ARTICLE 17.6 OF THE WTO ANTI DUMPING AGREEMENT: 
A BURDEN FOR DOMESTIC PRODUCERS TO OBTAIN RELIEF *)

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Abstract

One type of administrative action that can be reviewed by a Panel under the WTO standard of review is the imposition of anti dumping duties. However, some scholars found that it is not clear how the standard of review as stipulated in the WTO Anti Dumping Agreement should be applied. This essay will focus on the application of standard of review as stipulated in Article 17.6 of the AD Agreement by the WTO panels and the Appellate Body. It is argued that the ambiguity of Article 17.6 has resulted in less deference towards national authorities’ anti dumping decision. Consequently, the panels and Appellate Body decision also stands less in favour of the injured domestic producers’ interest to obtain relief.

Keywords: anti dumping, domestic producer, standard of review.

1. Introduction

One of the fundamental reforms of the GATT dispute settlement system is the adoption of the Dispute Settlement Understanding (DSU) along with the Final Act of Marakesh Agreement establishing the World Trade Organization (WTO) concluding the Uruguay Round of Multilateral trade negotiations. Consequently, questions about Members’ compliance with international trade obligations have become more legalized.¹ The transition of international trade regulation from pragmatism to legalism has put the process of the WTO adjudication under intense scrutiny.² According to Steven P. Croley and John H. Jackson, it is generally accepted that the dispute settlement procedure is

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aimed to assist the effective application of the rules and is “adding an essential measure of predictability and effectiveness to the operation of the rule-oriented system”.

The legalistic framework of the WTO dispute settlement system is carried by dispute settlement bodies known as Panel. Conducting quasi-judicial proceeding, the panel hears complaints from member states which allege that the other member has violated its obligation under the GATT or other agreements of the WTO. One of the most important aspects of adjudication of the Panel is that it may conduct direct reviews to some national administrative action. One type of the administrative action that can be reviewed by the Panel under the WTO standard of review is the imposition of anti dumping duties. In relation to this issue, Croley and Jackson stated that there “have been questions about the degree in which an international body should “second-guess” a decision of a national government agency concerning economic regulation that is allegedly inconsistent with an international rule.

As a result of the specific standard of review, it is possible to challenge the national dumping determination. Interestingly, Daniel K. Tarullo found that “national authorities have lost on at least one significant issue in the final dispute settlement stage of every such challenge…”. This fact has raised criticism from a member state which accused that the panel and Appellate Body “ignoring their obligation to afford an appropriate level of deference to national authorities, and eroding bargained for trade remedy protection”. On the contrary, James P. Durling stated that this critic has been unfair. He further firmly believed that the WTO panels and the Appellate Body have adequately aware that they have duty to enforce the Anti-Dumping (AD) Agreement. He therefore asserted that “notwithstanding the special standard of review reflected in Article 17.6. WTO panels have been deferential, but only when deference is due”.

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4 Daniel K. Tarullo, ‘The Hidden Costs of International Dispute Settlement’ above n1 at 110.
5 Steven P. Croley and John H. Jackson, above n3 at 194.
8 Id at 127.
However, that argument seems to suggest that there have been no problems with the application of article 17.6 of the AD Agreement by the WTO panels. Jeff Waincymer found that it is not clear how the standard of review as stipulated in Article 17.6(i) and (ii) should be applied. For instance, Article 17.6(i) leaves an ambiguous determination of “proper, unbiased and objective establishment of the facts”. Similarly, Article 17.6(ii) leaves the application of terms “permissible interpretation” uncertain. Although Article 17.6(ii) requires the panels to interpret AD Agreement in accordance with the interpretation methodology as stipulated in the Vienna Convention on the Law of Treaties, it is not clear whether the panels is allowed come out with more than one “permissible interpretation”.

This essay will focus on the application of the standard of review as stipulated in Article 17.6 of the AD Agreement by the WTO panels and the Appellate Body. Does Article 17.6 of the AD Agreement make it too difficult for injured domestic producers to obtain relief? Part 2 of this essay will discuss the application of Article 17.6. It will start with the negotiation history of this Article under the GATT system and will be followed by an analysis on the foundation of the standard of review under AD Agreement. The WTO panels and Appellate Body decisions will be discussed in Part 3 of this essay, particularly this part will focus on the impact of the application of Article 17.6 to the panels and Appellate Body decisions. To limit the discussion, only some leading cases relating to the review of Article 2 and 3 of the AD Agreement by the Appellate Body will be presented. A conclusion will be delivered in Part 4. It is argued that the uncertain meaning of Article 17.6 has resulted in less deference towards national authorities’ factual findings and interpretation of law. In fact, the Appellate Body has shown an overreaching conduct in reviewing national authorities’ factual evaluation and exclusively limited the members’ prerogative rights to chose among a range of possible interpretations of the AD Agreement. Consequently, the Appellate Body decisions seem to stand less in favour of a Member’s interest in providing remedies from the effects of dumping for its injured domestic producers.

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2. Application of Article 17.6 – Standard of Review

A. Negotiating History of Article 17.6

The AD Agreement is the only agreement which has a special standard of review that must be applied by the WTO panels in reviewing national authorities’ decisions on the imposition of anti dumping duties. This standard of review is as set forth in Article 17.6 of the AD Agreement. Paragraph (i) provides the WTO panels with the rules on the standard of review of factual findings and paragraph (ii) stipulates the standard of review of legal interpretations of the AD Agreement.  

In examining the matter referred to in paragraph 5:
(i) in its assessment of the facts of the matter, the panel shall determine whether the authorities’ establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective. If the establishment of the facts was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned;
(ii) the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. Where the panel finds that a relevant provision of the Agreement admits of more than one permissible interpretation, the panel shall find the authorities’ measure to be in conformity with the Agreement if it rests upon one of those permissible interpretations.

In order to understand the meaning of Article 17.6, Alford suggested that it is significant to consider the negotiating history of this provision. This special standard of review of the AD Agreement was added on the final days of the Uruguay Round of Multilateral Trade Negotiations at the insistence of the United States. Apparently the drafters adopted the Chevron’s deference principle as applied by the U.S. federal courts because some government representatives believed that this principle would provide a useful model for this constraint. The Chevron principle provides that the interpretation of statutory provision conducted by an administrative agency must not be overruled by the courts if it falls within the reasonable construction of the statute. However, some changes had been made to compromise the interests of the member states. Some nations

10 Matthias Oesch, Standards of Review in WTO Dispute Resolution (OUP, New York, 2003) at 89.
11 Roger P. Alford, above n2 at 200.
12 Steven P. Croley and John H. Jackson, above n3 at 199.
13 Roger P. Alford, above n2 at 200.
believed that ‘reasonable’ standard would allow member states to develop their own approaches to the WTO agreements. Furthermore, the “reasonable criteria” would make it too difficult to challenge the non compliance conduct of the WTO members. Therefore, the word “reasonable” was replaced with “permissible” and the drafters added an additional sentence which requires the WTO panels to interpret the AD Agreement in accordance with customary rules of interpretation of public international law.

According to Alford, the wording of Article 17.6 “embraces a well-recognized interpretative approach in international law which requires judicial deference to national authorities under certain circumstances”. More importantly he also asserted that this approach of deference is “consistent with the broader general international law principle that everything that is not prohibited under international law is permitted”. On the contrary, Croley and Jackson took a different argument. They believed that Chevron interpretative approach cannot be sustained in the WTO adjudication proceedings for at least three reasons. Firstly, the word “permissible” under article 17.6 may not have identical meaning with the word “reasonable” or “permissible” as stipulated in U.S. Law. Secondly, it is obvious that the "customary rules of interpretation of public international law" are different to the “traditional tools of statutory construction” under the U.S. domestic law. Thirdly, there is a difference in the underlying legal problem in an international proceeding. In national court proceeding, the judge is reviewing national administration decision under national law, whereas in international proceeding, the international body is obliged to interpret and apply the international rules related with the case.

For these reasons, Croley and Jackson concluded that “If Article 17.6 is to be applied in a Chevron-like way, its justification must come from outside the Chevron paradigm”. Unfortunately, Croley and Jackson did not give a clear justification of the application of Article 17.6 AD Agreement. They suggested the use of national

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14 Steven P. Croley and John H. Jackson, above n3 at 199.  
15 Roger P. Alford, above n2 at 200.  
16 Roger P. Alford, above n2 at 202.  
17 Ibid.  
18 Steven P. Croley and John H. Jackson, above n3 at 205-206.  
19 Id at 210.  
20 Id at 211.
“sovereignty” principle may justify deferential standard in the WTO panel review; however, they admitted that even this suggestion does not provide a persuasive argument.\textsuperscript{21} Therefore, they concluded that “when a particular national authority's activity or decision would undermine the effectiveness of WTO rules, or would establish a practice that could trigger damaging activities by other member countries, panels will undoubtedly show it less deference”.\textsuperscript{22} In conclusion, by examining the negotiating history of Article 17.6 AD Agreement, it is clear that the Chevron standard of review approach was not the standard of review as embraced in Article 17.6 AD Agreement. As a result of this situation, if the Chevron standard of approach is still to be applied in international dispute settlement like the WTO system, then it is more likely that the Panel and Appellate Body will give less deference to the national authorities’ decision.

B. Ambiguous Meaning of the Article 17.6

(i.) Article 17.6(i)

As noted above, Article 17.6(i) provides the WTO panels with the rules on the standard of review of factual findings. The basic tenet of this article is to prevent the Panels from conducting assessment and evaluation of the facts. Although the Panels might have reached a different factual conclusion, they are not allowed to overturn the national authorities’ evaluation if the establishment of the facts was proper and the evaluation was unbiased and objective. Oesch noted that Article 17.6(i) is “designed to preclude \textit{de novo} panel review of facts”, therefore, this article obliged the Panels to give certain deference to the factual findings of the national authorities.\textsuperscript{23} However, he found that it is not clear what degree of deference is to be allowed between \textit{de novo} review and total deference.\textsuperscript{24}

In relation to the second sentences of Article 17.6(i), Oesch found an ambiguity in the application of “unbiased” and “objective”. Similarly, Jaques H.J. Bourgeois stated that it is not clear whether a Panel should ignore evidence which shows that the

\begin{itemize}
  \item \textsuperscript{21} Ibid.
  \item \textsuperscript{22} Id at 213.
  \item \textsuperscript{23} Matthias Oesch, above n10 at 89.
  \item \textsuperscript{24} Ibid.
\end{itemize}
investigating authority had relied on a wrong fact.\textsuperscript{25} Article 17.6(i), on its face, imposes obligation to the panels to uphold national authorities’ evaluation if such evaluation has not been proven to be ‘biased’ and ‘subjective’. The Panel must do so even though that evaluation may be wrong or improper in another way. Matthias Oesch asserted that “there is no textual basis for overturning such an evaluation except in the case of ‘bias’ or ‘subjectivity’.”\textsuperscript{26} As a consequence of this ambiguity, he believes that panels could then gives less deference to national investigating authorities’ factual evaluation and therefore, may come out with decision which “stands less in favour of domestic industry’s protectionist interest”.\textsuperscript{27} As cited by Oesch, a similar argument is suggested by Waer and Vermulst, they stated that “panels may well find “bias and subjectivity” inherent in any unconvincing evaluation of the facts which \textit{de facto} results in favouring the importing country’s domestic industry”.\textsuperscript{28}

(ii.) Article 17.6(ii)

In connection with questions of law, it is clear that the first sentence of Article 17.6(ii) instruct panels to interpret the provision of the AD Agreement in question “in accordance with customary rules of interpretation of public international law”, which is Articles 31 and 32 of the \textit{of the Vienna Convention on the Law of Treaties} (VCLT).\textsuperscript{29} The second sentence of Article 17.6(ii) requires Panel to defer to national authorities’ interpretation of the AD Agreement if this interpretation rest upon a permissible interpretation and in conformity with the customary international law.\textsuperscript{30} Moreover, Article 17.6(ii) allows panels to find more than one permissible interpretation and not to overturn the national authority decision if it rests upon one of those permissible interpretations. According to Ehlermann and Lockhart, as cited by Asif H. Qureshi, this deference does not conform to the standard of interpretation for international treaties as construed in Articles 31 and 32 VCLT, which allows only one interpretation.\textsuperscript{31}

\textsuperscript{26} Matthias Oesch, above n10 at 92.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid.
\textsuperscript{29} Id at 93.
\textsuperscript{30} Asif H. Qureshi, \textit{Interpreting WTO Agreements} (Cambridge, UK, 2006) at 216.
\textsuperscript{31} Ibid.
Matthias Oesch believes that the possibility of arriving at more than one permissible interpretation as stipulated in the second sentence of Article 17.6(ii) is “arguably inconsistent with the rules of interpretation stipulated in Articles 31 and 32 of the VCLT.”

According to Croley and Jackson, Article 32 of the VCLT provides additional guidelines when the interpretation according to article 31 still leaves the meaning of the provision in question “ambiguous or obscure”, or when it leads to an interpretation result which is “manifestly absurd”. They further affirmed that the object of Article 31 is to resolve ambiguities, but if this article could not do so, in order to confirm the meaning resulting from the application of Article 31, the rules as stipulated in Article 32 must then be applied. Croley and Jackson therefore concluded that “Thus, it is not clear what sort of ambiguity in an agreement's provision is sufficient to lead a reviewing panel to the second step of the analysis contemplated in Article 17.6(ii)). As a result of this uncertainty, there is a question on “what sort of ambiguity is sufficient to trigger a panel's deference?”

To sum up, the imprecise meaning of both Articles 17.6(i) and (ii) leaves the standard of review of the provisions of the AD Agreement remains uncertain. As cited by Matthias Oesch, Palmeter stated that the AD Agreement standard of review “is a standard with a flawed rationale and with contradictory terms”. Consequently, it is reasonable if panels and the Appellate Body give less deference to national anti dumping authorities’ decision. This view is shared with Jaques H. J. Bourgeois, which asserted that “…allowing more scope for protective action under Article VI of the GATT which is a departure from basic rules of the GATT … seems hardly consistent with general principle that exceptions are to be narrowly construed”.

C. Determination of Article 17.6 Based on the Appellate Body Decisions

32 Matthias Oesch, above n10 at 94.
33 Steven P. Croley and John H. Jackson, above n3 at 201.
34 Ibid.
35 Ibid.
36 Matthias Oesch, above n10 at 93.
37 Jaques H.J. Bourgeois, above n25 at 271.
In relation with Article 17.6(i), the Appellate Body in *Thailand – H-Beams* determined the purpose of Article 17.6(i) as follows:

“Article 17.6(i) places a limitation on the panel in the circumstances defined by the Article. The aim of Article 17.6(i) is to prevent a panel from "second-guessing" a determination of a national authority when the establishment of the facts is proper and the evaluation of those facts is unbiased and objective.”

A more detailed explanation on the application of the standard of review of factual findings by the Panel is as clarified by the Appellate Body decision in *US – Hot Rolled Steel*, which stated that:

“In considering Article 17.6(i) of the Anti-Dumping Agreement, it is important to bear in mind the different roles of panels and investigating authorities. Investigating authorities are charged, under the Anti-Dumping Agreement, with making factual determinations relevant to their overall determination of dumping and injury. Under Article 17.6(i), the task of panels is simply to review the investigating authorities' "establishment" and "evaluation" of the 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 Article 17.6(i) should require anything other than that panels make an objective "assessment of the facts of the matter".”

Based on the above Appellate Body decisions, Oesch concluded that Article 17.6(i) embraces a less deferential standard. This is because in order to reverse the national authorities’ decision, a panel is only required to find the existence of an improper establishment and evaluation of the facts. Article 17.6(i) does not require a panel to “necessarily establish the existence of an arbitrary mistake in the establishment and evaluation of the facts”.

With respect to the process of panel examination on Member’s legal interpretation of the AD Agreement, in the early case, the Appellate Body in *Thailand – H-Beams* did not clarify the operation of the Article 17.6(ii). However, in *US – Hot Rolled Steel* the Appellate Body provided clarification on how the panels should determine whether

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42 Matthias Oesch, above n10 at 90.
national authorities’ interpretation of the AD Agreement is permissible. There are two steps in this proceeding, firstly, Panel must apply the customary rules of treaty interpretation as construed in article 31 and 32 of the VCLT and secondly after making an appropriate interpretation on the provision of the AD agreement in question, panel must then determine the “permissibility” of the Member’s interpretation. In particular, the Appellate Body stated that:

“… a permissible interpretation is one which is found to be appropriate after application of the pertinent rules of the Vienna Convention. … We cannot, of course, examine here which provisions of the Anti-Dumping Agreement do admit of more than one "permissible interpretation". Those interpretive questions can only be addressed within the context of particular disputes, involving particular provisions of the Anti-Dumping Agreement invoked in particular claims, and after application of the rules of treaty interpretation in Articles 31 and 32 of the Vienna Convention.”

Nevertheless, this decision still leaves uncertainty on the question of which provisions of the Anti-Dumping Agreement do admit of more than one “permissible interpretation”. In particular, Matthias Oesch criticized the wording of “within the context of particular disputes”. He believes that unlike the interpretation of facts which is case-specific, the interpretation of law should not be limited to a specific case. He further asserted that the interpretation of rights and obligation of WTO Members under the AD Agreement should not be varied “depending on the ‘context of the dispute’ or the ‘particular claim’. Thus, by deciding that the interpretation of law under the AD Agreement should be addressed “within the context of particular disputes”, the Appellate Body seems to deny the duty to ensure consistency in its decision making process. This is in contradiction with the Appellate Body working procedures that “it is also important to ensure consistency and coherence in our decision-making, which is to the advantage of every WTO Member and the overall multilateral trading system we all share”. Therefore, by leaving the interpretation of law under the AD Agreement ambiguous, the Appellate Body makes it too difficult for the WTO Members to interpret their rights and obligations.

44 Ibid.
46 Matthias Oesch, above n10 at 181.
47 Ibid.
obligation under the AD Agreement. Consequently, this situation could become a burden for the domestic industry to obtain relief from the effects of dumping.

3. **Panels and Appellate Body Decisions Relating to the Application of Article 17.6 in Interpreting Article 2 and 3 of the AD Agreement.**

   As discussed above, it is argued that standard of review under the AD Agreement embraces a less deferential standard on both the national authorities’ factual evaluation and interpretation of law. Furthermore, this standard of deference also stands less in favour of domestic industry’s interest to obtain relief from dumping practices. This part will discuss the panels and Appellate Body decision on several cases relating to the application of Article 17.6 in interpreting Member’s factual evaluation and legal interpretation on Article 2 and 3 of the AD Agreement. What is the impact of this less deferential standard and ambiguity of Article 17.6 to the panels and Appellate Body decision? Regarding this issue, Tarullo found that the application of Article 17.6 standard of review by the Appellate Body “has had no perceptible impact on WTO review of national anti-dumping actions”. This standard of review has not changed the importing countries position of losing in almost every issue in anti dumping disputes. Subsequently, this condition would make it more difficult for injured domestic producers to obtain relief.

A. **Appellate Body Decision in Relation with Fact Findings**

   In *United States - Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")* case, the European Communities alleged that the methodology used by the United States, in the calculation of dumping margins or known as “zeroing” is inconsistent with the United States’ obligations under the AD Agreement. One of the US legal instrument that is challenged by the EC was the US "practice or methodology"

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49 Daniel K. Tarullo, ‘Paved With Good Intentions’ above n6 at 15.
of “zeroing", “as such”. The factual question in this particular dispute was whether the United States had a policy on zeroing that represented an unwritten rule or norm that was inconsistent with Article 2.4.2 of the AD Agreement. According to Alford, this case has shown a significant example of an overreaching conduct of the Appellate Body in reviewing a national authority’s factual determinations.

In this case, the Appellate Body took a different approach from the Panel in assessing factual evidence. It concluded that the Panel’s factual findings were insufficient and it relied on the evidence that had been avoided by the Panel. In particular the Appellate Body stated that:

Reviewing the Panel’s reasoning, it is evident that there are several features of the Panel's analysis that differ from our own. First, the Panel did not articulate the criteria for bringing an "as such" challenge in the same way as we have above. Moreover, the Panel did not, in its analysis, clearly distinguish between the issue of ascertaining the existence of the challenged measure, which is especially important when unwritten measures are at issue, and the separate examination of its consistency with the relevant provisions of the covered agreements. We are also of the view that the Panel did not articulate its ultimate conclusion regarding the consistency of the "zeroing methodology" with Article 2.4.2 with sufficient precision.

As discussed above in Part 2 of this writing that Article 17.6(i) is designed to preclude de novo panel review of facts. However, as stated by Oesch, it is not clear what degree of deference is to be set out in between de novo review and total deference. This particular case provides an example on the effects of the uncertain degree of deference in Article 17.6(i). Alford believed that in this case, the Appellate Body had undertaken de novo review of the evidence presented by the party to the panel which is prohibited by Article 17.6(i). Consequently, the importing country is the most suffered by this Appellate Body Approach of de novo review.

By precluding panels in doing de novo review, Article 17.6(i) clearly requires the Panels to gives deference to the factual findings of the national authorities. However, this deferential standard was ignored by the Appellate Body as shown in its decision above.

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52 Roger P. Alford, above n2 at 214.
53 Ibid.
55 Roger P. Alford, above n2 at 214.
mentioned. Thus, if this decision becomes precedent in the WTO dispute settlement system, it will make it more difficult for the Member States to provide relief for their domestic industries which are injured by dumped products.

B. Appellate Body Decision in relation with Interpretation of Law

As discussed above in Part 2, Article 17.6(ii) allows panels to find more than one permissible interpretation and not to overturn the national authority decision if it rests upon one of those permissible interpretations. In contrast, many scholars argued that the possibility of arriving at more than one permissible interpretation is arguably inconsistent with the rules of interpretation stipulated in Articles 31 and 32 of the VCLT. However, this ambiguity has its own cost. The effect of this ambiguity is as shown in several cases where the Appellate Body has failed to recognize the possibility of permissible alternative interpretation as required by Article 17.6(ii). As noted by Tarullo, the Appellate Body failure to recognize the possibility of permissible alternative interpretation can be found at least in three cases. These cases are the European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India,\textsuperscript{56} the United States - Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan\textsuperscript{57} and in United States - Zeroing.

In EC - Bed Linen, one of the key issues raised before the Appellate Body was whether the practice of “zeroing” in establishing “the existence of margins of dumping”, as applied by the European Communities in the anti-dumping investigation is consistent with Article 2.4.2 of the AD Agreement.\textsuperscript{58} In relation with this issue, the Appellate Body emphasized that in order to determine the dumping margin for a product “Article 2.4.2 speaks of "all" comparable export transactions”, thus, “by "zeroing" the "negative dumping margins", the European Communities, therefore, did not take fully into account the entirety of the prices of some export transactions”.\textsuperscript{59} However, as criticized by Tarullo, the Appellate Body failed to consider whether there could be multiple

\textsuperscript{56} European Communities - Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India, Appellate Body Report, (WT/DS141/AB/R) / DSR 2001:V, 2049.
\textsuperscript{58} EC-Bed Linen, Appellate Body Report (WT/DS141/AB/R) at Para. 46.
\textsuperscript{59} EC-Bed Linen, Appellate Body Report (WT/DS141/AB/R) at Para. 55.
‘permissible’ interpretation of the word “comparable” within the meaning of Article 2.4.2 of the AD Agreement. Instead, the Appellate Body used the Concise Oxford Dictionary of Current English to determine the meaning of the word ‘comparable’ and stated that “the ordinary meaning of the word "comparable" is "able to be compared". According to Tarullo, this case is one of the most obvious examples of a disregard for Article 17.6(ii) standard of review.

In the next case, by relying on its previous reports in a safeguard disputes, the appellate Body in US – Hot Rolled Steel failed to address the possibility of another “permissible” alternative interpretation of the non-attribution language within the meaning of Article 3.5 of the AD Agreement. In this case, the Appellate Body reversed the Panel's interpretation of the non-attribution standard in AD Agreement Article 3.5. It concluded that the national investigating authorities “must "separate" and "distinguish" the injurious effects of other causal factors from the effect of dumped imports”. In order to reach that conclusion, the Appellate Body cited and found support from its reports in U.S. - Wheat Gluten Safeguards and U.S. - Lamb Safeguards which dealing with non-attribution language contained in the causation standard of Article 4.2(b) of the Safeguards Agreement. In particular, the Appellate Body stated that:

“Although the text of the Agreement on Safeguards on causation is by no means identical to that of the Anti-Dumping Agreement, there are considerable similarities between the two Agreements as regards the non-attribution language. ...In these circumstances, we agree with the Panel that adopted panel and Appellate Body reports relating to the non-attribution language in the Agreement on Safeguards can provide guidance in interpreting the non-attribution language in Article 3.5 of the Anti-Dumping Agreement”.

Although Durling believed that in this case, Appellate Body had correctly replaced the old standard for non-attribution in Atlantic Salmon with the new non-attribution

60 Daniel K. Tarullo, ‘Paved With Good Intentions’ above n6 at 378.
62 Daniel K. Tarullo, ‘Paved With Good Intentions’ above n6 at 378.
65 Id. at 17.
language in Article 3.5, Tarullo found that in interpreting the non-attribution language in Article 3.5 of the AD Agreement, the Appellate Body failed to mention Article 17.6(ii) standard of review. Therefore, apparently the Appellate Body seems reluctant to employ the standard of review as stipulated in Article 17.6(ii). In addition, Tarullo also believed that by disregarding Article 17.6(ii) standard of review, the Appellate Body failed to consider that the non-attribution standard in anti-dumping case might require a different permissible meaning than in a safeguard case.

The third case which showed the reluctance of Appellate Body to consider the possibility of another “permissible” interpretation of the provisions of AD Agreement is as shown in US – Zeroing case. As cited by Alford, the Panel in US – Zeroing found that the United States’ interpretation on the second sentence of Article 2.4.2 is logically accepted. Majority of the Panel agreed with the United States interpretation and concluded that “Article 2.4.2 prohibition on zeroing does not apply to administrative reviews, and thus it found that zeroing in administrative reviews does not violate Article 2.4.2.” Particularly, the Panel stated that:

“… We cannot interpret the Agreement in a manner that denies a provision the role for which it was created and in fact renders that provision without effect. Accordingly, we must conclude that Article 2.4 does not consider zeroing to be unfair and thus prohibited in all circumstances, but rather recognizes that in some cases zeroing may be appropriate in order to accurately reflect the existence of dumping by an exporter”.

On the contrary, the Appellate Body took a different approach on this issue. Instead of examining whether the Panel has correctly reached its decision in accordance with Article 17.6(ii) standard of review, the Appellate Body relied in its own finding with the support of its previous decision in US - Softwood Lumber which found that Article 2.4.2 prohibited certain methodologies to establish the margin of dumping in the investigation phase of anti-dumping proceeding. Specifically, the Appellate Body stated that:

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68 James P. Durling, above n7 at 140.
70 Roger P. Alford, above n2 at 207.
73 Roger P. Alford, above n2 at 208.
“… in US - Softwood Lumber V, the Appellate Body ruled on a claim regarding the calculation of a margin of dumping in an original investigation based on the weighted-average-to-weighted-average methodology as provided for in the first sentence of Article 2.4.2. The Appellate Body confirmed that the text of Article 2.1 of the Anti-Dumping Agreement, as well as the text of Article VI:1 of the GATT 1994 (which, as we mentioned above, defines dumping as occurring where "products of one country are introduced into the commerce of another country at less than the normal value of the products") indicate clearly that "dumping is defined in relation to a product as a whole". The Appellate Body specified that, while an investigating authority may choose to undertake multiple comparisons or multiple averaging at an intermediate stage to establish margins of dumping, "it is only on the basis of aggregating all these 'intermediate values' that an investigating authority can establish margins of dumping for the product under investigation as a whole." The Appellate Body added that, in the context of the weighted-average-to-weighted-average methodology, there is no justification for "taking into account the 'results' of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other 'results'." Thus, "[i]f an investigating authority has chosen to undertake multiple comparisons, the investigating authority necessarily has to take into account the results of all those comparisons in order to establish margins of dumping for the product as a whole under Article 2.4.2."  

According to Alford, the significance of this case is whether in reaching that conclusion, the Appellate Body has taken into account the deferential standard of review as stipulated in Article 17.6(ii). He further believed that by failing to taken seriously its obligation under Article 17.6(ii) standard of review, the Appellate Body “failed to recognize the possibility of more than one permissible interpretation of the relevant provisions of the Antidumping Agreement, including the one reflected in longstanding practice of the United States”.  

Based on the above discussion on Appellate Body decisions, it can be concluded that the ambiguity in Article 17.6(ii) has an obvious impact on the Appellate Body decision relating with the Members’ interpretation on the relevant provision of AD Agreement. Because the question of which provisions of the AD Agreement do admit of more than one “permissible interpretation” has not yet been defined, the Panel and Appellate Body seemed to be reluctant to accept more than one permissible interpretation. According to Oesch, this situation gives rise to the question “whether panels and Appellate Body have excessively limited the members’ prerogative to choose

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75 Roger P. Alford, above n2 at 210.
among range of possible interpretations of the AD Agreement”. In fact, from the three cases above, it is obvious that by limiting the Members’ prerogative right to choose possible interpretations of the AD Agreement, the Appellate Body has also indirectly diminished Member’s rights to impose anti dumping measure to any dumping practice which is found to be injurious. Similarly, by disregarding the possibility that the provisions of the AD Agreement admit of more than one “permissible interpretation”, the Appellate Body seems to diminish the deference standard as required by Article 17.6(ii). As a result, this situation will make it too difficult for the injured domestic producers to obtain relief.

4. Conclusion

Article 1 of the AD Agreement clearly requires that no anti dumping measure shall be applied by Members of the WTO unless it is conducted in accordance with the provisions of the AD Agreement. In order to assess whether national investigating authority had properly applied the relevant AD Agreement in imposing anti dumping measure, Article 17.6 of the AD Agreement provides standard of review for the Panel and Appellate Body. Although Article 17.6 obliged the Panel to gives certain degree of deference to the factual findings and legal interpretation of the national authorities, it is argued that this standard of review gives less deference to the national investigating authorities’ decision and stands less in favour of the domestic industry’s interest to obtain relief from the injuries caused by dumping practice. Relating with this situation, I agree with Edwin Vermulst which has correctly concluded that “It is significant that international regulation has always focused more on the trade distorting effects of anti dumping action than on the effects of dumping it self.”

The possibility of a WTO Member to provide remedies for its domestic industries is even worsened by the uncertain meaning of the AD Agreement standard of review. As discussed in this writing, the Appellate Body has shown a tendency to substitute its own judgment for that of the national authorities. Article 17.6(i) leaves unclear to what degree of deference is to be allowed between de novo review and total deference? Similarly

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76 Matthias Oesch, above n10 at 182.
Article 17.6(ii) leaves uncertain which provisions of the AD Agreement do admit more than one “permissible interpretation”. Based on the cases reviewed in this writing, it is obvious that the Appellate Body has excessively limited the Members’ prerogative to choose among a range of possible interpretations of the AD Agreement.

In conclusion, Article 17.6 of the AD Agreement gives less deference to the national authorities’ decision to interpret the provision of the AD Agreement. Consequently, the standard of review as embraced in Article 17.6 of the AD Agreement makes it too difficult for the injured domestic producers to obtain relief.

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