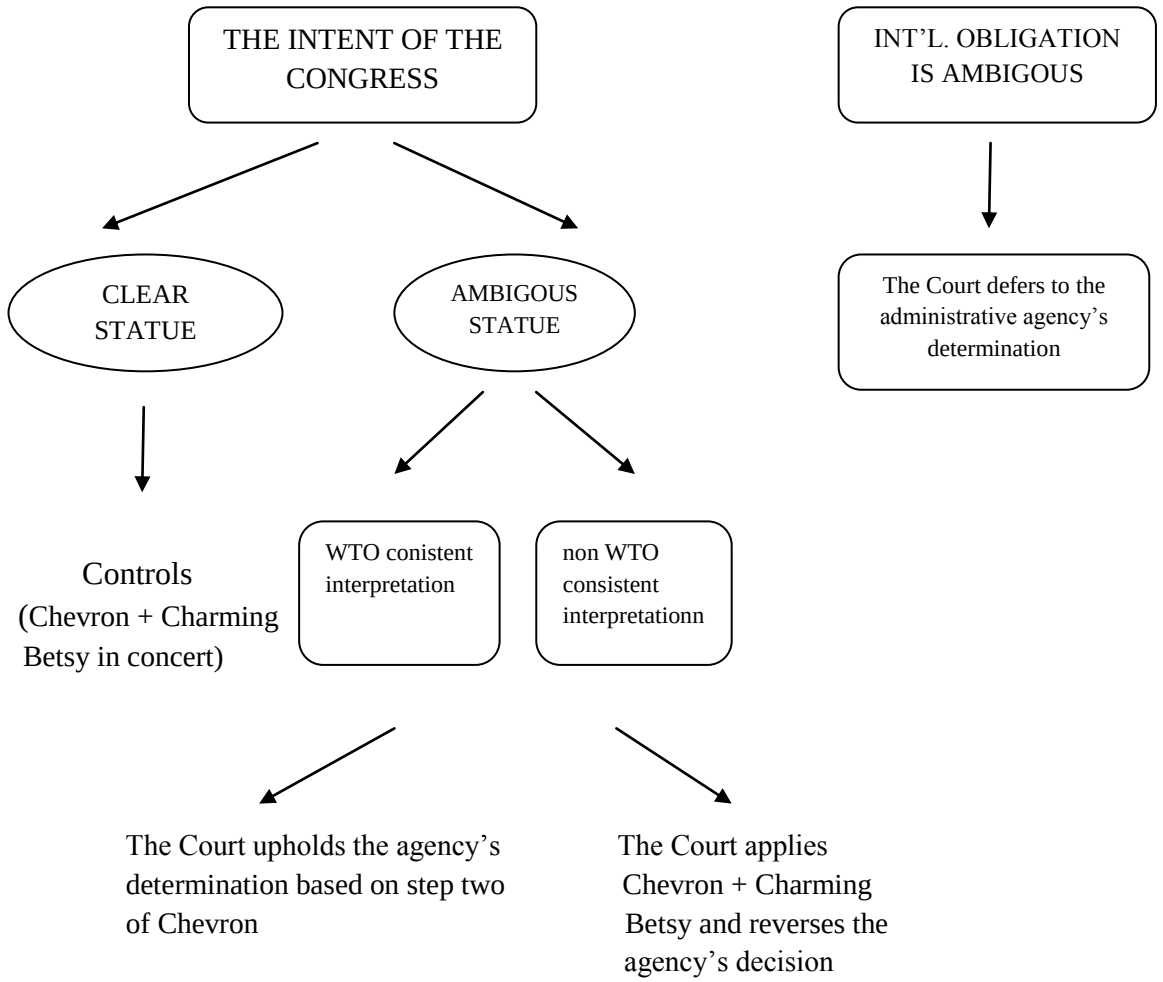

Table 4. The deference doctrines applied in the US

VI.2.4. WTO rulings at the US courts

By and large, the interpretation of international obligations by an international tribunal does not have mandatory binding effects within the USA. The Supreme Court in *Breard v. Greene* noted[377] that US courts should give "respectful consideration" to the construction of treaty provisions rendered by an international tribunal.

[377] Breard v. Greene, 523 US 371, 375 (1998), p. 2; the Supreme Court stated that it "should give respectful consideration to the interpretation of an international treaty rendered by an international court with jurisdiction to interpret such, it has been recognized in international law that, absent a clear and express statement to the contrary, the procedural rules of the forum State govern the implementation of the treaty in that State."

In the past, US Courts had been reluctant to consider *GATT panel rulings*. For instance, the CAFC in its *Suramerica* judgment, instead of following a GATT panel decision, upheld the agency determination based on the consideration that the administrative body's exercise of discretion was reasonable.[378]

Some changes and clarification in relation to the place of *WTO rules and rulings* has been necessary, following the Uruguay Round. As it has been mentioned, the URAA and the SAA do not only determine the place of the WTO Agreements in the US legal order but also the status of the DSB decisions. The SAA clearly denies any legal effect of DSB recommendations when it states that: "[…] reports issued by panels or the Appellate Body under the DSU have no binding effect under the law of the United States and do not represent an expression of U.S. foreign trade policy. […] Furthermore, neither federal agencies nor state governments are bound by any finding or recommendation included in such reports."[379] However, US Court do not entirely refuse to consider DSB rulings. In fact, it does not assume that DSB decisions are the "correct interpretations of United States obligations pursuant to the GATT,"[380] rather they are non-binding decisions that may help to inform the Court on the construction of the international adjudicatory body.[381]

In 2004, the CIT and the CAFC seemed not to consider the above prohibition too much. In this year, the case law of both of the courts at least implicitly considered the rulings of the panels or the Appellate Body, and to reach this result they relied to a large extent on the Charming Betsy canon. The *Turtle Island Restoration Network v. Evans* case the government argued the statue on import prohibition of shrimps harvested without programs aiming at the protection of turtles had the scope to harmonize the US statue with the GATT agreements and the decision of the Appellate Body, taken in relation to the statue. However, since no conflict has been found between the US statue, the WTO Agreements and the AB ruling, it was needless to apply the Charming Betsy standard.

The CAFC in the landmark and often quoted *Timken* judgment decided on the zeroing practice of the DOC subsequent to the Appellate Body's report in the Bed Linen case. It held that the Commerce's practice concerning the zeroing methodology was reasonable, and it acknowledged that (according to Charming Betsy) US statues shall be construed (whenever it is feasible) consistent with the country's international obligations. Then the court reached the conclusion that the Appellate Body's decision was not relevant in the case at bar since it did not address the US zeroing practice and because it dealt with the anti-dumping investigation rather than with an administrative review.[382] The appellant insisted to rely on the AB's

[378] LEEBRON, D.W.; *Implementation of the Uruguay Round Results in the United States*, p. 217 in JACKSON, J.H., SYKES, A.O.; Implementing the Uruguay Round. Oxford (1997), p. 217. Cases: Suramerica de Aleaciones Laminadas C.A. v. United States, 966 F. 2d 660 (Fed.Cir. 1992),p.7; Federal Mogul v. United States, 300 F.3d 368 (Fed.Cir, 1995) p. 13
[379] SAA, H.R. Rep. No. 103-316 (1994)
[380] Timken v. US, Slip op. 02-106 (CIT, 2002),p. 21
[381] Timken v. US, Slip op. 02-106 (CIT, 2002),p. 19
[382] Timken Co. v. US, Slip Op. 02-106 (CIT, 2002), pp. 30-32

decision without avail: the CAFC (deferring to the CIT's view) declared that the WTO decisions are not binding on the US courts, in addition they also lack persuasive value to render DOC's decision unreasonable with respect to the WTO Agreement.[383] The court put an emphasis on the non-binding and non-precedential nature of DSB rulings by stressing that the authentic interpretation of WTO obligations can only stem from the ministerial body of the WTO.[384] At the end, the CAFC found that the US statue was compatible with the ADA. For this reason, the Charming Betsy canon became irrelevant and the Court decided the case in the light of the second prong of the Chevron doctrine, and deferred to the Commerce's statutory interpretation.

Contrary to *Timken*, the CAFC in *Allegheny Ludlum Corp. v. US* (concerning subsidies) referred to the Charming Betsy doctrine as a guide.[385] In its view, the DOC's shift in methodology was justified also on the grounds that the US shall honor its international obligations and avoid unnecessary conflicts between domestic and international law.[386] In a contrary case, the former method applied by Commerce would have contravened the international obligations of the country. The CAFC mentioned the AB's report as well, declaring that the prior methodology violated the URAA. However, it stated that the report does not bind the trial court in constructing domestic laws and only supports the trial court's judgment.[387] Consequently, the WTO ruling has been used only as a *factor* in assessing the application of US trade laws in a way that they conflict with the decision of the Appellate Body. The CAFC's judgment can be subject to criticism, since it misunderstood the object of the harmonization. In fact, the domestic statue should not have been brought into conformity with a WTO Agreement (so there was no need to apply the Charming Betsy canon) but with a national law, the URAA.

The judgments of the CIT followed the same path as the judgments of the CAFC. The Court in *Allegheny Ludlum Corp. v. US*, looked at the Appellate Body report having "persuasive weight" (while denying the binding character of these decisions) and used it to harmonize the statue at stake with the SCM Agreement.[388]

Similarly, the Court in *SNR Roulments* made an implicit Charming Betsy determination on the standing, then it went on analyzing the DSB's decision in Hot Rolled Steel concerning the 99.5 per cent arm's length test. Subsequently, it acknowledged that the obligation imposed by Charming Betsy may conflict with the deference that the Court shall grant to the agency's determination.[389] At the end, the CIT held that –although both Charming Betsy and Chevron were applied – the Chevron type deference controlled the situation[390] and upheld the

[383] Timken Co. v. US, Slip Op. 02-106 (CIT, 2002), p. 19
[384] Timken Co. v. US, Slip Op. 02-106 (CIT, 2002), p. 30
[385] Allegheny Ludlum Corp. v. US, 03-1189, -1248 (Fed. Cir., 2004), p. 10, p. 14
[386] Allegheny Ludlum Corp. v. US, 03-1189, -1248 (Fed. Cir., 2004), p. 10
[387] Allegheny Ludlum Corp. v. US, 03-1189, -1248 (Fed. Cir., 2004), p.14
[388] Allegheny Ludlum Corp. v. US, Slip Op. 05-19, (CIT, 2005) pp. 29-30
[389] SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 13
[390] SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 17

Commerce 99.5 per cent arm's length test. It is remarkable that the Court refrained from determining whether there has been an international obligation to respect and defer to the Appellate Body's interpretation of the WTO Agreement.[391] The CIT's use of Charming Betsy is confusing: it seems that courts can use the canon, but special attention should be paid before a court "upsets Commerce's regulatory authority under the Charming Betsy doctrine."[392] In a similar vein, after pointing out the importance of Charming Betsy, the CIT refused to address the question of whether the DSB decisions in general or especially the AB decisions are considered as to be international obligations.

The CIT in *Usinor II* (an appeal regarding to a sunset review determination after the CIT remanded the case to the ITC for further determination in Usinor I) applied the Chevron doctrine and it maintained that the DOC not "invoke […] court decisions that stress the primacy of domestic law where a conflict with international law arises. Rather, it must first expressly identify and analyze such a conflict before relying on those decisions."[393] The Court pointed out that the URAA does not establish the primacy of domestic law over all (!) international agreements, but only in relation with the WTO agreements or decisions. On the other hand, the court recognized that decisions of the Appellate Body have "persuasive […] reasoning"[394] to harmonize the WTO and the URAA anti-dumping requirements. The DSB decisions' "persuasive authority" was highlighted in the *PAM S.p.A. v. DOC* case concerning the issue of zeroing as well. The CIT did not attribute binding precedential value to the AB's report, however it did consider the Body's decision in such a way that it was not necessary to apply the Charming Betsy canon.[395]

The most remarkable case in which the highest level of deference has been given to the administrative agency is the CIT's *Corus Staal* judgment. First, the Court considered the Appellate Body's report given in the Bed Linen case, although the US was not party to it. It held that the zeroing methodologies applied in the case at hand and in Bed Linen are apparently similar, but despite this similarity, the court sustained that the DSB's decision cannot be the basis to reject the DOC's construction of a statue.[396] In the CIT's view, the AB's report cannot compel the US to abandon the administrative agency's approach. The court held that a DSB decision is a "non-binding interpretation of an international agreement,"[397] since – due to the need to construe the provisions of the ADA – the international agreement must be unclear by definition. The court sustained that even if the conflicting domestic statue is ambiguous, deference shall be given to the domestic interpretation of the provisions of the statue, based on the considerations that administrative agencies have well-established expertise, in addition because dumping determinations also have foreign policy

[391] SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), pp. 10-11
[392] SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 17. The CIT also stated that "[t]he Court is wary of overstepping the bounds of its judicial authority under the guise of the Charming Betsy doctrine."
[393] Usinor v. US, (Usinor II), Slip Op. 04-65 (CIT, 2004), p.19
[394] Usinor v. US, (Usinor II), Slip Op. 04-65 (CIT, 2004), p. 20
[395] PAM S.p.A. v. Dep't. of Commerce, Slip Op. 03-48 (CIT, 2003), p. 19
[396] Corus Staal v. US, Slip Op. 03-25 (CIT, 2003), p. 44
[397] Corus Staal v. US, Slip Op. 03-25 (CIT, 2003), p.45. See also Timken v. US, Slip Op. 02-106 (CIT, 2002), p. 32

repercussions.[398] Finally, the CIT came to the conclusion that the zeroing method as applied by the Department of Commerce is not prohibited by the Anti-dumping Agreement.

Clearly, the CIT and the CAFC had not recognized the binding character of the decisions of the DSB, however both of them have implicitly considered those rulings in determinations of law. On the other hand, the courts had avoided referring to the Supremacy clause laid down in the URAA, mandatory for the US courts. They addressed the importance of WTO decisions[399] as relevant in interpreting US laws but the final decisions of the CIT/CAFC rest upon the court's analysis of the lawfulness of the agency's action under the domestic law.

The CIT's and the Federal Circuit's approach has radically changed from 2005 onwards. The Court in *Corus Staal*, similar to the Timken court's assertions, the CAFC refused to consider the DSB decisions as binding for the US courts and added that "if U.S. statutory provisions are inconsistent with the GATT or an enabling agreement, it is strictly a matter for Congress."[400] However, the main difference is that while the court in *Timken* theoretically recognized the persuasive value of WTO decisions (even though at the end it deferred to the administrative agency's decision), the Federal Circuit in *Corus Staal* not only did not defer to the DSB's decisions but it "refuse[d] to overturn [the domestic statutory interpretation] based on any ruling by the WTO or other international body,"[401] unless the Congress adopted the ruling according to the URAA. In sum, the court accorded no deference to the DSB ruling. In addition, it also considered the separation of powers between the executive and the judicial branch. The CAFC, in its reasoning held that it did not intend to "perform duties that fall within the exclusive province of political branches"[402] and gave "commerce substantial deference in its administration of the statue because of foreign policy implications of a dumping determination."[403] As a consequence, the Court abruptly refused to overturn the DOC's zeroing practice based on the DSB decision.

The Court continued with its new line of jurisprudence[404] in the *Koyo Seiko Ltd. v. United States*, where the CIT rejected the plaintiff's request to amend its complaint in order to reflect the following WTO decision: "given it is not controlling precedent and is immaterial to the court's examination of the administrative decisions"[405] issued by the DOC. On the other hand, the Court did not completely reject the idea of considering WTO decisions. In a contrary vein,

[398] Corus Staal v. US, Slip Op. 03-65 (CIT, 2003), p. 45
[399] Other CIT decisions that had addressed the relevance of WTO rulings to US courts in the judicial review are: Accai Speciali Terui S.P.S. v. US 350 F. Supp. 2d 1254, 1264 n.11 (CIT, 2004); Usinor, Beautor, Haironville, Sollac Atlantique, Sollacr Lorraine v. USA, 342 F. Supp. 2 d 1267, 1279 & n. 13 (CIT 2004)
[400] Corus Staal v. Dep't. of Commerce (Fed.Cir., 2005), 395 F.3d at 12
[401] Corus Staal v. Dep't. of Commerce (Fed.Cir., 2005), 395 F.3d at 14
[402] Corus Staal v. Dep't. of Commerce (Fed.Cir., 2005), 395 F.3d at 14
[403] Corus Staal v. Dep't. of Commerce (Fed.Cir., 2005), 395 F.3d at 14
[404] Another case is that accorder no deference to a World Customs Organization opinion on a matter related to customs classification is the *Cummins Engine v. United States*.
[405] Koyo Seiko Co. v. United States, Slip Op. 06-121 (CIT, 2006), p. 5

it referred to the long-established principle that "WTO adjudicatory decisions may be persuasive" [406] in constructing US trade laws.

The reasoning of the Court makes emerge a logical problem: if the interpretation of a domestic agency is permissible, so that the CIT/CAFC shall defer to the agency's decision, how could DSB decisions come into play as relevant factors in the judicial review of the DOC's or ITC's decisions? There is no legal obligation to take into account or follow these rulings, since they are not considered as international obligations, consequently the Charming Betsy standard cannot apply. An additional problem with these decisions is that they did not address the problem faced in *SNR Roulments*, namely "whether a WTO dispute settlement decision interpreting a WTO agreement may constitute an international obligation under the circumstances in applying the Charming Betsy doctrine."[407]

The question was dealt with by the CIT in *Tembec v. United States*, where the Court highlighted that the WTO Member States are not required to automatically comply with the recommendations of a WTO panel or the Appellate Body and they are free to disregard these decisions. Afterwards, it stressed the different possibilities to reply for an adverse panel or AB report: (1) to bring in line the domestic practice with the DSB's recommendations; (2) not to respect the ruling and compensate the winning WTO Member State for the loss; (3) not to choose to conform to the ruling and suffer the consequences of retaliation.[408] In *Andaman Seafood*,[409] the CIT referred to Tembec and stressed that Section 129 of the URAA was designed "to allow the United States to take full advantage of its remedial options before the WTO" and preserve the independence of the US law until the Executive decides what option is going to follow.

The stance of the Courts is not surprising in the light of the statutory rules that deny the primacy of WTO and in the light the US Courts' case law that refuse to regard DSB reports as binding on the judiciary. The CIT and the CAFC have consistently rejected to defer to WTO rulings and it considered them as non-binding interpretations of international agreements, with limited precedential value. It can be said that US Courts did not accept to follow WTO decisions based on various considerations: (1) either because small differences existed between the WTO recommendation and the case at hand; (2) or because the USA was not party to the dispute in front of the DSB; (3) or the DSB reports were considered as nonbinding because the finding therein was not adopted as per Congress's statutory scheme.[410] At last, as it has been mentioned, Courts have never clarified whether a decision of the Dispute Settlement Body constitutes an international obligation of the USA. Nonetheless, of the confusing approach of the CIT and the CAFC, DSB decisions are considered as a factor in the domestic review of the administrative agencies' decisions. They are rather regarded as

[406] Koyo Seiko Co. v. United States, Slip Op. 06-121 (CIT, 2006), p. 5
[407] SNR Roulments v. US, Slip Op. 04-100 (CIT, 2004), p. 18, footnote 6
[408] Tembec v. US, Slip Op. 06-109 (CIT,2006) p. 41
[409] Andaman Seafood v. US, Slip Op. 10-12 (CIT, 2010), p. 21
[410] Corus Staal v. Dep't. of Commerce 395 F.3d 1343 (CAFC, 2005), at 13

"evidence of international understandings of treaty obligations."[411] The judicial branch cannot act otherwise, since it is "strictly a matter for Congress" to bring in consistency domestic rules with the ADA. Clearly, there is tension between the executive and legislative branches and the international understanding of the obligations of the USA under the Anti-dumping Agreement.[412]

This approach, however, helps to preserve the sovereignty of the country during the implementation of the DSB rulings. *The implementation of the decisions* of the panels or the Appellate Body is complex and it is regulated by Section 123 of the URAA. There are distinctions for federal statutory law, federal administrative regulations and rulings and state law. If a federal statue is found to be in violation of WTO law, it is only the Congress that can change the statue and the normal legislative process applies. In the second case, so when the agency practice or regulation is found to violate the WTO Agreements, the practice may not be modified until the Congressional committees are consulted, private sector advice is sought, the agency follows certain procedural requirements and the USTR has submitted reports on any proposed modifications to the relevant Congressional committees. Moreover, both the USTR and the agency must consult with those committees concerning any proposed definitive rule. In the upcoming 60 days, two different committees may approve or disapprove the proposed change, although this will not bind the agency.[413] These proceedings, however, are not applicable in relation to the International Trade Commission (ITC). If the DSB recommendation holds that the ITC violates the ADA, SCM and the Agreement of Safeguards, the USTR may request an advisory report from the ITC on whether the ITC would be permitted under the laws of the United States to bring its action into conformity with the panel's or the Appellate Body's ruling. Then the USTR has to notify the Congressional committees if it makes such a request, and consult with then if the ITC determines that it retain possible to conform to the decision. In that case, the USTR is authorized to request the ITC to make a determination that would bring its action into compliance with the DSB decision, and the ITC is required to do so. In a similar vein, these provisions apply to the determinations of the DOC regarding anti-dumping and countervailing duties.[414] Obviously, dispute settlement rulings are not self-executing until they have been implemented under the URAA Section 123 or 129,[415] consequently they cannot be used in judicial actions.

The clear intent of the Congress with the latter implementing procedure was "to allow the United States to take full advantage of its remedial options before the WTO"[416] and to

[411] NICHOLS, Dan; *Use of WTO Panel Decisions in Judicial Review of Administrative Action Under U.S. Anti-dumping Law*, Int'l. Law and Management Review, Vol.1. (Spring, 2005), p. 274
[412] NICHOLS, Dan; *Use of WTO Panel Decisions in Judicial Review of Administrative Action Under U.S. Anti-dumping Law*, Int'l. Law and Management Review, Vol.1. (Spring, 2005), p. 248
[413] URAA, Sec. 123 (f)
[414] URAA, Sec. 129 (a)
[415] REED, Patrick C., *Relationship of WTO Obligations to U.S. International Trade Law: Internationalist Vision Meets Domestic Reality*, Geo. J. of Int'l. Law, Vol.38., No.1 (Fall, 2006), p. 234
[416] Andaman Seafood Co, Ltd. v. United States, Slip Op. 10-12 (CIT, 2010), p. 21 citing Tembec, 30 CIT at 985, 441 F. Supp. 2d at 1328

"preserve the independence of the US law form adverse decisions of the DSB"[417] until the political branches decide whether it is appropriate to change laws and/or policy or methodology. It is clear, that the CIT and CACF refused to overturn several decisions of the Commerce (in particular as far as the zeroing methodology is concerned), unless the Executive changes its position and decides to conform with the DSB recommendation.[418]

VI.2.5. Agency discretion and deference to agencies

Similarly to the European Union, administrative agencies in the USA dispose of wide discretionary powers in relation to foreign commercial policies. The reasons are approximately the same, like in the old continent, so that they are based on *political considerations* and on the agency expertise.

As far as the first argument is concerned, it is a well-established principle that the judicial branch is not suited to act in the field of foreign affairs, compared to the executive branch. Generally, the judiciary grants the executive branch a great level of deference in the area of foreign affairs.[419] The CAFC *Federal Mogul* case declared the maxim pursuant to "[t]rade policy is an increasingly important aspect of foreign policy, and area in which the executive branch is traditionally accord considerable deference."[420] This is due to various considerations, such as (1) the executive is the sole voice of the United States at international level; (2) foreign affair questions tend to be policy-driven; and (3) the executive expertise better suits to foreign affairs issues.[421] Accordingly, foreign trade affairs (and in particular anti-dumping) are politically sensitive and policy-intense areas of decision-making. Obviously, when *policy* questions come under the *legal* prism of the judicial branch, the US courts must consider the reasons of the actions of the Executive and – since it is the branch responsible for the conduct of foreign relations – the courts shall avoid to contradicting to the executive. Agencies are more politically accountable than courts and a robust deference doctrine helps to avoid the imposition of political preferences of the judicial branch on the public to which they are not responsible.[422]

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[417] Andaman Seafood Co, Ltd. v. United States, Slip Op. 10-12 (CIT, 2010), p. 21

[418] BRIGHTBILL, Timothy C., KWON Jennifer, FOGARTY Matthew W.*; 19 U.S.C. 1581 (c) – Judicial Review of Anti-dumping and Countervailing Duty Determinations Issued by the department of Commerce*; Geo. J. Int'l. L., Vol.39 (2007), p. 55

[419] United States v. Curtiss-Wright Export Corp., 299 U.S. 304,320 (1936)

[420] Federal Mogul Corp. v. United States, 63 F.3d (Fed.Cir. 1995), p. 9, see also Tembec v. US, Slip Op. 06-109 (CIT, 2006) p. 37

[421] NICHOLS, Dan; *Use of WTO Panel Decisions in Judicial Review of Administrative Action Under U.S. Anti-dumping Law*, Int'l. Law and Management Review, Vol.1. (Spring, 2005), p. 252. Nonetheless, the executive branch is not alone in forming foreign policies, since both the Senate and the Congress have powers in relation to regulate international trade.

[422] This is also an implicit recognition of the agencies' institutional superiority. In ROSSI, Jim, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron*, William and Mary L. Rev., Vol. 42., No.4. (2001), p. 1115, referring to Justice Steven's opinion delivered in Chevron.

In relation to the justiciability of foreign policy issues, it is crucial to make distinction between non-justiciable political questions and those that are justiciable but the courts defer to the Executive.[423] As regards the above argument, it shall be stressed that the case of highly regulated and rule-based fields, such as anti-dumping, the courts judicial review (although limited) is still effective.

A further reason that calls for deference to the Executive is the *special knowledge or familiarity* of this branch.[424] In the field of foreign trade, it disposes of more information and expertise than the judicial branch: e.g. the ITC has a significantly better experience than a federal judge. The CIT in *PAM* affirmed: "[d]eference is based upon a recognition that Commerce has special expertise in administering the anti-dumping law."[425] Moreover, the enforcement of anti-dumping laws is a "difficult and supremely delicate endeavor"[426] that entitles Commerce with discretionary powers. In particular, in anti-dumping investigations, fact gathering can be extremely difficult, because only a certain amount of information can be obtained from domestic sources. Therefore, the federal judge may decline to impose his judgment in the light of the top-level expertise of the ITC or the DOC. Not by chance, the Federal Circuit in the remarkable *Torrington* not just simply deferred to Commerce's construction of the antidumping laws, but it also recognized the superior expertise of the DOC stating that the Court "accord[s] substantial deference to Commerce's statutory interpretation, as the International Trade Administration is the "master" of the antidumping laws."[427] In a very recent anti-dumping case, in *Changzhou Wujin*, the CIT pinpointed the superior expertise of the DOC compared to that of the CIT[428] that entitles the Commerce with a great level of deference.

The deference that the US courts manifest towards the determinations of the executive branch (in particular towards the determinations of the Commerce and the ITC in anti-dumping cases) works through the application of various doctrines, already detailed above (see Chevron, Charming Betsy and Chenery standards under VI.2.3.).

For the sake of clarity, the most important doctrine, the *Chevron* maxim has to be recalled. The maxim controls the agency interpretation of a statue and it is a very pro-agency approach compared to other standards of judicial review. As it has been said, if the statue is clear, the agency has to follow the Congress' intent. In a contrary case, if the statue is ambiguous or the Congress has not directly addressed the question, the agency's permissible construction of a

[423] For instance, the political issue whether subsequent to change in conditions a country continues to remain a party to a treaty can be subject to judicial review.
[424] See e.g. Corus Staal v. US, Slip Op. 03-25 (CIT, 20039, p. 45
[425] PAM S.p.A. c. USA, Slip op. 05-125 (CIT, 2005) p. 8, citing *Ta Chen Stainless Steel Pipe, Inc. v. United States*, 298 F.3d 1330, 1335 (Fed. Cir. 2002)
[426] Smith-Corona Group v. US, 713 F.2d 1568 (Fed.Cir., 1983) at 4
[427] Torrington, p. 16 citing also Daewoo Elecs. Co. v. International Union, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994); Koyo Seiko Co. v. United States, No. 94-1363 (Fed. Cir. Sept. 20, 1995), slip op. 10-13; Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033, 1039, 3 Fed. Cir. (T) 83, 90 (1985), Micron Technology v. US, 243 F.3d 1301 (Fed. Cir. 2001) at 39
[428] Changzhou Wujin Fine Chemical Factory Co. Ltd. v. US, Slip Op. 10-85 (CIT, 2010), p. 4

statue is upheld. In the judicial review of anti-dumping orders, this question has particular importance since the US anti-dumping statue does not specify the methodology to use in order to calculate anti-dumping duties. The question then becomes whether the DOC's interpretation is *permissible* or not: under the second step of the *Chevron* analysis, *"[a]ny reasonable construction of the statute is a permissible construction."*[429] In the *Timken* court's reading, it means that the Commerce's construction "need not be the only reasonable interpretation or even the most reasonable interpretation. Rather, a court must defer to an agency's reasonable interpretation of a statute even if the court might have preferred another."[430] So that if the administrative agency's construction is reasonable, the Court considers it as a permissible interpretation under the second prong of the Chevron test, and consequently defers to the DOC's or ITC's determination.

This approach is reflected in the CIT's and CAFC's case-law when they upheld the determinations of the DOC and ITC based on the consideration that their exercise of discretionary powers is "proper and reasonable." For instance, the Federal Circuit sustained that the exporter's sales price offset is a "proper and reasonable exercise of the Secretary's [Commerce] authority to administer the statue fairly."[431]

Although the court might conclude that the DOC's interpretation was questionable, the court may defer to the executive's determination based on the implied authority over foreign affairs legislation.[432] This supplementary category of deference has been recognized by the Supreme Court in *US v. Mead Corp.* in the following way: "[…] the Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statue or fills a space in the enacted law, even one about which "Congress did not actually have an intent" as to a particular result. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, but is obliged to accept the agency's position […]."[433]

The judicial review of reasonableness and permissibility of the **administrative agencies' determination** is in close relation with the **deference** granted to these bodies. As it has been said, the rationale is the high level expertise of this specialized agencies[434] and the fact that anti-dumping duties are trade-policy sensitive and it is not up to the judicial branch to review

[429] Torrington v. United States, 82 F.3d 1039, 1044 (Fed.Cir.1995).
[430] Timken, para. 18, Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed.Cir.1994) (citing Zenith Radio Corp. v. United States, 437 U.S. 443, 450, 98 S.Ct. 2441, 57 L.Ed.2d 337 (1978)). I
[431] Torrington Co. v. United States, 95 1134 (Fed.Cir. 1995), B, p. 9 citing Smith-Corona v. US 713 F.2d at 1597, 1 Fed.Cir. (T) at 141
[432] The implied powers of the executive branch in foreign affairs are possible since the Congress grants the Executive to implement international trade laws, consequently any administrative provision in relation to it might be shielded by foreign affairs deference.
[433] US v. Mead Corp., 533 US (Supreme Court, 2001), p. 9
[434] The CAFC in *Corus Staal* (395 F.3d 1343 (Fed. Cir. 2005), p. 3) stated as follows: "Commerce's expertise in the field of antidumping investigations, we accord deference to its statutory interpretation in the presence of ambiguity." quoting Pesquera Mares Australes Ltda. v. United States, 266 F.3d 1372, 1382 (Fed.Cir.2001)

political questions. Therefore, the US courts shall accord "substantial weight to an agency's interpretation of a statute it administers."[435] The Federal Circuit in the leading case *Timken* clearly declared that it accorded "*particular* deference" to Commerce in antidumping determinations."[436] In another decision, in *Torrington*, the CAFC stated that it gives "*considerable* deference" to Commerce's construction of the antidumping laws.[437] It also added that it "accord[s] *substantial* deference to Commerce's statutory interpretation, as the International Trade Administration is the "master" of the antidumping laws."[438] In a similar vein, the CIT in *Hyundai Electrics* affirmed that "Commerce's determinations are entitled to deference in the complex area of antidumping calculations." Such deference is appropriate only "so long as there is substantial evidence to be found in the record as a whole." [439] In another instant, in *Changzhou Wujin Fine Chemical Factory Co.*, the CIT granted "*tremendous* deference" to Commerce's final antidumping determinations due to the technical and complex economic and accounting nature of the anti-dumping decisions.[440]

At last, it shall be stressed that in the light of the extreme deference that the CAFC accords to DOC's dumping determinations, it is unlikely that an ambiguity and a potential conflict with a WTO Agreement will be found that can trigger the application of the Charming Betsy canon.[441] Not accidentally, the CIT in *Usinor* clarified that "[d]eference to an agency's statutory interpretation is at its peak in the case of a court's review of Commerce's interpretation of the antidumping laws."[442] Being an independent agency, all the more so, high level of deference is given to the ITC's injury determination as well.

The *CIT*, in principle shall entitle the Commerce's and ITC's decisions with Chevron deference, factual assessments and statutory interpretations. Once again, it implies that the Court upholds the administrative agency's construction if it rests upon a permissible interpretation of the statue, even though it would have preferred another interpretation. In addition, it also checks some control criteria, such as the satisfaction of the "substantial

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[435] Serampore Industries v. US, 675 F. Supp. 1357 (CIT, 1987) p. 2

[436] Timken Co. v. United States, 37 F.3d 1470, 1474 (Fed. Cir. 1994), para 16, also cites *See Smith-Corona Group v. United States*, 713 F.2d 1568, 1571 (Fed.Cir.1983) "The Secretary has broad discretion in executing the [anti-dumping] law."

[437] Torrington, B, p. 21, citing Daewoo Elecs. Co., 6 F.3d at 1516

[438] Torrington, p. 16 citing also Daewoo Elecs. Co. v. International Union, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994); Koyo Seiko Co. v. United States, No. 94-1363 (Fed. Cir. Sept. 20, 1995), slip op. 10-13; Consumer Prods. Div., SCM Corp. v. Silver Reed Am., Inc., 753 F.2d 1033, 1039, 3 Fed. Cir. (T) 83, 90 (1985)

[439] Hyundai Electronics Industries Co. v. US, Slip Op. 06-9 (CIT, 2006), p. 20. Quoting also NLRB v. Brown, 380 U.S. 278, 292 (1965); see also Anderson v. Dep't of Transp., FAA, 827 F.2d 1564, 1577 (Fed. Cir. 1987)

[440] Changzhou Wujin Fine Chemical Factory Co. Ltd. v. US, Slip Op. 10-85 (CIT, 2010), p. 4. The Court referred to the *Fujitsu* case.

[441] DAVENPORT, Filicia; *The Uruguay Round Agreements Act Supremacy Clause: Congressional Preclusion of the Charming Betsy Standard with respect to WTO Agreements*, Fed.Cir. B.J., Vol.15, No. 279 (2005-2006), p. 297

[442] Usinor v. US, Slip Op. 04-65 (CIT, 2004) p.8 quoting also Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994); Daewoo Elecs. Co. v. United States, 6 F.3d 1511, 1516 (Fed. Cir. 1993), cert. denied, 114 S. Ct. 2672 (1994)

evidence" and the "arbitrary and capricious" standards and whether the administrative agencies' determinations are in accordance with the law (see under VI.2.6.). The CIT, therefore, acts as an appellate tribunal in anti-dumping cases, rather than a fact-finding tribunal.[443]

Another issue is the question of **deference in relation to the Court of International Trade and the Federal Circuit** in the deferential chain. The *Federal Circuit*'s deferential relations shall be viewed referring to the CIT on the one hand and to the administrative agencies' decision on the other. As far as the lower court is concerned, the CACF is not required to give deference to the CIT's decisions. The Federal Circuit in *Allegheny Ludlum* confirmed not to defer to the Court of International Trade in its reviews of statutory construction.[444] A year later, the CAFC in *Corus Staal* harshly reaffirmed that it "review[s] the grant of judgment on the agency record by the Court of International Trade without deference."[445] Clearly, the CAFC applies "anew the standard of review applied by the Court of International Trade in its review of the administrative record" in its review of anti-dumping determinations made by Commerce.[446]

VI.2.6. The control criteria in judicial review of anti-dumping decisions

Judicial review of agency actions is possible under the APA:[447] it provides that agency actions are reviewable, either by statue or because there is no other adequate remedy against the decision. Both the CIT and the CAFC apply US law and review the agency's determination to see if it is "unsupported by substantial evidence on the record, or otherwise not in accordance with the law."[448]

On the one hand, the Court of International Trade's and the Federal Circuit's role is marked out by the *Chevron* doctrine that refers to ***legal questions***. At first, the Courts shall establish whether the statue is clear. If so, they follow the intent of the legislative branch, and this is the end of the matter. If, however, the statue is ambiguous, because the Congress has not directly spoken about a precise question, the Courts shall establish whether the agency's interpretation is a *permissible construction of the statue*. The CIT and the CAFC shall defer to the agency's decision, subject to the respect of certain control criteria, and should not substitute their own construction for a *reasonable interpretation* made by the agency. Consequently, only a sufficiently reasonable interpretation deserves judicial deference. On the other hand, the substantial evidence standard concerns ***factual matters***. Pursuant to this standard, the Court

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[443] PALMETER, *Regulation of imports in the United States: from Trade Policy to Trade Law*, International Trade Law and Practice (1987), p. 541

[444] Allegheny Ludlum v. US (countervailing duty case), 03-1189, -1248 (Fed. Cir., 2004) p. 7 quoting Staarstahl, A.G. v. United States, 78 F.3d 1539, 1542 (Fed. Cir. 1996)

[445] Corus Staal v. US, 395 F.3d 1343 (Fed. Cir., 2005) p. 3, at 5

[446] Micron Tech. v. US, 243 F.3d 1301, 1307-08 (Fed.Cir.2001) at 38

[447] APA, § 704

[448] 19 U.S.C, § 1516 a(b)(1)(B)(i) see also e.g. Micron Tech.v. US, 243 F.3d 1301, 1307-08 (Fed.Cir.2001) at 38, 39

upholds the administrative agency's determination if it is supported by substantial evidence and it is in accordance with the statutory provisions.

There are two fundamental tests (or control criteria) that frame the CIT's and the CAFC's standard of review of anti-dumping decisions:[449]

(1) "*arbitrary and capricious standard*" that applies only to informal rulemaking and adjudication, hence it is linked to the anti-dumping proceedings depending on phase of the investigation the decision was taken. In principle, the agencies' preliminary determinations fall under this category; and the
(2) "*substantial evidence*" in a narrow sense, referring to the need that the agency construction needs to be satisfactorily upheld by evidence.

Moreover, it is also examined whether the Commission's and the Commerce's construction is *in accordance with laws* (according to the second step of Chevron[450]) and whether the administrative agency has complied with the *procedural requirements*.

All of these criteria aim at ascertaining whether the agency has exercised its expertise in a thoughtful and disciplined manner.[451] Were the above conditions unsatisfied, the agency action, conclusion or decision shall be remanded to the agency for further revision.

The first control criterion of the agency's determination is the ***substantial evidence standard*** and it is systematically applied in anti-dumping cases. It is a typically deferential administrative standard [452] and although by definition used in relation to final determinations, it has relevance at any stage of the original anti-dumping procedure and in sunset reviews. In fact, the Chevron doctrine and this standard are in the focus of the judicial review of anti-dumping decisions.

The substantial evidence standard refers to factual questions and comprises the duty of the agencies to provide for such *relevant evidence* as a *reasonable mind* might accept as *adequate* to support their conclusions.[453] It is more than a mere scintilla – essentially, it is a *reasonableness analysis*: the court shall examine the record that the agency had before it and consider all the evidence for and against a certain position, and then determine whether the factual conclusions or decisions of the agency are supported by substantial evidence. The test is also linked to the second prong of the Chevron doctrine, since agency discretion (supported by satisfactory evidence) comes into play only at this stage.

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[449] CASSON, Andrea C.; *Judicial Review of the International Trade Commission's Injury determinations in Anti-dumping and Countervailing Duty proceedings: an Overview and Analysis of Federal Court Decisions in 2005*; Geo. J. Int'l. L., Vol. 38, No. 89 *89 (Fall, 2006), p. 2
[450] Changzhou Wujin Fine Chemical Factory Co. Ltd. v. US, Slip Op. 10-85 (CIT, 2010), p. 5
[451] MURPHY, Richard W; *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretative Freedom*; Admin. Law Rev, Vol. 56, No. 1 (2004), p. 20
[452] Universal Camera Corp. V. NLRB, 340 US 474, 478 (1951)
[453] PAM S.p.A. v. US, Slip Op.03-48 (CIT, 2003) p. 6

The reasonableness test establishes three criteria to be considered:

(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(2) unsupported by substantial evidence (This is the substantial evidence standard in a narrow sense. It refers to a case where there has been a formal agency hearing, so that e.g. in *final* anti-dumping determinations[454]);
(3) unwarranted by the facts to the extent that the facts are subject to *de novo* judicial review, calling for an independent judgment.[455]

The CIT in *Changzhou Wujin* was very clear in explaining what its understanding is of the substantial evidence criterion in a narrow sense. It held that the standard requires Commerce to "*thoroughly examine the record and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."* [456] For this reason, it can be deduced that the proof presented by the plaintiff shall be enough to convince the Court that a reasonable mind would not have found the Commerce's or the ITC's evidence sufficient to support a conclusion. In turn, the *quality of the proof* shall be sufficient to fairly detract the conclusions from the substantiality of the evidence. As the CIT stated in *Hyundai Electronics*, "the court sustains Commerce's factual determinations so long as they are reasonable and supported by the record as a whole, even if there is some evidence that detracts from the agency's conclusions."[457] In another instant, in *Nippon Steel Corp.*, the Federal Circuit plainly stated that the courts owe considerable deference to the agencies' analysis of the evidentiary record.[458]

Whether the Commerce or the ITC satisfied the substantial evidence standard depends upon the characteristics of a single case, it is decided on a case-by-case basis. The US courts review the the administrative agencies' evidentiary record and decide whether the factual base is enough to substantially sustain the agencies' conclusions. In the above mentioned judgment, *Hyundai Electronics*, the plaintiff contested the DOC's decision not to revoke the anti-dumping duty subsequent to the administrative review. In relation to this, the CIT held that Commerce has discretion to decide which data it uses to make a decision on the likelihood of occurrence of dumping.[459] The Court agreed with the plaintiff that standing alone, below-cost sales over a limited period alone are not indicative of future dumping, however it held that DOC is entitled to use such data as one factor among several to make its likelihood-

[454] AKAKWAM, Philip A.; *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, Minn. J. Global Trade, Vol.5. (1996), p. 292. In addition, final determinations are also examined whether they are consistent with US laws and statues.
[455] VERMULST, Edwin A.L.M.*; Judicial review in Trade Policy Matters in the United States and the European Community: the Legalization of International Trade Law*, in SEW Tijdschrift voor Europees en Economisch Recht (1985), 33/05, p. 355
[456] Changzhou Wujin Fine Chemical Factory Co. Ltd. v. US, Slip Op. 10-85 (CIT, 2010), p. 4 -5
[457] Hyundai Electronics Co. v. US, Slip Op. 99-44 (CIT, 1999) p. 10
[458] Nippon Steel Corp. v. USA, 458 F. 3d 1345 (Fed.Cir., 2006) at 35
[459] Hyundai Electronics Co. v. US, Slip Op. 99-44 (CIT, 1999) p. 36

determination. The CIT also highlighted that there is no need to reach a sole conclusion from the evidentiary record that can be qualified as substantial.[460]

As long as there is substantial evidence to be found in the record as a whole, the Courts give deference to the DOC or ITC. For this reason, the CIT/CAFC scrupulously verify the entire record and remand a decision which is not supported by substantial evidence.[461] In striking down the administrative agencies' action or decision, the Court cannot rewrite the Commerce's or ITC's determinations. It can merely ask the agency to review the determination it has made.[462]

In *Nippon Steel*, the CIT reviewed the proof gathered by the ITC in order to establish whether the plaintiffs sold their goods and what market share they had in the USA during the examined period. In reviewing the injury assessment, the court sustained not to be entitled to evaluate the "substantiality of evidence supporting an ITC determination '[…] without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.' […] Rather, to determine the substantiality of the evidence, the court must also take into account "whatever in the record fairly detracts from its weight." [463] The evidentiary record of the ITC and DOC in an anti-dumping case (i.e. during the *original investigations*) shall establish the occurrence of three factors: (a) dumping (so that the normal value and export price through various methodologies and a wide range of economic factors, such as market share, volume and price effect of imports, existence of affiliated parties of the exporter, capacity utilization, calculation of transport cost fungibility of the imports, conditions of competition between exporters and domestic companies, conditions of the domestic industry etc.); (b) the injury suffered by the domestic industry, and (c) the causal link between the two. In a different vein, in *sunset reviews*, it is not possible to rely on concrete evidence that can establish the occurrence of certain future events upon revocation of an anti-dumping order. Rather, it is feasible to assess the likely effect of revocation of the antidumping order on the behavior of the importers, based on the available evidence and on

[460] "[T]he possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." Hyundai Electronics Co. v. US, Slip Op. 99-44 (CIT, 1999) p. 42 referring to Consolo v. Federal Maritime Comm'n, 383 U.S. 607, 620 (1966); see also Matsushita, 3 Fed. Cir. (T) at 54, 750 F.2d at 936

[461] Hyundai Electronics Co. v. US, Slip Op. 06-9 (CIT, 2006) p. 39-40. It is interesting to note, that the outcomes of anti-dumping investigations are not determined in a political vacuum. Both economics and politics play an important part in the DOC's and especially in the ITC's decision-making. In particular, the injury determination is more likely e.g. if a country has a larger market share in the USA or towards those countries that have high trade surplus with the USA or they have a bad reputation (i.e. frequently engaged in violations of international rules on fair trade). For more, see HANSEN, Wendy l.; PRUSA Thomas J; *The Economics and Politics of Trade Policy: An Empirical Analysis of ITC Decision Making*; Rev. Int'l. Ec., Vol.5., No.2. (1997); KENNEDY, Kevin C.; *Judicial Review of Commerce Department Antidumping Duty determinations: Deference or Abdication?,* N.C.J. int'l. & Cm. Reg., Vol. 11, no. 19 (1986)

[462] This gives the possibility of the agency to eventually overrule the CIT's decision.

[463] Nippon Steel v. US, Slip Op. 03-168 (CIT, 2003), p. 16 quoting Suramerica de Aleaciones Laminadas, C.A. v. United States, 44 F.3d 978, 985 (Fed. Cir. 1994); Universal Camera Corp. v. NLRB, 340 U.S. 474, 487 (1951) Universal Camera, 340 U.S. at 488; Suramerica, 44 F.3d at 985 (citing Atl. Sugar, Ltd. v. United States, 744 F.2d 1556, 1562 (Fed. Cir. 1984))

logical assumptions and extrapolations flowing from that proof.[464] In fact, the CIT in *Usinor* stressed the nature of sunset reviews: they are factual, case-by-case determinations and need only be supported by substantial evidence.[465] As far as the establishment of the likelihood of the material injury in sunset reviews is concerned, the CIT clarified the difference between adverse impact and material injury: it held that the former may be discernible but may not cause material injury, since by definition, the latter has a stronger effect on the domestic producers.[466] The low "discernible threshold" implies that the ITC is not required to conduct a complete likely material injury analysis but rather "to identify those subject countries that are unlikely to present any identifiable harm to the domestic industry such that they should be removed from the possibility of being cumulated with other subject countries."[467]

Accordingly, the evaluation of the evidence is in the agencies' task: it is within their discretion and "good conscience"[468] to make reasonable appraisal of the evidentiary record and to determine the overall significance of any particular factor or piece of evidence.[469] This discretion is properly exercised if it is based on substantial evidence from that the agency, after weighing the proof,[470] made its conclusions that underlie the anti-dumping order. On the other hand, the evidence is not reconsidered during the judicial review.[471] Moreover, the courts cannot substitute the agency's judgments with their preferred construction.

The courts are not entitled to re-establish the facts in reviewing anti-dumping decisions. In *Nippon Steel Corp.* the Federal Circuit declared that the CIT went beyond its role and powers to review agency decisions by "refinding the facts […], or interposing its own determinations on causation and material injury itself."[472]

The last element of the substantial evidence standard relates to the *de novo* judicial review. This type of review calls for an independent judgment, and in anti-dumping cases it is applied only to disputes on confidential information submitted to the agencies.[473]

The other test that US courts apply is the ***arbitrary, capricious standard.*** It stems from the APA (§ 706 (2) (a) of the APA) and is linked both to the abuse of discretion and to the

[464] Nippon Steel v. US, Slip Op. 03-168 (CIT, 2003), p.24
[465] Matsushita Elec. Indus. Co. v. United States, 750 F.2d 927 (Fed. Cir. 1984) at 36, 42; Usinor v. US, Slip Op. 04-65 (CIT, 2004) p. 30
[466] Usinor v. US, Slip Op. 04-65 (CIT, 2004) p. 24
[467] Usinor v. US, Slip Op. 04-65 (CIT, 2004) p. 24-25
[468] Grupo Industrial Camesa v. US, 85 F.3d 1577 (Fed.Cir.,1996) at 12
[469] Usinor v. US, Slip Op. 04-65 (CIT, 2004) p. 37
[470] Even when "when adequate evidence exists on both sides of an issue, assigning evidentiary weight falls exclusively within the authority of the [… agencies]." Nippon Steel Corp. v. USA, 458 F. 3d 1345 (Fed.Cir., 2006) at 48
[471] Hyundai Electronics Co. v. US, Slip Op. 06-9 (CIT, 2006) p. 39 quoting Matsushita Elec. Indus. v. United States, 3 Fed. Cir. (T) 44, 54, 750 F.2d 927, 936 (1984); Nippon Steel v. US, Slip Op. 03-168 (CIT,2003) p. 6
[472] Nippon Steel Corp. V ITC, 345 F.3d 1379 (Fed. Cir., 2003) at 5
[473] AKAKWAM, Philip A.; *The Standard of Review in the 1994 Antidumping Code: Circumscribing the Role of GATT Panels in Reviewing National Antidumping Determinations*, Minn. J. Global Trade, Vol.5. (1996), p. 292

criterion that the agencies' determinations shall be in accordance with law.[474] Pursuant to the criterion, the reviewing court considers whether the agency's decision was based on a consideration of the *relevant factors* and whether there has been a c*lear error of judgment.* The courts in a "hard look review" (that is more characteristic in applying the Skidmore standard rather than the lenient Chevron) would consider an agency decision as arbitrary or capricious "if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a different in view or the product of agency expertise."[475]

In applying the standard, the Courts should look at the reliability associated with the agency action and to the legitimacy of the ITC's or DOC's claim to primacy in interpreting the ambiguous statutory provision.[476] For this purpose, the CAFC in *Koyo Seiko* declared that one of the purposes of the anti-dumping statue is to guarantee that the administering authority makes the fair value comparison, a fair and equitable comparison between foreign and domestic market prices or values on a fair basis. "To this end, as long as Commerce's application of the […statutory] provisions […] are not arbitrary or illogical, [the Court] must uphold its construction even if the approach supported by the Court of International Trade is even more fair or logical."[477]

The agencies' statutory construction shall be ***in accordance with laws*** as well. This is a *question of law*, therefore theoretically, courts are not bound by the agency interpretation, but in practice they defer to it.[478] The standard fundamentally relates at first to the reasonable and/or permissible interpretation of a statue, secondly to the methodology applied by the agencies. Accordingly, it is directly connected to the second step of Chevron.

The *reasonable and/or permissible statutory construction* is present in every CIT or CACF decision. If a statue is ambiguous, according to the second step of Chevron, the courts have the duty to evaluate whether the agencies' interpretation is based on a permissible statutory construction. To come to this conclusion, the agency's interpretation shall be a *reasonable interpretation* of the statue.[479] If the agency's statutory construction does not contravene "clearly discernible legislative intent," the Court must defer to such interpretation as long as it is "sufficiently reasonable."[480] Moreover, the agencies' discretionary powers shall be

[474] For instance referred to in Tembec v. US, Slip Op. 06-109 (CIT,2006), p. 38
[475] Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Ins. Co., 463 US 29, 43 (1983) in ROSSI, Jim, *Respecting Deference: Conceptualizing Skidmore Within the Architecture of Chevron,* William and Mary L. Rev., Vol. 42., No.4. (2001), p. 1143
[476] KROTOSZYNSKI, Roland J., JR.; *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, Admin. L. Rev., Vol. 54, No. 2. (202), p. 755
[477] Koyo Seiko v. US, 36 F. 3d 1565 (Fed.Cir., 1994) at 33; Similarly see the Morton doctrine (US v. Morton, 467 US 822, 834 (1984))
[478] Zenith Radio Corp. v. US, 437 US 443, 98 S.Ct. 2441 (1978) at 22
[479] Corus Staal v. US (CIT, 2008), p. 19
[480] Seramphore Industries PVT. Ltd. v. US, 675 F.Supp. 1359 (CIT, 1987)

exercised in a "proper and reasonable" manner in order to administer the statue fairly.[481] The deference that courts manifest towards the DOC's and ITC's determinations is at high levels (and at its peak in anti-dumping procedures): administrative agency's permissible construction of the statute is upheld whether that interpretation manifests itself in the application of the statute.[482] Hence, the agency interpretation, for surviving judicial scrutiny, needs "not be the only reasonable interpretation or even the most reasonable interpretation."[483] For this reason, the agency's reasonable construction shall be upheld by the court.[484]

The reasonableness test is particularly important in relation to the *methodologies* applied by the agencies, because the ADA and the statues do not specify which methodology shall be used to calculate anti-dumping duties. The question then becomes whether the DOC has *permissibly* constructed the statue. The CIT in *Nucor* referred to the principle of deference based on the reasonable application of agency methodologies. The court held that "[a]s long as the agency's methodology and procedures are reasonable means of effectuating the statutory purpose, and there is substantial evidence in the record supporting the agency's conclusions, the court will not impose its own views as to the sufficiency of the agency's investigation or question the agency's methodology."[485]

Obviously, one of the most remarkable questions on the methodology concerns the technique of zeroing, several times condemned by the WTO panels and Appellate Body as an unreasonable construction of the Anti-dumping Agreement. This however, did not obstruct US courts from upholding Commerce's practices, as reasonable statutory interpretations.[486] Nevertheless, the Court has also stated that it would only continue to uphold the Department's practice of zeroing "until it becomes clear that such a practice is impermissible."[487]

At the very last, the respect of ***procedural rules*** shall be highlighted. Deference to agencies' decision is possible, if they are ready to provide sufficient process in order to assure the courts to reflect the benefit stemming from the agencies' superior knowledge and familiarity with trade defense.[488] The importance of the criterion was stressed by the CIT in *Corus Staal* where the Court held that the "Commerce's use of the date of sale as a selection criterion for Corus's CEP [constructed export price] sales [was] in accordance with its standard procedure and is reasonable." [489]

[481] Torrington v. United States, 82 F.3d 1039, 1044 (Fed.Cir.1995) p. 9
[482] Bowe Passat v. US, 926 F.Supp. 1141 (1996) (CIT), p. 2
[483]Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) at 14
[484] Koyo Seiko Co. v. United States, 36 F.3d 1565, 1570 (Fed. Cir. 1994) at 32
[485] Nucor v. US, Slip Op. 04-105, (CIT, 2004), p. 5
[486] Timken v. US, Slip Op. 02-106 (CIT, 2002), p. 29-30 citing previous judgment on the issue: Serampore Indus. Pvt. Ltd. v. Dep't of Commerce, 11 CIT 866, 874, 675 F. Supp. 1354, 1360-61 (1987); Bowe Passat Reinigungs-und Waschereitechnik GmbH v. United States, 20 CIT 558, 572, 926 F. Supp. 1138, 1150 (1996)
[487] Timken v. US, Slip Op. 02-106 (CIT, 2002), p. 29-30
[488] KROTOSZYNSKI, Roland J., JR.; *Why Deference?: Implied Delegations, Agency Expertise, and the Misplaced Legacy of Skidmore*, Admin. L. Rev., Vol. 54, No. 2. (202), p.
[489] Corus Staal v. Unites States, p. 21

In sum, the job of the US courts is not to determine and impose the best available meaning on an ambiguous agency statue, but rather to determine whether an agency interpretation falls within a zone of reasonable interpretation.[490]

VI.2.7. Concluding remarks

The US anti-dumping authorities have broad discretionary powers in administering anti-dumping law. The discretion is due to the acknowledgement that the ITC and the DOC are the "masters of the subject."[491] The primary control of decision-making in the field of international trade is in the agencies' hands, because they are the experts of the field, especially compared to generalist judges.[492] In addition, international relations are policy matters that are better dealt with under the executive rather the judicial branch.

In acknowledging this, the US Courts' review focuses (1) on the rationality of the agency decisions and actions, (2) on the use of administrative discretion and (3) on the respect of the procedural requirements.[493] While the third is a totally objective control criterion, the first two are charged with subjective elements and are connected to the agencies' expertise and consequently their margin of maneouvre.

In order to check the above criteria, the Courts have developed various doctrines of deference that respect the bureaucratic bodies' ample margin of discretionary powers. The most important and highly deferential doctrine applied in anti-dumping cases is the Chevron doctrine, pursuant to that, agency interpretations – while filling the gaps stemming from statutory ambiguities – shall be "reasonable" otherwise they are not entitled to deference. The Skidmore standard provides for a lesser degree and sliding-scale of deference and it is only marginally used in anti-dumping decisions.

The Charming Betsy canon is applied in relation to international obligations, so that anti-dumping decisions concerned as well. It has relevance both in delimiting the place of the provisions of the Anti-dumping Agreement and the status of the DSB's reports. Although, the doctrine calls for the statutory construction in conformity with the international obligation, the US courts consistently refused (based on the SAA and the URAA) to take into account the rules of the ADA. The same can be said about the rulings of the panel and the Appellate Body that are merely considered as informative factors on the view of the international tribunal. As a consequence, the Charming Betsy maxim has a limited importance and not accidentally, the CIT and the CACF usually refer to it only implicitly.

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[490] MURPHY, Richard W.; *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretative Freedom*, Admin. Law Rev., Vol. 56., No.1., (2004) p.13

[491] Consumer Products Division v. US, 753 F. 2d 1033 (Fed.Cir., 1985), p.5

[492] On the other hand, the CIT's experience in international trade shall be stressed. In fact, it is less deferential than other US courts, so that it has a greater impact on policy-making than other courts.

[493] HANSEN, Wendy L.; JOHNSON, Renée J; UNAH, Isaac; *Specialized Courts, Bueaucratic Agencies, and the Politics of U.S. Trade Policy*, Am. J. of Pol. Science, Vol.39, No. 3 (Aug., 1995) p. 537

The judicial review of anti-dumping orders on the one hand is patterned by the USA's legislative arrogance denying not only the self-executing nature of the WTO covered agreements, but also (at least formally) the possibility to consider the decisions of the Dispute Settlement Body. In turn, US Courts are reluctant to interfere with foreign policy affairs. They have consistently held that the best interpretation of statutory language in the field of international trade can be carried out by the administrative agencies.

VII. THE SPECIAL STANDARD OF REVIEW AND THE MULTIPLICITY OF THE STANDARD OF REVIEWS IN THE WTO LEGAL SYSTEM

WTO Member States' anti-dumping decisions and anti-dumping legislation can be subject to judicial review by the Dispute Settlement Body. If a State maintains that another WTO Member violates the requirements to impose an anti-dumping duty provided for by the Anti-dumping Agreement, it can seek legal remedy in the framework of the WTO. The panels' and the Appellate Body's judicial review is guided by the standard of review, according to Article 17.6 of the ADA.

In exploring the standard of review, various considerations should be borne in mind. Firstly, similar to tribunals, the work of the panel comprises of more basic activities too. Panels make findings that (a) are purely *legal* in nature; (b) are merely *factual;* and (c) involve *application of facts to the law*. This last activity is the most difficult to pin down because it involves the weighing and appreciation of the facts and their characterization in terms of legal rules. The nature and the intensity of the review of these factors differ in WTO law, depending on which of these activities the panel is engaged in. For instance, the panel is entitled to make an almost *de novo* review of the facts in disputes arising under the covered agreements, but cannot act in the same way in an anti-dumping cases because the special standard of review constrains panels to a more deferential treatment of the factual record of the domestic authorities.

Secondly, the *review changes with the subject-matter of the dispute*. For instance, a measure examined under the SPS Agreement shall be overviewed differently than a measure taken under the Anti-dumping Agreement due to the different standards of review applicable to the agreements: while the former has been mainly developed by the jurisprudence, the latter is based on a treaty provision.

The standard of review provided for in the Anti-dumping Agreement is unique in the whole WTO legal system. There are no other explicit reviews provided by the covered agreements, therefore in the academic literature it is often called as *special standard of review*. However, the WTO jurisprudence evolved a general standard of review applicable to every case that constitutes a kind of framework structure for the panel reviews. In addition – considering the peculiarities of certain agreements – the Appellate Body has also created *specific standards* in reviewing e.g. safeguard or SPS measures, based on substantive provisions of the Agreement on Safeguards and the SPS Agreement. Similar to the special standard of review, these standards of reviews are agreement specific but stem from the panel/AB case law and from substantive provisions of the relevant agreements. Notwithstanding the similarities at first sight, the standard under the Anti-dumping Agreement is different from these control methods because it is clearly more restrictive, as it does not entitle the panel or the Appellate Body to review the facts established at national level and to draw conclusions from this factual record.

VII.1. Illustrative GATT panel case law

GATT 1947 panels did not apply an explicitly treaty-origin standard of review in anti-dumping cases and the boundaries of the panels' scrutiny had been *developed by the jurisprudence*. Not surprisingly, panels' decisions had been often considered too intrusive and had been felt that they over-reached their authority.

The first case that involved the issue of the standard of review referred to the escape clause applied in relation to importations of hatters' fur from the former Czechoslovakia,[494] where the panel upheld the American measures since it was considered that the administrative agencies had investigated the matter in front of them thoroughly, on the basis of the available data and had reached their conclusion in good faith.

The earliest anti-dumping case when a GATT panel ruled on its own intrusiveness goes back to 1955, to the *Swedish anti-dumping duties* dispute. The importance of the ruling consists of declaring that the discretion of GATT Members is not without limits, since they are obliged to enquire into certain facts. With the panel words: "[…] it was clear from the wording of Article VI that no anti-dumping duties should be levied until certain facts had been established. As this represented an obligation on the part of the contracting party imposing such duties, it would be reasonable to expect that that contracting party should establish the existence of these facts when its action is challenged."[495]

The issue emerged maybe more interestingly in the landmark *New Zealand – Electronic transformers* case, decided by a GATT 1947 panel in 1985, when a complaint was bought against New Zealand's imposition of anti – dumping duties on electronic transformers exported from Finland. The core focus of the dispute was on the determination of the material injury. New Zealand's contention that neither the Contracting Parties, nor the GATT panel cannot challenge or scrutinize the validity of the conclusions of the investigating authority had been rejected. The panel stated that: "[…] the responsibility to make a determination of material injury caused by dumped imports rested in the first place with the authorities of the importing contracting party concerned. However, […] if a contracting party affected by the determination could make a case that the importation could not in itself have the effect of causing material injury to the industry in question, that contracting party was entitled, […] [to] refer the matter to the CONTRACTING PARTIES […]. *To conclude otherwise would give governments complete freedom and unrestricted discretion in deciding anti-dumping cases without any possibility to review the action taken in the GATT. This would lead to an unacceptable situation under the aspect of law and order in international trade relations as governed by the GATT."*[496]

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[494] Report of the Intersessional Working Party on the Complaint of Czechoslovakia Concerning the Withdrawal by the United States of a Tariff Concession under the Terms of Article XIX, (Hatters' Fur) GATT/CP/106 adopted 22 October 1951

[495] Swedish anti-dumping duties, Report adopted on 26 February 1955, (L/328 - 3S/81, BISD 3S/81), para.15

[496] New Zealand – Imports of electrical transformers from Finland, Report adopted on 18 July 1985 (L/5814 - 32S/55, BISD 32S/55), para. 4.4.

In another case, the USA challenged the anti-dumping duties imposed by Korea on polyacetal resins exported from the United States (*Korea – Polyacetal resins*). In the case, Korea called the panel for a deferential treatment of its administrative authority's determination. It asserted that "the Panel's job was not to conduct a *de novo* investigation, nor to attach its own weights to the different factors. Its job was to consider whether, under the Agreement, there was a basis for the majority decision of the KTC [Korean Trade Commission] in favor of an affirmative finding of injury. *If the Panel, in its investigation, decided to assign greater significance to some factors rather than others, it would usurp the authority of the investigating body, and the Agreement did not permit that*."[497] Nevertheless, the panel decided to carry out an *effective review* referring to the injury determination and called for an adequate explanation by the investigating authorities of how they had considered and evaluated the evidence with regard to the factors provided for in the treaty. The panel then decided that the Korean administrative authority's injury determination did not satisfy the requirements established by the treaty.

Lastly, the panel in *US – Atlantic salmon* declared that its task – amongst others – is to review whether the investigating authorities had carried out an "objective examination."[498]

There is not much that can be said about the pre-Uruguay standard of review. It is clear that without an explicit treaty provision it was in the panels' hands to define their own bounders. It is also clear, that both the Contracting Parties and the GATT 1947 panels wished to restrain the overview of anti-dumping decisions. However, it seems that the level of deference that panels manifested had not been always satisfactory for States that during the Uruguay Round were willing to tie the hands of the "WTO tribunals" through legal treaty-provisions by directing the panel and the Appellate Body to manifest a certain degree of deference towards the laws and measures of the WTO Member States.

In any event, the Appellate Body rejected the idea to have recourse to the GATT 1947 case law and to use it as a yardstick for the standard of review. This is coherent with the approach of the AB that – even though adopted GATT panel reports form part of the GATT *acquis* – these decisions have no binding force, do not create precedent to the "WTO tribunals." [499]

VII.2. The hybrid nature of Article 17.6 of the Anti-dumping Agreement

The only explicit special standard of review in the WTO legal text can be found under Article 17.6 of the Agreement on the implementation of Article VI of the General Agreement on

[497] Korea – Anti-dumping duties on imports of polyacetal resins, Report adopted on 2 April 1993, (ADP/92, BISD 40S/ 205), para. 57

[498] United States – Imposition of anti-dumping duties on imports of fresh and chilled Atlantic salmon from Norway, Report of the Panel adopted by the Committee on Anti-Dumping Practices on 27 April 1994, (ADP/87), para. 509

[499] Japan - Taxes on Alcoholic Beverages, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 4 October 1996, p. 15

Tariffs and Trade 1994. No equivalent provision exists in any other covered agreement. The Article referred below reads as follows:

"In examining [a dispute under the Anti-dumping Agreement]:

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

This standard of review is of a *hybrid nature,* consisting of both substantial and procedural rules. On the one hand, although national authorities are not direct addressees of the provision, it provides for *procedural requirements* to be followed by them and they are subject to the panel's scrutiny – since the latter shall determine "whether the authorities' establishment of the facts was proper." It is logical then that domestic agencies shall implicitly respect to and conform to the same standards. On the other hand, it is clear, that the proper establishment and the unbiased and objective evaluation of the facts are up to national administrative agencies. Thus, the provision contains two separate *substantial* standards to be followed by the domestic authorities: firstly, the objective *establishment* of the facts and then the *evaluation* of those facts; the latter is a sort of (in contrast to the requirement of the proper establishment of the facts) subjective criteria requiring an impartial approach by the national bodies.

On a theoretical level, one may wish to distinguish between the two cases and "maintain that the measure 'is' really only justified if the substantive rule itself grants the margin of appreciation, whereas if a procedural rule only restricts control by the courts, the measure may still 'be' illegal although it is sheltered from judicial invalidation."[500] However, from a practical point of view there exist no differences between the two cases. "It is more accurate then to regard standard of review not as a legal rule itself, but as the description of *interplay of substantive and procedural rules* which, together, specify the roles of the panels when reviewing national authorities' determinations, and thus define the structural relationship between Members and the panel (and, by the same token, the scope of the obligations binding Members *vis-à-vis* each other under the WTO agreements)."[501]

[500] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38, No.3,(2004) p. 514
[501] *Id.*

VII.3. A deferential standard of review

The standard of review has its roots in the common-law countries, in particular in the USA, where various types of deferential doctrines co-exist and they are applied in consideration of the nature of the case. For instance, in the US courts' judicial review of anti-dumping cases the commonly used maxim is the highly deferential Chevron doctrine[502] that calls US courts to uphold the administrative agency's permissible interpretation. In other types of administrative decisions are reviewed by applying the less deferential Skidmore doctrine. The rationale of the standard of review is also used in other legal systems – the difference is the question of the level of deference to be attributed to the executive's decisions. The problem of deference also arises when a panel or the Appellate Body examines and decides on the case before it.

The standard of review is an important tool of the judicial review and it is capable to restraint the discretion of the judges. However, it is a misbelief that only the standard of review is able to restrict the judges' authority. For example, the distribution of the burden of proof is capable to shelter administrative decisions by putting the burden of providing evidence on the claimant and requiring a high level of proof. In the WTO context one may think that the lack of direct effect of the provisions of the legal texts or the fact that individuals do not have a standing in front of "WTO tribunals" constitutes a restricted judicial control of Member States' decisions. As opposed to these methods, the specificity of the standard of review is that it *tries to carve out the issues involving subjective judgment from the panel's or the Appellate Body's review*.

Hence, the core issue of the standard of review is the allocation of the subjective judgment between the authorities of WTO Members and "WTO tribunals". The reasons to limit the panels' and Appellate Body's control is based on the one hand on purely factual considerations, on the other hand it is on the intent to separate the powers between the Organization and its Member States.[503] For the well-functioning of the Dispute Settlement System it is necessary to avoid the duplication of the efforts of the reviewing court concerning the determination of the facts because the main fact- finder in anti-dumping cases is the domestic investigating authority. Once again, it shall be taken into account that panels in AD cases are deprived of conducting a *de novo* review of facts. There are many reasons of this: firstly, the panels are not well-equipped for this purpose, since they lack the necessary experience and they have a poor knowledge of the economic, political and social situation of the country. Moreover, the fact-finding and the investigation would overload the panels' work as well, consequently the decision-making process would become considerably slower. It is also questionable that panels would have the necessary resources and time to conduct a full review. At last, a more intrusive review would also undermine the authority of States to determine their own internal policies.

[502] See more under point Chapter IV.3.

[503] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38, No.3,(2004) p. 515

The special standard of review provided for by the Anti-dumping Agreement is a *deferential* kind, i.e. favorable to the defending Member State. Deference shall be applied towards factual and legal determinations of the anti-dumping authorities. This means that the appropriate standard of review lies in the middle, between the *de novo* review and the total deference, but where exactly, is decided on a case- by-case basis. In other words, it is an *intermediate standard of review*, because it calls the panels not to overturn the decisions of the national authorities if their establishment of the facts was proper and the evaluation was unbiased and objective, *"even though the panel might have reached a different conclusion."* Therefore, a domestic decision to be upheld by the panel or the AB should be made on the basis of properly established facts, evaluated in an unbiased and objective manner. This deferential treatment of decisions of national agencies is ensured by the second part of Article 17.6 (ii) which states that the panel shall find the authorities' measure to be in conformity with the Anti-dumping Agreement *"if it rests upon one of the permissible interpretations of the AD Agreement."*

This sentence was subject to fierce criticism, since it should be read together with the first part of Article 17.6 (ii), which provides for the legal architecture of the review of the domestic authority's determination. Ever since the "customary rules of interpretation of public international law" invoked by the subparagraph in practice mean Article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT), and these rules aim at arriving to only one interpretation of a treaty provision, it is difficult to imagine that the panel would ever arrive to more permissible interpretations. This could imply that, in the absence of the possibility of multiple interpretations, panels may substitute the domestic decision with their own and unique interpretation, thereby further restricting the discretion of Member States in their ability to impose anti-dumping measures. Although, the Appellate Body in *Mexico – Guatemala Cement II* case stated that "permissible interpretations" are permitted by the Anti - dumping Agreement and what matters is not whether the challenged determination rests upon the best or "correct" interpretation of the Agreement, but whether it rests on a "permissible interpretation."

Even though the standard provided for by Article 17.6 ADA on its face calls for a deferential treatment of laws and measures of national bodies, in practice it is does not defer extensively to the Member States' determinations.

For instance, the US GAO Report[504] heavily criticized the manner in that the panel and the Appellate Body applied the legal standard of review in Article 17.6. (ii) of the Anti-dumping Agreement. In their view, the deference applied by "WTO tribunals" was not the same intended by the United States, as expressed in the U.S. Statement of Administrative Action (SAA) accompanying the U.S. Uruguay Round Agreements Act. This Statement describes Article 17.6 as a special standard of review analogous to the deferential, Chevron standard, applied by U.S. courts in reviewing actions by the Commerce Department and the ITC. "[…]

[504] United States General Accounting Office (GAO), Standard of Review and Impact of Trade Remedy Rulings, Report to the Ranking Minority Member, Committee on Finance, U.S. Senate, (July 2003), available in http://www.gao.gov/new.items/d03824.pdf (GAO Report)

from the U.S. perspective, Article 17.6 was intended to ensure that WTO panels neither second-guess the factual conclusions of domestic agencies, even when panels might have reached a different conclusion, nor rewrite, under the guise of legal interpretation, the provisions of the Antidumping Agreement."[505]

VII.4. Analogy with the Chevron doctrine?

Several scholars, in particular Professor J. H. Jackson, and initially the USA[506] argued that that the special standard of review was inspired by the Chevron doctrine.

During the Uruguay Round, the USA pushed the canon to be inserted into the Anti-dumping Agreement. The United States intended to create a standard similar to that used by the US courts in reviewing anti-dumping determinations. The original intention of the negotiators was to obtain a deferential treatment of administrative decisions. However, Chevron calls for deferential treatment of these decisions only in its face. The US standard for review of an anti-dumping decision is whether the determination is supported by substantial factual evidence or whether it is in the respect of the applicable laws. In practice, as applied by the US courts, it has not resulted in overwhelming deference to the administrative agencies' decisions and they were subject to the courts' close scrutiny.[507]

The Chevron doctrine is a canon used by the courts in the USA in the review of the administrative agencies' decisions, distinguished from the traditional approach of statutory interpretation absent from any agency construction. The courts have to face two questions, which can be described as step one and step two. At first, the court has to ask itself weather the Congress has directly spoken about the question at issue or not. The threshold question is whether the intent of the Congress is clear – if it is unambiguously expressed, that is the end of the matter, because the principle of *stare decisis* shall be applied by the courts. This is because if the "Congress had an intention on the precise question at issue, that *intention is law* and must be given effect." [508]

The second step refers to the situation in that the Congress has not *directly* addressed the precise question. The Chevron analysis at this stage consists of the review of the agency action to determine whether there is a *reasonable* interpretation of the ambiguous statute. If the law is silent or ambiguous on the issue, the Court should decide whether the

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[505] United States General Accounting Office (GAO), Standard of Review and Impact of Trade Remedy Rulings, Report to the Ranking Minority Member, Committee on Finance, U.S. Senate, (July 2003), available in http://www.gao.gov/new.items/d03824.pdf (GAO Report), p.28

[506] HORLICK, Gary, CLARKE, Peggy A., *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst – Ulrich PETERSMANN, *International trade law and the GATT/WTO dispute settlement system*, Kluwer Law Int'l., Vol.11., (1991), p. 320

[507] HORLICK, Gary, CLARKE, Peggy A., *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, in Ernst – Ulrich PETERSMANN, *International trade law and the GATT/WTO dispute settlement system*, Kluwer Law Int'l., Vol.11., (1991), p. 320

[508] DAME, Paul A., *Stare decisis, Chevron and Skidmore: Do Administrative Agencies Have the Power to Overrule Courts?* Wm. & Mary Law Rev., Vol. 44, No. 405 (2002 – 2003), p. 418

administrative authority's legal construction is *permissible*. It is not necessary to establish that the agency's interpretation was the only permissible construction or not, or that the court agreed with the decision – the court only need to defer to an authority's *reasonable* interpretation. The canon then constitutes a significant shift of power from the judicial to the executive branch.

An analogy between the Chevron doctrine and the provisions of Article 17.6 of the Anti-dumping Agreement can be drawn only to a certain extent since the two standards are more divergent than they are similar.[509] At first, the difference between the two of them lies in the degree of freedom they leave to the administrative agencies in construing the statutory provision. While according to Chevron, the authorities' interpretation shall be either *reasonable or permissible*,[510] the Anti-dumping Agreement provides for a deferential treatment of the agencies' determination as long as the interpretation of the executive is *permissible*.[511] Secondly, there are divergences in the rules of construction: the Chevron canon instructs the courts to employ the "traditional tools of statutory construction" when determining whether the statutory provision in question is ambiguous at first place; Article 17.6 refers to the customary rules of interpretation of public international law when determining whether the provision in question permits more than one permissible interpretation. Thirdly, the Chevron doctrine is somewhat unclear on the level of ambiguity that is required to trigger step two; hence the approach of lower courts varies on this issue. In turn, Article 17.6 is unclear how panels will ever get to step two, given the implicit invocation of the VCLT.

At last, a common and probably most important characteristic is that both Chevron and the standard of review according to the Anti-dumping Agreement bear important implications about the distribution of legal and political authority. As it has been mentioned, the application of the Chevron doctrine apparently shifted the power from the courts to the administrative agencies: fundamentally, the former can intervene properly only in step one, when they have a significant leeway to find or not, as the case may be, ambiguity in the statue and maintain power to vindicate or invalidate the authorities' decisions.[512]

According to Professor Jackson, none of the three bases for deference to administrative authorities may apply to domestic legal proceedings is relevant in the context of the WTO

[509] JACKSON John H., CROLEY Stephen, *WTO Dispute Procedures, Standard of Review and Deference to National Governments*, The Am. J. of Int'l. Law, Vol. 90, No. 2 (April, 1996), p. 204

[510] See more in Chapter VII.5.1.D. Basically, this standard requires that the the administrative agency's determinations shall rest upon a sufficient factual basis to allow it to draw reasoned conclusions)

[511] The "permissible" standard refers to the permissible treaty interpretation, so that the construction "which is found to be appropriate *after* application of [Article 31-32…] of the Vienna Convention." In US – Hot rolled steel (AB), para. 60

[512] Consequently, the canon ties the courts' hands insofar as step one requires the court to defer to the construction that would have invalidated before Chevron but gives power to them insofar as step one allows a court to defer to a preferred interpretation of a law that, before Chevron, they would have been required to invalidate. In JACKSON John H., CROLEY Stephen, *WTO Dispute Procedures, Standard of Review and Deference to National Governments*, The Am. J. of Int'l. Law, Vol. 90, No. 2 (April, 1996), p. 204 – 205

panel reviews. Firstly, he invokes the *expertise argument*. According to this reasoning, unlike in domestic regulatory affairs and legal proceedings, no WTO Member disposes of greater expertise in interpreting WTO law than another Member State. Secondly, he states that the *democracy rationale* (according to that judges are accountable to the population) is not applicable in the WTO context, where panelists are the Member's nominees[513] and national authorities are not accountable to the WTO Membership. At last, the *efficiency rationale* of the Chevron canon (that a single interpretation by the agency charged to administer a law is preferable to the potential multiple interpretations by various courts) should be rejected as well. From a WTO perspective, deference to the national agencies' determinations would lead to very multiple interpretations that the efficiency rational was supposed to prevent.[514]

The vocation of the "World Trade Court" does not imply deference towards the executive's decision only in case of ambiguity in the Anti-dumping Agreement but it is a general overview of the *consistency* of the national agencies' determinations with specific provisions of the ADA. Therefore, the very purpose of these standards is different. However, at first sight, similarly to the Chevron canon, it seems that the panel and the Appellate Body have limited powers in their overview. This is a true and valid argument if we compare the leeway and discretion of the "WTO tribunals" in cases arising under other covered agreements with the disputes in anti-dumping cases. In the former case the general standard of review is applied and in the latter that provided for by the Anti-dumping Agreement. Albeit, the special standard of review is not applied in isolation from other provisions, and the panels and the AB may find techniques to employ a more intrusive approach (e.g. through the overview of the evaluation of the evidence) and overturn the reasoning or the outcome of the domestic agencies' decision.[515]

In addition, another substantial difference between the two standards lies in the interpretative methods: while the US courts use the traditional tools of statutory construction, the panel and the Appellate Body must interpret the rules in the light of the international customary law. It also has to be mentioned that the Anti-dumping Agreement uses the word "permissible" and not the "reasonable" and the two meanings may not be identical.

[513] The three or five members panel is established by the DSB, but it must be ad hoc composed for every single dispute because there are neither permanent panels nor permanent panelists in the WTO. The Secretariat proposes nominations for the panel to the parties to the dispute. The WTO Secretariat maintains an indicative list of names of governmental and non-governmental persons, from which panelists may be drawn. WTO Members regularly propose names for inclusion in that list, and, in practice, the DSB almost always approves their inclusion without debate. It is not necessary to be on the indicative list in order to be proposed as a potential panel member in a specific dispute. Potential candidates must meet certain requirements in terms of expertise and independence.

[514] United States – Anti-dumping duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one megabit or above from Korea, (*US – DRAMS*), WT/DS99/R, 26 January 1999, para. 4.66

[515] It is also worthwhile to stress that the panel's decision may have limited consequences on the outcome of the case. For instance, the domestic authorities' decision is not affected if only the reasoning of the legal instrument imposing an anti-dumping measure was not upheld.

Lastly, the valid argument for increased judicial deference in the WTO system is the expertise –argument, namely that domestic agencies have a more in – depth knowledge on the issues they decided about, hence more deference is needed at international than at national level.

VII.5. Factual special standard of review (Art.17.6 (i) of the ADA)

VII.5.1. The criterion of factual assessment

The WTO dispute settlement is increasingly shaped by fact-intensive cases which particularly stand for trade remedy litigation. The Anti-dumping Agreement obliges WTO Members to impose anti-dumping duties by ascertaining whether the dumping exists, whether it causes material injury to the domestic industry and whether this injury is attributable to dumping practices. The occurrence of these essential requirements shall be verified through the examination of various economic factors, through the fair comparison of the export price and normal value (to establish the occurrence of dumping; Article 2.4. of the ADA), through for instance the analysis of the factual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments (to verify the injury suffered by the domestic industry; Article 3.4. of the ADA). The existence of the causal link is evaluated based on all the relevant evidence available for the administrative authorities.

The "World Trade Court's" judicial control in anti-dumping cases involves the review of the establishment of a large amount of highly technical factual determinations (ascertainment of "raw facts"), the use of discretionary powers of the investigating authorities and legal conclusions. It is particularly important to point out that it is up to the panels to determine the credibility and the weight of the evidence since they are the *triers of the facts* – however, they are not super-investigative authorities. In a different vein, the Appellate Body's mandate only refers to the review of questions of law and the assurance of the uniformity and consistency of WTO law. In trade remedy cases, in particular in controlling anti-dumping decisions, this intrusiveness is restricted and panels fundamentally verify the WTO-consistency of the domestic investigation procedure. The highest manifestation of the restriction of WTO judges' review can be found under Article 17.6 of the Anti-dumping Agreement. For this reason, the panels' powers of overview under the above mentioned Article are restrained and place limited obligations on the "WTO tribunals" in relation to the review of the establishment and evaluation of the facts. The direct addressees of these duties are exclusively the panels and not the national authorities[516] – although indirectly they should consider the provision.

[516] Thailand – Anti-dumping duties on angles, shapes and sections of iron, non-alloy steel and H-beams from Poland (Thailand – H-beams), (AB) WT/DS122/AB/R, 12 March 2001, para. 114

The twofold architecture of this provision has already been pointed out. The panel's review of anti-dumping measures consists of a two step process: at first, a panel shall examine the establishment and the evaluation of the facts by the national administrative bodies (i.e. the so called *factual standard of review* set forth in Article 17.6. (i) of the Anti-dumping Agreement) and then it has to interpret the relevant provisions of the ADA in accordance with the customary rules of international law and uphold the decisions of the investigating authorities even though it does not agree with it (this is the *legal standard of review* under Article 17.6. (ii) of the ADA). For quite a long time, the panel and the Appellate Body reports had not been clear on whether a similar or a different standard is to be applied for the two phases of the factual assessment. The Body in the *US – Lamb Meat*[517] case clarified that the review of facts comprises a *formal* aspect, namely the assessment whether all relevant facts have been examined by the national investigating authorities and a *substantive* aspect that gives the duty to panels to verify how those facts support the domestic determinations. These key elements are generally valid through all the agreements and not just in relation to the Anti-dumping Agreement.

The factual standard of review in anti-dumping cases mandates the panels to examine at first whether the establishment of the facts in relation to a particular claim was proper and secondly, whether an unbiased and objective authority might have reached the conclusions that the investigating authority reached in the specific case.

This standard of review refers to the question whether the establishment of the facts was *proper* and whether their evaluation was unbiased and objective, which directly creates obligations both for the panels and indirectly for national authorities. It precludes panels and the Appellate Body from a *de novo* review but it does not specify to what extent judges are entitled to review the appropriateness and objectivity of the factual findings of national authorities. Consequently, under certain circumstances, panels are deprived of overturning the decision of national authorities, even though they would have preferred another factual conclusion.[518]

The Appellate Body in the *US – DRAMS* dispute expressed probably most clearly and frankly how the panel should act in relation to the review of factual matters. It stated that Article 17.6(i) provides that the Panel shall do the following:

[517] US – Lamb Meat, para. 103

[518] Some scholars tried to compare this standard with the standards used in the US administrative law, such as the "substantial evidence test," the "clearly erroneous test" and the "arbitrariness test" with little success. For instance, the "arbitrariness test" is a highly deferential standard which requires judges to check whether there has been an arbitrary mistake in the establishment and the evaluation of the facts therefore it is incompatible with the wording and purpose of Article 17.6 (i) of the Anti-dumping Agreement, since the latter requires the panel to verify whether the establishment of the facts was proper and unbiased and the evaluation of those facts was objective. [518] Instead, the second arm of Article 17.6 (i) – so that the expression of "unbiased and objective" authority – is potentially a looser standard.

"First: "*determine whether the authorities' establishment of the facts was proper*." This means that the Panel should determine whether the authorities followed procedures for collecting, evaluating, and processing facts during their investigation which were consistent with the requirements of the AD Agreement.

Second: *determine whether the authorities' "evaluation of those facts was unbiased and objective"*
This provision means that the Panel must evaluate whether (a) the authorities examined all of the relevant facts before it, including facts which might detract from an affirmative determination, (b) whether adequate explanation has been provided of how the determinations made by the authorities are supported by facts in the record, and (c) whether the authorities based their determinations on an examination of factors required by the AD Agreement." [519]

A. Proper establishment of the facts

The Dispute Settlement Understanding does not contain explicit rules on fact-finding and on the panels' authority to discover evidence, therefore the Dispute Settlement Body developed their own role concerning the issue. It seems that panels have developed an unlimited discovery in cases arising out of the covered agreements, except the Anti-dumping Agreement, and the method of their fact-finding technique is more inquisitorial rather than adversarial.

In anti-dumping cases, national authorities dispose of broad discretionary powers in the determination of the facts. According to Article 17.6 of the ADA, "[…] in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."

This in turn means that the provision provides for two different standards: the "establishment" of the facts and the consequent "evaluation" of these facts. The first refers to the investigating process in the framework of which authorities are required to gather factual data and information in order to verify the existence or not of certain facts, to weight them and consequently the occurrence of all the necessary conditions to imposing anti-dumping measures. The second criterion (i.e. the "evaluation" of the "raw" facts) refers to the consideration of the data in the light of the legal provisions.

The first arm of Article 17.6 provides for a deferential treatment of factual determinations of national authorities, subject to the satisfaction of the so called "*control criteria*," that is the "limits on the national authorities' liberty to make factual determinations." [520] In other words,

[519] US – DRAMS, para. 4.52
[520] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38, No.3,(2004) p. 540

the overview of the panel concerns the way in which the facts have been gathered and, as a result, it is devoid of independent fact-finding.[521]

The aforementioned Article states that the panel verifies whether the authorities' ***establishment*** of the facts was ***"proper"*** and in an affirmative case must respect their determinations**.** The stress is on the term "proper," which implies that logical errors or giving weight to irrelevant factors is not permitted or omitting relevant ones should render the establishment of the facts improper. In turn, while panels check the "proper establishment" of the facts, they shall not focus on the review of factual findings of the national investigating authorities, but they have to *verify the procedure of gathering data* and information. In other words, that means that the focus is on the proper establishment of the facts and not the review of the factual record. Panels (contrary to the general rule applicable to disputes arising under the covered agreements) are not allowed to conduct a supplementary fact-finding in case of defective or inadequate factual record presented to them by the national administrative authorities, but they need to limit themselves to verify the properness of the whole fact-gathering procedure without carrying out a complementing analysis. So, even though the panels examine quite thoroughly the establishment of the relevant facts by the competent domestic agencies, they are not entitled to conduct a completely new factual review.

As it has been said, the complete process of fact-gathering needs to be "proper." If the establishment of the facts was not "proper" and/or the evaluation of these facts was not unbiased and objective, the panel must hold that the factual establishment and evaluation was inconsistent with the Anti-dumping Agreement. The facts found as a result of the "proper" process should be accepted, "even though the panel might have reached a different conclusion." "Here, the evidence is not simply a matter of fact but rather one of judgment or political assessment."[522] *De novo* review is then not permitted, so that panels cannot substitute the analysis of national authorities with their own conclusions. Panels interfere to the analysis of the anti-dumping authorities probably only in case of "manifest or egregious impropriety,"[523] that implies that these authorities dispose of a considerable margin of discretion in factual determinations.

The meaning of the "proper establishment of the facts" was explained by the Appellate Body in several occasions. In the *US – Hot Rolled Steel* dispute,[524] the panel made the "proper" assessment of facts conditional upon the verification whether the national investigating authorities have collected the "relevant and reliable information" concerning the case at stake. In addition, the AB clarified in the *Mexico – HFCS* case that the "establishment" of facts by investigating authorities includes both *affirmative findings of events* that took place during the period of investigation as well as *assumptions* relating to such events made by those

[521] *Mexico – HFCS*, para. 84, *EC – Bed linen*, para. 169
[522] GUZMAN, Andrew T., *Determining the Appropriate Standard of Review in WTO Disputes*, Cornell Int'l. Law J., Vol. 42, (2009), p. 64
[523] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38, No.3,(2004) p. 504
[524] US – Hot Rolled Steel, (panel report), para. 7.26

authorities in the course of their analyses." As regards the determination of the existence of a *threat* of material injury, the AB in the concrete case stated that investigating authorities shall make assumptions concerning the "occurrence of future events" since such *future* events "can never be definitively proven by facts." A "proper establishment" of facts in a determination of a threat of material injury must be based on events that, although they have not yet occurred, must be "clearly foreseen and imminent," in accordance with the provisions of the ADA.[525]

In order to properly establish the facts, the information gathered needs to be necessarily ***accurate***[526] and *correct*. [527] The question here arises whether the panel is entitled to review all the facts relevant to the case at stake or only those that they were made available to the investigating authorities? Does the panel have powers to consider also the factual record that was presented after the original investigation was closed? And what is considered investigation?

Part of the answer lies in Article 17.5. (ii) of the Anti-dumping Agreement that should be read together with Article 17.6., the same agreement. The former provision states the following: "The DSB shall, at the request of the complaining party, establish a panel to examine the matter based upon […] the ***facts made available*** in conformity with appropriate domestic procedures to the authorities of the importing Member." Both of these provisions are explicit obligations upon "WTO tribunals" and not on Member States. As a result, panels are precluded from establishing facts and evaluating them for themselves. However, this does not limit their examination of the matters in dispute, but only the *manner* in which we conduct that examination.[528]

Accordingly, the domestic investigative authorities are in a pre-eminent position in establishing the facts since at a first instance, the determination of the need and justification of the imposition of an anti-dumping measure is carried out at national level. The nature of the panel's review takes into account that the Anti-dumping Agreement at first place makes accountable the domestic agencies for investigating and gathering the facts and initially making provisional, later definitive determinations. Therefore, the role of the panel is to review the whole process at national level: starting from the investigation, until the imposition of the anti-dumping measure.

A panel in assessing the evaluation of the facts needs to examine the evidence considered by the anti – dumping authority, and this examination shall be limited by **Article 17.5. (ii) of the ADA** to the facts before the domestic agency. In other words, it means that the factual basis

[525] Mexico – HFCS, para. 85

[526]Article 6.6. ADA, Korea – Anti-dumping duties on imports from certain paper from Indonesia (*Korea- paper*), WT/DS312/RW, 28 Sept 2007, para. 6.44

[527] In the panel's view, there is difference between the accuracy of the information and the substantive relevance of such information. E.g. Article 6.6. of the ADA requires that the investigating authority satisfy itself that the substantially relevant information is accurate. Guatemala – Definitive anti-dumping measures on grey portland cement from Mexico II (*Guatemala – Cement II*), WT/DS156/R, 24 Oct. 2000, para. 8.172

[528] United States – Anti-dumping and countervailing measures on steel plate from India (panel report) (*US – India Steel Plate*), para. 7.6

relied upon by the authorities must be "discernible" by the documents of the record of the investigation.[529] This, however, does *in itself exclude a de novo review* in anti-dumping cases by the panel since the overview of facts by them is limited to the factual record available before the national authorities. With this regard, it was laconically stated in the *Guatemala – Cement II* case that the panel is *"not to examine any new evidence that was not part of the record of the investigation*."[530] There is a clear distinction between "old" and "new" evidence and consequently, the panel cannot rule on the proof if the information had not been submitted at the time of the determination and, hence, could not have been known. In another case, in *EC – Bed linen*, in relation to the assortments of the claims that the same factors could not be known in the establishment of injury and dumping, the Appellate Body stated that a "factor is either "known" to the investigating authority, or it is not "known"; it cannot be "known" in one stage of the investigation and unknown in a subsequent stage."[531]

The investigative process has a crucial importance. The investigation does not only refer to the original investigation in the "common sense" but also to the implementation proceedings that are considered as part of it and not as a new procedure.[532] This was envisaged in the *Mexico – HFCS* case[533] as well, in which the Appellate Body declared that "the original determination and original panel proceedings, as well as the redetermination and the panel proceedings under Article 21.5 [of the DSU],[534] form part of a continuum of events."

Moreover, the Body in *Thailand – H-Beams* affirmed that the proper establishment of the facts seems to have "no logical link to whether those facts are disclosed to, or discernible by the parties to an anti-dumping investigation prior to the final determination."[535] No matter whether the information and documents before the panel are *confidential or not*, they shall be examined by the "WTO tribunal." Henceforth, the panels' scrutiny is focused on all the facts that were made available in the importing country and they are entitled to examine all the facts that were not disclosed or discernible by the interested parties at the time of the determination. "The 'facts' […] thus embrace 'all the facts confidential and non-confidential,' made available to the authorities of the importing Member in conformity with the domestic

[529] Thailand – H-Beams (panel), para. 7.143

[530] Guatemala – Definitive anti-dumping measures on grey portland cement from Mexico II (*Guatemala – Cement II*), WT/DS156/R, 24 Oct. 2000, para. 8.19

[531] EC – Bed linen, para. 178. Albeit in a subsidy case (US – DRAMS, para. 164), the AB declared that the administrative authority is not required to cite every piece of evidence in order to support its final determination.

[532] Korea paper, para. 6.74

[533] Mexico – Anti-dumping investigation of high fructose corn syrup (HFCS) from the United States (*Mexico – HFCS*),
WT/DS132/AB/RW, 22 October 2001, para. 121

[534] "Where there is disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel. The panel shall circulate its report within 90 days after the date of referral of the matter to it. When the panel considers that it cannot provide its report within this time frame, it shall inform the DSB in writing of the reasons for the delay together with an estimate of the period within which it will submit its report."

[535] Thailand – Anti-dumping duties on angles, shapes and sections of iron or non-alloy steel and H-Beams from Poland, (*Thailand – H-Beams* WT/DS122/AB/R),12 March 2001, para. 116

procedures of that Member." However, whether the evidence or the reasoning is disclosed is a matter of *due procedure.*[536]

It also has to be highlighted that the *"all relevant factors test"* (applied in relation to Article 11 of the DSU) that states that a panel's duty is to comprehensively review whether the national authorities had examined "all relevant facts", is not explicitly contained under Article 17.6. (i) of the ADA. However, over time, the requirement to "examine all the relevant facts" became a standard phase for panels to define the standard of review of "raw" evidence.

By the same token, even though it is not plainly provided by the Anti-dumping Agreement, the test is detailed under other rules of the ADA: the provision on the special standard of review does not speak about *which* factors shall be evaluated but it only describes "how the panel is to access the *existence* (establishment) of the facts and their *meaning* (evaluation)."[537] On the other hand, once the factors to examine are known, panels are not required to control all the disclosed facts, but only to the *extent* that they are relevant to the determination and satisfaction of the conditions to impose anti-dumping duties.[538]

Finally, the interplay between Article 17.6 of the ADA and **Article 13 of the DSU**[539] shall be emphasized. The above Article details the panels' rights to seek information from various sources and its function is to guarantee that panels have the possibility to look for answers beyond what has been pleaded. The Appellate Body in the *EC – Bed linen* case declared (by invoking the statements of the panel in the European Communities – Sardines case) that panels are entitled to seek for information from various sources. Nevertheless, there is nothing that implies that a panel *must* exercise its *discretionary* rights to seek information: "it is for the panels to decide whether it is necessary to request information from any relevant source pursuant to Article 13 DSU."[540] Its underlying rationale stems from the de-centralized character of enforcement at the World Trade Organization: "WTO Members are indeed the masters of their disputes only as far as their representation is concerned. From there onwards and all the way to the end of the result, there is only one master: adjudicating body."[541]

To sum it up, the special standard of review imposes two important limitations concerning the raw evidence: at first, a certain degree of deference needs to be accorded in the light of the

[536] Thailand- H-Beams, para. 117
[537] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis*, J. of World Trade, Vol. 38, No.3,(2004) p. 539
[538] Thailand – H-Beams, para. 137
[539] The second paragraph of the Article states that "[p]anels may seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." With respect to a factual issue concerning a scientific or other technical matter raised by a party to a dispute, a panel may rely on an expert's opinion.
[540] EC – Bed-linen, para. 167
[541] MAVROIDIS, Petros C., *Amicus Curiae Briefs before the WTO: Much Ado About Nothing,* Act three, Jean Monnet Centre for International and Regional Economic Law & Justice, published in the Festschrift für Claus-Dieter Ehlermann, eds. VON BOGDANDY, Armin, MAVROIDIS, Petros C., MENY Yves, Kluwer (2002), available in: http://centers.law.nyu.edu/jeanmonnet/papers/01/010201-03.html

panels' limited fact-finding capabilities and resource allocation problems; secondly the case law indicates that panels take into consideration only that factual record and evidence that was available at the time of the investigation and when the decision was made at a domestic level.

B. Objective and unbiased evaluation of the facts

The standard of review to be applied to factual conclusions drawn from the "raw" evidence is the substantive aspect of the panel's duty to make an objective assessment of the facts pursuant to Article 11 of the DSU.[542] Contrary to the establishment of the "raw evidence," the conclusions drawn from the proof gathered during the investigative process may involve societal, political and economic considerations. This stands particularly true for trade remedy cases.

The panels in anti-dumping disputes have the legal obligation to assess whether the facts had been ascertained by the investigating authority in the original proceedings. Contrary to the requirement of "objective assessment of the matter" under Article 11 of the the DSU, the Anti-dumping Agreement does not explicitly ask the panel to objectively assess the issues at stake. Yet, it is hard to imagine that the panels would not be called for to do so. The Appellate Body in *US – Hot Rolled Steel* clarified it in the following way:

"Under Article 17.6 (i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6 (i) requires panels to make an "*assessment* of the *facts*." The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "***objective assessment of the facts*** ". Thus, the text of both provisions requires panels to "assess" the facts and this […] clearly necessitates an active review or examination of the pertinent facts. Article 17.6 (i) of the Anti-Dumping Agreement does not expressly state that panels are obliged to make an assessment of the facts which are "*objective*". However, it is inconceivable that Article 17.6 (i) should require anything other than the panels make an *objective* "assessment of the facts of the matter." In this respect, [… there is] no "conflict" between Article 17.6 (i) of the Anti-Dumping Agreement and Article 11 of the DSU." [543]

The word "objective" implies that the decision-maker is not influenced by its own feelings and opinions. The panel's task in relation to the assessment is to examine the way in which the data had been gathered, inquired into and evaluated. Once again, this examination can be nothing other than "objective," so that if "conform to the principles of good faith and fundamental fairness." [544] This clearly necessitate the active review or examination of the

[542] US – Lamb Meat, para. 103. The threshold is that a "reasoned and adequate explanation" is to be given by the competent authorities.
[543] US – Hot rolled steel, para. 55. See also ADINOLFI, Giovanna; *Lo standard of review nelle controversie relative alla misure di difesa commerciale*. In VENTURINI, Gabriella COSCIA, Giuseppe; VELLANO, Michele; *Le nuove sfide per l'OMC a dieci anni dalla sua istituzione.* Giuffrè Ed. (Milano, 2005) p.114
[544] US – Hot rolled steel, para. 193 - 196, EC – Bed linen, para. 114

pertinent facts.[545] Hence, the panel must review actively both the "raw" evidence and the authority's evaluation of the facts, although the "World Trade Court" cannot engage itself in a *de novo* review of the national authorities' evaluation of facts.

The panels' role in this regard is more of procedural nature: they shall control whether the investigative authorities had objectively collected, verified and evaluated the necessary facts. The requirement of "***objective examination***" was clarified by the Appellate Body in *US – Hot rolled steel*. According to the AB, the term is concerned with the investigative process itself and it aims at demanding a certain attitude from the anti-dumping authorities. In a similar vein, the word "examination" relates to the conduct of the investigation generally, so to the way and the manner in which the evidence is gathered, inquired into and evaluated. The objective examination requires the domestic industry to investigate in an unbiased manner, without favoring the interests of any interested party or group of interested parties. The duty of the investigating authorities to conduct an "objective examination" recognizes that the determination will be influenced by the objectivity, or any lack thereof, of the investigative process. The consideration of the relevant factors, hence, must be *even-handed.*[546]Accordingly, the investigating authorities shall not act in a manner that it becomes more likely to establish the material injury or the existence of dumping.

The assessment of the facts might not be objective, and consequently flawed. The question is how flawed the panel's determination could be; it is likely to involve the commitment of an "egregious" error so that it would call into question the good faith of the panel. In addition the panel's discretion would be questioned in cases of "deliberate disregard" and "refusal to consider" evidence and "willful distortion and misrepresentation of the evidence." [547] The problem with this standard of review is that it equates the failure to apply the proper standard of review with the bad faith of the panel in reviewing facts. It is doubtful that the methodology of factual assessment and questions of good faith are closely connected issues.

Attention must be paid by the panels not to assume the role of the initial fact-finder, but either to be passive by simply accepting the conclusions of the domestic authorities. This does not "condemn" to passivity the panels but, to the contrary, it requires a reactive and critical panel-review in the light of the facts and alternative explanations that were before the authority at the time of the decision. The *critical and searching analysis* necessitates the panel to look behind the reasoning of the investigating authorities to test its adequacy in the light of the evidence on the record, and to differentiate between distinct but related factors, discussed in the arguments of the parties.[548] The active panel review, however, cannot amount to the

[545] EC – Bed linen, para. 163, US – Hot rolled steel, para. 55
[546] US – Hot rolled steel, para. 193
[547] BRONCKERS, Marco; McNELIS, Natalie, *Fact and Law in Pleadings Before the WTO Appellate Body*, in Improving WTO Dispute Settlement procedures. Issues and lessons from the practice of other international courts and tribunals, ed. by Friedl Weiss, Cameron May, 2000. These standards are not the same – for instance, it is quite unlikely to prove how the panel has deliberately disregarded the evidence, since it also calls into question the adjudicative body's good faith.
[548] US – Softwood lumber, para. 124

overturning of the investigative authorities' conclusions simply because the panel might have preferred an alternative interpretation or decision.

One would think that the powers of panel are completely restricted due to the deferential standard of review provided by Article 17.6 of the ADA. Notwithstanding, that the Appellate Body in *EC – Bed linen* specified that "the discretion that panels enjoy as triers of facts under ***Article 11 of the DSU*** is equally relevant to cases governed also by Article 17.6 (i) of the Anti-Dumping Agreement." At first sight, this statement seems to contradict with the deference that panels and the Appellate Body shall manifest towards the determinations of the domestic agencies. However, it refers for example to the discretionary powers of the panels to decide which evidence to *admit* during the proceedings.[549]

C. Questions on evidence and on the burden of proof

C.1. Evidence

It has been said, that cases on trade defense instruments involve an elevated amount of factual data hence they are fact-intensive cases. The "raw" facts are gathered by the domestic authorities, than verified by the panel. Article 6 of the ADA refers to the evidence that can be used in original anti-dumping proceedings: it is a very liberal rule, as the only restriction it imposes is to provide a written proof, considered to be relevant in respect of the investigation. In addition, the anti-dumping authorities gather information as well, as they – amongst others – send out questionnaires and carry out on-the-spot investigations.
It is important to mention, that there are no rules in the Dispute Settlement Understanding that govern the admissibility, production or sufficiency of the evidence. This gives flexibility to both the panel and the litigating parties in the type of evidence that can be used. The absence of specific WTO rules on the admissibility means that the members submitting evidence are relieved of proving that the evidence is admissible.[550]

It has been underscored that in trade remedy cases, WTO panels should accord a considerable level of discretion to the determination and evaluation of the facts by national authorities and shall not displace the conclusions of these agencies by doing their own inquiry on facts. Panels have a limited capacity and possibility to examine the evidence presented to them in anti-dumping cases since they follow more an adversarial than an inquisitorial-type procedure in establishing the facts. In addition, panels in anti-dumping proceedings need to manifest restraint towards the domestic administrative agencies' factual conclusions, consequently they are not entitled to conduct a completely new review of the case, comprised of factual determinations, but to defer to the record of the agencies decisions. Therefore, if the facts had been properly established and the evaluation of the available data and information were unbiased and objective, the panel shall uphold the national authority's decision.

[549] EC – Bed linen, para. 169
[550] ANDERSSEN, Scott, *Administration of evidence in WTO dispute settlement proceedings*, p. 179 in YERXA, Rufus, WILSON, Bruce, Key issues in WTO Dispute settlement. The first ten years, Cambridge Uni. press, 2005

These two aforementioned factors, namely the restricted capabilities of panels to assess the facts and the panels' tendency to limit the evidence to those factual elements which were available at the time of the original proceedings, limit the panels' capacity to review the "raw" evidence. Once again, the exclusion of the *de novo* review makes sense because it would be difficult for the panel to conduct a new investigation because it does not dispose of the necessary resources and technical expertise to do so.

Even though panels in trade remedy cases have limited fact-finding powers, the importance of the issues on the burden of proof and the evidence cannot be disregarded, since panels are able to overturn the domestic agencies' conclusions in relation to these issues.

In every modern procedure based on the rule of law, determination of the court shall rely on evidence and on the application of procedural and substantive rules. This is not different in the WTO proceedings either. The understanding of the term "***positive evidence***" was described by the Appellate Body in the *US – Oil Country Tubular Goods* and in *US – Hot Rolled Steel*. According to the Body, the thrust of the investigating authorities' obligation lies in the requirement that they base their determination on positive evidence and conduct an objective examination. "The term "positive evidence" relates […] to the *quality* of the evidence that authorities may rely upon in making a determination. The word "positive" means […] that the evidence must be of an *affirmative, objective and verifiable* character, and that it must be *credible*."[551] As a consequence, the term "positive evidence" focuses on the facts underpinning and justifying the determination of injury and dumping. The panel applies the standard of review properly, if it has examined the consistency of the facts assessing the determinative factors necessary to impose an anti –dumping duty with the WTO obligations.

The quality and the amount of the evidence must be *sufficient* too. The sufficiency-threshold is different prior to the initiation of an investigation than at the time the anti-dumping authority makes its determination. Clearly, it is lower at the beginning of the procedure and it means a higher standard at the time of the final decision. In addition, the sufficiency also implies that not any kind of proof is to be taken into account and that this sufficiency means more than mere allegation or conjecture. At the end what counts, is that the domestic investigating agencies restructured a sufficient factual record on which they base their measures.[552]

The investigating authorities shall control every single piece of evidence and then base their conclusions in the *totality* of that evidence. *Tout court*, panels need to examine the *sufficiency* of the evidence gathered and – with due regard to the administrative agency's approach – verify how the totality of the evidence supports the conclusion reached.[553] Therefore, it is important that the relevant facts constitute a satisfactory factual basis to allow reasonable conclusions concerning the determination of dumping, injury and causal link. In this context it is important

[551] US – Oil country tubular goods, paras. 321, 340, US – Hot rolled steel, para. 192, EC – Pipe fittings, para. 132
[552] Guatemala – Cement II, para. 6.37 , United States - Measures Affecting Imports of Softwood Lumber from Canada, (US – Softwood lumber II) BISD-40S/358, 27 October 1993, para. 332,
[553] US – Softwood lumber, para. 94

to take into account how the interaction of certain proofs may justify certain conclusions that otherwise, considering them in isolation, would have not been understood or would have not been retained logical.

Nonetheless, it might happen that parties to the dispute do not provide the satisfactory amount and quality of evidence. In this case, the panel has to options: firstly, it may draw adverse interferences, i.e. determine that the information, if provided, would have been adverse to the interest of the State withholding; secondly, the panel may base its decision on the "best information available (BIA)" (i.e. the fact – finding is based on the available information) in cases when the Member failed to produce the requested information.[554]

The ***type of the evidence*** is not well defined, in neither general procedures nor in the anti-dumping procedures; for this reason, the factors to be verified are described under the single provisions of the Anti-dumping Agreement on which, in turn, implicitly depend the type and/or manner of the evidence to be provided. The proof typically consists of the text of the relevant measure, legislation or legal instrument that might be reinforced by the proof of practical application and interpretation of such laws and opinion of experts and writings of recognized scholars.[555] For instance, municipal law is treated as a "matter of evidence," a question of fact in WTO dispute settlement proceedings.[556] At the same time, domestic laws are not considered in isolation but with the case law, if it is relevant. In relation to that, panels are not prevented from weighing the jurisprudence of municipal courts" if it is "uncertain or divided."[557]

Economic data is by far the most important proof in an anti-dumping procedure since the injury- and the dumping margin calculation is based on economic calculations and estimations of the investigating authority. In disputes turning on assessment of economic data, the panels have been consistently searching and examining the relevance and the reliability of such information. In assessing such data, Member States have some margin of appreciation in determining the methodology for carrying out the examination of the relevant factors.[558]

Such an approach is supported by policy concerns, since the panel and the Appellate Body have no jurisdiction to interpret claims "as such". The general principle of law, the *jura novit curia* does not apply to the interpretation of domestic law by international adjudicating

[554] See more e.g. in MOORE, Michael O., *"Facts available" dumping allegations: when will foreign firms cooperate in antidumping petitions?*, Eu. J. of Political Economy, Vol. 21 (2005), p. 185 – 204
[555] US – Corrosion resistant carbon steel, para. 168
[556] The panel in the US – Section 301 Trade Act stated that in making factual findings concerning the meaning of provisions of a domestic law, it is not bound to accept the interpretation presented by the US. That said, any Member can reasonably expect that considerable deference be given to its views on the meaning of its own law. United States – Sections 301 – 310 of the Trade Act of 1974 (*US – Section 301 Act*), WT/DS152/R, 22 December, 1999, para. 7.19
[557] United States – Anti-dumping Act of 1916 (panel report), (US – 1916 Act), W T/DS136/R, 31 March 2000, para. 6.53
[558] United States – Anti-dumping measures on certain hot rolled steel products from Japan, (panel report) WT/DS184/R, 28 Feb. 2001, para. 7.190

bodies.[559] This holds true, not exclusively because of policy considerations, but for practical reasons as well. It is simply irrational to expect panelists to have sufficient expertise and knowledge on each of the laws that are under their scrutiny. Of course, this expertise argument allocates more power in the hands of the administrative agencies but does not create problems concerning the uniform construction of WTO law, since the interpretation of domestic law is (by definition) State-specific.

There is also room for expert witnesses[560] to testify before WTO panels in relation to the proof. The contribution of the experts can be important in different ways as well, since the panel and the Appellate Body have to review highly complex determinations relating to industrial products and they may need to understand a specific market and an industry. In these cases, the opinion of an expert can be crucial in the assistance of the panel to understand the industry and to overview whether the establishment of the fact was proper and the investigation was objective and unbiased.

Nonetheless, the ADA usually does not prescribe the manner and the evidence to be provided and leaves these issues – of course to the extent they are adequate – in the discretion of the administrative agencies.

As it was stated by the panel in the *EC – Bed linen* case, "international tribunals are generally free to admit and evaluate evidence of every kind, and to ascribe to it the weight that they see fit."[561] The absence of any rules governing the *admissibility* of the types of evidence stems from the historical diplomatic nature of WTO proceedings and it is based on the rationale that for diplomatic reasons, international tribunals are especially reluctant to reject anything offered by a sovereign. The requirement to introduce evidentiary rules is also diminished by the presumption that parties act in good faith.[562] However, as disputes are becoming more and more fact-intensive, it constitutes an increasing burden on both the panels and parties to address various evidences and consider their degree of credibility. The flexibility of panels in using a wide range and variety of evidence requires that they have responsibility to analyze critically the weight to be given to different forms of evidence.

[559] OESCH, Matthias, *Standards of review in WTO panel proceeding*, p. 172 in YERXA, Rufus, WILSON, Bruce, Key issues in WTO Dispute settlement. The first ten years, Cambridge Uni. Press, 2005
[560] US – Steel plate from Korea (panel report), WT/DS206/R, 28 June 2002, para. 7.13
[561] European Communities – Anti-dumping duties on cotton type bed linen from India, (panel report) WT/DS141/R, 30 October 2000, para. 6.34
[562] ANDERSSEN, Scott, *Administration of evidence in WTO dispute settlement proceedings*, p. 181 – 182 in YERXA, Rufus, WILSON, Bruce, Key issues in WTO Dispute settlement. The first ten years, Cambridge Uni. press, 2005

C.2. Burden of proof

In any proceeding, be it domestic or in particular international, the ***burden of proof*** raises multiple and complex issues of *facts.*[563] The meaning of the word is partially divergent depending on whether it is a concept used in common law or civil law legal systems.

In both of the aforementioned systems, the *substantive* or real sense of burden of proof means a "*burden of persuasion*" or *"risk of non- persuasion,"* which implies that a party to the dispute has the duty to persuade the fact-trier of the truth of certain propositions. In other words, it simply refers to the duty of the parties to prove their allegations,that is the facts have to be sufficient to prove matters of law. If the evidence submitted by the party is incomplete, the party upon which rests the burden of persuasion looses; hence, the "benefit of doubt" plays in favor of the opposing party.

In the common law, the burden of proof could be a *procedural* issue as well that arises from the division of work between the jury and the judge. Fundamentally, it establishes the burden on the complaining party to present sufficient evidence in order to justify the judge in leaving the case to the jury or – in case there is no jury – to allow to continue the hearing. For this reason, it is also called as "*duty of passing the judge*."[564] This obligation also corresponds to the duty of the complainant to present a *prima facie* case, i.e. to introduce enough evidence in order to convince the court that there is a case to examine and answer.

In both the common- and civil law systems, the notion burden of proof has the same, twofold scope. At first, it is limited to issues of facts and not to legal issues, since the court is deemed to know the law (*jura novit curia*) and does not need to be persuaded in legal questions. Secondly, the burden of proof does not shift and it remains on the party that bears it throughout the whole proceeding. This, however, does not mean that the burden of proof is static and it will always rest on the same party. Instead, the burden of persuasion is upon the party that alleges certain facts to prove its claim. The lack of success in presenting the sufficient evidence to prove the assertions of a party has negative consequences on that party.

The panel's and the AB's view is, however, that the burden of proof is "a *procedural* concept which speaks to the fair and orderly management and disposition of a dispute." [565] As a general rule, the panel first states that the complainant needs to present a *prima facie* case and prove the inconsistency of a challenged measure with the provision(s) of a covered agreement. Once it is made, the burden of proof shifts to the responding party. This mechanism is part of the control of the process by which the panel informs itself of the relevant facts of the dispute and the legal principles applicable to such facts.

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[563] QUICK, Reinhard, BLÜTHNER, Andreas, *Has the Appellate Body Erred? An appraisal and criticism of the ruling in the WTO Hormones case,* J. of Int'l. Ec. Law, Vol.2., No. 4., (Dec. 1999), p. 607

[564] PAUWELYN, Joost, *Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?,* J. of Int'l. Ec. Law, Vol.1. (1998), p. 229

[565] Thailand – H-beams (panel) , para. 4.50, Appellate Body Report, Canada - Measures Affecting the Export of Civilian Aircraft, WT/DS70/AB/R, adopted 20 August 1999, para. 198., Guatemala – Cement II, para. 6.396

At last, it has to be highlighted that the *determination* of who bears the burden of proof does not overlap with the evaluation whether the party *discharged* the burden of proof. It is because the duty to present evidence on a specific allegation does not always rest exclusively upon the claimant, since the defending party has the obligation to co-operate by providing evidence.

The burden of proof in an international procedure can be described as "the obligation of each of the parties to a dispute before an international tribunal to prove its claims to the satisfaction of, and in accordance with the rules acceptable to, the tribunal."[566] This vague definition is valid both for the pre-WTO and current WTO cases.

Under both areas, the claim is complainant driven, so there is no *ex officio* complaint in the GATT/ WTO. This, in turn, means that Member States are the "masters" of the dispute by presenting a complaint and delimiting the extent of the panel's examination according to the maxim of *non ultra petita:* panels cannot rule on claims other than those presented to them by the parties to the dispute.[567]

In general, panels recognized two basic rules in ***GATT 1947 cases***. The first is a kind of "good sense" rule on the *burden of production*, namely who bears the consequences to produce evidence. It stems from the maxim *actori incumbit probatio,* applied in general public international law, according to which the claiming party is required to present the evidence. As applied by GATT panels, it provides for the claimant to prove the violations it alleges. However, this rule had never been explicitly stated by any GATT 1947 panel and can be only deduced from the case law. According to the second rule that refers to the exceptions – so to Article XX of GATT 1947 (General Exceptions) – it is up to the defendant to convince the panel that the conditions set out in the provision are met.[568]

For instance, in the *US – Swedish steel hollow* case the panel stated that it "considered the arguments and information presented to it during the course of its proceedings by the United States in response to the claim by Sweden that the initiation of the subject investigation was not consistent with the Agreement."[569] Since the USA failed to provide sufficient evidence and data to sustain its position the panel dismissed the country's claim on the specific issue. Quoting the panel, "[t]here was […] no statistical evidence provided to the Panel in support of the claim that the request "on its face" supported the initiation of an investigation on behalf of the domestic industry."[570]

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[566] KAZAZI, Mojtaba, *Burden of Proof and Related Issues. A Study on Evidence Before International Tribunals* (1996), p. 180 -220, in PAUWELYN, Joost, Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?, J. of Int'l. Ec. Law, Vol.1. (1998), p. 231

[567] HORN, Henrik; MAVROIDIS, Petros C., *Burden of Proof in Environmental Disputes in the WTO: Legal Aspects*, European Energy and Environmental Law Review, April 2009, p. 113

[568] PAUWELYN, Joost, *Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?,* J. of Int'l. Ec. Law, Vol.1. (1998), p. 235 -236

[569] US – Swedish steel hollow, para. 5.13

[570] US – Swedish steel hollow, para. 5.14

The decisions of the ***WTO panels and Appellate Body*** confirmed the former GATT 1947 panels' practice. At first, in WTO panel proceedings the fundamental rule is that the complaining party shall prove the violation it alleges.

For instance, the principle that the claiming party is required to present the evidence, was affirmed in the *US – Wool shirts and blouses* (even though it was an ATC[571] case) in the following way: "[…] it is a generally accepted canon of evidence in civil law, common law and, in fact, most jurisdictions, that the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defense. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption." [572]

The panel in *Guatemala – Cement II* clearly stated that the principle, according to the burden of the proof lies with the party making the assertion "has been duly incorporated in the WTO dispute settlement mechanism."[573] It also added that the nature and the extent of the evidence required to satisfy the burden of proof varies from case to case.[574]

This rule was further clarified both by the panel and the Appellate Body in the *US – Carbon steel*. They stated that the burden of introducing the evidence lies with the party asserting the violation or the impairment of its benefits stemming from a relevant treaty obligation. However, the "WTO tribunals" are not required to expressly state which party bears the weight[575] of presenting the evidence and the consequences in case of failure. In addition, according to the case law, the panel is not required to make a separate and specific finding in each and every instance, whether the party met its burden of proof of a particular claim or rebutted a *prima facie* case.

It is also established rule that if the burden of proof of the party has been discharged, it is up to the other party to rebut the *prima facie* evidence. The rebuttal is possible by supplying "persuasive evidence,"[576] but the exact meaning of the word has not been clarified yet. If the proof remains in equipoise, the panel shall follow the interpretation that favors the party against which the claim has been made, considering that the claimant did not convincingly support its claim.[577]

Another interesting issue is the interface between this obligation and the provisions of ***Article 3.8 of the DSU*** stating that "in cases where there is an infringement of the obligations

[571] Agreement on Textiles and Clothing
[572] United States - Measures Affecting Imports of Woven Wool Shirts and Blouses from India (US – Wool Shirts and Blouses), p. 14, IV.
[573] Guatemala – Cement II, para. 6.20
[574] US – Corrosion resistant carbon steel, para. 168
[575] Thailand – H-beams, para. 133
[576] US – Anti-dumping Act of 1916, WT/DS136/AB/R, WT/DS162/AB/R, 28 August 2000, para. 97
[577] US – Anti-dumping Act of 1916 (panel report), WT/DS136/R, 31 March 2000, para. 6.58

assumed under a covered agreement, the action is considered *prima facie* to constitute a case of nullification or impairment. This means that there is normally a presumption that a breach of the rules has an adverse impact on other Members parties to that covered agreement, and in such cases, it shall be up to the Member against whom the complaint has been brought to rebut the charge." The afore mentioned article establishes a presumption that the breach of WTO rules constitutes a *prima facie* case of nullification and impairment, which in turn means that there is also a presumption that there is an infringement and that this has an adverse effect on Member States.[578]

For the sake of completeness, the second main rule – that refers to the exceptions – has to be mentioned. It states that the party invoking an exception or defense bears the burden to prove its assertions. This WTO-orientation has been confirmed in several panel and Appellate Body reports, such as in the *USA – Shirts and Blouses,* when the Appellate Body declared that "Articles XX and XI:(2)(c)(i) are limited exceptions from obligations under certain other provisions of the GATT 1994, not positive rules establishing obligations in themselves. They are in the nature of affirmative defenses. It is only reasonable that the burden of establishing such a defense should rest on the party asserting it."[579] The rule was further reinforced in the *USA – Gasoline* dispute, where the panel established in detail the factors to be proven by the defendant invoking an exception (Article XX (b) in the case). It stated that the party invoking an exception bears the burden of proof in demonstrating that the inconsistent measures came within its scope. This party has to establish the following elements:

> (1) that the *policy* in respect of the measures for which the provision was invoked fell within the range of policies designed to protect human, animal or plant life or health;
> (2) that the inconsistent measures for which the exception was being invoked were *necessary* to fulfill the policy objective; and
> (3) that the measures were applied in conformity with the requirements of the *introductory clause* of Article XX."[580]

The panel also added that in order to justify the application of Article XX (b), all the above elements had to be satisfied.

As far as trade control litigation – in particular anti-dumping – is concerned, the first rule has relevance in the resolution of these disputes. In the *Argentina – poultry* case, the panel affirmed the rule applied in general WTO disputes arising under the covered agreements that the *burden of proof rests with the party* – independently whether it is a complainant or respondent – *that asserts the affirmative of a particular claim or defence.* Consequently, the

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[578] More about the topic by DAVIES, Arwel, *The DSU Article 3.8 Presumption That An Infringement Constitutes A Prima Facie Case of Nullification or Impairment: When Does it Operate and Why?,* J. of Int'. Ec. Law, Vol.13., No.1 (March, 2010), p. 181 – 204

[579] United States – Measure affecting imports of woven wool shirts and blouses from India (*USA – Shirts and Blouses*), WT/DS33/AB/R, 15 April 1997, p. 16. IV.

[580] United States - Standards for Reformulated and Conventional Gasoline (*USA – Gasoline*), WT/DS2/R, 29 Jan. 1996, para. 6.20

complaining party must make a *prima facie* case of violation of the relevant provisions of the WTO agreements, which the respondent must refute.[581] This party bears the burden to demonstrate that the measure is inconsistent with the relevant provisions of the Anti-dumping Agreement and provide the proof thereof. At this point the notion of the *prima facie* case comes into play. In the absence of effective refutation by the other party, this presumption technique requires the panel to rule in favor of the party presenting a *prima facie* case.

At last, the panel reaffirmed the duty of both parties "to cooperate in the proceedings in order to assist [… the panel] in fulfilling [its] mandate, through the provision of relevant information."[582]

It is important to outline the role of the ***"prima facie" evidence*** that provides for the obligation of the complaining party to "substantiate" its case. To adopt this approach would incorporate the common law procedural obligation, the "duty of passing the judge." As it has been already said, it is a presumption technique that requires from the panel to decide in favor of the party presenting the *prima facie* case. It is used in the *evaluation* of the evidence, once the determination who bears the burden of proof has been made.

First of all, this criterion refers to the establishment of a *prima facie* case of dumping, injury and a causal link, but does not govern the threshold of sufficiency of the evidence submitted in order to initiate anti-dumping investigations.[583] This last is a lower standard of proof than that required for the determination of dumping. The sufficient evidence to establish a *prima facie* case is essentially the amount of evidence that would support a finding if proof to the contrary is not considered. [584]

The necessary element to establish a *prima facie* case does not only comprise the claim that a certain treaty obligation was not respected, but it also includes the necessity to prove that violation with facts, with *prima facie* evidence. In other words, although the violation of a WTO/ GATT obligation is a necessary but *per se* not sufficient element of constituting a *prima facie* case.[585] There is no automatism. Instead, at the earliest stage of the proceedings,

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[581] Argentina – Definitive anti-dumping duties on poultry from Brazil (*Argentina – Poultry*), WT/DS241/R, 22 April 2003, para. 7.50. The Appellate Body confirmed this view in *Thailand – H-beams*' para. 134: "In our view a panel is not required to make a separate and specific finding in each and every instance that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a prima facie case."

[582] Argentina – Poultry, para. 7.50

[583] During the Uruguay Round, Hong Kong and the Nordic countries aimed at clarifying the circumstances under which an anti-dumping investigation shall be initiated and to introduce a more definitive requirement of "evidence sufficient to establish a prima facie case". That the investigating authorities had a particular responsibility in the vetting of complaints was emphasized. This "more definitive requirement" was rejected during the negotiations, and the standard of the Tokyo Round was maintained basically intact.

[584] MTN.GNG/NG8/W/83/Add.5 (23 July 1990). Sufficient evidence to establish "a prima facie case" is essentially the amount of evidence that would support a finding if proof to the contrary is not considered. The standard of "sufficient evidence" in Article 5.3 establishes a lower threshold.

[585] E.g., in the *USA – URAA* case the panel report stated that "[t]he fact that Canada has made no claim under the DSU should be sufficient for the Panel to find that they have failed to make a *prima facie* case." United States – Section 129 (1)(c) of the Uruguay Round Agreements Act, WT/DS221/R, 25 July 2002, para. 3.86

the complaining party shall provide for the panel with the sufficient evidence to prove its argument. It is up to the complainant to present the *prima facie* evidence. This argumentation overlaps with Joost Pauwelyn's approach, according to which the *prima facie* argument refers to "a duty to provide 'evidence sufficient to raise a presumption that what is claimed is true,' rather than to establish a *prima facie* case."[586] This, in turn, means that the *prima facie* technique in his view is more related to the substantive law criteria on the burden of proof than to the procedural requirements (i.e. the "duty of passing the judge").

This methodology was followed by the Appellate Body in *Guatemala – Cement II,* when it faced the issue of the *prima facie* case. The Body stated that it is up to the complainant to prove that the AD Agreement was violated therefore the AB allocated the burden on the complaining party to establish *prima facie* that there is an inconsistency with a provision of the aforementioned Agreement. When the *prima facie* case is made, and at this point the AB invoked the *EC – Hormones* case, "the burden of proof moves to the defending party, which must in turn counter or refute the claimed inconsistency."[587] In sum, the mere *existence* of a violation or the impairment or nullification of the benefits stemming from a covered agreement do not automatically make a case, instead the claimant has to *prove* that a violation has indeed occurred and only this can constitute a prima *facie case*.

However, there is no uniform rule on the type and amount of evidence to be presented to the panel, since the nature and scope of proof required to establish a *prima facie* case necessarily vary from measure to measure, provision to provision, and case to case. It is certain, that as far as "as such" claims are concerned, one element of a *prima facie* case that a complainant must present with respect to a measure consists of evidence and arguments "sufficient to identify the challenged measure and its basic import"[588] so it seems to be necessary to provide the text of the legal instrument. The fact that the text of the statue is subject to multiple interpretations does not negatively affect the establishment of a *prima facie* case. [589]

The AB in the *US – Zeroing* dispute observed again that a *prima facie* case is one in which, the absence of effective refutation by the defending party, the panel is required to rule in favour of the complaining party presenting the *prima facie* case. Therefore, in determining whether in the concrete *casu* the European Communities established a *prima facie* case – i.e. that the zeroing methodology, as it relates to original investigations, is inconsistent, as such, with the ADA – the panel needed to examine the evidence and arguments that the European Communities submitted to the Panel in relation to this claim. The threshold of evidence and arguments submitted by the Communities must have been sufficient to identify (a) the challenged measure and its basic import; (b) the relevant WTO provision and obligation

[586] PAUWELYN, Joost, *Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?* J. of Int'l. Ec. Law, Vol.1. (1998), p. 246
[587] Guatemala - Cement II, para. 6.75, EC – Hormones, para. 98
[588] Mexico- Definitive Anti-dumping measures on beef and rice (*Mexico- Beef and rice*), WT/DS295/AB/R, 29 November 2005, para. 268 – 269
[589] US – Oil country tubular goods, para. 257

contained therein, and (c) explain the basis for the claimed inconsistency of the measure with that provision.[590]

The same definition of the prima facie case was provided by the panel in *Thailand – H – Beams,* and when the "World Trade Court" also called for Thailand to provide *effective refutation* against Poland's *prima facie* case.[591]

Concerning the consistency of the implementation proceedings according to Article 21.5 DSU, the Appellate Body in the *EC – Bed linen* case stated that it should not be given a "second chance" to the complainant that fails to establish a *prima facie* case because this way it would be treated more favorably than the complainant that did establish a *prima facie* case but failed to prevail before the original panel, with the result that the panel did not find the challenged measure inconsistent with WTO obligations.[592]

The interesting *prima facie* -related issue of the "objective and impartial investigating anti-dumping authority" was faced by the panel in the *US – DRAMS* dispute. According to the panel, Korea has failed to establish a *prima facie* case "that an objective and impartial investigating authority could not properly have found that the study did not 'reasonably reflect the costs associated with the production and sale' of DRAMS."[593]

At last, it is pivotal to underscore that (contrary to safeguard cases) a panel is not required to make a separate and specific finding, in each and every instance, that a party has met its burden of proof in respect of a particular claim, or that a party has rebutted a *prima facie* case.[594]

The logic of this presumption technique is understandable, however the problems, namely how and when to decide that the *prima facie* case has been established by the complainant and, as the case may be, that this *prima facie* case has been rebutted by the respondent, are still stay to be resolved. The risk is that "WTO tribunals" may use this methodology to *support* their findings and not as a tool to *reach* them. "Indeed, if the determination on who bears the burden of proof is, in practice, no longer made on the basis of the adage *actori incumbit probatio* (a fixed rule imposed on each trier of fact), but remains or shifts, rather, depending on whether or not a *prima facie* case has been established (a criterion, on the basis of the adjudicator's discretion to evaluate evidence, to decide upon the adjudicator), it could be easy […] to decide that the burden of proof rest on, or has shifted to, that party according to the panel and/or Appellate Body should lose."[595]

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[590] United States– Laws, regulations and methodology for calculating dumping margins (*US– Zeroing*), WT/DS294/AB/R, 18 April 2006, para. 217

[591] Thaliand – H-beams, WT/DS122/R, 28 September 2000 , para.7.49

[592] EC – Bed linen, para. 96

[593] United States – Anti-dumping duty on Dynamic Random Access Memory Semiconductors (DRAMS) of one megabit or above from Korea, (*US – DRAMS*), WT/DS99/R, 26 January 1999, para. 6.69

[594] Thailand – H-beams, para. 174

[595] PAUWELYN, Joost, *Evidence, Proof and Persuasion in WTO Dispute Settlement. Who Bears the Burden?* J. of Int'l. Ec. Law, Vol.1. (1998), p. 258

Finally, the *probative value of the evidence* shall be mentioned: it depends on the single case and varies from case to case. In the *US– Corrosion resistant carbon steel* sunset review the AB affirmed this approach and stated that "the significance and probative value of the two factors for a likelihood determination in a sunset review will necessarily vary from case to case." The Body also added that the degree of decrease of import volumes or dumping margins is crucial to determine the likelihood of recurrence or continuance of dumping and whether the historical data is recent or not may affect its probative value and trends in data over time may be significant for an assessment of likely future behavior.

D. "Objective and unbiased" evaluation of facts and the "reasoned and reasonable" and "adequate" standards

Once the appropriate and necessary amount of evidence was presented to the panel, it shall verify whether the investigating authorities at the time of the original proceedings had evaluated the facts before them in an objective and unbiased manner. The ***"unbiased and objective"*** standards are qualitative criteria that a national investigating authority shall fulfill and shall be verified by the panel or the Appellate Body. It covers something akin whether the authority was impartial, open-minded, balanced and equidistant in its evaluation of the factual record. Hence, the term refers to the administrative agencies' subjective intent that may be difficult to establish by the panels. It comprises the attitude of the investigating authorities to reach its findings "without favoring the interest of any interested party."[596] The meaning of this "objective decision maker standard" is dubious and it was not appropriately clarified by the WTO jurisprudence. What is certain is that these subjective criteria should be established through objective indicators.

As it was said, not much can be deduced from the case law, in particular because the panels and the Appellate Body did not apply the standard in a coherent and consistent manner: the "objective and unbiased" criteria has been employed in relation to various provisions of the ADA and – somehow confusingly – has been used as a synonym of a "reasoned and adequate" or "reasonable" standards.

Referring to the first issue, the AB's decisions in *Thailand – H-beams* can be remarkable. In the specific case, Thailand appealed the panel report since it retained that the panel did not conduct a deferential examination of the factual record before it. The Appellate Body dismissed Thailand's claim by recalling that Article 17.6 (i) of the ADA does not prevent the panel from examining whether the investigating authorities have complied with their substantive obligations as provided for by the ADA. In relation to Article 3.1 of the ADA,[597]

[596] US – Softwood lumber, para. 99

[597] Article 3.1 of the ADA refers to the injury determination and states that it "shall be based on positive evidence and involve an objective examination of both *(a)* the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and *(b)* the consequent impact of these imports on domestic producers of such products."

the Body stated as follows: "Article 17.6 (i) does *not* prevent a panel from examining whether a Member has complied with its obligations under Article 3.1. A panel – in evaluating whether a Member has complied with this obligation – must examine whether the injury determination was based on positive evidence, and whether the injury determination involved an objective evaluation. Thus, to the extent that the Panel examined the facts in assessing whether Thailand's injury determination was consistent with Article 3.1, we are of the view that the Panel correctly conducted its examination consistently with the applicable standard of review under Article 17.6 (i) of the Anti-Dumping Agreement."[598]

The language of the Body does not indicate any differences in a panel's mandate under Article 11 of the DSU compared with that under Article 17.6 (i) in relation to Article 3 of the Anti-dumping Agreement.

With regard to the second argument (the "reasonable" standard), the panel in *US – Hot Rolled Steel* underlined these difficulties by using interchangeably the "unbiased and objective" and the "reasoned and reasonable" standards. The question that the panel faced in relation to the standard of review was weather the investigating authorities failed to conduct an *objective and unbiased evaluation* of the facts. Then the panel upheld the USITC's (United States International Trade Commission) injury determinations on the basis that it provided a *reasoned and reasonable explanation* of its evaluation of the facts. Although it might have been preferable to include other factors, this lack is not sufficient in and of itself to conclude that the investigating authority failed to evaluate all relevant factors objectively and in an unbiased manner.[599]

They might seem to be similar at first sight, but the "reasonable standard" does not overlap with the "non reasonable standard" since the latter constitutes a lower threshold and does not necessarily answer the question whether the findings of the national anti-dumping authority have been based on positive evidence.[600]

Moreover, the panel in the *US – Corrosion resistant steel* sunset review case[601] – instead of the "unbiased and objective" criteria – applied the *reasonableness* standard in relation to the sufficiency of the relevant factual basis. In another sunset review, in the *US – Oil country tubular goods*, the Appellate Body stated that: "if the panel is satisfied that an investigating authority's determination on continuation or recurrence of dumping or injury rests upon a sufficient factual basis to allow it to draw *reasoned and adequate* conclusions, it should conclude that the determination at issue is not inconsistent with Article 11.3 of the Anti-Dumping Agreement."[602]

[598] Thailand – H-beams, para. 137
[599] US – Hot Rolled Steel, Panel report, WT/DS184/R, 28 February 2001, para. 7.235
[600] US – Softwood lumber, para. 113
[601] United States – Sunset review of anti-dumping duties on corrosion resistant carbon steel flat products from Japan (*US – Corrosion resistant steel*), WT/DS244/AB/R, 15 Dec. 2003, para. 206
[602] US – Oil country tubular goods, para. 322

The panel's mandate may have been the most precisely described by the Appellate Body in *the US – Softwood lumber*[603] that laid down the ***"reasoned and adequate" standard***.[604]According to this threshold, panels must examine whether in the light of the evidence on the record, the conclusions reached by the investigating authority are reasoned and adequate. The adequacy criterion curbs any leeway that the national administrative agencies might have under the WTO agreement. What is considered to be adequate can be ascertained only on a case-by-case basis since this terminology depends on the circumstances of the single case. However, some general considerations have been drawn by the AB that recalled the criteria suggested by the AB in *US – Lamb*.

According to the Appellate Body, the panel's scrutiny should focus on the following elements:

a.) whether the *reasoning* of the authority is coherent and internally consistent;
b.) whether the *explanations* given disclose how the investigating authority treated the facts and evidence in the record and whether there was positive evidence before it to *support the inferences* made and *conclusions* reached by it;
c.) whether the explanations demonstrate that the investigating authorities had taken properly account the *complexities* of the data before it and it explained why it rejected or discounted alternative explanations; at last
d.) panels must also be *open to* the possibility that the explanation given by the domestic authorities is not reasoned and adequate in the light of other *alternative explanations*.

To sum up, the Appellate Body requires the panels to thoroughly examine the national investigative authorities' explanations of how the "raw evidence" supports their overall factual conclusions. This comes close to the *de novo review* and it can be said that the degree of deference manifested towards domestic determinations has been generally small, although panels have refrained from substituting their own evaluations of facts with those of the national investigating authorities.[605]

In the *Mexico – HFCS* the Appellate Body's benchmark in relation to the injury determination was that the investigating authority provides *"reasoned explanation"* and sufficient evidence

[603] United States – Investigation of the International Trade Commission in Softwood Lumber from Canada. Recourse to Article 21.5 of the DSU by Canada (*US – Softwood lumber)*, WT/DS277/AB/RW, 13 April 2006, para. 93

[604] The "reasoned and adequate" test is a safeguard standard as well. However, the adequacy of the explanation required by national investigating authorities cannot be found in the Safeguard Agreement. Theoretically, the adequate criterion is the element of the standard of review that determines the subjective leeway granted to domestic agencies. On the other hand, the "reasoned and adequate" test is a necessary condition to be in compliance with the provisions of the above mentioned agreement. It seems that – similarly to anti – dumping cases – this standard is based on the adequacy of the explanations and the sufficiency of the factual determinations. The same test is used in countervailing duty cases too and it is based upon the definition of "subsidy" under Article 1 of the SCM Agreement.

[605] OESCH, Matthias, *Standards of Review in WTO Panel Proceedings,* in Wilson, Bruce, Yerxa, Rufus H., Key issues in WTO dispute settlement: the first ten years, Cambridge Uni. Press, 2005, p. 170

for the causes of decline in the domestic industry's performance.[606] The domestic agencies' analysis has to be "meaningful" in relation to the occurrence of injury-factors and they have to examine "whether all listed and other relevant factors were evaluated and […] whether the evaluation of each factor by the investigating authorities was adequate."[607]

The "reasoned and adequate" standard forms part of the starting point of the panel's analysis whether the domestic agencies' determination of facts is acceptable for the purposes of the WTO proceeding. The same standard also calls for testing "the relationship between the evidence on which the authority relied in drawing specific interferences, and the *coherence of its reasoning*."[608] This, in turn, requires panels to examine whether the investigating authorities have sufficiently taken into account conflicting evidence and considered the possible explanations drawn from that evidence.

The task of the panels is then to overview of the objective assessment of the matter before them, however, this objectivity also includes that the anti-dumping authority shall be ***unbiased***. The two terms are almost identical: while the meaning of the word "objective" is that the person is not influenced by his/her own feelings in making the decision or judgment, the term "unbiased" implies the ability to make a fair judgment, in particular because the person is not influenced by his/her own or other people's opinion. To the contrary of the criteria of "objectivity," the term "unbiased" refers to the state of mind, hence it is a subjective definition that cannot be easily and directly controlled. Unbiased means that national authorities shall reach their findings "without favoring the interest of any interested party, group of parties, in the investigation."[609]

Therefore, Article 17.6 (i) of the ADA establishes a double-standard in the overview of factual findings of administrative agencies. The second arm of Article 17.6 of the Anti-dumping Agreement, namely the "unbiased and objective" criteria, refers to the *evaluation* of the facts and not the *establishment* of them. The establishment of facts is hallmarked by the "proper" fact-gathering, which is a more stringent standard than the first one. There is no explicit requirement of proper evaluation of the facts that, in conclusion, could result in considerably less stringent panel review than is required by policy considerations and observed in the precedent GATT 1947 panel practice. The second arm has a particular importance, since it provides for the panels with so called "*marginal scrutiny*,"[610] that is not to overturn the evaluation if it was unbiased and objective. This provision is explicitly conditional since it requires fairly and thoroughly conducted investigations and fair evaluation of the facts. In other words, it is only if the facts are "proper," "objective," and "unbiased" the obligation of the panels to defer comes into play.

[606] Mexico – HFCS, para. 99
[607] Mexico – HFCS, para. 112
[608] US – Softwood lumber, para 97
[609] US – Softwood lumber, para. 97
[610] BOURGEOIS, J.G.H., *WTO Dispute Settlement in the Field of Antidumping Law*, J. of Int'l. Ec. Law, Vol.1. (1998), p. 273

This suggests that the complainant needs to prove that the national anti-dumping authority's evaluation was not "unbiased and objective," therefore flawed by "bias, subjectivity or partiality." In order to prove bias, the complaining party is called upon to demonstrate that the administrative agency's opinion was not impartial because its evaluation of facts was influenced by an external (e.g. lobbyist pressures) or internal opinion (e.g. own prejudice). Since this is a heavy burden, the standard applied by the panels can be a loose one. According to this interpretation, even though incompetent or flawed another way, the decision of the investigating authorities has to be upheld if it has not been proven to be biased or subjective.[611]

This, however, does not seem to be the case followed by the panel and the Appellate Body, whose overview is nearer to the *de novo* than to a deferential type. Even though they do not have the same freedom in the fact-finding process like in general WTO cases, panels found the ways to make substantive reviews. This is so despite the fact that panels cannot overturn the domestic authorities' decisions "if the process by which the domestic authorities established the facts is consistent with the AD Agreement, and the authorities assessed all of the evidence in the record [….] if it is supported by a factual basis in the record."[612]

The language of the factual standard of review is not without ambiguities, especially because it contains some escape language. For this reason, panels – following a more pragmatic approach – could easily read and apply the provisions of Article 17.6 (i) of the ADA in a manner that they manifest less deference towards the decisions of domestic bodies and consequently favor less the protectionist interest of the domestic industry. Another, less pragmatic interpretation, suggested by Vermulst and Waer,[613] could be that "panels may well find "bias and subjectivity" inherent in any unconvincing evaluation of the facts which *de facto* result in favoring the importing country's domestic industries." Moreover, both of the terms "unbiased" and "objective" reinforce the idea that a panel shall undertake an active review.[614]

This second reading is to be sustained, since it aims at avoiding the approval of unacceptable factual conclusions thereby it does not permit to the national anti-dumping authority to draw protectionist conclusions. Only through a wider interpretation of these provision is it possible not to legitimizing through the judicial review protectionist aspirations. Otherwise, the strict interpretation of Article 17.6 (i) would prevent the panel to properly exercise its functions and would make the judicial review of anti-dumping decisions meaningless. A standard similar to the GATT 1947 panels' reasonableness standard "may be 'couched' within the requirements

[611] BOURGEOIS, J.G.H., *WTO Dispute Settlement in the Field of Antidumping Law*, J. of Int'l. Ec. Law, Vol.1. (1998), p. 300

[612] US – DRAMS, para. 4.53

[613] WAER Paul, VERMULST Edwin, *EC Anti-dumping Law and Practice after the Uruguay Round. A New Lease of Life?*, J. of World Trade, Vol. 28, No.2. (April, 1994), p. 9

[614] DURLING, James P., *Deference but Only When Due: WTO Review of Anti-dumping Measures*, J. of In'tl. Ec. Law, Vol. 6, No.1 (2003), p. 142. This is because there is a double standard in anti-dumping cases referring to factual findings: one provided by Article 11 of the DSU and the other by Article 17.6 (i) of the ADA. Both call for an "objective assessment" of the fact. See more under point F.)

of bias and subjectivity."[615] In fact, several scholars and AB decisions[616] have argued that the special standard of review fundamentally codifies the GATT 47 panels' practice concerning the standard of review of facts (so that the deference to national authorities' fact-finding under the earlier Tokyo Round Anti-dumping Code). If this was the case, this argument would be against a highly deferential review of both the establishment and the evaluation of the facts.

Although panels are required to follow an intermediate standard of review, their scrutiny towards factual determinations is quite intrusive and it is nearer to a *de novo* style review in disputes arising from the covered agreements than to a deferential treatment. However, in anti-dumping disputes panels refrained from substituting their own evaluation of facts with those of the national authorities'. This is due to the fact that the degree of deference is supposed to be much higher in anti-dumping litigation because it touches trade policy discretion. Notwithstanding, there is no uniform opinion on whether the application of the legal standard of review was appropriate, i.e. deferential or too intrusive in the control of fact-finding in anti-dumping proceedings.

The panels and the Appellate Body must carry out a *formal* review through the verification of the appropriateness of the original investigative procedure in the light of the requirements pursuant to Article 17.6 of the ADA. This mechanical limit in the panels' overview might be capable to order the "WTO tribunals" to uphold the anti-dumping authorities' flawed decisions. Therefore, it is corollary to take an advantage from the possibility to invoke the opportunities under Article 11 of the DSU, that (although still in an intermediate review-style) entitles panels to carry out a deeper, more intrusive factual review and shifts the standard of review towards the spectrum of the complete review. In other words, apparently the categorization of the factual standard of review has not been altered but internal changes have occurred, that made panels' scrutiny more intense in relation to the establishment of the facts.

The panels' review is therefore close to a *de novo* review; however the panel – even though it might have preferred another conclusion – refrained from reversing the domestic agencies' determinations, as long as the Member State's conclusions were "reasonable."

VII.5.2. Assessment of facts in sunset reviews

According to Article 11.3 of the Anti-dumping Agreement, any definitive anti-dumping duty shall be terminated not later than five years after its imposition unless the authorities determine, in the framework of a review initiated before that date (in the WTO jargon called "sunset review" or "expiry review") that the expiry of the duty would be likely to lead to the continuation or recurrence of dumping and injury.

The sunset review comprises both *investigatory* and *adjudicatory* aspects. Like in the original ***investigations,*** the administrative agencies are obliged to seek out relevant information and to

[615] OESCH, Matthias, *Standards of Review in WTO Dispute Resolution*, Oxford University Press, (2003), p.92
[616] For instance, US – DRAMS, para. 4.54

evaluate it in an objective manner. The authorities cannot simply assume the existence of the likelihood of dumping and injury, but they must be determined via *positive evidence*. This, of course, puts a burden on interested parties to produce the proof, since they are the primary source of information. For instance, a company specific data relevant to the likelihood determination in expiry reviews can be often provided only by the companies themselves.[617]

The term ***positive evidence*** relates to the quality of the evidence that authorities may rely upon in making their determinations. It shall have objective qualities similar to original anti-dumping and general WTO proceedings, therefore it must be of affirmative, objective and verifiable character and it must be credible. The conclusions of the authorities must be based on evidence that has these characteristics.

Similar to original ***determinations***, the review must be conducted with an appropriate degree of diligence and anti-dumping authorities must arrive at a *reasoned conclusion* on the basis of the information gathered during the process of *reconsideration and examination.*[618] The information and the data collected by the investigating authority shall constitute a *sufficient factual basis* to allow to be reasonably drawn the conclusions concerning the likelihood of such continuation and recurrence.[619] However, the evidence shall be looked in a different context than in original proceedings because sunset reviews are "prospective in nature and they involve a forward-looking analysis."[620] Such an analysis inevitably may entail assumptions about projections into the future and as a consequence, the inferences drawn from the evidence to a certain extent will be *speculative*. However, this does not suggest that these interferences are not based on positive evidence but merely expresses the ever-existing degree of uncertainty of likelihood determinations.

Another important issue to be pinpointed is that the injury likelihood determination is different in expiry reviews than in original investigations, not just because of the particularity of the establishment of the possibility of occurrence of dumping and injury, but also because of the rules on the *injury determination*. The Appellate Body in the *US – Oil country tubular goods* sunset review clarified the establishment of the injury likelihood. Firstly, it started with that the *definition* of injury according to footnote 9 to Article 3 of the Anti-dumping Agreement is applicable through the whole agreement, hence the investigating authorities shall evaluate the continuation or recurrence of injury according to the substantive criteria laid down under that footnote. In a different vein, the *determination* of the injury recurrence is not governed by Article 3 as in original investigations but by Article 11.3 of the Anti-dumping Agreement. The Body also added that "in a sunset review determination, an investigating authority is never required to examine any of the factors listed under Article 3. "Certain analyses mandated by this article and necessarily relevant in an original investigation may

[617] US – Corrosion resistant carbon steel (sunset review), para. 199
[618] US– Corrosion resistant carbon steel (sunset review), para. 104, US- Oil country tubular goods (sunset review), para. 179
[619] US– Corrosion resistant carbon steel (sunset review), para. 206, US– Oil country tubular goods (sunset review), para. 321
[620] US – Oil country tubular goods (sunset review), para. 341

prove to be probative, or possibly even required, in order for an investigating authority in a sunset review to arrive at a "reasoned conclusion". In this respect, […the AB was] of the view that the fundamental requirement of Article 3.1 that an injury determination be based on "positive evidence" and an "objective examination" would be equally relevant to likelihood determinations under Article 11.3."[621] The Appellate Body also stated that the relevant factors to be taken into account in injury determinations, such as e.g. the conditions of competition, may be pertinent to different extents and investigating authorities may consider other factors when making a likelihood-of-injury determination. It does not change the requirement, that a likelihood of injury determination shall rest on a "sufficient factual basis" that allows the agency to draw "reasoned and adequate conclusions."[622]

In relation to the ***overview of the sunset reviews*** by the panel or by the Appellate Body, the "WTO tribunals'" task consists of assessing whether the investigating authorities properly established the facts and evaluated them in an objective and unbiased manner. Hence, the standard of review to be applied is the same like in original cases and – by the same token – also the degree of deference manifested towards sunset determinations is theoretically equivalent to that applied in original proceedings.

VII.5.3. Interplay between standards of review in WTO legal text and Article 17.6 (i) of the ADA

In the overview of anti-dumping decisions not just the previously mentioned articles come into play, but also other provisions of the ADA and the Dispute Settlement Understanding shall be taken into account by the panels and Appellate Body in considering anti-dumping determinations. The interconnection between Article 17.6 (i) and various provisions of the Anti-dumping Agreement and the DSU make the factual standard of review increasingly *complex.*

It is corollary to highlight the special relationship between the ADA and the DSU. In relation to the issue, the key provision is ***Article 1.2. of the DSU*** that states that the rules and procedures of the Understanding shall apply subject to special and additional rules identified in Appendix 2 of the DSU. Article 17.6 of the ADA is considered under these provisions as one of the "special and additional rules and procedures" that shall prevail over the provisions of the DSU. This is in coherence with the general principles of interpretation of law – namely with the maxim *lex specialis derogat legis generalis*. Nonetheless, the Appellate Body in *Guatemala – Cement I* declared that there is no significant difference between Article 1.2. of the DSU and Article 17.6 (i) of the ADA and surprisingly (rather than applying the general principle of law *lex specialis derogat legis generalis*) it came to the conclusion that they *complement* each other. It stated that the two sets of norms shall be applied together to the extent there is no *difference* between them. [623] Thus, if there is no conflict between Article 11

[621] US – Oil country tubular goods (sunset review), para. 284
[622] US – Oil country tubular goods (sunset review), para. 280 – 284
[623] Guatemala – Cement I, para. 65

of the DSU and Article 17.6. of the ADA (identified as one of the "special and additional rules and procedures" in Article 1.2. and Appendix 2 of the DSU) they operate together and only in cases when there is conflict between them will special rules prevail.

Clearly, the Appellate Body had no intention to replace the general rules of the DSU with those valid in anti-dumping cases, because like this it would have denied the integrated nature of the WTO Dispute Settlement System.

Another important provision to take into account is ***Article 11 of the DSU***, even though it has been drafted with quite broad terms. Its wording is similar to that of Article 16 of the 1979 Understanding which indicates continuity with the past GATT 1947 panel practice. It can be said, that Article 11 does not contain a new or modified standard of review but merely expresses the notion of the standard of review as developed by the pre-WTO panels.[624]

Contrary to that of the Anti-dumping Agreement, this standard is not explicit and it has been judged as a *general standard of review* only by the WTO jurisprudence.[625] The Article partially reads as follows: "[…] a panel should make an *objective assessment of the matter* before it, including an objective assessment of the facts of the case and the applicability of and the conformity with the relevant covered agreements […]." The objective assessment of the matter implies both the objective assessment of the facts and the applicability and conformity with the relevant covered agreements. Undoubtedly, it *does not promote much judicial restraint*, as Article 17.6 of the ADA, that was designed to preclude *de novo* review. For this reason, Article 11 panels are not obliged by law to defer to the fact-finding (and legal interpretation) of national authorities. In Mavroidis view, the rationale of this is that "[a]fter all, a court's role is to look for the truth (its truth, of course). The pleadings by the parties circumscribe the dispute; they should not be understood as frontiers of truth."[626]

Article 11 does not really signify any particular degree of deference or intrusion by panels to adapt in examining measures. Nonetheless, as applied by the "World Trade Court," it calls panels or the Appellate Body neither for a total deferential, nor for a *de novo* review of national decisions.[627] In order to obtain this restraint, other grounds that simple reference to this Article shall be put forward. Basically, it can be said that the factual findings of the national authorities shall be respected to a certain extent (this deferential standard benchmark

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[624] HORLICK, Gary, CLARKE, Peggy A., *Standards for Panels Reviewing Anti-dumping Determinations under the GATT and WTO*, PETERSMANN, Ernst- Ulrich, International trade law and the GATT/WTO dispute settlement system, Kluwer Law Int'l., Vol.11., (1991), p. 317

[625] This is important to underscore, since in trade remedy – and SPS (Sanitary and Phyto-sanitary) cases the standard referred was the "all relevant factors" and "reasoned and adequate explanation" test, however in other cases the objective assessment of the facts required by Article 11 of the DSU was the threshold criteria.

[626] MAVROIDIS, Petros C., *Amicus Curiae Briefs before the WTO: Much Ado About Nothing*, Act three, Jean Monnet Centre for International and Regional Economic Law & Justice, published in the Festschrift für Claus-Dieter Ehlermann, eds. VON BOGDANDY, Armin, MAVROIDIS, Petros C., MENY Yves, Kluwer (2002), available in: http://centers.law.nyu.edu/jeanmonnet/papers/01/010201-03.html

[627] EC – Hormones, para. 117

however is not well agreed) but the panel and the Appellate Body are not bounded by the legal interpretation of the Member State.

Both of the above articles call for a treatment of domestic decisions somewhere in between the total deference and the *de novo* review. However, the level of deference manifested is different in disputes arising under a covered agreement and in anti-dumping litigation, since Article 11 of the DSU permits more intrusiveness to panels than Article 17.6 of the ADA: while panels generally are free to conduct a quasi *de novo* review (in particular as far as the fact-finding is concerned and (apart from anti-dumping cases) the Appellate Body's review of questions of law is free of deferential constraints), anti-dumping panels neither have the freedom to conduct a fresh investigation, nor are entitled to substitute their own judgment with that of the national authority.

The article was first discovered in the *EC – Hormones* dispute and – although it is not a trade remedy case – it has been referred several times afterwards in anti-dumping decisions. It was declared that Article 11 of the DSU is considered as a general standard of review, applicable to disputes arising from all the covered agreements. The Appellate Body in the above case argued that "Article 11 of the DSU bears directly on this matter and, in effect, articulates with great succinctness but with sufficient clarity the appropriate standard of review for panels in respect of both the ascertainment of facts and the legal characterization of such facts under the relevant agreements."[628]

Nonetheless, Article 11 of the DSU is quite a broadly drafted provision and it does not indicate specifically what panels are expected to do by way of review. It seems that that the article adopts a "one-size-fits-all" approach to standard review: every question concerning the standard of review is to be answered by resort to the notion of the "objective assessment." In other words, this means that the general standard of the "objective assessment" shall work together with a more detailed, underlying standard of review.[629] As a result, the standard of review is getting increasingly complex and more and more *agreement- specific*, which means that Article 11 must be read in the context of the underlying obligations provided by the relevant WTO Agreement.

The generality of the standard of review under Article 11 of the DSU causes uncertainty and controversy since it does not detail the *degree of intrusion* of the panels. It is also crucial to make distinction between various types of factual reviews: the panel's level of scrutiny is

[628] EC – Hormones, para. 116

[629] EHLERMANN, Claus – Dieter, LOCKHART Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7., No.3., (2004) p. 495. For instance, if we take two different standards of review and one requires the authority's decision to be reasonable, the other to be correct, under both standards the panel could perform an "objective assessment" of the matter – only the degree of deference would be different in the examples. Moreover, in the *Korea – Anti-dumping duties on imports of certain paper from Indonesia* (case pursuant to Article 21.5 of the DSU, so that in an implementation proceeding, that is not separated from the original proceeding according to the AB in Mexico - HFCS), the panel stated that the relevant standard of review to apply is established by Article 11 of the DSU taken together with Article 17.6 of the ADA (para. 6.3), WT/DS312/RW, 28 September 2007

different in TDI cases, when it reviews the domestic agency's decision on the basis of a *formal investigation,* from cases where it reviews a contested measure without the facts having been established through this type of formal process.[630]

The meaning of the requirement of "objective assessment" was clarified by the panel in the *US – Underwear* case. It declared that the total deference to national agencies' decisions could not ensure the "objective assessment" of the case as foreseen by Article 11 of the DSU. According to the panel, an objective assessment would entail an enquiry of (1) whether the administrative agency had examined all relevant facts before it; (2) whether adequate explanation had been provided of how the facts as a whole supported the determination made; and consequently (3) whether the determination made was consistent with the international obligations of Member State.[631]

The matter to be assessed objectively might be *legal or factual* and it includes an obligation of the panel to take into account the proof provided by the interested parties and a duty for the Appellate Body to consider the evidence presented to the panel and to make factual findings on the basis of that proof. However, in anti-dumping cases, both the panel and the investigating authorities have different roles compared to other disputes arising under the covered agreement: while investigating authorities are in charge of making factual determinations referring to the occurrence of dumping, injury and causal link between them, the panels simply review the establishment and evaluation of the facts. For that purpose, Article 17.6 (i) of the Anti-dumping Agreement requires the panels and the AB to make an "assessment of the facts." The language of this phrase reflects closely the obligation imposed on panels under Article 11 of the DSU to make an "*objective assessment* of the *facts*."[632]

Thus, the text of both provisions requires panels to "assess" the facts and this necessitates an *active review or examination of the pertinent facts*. Article 17.6 (i) of the Anti-Dumping Agreement does not expressly state that panels are obliged to make an assessment of the facts which is "objective." However, it is inconceivable that this Article should require anything other than panels make an objective assessment of the facts of the matter. The Appellate Body in *US – Hot Rolled Steel* declared that "[u]nder Article 17.6 (i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the facts. To that end, Article 17.6 (i) requires panels to make an "*assessment* of the *facts* […]". Moreover, Article 11 of the DSU calls for the panels to an "objective assessment" of the matter before them. Thus "the text of both provisions requires panels to "assess" the facts and this […] clearly necessitates an active review or examination of the pertinent facts."[633] Basically, the AB stated that although Article 17.6 (i) of the ADA does not require the

[630] BECROFT, Ross, *The Standard of Review Strikes Back: The US – Korea DRAMS Appeal*, Journal of Int'l. Ec. Law, Vol.9., No.1. (Jan.,2006), p. 208

[631] United States – Restrictions on imports of cotton and man – made fibre underwear (panel report), (*US – Underwear*) WT/DS24/R, 8 November 1996, para. 7.13

[632] The ordinary meaning of "objective" suggests a high threshold for appellate review of panels' factual findings.

[633] US – Hot Rolled Steel, para. 55

objective assessment of the facts but it is inconceivable that this provision should require anything other than an objective assessment of the facts of the matter. In this respect, the Appellate Body saw *no conflict between Article 17.6 (i) of the ADA and Article 11 of the DSU.*[634]

The discretion of the panels that they enjoy under the provisions of Article 11 of the DSU is equally relevant to cases arising under Article 17.6 (i) of the Anti-dumping Agreement, hence panels dispose of a certain degree of manoeuvre under the factual standard of review. This does not mean the same level of leeway for panels as they dispose of in general cases under a covered agreement. However, they dispose of a certain degree of freedom in e.g. the admission of proof in the proceedings.

Notwithstanding the similarities, the deference to be manifested by the panel and the Appellate Body towards national determinations and consequently the activity of these WTO bodies is quite divergent. The appropriate standard of review of facts under Article 11 of the DSU is fundamentally a *de novo* review and the review of legal questions is somewhere in the spectrum between the *de novo* review and total deference. Under Article 17.6 (i) of the ADA, panels are precluded from reviewing facts not present in the original record and are required to make a more procedural and less substantive overview of the original proceedings. All of these indicate that – contrary to Article 17.6 of the ADA that was drafted to exclude a *de novo* review – Article 11 does not limit the authority of panels comprehensively examine the national measures.

Consequently, in the WTO legal system there are two standards of reviews anti-dumping cases concerned: the deferential special standard of review provided by the Anti-dumping Agreement and the less deferential standard in the DSU that is generally applicable to all other agreements.[635]

Several rules of the Anti-dumping Agreement have relevance in relation to the special standard of review. In particular, ***Article 5.3*** comes into play: it obliges the authorities to examine the "accuracy and adequacy of the evidence" provided in the application to determine whether there is "sufficient evidence to justify the initiation of an investigation."

In addition, ***Article 3.1*** shall be considered. The provision places obligations on WTO Members and requires that the determination of injury shall be "based on positive evidence and involve an objective examination" of certain factors listed in the Agreement. These duties

[634] US – Hot rolled steel, para. 55, EC – Bed linen, para. 163 – 164. Because of this reason, certain scholars, such as Guzman, affirm that Article 11 of the DSU is not a standard of overview but it merely provides for the application of the requirement of objectivity. Guzman further argues that this article simply calls for objectivity that is not enough to resolve the disputes. In GUZMAN, Andrew T., *Determining the Appropriate Standard of Review in WTO Disputes*, Cornell Int'l. Law J., Vol. 42, (2009), p. 50 -51

[635] According to Oesch, in practice, "the different drafting of the two provisions has not yet resulted in different standards of review of the factual conclusions drawn from the "raw" evidence." in OESCH, Matthias, *Standards of Review in WTO Dispute Resolution*, Oxford University Press, (2003), p. 145

apply to *all* injury determinations undertaken by Members. According to the jurisprudence, this requirement shall be read together with Article 17.6 (i) of the ADA to permit the examination of only those documents that were available to the interested parties in the course of the investigation and at the time of the final determination.[636]

The inter-connection between Articles 17.5[637] -17.6 and 3.1 of the ADA were well explained by the Appellate Body in the *Thailand – H-beams* case. In the Body's view, the first two provisions clarify the powers of review of a panel established under the ADA and they place limited obligations on a panel with respect to the review of the establishment and evaluation of facts by the investigating authority. Consequently, the addressee of these provisions is not the WTO Member State (as in the case of Article 3.1. of the ADA), but the "World Trade Court." For this reason, the obligations under Articles 17.5 and 17.6 are distinct from those in Article 3.1.[638]

The interplay between different provisions and Article 17.6 (i) of the ADA is important since they contribute to the clarification of the meaning and content of the special standard of review and thereby they give more predictability to the domestic administrative authorities. Nonetheless, these inter-connections have made the special standard of review more complex. In particular, the wider discretionary powers of the panels, according to the general standard of review under Article 11 of the DSU cause less predictability for Member States that is attributable to the less deferential handling of factual conclusions under this provision compared to, more deferential standard of review pursuant to Article 17.6 (i) of the ADA. At the end of the dispute the two are mixed up and the "World Trade Court's" intrusiveness starts to depend on the characteristics of every single case.

VII.5.4. Internal deference with regard to the facts – the relations between the panel and the Appellate Body in appeals

It is worth noting that in anti-dumping cases there exists not only the ***external standard of review*** (so that the review of national agencies' determinations) but also another, ***internal standard of review*** that refers to the deferential treatment of the panel reports by the Appellate Body. Needless to say, that the internal deference has relevance exclusively in relation to the panel and the AB in cases of appeal.[639]

The right to appeal to the Appellate Body is perhaps the most important aspect of the juridification of the WTO dispute settlement and its establishment heralded an unprecedented

[636] STEGER, Debra P., *Appellate Body Jurisprudence Relating Trade Remedies*, J. of W. Trade, Vol. 35, No. 1 (2001), p. 817
[637] See more in Chapter VII.5.1. A
[638] Thailand – H-beams, para. 114
[639] For a general overview of the process of appeal see SACERDOTI, Giorgio, *Appeal and Judicial Review in International Arbitration and Adjudication: The Case of the WTO Appellate Review*, p. 270 – 280 in PETERSMANN, Ernst – Ulrich, International trade law and the GATT/WTO disputes settlement system. Kluwer law, (1997)

development in the evolution of international organizations. The Body hears appeals from panel cases. In accordance with Article 17.6 of the DSU, parties to the original dispute – not third parties – may appeal on issues pertaining to law and legal interpretations developed by the panel. The appeal can exclusively refer to questions of law because it is up to the panels to be the triers of facts – the panel "determines the credibility and the weight properly to be ascribed to a given piece of evidence"[640] and it is part of the fact-finding process, in the discretion of the panel. The only provision that explicitly speaks of facts is Article 11, which requires the panel to conduct an *"objective assessment"* of the facts. The "objective assessment of the facts" concerns both the issue of legal interpretation and the *application* of the interpretation of a provision to the relevant facts. Accordingly, the consistency or inconsistency of the facts with a given treaty provision is a legal characterization of the issue, hence this way the Appellate Body can have a look at the facts. The issue at hand, whether the panel had made an objective assessment of the facts under Article 11 of the DSU, is a legal one as a result the Body is entitled to review the fact-finding process of the panel.

Thus far, the Body has taken an extremely limited view of this power. In *US – Wheat gluten* it stated that "a panel's appreciation of the evidence falls, in principle, "within the scope of the panel's discretion as the trier of facts."[641] The Body then went further and recalled a tone, similar to the provisions of the special standard of review in a following way: "In assessing the panel's appreciation of the evidence, [… the Appellate Body] cannot base a finding of inconsistency under Article 11 simply on the conclusion that [… the AB] might have reached a different factual finding from the one the panel reached. Rather, [… the Appellate Body] must be satisfied that the panel has exceeded the bounds of its discretion, as the trier of facts, in its appreciation of the evidence. As is clear from previous appeals, [… the Body] will not interfere lightly with the panel's exercise of its discretion."[642] It is straightforward that the Appellate Body attributes a deferential treatment to the panel's factual conclusions.

On the other hand, the Appellate Body is of the position that it can only intervene in a panel's factual assessment if its consideration of the facts was so flawed as to amount to a failure to conduct an "objective assessment" of the facts, contrary to Article 11 of the DSU.[643] It is a serious allegation which goes in "the very core of the integrity of the WTO dispute settlement process."[644] The AB developed the following criteria to establish whether the failure to make an "objective assessment" of the facts could be considered an issue of law, hence susceptible for appellate review:

[640] EC – Hormones, para. 132
[641] US – Wheat gluten, para. 151
[642] US – Wheat gluten, para. 151, EC – Bed linen, para. 176
[643] BRONCKERS, Marco, McNELIS, Natalie, *Fact and Law in Pleadings Before the WTO Appellate Body*, p. 322, in WEISS Friedl, *Improving WTO Dispute Settlement Procedures. Issues and Lessons from the Practice of Other International Courts and Tribunals*, Cameron May (2000)
[644] European Communities – Measures affecting the importation of certain poultry products (*EC – Poultry*), WT/DS69/AB/R, 13 July 1998, para. 131

(1) Failure of the panel to carry out the necessary analysis or to base its findings on facts and exhibits before it;
(2) Incorrect reasoning by the panel, e.g. inappropriate comparisons, logical jumps or drawing conclusions which cannot reasonably be drawn.[645]

The question is what ***degree of flaw*** amounts to commit the failure of a non-objective assessment. This was described by the Appellate Body in the following terms: the panel can make an "egregious" error that calls into question the good faith of the panel or deliberately disregard or refuse to consider evidence but also the "willful distortion or misrepresentation of the evidence" by the WTO adjudicative body are listed here.[646] The Appellate Body should not let a manifest error of fact stand where the *error was critical* to the resolution of the dispute at stake. With this regard, the first decision of the Appellate Body that was principally based on the standard of review under Article 11 of the DSU in overturning the panel's conclusions was a subsidy case in the *US – DRAMS* appeal. Here, the AB concluded that – even though the panel properly identified the applicable standard of review applicable in the dispute – it failed to apply it properly since it went beyond its authority because it conducted its own assessment and was not a simple reviewer of the investigating authority's decision. Accordingly, the panel did not comply with its obligations provided by Article 11 of the DSU.[647]

One might question whether this is an appropriate standard since for instance the "willful" and "egregious" error standards basically require the appellant to allege the bad faith of the panel. This would be an excessive contention that it would almost never be appropriate. The standard for an appellate review is too strict, accordingly the criteria required by the Appellate Body are very hard to carry out and it is improbable that it will ever be met.

At the same time, the Body shall bear in mind that the "masters" of fact-finding are the panels and they enjoy wide discretionary powers in establishing and evaluating the facts. The Appellate Body shall not second-guess the assessment of the facts by the panels – however, it shall establish, whether the panel remained within the boundaries of its discretional powers and shall intervene only if the panel acted manifestly in breach of that power.[648]

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[645] LUGARD, Maurits, *Scope of Appellate Review: Objective Assessment of the Facts and Issues of Law,* J. of Int'l. Ec. Law, 1 (1998), p. 324

[646] BRONCKERS, Marco, McNELIS, Natalie, *Fact and Law in Pleadings Before the WTO Appellate Body,* p. 322, in WEISS Friedl, Improving WTO Dispute Settlement Procedures. Issues and Lessons from the Practice of Other International Courts and Tribunals, Cameron May (2000). Another, however connected issues are for instance if the panel disregarded or distorted evidence submitted or denied the submission of a proof – that is also a question of due process of law. EC – Bed linen, para. 179

[647] United States – Countervailing duty investigation on Dynamic Random Access Access Memory Semiconductors (DRAMS) from Korea, WT/DS296/AB/R, 25 June 2005, para. 190

[648] STEGER, Debra P., *Amicus Curiae: Participant or Friend? The WTO and NAFTA Experience*, In VON BOGDANDY Armin, MAVROIDIS Petros C., MÉNY, Yves, European integration and international co-ordination: studies in transnational economic law in honour of Claus-Dieter Ehlermann, Kluwer Law Int'l. (2002), p. 431

The aforementioned arguments are valid in general and also in anti-dumping cases when parties appeal under Article 11 of the DSU as well, so that the two provisions operate together.[649] The establishment of a violation of Article 11 depends on the positive definition of the appropriate standard of review in a specific case – the former is determined by the latter. Consequently, the Appellate Body in all cases when it determined that the panels did not apply the appropriate standard of review shall also establish that Article 11 of the DSU has been breached.[650]

The standard of review of anti-dumping cases decided by the panel is similar to the standard applied by panels in reviewing domestic decisions. Therefore, the Body does "not interfere lightly with [a] panel's exercise of its discretion" under Article 17.6 (i) of the Anti-Dumping Agreement. Once again, the panel is the organ that checks the facts at first place and the AB – if it is possible – leaves this authority to it, except if there are "sufficiently compelling reasons" that we should disturb a panel's assessment of the facts or interfere with a panel's discretion as the trier of facts."[651]

The Body also used the "unreasonable" standard in the overview of the panel report in the in the *US – Corrosion resistant steel* sunset review case. The Appellate Body upheld the panel's decision because it was not "unreasonable" from the panel to conclude that the national authority's establishment of the facts was proper and their evaluation objective.[652]

The ***relationship*** between the Body and the panels is not only vertical but – according to E. Leuterpacht – one shall consider the appellate courts someway have a better or *superior knowledge* to those whose judgment is being reviewed. The AB is the guardian of the uniformity of the WTO law and its interpretations have an elevated importance in shaping future panel decisions (even though the principle of the *stare decisis* does not apply) and domestic judgments (even if the WTO decisions are binding to the parties that participated in the dispute). The Appellate Body is the highest organ (except the Ministerial Conference) of the WTO empowered with the interpretation of the pluri- and multilateral agreements.

It is not always easy, however, to distinguish between issues of facts and law. Very often, questions of fact shade into the field of conclusions and vice versa. For instance, the issue whether a fact exists is a factual question but the query whether a given set of facts meets or not does meet a legal standard is a question of law. In addition, many facets of WTO law involve the application of a legal standard to a particular set of facts – a good example is whether injury or causality exists in the context of an anti-dumping case. These cannot be

[649] United States - Final anti-dumping measures on stainless steel from Mexico (*US – Stainless steel*), WT/DS344/AB/R, 30 April 2008, para. 76
[650] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003), p. 157
[651] EC – Bed linen, para. 170, EC – Pipe fittings, para. 125
[652] US – Corrosion resistant steel (sunset review), para. 205

dismissed as questions of fact and left to the discretion of *ad hoc* panels.[653] The threshold of the distinction between questions of law of facts also depends on the posture of the reviewing body: a panel determined to escape the narrow confines of the deferential standard of review may characterize questions of facts as one of law.[654]

As has been said, the subject matters of the appeal are either the issues of law in the panel report or other interpretations developed by the panel. The Appellate Body cannot remand a dispute to the panel for further additional fact-finding or examination of legal questions not addressed by the panel. For that reason, it is essential in an appellate review to have an adequate factual record, otherwise supplementary fact-finding would be necessary, i.e. where the failure of the adjudicator to make certain facts is not fatal to complementing the analysis.[655] For instance, in the Turtle case, the Appellate Body made conclusions concerning the facts from evidence other from than that already front of the panel. Consequently, there is nothing to prohibit the Body from finding facts where that is necessary and incidental to its role in correcting errors of law.[656]

In sum, while the Appellate Body reviews panel reports, it maintains a similar attitude towards the panels that the latter have in relation to the national administrative authorities' decisions. In the three-degree deferential chain (so that the national investigating authority – panel – AB) the upper body shall manifest deference towards the fact-finding of the lower body but it has less leeway than in the construction of the matters of law. It is because the factual standard of review is a deferential one, while the legal standard of review is – even though at first sight seems to be deferential – in fact a little bit shifted from the "in between" towards the *de novo* review. The rationale of the factual deference is the greater expertise and better knowledge of the subject by the domestic agencies, and the Appellate Body's restricted power of review of the panel reports that is limited to the legal matters and not extended to the factual issues of the case.

VII.5.5. Conclusions

For a considerable time, panels and the Appellate Body were very moderate in defining the factual standard of review under the Anti-dumping Agreement. Henceforth, the first panels dealt with the issue by making reference to panel and AB reports outside of the anti-dumping

[653] BRONCKERS, Marco, McNELIS, Natalie, *Fact and Law in Pleadings Before the WTO Appellate Body*, p. 333, in WEISS Friedl, Improving WTO Dispute Settlement Procedures. Issues and Lessons from the Practice of Other International Courts and Tribunals, Cameron May, (2000)

[654] AKAKWAM, Philip A., *The Standard of Review in the 1994 Anti-dumping Code: Circumscribing the Role of GATT Panels in Reviewing National Anti-dumping Determinations*, Minnesota J. of Global Trade 277 (Summer 1996), p. 14

[655] HOWSE, Robert, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence – the Nature and Limits of the Judicial Power*, p. 20 In MAVROIDIS, P.C., COTTIER T., The role of the judge in international trade regulation: Experience and lessons from the WTO., World Trade Forum, Vol. 4, Michigan Uni. Press, 2003

[656] HOWSE, Robert, *The Most Dangerous Branch? WTO Appellate Body Jurisprudence – the Nature and Limits of the Judicial Power*, p. 22 In MAVROIDIS, P.C., COTTIER T., The role of the judge in international trade regulation: Experience and lessons from the WTO., World Trade Forum, Vol. 4, Michigan Uni. Press, 2003

context and in which the factual standard of review was not based on Article 17.6 (i) of the ADA but on Article 11 of the DSU. Apart citing other reports, panels often repeated the wording of Article 17.6 (i) without making clear its concrete meaning. However, by now, there are some landmark decisions that can give guidance on what is the exact meaning of the factual, special standard of review.

The first arm of Article 17.6 of the Anti-dumping Agreement calls for the panels to defer to the evaluation of facts carried out by the national authority if they find that such evaluation is unbiased and objective and the factual establishment was proper. The respect of these procedural obligations is reviewed but this overview implies no judgment on the substance. Nonetheless, this "check-list" type review is important, since procedural errors can have repercussions on final determinations. On the other hand, the panel in *EC – Pipe fittings* underscored that the provisions of the Anti-dumping Agreement "require substantive, rather than purely formal compliance." [657]

The above mentioned provision does not contain enough guidance since it does not specify how deeply the panel can prove the appropriateness and objectivity of an authority's evaluation. Clearly, a panel should not "second-guess" the domestic agencies' factual evaluation. At the same time, panels may do more than merely look at the facts to determine the objectivity of the authorities, since the Appellate Body declared that Article 11 of the DSU and Article 17.6 (i) are equally applicable in anti-dumping cases, consequently (even though the leeway of the panels is different under these provisions) panels are required (and not entitled!) to actively examine the "raw" evidence. Therefore, it can be said, that notwithstanding the different drafting of Article 11 of the DSU and Article 17.6 (i) of the ADA, the two standards of review in practice did not result in different standards of factual findings.

This lack of clarity came to the surface and led to tensions in trade remedy cases, since here the panels' hands are more tied and they are required to carry out a formal review of the domestic investigations. This has implications concerning both the establishment and evaluation of facts and the possibility to overturn the administrative agencies' decisions.

The first consequence stems from the panel's limited capacities and powers to check whether the "control criteria" had been respected and its review is restricted to the overview of the investigative proceedings. For this reason, the panels' scrutiny extends more to *procedural* rather than to substantive issues in anti-dumping disputes that impede the panel to gather additional facts and supplement the factual record of the original investigation. On the other hand, it does not mean that the panels carry out merely a formal review and they do not enter into substantial questions, into the rationale and logic of the WTO Member's decision concerning the facts of the case. Instead, as it was stated, they are required to make an *active* review of the factual record that is "frozen" into the moment of the original decision-making.

[657] European Communities –Anti-dumping duties on malleable cast iron tube or pipe fittings from Brazil (*EC – Pipe fittings*), WT/DS219/R, 7 March 2003, para. 7.310

The other consequence of this procedural-type review is that nonetheless, step by step, panels found some leeway to overturn the national authorities' conclusions, consequently they were accused of lack of deference towards the Member States' determinations. The fact that the "fine line" between the *de novo* review and total deference is not clear also induced States to appeal panel decisions based on the allegation that panels overviewed the issues of fact to the point where it is akin to them having adjudicated the dispute for the first time and thus they failed to comply with their duties under Article 11 of the DSU.

The standard of review as applied by "WTO tribunals" has been (and it is still) changing over time – it is not just agreement specific but it became complex and increasingly intrusive: while in the past panels mainly carried out a procedural oversight of the administrative agencies' decisions later they shifted to a more invasive approach related to the appreciation of the evidence. This is not necessarily less favorable for the defending party because the intermediate standard of review with its control criteria (such as the "adequate and reasonable explanation" test) *shifts the focus from the result of the determination to the administrative authority's reasoning* that gives more opportunity to a panel review and multiplies the points of error. This is the case, because the control criteria must be applied to each and every substantive condition subject to the intermediate standard of review that can give rise to more errors. Whereas, under the *de novo* review panels look into whether the administrative agencies got the result right and the national agencies' determinations will stand as long as the panel agrees with the result – the same decision would be invalidated under a deferential standard of review if the national authorities make just one mistake.[658]

VII.5. Legal special standard of review (Article 17.6 (ii) of the ADA)

VII.6.1. A deferential standard of review – on its face

Legal questions come up in every dispute and both the panel and the Appellate Body approach the questions from principles, as if they were the first to deal with the issue. In many cases it is up to the "World Trade Court" to construe WTO norms, since domestic authorities apply national laws and rules – although these norms are often enacted to implement WTO obligations and it is not rare that the wording is almost the same like the provisions of the treaty. This stands particularly true for anti-dumping laws that fundamentally are transposed into national legal systems with minimum changes to the Anti-dumping Agreement. Nonetheless, these similarities do not prevent the panel and the Appellate Body to reach their independent conclusion as regards the interpretative question – another issue is afterwards the deference to maintain towards the domestic authorities' decisions or part of them.

It can be said, that in disputes arising under the covered agreements (except anti-dumping) both the panel and the Appellate Body have constantly engaged themselves in *de novo*

[658] SPAMANN, Holger, *Standard of Review for World Trade Organization Panels in Trade Remedy Cases: a Critical Analysis,* J. of World Trade, Vol. 38., No.3., (2004), p. 543

standard of review of WTO law based on the necessity to clarify the meaning of the WTO provisions and they ensure the u*niform* interpretation of the WTO legal texts. Not surprisingly, the "WTO tribunals" have interpreted the relevant treaty provisions pursuant to the methods provided for in the VCLT and not deferred to the construction of domestic agencies. The panels and the AB were eager to explain and elaborate the meaning of treaty obligations in the light of the Vienna Convention of the Law of Treaties. The "World Trade Court" is a superior organ of interpretation compared to domestic courts, so to give into its hands the complete examination of legal issues is more than rationale in the light of the principle of *jura novit curia.*

The same cannot be said about the special standard of review concerning legal questions since the "WTO tribunals" were reluctant to explain the meaning of Article 17.6 (ii) of the ADA and claims concerning the matter had been generally dismissed. The underlying rationale may be that while – generally saying – questions of law call for a *de novo* review, the legal standard of review applicable in anti-dumping disputes excludes it *on its face* and requires a deferential treatment of domestic interpretations.

VII.6.2. The structure of the legal standard of review

The special standard of review examines two different but interconnected matters: at first the facts and secondly the legal-interpretative questions in relation to those facts. The second arm of Article 17.6 of the Anti-dumping Agreement, Article 17.6 (ii), refers to the legal issues and comes into play only if the criteria detailed in Article 17.6 (i) of the ADA have been satisfied. In this sense, the *requirements* of the two provisions are *cumulative*.[659] Only if the conditions of the first arm are fulfilled, in the second part of its review, the panel or the Appellate Body can interpret the relevant provisions of the above Agreement. However, the panel's and the AB's decision-making is restricted since the "World Trade Court" is required to upheld the Member State's interpretation, if it rests upon a "permissible" constructions of the ADA.

The two-steps procedure for assessing the interpretation of the relevant portions of the Anti-dumping Agreement has been confirmed in the *US – Steel Plate from Korea* case[660] and has been summed up in the *US – DRAMS* dispute. The Body stated as follows: "The first sentence of Article 17.6 (ii) directs the panel to *interpret* the relevant provisions of the Agreement in accordance with the *customary rules of interpretation of public international law*. In the context of practice developed by the Appellate Body and panels, such a direction has meant the application, *inter alia*, of the provisions of the Vienna Convention. In the typical case, a panel or the Appellate Body has used the Vienna Convention as a tool for determining a *single* meaning for a particular WTO text. However, Article 17.6 (ii) reveals that the negotiators anticipated that it may well be possible for Members' authorities to interpret the text of provisions of the AD Agreement in more than one "*permissible*" way. In making the assessment, whether there is more than one permissible way to interpret an AD text, the panel

[659] Mexico – HFCS, para. 130
[660] US – Steel plate from Korea, para. 6.4

could make use of the Vienna Convention to *determine whether an interpretation of a particular authority* […] *is permissible*. If the panel finds that the text is susceptible to more than one permissible meaning, then Article 17.6 (ii) provides that "the panel shall find the authorities' measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations. Accordingly, Article 17.6 (ii) is intended to provide a certain flexibility – where the language was undefined or otherwise ambiguous – for authorities to establish (or maintain) implementing procedures." [661]

The construction of the relevant provisions of the Anti-dumping Agreement shall be carried out in the light if the "customary rules of interpretation of public international law" that has been consistently identified with the Articles 31-32 of the Vienna Convention. Panels and the Appellate Body have repeated these interpretative methods and followed them as binding principles of treaty construction.

According to Article 31(1) of the Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." This provision of the VCLT provides that the words of a treaty must form the starting point for the process of interpretation.[662] In this regard, words must be construed according to their "ordinary meaning" taking into account their "context" (i.e., other provisions of the treaty) and the "object and purpose"[663] of the agreement. While recourse to a treaty's object and purpose is permissible, it may not override the clear meaning of the text – it cannot be used as an independent basis for construction. If the text of a treaty (i.e. interpretation pursuant to Article 31) either leaves the meaning "ambiguous or obscure," or leads to a "manifestly absurd or unreasonable result," Article 32 of the Vienna Convention[664] authorizes recourse to further, "external" means of interpretation (such as the *travaux preparatoires*, subsequent practice of the parties, the treaty's negotiating history) that aim at verifying or confirming the meaning that emerges as a result of the textual approach.

At first sight, the Appellate Body's approach follows the interpretation of the strict constructionist school, calling for a *de novo* review. Indeed, the Body often interprets text literally and narrowly; the obvious demonstration of this of the frequent reference to dictionaries. Another manifestation of the literal approach is the tendency to keep the Body's

[661] US – DRAMS, paras. 4.55-4.56

[662] The AB in the US – Byrd Amendment dispute argued that the above provision does not refer only to the interpretation but also to the *performance* of the provisions of the treaties. United States – Continued Dumping and Subsidy Offset Act of 2000, WT/DS217/AB/R, WT/DS234/AB/R, (*US – Byrd Amendment*) 16 Jan. 2003, paras. 296-297

[663] This reflects the teleological approach that is in stark contrast with the strict constructionsim and it is usually used by referring to the "initial common intention of the parties."

[664] Pursuant to Article 32 of the Vienna Convention, recourse may be had to the preparatory work of a treaty "when the interpretation according to Article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable."

reasoning close to the words.[665] Nonetheless, the DSB's interpretation cannot be retained as strictly *textualist*, and much of the construction is (either explicitly or implicitly) informed by recourse to the object and purpose of the treaty.

An interesting issue is the ***construction of domestic laws***,[666] since they are considered as questions of fact and accordingly, "WTO tribunals" shall manifest deference towards national laws. The underlying rationale of this is that the panel and the Appellate Body do not have the familiarity with the domestic law and practice.

The panel in the *US Anti-dumping Act of 1916* case faced the problem of treatment and interpretation of domestic law. The case related to a US anti-dumping law that was enacted more than eighty years ago. Therefore, the adjudicative body was aware that the law might be different as it was written and as it was applied by US authorities. For this reason, the panel felt compelled to carry out a deeper enquiry to establishing its understanding of the relevant provisions of the American Anti-dumping Act.

At first, the panel explained that a law cannot be construed in isolation and it took into account in its assessment the "law and its "surrounding," i.e. the circumstances of its enactment (including the *legislative history* [*tout court* the preparatory works in an international context]) and the subsequent interpretation(s)."[667] In considering the legislative history, "the political and economic context as it emerges from public declarations of the time or studies of the period"[668] was considered relevant as well. It was also underscored by the panel that in cases when the provisions of a law are not clear, or it is necessary to confirm the clear meaning of a law, the legislative history can be an important tool of interpretation that allows US courts to construe a law in accordance with what they perceive to be the original intent of the US Congress when the text of that law is dubious.[669]

At last, in the *casu*, the panel highlighted the importance of *judicial interpretation of* US *courts*, "as evidence of the meaning given to the terms of a legal text, may affect the way [… the panel] should understand the terms of the 1916 Act."[670]

In conclusion, the panel did not develop its own, independent interpretation of the US law because it took into account for its analysis any factual evidence (historical context, jurisprudence and administrative practice) that considered helpful in establishing and clarifying the meaning of the law at stake. At the end, the panel and the Appellate Body are the masters of interpretation of WTO – and not foreign law. Here, we might not speak about

[665] ABI-SAAB, Georges; *The Appellate Body and Treaty Interpretation*, in FITZMAURICE, Malgosia A.; OLUFEMI, Elias; MERKOURIS, Panos, Treaty interpretation and the Vienna Convention on the Law of Treaties: 30 years on., M. Nijjhoff (2010), pp. 106-107
[666] They are often related to the "as such" claims, contrary to the common "as applied" cases.
[667] United States – Anti-dumping Act of 1916, paras. 6.17, 6.43
[668] United States – Anti-dumping Act of 1916, para. 6.60
[669] United States – Anti-dumping Act of 1916, para. 6.120
[670] United States – Anti-dumping Act of 1916, para. 6.17

deferential standard of review in relation to domestic law, rather about an interpretative method.

VII.6.3. Sources of interpretation

In general, it can be affirmed that panels and the Appellate Body in interpreting WTO texts relied on various sources. At the beginning of the history of the WTO, the above bodies took into account the *case law of different international courts*, such as the International Court of Justice (ICJ). This attitude might be attributed to the fact that the members of the standing Appellate Body usually did not have a background, anchored into the GATT. The panels and the Body have also frequently invoked the *general principles of public international law* as well, although they have hardly explained their content because they only defined the principle at stake and stated its meaning. In general, the "World Trade Court" has been cautious to elaborate actively on the definition of general principles and their limits.[671] However, the Body gave no possibility to the parties to actively shape the contents and limits of the general principles of public international law – it is the prerogative of the panels and the AB to decide upon these matters. Consequently, the adjudicative bodies did not manifest deference towards the parties' arguments in this regard, rather they engaged themselves in a *de novo* review of these questions.

It may seem a cliché, but it is important to stress that "WTO tribunals" also take into account the *arguments of the parties*: it is up to them to present their case, underpinned by their claims, arguments, proofs and views on the correct interpretation of the relevant provision. Panels usually examine very carefully the reasoning of the parties and explain why they considered them sound or irrelevant. Moreover, the panel and the Appellate Body also take into account the *writings of the scholars* and refer to highly reputed professors in the field of international trade law and international public law.[672] It also became a practice of the parties to sustain their position not just by basing it on GATT/ WTO precedents but also by referring to academic writings, articles and treatises. This attitude is quite new, since in pre – WTO times, GATT panelists – although they were aware of the scholars' views – did not refer to their writings.

Finally, *Article 13 of the DSU* is frequently referred as well. Amongst others, it entitles panels to "seek information from any relevant source and may consult experts to obtain their opinion on certain aspects of the matter." The provision is crucial since it entitles panels to gather information as they deem proper and even because the Article in question is relevant not just in the establishment of facts, but also with regard to issues of law. The most interesting thing in connection with this provision is the panel's possibility to reject unsolicited information and submissions that stands for both factual and legal questions.

[671] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003) p. 217
[672] For instance, reference to Prof. Jackson as a leading GATT/WTO scholar in the US – DRAMS dispute, para. 4.66

VII.6.4. "Permissible" interpretation – is it possible?

The second sentence of Article 17.6 (ii) of the Anti-dumping Agreement states that where a domestic agency's anti-dumping measure rests upon a "permissible" interpretation of a WTO provision, the panel or/and the Appellate Body must accept the measure as WTO consistent.

The above Article is a vividly discussed provision, mainly because this second arm is full of ambiguities and contradictions, moreover it creates difficulties for the interpreter of the Anti-dumping Agreement: it is hard to reach the conclusion that, after interpreting the relevant provision of the ADA in the light of the customary rules of general international law, one could arrive to more than one construction. It is particularly true in the light of the significance of the "customary rules of general international law" that overlaps with Article 31-32 of the Vienna Convention. Ever since the purpose of these provisions is to resolve the ambiguities of the text of an international agreement, there will be no remaining uncertainties. Accordingly, the result of the interpretation is one and the second arm of Article 17. 6 (ii) will not come into play. This might not be in conformity with the original intent of the negotiators that wanted to preclude the panel and the Body to rewrite legal interpretations of the provisions of the ADA.[673]

Since the "World Trade Court" was quite reluctant to examine the above provision, the case law cannot give much guidance to clarify the doubts. The Appellate Body in the *US – Hot Rolled Steel* made some general considerations concerning the issue. The Body stated that the second sentence of Article 17.6 (ii) *presupposes* the application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention could give rise to, at least, two interpretations of some provisions of the Anti-dumping Agreement, which, under that Convention, would both be "permissible interpretations." In that event, the rule of deference comes into play: a measure is deemed to be in conformity with the Anti-dumping Agreement "if it rests upon one of those permissible interpretations."[674] The method was confirmed in the *US – India Steel Plate* dispute as well, so that if the interpretation of the treaty provision in question put forward by the defending party is permissible, the AB shall find the measure in conformity if it is based on that permissible interpretation.[675]

In the *Thailand – H-Beams* dispute, the Body recognized that the customary rules of public international law are the basic means of treaty interpretation. In addition, the Appellate Body also declared that *mandatory provisions of the Anti-dumping Agreement do not permit permissible interpretations*. In its own words: "the Panel's interpretation that Article 3.4 requires a mandatory evaluation of all the individual factors listed in that Article clearly left no room for a "permissible" interpretation that all individual factors need *not* be

[673] See more in the GAO Report, p. 28-29. In particular, this was the perspective the of the USA that intended to insert Article 17.6 into the ADA in order to preclude the panels to second-guess the factual conclusions of domestic authorities and to re-construe legal interpretations under the ADA.
[674] US – Hot rolled steel, paras. 57 – 59
[675] US – India Steel Plate, para. 7.7

considered."[676] The statement is straightforward since mandatory norms do not permit multiple constructions by definition.

A prominent example – although strictly related to the issue of the zeroing methodology – for the lack of possibility of multiple interpretations is the Appellate Body's decision in the *US – Zeroing from Japan* dispute. In the case at question, the Body declared that certain provisions of the Anti-dumping Agreement and the GATT referring to dumping do not permit more than one interpretation – at least as far as the issue of zeroing is concerned.[677] With this statement, the Body excluded the likelihood of a different construction of certain provisions, hence the possibility to find permissible interpretations and defer to the domestic agencies' determinations. In another zeroing case, in *US – Zeroing*, the Body affirmed that certain ADA and GATT provisions, "when interpreted in accordance with customary rules of interpretation of public international law […] do not […] allow the use of the methodology applied by the United States in the administrative reviews at issue."[678] Once again, the Body declined the possibility of multiple interpretations zeroing concerned.

To date, neither the panel nor the Appellate Body found that there are provisions of the Anti-dumping Agreement that resulted in more than one permissible interpretation, even though defendants often argued that their interpretation was "permissible." By the same taken, the "WTO tribunals" consistently concluded that the application of Article 31– 32 of the VCLT led to one single interpretative meaning of the relevant provision at stake and did not leave leeway for additional "permissible" interpretations. This outcome is not surprising since the Vienna Convention was drafted in order to avoid multiple interpretations.

VII.6.5. Interplay with other provisions

At first, ***Article 3.2 of the DSU*** shall be underscored. The relevant provision seeks to guarantee the security and predictability to the trading system and maintain the balance between the rights and obligations of the Members of the Organization. It states that "[…] [t]he Members recognize that [the dispute settlement] serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law. Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements." The provision makes reference to the "customary rules of interpretation of public international law," so that to Articles 31-32 of the VCLT, which means that it implicitly provides for a *de novo* review of the Member States' decisions concerning purely legal questions. Furthermore, Article 3.2 restraints the discretion of the "World Trade Court" since a panel or AB ruling cannot add or diminish the rights and obligations under the covered agreements. This constitutes a limit to the panel's and Appellate Body's scrutiny, though not to the same extent as provided by the special

[676] Thailand – H-beams, para. 127
[677] US – Zeroing from Japan, paras. 188 – 189
[678] US – Zeroing, para. 134

standard of review under Article 17.6 of the ADA. The provision is also important in order to safeguard the uniform interpretation of the WTO law and to avoid the "Tower of Legal Babel."[679]

Article 3.2 of the DSU does not call for a judicial restraint in the framework of the standard of review, so that it does not requires the panels for a deferential approach towards the interpretation of the WTO law, but rather it emphasizes the fundamentally *contractual nature* of the WTO system in which the "WTO tribunals" must not create additional obligations that do not exist between the Member States.

Article 11 of the DSU arises not just in assessment of facts but in legal interpretations as well. When interpreting WTO provisions, panels are obliged to make an "objective assessment" of the matter, consistent with the above mentioned Article. This means that the "objective assessment" comprises the interpretation of legal questions too. According to the Appellate Body in the *US – Hot Rolled Steel*, Article 17.6 (ii) supplements rather than replaces the DSU and Article 11 in particular. With the Body's words, "Article 11 requires panels to make an "objective assessment of the matter" as a whole. Thus, under the DSU, in examining claims, panels must make an "objective assessment" of the legal provisions at issue, their "applicability" to the dispute, and the "conformity" of the measures at issue with the covered agreements. Nothing in Article 17.6 (ii) of the Anti-dumping Agreement suggests that panels examining claims under that Agreement should not conduct an "objective assessment" of the legal provisions of the Agreement, their applicability to the dispute, and the conformity of the measures at issue with the Agreement. Article 17.6 (ii) imposes an additional obligation not found in the DSU and under Article 11 of the DSU[680] – it adds that a panel shall find that a measure is in conformity with the Anti-dumping Agreement if it rests upon one permissible interpretation of that Agreement."[681]

This instruction does not mean that the panels should do anything differently in interpreting the ADA but only implies the deference to the Member State's permissible construction. Once again, this means freedom of interpretation of the "World Trade Court" but does not imply also freedom of decision.

VII.6.6. Panel and Appellate Body relations concerning legal interpretations – lack of internal deference

It has been pointed out that pursuant to Article 17.6 of the DSU an appeal refers only to questions of law covered by the panel report and to the interpretation of relevant treaty provisions developed by the panel. The review of factual determinations is in principle,

[679] PALMETER, David, SPAK, Gregory J., *Resolving Anti – dumping and Countervailing Disputes: Defining GATT's Roles in an Era of Increasing Conflict,* Law and Policy in Int'l Business, Vol. 24 (1993), at 1158 in EHLERMANN, Claus-Dieter, LOCKHART Nicolas, *Standard of Review in WTO Law*, J. of Int'l. Ec. Law, Vol. 7., No.3., (2004) p. 498
[680] US – India Plate, para. 7.5
[681] US – Hot rolled steel, para. 62

excluded from the Appellate Body's scrutiny. The appeal is a corollary of the WTO legal system, since it ensures the uniform interpretation of the law of the Organization and clarifies existing provisions.

The Anti-dumping Agreement provides for a completely new review of legal interpretations developed by the administrative agencies. This refers both to the treatment of national authorities' legal interpretations and that of the panels'. No deference is applied at every stage of this "interpretative chain."

It can be acknowledged that the Appellate Body has consequently applied the policy of full *de novo* review of the panels' constructions, which are in stark contrast with the standard of review of factual findings. As an obvious result, the Appellate Body followed a proactive approach, a *de novo* review of legal questions submitted. In practice (although did not defer to the Member State's interpretative findings), the AB favored more deferential methods of construction towards Member States' determinations than the panels did, moreover it often reversed the panels' interpretative findings and reasoning without altering the overall conclusions. The Body affirms or rejects the findings of the panels based upon a complete and independent assessment and interpretation of the law. Clearly, the *Appellate Body has not adopted policies of judicial restraint*: it does not limit its review to examining whether or not a particular reasoning of the panel is consistent and reasonable therefore to be sustained.[682]

The AB's *de novo* review has the advantage that it contributes to the continuity of law, consistency and gives clear guidance and authority. New findings are better and more deeply explained than those looked at the second time. On the other hand, the disadvantage of the full *de novo* review is that it has to the potential to reduce the effectiveness of the dispute settlement system. In fact, the proceedings in front of the panels are increasingly perceived as a mere preliminary stage to the appellate review that reduces the impact and importance of these bodies and prolongs the definitive settlement of the disputes. This leaves no doubt that the Appellate Body perceives its relationship with the panels in a hierarchical and non-communicational manner.[683] The risk is that the panel will deteriorate into a purely classical juridical model that has limited effectiveness in international contexts.

VII.6.7. Conclusions

Every case involves legal interpretations since facts need to be "tailored" under legal provisions. Once the factual record has been properly established and objectively and impartially evaluated by the anti-dumping authorities, the panel or the Appellate Body shall construe the relevant treaty provision in the light of the international customary law that fundamentally covers Articles 31-32 of the Vienna Convention on the Law of Treaties. The VCLT calls for a *de novo* review of legal norms and permits no deference towards the

[682] COTTIER, Thomas, The *WTO Dispute Settlement: New Horizons* in The Challenge of WTO Law: Collected Essays, COTTIER, Thomas, Cameron May (2007), pp. 194 – 195
[683] COTTIER, Thomas, The *WTO Dispute Settlement: New Horizons* in The Challenge of WTO Law: Collected Essays, COTTIER, Thomas, Cameron May (2007), p. 195

national administrative agencies' interpretation. It might be that due to the lack of deference, negotiators inserted the deference rule of "permissible" interpretation. Hence, pursuant to the second arm of Article 17.6 (ii) of the ADA, the "World Trade Court" must uphold the decision as interpreted by the administrative agencies whenever it rests upon a "permissible" construction of the Anti-dumping Agreement.

The twist lies in the second sentence of the above, vividly disputed Article, since it provides for the panels to maintain the domestic authorities' decision if it rests upon a permissible interpretation of the relevant provision of the Anti-dumping Agreement. However, the second arm gives no guidance as to which provision permits various (but at least two) interpretations nor is there any guidance on how to read the first and the second arm of Article 17.6 so as to give a proper meaning to both of them. What is certain is that Articles 31-32 of the Vienna Convention aim at eliminating multiple interpretations and to arrive at one single and consistent construction of a treaty provision. In light of this (even though the Appellate body has not excluded this possibility) it is unlikely that the "World Trade Court" will ever arrive at multiple interpretations of a treaty provision. In fact, to date, neither to panel nor the Appellate Body found that a provision of the Anti-dumping Agreement permits more than one interpretation. This raises the question whether the "World Trade Court" has excessively limited the prerogative of the Member States to choose among divergent interpretations of the ADA.

Despite the strict policy of *de novo* review, the panels and the Appellate Body did not engage in a too active role of interpreting ambiguities, contrary to national interest.[684] According to some views, through the application of a *state sovereignty conscious method of treaty interpretation* – rather than through the deferential standard of review – the panel and the Body took into account national policy preferences and other sensitive subject matters.[685]

Whatever the case is, it is certain that the panels and the Body have an ultimate restriction to defer to the Member State's permissible construction, however, they are able to elude deference by concluding that the relevant provision of the Anti-dumping Agreement is not suitable for permissible interpretations.

VII.7. Final conclusions

Taken as a whole, the panels and the Appellate Body applied quite an intrusive standard of review. This stands particularly true as far as ***legal questions*** are concerned, since these bodies dispose of wide freedom of interpretation in this field. The *de novo* review of legal matters has some rational limits in the "WTO tribunals'" jurisprudence: on the one hand, international law (other than WTO law) has been always construed in the light and in accordance with the existing practice of international tribunals; on the other hand, domestic law has been consistently interpreted in the light of the law, practice and jurisprudence of a

[684] The dispute on the Byrd amendment might be an exception.
[685] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003) p. 182

given Member State. All of these indicate that the panel and the Body are developing a policy of deference towards the interpretation of Member States' laws which is underpinned by the fact that in the WTO jurisprudence, domestic laws are considered as matters of evidence that call the "World Trade Court" for a deferential treatment.

Other legal questions are construed through a complete and non-deferential review that guarantees the uniform and consistent interpretation of the WTO law.

The lack of deference in legal construction applies as regards the relations between the Appellate Body and the panels as well, and shifts the latter's role towards a first-stage court. Instead, the Body should have more a "Supreme Court"-type attitude in reviewing panel reports, and focus on fundamental questions, and leaving more discretion to lower adjudicative bodies in assessing the law and facts in a particular case. For this reason it would be necessary to design proper policies of judicial restraint and deference in reviewing the findings of the panels.

Contrary to the overview of legal matters, the standard of review regarding ***factual determinations*** does not allow to the panels a total overview. In principle, in anti-dumping disputes, panels are *expressly* – by treaty provision – not consented to establish the factual record on their own but they must verify the process through which the investigating authorities have established and evaluated the facts.

This means a significant restraint on panels and requires a *deferential treatment* of the factual records gathered by the national anti-dumping authorities. Not surprisingly, panels have refrained from substituting their own conclusions for those of the national administrative agencies' by granting a margin of discretion for the evaluation of facts. The respect of the Member State's decision to a certain extent (if it respects the "control criteria") implies deference towards the factual record and conclusions, that is often subject to appeal. The fact that the deferential treatment is embedded into the intermediate standard of review, that lies somewhere in between the spectrum of the total deference and the *de novo* review, permits an interpretative leeway and consequently, opportunities to appeal. However, according to M. Oesch, these appeals submitted in favor of more deference did not result in more panel intrusiveness.[686]

From a pragmatic *policy perspective*, the intermediate standard of review is considered to be the most suitable and appropriate to defer to national policy goals, social- and economic priorities of a Member State. Nonetheless, the importance of the standard of review appropriate consideration to national sensitivities and political preferences in sensitive subject-matters was ensured through a variety of procedural techniques – most significantly through deferential methods of interpretation –but not through a deferential standard of review. [687]

[686] OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003) p. 238
[687] DAVEY, William J., *Has the WTO Dispute Settlement Exceeded its Authority? A consideration of deference Shown by the System to Member Government Decisions and its Use of Issue-Avoidance Techniques*, J. of Int'l.

The standard of review is also connected to State sovereignty and to the theory of separation of powers. However, it is rather a method of treaty interpretation than a method of division of powers. This stands particularly true if we consider that the WTO system is essentially a contractual system in the framework of which the panels and the Appellate Body mechanically control the consistency of domestic measures with the Member State's obligations in the light of the WTO treaties. That is why we cannot speak about the trilogy of legislative, judicial and executive branches yet. Nonetheless, the system of the World Trade Organization has been and it is still changing: from an essentially contractual and functional GATT 1947 system it is shifting towards more constitutional structures. The Appellate Body's activity is essential in this regard because it creates the constitutional norms through its jurisprudence. In a similar vein, the AB and panels have also begun to develop methods of interpretation to develop a *policy of deference* in interpreting unclear and ambiguous provisions.

As far as both legal and factual questions are concerned, there is still a lot to go on and more clarity is needed. Since the standard of review became increasingly complex due to several interconnections between various treaty provisions and Article 17.6 of the ADA, it is necessary to make clear the meaning and limits of the judicial review at the "WTO level."

Ec. Law, Vol.4 (2001), p. 96-110 and OESCH, Matthias, Standards of Review in WTO Dispute Resolution, Oxford University Press, (2003) p. 241

VIII. CLOSING WORDS

Trade control mechanisms form an important part of external commercial policies since they allow States to protect domestic industries against unfair imports. The use of trade remedy measures had been extensive and gave birth to abuses in the past, in particular in the field of anti-dumping. Countries used the anti-dumping instrument for protectionist purposes also in cases when the domestic producers had to face fairly imported goods. The reaction of the States was manifold but in all the cases, it was based on the application of national laws. For this reason, the acceptance of common rules in a multilateral trading framework was crucial for increasing the security and predictability of international trade. The norms on the investigation, imposition and revision of anti-dumping duties/other measures agreed under the umbrella of the GATT and later in the WTO framework help both states and enterprises to navigate on international trade waters because these rules can shape the expectations of the actors.

The addressees of the WTO Anti-dumping Agreement are the Member States of the Organization. Nevertheless, the agreement directly concerns privates as well, as companies are the main actors of international trade. They operate in various fields and trade their goods and products. These enterprises need to have a medium- and long-term predictability in order to efficiently and profitably do business. For this reason, it is of utmost importance for them to have clear norms, on the basis of that they can do their business, make investments etc. and that these norms are applied and executed in a fair manner. In addition, the possibility to have access to efficient legal remedies is significant as well.

In cases where an exporting company becomes a victim of an anti-dumping measure manifold legal questions arise. Firstly, first, whether the private party has *standing* in the WTO context. It is well known that the WTO Dispute Settlement System is accessible only for States and not for private parties. However, it does not mean that the latter stay with no legal means of protection. Rather, they can seek legal remedies in the importing countries' judicial system – laws of WTO Members allow companies to appeal to an independent organ against the administrative agency's decision. The "organ of appeal" is usually a court of first grade: the "generalist" Court of First Instance, in the case of the European Union and the Court of International Trade in the United States, specialized in international commercial matters.

In examining the plaintiffs' claim, these courts face different questions, first of all, the nature and the *status of WTO Agreements, in particular the Anti-dumping Agreement* in the domestic legal order. Both the European Union and the USA follow a monist system, however in case of the WTO covered agreements they apply a dualist approach, thereby denying the direct effect (or self-executing nature) of the provisions of these agreements. Consequently, an internal legislative act is needed in order to transpose the provisions of the ADA into the European/ US legal order. The claim shall be necessarily based on the argumentation that the anti-dumping investigating authority has allegedly violated a provision of the domestic act, transposing the provisions of the Anti-dumping Agreement. The plaintiffs have also tried several times to directly rely on the provisions of the ADA. Nevertheless, the courts in both

sides of the Atlantic deny applying the Anti-dumping Agreement in disputes. In this regard, the stance of the USA is more marked, since the implementing legislation (namely the SAA, URAA and the Presidential Proclamation No. 6780) expressly prohibits the direct applicability of the WTO covered agreements (so that also the ADA). As a consequence, the possibility to invoke such agreements in trade litigation is excluded. Although, the clear statutory instructions, the two- century old Charming Betsy canon calls US courts to construe domestic statues in conformity with international treaties, that is in clear contrast with the SAA and the URAA. The result is that in *praxis*, US courts consider the above agreements merely as an authoritative guide in their statutory construction. In the European Union the Portugal principle is applied, pursuant to that the WTO Agreements are not considered in the interpretation of EU secondary law as a benchmark of conformity with the WTO law. However, the ECJ established two exceptions from the maxim, the so called implementation exceptions in the Nakajima and Fediol landmark judgments. In cases when the EU intended to implement an obligation assumed in the context of the WTO, or where a secondary law proviso refers to a WTO rule, the validity of the European act can be reviewed in the light of a WTO Agreement or provision. Hereby, the Court of Justice has implicitly granted direct effect to WTO rules.

Another delicate point is whether and to what extent domestic courts consider the *rulings of the Dispute Settlement Body*. It is an often invoked argument of the claimants that ask for the court to take into account the panel's or the Appellate Body's recommendation condemning the state for violating the ADA. Similar to the position of the WTO rules, the respect of the panels' and the Appellate Body's decision is ensured neither in the EU, nor in the USA. The ECJ in Op. 1/91 recognized that in principle, the decisions of international tribunals can be binding to the EU under certain circumstances. However, the decisions of international courts can bound the Union only if the provisions of the international treaty founding the above tribunal have direct effect. Hence, the possibility to rely on the decision of an international court is linked to the direct effect of the international treaty. Analogously, the DSB rulings cannot be relied on, since WTO Agreements are not granted direct effect. The USA follows the same approach: by statue, the interpretations of international tribunals do not have binding effects on US courts. However, in practice they are taken into account as additional factors that help to inform the CIT and the CAFC about the panel's or the Appellate Body's construction of a treaty provision.

The same can be said about the *implementation* of the Dispute Settlement Body's rulings. The courts both in Europe and in the United States steadily held that WTO Member States are not required to automatically comply with the recommendations of the panel and the Appellate Body. They highlight the importance of negotiations and the discretionary powers of the executive branch in conforming to the DSB's decisions even after the reasonable period of time for the execution has elapsed. Through this approach, the courts aim at preserving the independence of the European and US laws and the margin of manoeuvre of the executive branch.

The judicial review of anti-dumping decisions is restrained both at a national/ supra-national – and at international level (i.e. at the WTO) due to the administrative agencies' longstanding, specialized expertise in anti-dumping investigations. This superior knowledge entitles the bureaucratic bodies with technical discretion that has been recognized by the adjudicatory and legislative bodies. Consequently, the executive branch disposes of a broad freedom during the investigative process and in the decision-making, however these *discretionary powers* are not without limits. The courts will *defer* to the administrative agencies' decisions, subject to the fulfillment of certain conditions.

At a domestic/ European level, the reviewing courts' scrutiny is reduced to check certain criteria in order to sustain the administrative agency's anti-dumping decision. In Europe, the CFI's or the ECJ's deferential review is subject to the satisfaction of so called *control criteria*, namely whether (1) the procedural rules have been complied with; (2) the facts have been accurately stated; (3) there has been misuse of powers; and (4) the institution has stated the reasons on which the regulation is based. The satisfaction of the above "check list" infers the courts to uphold the Council's anti-dumping regulation. The judicial review in the USA is more complex, since it operates through two channels: on the one hand, through the application of various doctrines of deference or statutory interpretation; on the other hand, through the application of a certain test, that are similar to the control criteria applied in the EU. As far as the first are concerned, the Chevron doctrine is a highly deferential and most commonly used maxim in the judicial review of the anti-dumping duty orders. It instructs the CIT and the CACF do defer to the bureaucratic agencies' decisions, only if the agencies' construction of an ambiguous statutory provision is a permissible interpretation of the statue. If the agencies' interpretation is reasonable, the US courts, even though they might have reached another conclusion, are required and not allowed to uphold the anti-dumping order. On the other hand, the courts in the review of anti-dumping orders use the same test as in the administrative review cases, so that they meet (1) the arbitrary and capricious standard and the (2) substantial evidence test; in addition they check whether (3) the procedural rules have been complied with and whether (4) the agency's statutory construction was in accordance with domestic laws. The requirements to control in the judicial overview fundamentally overlap in the EU and the USA. In both of the continents the stress is on the proper establishment of the facts and on their accurate and unbiased evaluation: in the European Union, after gathering the facts, the administrative authority's reasoning and conclusions shall be sustained by a "sufficiently convincing analysis" otherwise the ECJ/CFI hold that the European Commission committed a manifest error of assessment. In the USA, the benchmark is to provide for "substantial evidence," namely such relevant evidence that a reasonable mind might accept as adequate to support the bureaucratic agencies' conclusions. In addition, there should be no "clear errors of judgment" in the DOC's or ITC's reasoning. It is worthwhile to note, that both in Europe and in the USA, the main reason, which is why the reviewing courts do not sustain the anti-dumping authorities' decisions, is because the courts maintain that (1) there has been a manifest error of assessment in the appraisal of any requirement necessary to impose the anti-dumping measure (European Union) (2) or because the administrative agencies failed to consider an important aspect of the problem (3) or simply runs counter the

evidence, so clearly commits an error of judgment (United States). By large, the two criteria cover the same situations.

This raises the question whether and to what extent domestic courts really defer to the administrative agencies factual establishment and conclusions. Both in the European Union and in the USA, courts are reluctant to interfere in the foreign policy affairs, under that umbrella falls trade defense as well. It is commonly held that the US courts' judicial restraint in the overview of anti-dumping decisions has been less deferential compared to that of the European Court of Justice. Albeit the limited overview, European courts have been increasingly intrusive in controlling anti-dumping rulings: in the last decade, the CFI/ECJ have found out on several occasions that the European Commission committed a manifest error of assessment of the factual record. This control criterion touches the anti-dumping decisions at their core point, since the factual establishment and appraisal of facts are closely linked. The latter implies a more intense review, because the legal construction is more linked to the agencies' discretionary powers of interpretation.

As the outcome of the judicial review, the CFI/ ECJ annul partially or *in toto* the contested anti-dumping regulation, while the CIT/CAFC remands the case to the administrative agency for further consideration. By the exhaustion of internal judicial remedies, enterprises have no further possibilities to attempt to change the anti-dumping decision.

The other channel for judicial overview of anti-dumping decisions takes place at international level, in the framework of the WTO, where only the Members of the Organization can have standing. These cases have more elevated implications, not just because of the parties' special status but also because of the global impact of the outcome and the possibility to make "as such" claims in the dispute.

A Member State of the WTO can bring a claim to the Dispute Settlement Body if it considers that any benefits accruing to it under the covered agreements are being impaired by measures taken by another Member. An anti-dumping measure is in clear contrast with the principle of most favored nation, therefore a WTO Member State legitimately takes action against another Member in case it obstructs the free flow of goods. As in the domestic disputes, the panels' and the Appellate Body's overview is restricted to an intermediate judicial review, namely to check certain factors. At first, the DSB shall make its judgment on the factual establishment of the bureaucratic agency, then check whether the assessment of those facts has been unbiased and objective. The panels' and the Appellate Body's task is twofold and inter-connected: examines the agencies' factual record and the way it had been gathered and subsequently makes its own evaluation of those facts, however it is called for upholding those decisions that rest upon a permissible interpretation of the statue. The DSB has limited fact-finding possibilities, therefore it does not re-establishes the facts already ascertained in the original anti-dumping investigation. Rather, its considerations are based on the factual record that was available for the investigating authority at the time of the anti-dumping determination. In turn, legal questions are reviewed through an independent treaty construction of the DSB but the final result of multiple interpretations is that of the accused

country's administrative agency. According to the provisions of the ADA, panels and the AB shall uphold the anti-dumping authorities' permissible construction.

Similar to domestic cases, the intrusiveness of the judicial body can be measured mainly through the examination of how panels' and the Appellate Body treat the issue of the factual appraisal. It can be said, that their overview of facts has been extended by time: the focus of the DSB is more on the appreciation of the evidence than on the respect of procedural requirements of the case. The reasoning became the core issue of the review and this gives more opportunity to the panel and the Body for a deeper review.

Overall, the courts' approach towards the review of anti-dumping decisions has considerably changed. While at the early stages subsequent to the inception of the anti-dumping instrument based on multilateral agreements these courts maintained a more deferential attitude towards anti-dumping determinations, either due to the foreign policy prerogatives of the executive branch or for reasons of technical expertise. Probably because of the increased use of this trade remedy measure, courts became more familiar with the instrument and they started to control increasingly these decisions. Nevertheless, under this escalating intrusiveness, courts are aware of the fact that although international trade is rule-based, it remains partially political-driven; as a consequence, they should not unduly restrict the negotiating powers of the executive at an international level, neither weaken the country's position by granting e.g. direct effect to WTO Agreements. These are almost universally followed principles, and the countries do not want to give them up based on considerations of reciprocity. This rationale is particularly true if we consider that the WTO aims at maintaining a balanced relationship between its Members.

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