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1 ARTICLE 2

1.1 Text of Article 2

Article 2

Determination of Dumping

2.1 For the purpose of this Agreement, a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.

2.2 When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country[2], such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits.

(*footnote original*)[2] Sales of the like product destined for consumption in the domestic market of the exporting country shall normally be considered a sufficient quantity for the determination of the normal value if such sales constitute 5 per cent or more of the sales of the product under consideration to the importing Member, provided that a lower ratio should be acceptable where the evidence demonstrates that domestic sales at such lower ratio are nonetheless of sufficient magnitude to provide for a proper comparison.

2.2.1 Sales of the like product in the domestic market of the exporting country or sales to a third country at prices below per unit (fixed and variable) costs of production plus administrative, selling and general costs may be treated as not being in the ordinary course of trade by reason of price and may be disregarded in determining normal value only if the authorities[3] determine that such sales are made within an extended period of time[4] in substantial quantities[5] and are at prices which do not provide for the recovery of all costs within a reasonable period of time. If prices which are below per unit costs at the time of sale are above weighted average per unit costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

(*footnote original*)[3] When in this Agreement the term "authorities" is used, it shall be interpreted as meaning authorities at an appropriate senior level.

(*footnote original*)[4] The extended period of time should normally be one year but shall in no case be less than six months.

(*footnote original*)[5] Sales below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represents not less than 20 per cent of the volume sold in transactions under consideration for the determination of the normal value.

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2.2.1.1 For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration. Authorities shall consider all available evidence on the proper allocation of costs, including that which is made available by the exporter or producer in the course of the investigation provided that such allocations have been historically utilized by the exporter or producer, in particular in relation to establishing appropriate amortization and depreciation periods and allowances for capital expenditures and other development costs. Unless already reflected in the cost allocations under this sub-paragraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production, or for circumstances in which costs during the period of investigation are affected by start-up operations.[6]

(*footnote original*)[6] The adjustment made for start-up operations shall reflect the costs at the end of the start-up period or, if that period extends beyond the period of investigation, the most recent costs which can reasonably be taken into account by the authorities during the investigation.

2.2.2 For the purpose of paragraph 2, the amounts for administrative, selling and general costs and for profits shall be based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(i) the actual amounts incurred and realized by the exporter or producer in question in respect of production and sales in the domestic market of the country of origin of the same general category of products;

(ii) the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(iii) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

2.3 In cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.

2.4 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability.[7] In the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties

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in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

(*footnote original*)[7] It is understood that some of the above factors may overlap, and authorities shall ensure that they do not duplicate adjustments that have been already made under this provision.

2.4.1 When the comparison under paragraph 4 requires a conversion of currencies, such conversion should be made using the rate of exchange on the date of sale[8], provided that when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Fluctuations in exchange rates shall be ignored and in an investigation the authorities shall allow exporters at least 60 days to have adjusted their export prices to reflect sustained movements in exchange rates during the period of investigation.

(*footnote original*)[8] Normally, the date of sale would be the date of contract, purchase order, order confirmation, or invoice, whichever establishes the material terms of sale.

2.4.2 Subject to the provisions governing fair comparison in paragraph 4, the existence of margins of dumping during the investigation phase shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a weighted average-to-weighted average or transaction-to-transaction comparison.

2.5 In the case where products are not imported directly from the country of origin but are exported to the importing Member from an intermediate country, the price at which the products are sold from the country of export to the importing Member shall normally be compared with the comparable price in the country of export. However, comparison may be made with the price in the country of origin, if, for example, the products are merely transshipped through the country of export, or such products are not produced in the country of export, or there is no comparable price for them in the country of export.

2.6 Throughout this Agreement the term "like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

2.7 This Article is without prejudice to the second Supplementary Provision to paragraph 1 of Article VI in Annex I to GATT 1994.

1.2 General

1.2.1 Period of data collection

1.2.1.1 Role of the period of investigation

1. In *EC – Tube or Pipe Fittings*, the Appellate Body rejected Brazil's argument that the investigating authority was obliged to base its export price determination on data relating to only that part of the period of investigation (POI) that followed a steep devaluation of the Brazilian currency. According to the Appellate Body:

> "[C]ertain anomalous results would flow from Brazil's assertion that when a major change, such as in this case a steep and lasting devaluation, occurs at a late stage of the POI, the dumping determination should be confined to and based on the data

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> following that major change. If such a change were to take place at the very end of the POI, Brazil's approach would imply that the determination would have to be based on the data of a very short period."[1]

The Appellate Body, pointing out that there could also be a revaluation late in the POI, considered as follows:

> "Permitting such discretionary selection of data from a period of time within the POI would defeat the objectives underlying investigating authorities' reliance on a POI for the purposes of a dumping determination. As the Panel correctly noted, the POI 'form[s] the basis for an objective and unbiased determination by the investigating authority.' Like the Panel and the parties to this dispute, we understand a POI to provide data collected over a sustained period of time, which period can allow the investigating authority to make a dumping determination that is less likely to be subject to market fluctuations or other vagaries that may distort a proper evaluation. We agree with the Panel that the standardized reliance on a POI, although not fixed in duration by the Anti-Dumping Agreement, assures the investigating authority and exporters of 'a consistent and reasonable methodology for determining present dumping', which anti-dumping duties are intended to offset. In contrast to this consistency and reliability, Brazil's approach would introduce a significant level of subjectivity on the part of the investigating authority to determine when data from a subset of the POI may be a reliable indicator of an exporter's future pricing behaviour. As the European Communities points out, the 'broad judgmental role' accorded investigating authorities by Brazil's approach is not consistent with the detailed nature of the rules and obligations of the Anti-Dumping Agreement governing various aspects of the dumping determination."[2]

2. The Appellate Body found that "the Anti-Dumping Agreement takes into account the possibility of such major changes occurring at a late stage of the POI, or even after the POI, not by allowing investigating authorities to pick and choose a subset of data or sub-periods of a POI according to their subjective considerations, but by review mechanisms."[3]

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1.3 Article 2.1

1.3.1 General

3. The Appellate Body in *US – Stainless Steel (Mexico)* found that: "Article 2.1 of the Anti-Dumping Agreement defines 'dumping', and the opening phrase of that Article makes it clear that the definition applies '[f]or the purpose of this Agreement'. Therefore, 'dumping' and 'margin of dumping' have the same meaning throughout the Anti-Dumping Agreement."[4]

4. In *EU – Footwear (China)*, the Panel rejected the argument that Article 2.1 contains requirements regarding the methodology used to determine normal value, more specifically regarding the selection of the analogue country in investigations involving non-market economy countries.[5]

1.3.2 "Product"

5. In *EC – Bed Linen,* the Appellate Body referred to Article 2.1 in relation to Article 2.4.2 and remarked that "[f]rom the wording of this provision, it is clear to us that the Anti-Dumping Agreement concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*."[6]

6. In *US – Zeroing (Japan)*, Japan argued that Article 2.1 proscribed zeroing in general, due to the fact that "dumping" and "margins of dumping" are defined in terms of a "product(s)". Japan

[1] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 78.
[2] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 80.
[3] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 81.
[4] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 96.
[5] Panel Report, *EU – Footwear (China)*, para. 7.260.
[6] Appellate Body Report, *EC – Bed Linen*, para. 51.

argued that "product" had to be understood as "product as a whole" and therefore "dumping" and "margins of dumping" could not be applied to models, types, categories, sub-groups or transactions.[7] The Appellate Body in *US – Zeroing (Japan)* found that Article 2.1 of the Anti-Dumping Agreement and Articles VI:1 of the GATT were definitional provisions, and read in isolation did not impose independent obligations. Because the Appellate Body found the United States was acting "inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by maintaining zeroing procedures in original investigations on the basis of T-T comparisons"[8], it did not consider it necessary to make any additional findings under Article 2.1 or Article VI:I.

7. The Panel in *US – Orange Juice (Brazil)* found that in light of the Appellate Body's decisions regarding this issue, "the only permissible interpretation of the definition of 'dumping' contained in Article 2.1 of the AD Agreement, with relevance for the entire AD Agreement, is one that is based on an understanding that 'dumping' can only be determined for the 'product as a whole', and not individual transactions."[9]

1.3.3 "like product"

8. The Panel in *EC – Salmon (Norway)* considered Norway's claim that the "product under consideration" must consist of a single, internally homogeneous product or, alternatively, categories that are each individually "like" each other so as to constitute a single homogenous product.[10] The Panel found that "[t]here is simply nothing in the text of Article 2.1 that provides any guidance whatsoever as to what the parameters of that product should be. The mere fact that a dumping determination is ultimately made with respect to 'a product' says nothing about the scope of the relevant product. There is certainly nothing in the text of Article 2.1 that can be understood to require the type of internal consistency posited by Norway."[11] The Panel cited other provisions of the Anti-Dumping Agreement as relevant context for interpretation:

> "Article 6.10 provides for limited examination in cases where the number of 'types of products involved' is so large as to make it impracticable to determine an individual margin of dumping. Similarly, the Appellate Body has recognized that an investigating authority may divide a product into groups or categories of comparable goods for purposes of comparison of normal value and export price – the practice of 'multiple averaging'. Neither of these would be necessary if Norway's view of the meaning of 'a product' in Article 2.1 were the only permissible interpretation. There would be no possibility of investigating more than one 'type of product' as mentioned in Article 6.10, and no reason to group comparable goods for purposes of making price comparisons for each group in the process of calculating a single dumping margin for the product as a whole."[12]

9. The Panel in *EC – Salmon (Norway)* concluded that Articles 2.1 and 2.6 did not have to be interpreted to require an investigating authority (in this case, the European Communities) to have defined the product under consideration to include only products that are "like".[13]

10. In *EC – Fasteners (China)*, the Panel also concluded that Articles 2.1 and 2.6 did not require the investigating authority to define the product under consideration to include only products that are "like". The Panel remarked that "[t]he mere fact that a dumping determination is ultimately made with respect to "a product" says nothing about the scope of that product. There is certainly nothing in the text of Article 2.1 that can be understood to require any consideration of 'likeness' in

[7] Panel Report, *US – Zeroing (Japan)*, paras. 7.103-7.108.
[8] Appellate Body Report, *US – Zeroing (Japan)*, para. 140.
[9] Panel Report, *US – Orange Juice (Brazil)*, para. 7.135.
[10] Panel Report, *EC – Salmon (Norway)*, para. 7.47.
[11] Panel Report, *EC – Salmon (Norway)*, para. 7.48.
[12] Panel Report, *EC – Salmon (Norway)*, para. 7.49.
[13] Panel Report, *EC – Salmon (Norway)*, para. 7.68.

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the scope of the exported product investigated.[14]"[15] The Panel concluded that "while Article 2.1 establishes that a dumping determination is to be made for a single 'product under consideration', there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article."[16]

11. See also the related discussion under Article 2.6 below.

1.3.4 "less than its normal value": calculation of normal value

1.3.4.1 Use of sales transactions for calculating normal value

12. In *US – Hot-Rolled Steel*, the Appellate Body considered that "[t]he text of Article 2.1 expressly imposes four conditions on sales transactions in order that they may be used to calculate normal value: first, the sale must be 'in the ordinary course of trade'; second, it must be of the 'like product'; third, the product must be 'destined for consumption in the exporting country'; and, fourth, the price must be 'comparable'."[17]

13. The Panel in *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 - Argentina)* noted that:

> "As Article 2.1 makes clear, the starting point for normal value is 'the comparable price, in the ordinary course of trade' for the like product when destined for consumption in the exporting country. Thus, the concept of dumping is, in the first instance, a comparison of home market and export prices. Only in the circumstances set forth in Article 2.2 may an investigating authority look to alternative bases to home market prices, such as costs, when determining normal value."[18]

1.3.4.2 Use of downstream sales for calculating normal value

14. In *US – Hot-Rolled Steel*, the US authorities, in calculating the normal value, discarded certain sales by exporters to their affiliates because these sales were not "in the ordinary course of trade", and replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer, which had been made "in the ordinary course of trade". Japan objected to the use of these sales in calculating normal value, arguing that it is implicit in Article 2.1 that a sales transaction may only be used to calculate normal value if the exporter is the seller. The Appellate Body, reversing the Panel, considered that Article 2.1 is silent on this issue and that, if all four explicit conditions in Article 2.1 are satisfied (see paragraph 12 above), the identity of the "seller of the 'like product' is not a ground for precluding the use of a downstream sales transaction when calculating normal value". The Appellate Body noted that the identity of the seller may still affect normal value because it may affect comparability -- though that aspect is dealt with by Article 2.4:

> "The text of Article 2.1 is, however, silent as to *who* the parties to relevant sales transactions should be. Thus, Article 2.1 does not expressly mandate that the sale be made by the exporter for whom a margin of dumping is being calculated. Nor does Article 2.1 expressly preclude that relevant sales transactions might be made downstream, between affiliates of the exporter and independent buyers. In our view, provided that all of the explicit conditions in Article 2.1 of the *Anti-Dumping Agreement* are satisfied, the *identity* of the seller of the 'like product' is not a ground for precluding the use of a downstream sales transaction when calculating normal value.

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[14] *(footnote original)* We do not exclude the possibility that there may be a group of goods whose range is so broad as to preclude their being considered "a product", for instance, a product denominated "transportation equipment" that includes bicycles and jet aircraft. But we do reject the view that the concept of likeness as set out in the Article 2.6 definition of "like product" is the appropriate basis for evaluating whether any particular group of goods comprises such a broad range of goods as to preclude being treated as a product under consideration.

[15] Panel Report, *EC – Fasteners (China)*, para. 7.263.

[16] Panel Report, *EC – Fasteners (China)*, para. 7.265.

[17] Appellate Body Report, *US – Hot-Rolled Steel*, para. 165.

[18] Panel Report, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 - Argentina)*, para. 7.76.

> In short, we see no reason to read into Article 2.1 an additional condition that is not expressed.
>
> We do not mean to suggest that the identity of the seller is irrelevant in calculating normal value under Article 2.1 of the *Anti-Dumping Agreement*. However, to ensure that prices are 'comparable', the *Anti-Dumping Agreement* provides a mechanism, in Article 2.4, which allows investigating authorities to take full account of the fact, as appropriate, that a relevant sale was not made by the exporter or producer itself, but was made by another party. …
>
> …
>
> [T]he use of downstream sales prices may necessitate the provision of appropriate 'allowances', under Article 2.4, which take into account any differences demonstrated to affect price comparability. We will explore this issue further below."[19]

1.3.5 Sales "in the ordinary course of trade"

1.3.5.1 Definition of sales "in the ordinary course of trade"

15. In *US – Hot-Rolled Steel*, the Appellate Body confirmed that the Anti-Dumping Agreement does not define the term "in the ordinary course of trade".[20] In this dispute, Japan, the complainant, had agreed with the definition of this term given by the United States authorities, namely: "[g]enerally, sales are in the ordinary course of trade if made under conditions and practices that, for a reasonable period of time prior to the date of sale of the subject merchandise, have been normal for sales of the foreign like product."[21] The Appellate Body considered that for the purpose of the appeal, it was content with that definition.[22]

16. The Appellate Body in *US – Hot-Rolled Steel*, when looking into the meaning of "sales in the ordinary course of trade" under Article 2.1 of the Anti-Dumping Agreement, noted that Article 2.2.1 does provide for a method to determine whether "sales below cost" are "in the ordinary course of trade". However, the Appellate Body considered that the said provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade" and it does not cover the more specific issue of sales between affiliated parties:

> "We note that Article 2.2.1 of the *Anti-Dumping Agreement* itself provides for a method for determining whether *sales below cost* are 'in the ordinary course of trade'. However, that provision does not purport to exhaust the range of methods for determining whether sales are 'in the ordinary course of trade', nor even the range of possible methods for determining whether low-priced sales are 'in the ordinary course of trade'. Article 2.2.1 sets forth a method for determining whether sales between *any* two parties are 'in the ordinary course of trade'; it does *not* address the more specific issue of transactions between affiliated parties. In transactions between such parties, the affiliation itself may signal that *sales above cost*, but below the usual market price, might not be in the ordinary course of trade. Such transactions may, therefore, be the subject of special scrutiny by the investigating authorities."[23]

1.3.5.2 Investigating authorities' discretion under Article 2.1

17. The Appellate Body in *US – Hot-Rolled Steel* noted that the investigating authorities' discretion under Article 2.1 to determine how to avoid distortions in the normal value should be exercised in an even-handed way that is fair to all parties:

> "Although we believe that the *Anti-Dumping Agreement* affords WTO Members discretion to determine how to ensure that normal value is not distorted through the inclusion of sales that are not 'in the ordinary course of trade', that discretion is not

[19] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 166-167, and 169.
[20] Appellate Body Report, *US – Hot-Rolled Steel*, para. 139.
[21] Appellate Body Report, *US – Hot-Rolled Steel*, para. 139.
[22] Appellate Body Report, *US – Hot-Rolled Steel*, para. 139.
[23] Appellate Body Report, *US – Hot-Rolled Steel*, para. 147.

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> without limits. In particular, the discretion must be exercised in an *even-handed* way that is fair to all parties affected by an anti-dumping investigation. If a Member elects to adopt general rules to prevent distortion of normal value through sales between affiliates, those rules must reflect, even-handedly, the fact that both high and low-priced sales between affiliates might not be 'in the ordinary course of trade'."[24]

1.3.5.3 Sales not in the ordinary course of trade

1.3.5.3.1 Purpose of excluding sales not in the ordinary course of trade

18. In *US – Hot-Rolled Steel*, the Appellate Body explained that the exclusion of sales not in the ordinary course of trade from the calculation of the normal value is mandated by Article 2.1 in order to ensure that the normal value is indeed "normal":

> "Article 2.1 requires investigating authorities to exclude sales not made 'in the ordinary course of trade', from the calculation of normal value, precisely to ensure that normal value is, indeed, the 'normal' price of the like product, in the home market of the exporter. Where a sales transaction is concluded on terms and conditions that are incompatible with 'normal' commercial practice for sales of the like product, in the market in question, at the relevant time, the transaction is not an appropriate basis for calculating 'normal' value."[25]

1.3.5.3.2 Prices above or below the ordinary course of trade price

19. In *US – Hot-Rolled Steel*, Japan had challenged the so-called "arm's-length" test which allowed the United States' authorities to automatically disregard the sales of a given exporter to individual affiliated parties as not being in the ordinary course of trade when the weighted average selling price to that affiliated party is below 99.5 per cent of the weighted average price of sales to all non-affiliated parties. Japan claimed that the application of this test was inconsistent with Article 2.1 of the Anti-Dumping Agreement because, first, the test excluded only low-priced affiliated sales, thereby inflating normal value, and, second, the test operated on the basis of an arbitrary threshold that did not take account of usual variation of prices in the marketplace. The Panel found that the application of the 99.5 per cent test "does not rest on a permissible interpretation of the term 'sales in the ordinary course of trade'."[26] The Appellate Body upheld the Panel's finding, although it followed a different reasoning.[27]

20. The Appellate Body in *US – Hot-Rolled Steel* considered that determining "whether a sales price is higher or lower than the "ordinary course" price is not simply a question of comparing prices" and that the other terms and conditions of the transaction must be taken into account:

> "We note that determining whether a sales price is higher or lower than the "ordinary course" price is not simply a question of comparing prices. Price is merely one of the terms and conditions of a transaction. To determine whether the price is high or low, the price must be assessed in light of the other terms and conditions of the transaction.

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[24] Appellate Body Report, *US – Hot-Rolled Steel*, para. 148.

[25] Appellate Body Report, *US – Hot-Rolled Steel*, para. 140. The Appellate Body, in para. 141, also provided examples of sales not in the ordinary course of trade: "We can envisage many reasons for which transactions might not be 'in the ordinary course of trade'. For instance, where the parties to a transaction have common ownership, although they are legally distinct persons, usual commercial principles might not be respected between them. Instead of a sale between these parties being a transfer of goods between two enterprises which are economically *independent*, transacted at market prices, the sale effectively involves a transfer of goods within a *single* economic enterprise. In that situation, there is reason to suppose that the sales price *might* be fixed according to criteria which are not those of the marketplace. The sales transaction might be used as a vehicle for transferring resources within the single economic enterprise. Thus, the sales price may be *lower* than the 'ordinary course' price, if the purpose is to shift resources to the buyer, who then receives goods worth more than the actual sales price. Or, conversely, the sales price may be *higher* than the "ordinary course" price, if the purpose is to shift resources to the seller, who receives higher revenues for the sale than would be the case in the marketplace. There are many reasons relating to corporate law and strategy, and to fiscal law, which may lead to resources being allocated, in these ways, within a single economic enterprise".

[26] Panel Report, *US – Hot-Rolled Steel*, para. 7.112.

[27] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 137-158.

> Thus, the volume of the sales transaction will affect whether a price is high or low. Or, the seller may undertake additional liability or responsibilities in some transactions, for instance for transport or insurance. These, and a number of other factors, may be expected to affect an assessment of the price."[28]

21. The Appellate Body in *US – Hot-Rolled Steel* further considered that nothing excludes that, even in the absence of any common ownership, "a sales transaction *might* not be "in the ordinary course of trade", either because the sales price is higher than the "ordinary course" price, or because it is lower than that price":

> "Clearly, the lower the degree of common ownership, implying common control, between the parties to a sales transaction, the less likely it is that the transaction will not be 'in the ordinary course of trade'. However, even where the parties to a sales transaction are entirely independent, a transaction might not be 'in the ordinary course of trade'.[29] In this appeal, we do not need to define all the circumstances in which transactions might not be 'in the ordinary course of trade'. It suffices to recognize that, *as between affiliates*, a sales transaction *might* not be 'in the ordinary course of trade', either because the sales price is higher than the 'ordinary course' price, or because it is lower than that price."[30]

1.3.5.3.3 Scope of the investigating authorities' duties under Article 2.1

22. The Appellate Body in *US – Hot-Rolled Steel* described the duties of the investigating authorities under Article 2.1:

> "In our view, the duties of investigating authorities, under Article 2.1 of the *Anti-Dumping Agreement*, are precisely the *same*, whether the sales price is higher or lower than the 'ordinary course' price, and irrespective of the reason why the transaction is not 'in the ordinary course of trade'. Investigating authorities must exclude, from the calculation of normal value, *all* sales which are not made 'in the ordinary course of trade'. To include such sales in the calculation, whether the price is high or low, would distort what is defined as '*normal* value'.
>
> In view of the many different types of transaction not 'in the ordinary course of trade' – some including affiliated parties, others not; some including high prices, others low prices; some including prices below cost, others not – investigating authorities need not, under the *Anti-Dumping Agreement*, scrutinize, according to *identical* rules, *each and every* category of sale that is potentially not 'in the ordinary course of trade'."[31]

1.3.5.3.4 Sales between affiliated companies

23. In *US – Hot-Rolled Steel*, the Appellate Body upheld, with different reasoning, the Panel's finding that the application by the US authorities of a 99.5 per cent test to determine whether the sales between affiliated companies were in the ordinary course of trade, did not rest upon a permissible interpretation of Article 2.1. See paragraphs 19-21 above. In *US – Hot-Rolled Steel*, the US authorities, in calculating the normal value, discarded certain sales by exporters to their affiliates because these sales were not "in the ordinary course of trade". The authorities had replaced the discarded sales with downstream sales of the product, transacted between the affiliate and the first independent buyer, which had been made "in the ordinary course of trade". See paragraph 14 above.

1.3.6 Temporal scope of evidence underlying the dumping determination

24. In *Pakistan – BOPP Film (UAE)*, the Panel examined the text of Article 2.1 of the Anti-Dumping Agreement, as well as the context provided in Articles VI:2 of the GATT 1994 and

[28] Appellate Body Report, *US – Hot-Rolled Steel*, para. 142.
[29] (*footnote original*) One example of such a transaction is a liquidation sale by an enterprise to an independent buyer, which may not reflect "normal" commercial principles.
[30] Appellate Body Report, *US – Hot-Rolled Steel*, para. 143.
[31] Appellate Body Report, *US – Hot-Rolled Steel*, paras. 145-146.

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Article 11.1 of the Anti-Dumping Agreement. In the Panel's view, these provisions "make it clear that the WTO disciplines on anti-dumping set forth a corrective scheme that is concerned with a current situation, confirming the reading of Article 2.1 as defining dumping in the present."[32]

25. The Panel also considered that Article 2.1, though a definitional provision, binds the investigating authority considering whether dumping has occurred, as well as the Member imposing the anti-dumping measures:

> "Article 2.1 has sometimes been regarded as merely definitional, i.e. as not itself imposing obligations. However, the text of this provision evidences that the definition it sets out is directed at an authority's determination. Article 2.1 uses the wording 'a product is to be considered as being dumped': the entity that 'considers' whether a product is being dumped is the investigating authority, and ultimately the Member imposing anti-dumping measures. We therefore consider that Members are bound by the definition that Article 2.1 sets out."[33]

26. Therefore, the Panel considered that, in accordance with Article 2.1, an investigating authority's determination of dumping must pertain to current dumping. Whether the determination pertains to current dumping will depend on the temporal scope of the evidence relative to the dates of initiation and final determination, as well as the authority's choice of the POI in light of the attendant circumstances surrounding the choice:

> "[W]e consider that to act consistently with Article 2.1 a Member's determination of dumping must pertain to current dumping. Whether this is the case will depend, first, on the temporal scope of the evidence relative to the dates of initiation and final determination. In this regard, as we found above in respect of the data underlying initiation, we agree that the more recent the data, the more likely it is to be relevant to the current situation, and vice versa. Second, we are of the view that temporal scope is not, alone, dispositive, and that therefore we must assess the authority's choice of the POI for dumping in light of all the relevant circumstances surrounding the authority's decision at the time. In this regard, we consider that depending on the facts of each case, circumstances such as those taken into account in assessing the temporal scope of the evidence of injury in *Mexico – Anti-Dumping Measures on Rice* are also relevant to the requirements of Article 2.1.
>
> Both parties to the case before us take the view that, in the words of Pakistan, Article 2.1 'can be read as requiring that a determination of dumping be based on data that bears a sufficiently proximate temporal link to the time of determination'. Both parties also agree that whether the data relied upon by an authority bear this sufficiently proximate temporal link – i.e. relates to current dumping – depends not just on the temporal scope of the evidence, in itself, but also on all the attendant circumstances, as also set forth in *Mexico – Anti-Dumping Measures on Rice* with reference, there, to the determination of injury under Article 3.1."[34]

27. The Panel then applied the applicable legal standard to the facts to assess whether the investigating authority of Pakistan (NTC) had failed to determine dumping on the basis of data that pertained to *current* dumping, thereby acting inconsistently with Article 2.1.[35]

28. In response to Pakistan's argument that a court had directed the NTC to proceed with the complaint before it, rendering it unable to change the temporal scope of the evidence, the Panel considered that a WTO Member is responsible for the WTO-consistency of the acts of all of its organs:

> "Pakistan asks the Panel to take into account that a domestic court order directed the NTC to proceed with the complaint before it, which, according to Pakistan, meant it could not change the temporal scope of the evidence. However, as we have already noted, a WTO Member is responsible for the WTO-consistency of the acts of all of its organs, including the judiciary, and therefore whether the NTC was abiding by the

[32] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.57.
[33] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.58.
[34] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.59-7.60.
[35] Panel Report, *Pakistan – BOPP Film (UAE)*, paras. 7.61-7.62.

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> instructions of a Pakistani court or acting in its own discretion does not change our assessment under the Anti-Dumping Agreement. Moreover, the argument is even more difficult to follow when one considers that the court order now invoked by Pakistan referred to proceeding 'with the complaint before [the NTC]', whereas Pakistan invokes it to explain its use of the POI selected in a first, interrupted investigation, which was not identical to the period covered in the 'complaint' in question."[36]

29. The Panel also agreed that several factors proposed by the UAE, similar to those outlined in *Mexico – Anti-Dumping Measures on Rice*, were relevant to an assessment under Article 2.1:

> "The United Arab Emirates argues that … '(i) the selected POI was essentially what was proposed by the applicant; (ii) the NTC did not establish that practical problems necessitated this particular POI; (iii) the NTC never established that updating the information was not possible; (iv) the NTC made no attempt at updating the information although there was no lack of cooperation from interested parties; and (v) the NTC provided no reason why it was not seeking more recent information.' As we have noted above, we agree that these factors are relevant to an assessment under Article 2.1."[37]

30. In line with these factors, the Panel found that the NTC had failed to ascertain the existence of current dumping, as required by Article 2.1:

> "To sum up … the NTC relied on a dumping POI that was almost two years old by the time of initiation and two years and seven months old by the time of the final determination, it made no attempt to update it and, during the proceedings, it provided no discussion whatsoever of this choice. For these reasons, we find that in making its determination of dumping, the NTC failed to ascertain the existence of current dumping, as required by Article 2.1."[38]

1.3.7 Request for information

31. In *Guatemala – Cement II*, the Panel rejected Mexico's argument that the request for cost data was not justified under Articles 2.1 and 2.2 because the application did not contain any allegation that Mexican producers were selling below cost, and stated that "[n]othing in those provisions prevents an investigating authority from requesting cost information, even if the applicant does not allege sales below cost."[39]

1.3.8 Relationship with other paragraphs of Article 2

32. In *US – Stainless Steel (Korea)*, the Panel found the US treatment of unpaid export sales as direct selling costs to be inconsistent with Article 2.4. In the context of this finding, the Panel explained the relationship between Articles 2.1, 2.3 and 2.4, as follows:

> "In our view, both Article 2.3 and Article 2.4 play an important role in respect of the construction of export prices. When determining whether dumping exists, Article 2.1 usually requires a comparison of the *export price* with the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. Article 2.3, however, authorizes a Member to *construct* the export price where, *inter alia*, the actual export price is unreliable because of association between the exporter and the importer. As discussed in section VI.C.2.(b)(i), it was pursuant to this authorization that the DOC disregarded the export price charged by POSCO to its affiliated importer POSAM in these investigations and instead constructed the export price.
>
> Further, Article 2.3 specifies that the export price may be constructed *on the basis of* the price at which the imported products are first resold to an independent buyer. It is clear from this language that, while the price charged to the first independent buyer is a starting-point for the construction of an export price, it is not *itself* the constructed

[36] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.69. See also ibid. paras. 7.68-7.76.
[37] Panel Report, *Pakistan – BOPP Film (UAE),* para. 7.72.
[38] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.76.
[39] Panel Report, *Guatemala – Cement II*, para. 8.183.

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> export price. Nor does Article 2.3 itself contain any guidance regarding the methodology to be employed in order to construct the export price. Rather, the only rules governing the methodology for construction of an export price are set forth in Article 2.4 of the *AD Agreement*, which provides that, '[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made.' Although the United States repeatedly refers to these allowances as 'Article 2.3 adjustments', the provision governing these allowances is found in Article 2.4 and it is therefore evident to us that a claim regarding the appropriateness of allowances made to construct an export price may be made pursuant to that Article.[40]"[41]

1.3.8.1 Article 2.2.1

33. See paragraph 16 above.

1.3.8.2 Article 2.4

34. See paragraphs 14 above.

1.3.9 Relationship with other provisions of the Anti-Dumping Agreement

1.3.9.1 Article 3.6

35. In *EC – Salmon (Norway)*, Norway argued that Article 3.6 supported the proposition that under the Anti-Dumping Agreement the results of separate production processes could not be considered a single product under investigation and therefore could not be the subject of a single investigation. The Panel disagreed:

> "Article 3.6 is a provision about what information an investigating authority may evaluate in considering the effects of dumped imports for the purpose of determining injury to a domestic industry. It simply has no bearing on the question of product under consideration. Article 3.6 addresses a particular question about the data to be considered in an investigating authority's inquiry into the effects of dumping. This happens, in every investigation, after the product under consideration has been defined, the domestic like product has been determined pursuant to Article 2.6, and the relevant domestic industry has been determined pursuant to Article 4.1 … we consider Norway's reliance on Article 3.6 to be misplaced and unpersuasive."[42]

1.4 Article 2.2

1.4.1 General

36. In *EU – Biodiesel (Argentina)*, the Appellate Body agreed with the Panel's view that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not limit the sources of information that an investigating authority may use in establishing the cost of production in the country of origin. Specifically, the Appellate Body pointed out that an authority may use information from outside the country of origin, provided such information is adapted as necessary in order to determine the cost of production in the country of origin:

> "We observe that Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 do not contain additional words or qualifying language specifying the type of evidence that must be used, or limiting the sources of information or evidence to only those sources inside the country of origin. An investigating authority will naturally look for information on the cost of production 'in the country of origin' from

[40] *(footnote original)* The United States' perception seems to be based on the assumption that there is a watertight separation between the provision relating to construction of the export price (Article 2.3) and that relating to comparison between export price/constructed export price and normal value (Article 2.4). It is evident from the face of the text, however, that the rules regarding allowances related to construction of the export price are found in the paragraph relating to comparison.

[41] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.90-6.91.

[42] Panel Report, *EC – Salmon (Norway)*, para 7.64.

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> sources inside the country. At the same time, these provisions do not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to 'in the country of origin', however, indicates that, whatever information or evidence is used to determine the 'cost of production', it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a 'cost of production' 'in the country of origin'.
>
> Turning to the relevant context, we recall that Article 2.2.1.1 of the Anti-Dumping Agreement identifies the 'records kept by the exporter or producer under investigation' as the preferred source for cost of production data to be used in such calculation. We do not see, however, that the first sentence of Article 2.2.1.1 *precludes* information or evidence from other sources from being used in certain circumstances. Indeed, it is clear to us that, in some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the 'country of origin'. While such documents, information, or evidence are from outside the country of origin, they would, nonetheless, be relevant to the calculation of the cost of production *in the country of origin*. These considerations support the understanding that the determination of the 'cost of production in the country of origin' may take account of evidence from outside the country of origin."[43]

37. The Appellate Body in *EU – Biodiesel (Argentina)* also stated that the obligation under Article 2.2.1.1 of the Anti-Dumping Agreement was narrower than that under Article 2.2. Therefore the obligation to calculate the cost of production in the country of origin continued to apply even if the investigating authority did not have information from the investigated exporter:

> "We further observe that, while both obligations apply harmoniously when an investigating authority constructs the normal value, the scope of the obligation to calculate the costs on the basis of the records in the first sentence in Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2. In circumstances where the obligation in the first sentence of Article 2.2.1.1 to calculate the costs on the basis of the records kept by the exporter or producer under investigation does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority may have recourse to alternative bases to calculate some or all such costs. Yet, Article 2.2 does not specify precisely to what evidence an authority may resort. This suggests that, in such circumstances, the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin'. Indeed, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 make clear that the determination is of the 'cost of production […] in the country of origin'. Thus, whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the 'cost of production in the country of origin'. Compliance with this obligation may require the investigating authority to adapt the information that it collects."[44]

38. The Panel in *EU – Biodiesel (Argentina)*, in a finding upheld by the Appellate Body, found the EU Commission acted inconsistently with Article 2.2 by basing the cost of the main raw material used by biodiesel producers on international prices, as opposed to the prices in the Argentine market. In finding so, the Panel also found irrelevant the fact that the prices used were published in Argentina:

> "In our view, it is plain from this that the cost used by the European Union is not a cost 'in the country of origin'. It was specifically selected to remove the perceived distortion

[43] Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.70-6.71.
[44] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.73. See also Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.83.

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> in the domestic price of soybeans caused by the Argentine export tax system. This is because the prices prevailing in Argentina were considered to be artificially lower than international prices. In other words, the EU authorities selected this cost precisely because it was *not* the cost of soybeans in Argentina.
>
> The fact that this price was published by the Argentine Ministry of Agriculture, and therefore, was a price published 'in' Argentina, is irrelevant. This price did not represent the *cost of soybeans in* Argentina for domestic purchasers of soybeans, including the Argentine producers/exporters of biodiesel. The European Union itself stated that 'the prices used were indeed reflecting the soya bean costs that the Argentine producers of biodiesel would have to bear in Argentina, *in the absence of the distortion*'. Thus, the European Union itself recognized that the prices used were not those actually prevailing in Argentina, but rather, were those that would have prevailed in the absence of the alleged distortion."[45]

39. In *EU – Biodiesel (Indonesia)*, the Panel noted that, in determining costs for purposes of constructing the normal value, the EU Commission had applied the same method in the investigation against Indonesia as in the investigation against Argentina discussed in the previous *EU – Biodiesel (Argentina)* dispute. The Panel found no reason to depart from the panel and Appellate Body findings in *EU – Biodiesel (Argentina)* about the consistency of that method with the Anti-Dumping Agreement. On this basis, the Panel found a violation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

40. Along similar lines, the Panel in *Ukraine – Ammonium Nitrate*, upheld by the Appellate Body, recognized that "investigating authorities may use out-of-country evidence to calculate the cost of production in the country of origin provided they adapt this evidence to reflect the cost in the country of origin" but did not consider "that the adjustment for transportation expenses made by MEDT of Ukraine was sufficient to adapt the export price from Russia to reflect the cost of gas in the country of origin."[46] The Appellate Body found no basis to question the Panel's findings and added that by reaching that conclusion, they "are mindful of the fact that, in the particular circumstances of this case, given that MEDT did not provide an adequate basis to reject the reported gas cost under the second condition in the first sentence of Article 2.2.1.1, there may not have been a basis to rely on costs other than those reflected in the records of the investigated producers."[47]

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41. The Panel in *US – OCTG (Korea)* found that Article 2.2 does not contain any criteria governing the choice to be made by an investigating authority between the two alternative methods for determining normal value, and that therefore Members are free to adopt their own criteria in this regard:

> "We disagree with Korea that the criteria for choosing between the two methods are set out in Article 2.2. Article 2.2 sets out the criteria for *use* of either of the two methods. However, criteria for the *use* of the two methods are not the same as criteria for *choosing between* those two methods. In the process of arriving at a *choice between* the two methods, an investigating authority will assess the criteria for use of the methods to see if they can be satisfied. That will show whether either or both of the two methods can be used, but will not necessarily determine which to use. In providing for a choice, Article 2.2 neither expressly limits nor directs how the authority should reach that choice. Thus, the authority is free to choose which method to use based on its own criteria, should it choose to have them. Therefore, we consider that Article 2.2 does not preclude an investigating authority from establishing its own criteria for choosing which method to use."[48]

42. In *Australia – Anti-Dumping Measures on Paper*, the Panel found that if an investigating authority had acted inconsistently with Article 2.2.1.1, first sentence, in disregarding the records kept by exporters as the basis for the calculation of costs of production, there was no legal basis for it to have used third-country export prices as a proxy for the exporters' costs when calculating

[45] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.258-7.259. See also Appellate Body Report, *EU – Biodiesel (Argentina)*, paras. 6.81-6.82.
[46] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.99.
[47] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.122.
[48] Panel Report, *US – OCTG (Korea)*, para. 7.18.

normal value under the terms of Article 2.2. Consequently, the use of adjusted third-country export prices of pulp as a starting point for the calculation of the costs of pulp in Indonesia was inconsistent with Article 2.2.[49]

43. In *Australia – Anti-Dumping Measures on Paper*, Indonesia asserted that since the exporter under investigation was an "integrated paper producer" and the pulp production was only "an intermediate stage in [its] paper production process," the investigating authority should have subtracted the exporter's profit from the pulp cost benchmark used to replace its actual pulp costs.[50] The Panel noted that the investigating authority had evidence that the exporter's production process was an integrated one and that the transfer of pulp was made "without the inclusion of profit, at actual cost."[51] In light of this, the Panel found inconsistent with Article 2.2 the Australian Investigating authority's failure to adjust the benchmark price used for pulp in determining the normal value for the investigated Indonesian exporter:

> "[I]t follows from the obligation in Article 2.2 that it is incumbent on the investigating authority to make all adaptations that are necessary, in the light of the facts before it, to arrive at the 'cost of production in the country of origin'.
>
> In the circumstances where the record of the investigation revealed that the transfer of pulp between the divisions of Indah Kiat happens at actual cost, we do not consider relevant whether the request for the adjustment for profit was made by interested parties or not.
>
> …
>
> We note that the Final Report provides no explanation as to why the ADC did not subtract profit from the pulp benchmark used as a substitute for Indah Kiat's recorded pulp costs. … In light of the absence of any such explanations, and given the facts on the record of the investigation discussed above, we find that the ADC's failure to adjust the level of profit included in the pulp cost benchmark used for Indah Kiat meant that the cost of production of A4 copy paper constructed for Indah Kiat was inconsistent with Australia's obligations under Article 2.2 of the Anti-Dumping Agreement."[52]

44. The Panel in *Australia – Anti-Dumping Measures on Paper* also examined whether the investigation authority should have adjusted the profit in the pulp benchmark used to replace the actual pulp costs for an exporter under investigation since the exporter obtained pulp from affiliated parties. It found that if the transactions between the exporter and its affiliates took place in accordance with normal commercial practices, the price at which the exporter obtained pulp would still be profitable. Accordingly, the cost of pulp for the exporter would include the profit component, and thus the profit component would not need to be adjusted from the substituted pulp benchmark.[53]

45. The Panel in *Australia – Anti-Dumping Measures on Paper* assessed whether the investigating authority had acted in violation of Article 2.2 by replacing the pulp costs of exporters with a benchmark based on third-country exports, instead of replacing the costs of woodchips, that is the direct input into the production of pulp. It found that pursuant to the obligation under Article 2.2 to use the "cost of production in the country of origin", the investigating authority was obliged to explore alternative methods enabling it to arrive at "the cost of production in the country of origin" by utilizing components of the producer's costs unaffected by a distortion, assuming *arguendo* that Article 2.2 allows for replacement of costs distorted by the effects of a particular market situation:

> "We note that, in challenging this specific aspect of the ADC's determination, i.e. the ADC's choice to replace the cost of the main input into the production of A4 copy paper (pulp) rather than the cost of the input into production of the main input (woodchips), Indonesia proceeds by assuming *arguendo* that the ADC was allowed to replace Indah Kiat's recorded

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[49] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.132.
[50] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.143.
[51] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.144.
[52] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.146-7.147, and 7.150.
[53] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.153.

> costs which were affected by the distortion resulting from the 'particular market situation'. For the purposes of our analysis, we will proceed to address the argument on the same basis.[54]
>
> …
>
> [W]here the investigating authority uses information other than that contained in the records kept by the exporter or producer to construct the cost of production, it has to ensure that it adapts the information appropriately. Although we agree with Australia that Article 2.2 does not specify precisely to what evidence an authority may resort in constructing the cost of production, the words 'in the country of origin' define the parameters of the investigating authority's inquiry. The investigating authority is required by Article 2.2 to arrive at the 'cost of production in the country of origin'. By virtue of this requirement, the investigating authority shall consider available alternatives for replacing recorded costs. In particular, we consider that the investigating authority is obligated to, as much as possible, use replacement information that conforms to the requirement to use 'the cost of production in the country of origin' for the exporter or producer under the investigation.
>
> …
>
> The circumstances of the investigation, in our view, called for the ADC to consider an alternative to replacing Indah Kiat's cost of producing pulp with the pulp benchmark which replaces *all the costs* used in producing pulp with external information. We note the ADC's above findings to the effect that the source of the distortions was in Indonesia's timber market. Although Australia argued that the ADC was only able to determine the cost data for *pulpwood* (input into production of woodchips) for one month, we do not find this relevant to deciding whether the cost of *woodchips* (input into production of pulp) could have been replaced …In light of the evidence on the ADC's record and the ADC's own findings regarding the source of the distortion, we find that the ADC should have considered using a replacement cost for woodchips in combination with Indah Kiat's other costs for producing pulp which were not found to be affected by the distortion (labour, energy, etc.). If the ADC had undertaken such analysis, it should have explained its choice of the final benchmark in light of this alternative. The Final Report, however, contains no such explanation."[55]

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46. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* addressed Russia's claim that the European Commission acted inconsistently with Article 2.2 of the Anti-Dumping Agreement in applying the Cost Adjustment Methodology. As part of this methodology, the European Commission used costs other than "the cost of production in the country of origin" in the construction of normal value. In so doing, the constructed normal value was alleged not to have been based on "the cost of production in the country of origin", as required by Article 2.2.[56]

47. The Panel recalled the legal standard applicable under Article 2.2 of the Anti-Dumping Agreement, as expressed by the Appellate Body in *EU - Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. The Panel noted that, in both disputes, the Appellate Body had stated that Article 2.2 does not prohibit an investigating authority from relying on information other than that which is contained in the records of the exporter or producer to determine the "cost of production". The Appellate Body had also noted that the investigating authority may be required to adapt such information to comply with the requirement that the information must be apt to yield or capable of yielding a cost of production "in the country of origin". Specifically, the Panel stated the following:

> "While pursuant to the first sentence of Article 2.2.1.1 costs shall normally be calculated on the basis of the records kept by the exporter or producer under investigation, in *EU – Biodiesel (Argentina*), the Appellate Body ruled that Article 2.2 does not prohibit an investigating authority from relying on information other than that contained in the records of the exporter or producer, including in-country and out-of-country evidence, to calculate some or all such costs. In this connection, the Appellate Body considered

[54] (*footnote original*) We note that because our reasoning proceeds on an *arguendo* basis, it is without prejudice to whether Article 2.2.1.1, first sentence, allows the investigating authority to disregard the recorded costs where those are found to be affected by the "particular market situation" or distorted, and whether Article 2.2 allows the investigating authority to replace distorted costs in constructing "the cost of production in the country of origin".

[55] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.157, 7.159, and 7.163.

[56] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.112.

> that Article 2.2 of the Anti-Dumping Agreement does not limit the *sources* of information or evidence to only sources inside the country of origin. However, an investigating authority remains bound by the obligation to arrive at the cost of production 'in the country of origin'. Hence, where an investigating authority uses information other than that contained in the records kept by the exporter or producer to construct the cost of production, it has to ensure that the information is suitable to determine a 'cost of production' 'in the country of origin'. An investigating authority is not allowed to simply substitute the costs from outside the country of origin for the 'cost of production in the country of origin'.
>
> In *Ukraine – Ammonium Nitrate*, the Appellate Body confirmed that the phrase 'cost of production in the country of origin' indicates that whatever information or evidence is used to determine the 'cost of production', it must be apt to yield or capable of yielding a cost of production 'in the country of origin' and that compliance with this obligation may require the investigating authority to adapt that information. We agree with the Appellate Body's interpretation of the obligation in Article 2.2 to determine 'the cost of production in the country of origin'."[57]

48. Turning to the measure at issue, the Panel noted that the second element of the Cost Adjustment Methodology provided for the use of out-of-country input price information for the calculation of the costs of production of the producer or exporter under investigation. Pursuant to this methodology, where the European Commission had rejected the input prices reflected in the records of the investigated companies, it would adjust the companies' costs of production by using information from other markets that it considered "representative". The Panel noted that the European Commission did not explain how it had adapted the out-of-country information to reflect or represent the costs of production in the country of origin:

> "As noted above, in almost all determinations, the adjusted input price was based on the average price of the relevant input when exported from the country of origin to another destination. In these cases, the European Commission made adjustments to the new input price for transport costs, customs export tax, value added tax, excise duty, local distribution costs, sea freight and fobbing costs, in order to remove export-related and transportations expenses. Russia has further demonstrated that, in applying the Cost Adjustment Methodology, the European Commission does not explain whether or how this adapted out-of-country input price information reflects or represents the costs of production in the country of origin."[58]

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49. Recalling the legal standard set out above, the Panel noted that, in both *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*, the respective investigating authorities had acted in contravention of Article 2.2 in a similar manner to the case at hand. Specifically, the investigating authorities in those disputes had failed to explain how the information used in their calculations was adapted to ensure that it represented the cost of production in the country of origin.[59]

50. The Panel noted that the investigating authorities in those disputes had considered that the price of the key input in each dispute was depressed because of an export tax system or government regulation. Each investigating authority had replaced the actual price paid by the exporter or producer at issue with another price. The Panel described the price substitution as follows:

> "In *EU – Biodiesel (Argentina)*, following the rejection of the price actually paid by Argentine producers for soybeans based on a finding that the Argentine export tax system depressed the domestic input price to an artificially-low level, the European Commission replaced the actual purchase price of soybeans with the average reference price of soybeans published by the Argentine Ministry of Agriculture for export, net of fobbing costs. …
>
> In *Ukraine – Ammonium Nitrate*, following the rejection of the reported gas cost of the investigated Russian producers based on a finding that, *inter alia*, the price of gas

[57] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.122-7.123.
[58] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.124.
[59] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.125.

> in Russia was regulated by the government, MEDT of Ukraine replaced the reported gas cost with gas prices outside Russia, specifically the price of gas exported from Russia to the German border, adjusted for transportation expenses."[60]

51. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* noted that, in each dispute, the Appellate Body had found that the investigating authority did not explain sufficiently how it had adapted the information used in its calculations to ensure that it represented the cost of production in the country of origin.[61] For example, the Panel recalled that, in *EU – Biodiesel (Argentina)*, the Appellate Body found that the European Commission had failed to meet the relevant standard in the specific anti-dumping determination at issue for the following reason:

> "Other than pointing to the deduction of fobbing costs, the European Union has not asserted, either before the Panel or before us, that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production in Argentina."[62]

52. The Panel also recalled that, in *Ukraine – Ammonium Nitrate*, the Appellate Body agreed with the panel that the investigating authority did not explain why the adjustment for transportation expenses made to the export price was sufficient to adapt this price to reflect the cost of production in the country of origin:

> "The Panel did not see any explanation by MEDT in the Investigation Report as to why adjustments for transportation expenses were adequate to adapt the export price from Russia at the German border to reflect the cost of the investigated Russian producers in the country of origin. The Panel also recalled its earlier finding under the second condition in the first sentence of Article 2.2.1.1, a finding with which we agreed above. Other than pointing to the deduction of transportation expenses, Ukraine has not asserted, either before the Panel or before us, that MEDT otherwise adapted the export price of gas used in its calculations in order to ensure that it reflected the cost of production in Russia."[63]

53. The Panel ultimately agreed with the considerations made by the panels and the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. The Panel found them relevant and supportive of its own conclusion that the Cost Adjustment Methodology was inconsistent with Article 2.2. Specifically, the Panel drew the following conclusions:

> "Similar to the facts underlying the anti-dumping decisions in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*, the Cost Adjustment Methodology provides for the calculation of the costs of production of the investigated companies on the basis of out-of-country input price information, adjusted for export-related and transportation concepts, without establishing whether or explaining how the adjusted out-of-country input price information reflects or represents the cost of production in the country of origin. This evidence persuades us that the Cost Adjustment Methodology contravenes Article 2.2."[64]

54. With respect to the adjustments to be made to arrive at the cost of production in the country of origin, the Panel disagreed with the European Union's argument that the decision of whether to make adjustments would depend on whether such adjustments have been invoked and justified by the investigated companies. The Panel considered that the obligation contained in Article 2.2 is not conditioned by the nature of the requests and participation of the investigated companies in the underlying investigation:

> "Article 2.2 requires investigating authorities to calculate the costs of production 'in the country of origin' and, according to Article 2.2.1.1, this obligation 'normally' requires the use of the records of the investigated companies provided that the two conditions set out in this provision are met. We consider that, to the extent an investigating

[60] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.126-7.127.
[61] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.126-7.127.
[62] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.126.
[63] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.127.
[64] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.128.

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> authority bases its calculations on information other than that reflected in the records of the investigated companies, it will be required to ensure that adjustments, if necessary, are made in order to arrive at the cost of production 'in the country of origin'. We do not consider that compliance with this obligation under Article 2.2 is conditioned by the nature of the requests and participation of the investigated companies in the underlying investigation."[65]

55. Accordingly, the Panel concluded that the Cost Adjustment Methodology, by providing for the use of out-of-country input price information, without establishing whether, or explaining how, such information is adequate to reflect or represent the cost of production in the country of origin, contravened Article 2.2 of the Anti-Dumping Agreement.[66]

56. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel found that the constructed normal value used by the respondent's investigating authority was inconsistent with Article 2.2 because it included distribution costs i.e., transportation costs and port fees, which were not part of the ex-factory price:

> "The parties agree that the Anti-Dumping Agreement does not contain a precise definition (or a methodology for determining the amount) of each component of normal value. …
>
> [I]f the investigating authority decides to construct normal value at the 'ex-factory stage', it should take into account only administrative, selling and general costs and expenses that are part of an ex-factory level price. In this case, the 'distribution cost' (and, in particular, the costs for transportation from the factory door to the delivery point specified in the contract) is not part of the ex-factory level price. It would therefore not be 'reasonable' to include the 'distribution cost' in a constructed normal value at the ex-factory level."[67]

57. In this context, the Panel rejected Morocco's argument that it was not responsible for errors in the construction of the normal value because it had simply accepted the data presented by the interested parties. The Panel stated that it was the investigating authority's responsibility to ensure the accuracy of the information supplied by interested parties for use in its findings, and to properly determine the facts and the correct normal value:

> "Morocco responds that the authority is not accountable for any error that may occur in the construction of normal value when that error is based on data provided by the producers/exporters that cooperated with the investigation. In the case at hand, MIICEN considers that it simply accepted exporters' data as presented and that 'if an error occurred in the formula for the constructed profit margin, that was not brought to its attention'.
>
> … [A]s we already noted above, any error or ambiguity in the manner in which an interested party responds to the authority's questions does not exempt the investigating authority from its obligation to ensure 'the accuracy of the information supplied by interested parties upon which their findings are based' and to establish the facts 'proper[ly]'. Nor does such an error or ambiguity exempt a Member from its obligation to establish the product's normal value, in accordance with the provisions of Article 2.2 of the Anti-Dumping Agreement.
>
> In the case at hand, we consider that Tunisia has demonstrated that, although MIICEN constructed the normal value of certain models of exercise books at the ex-factory level, it included domestic transportation costs and port fees in its calculation, which are not part of normal value at the ex-factory level. We therefore conclude that the amount used by MIICEN as normal value for certain SOTEFI models is not a correct 'normal value' within the meaning of Article 2.2 of the Anti-Dumping Agreement."[68]

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[65] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.129.
[66] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.131.
[67] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.99-7.100.
[68] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.101-7.103.

58. Following this reasoning, the Panel concluded that the Moroccan investigating authority's construction of the normal value was inconsistent with Article 2.2 of the Anti-Dumping Agreement. However, the Panel declined Tunisia's request that it should also find a consequential violation of Article 2.1:

> "[O]ther panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations. Furthermore, we indicated that we did not share Tunisia's view that a violation of Article 2.2 or Article 2.2.2 of the Anti-Dumping Agreement 'would necessarily result in a finding of violation of Article 2.1'. In that sense, we consider that, in order to establish a violation of Article 2.1, even a consequential violation, the requesting party must explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.
>
> In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Article 2.2 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations are under Article 2.1, or how those obligations were violated as a result of errors made by MIICEN when it established the normal value.
>
> In view of the foregoing, we conclude that Tunisia has established that the inclusion of distribution costs in the constructed normal value of certain models of SOTEFI exercise books was inconsistent with the obligation under Article 2.2 of the Anti-Dumping Agreement to construct normal value on the basis of the 'cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profit'. We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement."[69]

59. The Panel in *Australia – AD/CVD on Certain Products (China)* found that the investigating authority acted inconsistently with Article 2.2 by basing its determination on the absence of "relevant" sales of the like product:

> "Australia's defence to China's claim under Article 2.2 boils down to a distinction that the ADC seems to have made between (a) the existence of sales of the like product and (b) the existence of *relevant* sales of the like product. Article 2.2, however, makes no such distinction; it only refers to 'sales' of the 'like product'.
>
> Thus, the ADC determined that the domestic sales did not permit a proper comparison with export sales on the basis of a 'relevance' test that has no basis in Article 2.2. In doing so, the ADC resorted to a constructed normal value in a manner inconsistent with that provision."[70]

1.4.2 "particular market situation"

1.4.2.1 Definition of "particular market situation"

60. The Panel in *Australia – Anti-Dumping Measures on Paper* noted that the phrase "particular market situation" had not been previously interpreted in any Panel or Appellate Body report. The Panel stated that the phrase "particular market situation" did not have to be defined in a manner to envisage all possible situations which would prevent a proper comparison between domestic and export prices:

> "[W]e agree with the observation of the GATT panel in *EEC – Cotton Yarn* that a 'particular market situation' is only relevant insofar as it has the effect of rendering domestic sales unfit to permit a proper comparison. The phrase 'particular market situation' does not lend itself to

[69] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.105-7.107.
[70] Panel Report, *Australia – AD/CVD on Certain Products (China)*, paras. 7.136 and 7.138.

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> a definition that foresees all the varied situations that an investigating authority may encounter that would fail to permit a 'proper comparison'."[71]

61. The Panel in *Australia – Anti-Dumping Measures on Paper* rejected Indonesia's argument that a "particular market situation" must be capable of preventing a proper comparison of domestic to export prices. It reasoned that the phrases "particular market situation" and "permit a proper comparison" in Article 2.2 operate together to establish the following condition under which domestic market sales can be disregarded as the basis for computation of normal value:

> "Specifically, that domestic sales 'do not permit a proper comparison' must be 'because of the particular market situation'. If domestic sales *do* permit a proper comparison, then they cannot be disregarded as the basis for normal value, regardless of the existence of the particular market situation and its effects, whatever those may be. We find no functional purpose is served by incorporating into the meaning of 'particular market situation' part of the function that will necessarily be served by the terms 'because of' and 'not permit a proper comparison'. Accordingly, we find that 'capable of preventing a proper comparison' is not a necessary qualification for a situation to constitute the 'particular market situation'. Indeed, incorporating such a meaning into the term 'particular market situation' would alter the functioning of this provision. Thus, we find that the term 'particular market situation' does not require or contemplate an analysis relating to the capability of causing domestic sales to not permit a proper comparison in the abstract. Rather, the terms 'because of' and 'not permit a proper comparison' in Article 2.2 already properly and adequately fulfil this function."[72]

1.4.2.2 Situations that distort input costs

62. The Panel in *Australia – Anti-Dumping Measures on Paper* was unpersuaded by Indonesia's argument that a situation of a low-priced input used to produce merchandise both for the domestic and export markets is necessarily precluded from constituting a "particular market situation":

> "We understand that Indonesia is arguing that a situation that equally affects the cost of producing merchandise for sale in domestic and export markets will necessarily equally affect the sales prices in both markets and will, therefore, permit a proper comparison between domestic market sales and export sales. First, we find no legitimate interpretative basis for incorporating this proposed meaning into the term 'particular market situation', particularly where such considerations are more appropriately examined in relation to the terms 'because of' and 'permit a proper comparison' as suggested by the above analysis. Second, we do not accept as a given that an equal impact on cost of merchandise produced for domestic and export markets would *necessarily* affect sales prices in both markets equally such that a proper comparison between domestic sales and export sales would not be prevented. We consider that these assertions are not appropriate elements for an interpretation of the term 'particular market situation', but rather are better suited to an analysis of whether domestic sales do not permit a proper comparison *because of* a particular market situation identified by an investigating authority."[73]

63. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* examined Russia's claim that the second subparagraph of Article 2(3) of the Basic AD Regulation was inconsistent with Article 2.2 of the Anti-Dumping Agreement.[74] Specifically, Russia argued that the phrase "the particular market situation" within the meaning of Article 2.2 refers exclusively to the specific circumstance described in the second *Ad* Note to Article VI:1 of the GATT 1994, i.e. "a country which has a complete, or substantially complete, monopoly of its trade and where all domestic prices are fixed by the State".[75] According to Russia, the circumstance introduced by Article 2(3) of the Basic AD Regulation was "an additional circumstance" for determining normal value, i.e. "when prices are artificially low", that is not provided for by Article 2.2 (as interpreted by Russia).[76]

[71] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.21.
[72] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.27.
[73] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.28.
[74] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.171.
[75] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.174.
[76] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.171.

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64. The Panel began its analysis by considering whether, as implied by Russia's argumentation, "the particular market situation" within the meaning of Article 2.2 refers exclusively to the specific situation set forth in the second *Ad* note to Article VI:1.[77]

65. The Panel began by considering that the word "the" before the term "particular market situation" served not to refer exclusively to one specific situation in the minds of the drafters, as Russia had argued. Rather, the Panel considered that the word "the" served to ensure that the "particular market situation" would be definite, not indefinite, referring to a situation existing in relation to the domestic sales of the like product by the specific exporter for which dumping is being determined such that those sales do not permit a proper comparison with the exporter's export sales of the product under consideration. The Panel noted that, had the drafters of Article 2.2 had only one specific situation in mind when they used the phrase "the particular market situation", they would have defined the phrase specifying such a situation.[78]

66. The Panel added that the use of the singular form "situation" in Article 2.2 merely avoids imposing an unintended requirement to find multiple situations in each instance of determining normal value. In the Panel's view, the singular form "situation" should be understood to mean that only *one* particular market situation that causes sales of the like product in the domestic market not to permit a proper comparison would be required in order to resort to alternative bases for determining normal value.[79]

67. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* also examined Russia's argument that the phrase "without prejudice" in Article 2.7 of the Anti-Dumping Agreement establishes that the provisions of Article 2 of the Anti-Dumping Agreement, including Article 2.2, apply "without detriment to the Members' rights under second *Ad* Note". In Russia's view, Article 2.2 contains the obligation to determine normal value *via* one of two methods described in this provision, and the second *Ad* Note offers flexibility in respect of the determination of normal value. Russia argues that, if the conditions of the second *Ad* Note are met, an investigating authority can derogate from the obligation in Article 2.2 by following the text of the second *Ad* Note.[80]

68. The Panel disagreed with Russia's reading of Article 2.7 as connecting Article 2.2 and the second *Ad* Note.[81] The Panel considered, rather, that the meaning of "without prejudice" suggests that Article 2 and the second *Ad* Note should operate in conjunction without narrowing the scope or effect of the second *Ad* Note:

> "We understand Article 2.7 as preserving the operation of the second *Ad* Note, and that Article 2 of the Anti-Dumping Agreement should not be construed in a way that negates or restricts the second *Ad* Note. The text of the second *Ad* Note 'recognizes' that a specific factual situation ('a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State'), could give rise to a circumstance ('special difficulties' in 'determining price comparability'), in which an importing Member may need to take into account a possibility ('that a strict comparison with domestic prices … may not always be appropriate')."[82]

69. The Panel also rejected Russia's interpretative argument on the basis that it would restrict the second *Ad* Note in two ways. First, the mandatory nature of the provision of Article 2.2 relating to "the particular market situation" would be nullified by the second *Ad* Note in all cases in which the latter were to apply. Second, the mandatory provision of Article 2.2 would restrict the effect of the second *Ad* Note in contravention of the requirement in Article 2.7 that Article 2 is without prejudice to the second *Ad* Note.[83] The Panel elaborated on these interpretative results as follows:

> "First, in recognizing that 'special difficulties may exist in determining price comparability' the second *Ad* Note refers to the difficulty of *determining* price comparability, whereas Article 2.2 *requires* a determination that an exporter's domestic

[77] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.175.
[78] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.178.
[79] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.179.
[80] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.185.
[81] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.186.
[82] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.186.
[83] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.186 and 7.189.

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> sales of the like product 'do not permit a proper comparison'. In other words, while the second *Ad* Note would allow the investigating authority to avoid a strict comparison with domestic prices that may be inappropriate because of the special difficulties that may exist in determining whether the prices are comparable, Article 2.2 is more restrictive by requiring a price to price comparison unless a determination is made that the domestic prices do not permit a proper comparison.
>
> Second, the second *Ad* Note leaves the investigating authority considerable discretion ('*may find* it necessary to *take into account the possibility* … *may not always* be appropriate') to find that a strict price to price comparison is appropriate despite the presence of 'special difficulties'. In contrast, Article 2.2 is more prescriptive in its application ('*when*, because of the particular market situation …, such sales do not permit a proper comparison, the margin of dumping *shall be determined* [using one of two alternative methods for determining normal value as provided for in Article 2.2]')."[84]

1.4.2.3 Situations not having an exclusively unilateral impact on domestic market sales

70. In *Australia – Anti-Dumping Measures on Paper*, the Panel pointed out that the text of Article 2.2 does not exclude a domestic market situation impacting domestic and export sales alike from the scope of a "particular market situation":

> "We do not consider the presence of some effect on export sales automatically forecloses the possibility that the effect on domestic sales will, nevertheless, be such that a proper comparison is not permitted. … [T]he 'proper comparison' language allows for an assessment of the relative effect upon domestic and export sales of the 'particular market situation'. Incorporating the requirement of an exclusively unilateral effect into the phrase 'particular market situation', as Indonesia suggests, would, in our view, deprive the 'permit a proper comparison' language of its intended function.
>
> …
>
> … The language of Article 2.2 focuses on domestic market sales simply for the reason that the provision is concerned with whether the domestic market sales are an appropriate basis for determining normal value, not because the effects of the underlying phenomena are necessarily exclusively unilateral in nature."[85]

1.4.2.4 Situations arising from government actions

71. In *Australia – Anti-Dumping Measures on Paper*, Indonesia asserted that the term "particular market situation" could not be interpreted in a way that "interjects the Anti-Dumping Agreement 'into the sphere of regulating government behaviour which is expressly regulated in the [SCM Agreement]'."[86] It characterised Australia's action as a "specific action against a subsidy",[87] and argued that the prohibition of such action under Article 32.1 of the SCM Agreement excluded situations arising from government action from the scope of the term "particular market situation". The Panel disagreed and instead found that a situation arising from government action is not necessarily disqualified from constituting a "particular market situation":

> "The GATT 1994 and the Anti-Dumping Agreement authorize specific action against dumping of exports where the requisite elements are satisfied, irrespective of whether the exports at issue also benefit from a subsidy. This action does not constitute specific action against a subsidy under Article 32.1 of the SCM Agreement because the authority to take the specific action derives from the satisfaction of the requisite elements for specific action against dumping of exports. … This understanding is confirmed by the clarification provided in footnote 56 of the SCM Agreement (and the corresponding footnote 24 of the Anti-Dumping Agreement). Specific action against dumping of exports constitutes 'action under other relevant provisions of GATT 1994, as appropriate' in the meaning of footnote 56 of the

[84] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.187-7.188.
[85] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.37 and 7.39.
[86] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.42.
[87] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.42.

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SCM Agreement. Therefore, Article 32.1 of the SCM Agreement is not intended to preclude such action."[88]

72. The Panel in *Australia – Anti-Dumping Measures on Paper* found no general principle to the effect that anti-dumping remedy under the GATT 1994 and the Anti-Dumping Agreement cannot be concerned with government action. Additionally, it did not consider that Article VI:5 of GATT 1994 affirmed this alleged general principle:

> "We note that the proposed general principle that anti-dumping measures otherwise available in accordance with the provisions of the GATT 1994 and the Anti-Dumping Agreement are nevertheless precluded where the difference, or part of the difference, between export price and normal value can be traced to government action is not found explicitly expressed in any text of the Anti-Dumping Agreement or the SCM Agreement. … [W]e find it implausible that such a general principle with preclusive effect on the scope of application of the Anti-Dumping Agreement would exist without an express basis in the text of either the Anti-Dumping Agreement or the SCM Agreement.
>
> Article VI:5 prohibits the 'double remedy' of applying anti-dumping duties and countervailing duties to remedy twice the situation where an export subsidy creates a difference between export price and normal value that constitutes dumping. Article VI:5 does not authorize the imposition of anti-dumping duties that would otherwise be precluded by operation of Indonesia's proposed general principle. Instead, Article VI:5 creates a prohibition of 'double remedies' to address a specific situation that arises only on the basis of an implicit assumption that anti-dumping duties could have been applied by reason of the price difference that constitutes dumping despite the fact that the same situation is also understood to constitute export subsidization. In other words, Article VI:5 represents a narrow exception to the general principle that anti-dumping duties and countervailing duties may be applied whenever the criteria set forth in the GATT 1994, the Anti-Dumping Agreement, and the SCM Agreement are satisfied. This contradicts Indonesia's argument that Article VI:5 represents an express authorization and exception to a more general rule that dumping arising from government action cannot be addressed by the provisions of the Anti-Dumping Agreement."[89]

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1.4.3 "permit a proper comparison"

73. The Panel in *Australia – Anti-Dumping Measures on Paper* concluded that an investigating authority must examine the effects of a "particular market situation" on export prices to determine whether a "proper comparison" of the domestic and export prices for the calculation of dumping margin is permitted and provide an adequate explanation for its findings.[90] For the purposes of this phrase, a purely numerical comparison between the domestic and export prices may not be revealing. Hence a qualitative assessment should be made to determine whether the domestic and export prices can be properly compared based on how a particular market situation affects that comparison.[91] According to the Panel:

> "The function of the 'permit a proper comparison' test is to determine whether the domestic price can or cannot be used as a basis for comparison with the export price to identify the existence of dumping. It is implied here in Article 2.2 that the words 'a proper comparison' refer to the comparison between the domestic price and the export price. Thus, the purpose of an investigating authority's examination under the second clause of Article 2.2 of the Anti-Dumping Agreement is to determine whether domestic sales of the like product in the ordinary course of trade do not permit a proper comparison between the export price and the domestic sales price because of the particular market situation or the low volume.
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> …
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> Turning to the assessment of whether 'a proper comparison' is not permitted because of the particular market situation, we note that the focus of the analysis is on whether the effect of the particular market situation is such that a proper comparison between domestic sales prices

[88] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.47.
[89] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.53-7.54.
[90] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.73.
[91] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.75.

> and export prices under examination is not permitted. In other words, the investigating authority must examine the domestic sales in order to determine whether a proper comparison between the two prices is permitted in spite of the effect of the particular market situation. The point is to determine if there is a *comparable* domestic price. … That determination is fact-specific and should be made on a case-by-case basis by the investigating authority assessing the effect of particular market situation on the domestic price in relation to the effect on the export price, if any. … [W]hile a particular market situation may have an effect on both domestic and export prices, it does not follow that the impact on domestic and export prices will be the same. If the investigating authority finds that because of a particular market situation a proper comparison of the domestic price and the export price is not permitted, it is required to give a reasoned and adequate explanation of its conclusion."[92]

74. The Panel in *Australia – Anti-Dumping Measures on Paper* also evaluated whether a "proper comparison" is permitted when a low-priced input is used to produce merchandise both for the domestic and the export market. In its view, such a low-priced input would not necessarily have the same effect on domestic and export prices, thereby permitting a proper comparison between the two for the purposes of calculating the dumping margin. The effect of a low-priced input on the domestic and export prices of an individual exporter would depend on a variety of factors such as competitive conditions in the respective markets and the existing relationship between price and cost. An exporter may have various options to benefit from a decrease in input costs, depending on the particular market conditions. Hence, whether an exporter's domestic sales permit a proper price comparison with the export price must only be determined through an examination of relevant factual circumstances.[93]

75. In the investigation at issue in *Australia – Anti-Dumping Measures on Paper*, the investigating authority considered "whether: (a) the domestic price of A4 copy paper was affected by government intervention that distorted costs and prices; and/or (b) the 'particular market situation' meant that the domestic price of A4 copy paper was fixed in a manner incompatible with normal commercial practice; and/or (c) the 'particular market situation' meant that the domestic price of A4 copy paper was fixed according to criteria which were not those of the marketplace."[94] However, the Panel reasoned that this approach fails to give meaning and effect to the phrase "permit a proper comparison":

> "We find a deficiency in the ADC's examination in this case because it focused exclusively on the domestic sales and domestic prices, without taking into account the export prices with which the domestic prices would be compared. In particular, the examination does not address the question whether the domestic prices could be properly compared with the export prices despite the effects of the particular market situation.
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> …
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> We find that Australia did not examine whether domestic sales permitted a proper comparison between the domestic prices found to be affected by the decreased cost of pulp with the export prices for which the pulp cost was presumably equally decreased, despite assertions in the underlying proceeding which called for such an examination. … [W]e conclude that the ADC was obligated to undertake the necessary additional examination to determine whether, because of the particular market situation, the domestic sales of the individual exporters do not permit a proper comparison of the domestic prices and the export prices."[95]

1.4.4 Article 2.2.1

76. In *US – Hot-Rolled Steel*, the Appellate Body, when looking into the meaning of "sales in the ordinary course of trade" under Article 2.1, noted that Article 2.2.1 of the Anti-Dumping Agreement "itself provides for a method for determining whether *sales below cost* are "in the ordinary course of trade". However, that provision does not purport to exhaust the range of methods for determining whether sales are "in the ordinary course of trade", nor even the range of possible

[92] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.74 and 7.76.
[93] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.80-7.81.
[94] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.86.
[95] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.87 and 7.89.

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methods for determining whether low-priced sales are "in the ordinary course of trade". See paragraph 16 above.

77. The Panel in *EC – Salmon (Norway)* explained how, in its view, Article 2.2.1 functioned:

> "As we have already noted, Article 2.2.1 establishes a methodology for determining when below-cost sales may be treated as outside of the ordinary course of trade by reason of price. Pursuant to this methodology, below-cost sales may be found to be outside of the ordinary course of trade, and thereby disregarded from the calculation of normal value, when three conditions are satisfied – the below-cost sales must be made: (i) within an extended period of time; (ii) in substantial quantities; and (iii) at prices which do not provide for the recovery of all costs within a reasonable period of time."[96]

78. In *EC – Salmon (Norway)*, Norway claimed that the investigating authority had acted inconsistently with the European Communities' obligations under Article 2.2.1 when it excluded sales of certain investigated companies from its calculation of normal value, on the grounds that they were outside of the ordinary course of trade by reason of price. The Panel found that an "*a contrario*" reading of Article 2.2.1 would be conducive to the effective and expeditious conduct of investigations, which the Panel considered to be an important practical consideration:

> "In our view, in adopting the text of the last sentence of Article 2.2.1, the drafters intended to describe a methodology that if applied would result in compliance with the obligation to 'determine' that below-cost sales *do not* provide for the recovery of costs within a reasonable period of time."[97]

79. After examining the EC regulation and conducting an analysis of Article 2.2.1 that led to a conclusion that it could be read *a contrario*, the Panel in *EC – Salmon (Norway)* found that the investigating authority's exclusion of the sales in question was not inconsistent with Article 2.2.1.[98] In making this finding, the Panel stated:

> "[W]e find that the last sentence of Article 2.2.1 was intended to be read *a contrario,* such that a finding of sales made at prices above weighted average costs for the period of investigation would be sufficient to show that all sales not found to be above weighted average costs for the period of investigation *do not* provide for the recovery of costs within a reasonable period of time."[99]

80. The Panel in *Ukraine – Ammonium Nitrate*, in a finding upheld by the Appellate Body[100], applied the approach of the Panel in *EC – Salmon (Norway)*, and determined that "costs used in the ordinary-course-of-trade test under Article 2.2.1 must be consistent with Article 2.2.1.1" as Article 2.2.1 is covered by the reference to paragraph 2 in Article 2.2.1.1.[101]

81. The Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* rejected the argument that Article 2.2.1 contained multiple obligations, and found that this provision contained a single obligation, namely that an investigating authority may disregard below-cost sales of the like product in determining normal value only if the conditions laid down in Article 2.2.1 are present.[102]

82. According to the Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)*, "the three conditions set out in Article 2.2.1 are cumulative, so the investigating authority must make an affirmative determination on each condition."[103]

[96] Panel Report, *EC – Salmon (Norway)*, para 7.312.
[97] Panel Report, *EC – Salmon (Norway)*, para. 7.274.
[98] Panel Report, *EC – Salmon (Norway)*, para. 7.276.
[99] Panel Report, *EC – Salmon (Norway)*, para. 7.275.
[100] Appellate Body Report, *Ammonium Nitrate*, para. 6.127.
[101] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.116.
[102] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.22.
[103] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.79.

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1.4.4.1 "withing an extended period of time"

83. With regard to the duration of "extended period of time", the Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found as follows:

> "In relation to the first condition (if below-cost sales are made 'within an extended period of time'), the definition of 'extended period of time' in footnote 4 of the Anti-Dumping Agreement is that it should 'normally be one year but shall in no case be less than six months'. The authority can therefore establish that below-cost sales are made 'within an extended period of time' when considering whether there are below-cost sales during the [period of investigation]. Furthermore, the specific definition in footnote 4 indicates that the authority does not need to determine the duration of the 'extended period' *per se* under the circumstances of a given investigation."[104]

1.4.4.2 "reasonable period of time"

84. In *EC – Salmon (Norway)*, Norway claimed that the "investigating authority failed to 'determine' that the below cost sales did not provide for the recovery of all costs within a reasonable period of time because its findings did not include an explicit and unambiguous explanation of why the prices of the sales discarded did not provide for the recovery of costs within a reasonable period of time."[105] The Panel understood Norway's concern to be "focused on the alleged absence of any mention of the terms 'cost recovery' and 'reasonable period of time' in the investigating authority's determination, as well as the alleged lack of any statement of the duration of the 'reasonable period of time'."[106] The Panel found that "an investigating authority that acts consistently with the second sentence of Article 2.2.1 need not 'state' that the 'reasonable period of time' is equivalent to the period of investigation because these two periods are equated by definition under the express terms of the second sentence."[107]

1.4.4.3 Second sentence – using an annual weighted average cost

85. In *Dominican Republic – AD on Steel Bars (Costa Rica),* the Panel pointed out that the determination by the investigating authority of whether the circumstances described in the second sentence of Article 2.2.1 apply has to necessarily precede the exclusion of the below-cost sales from the determination of the normal value.[108]

86. In the underlying investigation, the investigating authority, in determining whether prices in the market of the exporting country were below per unit costs, used an annual weighted average cost instead of available monthly average costs. According to the complainant, such determination did not to reflect the costs incurred "at the time of sale" and allowed the investigating authority to "disregard many transactions in the early part of the [period of investigation] for reportedly being below the annual average cost".[109] The Dominican Republic referred to the lack of any precise methodology prescribed in the second sentence of Article 2.2.1, and argued, consequently, that the investigating authority had discretion in this regard.[110] The Panel disagreed with the Dominican Republic and stressed on the importance of the requirement for the comparison between prices and costs to be made at the time of sale:

> "We disagree with the Dominican Republic that the discretion under Article 2.2.1 is such that it would have allowed the CDC to employ such a methodology.
>
> The second sentence of Article 2.2.1 establishes that the authority must take two matters into account: firstly, the authority must consider the prices in respect of the costs at the 'time' of the sale; and secondly, sequentially and if appropriate, the authority should compare the price with the weighted average cost of the POI. The latter comparison with the annual weighted average determines whether sales in the normal

[104] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.80.
[105] Panel Report, *EC – Salmon (Norway)*, para. 7.277.
[106] Panel Report, *EC – Salmon (Norway)*, para. 7.277.
[107] Panel Report, *EC – Salmon (Norway)*, para 7.277.
[108] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.82.
[109] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.85-7.86.
[110] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.87.

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> value calculation should be retained, even if the price of such sales was lower than the costs 'at the time of sale'. If the initial comparison of the price to costs at the time of sale shows that the price was above costs at the time of sale, the sale would not be considered below cost and there would be no need to compare the price against the annual weighted average price. This is consistent with the first sentence of Article 2.2.1, which allows the investigating authority to exclude from the normal value calculation sales that are at 'prices below per unit costs', provided that such sales meet the conditions of Article 2.2.1. In fact, any determination of whether sales had been made at prices which did not provide for the recovery of all costs within a reasonable time would be meaningless if prices and costs were not initially compared at the time of sale.
>
> Based on the foregoing, we consider that an investigating authority is required to use a methodology that reasonably allows it to identify sales that are above costs 'at the time of sale' so as not to unduly exclude them from the margin of dumping calculation. Therefore, in general, it would be reasonable to use a methodology that takes into account the costs at the time of sale determined on a basis other than the annual weighted average per unit cost. This is intended to avoid the risk of excluding sales from the margin of dumping determination that were not in fact below cost at the time of sale. We consider that the risk could be particularly high in circumstances when production costs increase significantly during the [period of investigation]."[111]

87. The Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* further explained that the use of an annual weighted average as a basis of comparison may not distort the analysis "in situations where costs, as well as prices, are relatively stable".[112] According to the Panel, this was not the case in the underlying investigation:

> "[W]e consider that the CDC was aware that production costs had increased significantly during the [period of investigation]. In view of this, the CDC, acting as an unbiased investigating authority, should have considered the possibility of distortion in its analysis based on using the annual weighted average for the [period of investigation].
>
> …
>
> [T]he fact that [a] high proportions of sales were excluded in the initial months of the [period of investigation] at least indicates to an investigating authority that there may be possible bias in the below-cost sales analysis."[113]

88. On this basis, the Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* found the methodology applied by the authority in the underlying investigation to be inconsistent with the second sentence of Article 2.2.1:

> "On the basis of the facts set out above, we conclude that the CDC had information on the increasing trend in the costs of the main feedstock and in the prices of the like product. Furthermore, the CDC's own analysis shows that the vast majority of sales in the first half of the [period of investigation] were below cost. In these circumstances, the use of an annual average cost was not appropriate, as it resulted in the CDC's analysis, for the purpose of determining the normal value, failing to take into account a significant number of sales made in the first few months of the [period of investigation] that were not in fact below cost. Such a result skewed the normal value estimate upwards. We therefore find that the CDC failed to act in an unbiased and objective manner when determining whether prices were below per unit costs at the time of sale, before concluding that the sales were not made in the ordinary course of trade by reason of price, in accordance with Article 2.2.1.
>
> We therefore conclude that the Dominican Republic acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement when the CDC performed its cost test analysis using an annual weighted average cost. In particular, the CDC failed to properly consider whether prices were below unit costs 'at the time of sale' pursuant to the

[111] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.97-7.99.
[112] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.99.
[113] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.100 and 7.104.

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second sentence of Article 2.2.1, before excluding those sales from the normal value determination."[114]

1.4.4.4 Article 2.2.1.1

1.4.4.4.1 "normally"

89. The Panel in *China – Broiler Products (Article 21.5 – US)* stated that the use of "normally" in the first sentence of Article 2.2.1.1 "means that to calculate cost of production for the purposes of Article 2.2, the rule for the information to be used is that the investigating authority relies on the records kept by the exporter or producer under investigation, except where the conditions for the application of the rule, set out in the provision, are not met."[115]

90. While the Appellate Body in *Ukraine – Ammonium Nitrate* did not consider it necessary to consider whether, in light of the word "normally", there are other circumstances in which the obligation in the first sentence of Article 2.2.1.1 to base the calculation of costs on the records kept by the exporter or producer under investigation would not apply and what these circumstances might be, it nevertheless stated:

> "Given the reference to 'normally' in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply."[116]

91. The Panel in *Australia – Anti-Dumping Measures on Paper* also considered whether the term "normally" in the first sentence of Article 2.2.1.1 provides a separate legal basis to disregard an exporter's records. According to the Panel, an investigating authority "shall normally" use the exporters' records as the basis for the calculation of costs of production upon satisfaction of two cumulative conditions: first, they must be "in accordance with the generally accepted accounting principles of the exporting country"; and second, they must "reasonably reflect the costs associated with the production and sale of the product under consideration".[117] When one or both of these conditions is not satisfied, an investigating authority may use another source of data for the calculation of an exporter's cost of production.[118] The term "normally" in Article 2.2.1.1 qualifies the verb "shall be calculated" and suggests that the obligation to use the exporters' records to calculate their costs is derogable under certain circumstances.[119] If the obligation to consider the records kept by exporters was only derogable in accordance with the limited conditions mentioned in Article 2.2.1.1, the first sentence of Article 2.2.1.1 "would have the same meaning with or without the word 'normally'", in violation of the principle of effective treaty interpretation.[120]

92. The Panel in *Australia – Anti-Dumping Measures on Paper* clarified the relationship between the term "normally" and the two conditions for considering records kept by exporters as contained in Article 2.2.1.1, first sentence:

> "[W]e do not believe that this dispute requires us to define precisely under what circumstances an investigating authority would be allowed to depart from the obligation to use the exporter's records on the basis of the term 'normally'.
>
> [T]he obligation to 'normally' use the records kept by the exporter, becomes operative when both explicit conditions are satisfied: the 'records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sales of the product under consideration'. It follows that, to rely on the flexibility provided by the term 'normally', the investigating authority has to consider whether the records satisfy the two explicit conditions and establish that, although the records are in accordance with GAAP of the exporting

[114] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* paras. 7.105-7.106.
[115] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.29.
[116] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.87.
[117] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.110.
[118] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.110.
[119] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.111.
[120] Panel Report, *Australia – Anti-Dumping Measures on Paper*, para. 7.112.

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> country and reasonably reflect the costs associated with the production and sale of the product under consideration, it nonetheless finds a compelling reason, distinct from the two explicit conditions, to disregard them. If the investigating authority were permitted to rely on the term 'normally' to disregard the records without giving any consideration to the two explicit conditions, this would render those conditions in Article 2.2.1.1, first sentence, unnecessary. … We conclude that in relying on 'normally', the investigating authority should give meaning to the whole of the obligation in Article 2.2.1.1, first sentence, and should therefore examine whether the records satisfy the two explicit conditions and provide a satisfactory explanation as to why, nonetheless, it finds compelling reasons to disregard them."[121]

93. In *Australia – Anti-Dumping Measures on Paper*, China relied on the Appellate Body's reasoning in *US – Clove Cigarettes*, where the Appellate Body had found that while the obligation in question was qualified with the term "normally", Members could only deviate from the same based on the explicit derogation contained in paragraph 5.2 of the Doha Ministerial Decision. Accordingly, China argued that the bases of derogation from the obligation to use exporters' cost records could only be those explicitly mentioned in the Article 2.2.1.1, first sentence. The Panel rejected this contention:

> "We note that the Appellate Body's reasoning was specific to Article 2.12 of the Agreement on Technical Barriers to Trade and paragraph 5.2 of the Doha Ministerial Decision, which relate to the timing of the publication of technical regulations – a matter that is quite different from the obligation to use an exporter's records to calculate the costs. In our view, the meaning of the term 'normally' in Article 2.2.1.1, first sentence, must be ascertained in light of the specific context of the Anti-Dumping Agreement. We consider that the context of the term 'normally' found in Article 2.2.1.1, first sentence, suggests that a different interpretation is appropriate.
>
> We note the text of the Anti-Dumping Agreement contains five sentences that use the words 'provided that' and an obligation introduced by the verb 'shall'. However, we have identified that only two of the five sentences use the word 'normally' in addition to the words 'provided that', whereas the other three sentences condition the respective obligations on the circumstances introduced by the words 'provided that' without qualifying the obligations by the term 'normally'. In light of this context, we consider that the term 'normally' in Article 2.2.1.1 was used by the drafters deliberately to introduce a difference to the meaning of the sentence and cannot be reduced to a mere reference to the conditions that follow the words 'provided that', as argued by Indonesia. Rather, the term 'normally', in our view, indicates that even where an exporter's records satisfy the two explicit conditions in Article 2.2.1.1, first sentence, there are circumstances in which the authority may depart from its obligation to use those records – an obligation that is operative only when the two explicit conditions are fulfilled."[122]

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1.4.4.4.2 "reasonably reflect the costs associated with the production and sale of the product under consideration"

94. In the investigation at issue in *EU – Biodiesel (Argentina)*, the EU Commission considered that the records kept by the Argentine producers did not reasonably reflect the costs within the meaning of Article 2.2.1.1 insofar as they pertained to the costs for soybeans and soybean oil, the raw materials used to produce the investigated product, biodiesel, on the ground that domestic prices of such raw materials in Argentina were artificially low because of Argentina's export tax system.[123] The Panel, in a finding upheld by the Appellate Body, found that Article 2.2.1.1 concerned whether the costs on the records reflected the costs that the investigated producer actually incurred in the production of the subject product, and not whether such costs were considered to be reasonable:

[121] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.116-7.117. See also Panel Report, *Australia – AD/CVD on Certain Products (China)*, para. 7.57.
[122] Panel Report, *Australia – Anti-Dumping Measures on Paper*, paras. 7.114-7.115.
[123] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.221.

> "On the basis of the foregoing considerations, we understand the ordinary meaning of the phrase 'provided such records … reasonably reflect the costs associated with the production and sale of the product under consideration', in its context, to concern whether the costs set out in a producer/exporter's records reflect all the actual costs incurred by the producer/exporter under investigation in –within acceptable limits – an accurate and reliable manner. This, in our view, calls for a comparison between, on the one hand, the costs as they are reported in the producer/exporter's records and, on the other, the costs actually incurred by that producer. We emphasize, however, that the object of the comparison is to establish whether the records reasonably reflect the costs *actually* incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more 'reasonable' than the costs actually incurred."[124]

95. The Panel, in a finding also upheld by the Appellate Body, found that in the investigation at issue the Commission had acted inconsistently with Article 2.2.1.1 by concluding that the Argentine producers' records did not reflect reasonably the raw material costs for biodiesel:

> "With the foregoing considerations in mind, we now turn to whether, in the case before us, the investigating authority derogated from using the costs reflected in the records kept by producers in a manner consistent with Article 2.2.1.1. The investigating authority determined not to use the costs of the main raw material, soybeans, in the production of biodiesel because 'the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system'. In our view, this does not constitute a legally sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel."[125]

96. In *Ukraine – Ammonium Nitrate*, the Appellate Body added that it is the "records" of the individual exporter or producer under investigation that are subject to the condition to "reasonably reflect" the "costs associated with the production and sale of the product under consideration". Hence, the Appellate Body considered that "there is no standard of reasonableness under that condition that governs the meaning of 'costs' itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally."[126]

97. On appeal, the Appellate Body added that the second condition in the first sentence of Article 2.2.1.1 refers "to whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[127]

98. The Appellate Body in *EU – Biodiesel (Argentina)* agreed with the Panel's view that records that are consistent with the generally accepted accounting principles may nonetheless be found to not be reasonably reflecting the costs associated with the production and sale of the subject product:

> "In this regard, we agree with the Panel that records that are GAAP-consistent may nonetheless be found not to reasonably reflect the costs associated with the production and sale of the product under consideration. This may occur, for example, if certain costs relate to the production both of the product under consideration and of other products, or where the exporter or producer under investigation is part of a group of companies in which the costs of certain inputs associated with the production and sale of the product under consideration are spread across different companies' records, or

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[124] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.242. See also Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.56.
[125] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.248.
[126] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.88.
[127] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.26.

> where transactions involving such inputs are not at arm's length. Thus, we do not consider that the Panel erred in this respect."[128]

99. In *EU – Biodiesel (Indonesia)*, the Panel noted that, in determining costs for purposes of constructing the normal value, the EU Commission had applied the same method in the investigation against Indonesia as in the investigation against Argentina discussed in the previous *EU – Biodiesel (Argentina)* dispute. The Panel found no reason to depart from the panel and Appellate Body findings in *EU – Biodiesel (Argentina)* about the consistency of that method with the Anti-Dumping Agreement. On this basis, the Panel found a violation of Article 2.2.1.1.

100. In the investigation at issue in *US – OCTG (Korea)*, the USDOC found that a producer's purchases of a certain raw material had not been made at arm's-length prices, and therefore that producer's records did not reasonably reflect the costs associated with the production and sale of the subject product. The Panel found that this determination was not inconsistent with Article 2.2.1.1. In coming to this conclusion, the Panel also took into consideration the Appellate Body's findings in *EU – Biodiesel (Argentina)*:

> "However, this does not mean that the figures reported in an exporter's or producer's records must be accepted for purposes of constructing normal value without further consideration in all cases. Both the panel and the Appellate Body in *EU – Biodiesel (Argentina)* recognized that if the prices recorded in an exporter's or producer's records do not reflect arm's length prices, an investigating authority may find that the records, insofar as those prices are concerned, do not 'reasonably reflect' the costs associated with production and sale of the product under consideration. In such a situation, the investigating authority would be entitled to disregard those prices when determining the exporter's or producer's cost of production. Thus, we consider that when the transactions between the exporter or producer and an associated or non-independent entity are found not to be at arm's length, the costs reflected in the exporter's or producer's records cannot be said to be 'accurate or reliable' or 'suitably and sufficiently correspond' to, i.e. reasonably reflect, the costs associated with production and sale of the product under consideration.
>
> To examine whether such transactions are or are not at arm's length, and therefore whether the reported prices should be used in constructing normal value, an investigating authority would have to examine the transactions in question. This is what the USDOC did in the underlying investigation. The USDOC calculated the weighted-average price of POSCO's steel coil sales to unaffiliated customers, and compared NEXTEEL's steel coil purchase prices (transfer prices) with POSCO's cost of production of OCTG and with the prices at which POSCO sold steel coils to unaffiliated customers. The USDOC found that the prices of **[[***]]** grades of steel coils purchased by NEXTEEL from POSCO were **[[***]]** the prices at which POSCO sold these grades of steel coils to other non-affiliated customers. In our view, it was not unreasonable for the USDOC to conclude that NEXTEEL's steel coil purchases were not at arm's length prices, and therefore that NEXTEEL's records did not reasonably reflect the costs associated with the production and sale of OCTG within the meaning of Article 2.2.1.1. In this regard, we note that Korea does not dispute that an investigating authority may conduct an arm's length test in this context. However, Korea asserts that an arm's length test cannot be used to assess whether the costs reflected in the exporter or producer's records reflect some 'hypothetical costs' which the investigating authority considers to be more reasonable than the costs actually incurred by the producer or exporter. We agree. As discussed above, the enquiry under Article 2.2.1.1 is not whether costs reported in the producer or exporter's records are reasonable. But this is not the question the USDOC was addressing in this case. In the underlying investigation, the USDOC did not compare NEXTEEL's steel coils purchase price with some 'hypothetical' reasonable cost or price. Instead, the USDOC compared the actual price at which POSCO sold steel coils to NEXTEEL with the actual price at which POSCO sold steel coils to non-affiliated customers, and concluded that the former was **[[***]]** the latter."[129]

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[128] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.33.
[129] Panel Report, *US – OCTG (Korea)*, paras. 7.197-7.198.

101. In considering the issue of non-arms-length transactions and their impact upon the reliability of reported costs, the Panel in *Ukraine – Ammonium Nitrate*, in a finding upheld by the Appellate Body found that the essential question, to be considered on a case-by-case basis, "is whether the records of the exporters or producers reasonably reflect the costs associated with production and sale of the product under consideration".[130] The Appellate Body further elaborated that the second condition in the first sentence of Article 2.2.1.1 does not contain open-ended "non-arm's-length transactions" or "other practices" "exceptions", as Ukraine seemed to suggest:

> "We do not subscribe to Ukraine's reading of the panel report or the Appellate Body report in *EU – Biodiesel (Argentina)*. In our view, it is clear from the language used in these reports that the panel and the Appellate Body provided only examples of circumstances in which records may be found, depending on the case at hand, not to reasonably reflect the costs associated with the production and sale of the product under consideration. We do not see that, in specifying these examples, the panel or the Appellate Body read the second condition in the first sentence of Article 2.2.1.1 to prescribe exceptions to, or otherwise limit in the abstract, the circumstances allowing for the rejection of records under that condition. Therefore, while we note Ukraine's understanding of arm's-length transactions, like the Panel, we do not read the panel or Appellate Body reports in *EU – Biodiesel (Argentina)* as having understood the second condition in the first sentence of Article 2.2.1.1 to contain open-ended 'non-arm's-length transactions' or 'other practices' 'exceptions'. Nor do we consider such exceptions to be embodied in that second condition. As set out above, the second condition in the first sentence of Article 2.2.1.1 relates to whether the records kept by the exporter or producer under investigation suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration. We thus agree with the Panel that the question under the second condition in the first sentence of Article 2.2.1.1 is whether the records of the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration and that this question is to be assessed on a case-by-case basis, in light of the evidence before the investigating authority and its determination."[131]

102. The Appellate Body in *Ukraine – Ammonium Nitrate* recalled the Panel's finding that a producer may source inputs used to produce the product under consideration from multiple *unrelated suppliers* and that the prices paid by the producer to these unrelated suppliers would form part of the costs that it incurs to produce the product under consideration. It also recalled that the Panel had not considered that "the investigated Russian producers' own records could be said to be unreliable, or not reasonably reflect the costs associated with the production and sale of the product under investigation, because its *unrelated suppliers*' prices are government regulated, lower than the prices prevailing in other countries, or allegedly priced below their cost of production." The Appellate Body continued:

> "These references by the Panel to 'unrelated suppliers', read in isolation, could arguably be read to suggest that, in the Panel's view, records may not be disregarded under the first sentence of Article 2.2.1.1 on the sole basis that input prices are set by the government below cost of production when the producers or exporters of the product under investigation and the input suppliers are unrelated (but might be when these entities are related). To the extent the Panel Report suggests as much, we have reservations regarding the relevance of drawing a distinction between related parties to input transactions, on the one hand, and unrelated parties to such transactions, on the other hand, for the inquiry under the first sentence of Article 2.2.1.1 as to whether cost calculations should be based on records kept by the exporter or producer under investigation. Simply because parties to input transactions are considered to be unrelated does not mean that cost calculations should necessarily be based on records kept by the exporter or producer under the first sentence of Article 2.2.1.1. In particular, as explained above, given the reference to 'normally' in the first sentence of Article 2.2.1.1, we do not exclude that there might be circumstances, other than those in the two conditions set out in that sentence, in which the obligation to base the calculation of costs on the records kept by the exporter or producer under investigation does not apply. However, to the extent the Panel's statements regarding unrelated suppliers can be understood to have been made in the limited context of the second condition in the first sentence of Article 2.2.1.1, we do

[130] Panel Report, *Ukraine – Ammonium Nitrate*, paras. 7.85-7.87.
[131] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.97.

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not take issue with the Panel's proposition that the prices paid by the producer to unrelated suppliers would form part of the costs that it incurs to produce the product under consideration."[132]

103. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* addressed Russia's claim that the Cost Adjustment Methodology was inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Specifically, using the Cost Adjustment Methodology, the European Commission rejected the recorded input prices reflected in the records kept by the exporter or producer under investigation. Such prices were rejected for having been "significantly lower than international prices due to alleged 'distortions' created by government regulation in the exporting country". In Russia's view, the European Commission rejected the recorded input prices on the basis of a "reasonableness" requirement not set forth in the first sentence of Article 2.2.1.1.[133]

104. The Panel considered the issue before it to be whether the first sentence of Article 2.2.1.1 allowed an investigating authority to reject the input prices reflected in the records kept by the exporter or producer under investigation on the basis of the "reasonableness" of such prices.[134]

105. The Panel began by recalling the interpretation of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement conducted by the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. The Panel noted that, in both disputes, the Appellate Body had considered that the second condition does not provide that the "costs" reflected in the "records kept by the exporter or producer under investigation" must themselves be "reasonable", but that such "records" must "reasonably reflect" such costs:

> "In *EU – Biodiesel (Argentina)*, the Appellate Body understood this condition to relate to whether the records kept by the exporter or producer under investigation 'suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration'. Noting that this provision focuses on the 'records' of the exporter or producer under investigation, the Appellate Body rejected an interpretation that the second condition in the first sentence of Article 2.2.1.1 concerns whether the recorded costs themselves are 'reasonable'. In this connection, based on the context provided by Article 2.2 of the Anti-Dumping Agreement, the Appellate Body understood that the second condition 'should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records kept by the exporter or producer pursuant to a benchmark unrelated to the cost of production in the country of origin'.
>
> In *Ukraine – Ammonium Nitrate*, the Appellate Body reiterated its view that there is no standard of 'reasonableness' under the second condition in the first sentence of Article 2.2.1.1 that governs the meaning of 'costs' itself, which would allow investigating authorities to disregard domestic input prices when such prices are lower than other prices internationally. The Appellate Body recalled that it is the 'records' of the individual exporter or producer under investigation that are subject to the condition to 'reasonably reflect' the 'costs associated with the production and sale of the product under consideration'."[135]

106. In its analysis, the Panel considered that the language in Article 2(5) of the Basic AD Regulation was virtually identical to the text of the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement.[136] The Panel also noted that, in both *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*, the Panel and the Appellate Body had examined "the existence of government measures in the country of origin, of a different nature and effect on domestic input prices in each case". Such government measures were found not to constitute a sufficient or adequate basis to conclude that the records of the producer or exporter under investigation did not "reasonably reflect the costs associated with the production and sale of the

[132] Appellate Body Report, *Ukraine – Ammonium Nitrate*, paras. 6.104-6.105.
[133] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.82-7.86.
[134] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.83-7.90.
[135] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.95-7.96.
[136] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.98.

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product under consideration", in the sense of the second condition in Article 2.2.1.1.[137] The Panel further elaborated on the similarities in fact and reasoning applied in these two disputes:

> "[I]n *EU – Biodiesel (Argentina)*, the government measure that was found to render the recorded costs unusable for the calculation of the costs of production was the Argentine export tax system, which depressed the domestic price of the relevant inputs to an 'artificially-low level'. The Appellate Body agreed with the panel that the European Commission's determination that domestic prices of soybeans in Argentina were lower than international prices due to the Argentine export tax system was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel. … [T]he Appellate Body upheld the panel's finding that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.
>
> Likewise, in *Ukraine – Ammonium Nitrate,* the Ministry of Economic Development and Trade (MEDT) of Ukraine, responsible for conducting anti-dumping investigations and reviews, rejected the gas cost reflected in the records of the Russian investigated companies because the gas price in the domestic Russian market was not a market price as the State controlled this price, it was artificially lower than the export price of gas from Russia and the price of gas in other countries, and was below costs. The Appellate Body agreed with the panel in finding that the MEDT of Ukraine did not provide an adequate basis under that second condition of Article 2.2.1.1 to reject the reported gas cost. The Appellate Body recalled, in this connection, that the examination under the second condition in the first sentence of Article 2.2.1.1 does not concern whether the costs contained in the records are not reasonable because, for instance, they are lower than in other countries."[138]

107. The Panel considered that the reasons underlying the European Commission's rejection of the recorded costs under the Cost Adjustment Methodology were not distinguishable from those offered by the investigating authorities in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate* to disregard the recorded costs of soybeans and natural gas, respectively.[139] Specifically, the Panel considered the following aspects to be relevant:

> "We recall that, under the Cost Adjustment Methodology, the recorded costs of investigated companies are rejected from the calculation of the cost of production because of significant input price differences in the domestic and out-of-country markets and the existence of price regulation in the country of origin or other measures that impact the domestic input price. Our review of the manner in which the methodology operates reveals that the decisive factor in rejecting the recorded input prices is that they are State-regulated and 'far below market prices paid in unregulated markets', as indicated by Russia."[140]

108. In the light of the above, the Panel considered that the Cost Adjustment Methodology did not provide for an analysis pertaining to whether the records kept by the exporter or producer met the standard outlined and applied by the Appellate Body in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*. Specifically, the Panel considered that the costs used by the European Commission did not "suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration".[141] The Panel expressed its finding after having noted that its underlying facts were similar to the underlying facts in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium Nitrate*:

> "Similar to the underlying facts in *EU – Biodiesel (Argentina)* and *Ukraine – Ammonium* Nitrate, the Cost Adjustment Methodology assesses the 'reasonableness' of the costs

[137] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.98.
[138] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.99-7.100.
[139] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.101.
[140] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.101.
[141] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.102.

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> reflected in the records kept by the investigated companies themselves *vis-à-vis* prices for the relevant inputs in what is considered to be unregulated markets. When this comparison reveals a significant price difference, the Cost Adjustment Methodology discards the recorded costs of the investigated companies. In our view, this does not constitute an adequate or sufficient basis under the second condition in the first sentence of Article 2.2.1.1 to conclude that the records of the investigated companies do not reasonably reflect the costs associated with the production and sale of the product concerned."[142]

109. The Panel also noted the European Union's position, based on the terms "normally" and "[f]or the purpose of paragraph 2" in the first sentence of Article 2.2.1.1, that the two conditions in the same sentence do not exhaust the circumstances in which the costs reflected in the records of the producer or exporter under investigation may be rejected.[143] Specifically, the Panel understood the European Union to be arguing that "distorted" cost information constitutes an "abnormal" circumstance that justifies the rejection of the costs through the application of the term "normally" within the meaning of Article 2.2.1.1 of the Anti-Dumping Agreement.[144]

110. Nevertheless, the Panel considered that the anti-dumping determinations evidencing the operation of the Cost Adjustment Methodology provided no explanation of any reliance on the term "normally" under Article 2(5) of the Basic AD Regulation, which was nearly identical to Article 2.2.1.1 of the Anti-Dumping Agreement.[145] Specifically, the Panel stated the following:

> "[T]he anti-dumping determinations evidencing the precise content of the Cost Adjustment Methodology do not indicate that the European Commission relied on the term 'normally' in the first subparagraph of Article 2(5) when it rejected the recorded input prices. If the European Commission had derogated from the requirement in Article 2(5) that 'costs … shall *normally* be calculated on the basis of … records', one could have expected to find an explanation of such derogation in the relevant determinations. However, no such explanation is present.
>
> Accordingly, we find that the anti-dumping determinations evidencing the existence of the Cost Adjustment Methodology provide no reasoned and adequate explanation of whether and why the fact that the recorded input prices were State-regulated and 'far below market prices paid in unregulated markets' constituted an 'abnormal' circumstance or otherwise justified the rejection of the recorded costs pursuant to the term 'normally' within the meaning of Article 2.2.1.1. On the contrary, in our view, the European Commission's reasoning in the determinations reproduced above is best understood to reveal that it applies the Cost Adjustment Methodology to reject recorded cost information in reliance on the *second condition* of the first subparagraph of Article 2(5) of the Basic AD Regulation. Moreover, as already noted, in the five court judgments advanced by Russia the Council of the European Union sought to defend the application of the Cost Adjustment Methodology by arguing that it was justified to reject the recorded cost information under the *second condition* of the first subparagraph of Article 2(5) of the Basic AD Regulation, not the alleged flexibility arising out of the term 'normally' in the first subparagraph of Article 2(5) of the Basic AD Regulation. We thus do not find it necessary to consider further whether the two express conditions in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement exhaust the circumstances in which costs reflected in the records of the producer or exporter under investigation may be rejected."[146]

111. The Panel in *EU – Cost Adjustment Methodologies II (Russia)* concluded that the Cost Adjustment Methodology applied by the European Commission provided for the rejection of the costs reflected in the records of the exporter or producer under investigation in a manner inconsistent with the second condition of the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Accordingly, the Panel found that the Cost Adjustment Methodology of the European Union was inconsistent with the first sentence of Article 2.2.1.1 of the Anti-Dumping

[142] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.102.
[143] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.103.
[144] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.105.
[145] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.105.
[146] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.105-7.106.

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Agreement.[147] The Panel considered that there was no evidence suggesting that the European Union, in applying the Cost Adjustment Methodology, meant to give effect to its interpretation of the term "normally" in the first sentence of Article 2.2.1.1.[148]

112. In a later section of the panel report in *EU – Cost Adjustment Methodologies II (Russia)*, the Panel found that the European Commission had rejected certain recorded cost information of the Russian producer in application of the second condition of the first subparagraph of Article 2(5) of the Basic AD Regulation.[149] The Panel considered that the European Commission erred by applying a standard of "reasonableness" to the costs instead of ensuring that the costs are "reasonably reflected" in the records. The Panel noted that it is the "costs associated with the production and sale of the product under consideration" that must be "reasonably reflect[ed]" in the "records".[150] In the Panel's view:

> "[T]he second condition prescribed in Article 2(5) of the Basic AD Regulation stipulates that 'it must be shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration'. This language is virtually identical to the text of Article 2.2.1.1 of the Anti-Dumping Agreement. As already noted, in *EU – Biodiesel (Argentina)* the Appellate Body understood the second condition in the first sentence of Article 2.2.1.1 to relate to whether the producer's records 'suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration'. Because it is the 'records' that are subject to the condition to 'reasonably reflect' the 'costs associated with the production and sale of the product under consideration', there is no standard of 'reasonableness' under the second condition that governs the meaning of 'costs' itself. Accordingly, the second condition in Article 2.2.1.1 'should not be interpreted in a way that would allow an investigating authority to evaluate the costs reported in the records … pursuant to a benchmark unrelated to the cost of production in the country of origin'.
>
> In light of the above, we consider that, in the expiry review for certain welded tubes and pipes, the European Commission improperly applied the second condition in the first sentence of Article 2.2.1.1 by rejecting the Russian producer's gas costs on the grounds that they were not reflected in the records."[151]

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113. The Panel also addressed the European Union's argument that Paragraph 132 of the Working Party Report on Russia's accession to the WTO committed Russia to ensuring that natural gas producers/distributors would operate on the basis of "normal commercial considerations".[152] The Panel considered that the text cited by the European Union does not appear to have been intended to establish the legal basis to disregard domestic gas costs in Russia that are regulated or far below market prices:

> "This paragraph records the statement of the representative of Russia that producers/distributors of natural gas in Russia 'would operate … on the basis of normal commercial considerations, based on recovery of costs and profit'. There is, however, no indication in paragraph 132 that this statement was meant to establish the legal basis to disregard domestic gas costs in Russia, pursuant to the second condition in Article 2.2.1.1, for reasons that these costs are regulated or far below market prices paid in unregulated export markets for Russian natural gas. Moreover, paragraph 132 does not make any reference to the Anti-Dumping Agreement, or Article VI:1 of the GATT 1994, and does not refer directly or indirectly to the calculation of the costs of production or normal value for Russian producers/exporters in anti-dumping proceedings. In this regard, unlike the instruments concerning the accession to the WTO of certain other Members, the Protocol of Accession of Russia does not contain specific rules applicable to anti-dumping proceedings conducted by foreign investigating authorities in relation to Russian imports. For these reasons, we disagree that the

[147] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.107.
[148] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.105.
[149] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.241.
[150] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.245-7.246.
[151] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, paras. 7.242-7.243.
[152] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.249.

> commitment reflected in paragraph 132 of the Working Party Report on Russia's accession to the WTO justifies the rejection of the cost of natural gas in the expiry review for welded tubes and pipes."[153]

114. For these reasons, the Panel disagreed that the accession commitment reflected above justified the rejection of the cost of natural gas in the expiry review for welded tubes and pipes.[154]

115. The Panel in *Pakistan – BOPP Film (UAE)* addressed the question whether an unbiased and objective investigating authority could have elected, as Pakistan's investigating authority (NTC) did, to use the cost information contained in appendix 2 instead of appendix D-3 to evaluate whether an exporter's (Taghleef's) domestic sales were made in the ordinary course of trade.[155] For the Panel, the answer to this question turned on (a) whether an objective and unbiased authority could, in accordance with Article 2.2.1.1, determine that Taghleef's appendix 2 cost data "reasonably reflect[ed]" the costs associated with the production of BOPP; and (b) the NTC "consider[ed] all available evidence" on the proper allocation of costs when it decided to rely on the appendix 2 data to measure Taghleef's costs.[156]

116. With respect to the first sub-question, the Panel noted that the cost information and representations that Taghleef had provided to the NTC appeared to be somewhat conflicted.[157] The Panel considered that, where an authority receives conflicting sets of company cost data, the phrase "reasonably reflect" in Article 2.2.1.1 provides the authority with discretion to select the data that best corresponds to the company's actual costs:

> "We are of the view that when an authority is presented with what appear to be conflicting sets of company cost data, the phrase 'reasonably reflect' in Article 2.2.1.1 provides the authority with a degree of discretion to select the data that correspond better to the company's actual costs, absent evidence that demonstrates that a particular dataset is clearly superior (for example data reflected in audited financial statements). While the exact scope of this discretion will vary depending on the specific facts of each proceeding, in this instance we conclude that the NTC acted within the bounds of its discretion when it elected to use Taghleef's appendix 2 data to conduct its dumping analysis."[158]

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117. With respect to the second sub-question, the Panel considered that the NTC's responses in its report on the final determination were sufficient to show that it had considered Taghleef's appendix D-3 material when determining how to properly allocate Taghleef's costs:

> "We appreciate that the United Arab Emirates takes the view that the NTC should have relied upon Taghleef's appendix D-3 data when determining how to properly allocate the company's costs. We disagree, however, with the suggestion that the NTC failed to consider this information. To the contrary, we note that the NTC's Report on final determination both summarizes and responds to the cost-related arguments that Taghleef submitted to the NTC regarding the appendix D-3 and appendix 2 data. While this portion of the Report on final determination is not lengthy, we believe that it is sufficient to demonstrate that the NTC did in fact, contemplate, think over, take note of, and regard – or, stated differently, 'consider' – Taghleef's appendix D-3 material when determining how to properly allocate Taghleef's costs."[159]

118. The Panel thus found that the UAE had not established that the NTC's decision to use Taghleef's appendix 2 data was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement:

> "In sum, given that (a) Taghleef made arguably conflicting statements about the nature of its data; (b) Taghleef provided arguably incomplete and conflicting information in response to the NTC's deficiency request that Taghleef separate and 'work out' its costs

[153] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.251.
[154] Panel Report, *EU – Cost Adjustment Methodologies II (Russia)*, para. 7.251.
[155] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.154.
[156] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.155.
[157] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.163.
[158] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.166.
[159] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.170.

> to 'make and sell … BOPP film' in the domestic and export market; (c) absent these clarifications, the NTC did not have the means to separately evaluate whether the appendix D-3 data were objectively superior to appendix 2 because the NTC could not weigh this data against the company's audited financial statements; and (d) the Report on final determination demonstrated that the NTC considered Taghleef's appendix D-3 arguments, we conclude that the NTC's establishment of the facts surrounding Taghleef's cost data was proper and that its evaluation of those facts was unbiased and objective. We therefore find that the United Arab Emirates has not established that the NTC's decision to use Taghleef's appendix 2 data was inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement."[160]

1.4.4.4.3 Cost data requirements or elements

119. The Panel in *US – DRAMS* addressed Korea's claim that the United States' authority had acted inconsistently with the first sentence of Article 2.2.1.1 by disregarding cost data which met with the two requirements set forth in the proviso of that Article, namely, "in accordance with generally accepted accounting principles" and "reasonably reflect costs". The Panel considered that the first sentence is only applicable to "records kept by the exporter or producer under investigation", and thus refused to apply this Article to cost data prepared by an outside consultant on behalf of the producer.[161]

120. In *Egypt – Steel Rebar*, the Panel noted:

> "[Both [Articles 2.2.1.1 and 2.2.2] emphasize two elements, first, that cost of production is to be calculated based on the actual books and records maintained by the company in question so long as these are in keeping with generally accepted accounting principles but that second, the costs to be included are those that reasonably reflect the costs *associated with* the production and sale of the product under consideration."[162]

1.4.4.4.4 Positive obligations on investigating authorities

121. The Panel in *US – Lumber V* considered that Article 2.2.1.1 contained only a limited obligation to base the cost on the records of the exporter or producer under investigation under certain circumstances. The Panel was of the view that Article 2.2.1.1 does not require that costs be calculated in accordance with Generally Accepted Accounting Principles (GAAP) nor that they reasonably reflect the costs associated with the production and sale of the product under consideration:

> "In our view, Article 2.2.1.1 imposes certain positive obligations on investigating authorities, including the obligation to calculate costs on the basis of records kept by the exporter or producer under investigation and to consider all available evidence on the proper allocation of costs. Neither of these obligations is absolute, however, as in both cases the obligations apply only if ('*provided*') certain conditions are met. The role of these conditions is therefore *not* to impose positive obligations on Members, but to set forth the circumstances under which certain positive obligations do or do not apply. Thus, Article 2.2.1.1 does not in our view require that costs be calculated in accordance with GAAP nor that they reasonably reflect the costs associated with the production and sale of the product under consideration. Rather, it simply requires that costs be calculated on the basis of the exporter or producer's records, *in so far as* those records are in accordance with GAAP and reasonably reflect the costs associated with the production and sale of the product under consideration. Similarly, Article 2.2.1.1 does *not* require that all allocations made by an investigating authority have been historically utilised by the exporter or producer; rather it simply provides that investigating authorities must consider all available evidence on the proper allocation of costs, including that made available by respondents, *insofar as* such allocations have been

[160] Panel Report, *Pakistan – BOPP Film (UAE)*, para. 7.171.
[161] Panel Report, *US – DRAMS*, para. 6.66.
[162] Panel Report, *Egypt – Steel Rebar*, para. 7.393.

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> historically utilised by the exporter or producer. Bearing this in mind, we shall examine Canada's arguments relating to Article 2.2.1.1."[163]

122. The Panel in *China – Broiler Products* held that an investigating authority is required to explain the reasons for departing from the norm set forth in Article 2.2.1.1, namely to calculate costs on the basis of records kept by the investigated exporter or producer:

> "In sum, the Panel is of the view that although Article 2.2.1.1 sets up a presumption that the books and records of the respondent shall *normally* be used to calculate the cost of production for constructing normal value, the investigating authority retains the right to decline to use such books if it determines that they are either (i) inconsistent with GAAP or, (ii) do not reasonably reflect the costs associated with the production and sale of the product under consideration. However, when making such a determination to derogate from the norm, the investigating authority must set forth its reasons for doing so."[164]

123. In the investigation at issue in *China – Broiler Products*, the Chinese investigating authority, MOFCOM, had used a weight-based cost allocation method. The Panel expressed the view that such a method was not necessarily inappropriate, but found its application in the cited investigation to be inconsistent with Article 2.2.1.1. In so finding, the Panel also faulted MOFCOM for not considering alternative cost allocation methodologies suggested by the investigated exporters:

> "The consideration of the appropriate cost allocation methodology necessarily includes the exercise of considering the methodologies used in the respondents' books and records. As noted above, the Panel finds that during the investigation MOFCOM not only received and took note of the evidence presented, but also asked a series of questions about the cost accounting methods of the respondents over several questionnaires, which indicates a general concern with understanding the cost allocation methods of the respondents. However, we see no evidence on the record of the investigation that the merits of the alternative allocation methodologies put forward by the respondents after the Preliminary Anti-Dumping Determination were weighed or reflected upon. Neither did MOFCOM explain the reasons why its own methodology led to a proper allocation of costs. Therefore, the Panel finds that China acted inconsistently with the obligation in the second sentence of Article 2.2.1.1 to consider all available evidence on the proper allocation of costs.
>
> In terms of whether MOFCOM's weight-based methodology was a proper allocation of costs, the issue is not whether weight-based methodologies are appropriate for joint products in the abstract, but whether the particular application of the weight-based methodology that MOFCOM devised is consistent with Article 2.2.1.1. MOFCOM's straight allocation of total processing costs to all products necessarily means that it included costs solely associated with processing certain products in its calculation of costs to all subject broiler products. This is not a reasonable reflection of the costs associated with production and sale of the product under consideration. Therefore, we conclude that MOFCOM impermissibly included costs not associated with the production and sale of the product under consideration in its allocations in contravention of Article 2.2.1.1."[165]

1.4.4.4.5 Consider all available evidence on the proper allocation of costs

124. In *US – Softwood Lumber V*, the Appellate Body considered that the requirement to consider all available evidence on the proper allocation of costs may in certain circumstances require the authorities to compare advantages and disadvantages of alternative cost allocation methodologies:

> "In our view, the parameters of the obligation to 'consider all available evidence' will vary case-by-case. It may well be that, in the light of the facts of a particular case, the requirement to 'consider all available evidence' may be satisfied by the investigating authority without comparing allocation methodologies or aspects thereof.

[163] Panel Report, *US – Lumber V*, para. 7.237.
[164] Panel Report, *China – Broiler Products*, para. 7.164.
[165] Panel Report, *China – Broiler Products*, paras. 7.195-7.196.

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> However, in other instances – such as where there is compelling evidence available to the investigating authority that more than one allocation methodology potentially may be appropriate to ensure that there is a proper allocation of costs – the investigating authority may be required to 'reflect on' and 'weigh the merits of' evidence that relates to such alternative allocation methodologies, in order to satisfy the requirement to 'consider all available evidence'. Thus, although the second sentence of Article 2.2.1.1 does not, as a general rule, require investigating authorities to compare allocation methodologies to assess their respective advantages and disadvantages in each and every case, there may be particular instances in which the investigating authority may be required to compare them in order to satisfy the explicit requirement of the second sentence of Article 2.2.1.1 to 'consider all available evidence on the proper allocation of costs'."[166]

125. The Panel in *China – Broiler Products (Article 21.5 – US)* explained the nature of an investigating authority's obligation to "consider" all available evidence on the proper allocation of costs, within the meaning of the second sentence of Article 2.2.1.1, as follows:

> "This consideration is not to be undertaken in the abstract. In context, its purpose is clear: to ensure that cost elements for the subject product are properly determined for, we recall, purposes of constructing a normal value for that product. The consideration of evidence as to cost allocation methodology goes to the heart of what Article 2.2.1.1 is about: coming up with a <u>properly allocated</u> cost of production for the product under investigation for use by an investigating authority in constructing a normal value for that product. This is further confirmed by the third sentence: '[u]nless already reflected in the cost allocations under this sub-paragraph'. Fundamentally, a normal value for a product cannot be properly constructed unless costs of production are properly allocated to that product, and a proper allocation of costs cannot happen without consideration of all available evidence on the proper allocation of costs."[167]

126. The Panel in *China – Broiler Products (Article 21.5 – US)* defined "evidence" in a broad manner, as follows:

> "The term 'evidence' is not defined in the Anti-Dumping Agreement. It is not necessary for us to do so in this case; at a minimum, it encompasses information provided to an investigating authority by an interested party, whether or not positive, accurate or adequate. Nothing in the Anti-Dumping Agreement, or the WTO Agreement as a whole, suggests that information loses its character as 'evidence' by virtue of failing to meet certain criteria. Whether the evidence meets these criteria is a separate matter for the investigating authority to consider."[168]

127. The Panel also stated that "nothing in the WTO Agreement defines 'evidence' or makes a distinction between information that is 'evidence' and information that is not. Information that purports to support an asserted fact is evidence; it may be good or bad, weak or strong, relevant, or not."[169]

128. As to what constitutes evidence "on the proper allocation of costs", the Panel in *China – Broiler Products (Article 21.5 – US)* provided the following guidance:

> "Thus, for example, evidence that a particular allocation methodology reasonably reflects the cost of production of the product at issue, evidence of 'appropriate' adjustments to costs, or evidence that certain costs relate to production of the product in question, is evidence 'on the proper allocation of costs'. We do not mean to suggest that in every instance, there is a single 'correct' allocation to be determined upon considering the evidence on cost allocation methodologies. Indeed, the use of the term 'proper' suggests due deference to the circumstances of a product's life-cycle or a

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[166] Appellate Body Report, *US – Softwood Lumber V*, para. 138.
[167] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.30.
[168] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.33.
[169] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.67.

> producer's or an exporter's production line and business model, as well as the availability of data and different accounting systems used."[170]

129. The Panel in *China – Broiler Products (Article 21.5 – US)* rejected the argument that an investigating authority should use the same cost allocation methodology throughout an investigation:

> "First, nothing in the text or context of Article 2.2.1.1 suggests that a 'proper' allocation of costs is necessarily one that is 'consistent', 'internally coherent', or follows the same 'logic' throughout. We see nothing in the text of the provision or in the concept of a 'proper' allocation of cost that would require an investigating authority to use the same cost allocation methodology in every instance a cost allocation is necessary in an investigation. For instance, different stages of a subject product's production cycle, or the production of different models of a subject product, or the production of by-products in the process of producing a subject product, may all raise questions of the proper allocation of costs. We see no inherent reason that all such questions must be resolved by applying the same cost allocation methodology in a given investigation. An interpretation that would so narrow the meaning of 'proper cost allocation' would be inconsistent with our understanding of the provision as requiring consideration of evidence of cost allocation that is appropriate to the circumstances.
>
> Second, nothing in the facts of this case as presented and argued to us demonstrates why, in the particular circumstances of this case, the use of the same cost allocation methodology throughout was necessary. The US argument that MOFCOM was required to use a 'consistent' or 'internally coherent' cost allocation methodology is not based on the circumstances of either Tyson or the broiler products at issue. For one thing, nothing in the record suggests that any evidence on whether such consistency would be necessary from an accounting or a commercial perspective was provided to MOFCOM. For another, we can envision a variety of situations in which strict consistency in the application of cost allocation methodologies might not be necessary or appropriate. For example, large manufacturing conglomerates with multiple subsidiaries, factories and business lines may well employ different cost accounting methodologies internally across their operations, vertically and horizontally. It would be neither practicable nor reasonable for such a company, in responding to an anti-dumping investigation involving one of its products, to be required to provide cost data for that product based on a 'consistent methodology' of cost allocation. As we have stated, we see nothing in Article 2.2.1.1 or its context that would require an investigating authority to use the same cost allocation methodology in respect of a product throughout. Of course, to the extent that an investigating authority uses more than one cost allocation methodology in calculating costs of production for purposes of determining normal value, the basis for this approach would have to be reasonable and adequately explained in its determination."[171]

130. However, the Panel in *China – Broiler Products (Article 21.5 – US)* also clarified that an investigating authority's discretion in choosing a cost allocation methodology is not unfettered:

> "Having identified a problem with an exporter's cost allocation methodology, an investigating authority that is required to consider all available evidence may not, however, disregard evidence related to that allocation, and use its own methodology, without an explanation of its decision that is reasoned and adequate."[172]

131. In the investigation at issue in *China – Broiler Products (Article 21.5 – US)*, MOFCOM had "decided to allocate 'the necessary expenses invested by a producer to produce products' on the basis of the weight of the entire broiler less the weight of feathers, blood, and viscera – because, it stated, the latter were non-subject products."[173] The Panel found error in this approach, noting that

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[170] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.35.
[171] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.44-7.45.
[172] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.52. See also ibid. para. 7.62.
[173] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.53.

MOFCOM had not explained why the cost of producing feathers, blood, and viscera was not part of the expenses associated with the production of broilers:

> "There is no dispute between the parties that feathers, blood, and viscera are not 'produced' for human consumption. At the same time, while there is no evidence directly on the record on this subject, it should be uncontroversial for us to take notice of the fact that feathers, blood, and viscera are essential parts of a live broiler, and thus they are intrinsic to the production of the subject broiler product models. MOFCOM does not explain why the cost of 'producing' feathers, blood, and viscera is not part of 'the necessary expenses invested by a producer to produce' the subject product models. Nowhere in the redetermination does MOFCOM explain why it was appropriate to exclude from its weight-based allocation of costs of producing subject product models 'necessary expenses' of producing a live bird, merely because it had accepted an allocation of costs between subject and non-subject products based on domestic market value, i.e. 'the income that a producer can gain from sales of a product'.
>
> …
>
> However, in the facts of this case, certain of the broiler product models identified by MOFCOM as 'non-subject' were inseparable from and intrinsic to the production of the subject broiler product models. In its consideration of all available evidence related to a proper cost allocation, MOFCOM was required, at a minimum, to explain why the concern – that allocations must 'reasonably reflect costs' of production – it relied upon to choose a weight-based cost allocation for subject product models nonetheless allowed for the exclusion of certain parts of a live broiler (feathers, blood, and viscera) that are necessarily part of the production of the subject broiler product models from its cost allocation."[174]

132. In the view of the Panel in *China – Broiler Products (Article 21.5 – US)*, the reference to "all available evidence" in the second paragraph of Article 2.2.1.1 requires consideration of all evidence that is available to the investigating authority:

> "[T]he reference to 'all available' evidence requires, in our view, consideration of all evidence that is available to the investigating authority. The phrase beginning 'including' makes clear that certain types of evidence must be considered if available, but does not limit the scope of 'all available evidence' that must be considered in any event. Rather, it establishes, for instance, that an investigating authority must consider evidence on the proper allocation of costs made available by the exporter or producer where such allocations have been historically utilized, even if that exporter or producer's records were rejected as the basis for calculating costs under the first sentence of Article 2.2.1.1. Merely because an investigating authority determines that the records kept by an exporter or producer are not in accordance with the generally accepted accounting principles of the exporting country or do not reasonably reflect the costs associated with the production and sale of the product under consideration does not necessarily mean that the cost allocation methodologies reflected in those records may not be appropriate if properly applied using appropriate information. An investigating authority may not summarily dismiss evidence of cost allocation provided by the exporter or producer that it had historically used."[175]

133. The Panel in *China – Broiler Products (Article 21.5 – US)* considered that data that is rejected for not meeting the criteria set out in the first sentence of Article 2.2.1.1 may nevertheless be relevant to the determination to be made under the second sentence of that provision:

> "This recognizes a commercial reality: the cost allocations in a company's records may be used for multiple reasons in internal accounting systems, but not, one would expect, generally in anticipation of an anti-dumping investigation. Where an exporter has historically utilized a cost allocation methodology, this suggests that the methodology was, in fact, not put in place for the sole purpose of the investigation. Thus, as noted above, even if the actual data on costs as reported in the records are rejected under

[174] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.54 and 7.58.
[175] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.36.

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> the first sentence, the allocation methodology reflected in those records may nonetheless result in a proper allocation of costs if applied to a different set of data.
>
> In the light of the above, evidence of allocation in the records of an exporter, where such allocation is historically utilized, must be 'considered' – alongside all other evidence – to arrive at an allocation methodology that can generate a 'proper allocation of costs' in calculating 'cost of production' for the 'purposes of paragraph 2'."[176]

134. The Panel in *China – Broiler Products (Article 21.5 – US)* underlined the breadth of the evidence that may be used in determining proper allocation of costs, and pointed out that in making that determination an investigating authority is not allowed to reject information that was submitted in response to the authority's own questions, on the ground that it was not "historically utilized":

> "[T]he subordinate clause starting with 'including' does not limit the scope of the evidence to be considered; rather, it confirms the breadth of the phrase 'all available evidence'. This is *a fortiori* the case where, as here, the evidence submitted is expressly developed by an exporter or producer at the behest or request of an investigating authority, or in response to its concerns. We recall that MOFCOM had rejected Tyson's data based on its historical cost allocation methodology and demanded that Tyson generate new data based on a methodology inconsistent with Tyson's accounting system. To read the subordinate phrase in the second sentence as permitting an investigating authority to ignore any evidence of proper cost allocation unless it is 'historically utilized' would mean that an investigating authority could simply ignore information and data submitted in response to its own questions and purporting to satisfy requirements without even examining it or weighing its merits.
>
> This strikes us as an unacceptable outcome and an unwarranted limitation of the explicit requirement to consider 'all available evidence'. Having failed to do so in this case, MOFCOM could not reject the data submitted by Tyson based on the methodology it developed in an effort to conform to MOFCOM's requirements, solely because that methodology was not 'historically utilized', as China contends."[177]

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1.4.4.4.6 Burden of proof

135. Referring to *EC – Hormones*[178], the Panel in *US – DRAMS* noted that the burden of establishing a *prima facie* case of inconsistency with Article 2.2.1.1 was on the complaining party.[179]

1.4.4.4.7 Non-recurring costs (NRCs)

136. The Panel in *EC – Salmon (Norway)* explained its understanding of the obligation in the final sentence of Article 2.2.1.1:

> "This sentence establishes an obligation on investigating authorities to make appropriate adjustments to cost of production for 'non-recurring items of cost which benefit future and/or current production' or for 'circumstances in which costs during the period of investigation are affected by start-up operations', when not 'already reflected in the cost allocations' that are contemplated under the second sentence. The first point to note about the second sentence is that it establishes a *conditional* obligation to make appropriate adjustments to cost of production for *two types* of cost: NRCs 'which benefit future and/or current production'; and start-up costs."[180]

137. The Panel in *EC – Salmon (Norway)* found that the standard for determining whether or not non-recurring costs (NRCs) may be properly counted as part of the cost of production is whether

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[176] Panel Report, *China – Broiler Products (Article 21.5 – US)*, paras. 7.37-7.38. See also ibid. para. 7.73.
[177] Panel Report, *China – Broiler Products (Article 21.5 – US)*, para. 7.68.
[178] Appellate Body Report, *EC – Hormones*, para. 98.
[179] Panel Report, *US – DRAMS*, paras. 6.68-6.69.
[180] Panel Report, *EC – Salmon (Norway)*, para. 7.487.

they are "associated with the production and sale" of the like product during the period of investigation:

> "[B]ecause the notion of costs 'associated' with production is broader than costs that 'benefit' production, it does not necessarily follow that costs which do not 'benefit' production cannot be 'associated' with production. In any case, as we have already noted, the obligation established under the last sentence of Article 2.2.1.1. does not define when NRCs may be included in cost of production, but merely recalls that were no cost allocation has been made for NRCs which benefit future and/or current production, investigating authorities must make an appropriate adjustment."[181]

138. The Panel in *EC – Salmon (Norway)* therefore disagreed with Norway that Article 2.2.1.1 required that NRCs could *only* be included in the *cost of production* when they benefited future and/or current production – that was an incorrect interpretation of Article 2.2.1.1.[182]

139. Regarding the allocation of NRCs, the Panel in *EC – Salmon (Norway)* noted that Article 2.2.1.1 did not prescribe any particular methodology, but that any methodology applied "must reflect the relationship that exists between the costs being allocated and the production activities to which they are 'associated'."[183] The Panel noted that the explanation was also necessary:

> "[W]e believe that it was incumbent on the investigating authority to at the very minimum explain why it was appropriate to allocate the relevant NRCs over a period of time that was equivalent to what the investigating authority considered to be the average period of time to farm salmon. However, we can find no such explanation, even in general terms, anywhere in the investigating authority's findings. Absent any such explanation, the approach undertaken by the investigating authority fails the test that is established under Article 2.2.1.1."[184]

1.4.5 Article 2.2.2

1.4.5.1 General

140. The Appellate Body in *China – HP-SSST (Japan) / China – HP-SSST (EU)* rejected the argument that Article 2.2.2 contained multiple obligations regarding "actual data" and "data pertaining to production and sales in the ordinary course of trade", and found that this provision imposed a single obligation concerning the determination of SG&A costs and profits when normal value is constructed:

> "Looking at the structure of Article 2.2.2, we note that the noun 'data' is immediately preceded by the adjective 'actual' and followed by the phrase 'pertaining to production and sales in the ordinary course of trade'. As we see it, the term 'actual data' is clearly linked to the language that follows. The phrase 'pertaining to production and sales in the ordinary course of trade' serves, in particular, to specify the actual data that is to be used in order to calculate an amount for SG&A costs for purposes of constructing normal value under Article 2.2.2. Thus, read as a whole, the relevant phrase imposes a single obligation, set out in the chapeau of Article 2.2.2, for investigating authorities to determine amounts for SG&A costs and profits on the basis of actual data that relates to, or concerns, production and sales in the ordinary course of trade. This reading of Article 2.2.2 would appear to be confirmed by the second sentence of that provision, which refers back to the first sentence, and provides that, when SG&A amounts 'cannot be determined on this basis', thus referring in the singular to the preferred method to be used to calculate such SG&A amounts."[185]

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[181] Panel Report, *EC – Salmon (Norway)*, para. 7.488.
[182] Panel Report, *EC – Salmon (Norway)*, para. 7.488.
[183] Panel Report, *EC – Salmon (Norway)*, para. 7.507.
[184] Panel Report, *EC – Salmon (Norway)*, para. 7.509.
[185] Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.27.

1.4.5.2 Amounts based on actual data pertaining to production and sales of the like product

141. The Panel in *US – Softwood Lumber V* was of the view that amounts for general and administrative expenses "pertain to" the production and sale of the like product unless it can be demonstrated that the product under investigation did not benefit from a particular General and Administrative costs (G&A) cost item.[186] The Panel elaborated on the reasoning as follows:

> "We next examine the term 'pertain to' within the meaning of the chapeau of Article 2.2.2. 'Pertain' is defined as 'relate or have reference to'. In our view, a meaningful interpretation of the term 'pertain[ing] to' must take into account the nature of those costs because, as Canada acknowledges, they 'are not directly attributable to the product under investigation or [to] any particular product'. Thus, it would appear to us that, unless a particular G&A cost can be tied to a particular product manufactured by a company, G&A costs – because normally they cannot be attributed to any particular product but are costs incurred by the company in the production and sale of goods – pertain or relate to all of those goods. Canada's argument that G&A costs 'benefit all products that a company (or division within a company) may produce rather than specific products' supports our view. If G&A costs benefit the production and sale of all goods that a company may produce, they must certainly relate or pertain to those goods, including in part to the product under investigation."[187]

142. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, Tunisia argued that the "amount for profits" used by Morocco's investigating authority to construct the normal value of the subject product was inflated, that the constructed value included other costs and expenses that were not part of the price of the investigated product, and therefore could not be based on "actual data" within the meaning of Article 2.2.2. Further, it was not a "reasonable" amount for profits within the meaning of Article 2.2.[188] The Panel summarised the relevant provisions of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement as follows:

> "The relevant provisions of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement stipulate that when an investigating authority constructs the normal value of the like product, it does so based on the 'cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits'. In turn, the reasonable amount for profits must be 'based on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation'. Article 2.2.2 does not provide for any particular methodology in order to determine those amounts based on 'actual data': only if these amounts cannot be determined on that basis does the Anti-Dumping Agreement envisage alternative methods in subparagraphs (i), (ii) and (iii) of Article 2.2.2."[189]

143. Having summarised the applicable rules, the Panel proceeded to examine Tunisia's argument and stated that the requirement in Article 2.2 to base findings on "actual data" imposed an obligation on the investigating authority to ensure the accuracy of the data collected from third parties, and to use that data correctly:

> "[I]t can be difficult for a company to extract the data required by an investigating authority from its accounts, and that errors may slip into responses to the investigation questionnaires. Similarly, it can be difficult for the investigating authority to interpret the responses provided by the interested parties. Nevertheless, any error or ambiguity in the manner in which a company responds to the authority's questions does not exempt the investigating authority from its obligation to ensure 'the accuracy of the information supplied by interested parties upon which their findings are based' and to establish the facts 'proper[ly]'. Nor does such an error or ambiguity exempt a Member from its obligation to establish the product's normal value, in accordance with the provisions of Articles 2.2 and 2.2.2 of the Anti-Dumping Agreement. The obligation

[186] Panel Report, *US – Softwood Lumber V*, para. 7.267.
[187] Panel Report, *US – Softwood Lumber V*, para. 7.265.
[188] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.38-7.39.
[189] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.46.

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> to 'base' the amount used for the profits on 'actual data' unquestionably rests with the investigating authority: that obligation is not limited to gathering data from businesses, but also implies that the authority must use the data correctly to determine the amount for profits on that basis. In this case, MIICEN did gather the relevant data, but failed to establish the actual profit from the sale of exercise books."[190]

144. However, the Panel rejected Tunisia's arguments that a violation of Article 2.2 would necessarily result in a consequential violation of Article 2.1:

> "We note that other panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations. Furthermore, we do not share Tunisia's view that a violation of Article 2.2 and/or Article 2.2.2 of the Anti-Dumping Agreement 'would necessarily result in a finding of violation of Article 2.1'. In that sense, we consider that, in order to establish a violation of Article 2.1, even a consequential violation, the party requesting those findings must explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.
>
> In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Articles 2 and 2.2.2 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations under Article 2.1 are, or how those obligations were violated as a result of errors made by MIICEN when it established a reasonable amount for profits."[191]

145. Based on the foregoing reasoning, the Panel agreed with Tunisia that the amount for profits used by the investigating authority was not in conformity with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement, but declined to find that there had been a consequential violation of Article 2.1:

> "We therefore conclude that Tunisia has shown that the amount used by the investigating authority to construct the exercise books' normal value was not based 'on actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation' and, therefore, is not in conformity with Article 2.2.2 of the Anti-Dumping Agreement. Consequently, the figure used by MIICEN to establish the profit margin of the two Tunisian exporters was not a 'reasonable amount' for profits within the meaning of Article 2.2 of the Anti-Dumping Agreement. We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement."[192]

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1.4.5.3 Use of low-volume sales in determining selling, general and administrative costs (SG&A) and profits for the purpose of calculating constructed normal value

146. In *EC – Tube or Pipe Fittings*, the Appellate Body was asked to examine whether an investigating authority must exclude data from low-volume sales when determining the amounts for SG&A and profits under the chapeau of Article 2.2.2, having disregarded such low-volume sales for normal value determination under Article 2.2. The Appellate Body reasoned:

> "Examining the text of the chapeau of Article 2.2.2, we observe that this provision imposes a general obligation ('shall') on an investigating authority to use 'actual data pertaining to production and sales in the ordinary course of trade' when determining amounts for SG&A and profits. Only '[w]hen such amounts cannot be determined on this basis' may an investigating authority proceed to employ one of the other three methods provided in sub-paragraphs (i)-(iii). In our view, the language of the chapeau indicates that an investigating authority, when determining SG&A and profits under Article 2.2.2, must first attempt to make such a determination using the 'actual data pertaining to production and sales in the ordinary course of trade'. If actual SG&A and profit data for sales in the ordinary course of trade do exist for the exporter and the like product under investigation, an investigating authority is obliged to use that data for

[190] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.54.
[191] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.57-7.58.
[192] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.59.

> purposes of constructing normal value; it may not calculate constructed normal value using SG&A and profit data by reference to different data or by using an alternative method.
>
> As the Panel correctly observed, it is meaningful for the interpretation of Article 2.2.2 that Article 2.2 specifically identifies low-volume sales *in addition to* sales outside the ordinary course of trade. In contrast to Article 2.2, the chapeau of Article 2.2.2 explicitly excludes only sales outside the ordinary course of trade. The absence of any qualifying language related to low volumes in Article 2.2.2 implies that an exception for low-volume sales should not be read into Article 2.2.2."[193]

147. The Appellate Body in *EC – Tube or Pipe Fittings* concluded that it is "significant that Article 2.2.2 specifies the data to be used by an investigating authority when constructing normal value. The text of that provision excludes actual data outside the ordinary course of trade, but does not exclude data from low-volume sales. The negotiators' express reference to sales outside the ordinary course of trade *and* to low-volume sales in Article 2.2, and the omission of a reference to low-volume sales in the chapeau of Article 2.2.2, confirms our view that low-volume sales are not excluded from the chapeau of Article 2.2.2 for the calculation of SG&A profits."[194] Thus, the Appellate Body found that in cases where low-volume sales are in the ordinary course of trade, an investigating authority does not act inconsistently with the chapeau of Article 2.2.2 by including actual data from those sales to derive SG&A and profits for the construction of normal value.

148. The Panel in *Korea – Certain Paper* accepted that the KTC's decision to disregard the domestic sales data submitted by Indah Kiat and Pindo Deli was not WTO-inconsistent because those data were not verifiable:

> "It follows that the KTC could not possibly carry out the determinations set out under Article 2.2 of the Agreement before resorting to constructed normal value for Indah Kiat and Pindo Deli. We therefore conclude that the KTC did not act inconsistently with Article 2.2 in basing its normal value determination on constructed value under Article 2.2 for these two companies and reject Indonesia's claim."[195]

149. In *EC – Salmon (Norway)*, the European Communities argued that the result of taking into account data from non-representative sales would have been to construct normal values that were identical to the normal values that would be determined on the basis of the prices of the same non-representative sales. The Panel saw the "main cause of the dilemma identified by the EC to be the requirement in Article 2.2.2 that actual profit margins pertaining to all sales in the ordinary course of trade be used when constructing normal value."[196] However, in light of the text of Article 2.2.2 and the Appellate Body's observations in *EC – Tube or Pipe Fittings* the Panel found that "Article 2.2.2 did not envisage a 'low-volume' sales exception to the rule that SG&A costs and profit used for the purpose of constructing normal value be calculated on the basis of data pertaining to sales made in the ordinary course of trade."[197]

150. The Panel in *US – OCTG (Korea)* followed the reasoning of the Appellate Body in *EC – Tube or Pipe Fittings* and the Panel in *EC – Salmon (Norway)*, in rejecting the United States' argument that the *chapeau* of Article 2.2.2 does not preclude disregarding low volume sales in establishing profits for the constructed normal value:

> "We recognize the logic behind the United States' argument. We understand the United States to argue that the price pertaining to sales made in low-volumes in the domestic market is discarded for purposes of normal value determination under Article 2.2 because it is considered to not permit a proper comparison with the export price. To require that data from the same sales be used to determine CV profit and SG&A under Article 2.2.2 for purposes of constructing normal value would seem to reintroduce the same improper comparison through the constructed normal value. This is, in terms of overall coherence of Article 2, somewhat perplexing. But this does

[193] Appellate Body Report, *EC – Tube or Pipe Fittings*, paras. 97-98.
[194] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 101.
[195] Panel Report, *Korea – Certain Paper*, para. 7.94.
[196] Panel Report, *EC – Salmon (Norway)*, para. 7.303.
[197] Panel Report, *EC – Salmon (Norway)*, para. 7.304.

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not allow an interpretation that does not fully comport with the express language of Article 2.2.2.

Under Article 2.2, upon the identification of low-volume sales, an investigating authority is required to either construct normal value or use third-country export prices as normal value. Therefore, the identification of low-volume sales serves as a trigger for an investigating authority to use an alternative to the *price* of those sales for normal value determination but not necessarily to exclude the *components of the price* pertaining to those sales from that determination. If an investigating authority opts to construct normal value, nothing in Article 2.2 suggests that it is required to, or may, exclude data derived from the rejected low-volume sales from that construction. Further, Article 2.2.2 requires that only *sales that are in the ordinary course of trade* be used as a basis for CV profit determination. Thus, only data from such sales, even if in low volumes, can be used in constructing normal value. Therefore, what is discarded for normal value determination under Article 2.2 is the price of *low-volume sales* but what is accepted for purposes of normal value construction under Article 2.2.2 is the amount for profit and SG&A on those *low-volume sales that are in the ordinary course of trade*."[198]

1.4.5.4 Ordinary course of trade

151. The Panel in *EC – Salmon (Norway)* did not agree with the European Communities that the notion of sales in the "ordinary course of trade" had to be interpreted so as to permit low-volume sales to be treated outside the "ordinary course of trade" for the purpose of Article 2.2.2:

"We note that Article 2.2.1 does not exhaust the situations where domestic sales may be considered to be outside the 'ordinary course of trade'. Indeed, as the Appellate Body has found, Article 2.2.1 establishes but one methodology for determining when below-cost sales may be treated as not being made in the 'ordinary course of trade' by reason of price. There may be many other reasons why domestic sales transactions might not be considered to be 'outside of the ordinary course of trade'. Thus, to find that sales determined to be outside of the 'ordinary course of trade' under Article 2.2.1 cannot also be considered to be 'outside of the ordinary course' for the purposes of Article 2.2.2, does not render 2.2.2 ineffective. Indeed, it is clear to us that the appreciation of sales in 'ordinary course of trade' that is called for under Article 2.2.2 envisages the identification of all sales that are outside the 'ordinary course of trade' by any means *other* than the below-cost sales test set out in Article 2.2.1. Given how we understand that Articles 2.2.1 and 2.2.2 are intended to operate in practice, we cannot see how any other result is practically possible. In this light we can find no support in the so-called 'logical circle' for the EC's suggestion that the notion of sales in the 'ordinary course of trade' must be interpreted in such a manner that would permit 'low volume' sales to be treated as outside of the 'ordinary course of trade' for the purpose of Article 2.2.2."[199]

152. In *EC – Salmon (Norway)*, the investigating authority in the European Communities applied a less-than-10 per cent profitable sales test. The Panel determined this was an impermissible means of determining whether domestic sales were in the ordinary course of trade. That is, the Panel found that the less-than-10 per cent profitable sales test was not a permissible means of determining whether domestic sales were made outside of the ordinary course of trade, and, as such, the investigating authority's decision to disregard the profit margin data of three of the ten investigated parties could not be justified under the terms of Article 2.2.2:

"[W]e note that one of the justifications the EC advances for the less-than-10 per cent profitable sales test is that it provides a 'complement to the less-then-20 per cent unprofitable rule' that is set out in footnote 5 to Article 2.2.1, and thereby 'helps to achieve the goal of even-handedness that was identified by the Appellate Body'. In making this statement, we understand the EC to suggest that the application of Article 2.2.1 may result in findings that are not 'even-handed' and 'fair to all parties affected by an anti-dumping investigation'. We are not convinced that the drafters of Article 2.2.1 agreed to establish a rule that could itself only result in 'even-handed' findings when applied in conjunction with another rule that does not appear elsewhere

[198] Panel Report, *US – OCTG (Korea)*, paras. 7.44-7.45.
[199] Panel Report, *EC – Salmon (Norway)*, para. 7.308.

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> in the provisions of the AD Agreement. By agreeing to the rules in footnote 5, it is evident that the drafters of the AD Agreement recognised that a minimum volume of below-cost sales is not incompatible with sales being made in the ordinary course of trade. As such, the result achieved through the operation of footnote 5 is, in and of itself, fair and even-handed, and therefore does not require the application of any complementary rule to ensure that normal value is appropriately calculated."[200]

153. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, Tunisia argued that Morocco's investigating authority improperly excluded domestic sales of government subsidised exercise books from its determination of the reasonable amount for profits component of the constructed normal value of the investigated product. The said exercise books were subject to an export ban. In this context, the Panel considered whether the investigating authority was only permitted to exclude sales which were not "in the ordinary course of trade" within the meaning of Article 2.2.2. The Panel stated as follows:

> "The question before us, therefore, is whether excluding sales that did not take place in the ordinary course of trade, as explicitly envisaged in Article 2.2.2, is the only possible exclusion, or whether other domestic sales may be excluded from the determination of the reasonable amount for profits for other reasons. Since Article 2.2.2 does not provide for other exceptions, we must consider the context of this provision and, in particular, the other paragraphs of Article 2."[201]

154. The Panel found that Morocco had "failed to demonstrate before us – that including sales of numbered and watermarked exercise books in the determination of the reasonable amount for profits would not result in a normal value that would permit a 'proper comparison' with the export price."[202] Accordingly the Panel concluded that "disregarding domestic sales of those exercise books led to a reasonable amount for profits that was not 'based' on 'actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation'"[203] which was inconsistent with Article 2.2.2 of the Anti-Dumping Agreement.

155. Based on the foregoing, the Panel found that Morocco's investigating authority's determination of the "reasonable amount for profits" was inconsistent with Articles 2.2.2 and 2.2 of the Anti-Dumping Agreement, because it excluded sales of the export restricted exercise books without demonstrating why their inclusion would have impaired a proper comparison between the normal value and the export price. However, the Panel declined to make a consequential finding of inconsistency with Article 2.1:

> "[O]ther panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations. Furthermore, we indicated that we did not share Tunisia's opinion that a violation of Article 2.2 or Article 2.2.2 of the Anti-Dumping Agreement 'would necessarily result in a finding of violation of Article 2.1'. In that sense, we consider that, in order to establish a violation of Article 2.1, even a consequential violation, the requesting party must explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.
>
> In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Articles 2 and 2.2.2 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations are under Article 2.1, or how those obligations were violated by the exclusion of the numbered and watermarked exercise books.
>
> In the light of the foregoing, we conclude that Tunisia has demonstrated that, by excluding sales of numbered and watermarked exercise books, MIICEN did not base the reasonable amount for profits on 'actual data pertaining to production and sales in the ordinary course of trade of the like product by the exporter or producer under investigation', thereby violating Article 2.2.2. Morocco therefore violated Article 2.2 of

[200] Panel Report, *EC – Salmon (Norway)*, para. 7.317.
[201] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.76.
[202] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para 7.82.
[203] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, para. 7.82.

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> the Anti-Dumping Agreement by not using a 'reasonable amount' for profits when constructing the normal value of certain models of exercise books. We also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement."[204]

1.4.5.5 Priority of options

156. In response to the argument that the order of methodological options for calculating reasonable amount for profit set out in Article 2.2.2 reflects a preference for one option over another, the Panel in *EC – Bed Linen* concluded that "the order in which the three options are set out in Article 2.2.2(i)-(iii) is without any hierarchical significance and that Members have complete discretion as to which of the three methodologies they use in their investigations."[205] The Panel set out the following reasoning:

> "Looking first at the text of Article 2.2.2, we see nothing that would indicate that there is a hierarchy among the methodological options listed in subparagraphs (i) to (iii). Of course, they are listed in a sequence, but this is an inherent characteristic of any list, and does not in and of itself entail any preference of one option over others. Moreover, we note that where the drafters intended an order of preference, the text clearly specifies it. … Had the drafters wished to indicate a hierarchy among the three options, surely they would have done so in a manner that made that hierarchy explicit. Certainly, we would have expected something more than simply a numbered listing. Thus, in context, it seems clear to us that the mere order in which the options appear in Article 2.2.2 has no preferential significance.
>
> … Paragraphs (i)-(iii) provide three alternative methods for calculating the profit amount, which, in our view, are intended to constitute close approximations of the general rule set out in the chapeau of Article 2.2.2. These approximations differ from the chapeau rule in that they relax, respectively, the reference to the like product, the reference to the exporter concerned, or both references, spelled out in that rule. …
>
> In our view, there is no basis on which to judge which of these three options is 'better'. Certainly, there were differing views during the negotiations as to how this issue was to be resolved, and there is no specific language in the Agreement to suggest that the drafters considered one option preferable to the others. Given, as explained above, that each of the three options is in some sense 'imperfect' in comparison with the chapeau methodology, there is, in our opinion, no meaningful way to judge which option is less imperfect – or of greater authority – than another and, thus, no obvious basis for a hierarchy. And it is, in our view, for the drafters of an Agreement to set out a hierarchy or order of preference among admittedly imperfect approximations of a preferred result, and not for a panel to impose such a choice where it is not apparent from the text."[206]

1.4.5.6 Relationship with Article 2.2.1.1

157. See paragraph 120 above.

1.4.5.7 Article 2.2.2(i) – "same general category of products"

158. The Panel in *EC – Bed Linen* pointed out that "Article 2.2.2(i) maintains the focus on the producer being investigated, but allows consideration of data concerning a broader range of products[.]"[207]

159. In *Thailand – H-Beams*, the Panel rejected Poland's argument that the Thai authority had, for the purpose of calculating profit in constructed normal value, adopted too narrow a definition of the term "same general category of products". The Panel stated:

[204] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.84-7.86.
[205] Panel Report, *EC – Bed Linen*, para. 6.62.
[206] Panel Report, *EC – Bed Linen*, paras. 6.59-6.61.
[207] Panel Report, *EC – Bed Linen*, para. 6.70.

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> "[W]e note that the text of Article 2.2.2 (i) simply refers without elaboration to 'the same general category of products' produced by the producer or exporter under investigation. Thus, the text of this subparagraph provides no precise guidance as to the required breadth or narrowness of the product category, and therefore provides no support for Poland's argument that a broader rather than a narrower definition is *required*."[208]

160. The Panel in *Thailand – H-Beams* went on to explain the contextual bases for its interpretation of Article 2.2.2(i) quoted in paragraph 158 above. The Panel first opined that the context of Article 2.2.2.(i) supports a narrow rather than a broad interpretation of the term "same general category of products":

> "We do find a certain amount of guidance in other provisions of Article 2.2.2, in particular its chapeau and its overall structure, however. In particular, we note that, in general, Article 2.2 and Article 2.2.2 concern the establishment of an appropriate proxy for the price 'of the like product in the ordinary course of trade in the domestic market of the exporting country' when that price cannot be used. As such, as the drafting of the provisions makes clear, the preferred methodology which is set forth in the chapeau is to use *actual* data of the exporter or producer under investigation for the *like product*. Where this is not possible, subparagraphs (i) and (ii) respectively provide for the database to be broadened, either as to the product (i.e., the same general category of products produced by the producer or exporter in question) or as to the producer (i.e., other producers or exporters subject to investigation in respect of the like product), but not both. Again this confirms that the intention of these provisions is to obtain results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country.
>
> This context indicates to us that the use under subparagraph (i) of a *narrower* rather than a *broader* 'same general category of products' certainly is permitted. Indeed, the narrower the category, the fewer products other than the like product will be included in the category, and this would seem to be fully consistent with the goal of obtaining results that approximate as closely as possible the price of the like product in the ordinary course of trade in the domestic market of the exporting country."[209]

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161. The Panel in *Thailand – H-Beams* found additional contextual support in Article 3.6 for its finding that the term "same general category of products" under Article 2.2.2 (i) permits a narrower rather than a broader approach:

> "Additional contextual support can be found in Article 3.6 (a provision related to data concerning injury), which provides that when available data on 'criteria such as the production process, producers' sales and profits' do not permit the separate identification of production of the like product, 'the effects of the dumped imports shall be assessed by the examination of the production of the *narrowest* group or range of products, which includes the like product, for which the necessary information can be provided' (emphasis supplied). Although this provision concerns information relevant to injury rather than dumping, and although we do not mean to suggest that use of the narrowest possible category including the like product is *required* under Article 2.2.2(i), in our view Article 3.6 provides contextual support for the conclusion that use of a narrow rather than a broader category is permitted.
>
> We note Poland's argument that a broader category is more likely than a narrower one to yield 'representative' results (by which we presume Poland to mean representative of the price of the like product in the ordinary course of trade in the domestic market of the exporting country), but we believe that as a matter of logic the opposite more often is likely to be true. The broader the category, the more products other than the like product will be included, and thus in our view the more potential there will be for the constructed normal value to be unrepresentative of the price of the like product. We therefore disagree with Poland that Article 2.2.2(i) requires the use of broader

[208] Panel Report, *Thailand – H-Beams*, para. 7.111.
[209] Panel Report, *Thailand – H-Beams*, paras. 7.112-7.113.

> rather than narrower categories, and believe to the contrary that the use even of the narrowest general category that includes the like product is permitted."[210]

162. The Panel in *US – OCTG (Korea)* found that the United States acted inconsistently with Articles 2.2.2(i) and 2.2.2(iii) by defining the "same general category of products" more narrowly than like product, in determining the profit margins for the constructed normal value:

> "For the foregoing reasons, we conclude that having relied on an impermissibly narrow definition of the 'same general category of products' as the basis for not calculating CV profit under Article 2.2.2(i) and for not calculating the profit cap under Article 2.2.2(iii), the USDOC acted inconsistently with its obligations under those provisions. In particular, we find that the United States acted inconsistently with its obligations under Articles 2.2.2(i) and (iii) because the USDOC defined the same general category of products more narrowly than the like product by excluding OCTG not used for down hole applications, which was part of the like product as defined by the USDOC. Thus, the USDOC had no proper basis for its conclusions that the methods under Article 2.2.2(i) could not be used, and that the profit cap called for in Article 2.2.2(iii) could not be calculated."[211]

1.4.5.8 Article 2.2.2(ii) – "weighted average" and data from "other exporters or producers"

163. In *EC – Bed Linen*, the Appellate Body reversed the Panel's finding under Article 2.2.2(ii) that the existence of data for more than one other exporter or producer is not a necessary prerequisite for application of the approach using "weighted average" in calculating the amount for administrative, selling and general costs ("SG&A") to determine the constructed normal value of subject products. The Appellate Body stated:

> "In our view, the phrase 'weighted average' in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase 'other exporters or producers' in the plural as including the singular case. To us, the use of the phrase 'weighted average' in Article 2.2.2(ii) makes it impossible to read 'other exporters or producers' as 'one exporter or producer'. First of all, and obviously, an 'average' of amounts for SG&A and profits *cannot* be calculated on the basis of data on SG&A and profits relating to only *one* exporter or producer. Moreover, the textual directive to 'weight' the average further supports this view because the 'average' which results from combining the data from different exporters or producers must reflect the relative importance of these different exporters or producers in the overall mean. In short, it is simply not possible to calculate the 'weighted average' relating to only one exporter or producer. Indeed, we note that, at the oral hearing in this appeal, the European Communities conceded that the phrase 'weighted average' envisages a situation where there is more than one exporter or producer.
>
> The requirement to calculate a 'weighted average' in Article 2.2.2(ii) is, in our view, the key to interpreting that provision. It is indispensable to the calculation method set forth in this provision, and, thus, it is indispensable to the entire provision – which deals only with the mechanics of that calculation. We disagree with the Panel that 'the concept of weighted averaging is relevant only *when there is information from more than one other producer or exporter* available to be considered.' (emphasis in the original) We see no justification, textual or otherwise, for concluding that amounts for SG&A and profits are to be determined on the basis of the weighted average *some* of the time but not *all* of the time. In so interpreting Article 2.2.2(ii), the Panel, in effect, reads the requirement of calculating a 'weighted average' out of the text in some circumstances. In those circumstances, this would substantially empty the phrase 'weighted average' of meaning.[212]

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[210] Panel Report, *Thailand – H-Beams*, paras. 7.114-7.115. See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.62.

[211] Panel Report, *US – OCTG (Korea)*, para. 7.75.

[212] *(footnote original)* We note that in a case where there is data relating to only one other exporter or producer, a Member may have recourse to the calculation method set forth in Article 2.2.2(iii), provided, of

> In our view, then, the use of the phrase 'weighted average', combined with the use of the words 'amounts' and 'exporters or producers' in the plural in the text of Article 2.2.2(ii), clearly anticipates the use of data from *more than one* exporter or producer. We conclude that the method for calculating amounts for SG&A and profits set out in this provision can only be used if data relating to more than one other exporter or producer is available."[213]

1.4.5.9 Article 2.2.2(ii) – production and sales amounts "incurred and realized"

164. In *EC – Bed Linen*, the Appellate Body reversed the Panel's conclusion that "an interpretation of Article 2.2.2(ii) under which sales not in the ordinary course of trade are excluded from the determination of the profit amount to be used in the calculation of a constructed normal value is permissible". The Appellate Body emphasized that Article 2.2.2(ii) refers to "actual amounts incurred and realized by other exporters and producers" and concluded that, in the light of this wording, in the calculation of weighted average all of the actual amounts have to be included, regardless of whether the underlying sales were made in the ordinary course of trade or not:

> "Here, we note especially that Article 2.2.2(ii) refers to 'the weighted average of *the actual amounts incurred and realized* by other exporters or producers'. (emphasis added) In referring to 'the actual amounts incurred and realized', this provision does not make any exceptions or qualifications. In our view, the ordinary meaning of the phrase '*actual* amounts incurred and realized' includes the *SG&A actually incurred*, and the *profits or losses actually realized* by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. There is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the 'actual amounts incurred or realized'. It follows that, in the calculation of the 'weighted average', *all* of 'the actual amounts incurred and realized' by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in our view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the 'weighted average' under Article 2.2.2(ii)."[214]

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165. The Appellate Body in *EC – Bed Linen* also discussed the first sentence of the chapeau of Article 2.2.2 as part of the context supporting its interpretation of Article 2.2.2(ii) quoted in paragraph 164 above. The Appellate Body stated:

> "In contrast to Article 2.2.2(ii), the first sentence of the chapeau of Article 2.2.2 refers to 'actual data pertaining to production and sales *in the ordinary course of trade*'. (emphasis added) Thus, the drafters of the *Anti-Dumping Agreement* have made clear that sales *not* in the *ordinary course of trade* are to be *excluded* when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.
>
> The exclusion in the chapeau leads us to believe that, where there is no such explicit exclusion elsewhere in the same Article of the *Anti-Dumping Agreement*, no exclusion should be implied. And there is no such explicit exclusion in Article 2.2.2(ii). Article 2.2.2(ii) provides for an *alternative* calculation method that can be employed precisely when the method contemplated by the chapeau cannot be used. Article 2.2.2(ii) contains its own specific requirements. On their face, these requirements do not call for the exclusion of sales not made in the ordinary course of trade. Reading into the text of Article 2.2.2(ii) a requirement provided for *in the*

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course, that the specific requirements for the use of this calculation method are met. We recall that Article 2.2.2(iii) states that amounts for SG&A and profits may be calculated on the basis of : "any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin."

[213] Appellate Body Report, *EC – Bed Linen*, paras. 74-75.

[214] Appellate Body Report, *EC – Bed Linen*, para. 80.

chapeau of Article 2.2.2 is not justified either by the text or by the context of Article 2.2.2(ii)."[215]

1.4.5.10 Article 2.2.2(ii) – should "weighted" average be based on the value or the volume of sales?

166. The Panel in *EC – Bed Linen (Article 21.5 – India)* rejected India's claim that the weighting of averages under Article 2.2.2 (ii) was to be performed on the basis of sales volume rather than value data. According to the Panel:

> "It is clear from the text of Article 2.2.2(ii) that the amounts for SG&A and for profits to be used in constructing normal value must be weighted averages. However, nothing in the text specifies the factor to be used in calculating those weighted averages. There is clearly no specific direction requiring that the averages be weighted on the basis of volume, rather than value. Article 2.2.2(ii) is simply silent on this issue. Article 2.2.2 (ii) does not specify the factor, volume or value, to be used in calculating weighted averages."[216]

167. The Panel in *EC – Bed Linen (Article 21.5 – India)* further explained that, in its view, "either volume or value may be relevant in the context of Article 2.2.2(ii), and both are "neutral" in the sense that the weighted average will reflect the relative importance of the companies with respect to that factor".[217] According to the Panel, "the fact that the choice of the factor used in calculating the weighted average will affect the outcome is simply irrelevant to the question whether Article 2.2.2(ii) requires the use of one volume rather than value as the weighting factor."[218]

1.4.5.11 No separate "reasonability" test

168. The Panel in *EC – Bed Linen* rejected the argument by India that "the results of a proper calculation under Article 2.2.2(ii) are subject to a separate test of 'reasonability' before they may be used in constructing a normal value for other producers."[219] The Panel was unable to find a basis for such a separate reasonability test in the wording of Article 2.2.2:

> "The text … indicates that the methodologies set out in Article 2.2.2 are outlined 'for the purpose' of calculating a *reasonable* profit amount pursuant to Article 2.2. There is no specific language establishing a separate reasonability test, or indicating how such a test should be conducted. In these circumstances, we consider that there is no textual basis for such a requirement. Thus, the ordinary meaning of the text indicates that if one of the methods of Article 2.2.2 is properly applied, the results are by definition 'reasonable' as required by Article 2.2.
>
> Further, we note that Article 2.2.2(iii) provides for the use of 'any *other* reasonable method', without specifying such method, subject to a cap, defined as 'the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin'. To us, the inclusion of a cap where the methodology is not defined indicates that where the methodology is defined, in subparagraphs (i) and (ii), the application of those methodologies yields reasonable results. If those methodologies did not yield reasonable results, presumably the drafters would have included some explicit constraint on the results, as they did for subparagraph (iii).
>
> Thus, we conclude that the text indicates that, if a Member bases its calculations on either the chapeau or paragraphs (i) or (ii), there is no need to separately consider the reasonability of the profit rate against some benchmark. In particular, there is no need to consider the limitation set out in paragraph (iii). That limitation is triggered only when a Member does not apply one of the methods set out in the chapeau or paragraphs (i)

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[215] Appellate Body Report, *EC – Bed Linen*, paras. 82-83. Following the excerpted paragraphs, the Appellate Body cited its Report, *India – Patents*, para. 45.
[216] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.81.
[217] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.84.
[218] Panel Report, *EC – Bed Linen (Article 21.5 – India)*, para. 6.84.
[219] Panel Report, *EC – Bed Linen*, para. 6.94.

> and (ii) of Article 2.2.2. Indeed, it is arguably precisely because no specific method is outlined in paragraph (iii) that the limitation on the profit rate exists in that provision."[220]

169. Similarly to the Panel in *EC – Bed Linen*, the Panel in *Thailand – H-Beams* also considered that no separate "reasonability" test is required under Article 2.2.2, and rejected Poland's argument that the results of applying any of the specified methodologies are at best rebuttable presumed to be reasonable. The Panel stated:

> "We find no trace in the texts of the relevant provisions of such a rebuttable presumption, however. To the contrary, the ordinary meaning of the text seems rather to indicate that, if one of the methodologies is applied, the result is by definition reasonable. First, as noted, the phrase 'for the purpose of paragraph 2' is without qualification in the text. In our view, this phrase is straightforward and means that Article 2.2.2 gives the specific instructions as to how to fulfil the basic but unelaborated requirement in Article 2.2 to use no more than a 'reasonable' amount for profit.
>
> Second, we note that the chapeau of Article 2.2.2 provides that where the methodology in the chapeau 'cannot' be used, one of the methodologies in subparagraphs (i), (ii) or (iii) 'may' be used. Poland argues that the word 'may' only provides for the possibility of using such methodologies and implies that any results derived thereby would be subject to a reasonability test arising under Article 2.2. We disagree, as in our view the word 'may' constitutes authorization to use the methodologies in the subparagraphs where the methodology in the chapeau, which is the preferred methodology, 'cannot' be used. We note that the text of Article 2.2.2 establishes no hierarchy among the subparagraphs and that there is no disagreement between the parties concerning this issue."[221]

170. The Panel in *Thailand – H-Beams*, similarly to the Panel in *EC – Bed Linen*, went on to find that the existence of a "cap" under subparagraph (iii) of Article 2.2.2. with respect to "any other reasonable method" implied that the methodologies under subparagraphs (i) and (ii) *ipso facto* yielded "reasonable" results, such that no separate constraint existed in respect of these paragraphs.[222] The Panel then also noted the requirement to use "actual data" under the Article 2.2.2 chapeau and subparagraphs (i) and (ii):

> "We note also the requirement in the chapeau of Article 2.2.2 as well as in subparagraphs (i) and (ii) that *actual data* be used. In our view, the notion of a separate reasonability test is both illogical and superfluous where the Agreement requires the use of specific types of actual data. That is, where actual data are used and the other requirements of the relevant provision(s) are fulfilled (e.g., that the 'same general category of products' is defined in a permissible way where 2.2.2(i) is applied), a *correct* or *accurate* result is obtained, and the requirement to use actual data *is itself* the mechanism that ensures reasonability in the sense of Article 2.2 of that (correct) result. By contrast, under subparagraph (iii) where no specific methodology or data source is required, and the use of 'any other reasonable method' is permitted, the provision itself contains what is in effect a separate reasonability test, namely the cap on the profit amount based on the actual experience of other exporters or producers. Thus, in our view, Article 2.2.2's requirement that actual data be used (and its establishment of a cap where this is not the case) are intended precisely to avoid the outcome that Poland seeks, namely subjective judgements by national authorities as to the 'reasonability' of given amounts used in constructed value calculations."[223]

1.4.5.12 Article 2.2.2(iii)

171. The Panel in *EC – Salmon (Norway)* addressed a claim by Norway regarding the meaning of "reasonable" in the context of this provision:

[220] Panel Report, *EC – Bed Linen*, paras. 6.96-6.98.
[221] Panel Report, *Thailand – H-Beams*, paras. 7.122-7.123.
[222] Panel Report, *Thailand – H-Beams*, para. 7.124.
[223] Panel Report, *Thailand – H-Beams*, para. 7.125.

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> "In our view, a methodology for calculating SG&A [selling, General and Administrative] that inflates SG&A costs above what they should have been cannot be 'reasonable' within the meaning of Article 2.2.2(iii). Accordingly, we find that the investigating authority acted inconsistently with Article 2.2.2(iii) of the AD Agreement when it determined [[XXX]] SG&A costs on the basis of data pertaining to the [[XXX]] consolidated accounts without excluding the G&A costs originally reported by [[XXX]] from the calculation of its costs of production."[224]

172. The Panel in *EU – Footwear (China)* held that the European Union violated Article 2.2.2(iii) because the EU Commission did not calculate "the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin" in constructing the normal value for an exporter in the investigation at issue:

> "Turning to the second question first, it is undisputed that the Commission not only did not calculate the cap established in Article 2.2.2(iii), it made no attempt to do so. The European Union asserts that the necessary data for calculating the cap was not available in this case, and suggests that this entitled the Commission to ignore this requirement. In any event, the European Union contends that the requirement of a 'reasonable method' nonetheless constrained the Commission's decision.
>
> Even assuming it to be the case that relevant data on the basis of which the cap could be calculated was not available to the Commission in this case, we fail to see how this excuses the Commission from complying with the requirements of the AD Agreement. More to the point, however, in the case before us, it is undisputed that the Commission made no attempt to calculate the cap called for in Article 2.2.2(iii). … Moreover, there is no indication that the Commission ever looked into whether there were producers who sold 'products of the same general category' whose data might have been used in this regard. … Given that it is undisputed as a matter of fact that the Commission did not determine 'the profit normally realized by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin', it is apparent that the Commission could not, and did not, ensure that the amount for profit it established for Golden Step did not exceed this level."[225]

173. The Panel in *US – OCTG (Korea)* reiterated that Article 2.2.2(iii) required the calculation of a cap for profits.[226] Given its prior finding that, in the investigation at issue, the USDOC had erred by establishing the "same general category of products" more narrowly than the like product, the Panel also found that the USDOC's finding that it could not calculate a cap as required under Article 2.2.2(iii) because of lack of data, was inconsistent with that provision:

> "We understand the situation that the United States presents as one in which the USDOC attempted to calculate the profit cap but was unable to do so because it lacked data pertaining to sales of products of the same general category in the domestic market. We recall, however, that we have concluded in this dispute that the USDOC wrongly defined the 'same general category of products' more narrowly than the like product in the underlying investigation. Based on that same conclusion, we consider that the USDOC's finding that it did not have profit data pertaining to sales of the same general category of products was similarly erroneous. This was because the USDOC's conclusion that it lacked data was premised on an erroneous definition of the same general category of products. Therefore, even assuming that a lack of data might otherwise justify failure to calculate and apply a profit cap, the USDOC's failure to do so in the underlying investigation is not justified. We therefore find that by failing to calculate and apply a profit cap, which is mandatory under Article 2.2.2(iii), in the underlying investigation, the USDOC acted inconsistently with its obligations under that provision."[227]

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[224] Panel Report, *EC – Salmon (Norway)*, para 7.605.
[225] Panel Report, *EU – Footwear (China)*, paras. 7.299-7.300.
[226] Panel Report, *US – OCTG (Korea)*, para. 7.101.
[227] Panel Report, *US – OCTG (Korea)*, para. 7.104. See also ibid. paras. 7.107-7.108.

174. In agreeing with the previous panels' view that Article 2.2.2(iii) requires that a cap be calculated for profits, the Panel in *EU – Biodiesel (Indonesia)* explained the importance of this obligation, as follows:

> "We consider that there are important reasons for requiring an investigating authority to calculate a cap and to further provide details on the cap in the determination. Absent this information, interested parties would be unaware of whether the determined amount for profit exceeds the cap or not. This lack of information would improperly place the burden on interested parties to then try to demonstrate that the chosen amount for profit is in excess of the cap. The burden would also shift to a WTO Member representing the exporting producers to bring a challenge and demonstrate before a WTO panel that the profit amount used in constructing normal value exceeds the cap and is therefore in violation of Article 2.2.2(iii). We also consider that the obligation to calculate the cap is fundamental for the reason mentioned by Indonesia; namely that, absent a firm obligation, investigating authorities would be incentivized to adopt a passive approach to establishing a cap as a way to lessen their obligation under Article 2.2.2(iii)."[228]

175. Turning to the investigation at issue, the Panel found that "[s]ince it is clear that the EU authorities did not calculate a cap, it is equally clear that the EU authorities failed to ensure that the amount for profit did not exceed that cap, contrary to the second condition set forth in Article 2.2.2(iii)."[229]

176. The Panel in *EU – Biodiesel (Argentina)* found that the word "method" in the text of Article 2.2.2(iii) "refers to a reasoned consideration of the evidence before the investigating authority for the determination of the amount for profits, rather than to a pre-established procedure or methodology".[230] The Panel then explained the reasonableness of the method to determine profits, as follows:

> "We now turn to assess what constitutes a 'reasonable' method in the context of Article 2.2.2(iii). In the context of Article 2.2.2(iii), it is clear from the use of 'any other' before 'reasonable' that what is 'reasonable' is connected to the preceding paragraphs and the chapeau and that the 'methods' set in the preceding paragraphs and the chapeau are presumptively reasonable. As we have discussed, these indicate a preference for the actual data of the exporter and like product in question, with an incremental progression away from these principles before reaching 'any other reasonable method' in Article 2.2.2(iii). In our view, this context suggests that the general function of Article 2.2.2 is to approximate what the profit margin (as well as administrative, selling and general costs) would have been for the like product in the ordinary course of trade in the domestic market of the exporting country. Thus, in our view, the reasonableness of the method used under Article 2.2.2(iii) for determining the profit margin turns on whether it is rationally directed at approximating what that margin would have been if the product under consideration were sold in the ordinary course of trade in the domestic market of the exporting country.
>
> Based on the foregoing considerations, we understand the term 'any other reasonable method' in Article 2.2.2(iii) to involve an enquiry into whether the investigating authority's determination of the amount for profits is the result of a reasoned consideration of the evidence before it, rationally directed at approximating the profit margin to what would have been realized if the product under consideration had been sold in the ordinary course of trade in the exporting country."[231]

177. Turning to the investigation at issue, the Panel in *EU – Biodiesel (Argentina)* rejected Argentina's claim that the EU Commission had violated Article 2.2.2(iii) in determining the profit margins for Argentine producers. In so finding, the Panel found no error in the Commission's reliance

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[228] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.51.
[229] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.52.
[230] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.335.
[231] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.337-7.338. See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.87.

on profit margins established for Argentine companies in prior investigations because the Commission had tested such figures against relevant benchmarks that were available:

> "We recall that investigating authorities might have recourse to Article 2.2.2(iii) when reliable data concerning the actual exporter or other exporters and their products is unavailable, making the more specific approaches in the chapeau and subparagraphs (i) and (ii) of Article 2.2.2 unusable. In that context, we consider that an unbiased and objective investigating authority could reasonably consider, as an initial step, that profit margins determined in prior investigations of other producers in the same industry at similar stages of development provide an indication of the profit margins of producers in a subsequent investigation. Further, since that figure was determined at a different point in time for different producers, it would be appropriate, in our view, that an unbiased and objective investigating authority would seek to test that figure against relevant benchmarks that might be available. In our understanding, four such benchmarks were considered by the EU authorities in this investigation and they seem to us to be plausible."[232]

178. The Panel in *EU – Biodiesel (Indonesia)* rejected the European Union's argument that the use of the word "normally" in the text of Article 2.2.2(iii) allows an investigating authority to disregard profits realized in transactions that are considered to be incompatible with normal commercial practice:

> "We disagree, however, with the European Union's interpretation of the term 'normally' in Article 2.2.2(iii). We see no basis for the European Union's argument that 'profit normally realized' in Article 2.2.2(iii) means that an investigator may disregard the profit realized on sales that are considered not compatible with normal commercial practice. The word 'normally' is defined as '[i]n a regular manner; regularly' or '[u]nder normal or ordinary conditions; as a rule, ordinarily' or '[i]n a normal manner, in the usual way'. This suggests that the term 'normally' in Article 2.2.2(iii) refers to commonality of occurrence, and therefore to profits that are regularly, ordinarily, usually, or as a rule realized. We consider this understanding is consistent with the way that the word 'normally' is used, for example, in footnote 8 of the Anti-Dumping Agreement, concerning what the date of sale should 'normally', i.e. usually, be. Similarly, Article 5.8 states that the volume of dumped imports shall 'normally' be regarded as negligible, except in the case countries which individually account for less than 3% of the imports of the like product in the importing Member collectively account for more than 7% of imports of the like product in the importing Member."[233]

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1.4.6 Relationship with other paragraphs of Article 2

179. In *Egypt – Steel Rebar*, the Panel indicated that, in its view, what might be necessary to take into account by way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 could not be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2:

> "[W]e do not think that the construction of a normal value under Article 2.2 precludes consideration of the making of various adjustments as between that normal value and the export price with which it is to be compared. A constructed normal value is, in effect, a notional price, 'built up' by adding costs of production, administrative, selling and other costs, and a profit. In any given case, such a built-up price might or might not reflect credit costs. Thus, what might be necessary to take into account by way of due allowance in a particular investigation in order to comply with the obligation to ensure a fair comparison under Article 2.4 cannot be limited by the simplistic characterisation of a normal value as being one arrived at by way of a construction under Article 2.2."[234]

180. The Panel in *EC – Tube or Pipe Fittings* found that the definition of "like product" in Article 2.6 governs how an investigating authority identifies the scope of the "like product" for the purposes of

[232] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.347. See also Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.97.
[233] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.65.
[234] Panel Report, *Egypt – Steel Rebar*, para. 7.388.

the investigation and of the Agreement. The Panel considered that, since the chapeau of Article 2.2.2 requires the use of actual data from all relevant sales of the like product, "actual data from relevant transactions relating to sales of the 'like product' – as a whole – may be taken into account to construct normal value. There is no provision to the effect that constructed normal value is to be based only on a limited subset of data relating to sales of certain selective product types falling within the definition of like product, but excluding data relating to sales of other such types."[235]

1.5 Article 2.3

1.5.1 General

181. The Panel in *US – OCTG (Korea)* stated that where an investigating authority purports to rely on the existence of an association between the exporter and the importer or a third party, within the meaning of Article 2.3, it has to have grounds for such a view. The Panel clarified, however, that Article 2.3 does not require that a determination be made to this effect:

> "Article 2.3 permits an investigating authority to disregard the transaction export price and construct the export price where, *inter alia*, '*it appears to the authorities concerned that the export price is unreliable because of association*' between the exporter and the importer or a third party. In our view, it is clear that an investigating authority must have grounds for the view that there is association. If there is no association, the export price cannot appear to be unreliable to the investigating authority 'because of' association.[236]
>
> While it is clear that the appearance of unreliability must be because of association, the text of Article 2.3 does not require any 'determination', let alone a determination as to the *reliability* of the export price. If such a determination had been intended, in our view Article 2.3 would have been drafted differently, to require, for example, that the investigating authority determine or demonstrate that the export price is unreliable because of association. Instead, it provides that export price may be constructed where it 'appears to the authorities' that the export price is unreliable. The verb 'appear' has different definitions but we find the definition 'seem to the mind, be perceived as, be considered' to be the most appropriate in respect of the text of Article 2.3. The adjective 'unreliable' is defined as 'not reliable'. 'Reliable' in turn is defined as 'in which reliance or confidence may be put, trustworthy'. Thus to us, the use of the terms 'appear to the authorities' and 'unreliable' in Article 2.3 denotes a situation in which, because of the association at issue, the investigating authority perceives the export price not to be trustworthy. Of course, an investigating authority must have grounds for this view: it is always obliged to establish facts properly and evaluate them in an unbiased and objective manner. Nothing in our understanding of Article 2.3 would suggest, however, any separate requirement to make a 'determination' as to the reliability of the export price."[237]

182. The Panel in *US – OCTG (Korea)* also pointed out that Article 2.3 does not authorize an investigating authority to construct the export price merely because of the existence of an association between the exporter and the importer:

> "It is also clear, in our view, that Article 2.3 does not allow an investigating authority to construct export price whenever there is association. If that were the case, we would again have expected Article 2.3 to have been drafted differently, to require, for instance, that an investigating authority may construct the export price where there is association. An investigating authority could not simply ignore evidence before it suggesting that the export price is reliable notwithstanding association and go on to construct the export price without considering such evidence. As noted above, an

[235] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.150.

[236] *(footnote original)* Article 2.3 of the Anti-Dumping Agreement also recognizes that an export price may appear to be unreliable to the investigating authority because of a "compensatory arrangement" between the exporter and the importer or a third party. Both parties agree, however, that in the underlying investigation, the USDOC found association and not a compensatory arrangement between the concerned entities.

[237] Panel Report, *US – OCTG (Korea)*, paras. 7.146-7.147.

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> investigating authority has an obligation to establish facts properly and evaluate them in an unbiased and objective manner, which entails the consideration of relevant evidence on the issues before it."[238]

183. The Panel in *US – OCTG (Korea)* reasoned that the existence of an "association" within the meaning of Article 2.3 depends on whether the exporter and the importer at issue act independently from one another:

> "Article 2.3 does not define association. The dictionary definitions of 'association' include 'action of joining or uniting for a common purpose; the state of being so joined'. These definitions are not limiting, and thus 'association' may arise from formal legal ties or far less structured and non-binding relationships. But it is clear from the overall context of Article 2.3 that the remedy for the appearance of unreliability resulting from association provided for in that Article is the construction of the export price on the basis of the price at which the exported merchandise is first resold to an *independent* buyer. This strongly suggests that a lack of independent action is central to the nature of 'association' and gives rise to the problem Article 2.3 seeks to remedy.
>
> 'Independent' is defined as 'not subject to the authority or control of any person, country, etc.; free to act as one pleases, autonomous'. Thus, for purposes of Article 2.3, association may be understood to mean a *lack* of autonomy to act as one pleases or the *presence* of authority or control over a person. Therefore, we consider that, at a minimum, there may be association for purposes of Article 2.3 where an exporter and the importer or a third party do not act independently of one another. Based on this understanding, a situation in which export sales are between associated entities, as opposed to *independent* entities, may constitute the problem Article 2.3 seeks to remedy: the appearance of unreliability of export price resulting from association. In considering the USDOC's conclusion of affiliation in the underlying investigation, we will consider whether it was consistent with this understanding of association."[239]

184. The Panel in *US – OCTG (Korea)* pointed out that for there to be an association between an exporter and importer within the meaning of Article 2.3, the relationship between the two does not have to be of an exclusive nature, nor does it require a formal agreement:

> "We find nothing in the notion of association as we understand it for purposes of Article 2.3 that would suggest that the lack of an exclusive relationship means that the evidence is not probative on the question of association or cannot support the inferences drawn by the USDOC on the basis of this evidence. Indeed, an exporter may have associations with multiple entities, in which case, the relationship between the exporter and any one of those entities will not be exclusive. Yet, that relationship may nonetheless suffice to show association for purposes of Article 2.3.
>
> Indeed, as we understand it, association for purposes of Article 2.3 can exist without any formal agreement[.]"[240]

185. In *US – Stainless Steel (Korea)*, the Panel explained the status of paragraph 3 in Article 2. See paragraph 32 above.

186. In the investigation at issue in *EU – Biodiesel (Indonesia)*, the EU Commission constructed the export price on the basis of the resale price to the first independent buyer in the European Union. In doing so, the European Union excluded from that price the premium paid by EU customers to the importer that was related to the Indonesian exporter.[241] Indonesia contended that this was in violation of Article 2.3. The Panel first stated that in constructing the export price pursuant to Article 2.3, the starting point should be the sum in money for which the imported product was sold to an independent buyer. The authorities may thereafter make the adjustments permitted under

[238] Panel Report, *US – OCTG (Korea)*, para. 7.148.
[239] Panel Report, *US – OCTG (Korea)*, paras. 7.150-7.151.
[240] Panel Report, *US – OCTG (Korea)*, paras. 7.165-7.166.
[241] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.113.

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the fourth sentence of Article 2.4.[242] The Panel rejected the European Union's argument that the premium was not part of the price:

> "We do not agree with the decision by the EU authorities that the premium is not part of the sum in money for which the exported product was bought by the first independent buyer. Both parties accept – as the EU authorities recognized – that customers are willing to pay a higher price for the PFAD biodiesel eligible for double counting. This is because of its particular physical properties which make it eligible for double counting. The parties additionally agree that the premium amount is determined by market factors and equals the increased amount that customers are willing to pay for double counting-eligible biodiesel. Customers are willing to pay a premium precisely because they are permitted to use half as much PFAD-based biodiesel when blending with mineral diesel. If the product did not qualify for the certificate and was ineligible for double counting because of its physical characteristics, the additional premium would not be paid."[243]

187. In *Republic – AD on Steel Bars (Costa Rica)*, the Panel pointed to the limited scope of Article 2.3:

> [W]e observe that, while Article 2.3 addresses the establishment of the export price, it is limited in scope, applying to the limited situations described in that article[.] … In this regard, we do not see how Article 2.3 can adequately address all of the issues that may arise in relation to the export price used in a comparison to determine a margin of dumping."[244]

1.6 Article 2.4

1.6.1 General

188. The Panel in *Colombia – Frozen Fries (Article 21.5 – EU)* rejected the European Union's claim of violation of Articles 2.1 and 2.4 of the Agreement in connection with the use by the Colombian investigating authorities of product codes in making the comparison between the normal value and the export price:

> "In our view, this evidence could properly be understood by an unbiased and objective investigating authority to mean that article numbers relate to product characteristics. The articles are described by Agrarfrost as being 'produced', and Agrarfrost states that each article represents a 'product with specific characteristics'. In addition, the product articles have distinct numerical labels, which are used for product identification. Thus, MINCIT could reasonably have determined that these numerical labels, or article numbers, relate directly to product characteristics.
>
> In rejecting Agrarfrost's assertion that article numbers do not relate to product characteristics, MINCIT referred specifically to a product catalogue submitted by Agrarfrost in the original investigation. Agrarfrost described this as a 'Catalogue of products for the domestic market and for export'. In this catalogue, which MINCIT referred to in its final technical report, Agrarfrost uses article numbers as a means of facilitating product identification:
>
> …
>
> We note that the European Union objects to MINCIT's reliance on the product catalogue by arguing that it is a pure marketing tool, which only provides an illustration of the products available to the clients in a very simplified manner. We are not persuaded by this argument. In our view, MINCIT could reasonably have referred to this document, which was prepared and submitted by Agrarfrost, as evidence that Agrarfrost itself

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[242] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.114.
[243] Panel Report, *EU – Biodiesel (Indonesia)*, para. 7.115.
[244] Panel Report, *Republic – AD on Steel Bars (Costa Rica)*, para. 7.31.

> relied on article numbers for the identification of product characteristics, and not merely for internal accounting purposes."[245]

189. The Panel in *Colombia – Frozen Fries (Article 21.5 – EU)* also rejected the European Union's claim that the Colombian investigating authorities had violated Articles 2.1 and 2.4 by assuming, in their product comparisons, that the first two digits in the codes provided by the exporter referred to the country of export, and the last three to product characteristics. In coming to this view, the Panel took into account the additional steps taken by the investigating authorities in making product comparisons, including reaching out to the exporter to seek information about product types.[246] In the latter regard, the Panel also rejected the European Union's argument that the Colombian authorities "exacerbated any unfairness" by not providing the exporter with an opportunity to comment on the assumptions made on the basis of the information provided by the exporter.[247]

190. The Panel in *EU – CVD/AD on SSCRFP (Indonesia)* stated that Article 2.4 does not require an investigating authority to use specific formula of words when explaining a particular adjustment:

> "The Panel finds that the Commission examined evidence that was specific to the export side and concluded that there was an effect on export price for which an adjustment was appropriate. The Panel does not consider that the Commission was obligated under Article 2.4 of the Anti-Dumping Agreement to use a specific formula of words or to make reference to supportive prior analyses when making this particular adjustment as the third sentence of Article 2.4 merely requires an authority to make due allowances for 'differences which are … demonstrated to affect price comparability'. We are of the view that the record in the underlying proceeding indicates that the Commission provided a reasoned and adequate basis for its decision to make a downward adjustment on price based on evidence that related specifically and exclusively to the export transactions..."[248]

191. In *EU – Footwear (China)*, the Panel rejected the argument that an investigating authority that uses a Product Control Number (PCN) system is required "to reflect all the characteristics of the product which may affect price comparability in the categories defined".[249] In so finding, the Panel stressed the role that exporters also have to play to ensure a fair comparison between the normal value and the export price as required under Article 2.4:

> "We recall that Article 2.4 does not address how due allowance for differences affecting price comparability is to be made. Thus, in the absence of any guidance in this respect, we consider that Article 2.4 cannot be understood to establish specific obligations with regard to the methodologies that investigating authorities may use in order to ensure a fair comparison. We therefore see no legal basis for China's contention that the Commission was obliged to reflect in its PCN methodology all the characteristics of the product which may have affected price comparability.
>
> Moreover, we recall our view that the fact that Article 2.4 requires investigating authorities to ensure a fair comparison does not mean that interested parties have no obligation in this process. Indeed, we consider that, consistently with Article 2.4, if an exporter believes that the methodology adopted by the investigating authority is inadequate to ensure a fair comparison, it is for the exporter to make substantiated requests for due allowance to be made in order to ensure such comparison. In this case, however, we see nothing in the evidence before us that would indicate to us that Chinese producers made substantiated requests for adjustments with respect to the factors which allegedly affected price comparability. Nor has China demonstrated otherwise. Simply arguing, as interested parties did before the Commission, and China does here, that the PCN categories established by the Commission were 'too broad' to allow a fair comparison is not sufficient, in our view, to discharge the exporters' obligations in this regard.

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[245] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, paras. 7.97-7.99.
[246] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, paras. 7.111-7.115.
[247] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, para. 7.119.
[248] Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, para. 7.618.
[249] Panel Report, *EU – Footwear (China)*, para. 7.280.

> In our view, however, the mere fact that an investigating authority chooses to use a system based on categorizing the product under consideration into comparable groups, even if those groups are broadly defined, does not alter or somehow shift the burden with respect to demonstrating the need for due allowance from interested parties to investigating authorities."[250]

192. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, Costa Rica challenged the selection of export sales transactions on which the investigating authority based its calculation of the margin of dumping. In the underlying investigation, the investigating authority of the Dominican Republic had included in its calculation of export price the sales of products that were invoiced prior to the start of the investigation period for dumping determinations and entered the Dominican Republic on dates within the period of investigation. The Panel found Article 2.4 to be applicable to Costa Rica's claim:

> "[W]e consider the issue of whether an authority makes a fair comparison under Article 2.4 to be directly related to the issue of the individual sales selected to establish the normal value and the export price. In other words, the Dominican Republic's argument does not address the nature of the issue raised by Costa Rica's claim. That is, Costa Rica's arguments are not limited to the components of the comparison, but rather they also refer to the CDC's comparison of export sales transactions to domestic sales transactions in Costa Rica's home market. In particular, the CDC selected the set of export transactions that would form the basis of the representative average export price. The CDC also requested information on domestic transactions and used these as the basis for the normal value for comparison purposes and to establish a margin of dumping. Costa Rica has also submitted arguments as to why the CDC's calculation was biased and therefore not 'fair'".[251]

1.6.2 Investigations where the analogue country methodology is used

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193. In *EU – Footwear (China)*, the Panel rejected the argument that Article 2.4 contains requirements regarding the methodology used to determine normal value, more specifically regarding the selection of the analogue country in investigations involving non-market economy countries:

> "Nothing in Article 2.4 suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements of the comparison to be made, that is, normal value and export price. Indeed, in our view, it is clear that the requirement to make a fair comparison in Article 2.4 logically presupposes that normal value and export price, the elements to be compared, have already been established."[252]

194. In the investigation at issue in *EC – Fasteners (China) (Article 21.5 – China)* the EU Commission used the analogue country methodology in determining normal values for the investigated Chinese producers. During the investigation, the Commission rejected certain requests for adjustments on the grounds that the requests were not substantiated or that they would undermine the Commission's use of the analogue country methodology. The Panel agreed generally with the view that the use of the analogue country methodology does not relieve an investigating authority of the obligation to conduct a fair comparison as required under Article 2.4.[253] However, the Panel did not find a violation of that obligation in the Commission's rejection of certain requests for adjustments, pointing out that such adjustments would undermine the Commission's use of the analogue country methodology. For instance, with regard to an adjustment concerning alleged differences in the taxation of raw materials, the Panel found:

> "We agree with the EU's argument. China states that 'it does not question the use of the analogue country methodology as such but rather the failure of the European Union to make necessary adjustments for differences affecting price comparability existing between the export price and the analogue country's normal value as a result of the

[250] Panel Report, *EU – Footwear (China)*, paras. 7.281-7.283.
[251] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.32.
[252] Panel Report, *EU – Footwear (China)*, para. 7.263.
[253] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.222.

> inclusion in the normal value of import duties on raw material that are not included in the export price'. However, to find for China in this respect would undermine the Commission's right to have recourse to the analogue country methodology, which China does not dispute here. The Commission resorted to the analogue country methodology because it determined that the Chinese producers subject to the investigation did not operate according to the principles of a market economy, including with respect to the price paid for domestic wire rod. As a result of this determination, the Commission decided to base the normal values of Chinese producers on the domestic prices charged by Pooja Forge, a fastener producer from India, which the Commission found to be operating according to market economy principles, including taking into account the price paid for imports of wire rod. We agree with the European Union that the very reason why such an exceptional methodology was used in determining the normal values of Chinese producers was the underlying determination that their costs and prices did not reflect the dynamics of a market economy.
>
> We also note that the issue of customs duties and other indirect taxes collected on the imports of raw materials has to do with India's internal tax and trade policy. Different WTO Members design such policies in different ways taking into account their economic needs and other relevant factors. Where an IA decides to resort to the analogue country methodology in an investigation involving producers that are not accorded market economy treatment and uses the prices of an analogue producer to determine the normal value, the different kinds of taxes that are imposed on different inputs used in the production of the investigated product in the analogue country may be relevant to the issue of the selection of the analogue country. However, once the analogue country has been selected, the existence of such taxes on inputs will likely become irrelevant as far as the obligation to conduct a fair comparison is concerned. This is because once the IA starts making adjustments for such cost differences, it will effectively be moving towards the costs in the investigated country that, at the outset of the investigation, was not considered to be a market economy."[254]

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195. On appeal, the Appellate Body disagreed with the Panel's reasoning. The Appellate Body generally agreed with the view that while the fair comparison obligation under Article 2.4 applies in investigations where the analogue country methodology is used in determining normal value, an investigating authority is not required to make adjustments that would lead the authority to use the costs in the market of the investigated exporters, which were found to be distorted:

> "As explained, the fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, including where normal value is determined on the basis of a surrogate third country. However, Article 2.4 of the Anti-Dumping Agreement has to be read in the context of the second *Ad* Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol. We recall that the rationale for determining normal value on the basis of the domestic prices of Pooja Forge was that the Chinese producers had not clearly shown that market economy conditions prevail in the fasteners industry in China. Costs and prices in the Chinese fasteners industry thus cannot, in this case, serve as reliable benchmarks to determine normal value. In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted. Based on the foregoing, an investigating authority can reject a request for an adjustment if such adjustment would effectively reflect a cost or price that was found to be distorted in the exporting country in the normal value component of the comparison that is contemplated under Article 2.4 of the Anti-Dumping Agreement. Accordingly, an investigating authority has to 'take steps to achieve clarity as to the adjustment claimed' and determine whether, on its merits, the adjustment is warranted because it reflects a difference affecting price comparability or whether it would lead to adjusting back to costs or prices that were found to be distorted in the exporting country."[255]

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[254] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 7.218-7.219. See also ibid. para. 7.245.

[255] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.207.

196. However, the Appellate Body held that the Panel had found "in general terms and without more" that making the adjustments required by the Chinese exporters would undermine the use of the analogue country methodology. In so finding, the Appellate Body stressed that to reject a requested adjustment on this particular ground, an investigating authority has to make a finding explaining why granting the requested adjustment would undermine the use of the analogue country methodology:

> "The Panel did not review whether the Commission had established that the differences in taxation on raw materials were related to the issue of the price of domestic raw materials that was found to be distorted or whether an adjustment was merited because price comparability was affected under Article 2.4. In addition, the Panel found that, 'once the [investigating authority] starts making adjustments for such cost differences, it will effectively be moving towards the costs in the investigated country that, at the outset of the investigation, was not considered to be a market economy'. However, the Panel did not review whether the Commission's determination reflected an examination of whether or why it would have moved towards the distorted costs of the relevant industry in the exporting country by adjusting for these differences in taxation. Therefore, the Panel did not properly review whether the Commission '[took] steps to achieve clarity as to the adjustment claimed and then determine[d] whether and to what extent that adjustment [was] merited' as required under Article 2.4.
>
> The Commission found that the cost of steel wire rod did not reflect market values in China and, therefore, could not be used as a basis for the requested adjustment. The Commission's determination, however, does not reflect that the Commission analysed the relationship between the differences in taxation for which an adjustment was claimed by the Chinese producers and these distorted costs. In particular, the Commission's determination does not reflect a finding that, as the European Union suggests, the Chinese producers would have sourced their wire rod internationally but for the distortion on the Chinese market, or that the price of wire rod in India would not be a market price if the import duties were to be removed. We, therefore, consider that the Commission's determination does not reflect that it assessed whether the requested adjustment was warranted or whether it would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison. The Commission, hence, failed to 'take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment [was] merited' as required under Article 2.4 of the Anti-Dumping Agreement."[256]

197. The Appellate Body also stressed that "adjustments are to be made for differences affecting price comparability irrespective of whether the difference pertains to an 'additional step' in the production process or to a step found to be carried out both by the analogue country producer and the NME producer."[257]

1.6.3 First sentence

1.6.3.1 Fair comparison of export price and normal value

198. In *Egypt – Steel Rebar*, the Panel considered that "Article 2.4 in its entirety, including its burden of proof requirement, has to do with ensuring a fair comparison, through various adjustments as appropriate, of export price and normal value".[258] The Panel indicated that the ordinary meaning of this provision confirms that it has to do with the nature of the comparison of export price and normal value. In the Panel's view, "the immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to … the calculation of the dumping margin". The Panel thus found that this provision did not apply to the investigating authority's establishment of normal value as such:

> "Article 2.4, on its face, refers to the *comparison* of export price and normal value, i.e., the calculation of the dumping margin, and in particular, requires that such a

[256] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.216-5.217. See also ibid. paras. 5.231-5.233.
[257] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.234.
[258] Panel Report, *Egypt – Steel Rebar*, para. 7.335.

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> comparison shall be 'fair'. A straightforward consideration of the ordinary meaning of this provision confirms that it has to do not with the basis for and basic establishment of the export price and normal value (which are addressed in detail in other provisions)[259], but with the nature of the comparison of export price and normal value. First, the emphasis in the first sentence is on the *fairness* of the *comparison*. The next sentence, which starts with the words '[t]his comparison', clearly refers back to the 'fair comparison' that is the subject of the first sentence. The second sentence elaborates on considerations pertaining to the 'comparison', namely level of trade and timing of sales on both the normal value and export price sides of the dumping margin equation. The third sentence has to do with allowances for 'differences which affect *price comparability*', and provides an illustrative list of possible such differences. The next two sentences have to do with ensuring 'price comparability' in the particular case where a constructed export price has been used. The final sentence, where the reference to burden of proof at issue appears, also has to do with 'ensur[ing] a fair comparison'. In particular, the sentence provides that when collecting from the parties the particular information necessary to ensure a fair comparison, the authorities shall not impose an unreasonable burden of proof on the parties.
>
> The immediate context of this provision, namely Articles 2.4.1 and 2.4.2 confirms that Article 2.4 and in particular its burden of proof requirement, applies to the comparison of export price and normal value, that is, the calculation of the dumping margin. Article 2.4.1 contains the relevant provisions for the situation where 'the *comparison* under paragraph 4 requires a conversion of currencies' (emphasis added). Article 2.4.2 specifically refers to Article 2.4 as 'the provisions governing fair comparison', and then goes on to establish certain rules for the method by which that comparison is made (i.e., the calculation of dumping margins on a weighted-average to weighted-average or other basis)."[260]

199. Similarly, the Panel in *EU – Biodiesel (Argentina)* pointed to the difference between methods that affect the establishment of the normal value and those that affect the fair comparison between the normal value and the export price:

> "[T]he Appellate Body considered that, in the context of an investigation in which the analogue country methodology is applied, the investigating authority is not required under Article 2.4 to adjust for differences in costs where this would lead it to adjust back to the costs in the NME industry that it had found to be distorted. We read the findings of the Appellate Body in *EC – Fasteners (China) (Article 21.5 – China)* as consistent with the general proposition that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as 'differences affecting price comparability'. We note that unlike the factual scenario in *EC – Fasteners (Article 21.5 – China)*, the methodology at issue in the present dispute was challenged by Argentina, and found by us to be inconsistent with certain provisions of the Anti-Dumping Agreement. However, in our view, the aforementioned general proposition applies as well to instances in which the methodology may reveal itself to be WTO-inconsistent as in the case before us."[261]

200. On this basis, the Panel declined to find a violation of Article 2.4 in the investigation at issue because of the use of international prices instead of the domestic prices in the exporting country in establishing raw material costs:

> "In our view, this difference is not a 'difference[] which affect[s] price comparability' within the meaning of Article 2.4 of the Anti-Dumping Agreement for which '[d]ue allowance' should have been made under that Article. It does not relate to a difference in the characteristics of the (actual or notional) domestic vs. export transactions being compared. In particular, we do not consider that this difference represents a tax – or

[259] (*footnote original*) In this regard, we note that earlier provisions in Article 2, namely Article 2.2 including all of its sub-paragraphs, and Article 2.3, have to do exclusively and in some detail with the establishment of normal value and export price, and in addition that Article 2.1 has to do in part with the establishment of the export price.

[260] Panel Report, *Egypt – Steel Rebar*, paras. 7.333-7.334.

[261] Panel Report, *EU – Biodiesel (Argentina)*, para. 7.304.

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> some other identifiable characteristic – that was incorporated into the constructed normal value by the EU authorities. Rather, the alleged 'difference' is one that arose exclusively from the methodology used to construct the normal value; it resulted from a methodological approach directed at remedying what the authority considered to be a distorted input cost, a matter that is primarily governed by Article 2.2 of the Anti-Dumping Agreement.
>
> …
>
> [I]n the present case, the action of the investigating authorities that is at the heart of Argentina's Article 2.4 claim – the use of reference prices in the construction of normal value, rather than the prices actually paid by the investigated producers – is not one which was undertaken with a view to adjusting for a difference relating to some characteristic of the domestic transactions in comparison with the export transactions."[262]

201. On appeal, the Appellate Body expressed concern regarding the "general proposition" that the Panel referred to, and stated that this merely reflected the Panel's own understanding of the Appellate Body's findings in *EC – Fasteners (China) (Article 21.5 — China)*:

> "We observe that, in referring to the 'general proposition' after having reached its conclusion under Article 2.4, the Panel was supplementing its earlier analysis as to why the difference at issue does not fall within the scope of the 'differences' under Article 2.4 of the Anti-Dumping Agreement. The Panel's statement, in which it referred to the 'general proposition', merely expresses its understanding of the Appellate Body's findings in *EC – Fasteners (China) (Article 21.5 — China)*. We do not share this understanding. The Appellate Body report in *EC – Fasteners (China) (Article 21.5 – China)* does not contain any such 'general proposition'. The reasoning in that report is tailored to the circumstances of that dispute, in which the analogue country methodology was used. The Appellate Body explained that Article 2.4 of the Anti-Dumping Agreement had to be read in the context of the second *Ad* Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol. Neither of those provisions is relevant for purposes of this dispute. Moreover, we would have serious reservations regarding what the Panel referred to as the 'general proposition'. The text of Article 2.4 itself makes clear that '[d]ue allowance shall be made *in each case*, *on its merits*'. This indicates that the need to make due allowance must be assessed in light of the specific circumstances of each case."[263]

202. However, the Appellate Body did not find it necessary to make findings on Argentina's claims on appeal regarding the Panel's findings under Article 2.4.[264]

203. In *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, the Panel explained that the investigating authority's obligation to ensure a "fair comparison" under Article 2.4 includes a responsibility to make allowances for differences in the characteristics of the products under investigation which affect price comparability, and that there is a concurrent obligation on interested parties to supply evidence of these differences to substantiate their requests for adjustments:

> "[T]he obligation to ensure a 'fair comparison' lies on the investigating authorities and it is therefore up to them to 'make allowance' for differences when making a comparison. However, it is up to the party seeking an adjustment to 'demonstrate' that there is a difference and that it affects price comparability. Therefore, in other dispute settlement proceedings, exporters were found to bear the burden of substantiating, 'as constructively as possible', their requests for adjustments. Failing this, there is no obligation for the authority to make an adjustment. In turn, the last sentence of Article 2.4 further states that the authorities shall nevertheless indicate to the parties what information is necessary to ensure a fair comparison, without imposing an 'unreasonable' burden of proof on those parties.

[262] Panel Report, *EU – Biodiesel (Argentina)*, paras. 7.301 and 7.305.
[263] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.87.
[264] Appellate Body Report, *EU – Biodiesel (Argentina)*, para. 6.89.

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> This process, which is likely to continue throughout the investigation, has been described as a 'dialogue' between the authority and interested parties. The distribution of the burden of proof between the authority and the interested parties is the same, regardless of the method used by the authority to 'make allowance' for differences affecting price comparability. Article 2.4 does not differentiate in this regard between whether the investigating authority uses - for the purposes of comparability - a typology of models or makes adjustments at the comparison stage."[265]

204. Having regard to these requirements, the Panel proceeded to examine whether the respondent's investigating authority had made a "fair comparison" between the normal value and the export price of the investigated product by failing to make allowances for a licencing agreement which resulted in differences in price between licenced and unlicenced exercise books:

> "The investigation record shows that MIICEN did establish a 'dialogue' with SOTEFI in respect of the requested adjustments:
>
> …
>
> [H]aving not requested an adjustment for licences in its initial response to the questionnaire, SOTEFI clarified its request in various exchanges with the investigating authority.
>
> …
>
> Another panel considered that an exporter was not obliged to request an adjustment in its response to the initial questionnaire and could do so later in the investigation. We agree. However, we believe that there remains a requirement to provide the information requested by the authority, provided that the burden of proof imposed on the exporter is not 'unreasonable', within the meaning of the last sentence of Article 2.4 of the Anti-Dumping Agreement. We note that in the present dispute, Tunisia does not assert that the burden of proof imposed by MIICEN was 'unreasonable'."[266]

205. Based on this, the Panel found that the investigating authority had complied with Article 2.4 and that the interested parties had not met their evidential obligation:

> "In view of the foregoing, it therefore appears that the investigating authority did comply with the requirement of Article 2.4 of the Anti-Dumping Agreement by indicating to SOTEFI what information was necessary to ensure a fair comparison. However, the record shows that SOTEFI never provided the information requested by MIICEN and therefore failed to 'demonstrate' that licences affected price comparability within the meaning of Article 2.4 of the Anti-Dumping Agreement.
>
> Tunisia insists that, in this case, SOTEFI was not asking for a precise adjustment for each transaction, but for an allowance to be made for licences in the classification of the exercise books by model. It asserts that, unlike a strict adjustment, the creation of a classification by model at the start of the investigation would not require specific information on the magnitude of the price difference.
>
> As noted above, we are not convinced that how an authority decides to make allowances for differences affecting price comparability (by developing a typology of different models or by making adjustments) changes the burden of proof falling on the authority and the interested parties, respectively. It is up to the party seeking an adjustment to 'demonstrate' that there is a difference and that it affects price comparability. It is also incumbent on this party to respond 'as constructively as possible' to requests for

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[265] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.116-7.117.
[266] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.120, 7.123 and 7.125.

information made by the authority, provided that it does not impose an unreasonable burden of proof."[267]

206. Based on the foregoing reasons, the Panel concluded that Morocco had not violated Article 2.4. Having found no inconsistency with Article 2.4, the Panel declined to consider whether there was a consequential violation of Article 2.1.[268] The Panel in *Morocco – Definitive AD Measures on Exercise Books (Tunisia)* also considered whether the investigating authority's application of an erroneous formula in the calculation of the margin of dumping was inconsistent with the "fair comparison" obligation in Article 2.4. First, the Panel assessed the investigating authority's methodology for calculating the margin of dumping, as follows:

> "As regards the formula's numerator, the spreadsheets show that MIICEN compared, for each exercise book model, the normal value and the export price and, in doing so, obtained a dumping amount per model that it then expressed as a percentage of the export price. The problem identified by Tunisia does not stem from this intermediate calculation, but from the fact that MIICEN then, for each model, multiplied the exported amounts by the percentage of dumping obtained per model and presented this result as the 'dumping amount' for each model. This result does not, however, represent the value of dumping per model, but simply a portion of the exports of each model. The sum of these 'dumping amounts' is therefore, in reality, only a sum of fractions of exports by model. This figure is, logically, irrelevant to the calculation of a margin of dumping.
>
> …
>
> The result of this division does not allow for the expression of a percentage of dumping for the product exported by each producer/exporter, insofar as it represents the division of a partial export volume by the total volume of exports. The calculation made by MIICEN does not therefore represent a margin of dumping.
>
> In making this finding, we are not questioning the fact that a margin of dumping can be expressed in different ways and, in particular, in *ad valorem* form, i.e. by expressing the dumping value as a percentage of the export value, or in a specific form, i.e. in a unit of currency per unit of volume. What is at issue here is the ability of MIICEN's formula to express dumping when using as a numerator a figure that does not represent an amount of dumping but rather an irrelevant export volume."[269]

207. The Panel found that the "fair comparison" obligation in Article 2.4 applies to the calculation of the margin of dumping:

> "Having established that the formula used by MIICEN was erroneous, there are two questions we must address in order to respond to Tunisia's claim under Article 2.4 of the Anti-Dumping Agreement:
>
> > a. whether the fair comparison obligation really applies to the issue of the calculation of margins of dumping, which is more specifically covered by the second subparagraph of Article 2.4 (Article 2.4.2); and, if so,
> >
> > b. whether the error identified by Tunisia in the mathematical formula used to calculate the margin of dumping really violates the fair comparison principle set out in Article 2.4.
>
> …
>
> In the present case, we note that the comparison between the normal value and the export price of each exercise book model is not - in itself - the root of the problem: this comparison was made for each model sold and gave rise to the establishment of

[267] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.126-7.128.
[268] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.129 and 7.133.
[269] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.157 and 7.159-7.160.

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> intermediate margins expressed in percentage terms, which are accurate. The problem identified by Tunisia instead concerns the aggregation of these intermediate margins and, in particular, the use, as numerator, of a figure that is irrelevant to the calculation of the margin of dumping.
>
> …
>
> We agree with the finding that the fair comparison obligation applies not only to the comparison made between the normal value and the export price for each model or transaction, but also to the aggregation of these individual margins so as to reflect a margin of dumping for the product as a whole. From this perspective, we therefore agree with Tunisia's argument that the fair comparison principle does apply to the mathematical formula used by MIICEN to calculate the margin of dumping of the two Tunisian exporters."[270]

208. Having found that the "fair comparison" obligation applied to the calculation of the margin of dumping, the Panel concluded that the investigating authority's erroneous calculation had violated Article 2.4:

> "In this case, we found that the calculation methodology used was incapable of:
>
> > a. correctly expressing dumping, i.e. determining whether Tunisian exercise books are introduced into the commerce of Morocco at less than their normal value; and
> >
> > b. yielding a result that correctly reflects the margin of dumping for each producer/exporter.
>
> This is therefore the nature of the comparison made by MIICEN, which (a) by not permitting dumping to be expressed correctly, i.e. by not permitting a determination as to whether Tunisian exercise books are introduced into the commerce of Morocco at less than their normal value; and (b) by not reflecting the reality of the dumping attributable to each exporter, is incapable of ensuring a fair comparison.
>
> In the light of the foregoing, we therefore conclude that MIICEN's use of an erroneous formula did indeed violate the fair comparison obligation contained in Article 2.4 of the Anti-Dumping Agreement."[271]

209. However, the Panel declined to make a finding that Morocco's violation of Article 2.4 consequently violated its obligations under Article 2.1:

> "We noted above that other panels and the Appellate Body have regarded Article 2.1 of the Anti-Dumping Agreement as a purely definitional provision, i.e. as not itself imposing obligations. Furthermore, we consider that establishing a violation of Article 2.1, even a consequential one, requires the requesting party to explain how the measure at issue specifically violates that provision of the Anti-Dumping Agreement.
>
> In the present case, we consider that Tunisia's arguments in support of its claim under Article 2.1 are the same as those developed in support of its claim under Article 2.4 of the Anti-Dumping Agreement. In our view, they are not sufficient to establish what Morocco's obligations are under Article 2.1, or how these obligations were violated on account of the error made by MIICEN in the choice of mathematical formula for calculating the margin of dumping.
>
> In view of the foregoing, we therefore conclude that Tunisia has demonstrated that Morocco violated Article 2.4 of the Anti-Dumping Agreement by using an erroneous mathematical formula to calculate the margin of dumping of the Tunisian exporters. We

[270] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.161, 7.166, and 7.168.

[271] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.177-7.179.

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> also conclude, however, that Tunisia has failed to demonstrate any violation of Article 2.1 of the Anti-Dumping Agreement."[272]

210. In *US – Zeroing (EC),* the Appellate Body recalled and affirmed Panel's view that "the 'fair comparison' language in the first sentence of Article 2.4 creates an independent obligation with the implication that this 'fair comparison' requirement is not defined exhaustively by the specific requirements set out in the remainder of that paragraph."[273]

211. With regard to the meaning of "fair comparison", the Appellate Body in *US – Zeroing (EC)* agreed with the Panel that the legal rule set out in the first sentence of Article 2.4 "is expressed in terms of a general and abstract standard," which implies that "this requirement is also applicable to proceedings governed by Article 9.3."[274]

212. The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* found that the view of the Panel below that Article 2.4.2 was *lex specialis* was "not a correct representation of the relationship between the two provisions [with Article 2.4]. Rather, the introductory clause to Article 2.4.2 expressly makes it '[s]ubject to the provisions governing fair comparison' in Article 2.4."[275] The Appellate Body summarized by saying:

> "In sum, the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination of dumping more likely. This way of calculating cannot be described as impartial, even-handed, or unbiased. For this reason, we do not consider that the calculation of 'margins of dumping', on the basis of a transaction-to-transaction comparison that uses zeroing, satisfies the 'fair comparison' requirement within the meaning of Article 2.4 of the *Anti-Dumping Agreement*."[276]

213. The Panel in *US – Zeroing (Japan)* exercised judicial economy regarding Japan's claim that model zeroing procedures in the context of original investigations were inherently biased and therefore inconsistent with the obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement given that the Panel had found model zeroing was inconsistent with Article 2.4.2. The Panel considered Japan's claim that simple zeroing in the context of original investigations was inherently biased and therefore inconsistent with the obligation to make a "fair comparison" under Article 2.4 of the Anti-Dumping Agreement. Japan interpreted the scope and substantive requirement to make a "fair comparison" as a basis for a general prohibition on zeroing. The Panel disagreed:

> "[A] general prohibition of zeroing would undermine the effectiveness of provisions in Article 9 that in our view clearly permit Members to assess anti-dumping duties on a transaction-specific basis. There is nothing in the second sentence of Article 2.4.2 or in Article 9 that indicates that these provisions establish exceptions to the 'fair comparison' requirement of Article 2.4. Therefore, if the 'fair comparison' requirement operates to prohibit zeroing, it necessarily also applies in the context of these provisions. Consequently, it is impossible, in our view, to reconcile the proposition that the 'fair comparison' requirement must be interpreted to create a general prohibition of zeroing with the second sentence of Article 2.4.2 and the provisions on duty assessment in Article 9 in a manner consistent with the requirement of effective treaty interpretation."[277]

214. The Panel in *US – Zeroing (Japan)* found that by maintaining simple zeroing procedures in the context of original investigations the US Department of Commerce did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement.[278] The Appellate Body in *US – Zeroing (Japan)* reversed this finding of the Panel, based on its reasoning in *US – Softwood Lumber V (Article 21.5 – Canada)*

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[272] Panel Report, *Morocco – Definitive AD Measures on Exercise Books (Tunisia)*, paras. 7.182-7.184.
[273] Appellate Body Report, *US – Zeroing (EC)*, para. 139.
[274] Appellate Body Report, *US – Zeroing (EC)*, para. 146.
[275] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 136.
[276] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para 142. Adopted and followed e.g. in Panel Report, *US – Shrimp (Viet Nam)*, para. 7.93.
[277] *US – Zeroing (Japan)* para. 7.159.
[278] *US – Zeroing (Japan)* para. 7.161.

(see also paragraph 212 above). The Appellate Body also reversed the Panel in Japan's "as such claim" on periodic reviews (Article 9.3) and new shipper reviews (Article 9.5), finding that Article 2.4 and the obligation to make a "fair comparison" would not be met if anti-dumping duties were assessed in a manner which resulted in anti-dumping duties being collected from importers in excess of the amount of the margin of dumping of the exporter.[279]

1.6.3.2 Relationship with other sentences

215. In *US – Stainless Steel (Korea)*, the Panel having found a violation of the third and fourth sentence of Article 2.4 in respect of certain allowances, considered that it was "not … necessary to examine Korea's claims that the United States' treatment of bad debt breached a more general 'fair comparison' requirement under Article 2.4 of the *AD Agreement*."[280]

1.6.4 Second sentence

1.6.4.1 "same level of trade"

216. The Panel in *EU – CVD/AD on SSCRFP (Indonesia)* reasoned that the delivery term of sale constitutes an important indicator in determining whether comparisons have are made at the same level of trade:

> "We agree with view that while Article 2.4 of the Anti-Dumping Agreement does not define the term 'level of trade', the connected phrase 'normally at the ex-factory level' indicates that the delivery term of sale constitutes an important basis for understanding whether or not comparisons are made at the 'same' level of trade."[281]

217. In *EU – CVD/AD on SSCRFP (Indonesia)*, Indonesia alleged a violation of Article 2.4 because the EU Commission made price comparisons that had been adjusted to correspond to delivery at multiple locations. The Panel disagreed:

> "We understand Indonesia's claim under the second sentence of Article 2.4 of the Anti-Dumping Agreement to be that the Commission acted inconsistently with its obligation to make comparisons at 'the same level of trade' when it made its comparisons on the basis of export prices and normal values that had been adjusted to correspond to delivery at multiple locations (i.e. the Surabaya and Morowali warehouses) at the 'premises' of the seller rather than a singular delivery location (i.e. the Morowali warehouse).
>
> …
>
> We are not persuaded that the text of the second sentence of Article 2.4 of the Anti-Dumping Agreement necessarily requires an investigating authority to define the same level of trade to be based on a singular delivery location in all circumstances. The Panel is of the view that sales made at the level of the ex-works delivery term could permissibly be considered by an investigating authority to be made at the 'same' level of trade even though a singular delivery location is not specified. In particular, we note that the ex-works delivery term allows the place of delivery to be specified, and that both parties agree that ex-works is a legitimate delivery term upon which to base the level of trade within the meaning of Article 2.4. Accordingly, while ex-works Surabaya warehouse and ex-works Morowali warehouse represent different delivery locations, both are properly understood to be ex-works sales. We consider that the ex-works level based on the 'premises' of the seller is not contrary to the common understanding of the term 'ex-works' put forward by either party, as both parties acknowledge that the ex-works delivery term allows the delivery location to be specified. Neither does the term ex-factory reference in Article 2.4 necessarily imply that a singular delivery location is mandatory to make the comparison at the same level because a seller could operate multiple factories that produce the merchandise at issue. We also consider that

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[279] Appellate Body Report, *US – Zeroing (Japan)*, para. 168.
[280] Panel Report, *US – Stainless Steel (Korea)*, para. 6.104.
[281] Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, para. 7.583.

> Indonesia's acknowledgement that the terms 'ex-works' and 'ex-factory' are commonly understood to be the same (while noting that there is a technical distinction between them) does not provide a textual basis for the Panel to conclude that the Commission's interpretation of the second sentence of Article 2.4 is an impermissible one.
>
> The Panel finds further support for this conclusion based on the fact that the third sentence of Article 2.4 of the Anti-Dumping Agreement includes the 'level of trade' as among the reasons that an authority may need to make due allowance to account for differences demonstrated to affect price comparability. The inclusion of the phrase 'level of trade' in the third sentence suggests to us that differences affecting price comparability may relate to additional delivery specifications. To the extent that differences between delivery specifications result in differences that affect price comparability, such differences can appropriately be addressed using 'due allowances' under the third sentence of Article 2.4 where such differences are not assumed to exist but instead must be demonstrated to exist."[282]

218. The Panel in *EU – CVD/AD on SSCRFP (Indonesia)* rejected Indonesia's allegation of violation of Article 2.4, second sentence, stemming from the fact that the EU Commission considered a warehouse that was rented by the Indonesian exporter to be part of the exporter's "premises":

> "Indonesia asserts that 'the rented Surabaya warehouse, located more than 1,000km away from IRNC's production facility (in Morowali, on another island), does not form part of IRNC's premises'. This issue arises from the Commission's use of the ex-works delivery term with the delivery location specified as the 'premises' of the seller as the basis for the level of trade that is the 'same level of trade' at which comparisons between export prices and normal values are made to determine margins of dumping, and is addressed above. We do not find any basis upon which to reject the Commission's determination that warehouses that are rented or owned by IRNC form part of IRNC's premises.
>
> We note that the Commission's determination also referenced the fact that sales contracts for export transaction allowed 'transshipment' by the trading company as the goods were transported to the European Union, in addition to the fact that the trading company incurred transport and warehousing expenses for export transactions while IRNC incurred such expenses for domestic transactions. The Commission further determined that 'an adjustment to the export price does not automatically entail an adjustment to the normal value, and that such adjustment to the normal value needs to be duly justified, based on facts and evidence, by the party requesting it'. The Panel agrees that an assertion of 'sameness' is not, by itself, sufficient to justify an allowance on the domestic side because expense-related evidence relating to domestic transactions – including evidence relating to the role played by trading companies in the sales transaction – will necessarily differ from export transactions."[283]

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1.6.4.2 "sales made at as nearly as possible the same time"

219. The Panel in *US – Stainless Steel (Korea)* rejected the United States argument that the "same time" requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods when calculating the dumping margin pursuant to the weighted average/weighted average method in Article 2.4.2, first sentence. See paragraph 289 below.

220. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, Costa Rica argued that the Dominican Republic's investigating authority had "used two different periods to establish the export price and the normal value" by including exports invoiced prior to the period of investigation in its calculation of the export price for the purposes of the dumping margin calculation. Hence, according to Costa Rica, the investigating authority had failed to make a fair comparison "in respect of sales made at as nearly as possible the same time" as provided in the second sentence of Article 2.4. The Dominican Republic disagreed, insisting that "nothing in Articles 2.1 or 2.4 requires

[282] Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, paras. 7.589, 7.591-7.592.
[283] Panel Report, *EU – CVD/AD on SSCRFP (Indonesia)*, paras. 7.595-7.596.

an investigating authority to use the date of the contract or of an invoice in order to determine which transactions must be included (or not) in its dumping analysis".[284]

221. The Panel found the approach taken by the investigating authority in the comparison of export price and normal value to be inconsistent with Article 2.4. The Panel stated as follows:

> "[The] first sentence of Article 2.4 requires the investigating authority to ensure that the comparison between the export price and the normal value is 'fair'. Among other meanings, the term 'fair' implies a lack of bias. Article 2.4 establishes certain requirements that must be met to ensure that the comparison is fair. First, the authority must ensure that the comparison is fair by making the comparison in respect of sales made at as nearly as possible the same time, as required by the second sentence of Article 2.4. In addition, the authority must consider differences, if any, which affect comparability, particularly elements that have an impact on the price of transactions.
>
> We do not agree with the Dominican Republic's statements that the CDC 'used the same period for both domestic market and export sales', or that the CDC used a 'reasonable' or 'systematically applied' criterion in the manner in which it decided which export sales and which domestic sales belonged to the POI.
>
> …
>
> We are of the view that the CDC failed to comply with the obligation in the second sentence of Article 2.4 to make a comparison between the export price and the normal value 'in respect of sales made at as nearly as possible the same time', given that it considered sales made in different periods, one to determine the normal value and another to determine the export price. We also understand that to properly ensure that the comparison is based on sales made at as nearly as possible the same time, the Investigating Authority, after having established the POI, should have chosen the sales on the basis of the same criteria. This means that as the normal value was established on the basis of the invoice date, the export price should have followed the same approach".[285]

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222. In its reasoning, the Panel in *Dominican Republic – AD on Steel Bars (Costa Rica)* also addressed the respondent's argument as to the alleged absence of any "clear legal basis in the text of the Anti-Dumping Agreement" that would require an investigating authority to apply "parallelism" when selecting the criteria applied to the comparison between the export price and normal value. The Dominican Republic contended that the "temporal aspect" of the comparison referred to in Article 2.4 may be relevant for the dumping margin calculation based on the transaction-to-transaction comparison, but that it "does not have a particular role to play in the methodology of a comparison between the weighted average normal value and the weighted average export price".[286] The Panel disagreed:

> "The fact that Article 2.4 allows for an average-to-average comparison does not mean that Article 2.4 does not establish requirements in terms of the particular sales considered and used to calculate the averages. The premise of the Dominican Republic's argument cannot be reconciled with the text of the provision. We also find no support for this argument in *US - Stainless Steel (Korea)*, to which the Dominican Republic refers and which expressly concluded that:
>
> > [W]e consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires as a general matter that *the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same*.
>
> As discussed above, the use of different criteria to determine the normal value and export price resulted in different time periods. However, the use of the weighted

[284] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, paras. 7.35-7.40.
[285] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, paras. 7.44-7.45, and 7.55.
[286] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, para. 7.58.

> average-to-weighted average comparison methodology does not allow the Investigating Authority to use different criteria to establish which sales will be considered within the POI in order to determine both the normal value and the export price. Accepting otherwise would mean compromising the fair comparison for the purposes of the margin of dumping calculation."[287]

1.6.5 Third sentence: "Due allowance"

1.6.5.1 "in each case, on its merits"

223. In *Argentina – Ceramic Tiles*, the Panel analysed the meaning of the requirement to make "due allowance in each case, on its merits" for differences in physical characteristics affecting price comparability. The Panel concluded that this requirement "means at a minimum that the authority has to evaluate identified differences in physical characteristics" and not only the most important ones:

> "Article 2.4 places the obligation on the investigating authority to make due allowance, in each case on its merits, for differences which affect price comparability, including differences in physical characteristics. The last sentence of Article 2.4 provides that the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison. We believe that the requirement to make due allowance for such differences, in each case on its merits, means at a minimum that the authority has to evaluate identified differences in physical characteristics to see whether an adjustment is required to maintain price comparability and to ensure a fair comparison between normal value and export price under Article 2.4 of the *AD Agreement*, and to adjust where necessary.
>
> …
>
> … We do not agree with Argentina's view that Article 2.4, through the qualifying language that due allowance shall be made 'in each case' 'on its merits', permits an investigating authority to adjust only for the most important of the physical differences that affect price comparability, even if making the remaining adjustments would have been, as the parties agree, complex. The DCD chose not to conduct a model-by-model comparison and it was then left to find other means to account for the remaining physical differences affecting price comparability. It did not do so."[288]

224. In *Egypt – Steel Rebar*, the Panel read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability:

> "[W]e read Article 2.4 as explicitly requiring a fact-based, case-by-case analysis of differences that affect price comparability. In this regard, we take note in particular of the requirement in Article 2.4 that '[d]ue allowance shall be made *in each case, on its merits*, for differences which affect price comparability' (emphasis added). We note as well that in addition to an illustrative list of possible such differences, Article 2.4 also requires allowances for 'any other differences which are also *demonstrated* to affect price comparability' (emphasis added). Finally, we note the affirmative information-gathering burden on the investigating authority in this context, that it 'shall indicate to the parties in question *what information is necessary* to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties' (emphasis added). In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between

[287] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica)*, paras. 7.60-7.61.
[288] Panel Report, *Argentina – Ceramic Tiles*, paras. 6.113 and 6.116.

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> interested parties and the investigating authority, and must be done on a case-by-case basis, grounded in factual evidence."[289]

225. The Panel in *EC – Tube or Pipe Fittings* considered that Article 2.4 did not set forth any particular methodology for calculating adjustments and that a Panel could therefore only examine whether the investigating authority acted in an unbiased and even-handed manner when calculating the adjustments made:

> "An investigating authority must act in an unbiased, even-handed manner and must not exercise its discretion in an arbitrary manner. This obligation also applies where an investigating authority confronts practical difficulties and time constraints. We do not find, in Article 2.4, or in any other relevant provision in the Agreement, any specific rules governing the methodology to be applied by an investigating authority in calculating adjustments. In the absence of any precise textual guidance in the Agreement concerning how adjustments are to be calculated, and in the absence of any textual prohibition on the use of any particular methodology adopted by an investigating authority with a view to ensuring a fair comparison, we consider that an unbiased and objective authority could have applied this methodology applied by the European Communities and calculated this adjustment on the basis of the actual data in the record of this investigation. Moreover, Tupy had an opportunity to substantiate its claimed adjustment."[290]

226. In *Colombia – Frozen Fries*, the Panel found that the Colombian investigating authorities' rejection in the original investigation of an exporter's request for an adjustment was inconsistent with the fair comparison obligation under Article 2.4:

> "The above review of the relevant facts and findings indicates that MINCIT's reasons for denying the requested adjustment evolved during the underlying investigation. In the preliminary determination, MINCIT denied the request on grounds that it was insufficiently substantiated. Subsequently, in its responses to the comments on essential facts, MINCIT no longer asserted that it had denied the adjustment because of insufficient substantiation but stated, instead, that the adjustment was incompatible with the format of MINCIT's preferred pricing data. MINCIT's explanations in the responses to the comments on essential facts marked the last instance during the investigation when the authority expressly considered the matter at issue; the final determination does not contain any new or different reasoning on this issue, nor does it indicate that MINCIT reversed or modified the reasoning set forth in its responses to the comments on essential facts."[291]

227. In coming to this conclusion, the Panel in *Colombia – Frozen Fries* declined to consider the information on the record of the administrative review that was conducted subsequent to the original investigation:

> "In light of Colombia's statements that the underlying investigation and the revocation proceeding, as well as their respective records, are separate and distinct from one another, we do not consider it appropriate to rely on the content of the revocation decision to conclude that the record of the investigation demonstrates that MINCIT rejected Agrarfrost's adjustment because of insufficient substantiation. This is particularly true given that the reason that MINCIT offered for rejecting Agrarfrost's adjustment in the revocation decision differs entirely from the reason MINCIT provided in response to Agrarfrost's comments on the essential facts disclosure (namely, that the DIAN database did not permit the authority to conduct a product-level cost comparison). We are therefore of the view that, contrary to Colombia's assertion, MINCIT's revocation decision does not 'complement', and thus cannot 'be read in conjunction with', the statements made by MINCIT on this issue during the final stage of the investigation."[292]

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[289] Panel Report, *Egypt – Steel Rebar*, para. 7.352.
[290] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.178.
[291] Panel Report, *Colombia – Frozen Fries*, para. 7.272.
[292] Panel Report, *Colombia – Frozen Fries*, para. 7.269.

228. The Panel in *Australia – AD/CVD on Certain Products (China)* found no error in the investigating authority's use of averaging in the calculation of certain costs, rather than using actual figures for each transaction:

> "We recognize, as did Primy, that, since the costs of domestic accessories varied across different product codes in an MCC, the ADC's methodology of deducting MCC-weighted-average accessory costs from the normal value logically has the distortive effect of over-deducting accessory costs from some product codes and under-deducting them from other product codes within the MCC. China's principal argument as to why such distortions led to an unfair comparison is that the averaging methodology did not correctly reflect the actual difference in accessory costs and thus increased the dumping margin. In response to a question from the Panel as to how the averaging methodology increased the dumping margin in the present case, China refers to and elaborates on the example of table 5 in Primy's submission as mentioned above. In particular, China argues that the use of averaging has the impact of (a) 'excluding domestic products with lower accessory costs'; (b) 'retaining domestic products with higher accessory costs'; and (c) 'comparing domestic products with higher accessory costs with the export price, where adjustment to the domestic product normal value for accessories was only based on the average accessory costs for the entire domestic product sales within the MCC, instead of using the actual, and higher, accessory costs associated with those domestic products sold that formed the basis of the normal value comparison, resulting in an insufficient 'deduction' or 'downward adjustment' to the normal value'. We note that table 5 contained not only instances for which the costs are higher than the average, but also instances where accessories costs are lower than the average. In our view, this result is merely a characteristic of averaging. We do not consider that an objective and impartial investigating authority would necessarily refrain from averaging transactions in this manner simply because different results were reached for individual transactions (or even the overall adjustment) than those that would have been reached without averaging. We further note that there is no claim that the averaging methodology itself was used in a biased manner against certain data sets but not others."[293]

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1.6.5.2 "differences which are demonstrated to affect price comparability"

229. In *US – Hot-Rolled Steel*, the Appellate Body ruled that the investigating authorities cannot exclude any differences affecting price comparability from being the object of an allowance:

> "Article 2.4 of the *Anti-Dumping Agreement* provides that, where there are 'differences' between export price and normal value, which affect the 'comparability' of these prices, '[d]ue allowance shall be made' for those differences. The text of that provision gives certain examples of factors which may affect the comparability of prices: 'differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences'. However, Article 2.4 expressly requires that 'allowances' be made for '*any other differences* which are also demonstrated to affect price comparability.' (emphasis added) There are, therefore, no differences 'affect[ing] price comparability' which are precluded, as such, from being the object of an 'allowance'."[294]

230. The Panel in *US – Softwood Lumber V* considered that there is no requirement to adjust for any and all differences but rather only those differences demonstrated to have affected the price comparability:

> "We consider that Article 2.4 does *not* require that an adjustment be made automatically in all cases where a difference is found to exist, but only where – based on the merits of the case – that difference is demonstrated to affect price comparability. An interpretation that an adjustment would have to be made automatically where a difference in physical characteristics is found to exist would render the term 'which affect price comparability' nugatory. Further, such an interpretation would make little

[293] Panel Report, *Australia – AD/CVD on Certain Products (China)*, para. 7.241.
[294] Appellate Body Report, *US – Hot-Rolled Steel,* para. 177.

sense in practice, as not all differences in physical characteristics necessarily affect price comparability."[295]

231. Reflecting further on the meaning of the term *comparability* in Article 2.4, the Panel in *US – Softwood Lumber V* concluded that an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability:

> "The identified differences concerning the products sold in the two markets must affect the *comparability* of normal value and export price for the obligation to make due allowance to apply. Article 2.4 does not define what *comparability* means, but includes a non-exhaustive list of factors which may affect price comparability. Comparability is a term which, in our view, cannot be defined in the abstract. Rather, an investigating authority must, based on the facts before it, on a case-by-case basis decide whether a certain factor is demonstrated to affect price comparability. We can imagine of situations where although differences exist, they do not affect price comparability. For instance, this could occur where in the exporting country all cars sold are painted in red, while cars exported are all black. The difference is obvious; in fact, it is one of those differences listed in Article 2.4 itself – a difference in physical characteristics. However, there might be no variable cost difference among the two cars because the cost of the paint – whether red or black – might be the same. If instead of differences in cost, we were looking at market value differences, we might reach the same conclusion if, either the seller or the purchaser, would be willing to sell or purchase at the same price, regardless whether the car is red or black."[296]

232. The Panel in *Korea – Certain Paper* noted that the fact that a trading company is involved in the distribution of the subject product either in the export or the domestic market does not in and of itself mean that there is a difference that affects price comparability and that an adjustment has to be made under Article 2.4:

> "The interested party claiming such an adjustment has to demonstrate that the involvement of the trading company gives rise to a difference that affects price comparability."[297]

233. The Appellate Body in *US – Zeroing (EC)* found that the third sentence of Article 2.4 applies *a contrario* and that, accordingly, it implies that allowances should not be made for differences that do not affect price comparability. It also concluded that the principle set out in the third sentence of Article 2.4, including its *a contrario* application, does not cover all adjustments, but only adjustments made for those differences that fall within the scope of that principle:

> "[I]f allowances could be made for differences not affecting price comparability, the purpose of the requirement of the third sentence of Article 2.4 would be undermined. Therefore, … this sentence implies that allowances should not be made for differences that do not affect price comparability." [298]

234. The Panel in *EC – Fasteners (China)* considered a claim that the anti-dumping authorities had violated Article 2.4 by denying certain adjustments. The Panel noted that "[t]here is no methodological guidance in Article 2.4 as to how due allowance for differences affecting price comparability is to be made."[299] It found that although the investigating authorities are obligated to make a fair comparison:

> "[U]nder Article 2.4, it is the investigating authorities, not the foreign exporters, that must ensure a fair comparison between the normal value and the export price. This does not, however, mean that the exporters have no obligation in this process. Although the obligation to make a fair comparison lies with the investigating authorities, it is for the exporters, who would be expected to have the necessary knowledge of the product in question, to make substantiated requests for adjustments in order to ensure such

[295] Panel Report, *US – Softwood Lumber V*, para. 7.165.
[296] Panel Report, *US – Softwood Lumber V*, para. 7.357.
[297] Panel Report, *Korea – Certain Paper*, para. 7.147.
[298] Appellate Body Report, *US – Zeroing (EC)*, para. 156.
[299] Panel Report, *EC – Fasteners (China)*, para. 7.297.

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> comparison. If it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment. Moreover, the fair comparison obligation does not mean that the authorities must accept each request for an adjustment. The authorities 'must take steps to achieve clarity as to the adjustment claimed and then determine **whether and to what extent that adjustment is merited'**. If no adjustment is requested, or if an adjustment is requested with respect to a difference that is not demonstrated to affect price comparability, or if the authority determines that an adjustment is not merited, no adjustment need be made. It follows that, in order to make a *prima facie* case of violation of Article 2.4 in this dispute, China has to demonstrate to the Panel that an adjustment should have been made with respect to (1) a difference (2) that was demonstrated to affect price comparability between the normal value and the export price, and that the Commission failed to make the adjustment."[300]

235. The Panel in *EC – Fasteners (China)* rejected claims by China under Article 2.4 on the basis that no evidence had been proffered to the investigating authority to demonstrate that differences in categorization or quality affected price comparability.[301] The Appellate Body upheld the Panel's evaluation of the record evidence, but found that the Panel had erred in its application of Article 2.4 by failing to take into account the last sentence of Article 2.4, relevant facts in the case and its finding under Article 6.4; by failing to communicate the basis for determining normal value in a timely manner, the investigating authority had deprived the Chinese producers of the ability to request adjustments. See paragraph 252 below. In this connection, the Appellate Body commented as follows regarding the duties under Article 2.4 of the investigating authority and the interested parties:

> "The Panel, quoting the panel's finding in *EC – Tube or Pipe Fittings*, found that the investigating authorities 'must take steps to achieve clarity as to the adjustment claimed and whether and to what extent that adjustment is merited'. Logically, as a step 'to achieve clarity as to the adjustment claimed', authorities must first evaluate the differences identified to assess whether they affect price comparability. Therefore, we do not consider that the Panel's interpretation of Article 2.4 differs from China's view that an investigating authority must evaluate identified differences and then make adjustments. We are less convinced, however, by China's assertion that the authority must evaluate any identified differences, regardless of whether a request for adjustment has been made. It is likely that, in an anti-dumping investigation, the differences between the products sold in the foreign producer's domestic and export markets would be numerous. Differences between the products, however, would not always affect price comparability and require adjustments by the authorities. China's assertion may place an undue burden on an investigating authority to assess each difference in order to determine whether adjustment is needed in every case, even without a request by the interested party."[302]

236. The Panel in *EU – Fatty Alcohols (Indonesia)* did not find an error in the EU Commission's treatment as a difference affecting price comparability of the mark-up paid by a producer to another company that engaged in the producer's export sales. This finding was based, among others things, on the finding that the producer incurred the same costs with regard both to its domestic and export sales, and that the amount paid to the other company was an additional cost incurred with regard to export sales only:

> "Further, we do not consider it unreasonable for the EU authorities to have inferred from PT Musim Mas' direct invoicing of domestic sales that PT Musim Mas possessed its own sales and marketing capacity. Such an understanding is corroborated by the charts in PT Musim Mas' questionnaire response indicating that it had a marketing branch, as well as entries in its P&L for **[***]** suggests that PT Musim Mas incurred internally the same type of costs for both categories of sales. From this, it could be reasonably inferred that PT Musim Mas incurred the same costs for selling and marketing expenses for both its direct sales to domestic customers and its sales (or transfers) to ICOF-S. It follows that the pricing component referred to as the 'ICOF Margin' in the Sale and Purchase

[300] Panel Report, *EC – Fasteners (China)*, para. 7.298.
[301] Panel Report, *EC – Fasteners (China)*, paras. 7.303, 7.306, and 7.311.
[302] Appellate Body Report, *EC – Fasteners (China)*, para. 517.

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> Agreement between PT Musim Mas and ICOF-S could reasonably be understood to reflect an additional cost, for which there is no equivalent on the domestic side, thereby giving rise to a difference for which an adjustment was required."[303]

237. In coming to this conclusion, the Panel also noted, and found no error in, the Commission's finding that the company engaged in export sales functioned like an agent working on a commission basis:

> "On the basis of the foregoing, we consider that the EU authorities did not act inconsistently with Article 2.4 of the Anti-Dumping Agreement by considering whether 'ICOF-S had functions similar to an agent working on a commission basis' and by reaching this factual finding on the basis of PT Musim Mas' direct sales, ICOF-S' trade in products of unrelated entities, and the terms of the Sale and Purchase Agreement between PT Musim Mas and ICOF-S. On the contrary, as our review above demonstrates, these aspects of the EU authorities' explanation corroborate and confirm the initial factual finding on which they concluded that the factor at issue constituted a difference affecting price comparability.
>
> In light of the foregoing, we conclude that the EU authorities had a sufficient evidentiary basis – encompassing both of the factual findings and their attendant evidence as discussed in the foregoing sections – for establishing that the mark-up was a factor that impacts the prices of the product and that was linked exclusively to the export side, therefore constituting a difference which affects price comparability under Article 2.4."[304]

238. The Panel in *EU – Fatty Alcohols (Indonesia)* held that the existence of a "single economic entity" did not determine whether a mark-up qualified as a difference affecting price comparability within the meaning of Article 2.4. In so finding, the Panel also disagreed that transactions between related parties could never affect the price of the product at issue:

> "Based on the foregoing, we do not consider the existence of what Indonesia denotes as a 'single economic entity' to be the 'dividing line' between an 'objective expense' and 'an internal shifting of funds/allocation of profits without any implication for price comparability', and therefore to be dispositive of whether a given payment is a difference which affects price comparability under Article 2.4 of the Anti-Dumping Agreement. Accordingly, we do not share Indonesia's view that transactions between related parties, such as PT Musim Mas and ICOF-S, can never affect the price of the product at issue to a final buyer. For the same reasons, we cannot accept the assertion that a payment cannot constitute a difference which affects price comparability simply because 'the economic benefit of the sale accrues to the [single economic entity] as a whole'. The fact that the benefit of a sale to a final buyer might accrue to an overall entity does not negate the possibility that a given expense that is tied only to export or domestic sales (or to both in different amounts) could be incurred within that entity, with the potential to affect price comparability.
>
> Rather, in our view, the 'dividing line' between: (a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision; and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected, is dependent on the particular situation and evidence before an investigating authority in a given case where the proper characterization of the payment in question is at issue."[305]

239. The Panel in *EU – Fatty Alcohols (Indonesia)* rejected the argument that the SG&A expenses and profits of a company involved in the sale of a product could not be treated as a difference affecting price comparability within the meaning of Article 2.4:

> "However, we disagree that the SG&A and profit of an entity involved in the sale of a product under investigation cannot, in any circumstance, be treated as a difference

[303] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.84.
[304] Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.96-7.97.
[305] Panel Report, *EU – Fatty Alcohols (Indonesia)*, paras. 7.105-7.106.

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> which affects price comparability. In particular, we consider that the intervention of downstream participants in the sales chain may result in 'additional costs and profit' which are likely to affect price comparability across markets. From an accounting point of view, these elements of the price would be characterized as the SG&A and profit of the downstream participant, but they would also be characterized as a direct selling expense for the producer/exporter concerned. We also recall the Appellate Body's statement in *US – Hot-Rolled Steel* that '[t]here are … no differences 'affect[ing] price comparability'' which are precluded, as such, from being subject to an allowance. In the context of Indonesia's claim, the mark-up must be viewed as a whole and not from the perspective of its constituent elements. In addition, it is apparent from the record that the EU authorities only disaggregated the mark-up into components for profit and SG&A in order to quantify the proper amount of the adjustment, having already concluded that the adjustment for the mark-up was warranted."[306]

240. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator stated, in the context of a claim raised under Article 6.2 of the DSU, that the fair comparison obligation may be violated by rejecting to make a due allowance or by making an unwarranted adjustment:

> "The text of Article 2.4 and its interpretation thus indicate that not only a lack of due allowance (e.g. MINCIT's refusal of Mydibel's request to make due allowance for higher packaging costs for domestic sales), but also an adjustment that is unwarranted (e.g. MINCIT's asymmetrical deduction of packaging costs only on the export price side), could lead to a violation of the principle of 'fair comparison'. Both types of conduct on the part of an authority concern differences affecting price comparability that could have a bearing on the ability to ensure a fair comparison."[307]

241. In the *ad hoc* appeal arbitration under Article 25 of the DSU in *Colombia – Frozen Fries*, the Arbitrator also disagreed with "Colombia's restricted reading of 'allowance' as pertaining only to '[a]djustments … requested by investigated parties' and involving 'the treatment of particular expenses incurred by the exporter'".[308]

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242. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel noted that the date of sales may have an impact on the price comparability of export and home market transactions:

> "We understand that the relevant differences are the differences in the characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transactions, as already mentioned. Moreover, when it is established that the comparison between the export price and the normal value is made 'in respect of sales made at as nearly as possible the same time', we consider that the date of sales may have an impact on the comparability of export and home market transactions."[309]

243. The Panel *Dominican Republic – AD on Steel Bars (Costa Rica)* stated that "the existence of one of the differences listed in Article 2.4 does not automatically mean that price comparability has been affected [by these differences]".[310]

244. In *AD/CVD on Certain Products (China)*, the Panel rejected the complainant's argument that the investigating authority's determination with regard to the effect of a particular difference on price comparability lacked a basis on record evidence. Based on the facts, the Panel found the investigating authority's determination adequate:

> "We next consider the question of whether the ADC acted reasonably in determining that the identified difference affected price comparability. Differences in taxation feature among the examples of factors that may affect the price comparability in Article 2.4. In the investigation, the ADC explained that, when making an export sale, exporting producers were aware of the fact that they are unable to recover the full amount of VAT

[306] Panel Report, *EU – Fatty Alcohols (Indonesia)*, para. 7.128.
[307] Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.62.
[308] Award of the Arbitrators, *Colombia – Frozen Fries*, para. 4.63.
[309] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.23.
[310] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.26.

paid on inputs, and would raise the export price accordingly to accommodate this extra cost. Thus, the ADC provided an explanation concerning the way in which the identified differences are likely to affect the comparability of normal value and export price.

We acknowledge China's argument that the ADC did not demonstrate that the difference in VAT recoverability *actually affected* price comparability. In our view, though, it was sufficient for the ADC to establish that exporting producers knew about the differences in VAT recoverability for their export sales and domestic sales, bearing in mind record evidence to this effect. We do not consider that the mere use of the words by the ADC that 'should have an associated effect on export price' shows that this conclusion was based on guesswork or unsupported presumption. Rather, it shows that the ADC considered that the evidence available on the record, although not an irrefutable proof, supported a finding that there is a likely possibility that the VAT difference has an associated effect on export price (i.e. resulting in the exporters raising export price) which is not present on domestic sales price. We further note that China has pointed to nothing on the record indicating that the exporters would have addressed the cost of unrecovered VAT on export sales in some other manner."[311]

1.6.5.3 Differences in "terms and conditions of sale"

245. In *US – Stainless Steel (Korea)*, the Panel examined Korea's argument that in violation of the third sentence of Article 2.4, which permits an adjustment "for differences affecting price comparability, including differences in conditions and terms of sales", the United States treated export sales which had not been paid because the customer had gone bankrupt later, as "direct selling expenses", and allocated these direct selling expenses over all United States' sales. The Panel rejected the United States' argument that bad debts are expenses directly related to the payment terms of the contract, and stated:

"We do not consider that the phrase 'differences in conditions and terms of sale', interpreted in accordance with customary rules of interpretation of public international law, can be understood to encompass differences arising from the unforeseen bankruptcy of a customer and consequent failure to pay for certain sales. In this respect, we note that Article 2.4 refers to the 'terms and conditions *of sale*'. Although of course both words – 'term' and 'condition' – have many meanings, both are commonly used in relation to contracts and agreements. Thus, 'term' is defined, *inter alia*, to mean 'conditions with regard to payment for goods or services', while 'condition' is defined, *inter alia*, as 'a provision in a will, contract, etc., on which the force or effect of the document depends'. Thus, we consider that, read as a whole, the phrase 'conditions and terms of sale' refers to the bundle of rights and obligations created by the sales agreement, and 'differences in conditions and terms of sale' refers to differences in that bundle of contractual rights and obligations. Thus, to the extent that there are, for example, differences in payment terms in the two markets, a difference in the conditions and terms of sale exists. The failure of a customer to pay is not a condition or term of sale in this sense, however. Rather, non-payment involves a situation where the purchaser has violated the 'conditions and terms of sale' by breaching its obligation to pay for the merchandise in question."[312]

246. The Panel in *US – Stainless Steel (Korea)* specifically responded to the United States' argument that unpaid export sales were to be treated as "direct selling expenses" in distinguishing between "differences in conditions and terms of sale" and the "mode or state of being" of such sales:

"We perceive no textual basis for the United States' effort to characterize all differences in costs associated with the terms of the contract and expenses directly related to the sale as 'differences in terms and conditions of sale'. The United States contends that 'conditions' of sale can be read in this context to mean the 'mode or state of being' of sales, such that 'differences in conditions and terms of sale' include the 'mode or circumstances' under which sales are made. Assuming this interpretation to be a permissible one, it might allow for adjustments for 'differences in conditions and terms of sale' in cases where the contractual provisions governing sales in the two markets

[311] Panel Report, *Australia – AD/CVD on Certain Products (China)*, paras. 7.209-7.210.
[312] Panel Report, *US – Stainless Steel (Korea)*, para. 6.75.

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> were identical but the seller was aware from circumstances existing at the time of sale that those provisions would likely entail different costs.[313] Thus to take an example often cited by the United States in this dispute, a seller might extend identical warranties in different markets or to different customers, knowing in advance that the costs related to those warranties in one market would likely be higher than in the other. Similarly, a seller might extend sales on the same credit terms in two different markets or to two different customers in the awareness that the risk of default – and thus the likely costs associated with the extension of credit – would be higher in one case than in the other. However, we fail to see how the fact that a customer who has purchased on credit subsequently went bankrupt and failed to pay for his purchases could be deemed a 'circumstance under which sales are made', at least in a case such as this one where the seller had no knowledge of the precarious financial situation of the purchaser.
>
> We consider that an examination of the context in which the phrase 'differences in conditions and terms of sale' is used supports our understanding of the ordinary meaning of this phrase. We recall that Article 2.4 identifies 'differences in conditions and terms of sale' as one of several 'differences which affect price comparability'. Thus, the notion of price comparability informs our interpretation of 'differences in conditions and terms of sale'. In our view, the requirement to make due allowance for differences that affect price comparability is intended to neutralise differences in a transaction that an exporter could be expected to have reflected in his pricing. A difference that could not reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the product in different markets or to different customers is not a difference that affects the comparability of *prices* within the meaning of Article 2.4. This reinforces our view that the phrase 'differences in conditions and terms of sale' cannot permissibly be interpreted to encompass an unanticipated failure of a customer to pay for certain sales."[314]

247. Further, the Panel in *US – Stainless Steel (Korea)* rejected the United States' argument that its methodology for the treatment of bad debt was simply a practical way to address differing levels of risks between markets in cases where sales are made on credit. The Panel opined that differences in risk of non-payment might be a difference relevant for the purposes of Article 2.4 and that actual bad debt could be evidence for establishing such different levels of risk of non-payment. However, it found that the United States' methodology did not base its determination on these factors:

> "[W]e agree with the United States that a difference in risk of non-payment between markets that was known at the time of sale might represent a difference for which due allowance could properly be made under Article 2.4. Nor do we preclude that actual bad debt experience during the period of investigation might be evidence relevant to establishing the existence of such a difference.[315] The United States did not however treat actual experience with respect to levels of unpaid sales as *evidence* of different levels of risk in the two markets in these investigations. Rather, it stated that it was the DOC's practice to treat bad debt as a direct selling expense when the expense was incurred in respect of the subject merchandise. Thus, even assuming that the US methodology was somehow intended to address differences in *risk* of non-payment, we do not accept the proposition that the existence of a higher level of non-payment in one market than in another during the period of investigation may be *deemed* to demonstrate the existence of such differences in risk and thus represent a permissible adjustment for 'differences in conditions and terms of sale'. "[316]

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[313] *(footnote original)* We note however that such a situation might more properly be considered to be an "other difference … affecting price comparability".

[314] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.76-6.77.

[315] *(footnote original)* Although in our view the existence of different levels of non-payment during prior periods would appear to be much more relevant.

[316] Panel Report, *US – Stainless Steel (Korea)*, para. 6.78.

1.6.6 Fourth sentence

1.6.6.1 Legal effect of "should"

248. In *US – Stainless Steel (Korea)*, the United States argued that the fourth sentence of Article 2.4 is not mandatory since it provides that allowances for costs and profits "should" be made in constructing an export price. The Panel agreed that the Anti-Dumping Agreement permits, but does not require such allowances, but opined that a Member may not make allowances other than those authorized by Article 2.4:

> "The term 'should' in its ordinary meaning generally is non-mandatory, i.e., its use in this sentence indicates that a Member is not *required* to make allowance for costs and profits when constructing an export price. We believe that, because the failure to make allowance for costs and profits could only result in a higher export price – and thus a lower dumping margin – the *AD Agreement* merely permits, but does not require, that such allowances be made.[317]
>
> … In our view, that the *AD Agreement* does not require such allowances does not mean that a Member is free to make any allowances it desires, including allowances not specified in this provision. To the contrary, we view this sentence as providing an *authorization* to make certain specific allowances. We therefore consider that allowances not within the scope of that authorization cannot be made.[318] If a Member were free to make any additional allowances it desired, there would be no effective disciplines on the methodology for construction of an export price and the provision in question would in our view be reduced to inutility. Thus, we conclude that it would be inconsistent with Article 2.4 of the *AD Agreement* to make allowances in the construction of the export price that are not within the scope of the authorization found in that Article.
>
> Our conclusion that Article 2.4 contains binding obligations regarding the scope of the permissible allowances that can be made in constructing an export price does not mean that we equate allowances for differences which affect price comparability with allowances relating to the construction of the export price. Rather, the third sentence of Article 2.4 requires due allowance to be made for differences affecting price comparability, while the fourth sentence provides that in the cases referred to in paragraph 3 – i.e., when constructing an export price – allowance for certain costs and profits should *also* be made. Finally, the fifth sentence of Article 2.4 makes clear that allowances relating to the construction of the export price could in fact *reduce* price comparability, such that one of several compensating steps should be taken. For all these reasons, it is clear to us that allowances in respect of construction of the export price are separate and distinct from allowances for differences which affect price comparability and are governed by different substantive rules."[319]

1.6.6.2 "costs … incurred between importation and resale"

249. In *US – Stainless Steel (Korea)*, the Panel agreed with Korea's argument that it was inconsistent with Article 2.4 to treat export sales unpaid as a result of the bankruptcy of a customer as direct selling costs, because the related costs were not "incurred between importation and resale"

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[317] *(footnote original)* It can be assumed that a Member will use this authorization where appropriate without being legally constrained to do so. By contrast, the *AD Agreement* provides that due allowance "shall" be made for differences affecting price comparability. Mandatory language is used here because the failure to make such allowances could generate or inflate dumping margins to the detriment of the interests of other Members.

[318] *(footnote original)* That the use of the non-mandatory phrase "should" does not support the conclusion advanced by the United States can be confirmed by replacing "should" with another non-mandatory term, "may". That a Member "may" make certain allowances would indicate that the Member was authorized but not required to make those allowances. It does not follow, however, that the Member was free also to make any other allowances not within the scope of the authorization. *Cf.* Appellate Body Report, *US – 1916 Act*, paras. 112-117 (that Article VI:2 of GATT 1994 makes imposition of anti-dumping duties permissive does not mean that a Member may impose measures other than anti-dumping duties to counteract dumping).

[319] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.93-6.95.

mentioned in the fourth sentence of Article 2.4. The Panel established the "foreseeability" of costs as the decisive factor:

> "[W]e note that Article 2.4 uses the word 'between'. That term is defined to mean, *inter alia*, '[i]n the interval separating two points of time, events, etc.'. Thus, the phrase costs 'incurred between importation and resale' in its ordinary meaning is most naturally read to refer to costs that were incurred between the date of importation and the date of resale. Under this reading, it might be difficult to conclude that a cost incurred after the date of resale was a cost incurred 'between importation and resale'.
>
> We are cognizant, however, that dictionary definitions can only take the interpreter so far, and that in interpreting a provision of a treaty we must take into account both context and object and purpose.[320] As discussed above, it is clear that the purpose of allowances to construct an export price is not to insure price comparability *per se*. Rather, an export price is constructed, and the appropriate allowances made, because it appears to the investigating authorities that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or third party. By working backwards from the price at which the imported products are first resold to an independent buyer, it is possible to remove the unreliability. Thus, we agree with the United States that the purpose of these allowances is to construct a reliable export price to use in lieu of the actual export price or, as expressed by the EC as third party, to arrive at the price that would have been paid by the related importer had the sale been made on a commercial basis.
>
> Read in light of this object and purpose, we recognize that costs related to the resale transaction but not incurred in a temporal sense between the date of importation and resale could as a general matter be considered to be 'incurred between importation and resale' and thus deducted in order to construct an export price. Nor do we preclude that an amount to cover the risk of non-payment might be considered to be such a cost. We do not believe, however, that this interpretation of costs 'incurred between importation and resale' can be stretched to include costs that not only were not incurred in an accounting sense until after the date of resale but which were entirely unforeseen at that time. In this regard, we observe that, while we agree with the United States that as a general principle a related importer may be expected to establish price based on costs plus profit, a price certainly cannot be expected to reflect an amount for costs that were entirely unforeseen at the time the price was set. To deduct costs which not only were incurred after the date of resale but which were entirely unforeseen at that time would not result in a 'reliable' export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis."[321]

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1.6.7 Fifth sentence: "the authorities shall"

250. In *US – Hot-Rolled Steel*, the Appellate Body considered that "the obligation to ensure a 'fair comparison" under Article 2.4 "lies on the *investigating authorities*, and not the exporters. It is those authorities which, as part of their investigation, are charged with comparing normal value and export price and determining whether there is dumping of imports."[322]

251. See also above under "differences which are demonstrated to affect price comparability" in paragraphs 229 and following.

1.6.8 Sixth sentence: "The authorities shall indicate… what information is necessary"

252. The Panel Report in *EC – Fasteners (China)* found that in the anti-dumping investigation at issue, the structure of the questionnaire suggested that requests for adjustments would not be necessary; however, the investigating authority later decided to use a different method of product

[320] *(footnote original)* As the Appellate Body has noted, "dictionary meanings leave many interpretive questions open." Appellate Body Report, *Canada – Aircraft*, para. 153.
[321] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.98-6.100.
[322] Appellate Body Report, *US – Hot-Rolled Steel*, para. 178.

grouping to conduct the comparison, and informed the Chinese producers one day before the final date for comments in the proceeding. The Appellate Body noted that:

> "[T]he facts of the case indicate that, because the Commission did not clearly indicate the product types used for purposes of price comparisons until very late in the proceedings, the European Union acted inconsistently with its obligations under Article 2.4 by depriving the Chinese producers of the ability to request adjustments for differences that could have affected price comparability."[323]

253. Although the Panel found no violation of Article 2.4 because China had not shown that interested parties requested adjustments and were denied them, the Appellate Body reversed the Panel:

> "[B]ecause of the Commission's failure to provide a timely opportunity to see the information concerning the basis of the price comparisons, the Chinese producers were precluded from requesting any adjustments for purposes of ensuring a fair comparison. The "absence" of a request from the Chinese producers for adjustments on the basis of the PCN characteristics, therefore, should not have prevented a finding of inconsistency under Article 2.4. On the contrary, it further demonstrates that, due to the Commission's failure to indicate what information was necessary for a fair comparison, the Chinese producers were unable to exercise their rights under Article 2.4 to ensure that the Commission conducted a fair comparison of the export price and the normal value. Thus, in failing to consider the last sentence of Article 2.4 in the light of the relevant facts of the case and its finding under Article 6.4, the Panel erred in its application of Article 2.4 of the *Anti-Dumping Agreement*."[324]

254. The Panel in *EC – Fasteners (China) (Article 21.5 – China)*, in a finding upheld by the Appellate Body[325], found that the EU Commission had violated the obligation set forth in the last sentence of Article 2.4 by failing to disclose to the Chinese exporters the information on the characteristics of the products sold by the analogue country producer, which was used in determining the normal value.[326] However, the Panel underlined the fact that its findings pertained to a particular factual situation because of the use of the analogue country methodology:

> "By failing to provide the Chinese producers with the information regarding the characteristics of Pooja Forge's products which were used in determining the normal value and which were then compared with the products of the Chinese producers, the Commission deprived these producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4. This, in our view, is inconsistent with the obligation set forth in the last sentence of Article 2.4. We do not see how the Chinese producers could have made requests for adjustments without having adequate knowledge of the product types with which their own products were being compared by the Commission.
>
> …
>
> We would like to underline, however, that our finding of violation under this claim is made in the context of a very particular factual situation. In the investigation at issue, the Commission used the so-called analogue country methodology in determining normal values for the Chinese producers because the European Union considered China to be an NME. The Commission determined the normal values of the Chinese producers on the basis of the prices of Pooja Forge, the analogue country producer selected for this purpose. This aspect makes this investigation very different from a typical anti-dumping investigation. In a normal investigation where the normal value is based on the foreign producer's own prices, the latter can participate meaningfully in the dialogue envisaged under Article 2.4 aiming to ensure a fair comparison between the normal value and the export price. In such an investigation, the foreign producer is well positioned to make informed decisions about the adjustments that it deems necessary

[323] Appellate Body Report, *EC – Fasteners (China)*, para. 513.
[324] Appellate Body Report, *EC – Fasteners (China),* para. 515.
[325] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5,197.
[326] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.148.

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> for a fair comparison. By contrast, in an investigation, such as the one before us, where the normal value information is obtained from a third source, an issue arises as to the foreign producer's access to that information. Fair comparison is to be carried out between two prices, namely the normal value and the export price. Where the IA uses the analogue country methodology, the foreign exporter will be left in the dark to the extent it does not have access to the normal value information. The IA's task in such an investigation is to find ways to disclose as much information on normal value as the foreign producer would need in order to meaningfully participate in the fair comparison process. In other words, the IA has to endeavour to put the foreign producer on an equal footing with a producer in a normal investigation in terms of access to the information on the basis of which requests for adjustments may be formulated. Failure to do so would preclude the exchange of information from taking place and would frustrate the purpose of Article 2.4, which is to ensure fair comparison between the normal value and the export price."[327]

255. On appeal, the Appellate Body agreed with the Panel's reasoning. According to the Appellate Body, while the methodology used in determining normal value is not pertinent to the obligation under the last sentence of Article 2.4, "the procedural requirement under Article 2.4 is necessarily even more pertinent in the context of an investigation involving information from an analogue country producer."[328]

256. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body agreed with the Panel's view that in investigations where the analogue country methodology is used in determining normal value, to the extent the investigated exporters do not have access to the normal value information, they are left in the dark as to what adjustments they could request.[329]

257. In *Dominican Republic – AD on Steel Bars (Costa Rica)*, the Panel underlined that "the last sentence of Article 2.4 requires that investigating authorities indicate to the parties in question what information is necessary to ensure a fair comparison."[330]

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1.6.8.1 Relationship with other provisions

258. In *EC – Fasteners (China) (Article 21.5 – China)*, the Appellate Body held that although the last sentence of Article 2.4 also contains a procedural obligation, given its limited scope, it "does not render any of the disclosure obligations under Article 6 'redundant'[.]"[331] The Appellate Body underlined the difference between the disclosure requirement under Article 6.9 and that under the last sentence of Article 2.4, and held:

> "Therefore, in most cases, a disclosure under Article 6.9 of the Anti-Dumping Agreement will not fulfil the requirements of Article 2.4. However, whether information shared at the end of an on-going dialogue under Article 2.4 is timely enough to ensure a fair comparison between normal value and export price must be assessed on a case-by-case basis, by assessing whether interested parties had a meaningful opportunity to request adjustments in the light of the information shared by the investigating authority towards the end of that dialogue. Therefore, it cannot be excluded that, in some particular instances, a disclosure under Article 6.9 of the Anti-Dumping Agreement could fulfil the requirements of Article 2.4."[332]

1.6.9 Article 2.4.1

1.6.9.1 Scope of Article 2.4.1

259. In *US – Stainless Steel (Korea)*, the complainant, Korea, argued that Article 2.4.1 is the only provision of the Anti-Dumping Agreement that addresses exchange rates and the permissible

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[327] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 7.142 and 7.149.
[328] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.172.
[329] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.188. See also ibid. para. 5.189.
[330] Panel Report, *Dominican Republic – AD on Steel Bars (Costa Rica),* para. 7.24.
[331] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.177.
[332] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 5.191.

modification to the dumping calculation methodology to account for exchange rate fluctuations, and thus, that the use of multiple averaging periods to account for the depreciation of the Korean won during the period of investigation was inconsistent with Article 2.4.1. The Panel responded as follows:

> "In our view, Article 2.4.1 relates to the selection of exchange rates to be used where currency conversions are required. It establishes a general rule – conversion should be made using the rate of exchange on the date of sale – and an exception to this general rule for sales on forward markets. It also establishes special rules in the case of fluctuations and sustained movements in exchange rates. We note Korea's view that the requirements of the second sentence of Article 2.4.1 prescribe specific results, rather than describing a method for selecting exchange rates. It appears to us, however, that, read in context, these special rules also relate to the selection of exchange rates, and not to the construction of averages. Rather, the permissibility of the use of multiple averaging is an issue addressed by Article 2.4.2.
>
> Even if Article 2.4.1 were not restricted to the issue of the selection of exchange rates, we find nothing in that Article that would prohibit a Member from addressing, through multiple averaging, a situation arising from a currency depreciation. Korea contends, and the United States does not dispute, that the provision of Article 2.4.1 requiring Members to allow exporters sixty days to adjust their export prices to sustained movements in exchange rates applies only in the case of currency appreciation, and not in the case of currency depreciation. Assuming that the parties are correct in this regard, the requirement that a Member take certain actions in the case of currency appreciation does not in our view mean that Members are prohibited from taking any action to address a situation arising from a currency depreciation."[333]

1.6.9.2 "required"

260. In *US – Stainless Steel (Korea)*, the complainant, Korea, argued that while Article 2.4.1 permits currency conversions only when such conversions are "required", i.e., when there is no other reasonable alternative, the United States' authority had performed an unnecessary "double conversion" of Korean local sales by converting the dollar amounts appearing in their invoices into won at one exchange rate and converting them back into dollars at a different exchange rate, in order to compare the prices of the local sales with those of exports to the United States. The Panel found that the conversions were not required because the prices being compared were in the same currency (dollars), and thus concluded that the currency conversions were inconsistent with Article 2.4.1:

> "While Article 2.4.1 does not spell out the precise circumstances under which currency conversions are to be avoided, we consider that it does establish a general – and in our view, self-evident – principle that currency conversions are permitted only where they are required in order to effect a comparison between the export price and the normal value. We note that a contrary interpretation would call into doubt the utility of the introductory clause of Article 2.4.1. If the drafters had not intended to establish a rule that currency conversions be performed only when required, they could easily have drafted Article 2.4.1 to provide that 'Currency conversions should be made using the rate of exchange on the date of sale ….' Further, such an interpretation could result in the unusual situation where currency conversions that were required in order to perform a comparison under Article 2.4 would be subject to the rules set forth in Article 2.4.1, but unnecessary currency conversions could be performed without regard to the rules of Article 2.4.1.
>
> We need not here arrive at any general understanding as to when currency conversions are or are not required within the meaning of Article 2.4.1, nor do we express any view regarding Korea's 'reasonable alternative' test[.]"[334]

[333] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.129-6.130.
[334] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.11-6.12.

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261. In *US – Stainless Steel (Korea)*, one of the issues in the context of Article 2.4.1 was whether the Korean local sales had been made for United States dollars or Korean won. The Panel stated:

> "[I]f the amount of won actually paid was based on the dollar amount identified in the invoice at the market rate of exchange on the date of *payment* (which, because the local sales in question were letter of credit sales, came some months after the date of invoice), then the controlling amount would be the dollar amount appearing in the invoice."[335]

1.6.9.3 Relationship with Article 2.4

262. In *US – Stainless Steel (Korea)*, the complainant, Korea, argued that certain factual determinations of the United States' authority on currency conversion were inconsistent with Article 2.4 as well as Article 2.4.1. The Panel held that the United States' determination which it found consistent with Article 2.4.1 was also consistent with Article 2.4[336], but that with respect to the other determination, which it found in violation of Article 2.4.1, "we do not consider it necessary to examine Korea's claim that those double conversions breached a more general 'fair comparison' requirement under Article 2.4 of the *AD Agreement*."[337]

263. In *EC – Tube or Pipe Fittings*, the Panel found that Article 2.4.1 "refers to currency conversion in connection with the prices of export sales, rather than to any conversion that may occur in the calculation of specific adjustments to either the normal value or the export price".[338] It thus concluded that "the obligations concerning currency conversions in Article 2.4.1 do not apply to *all* conversions made in order to calculate adjustments under Article 2.4.1—we can conceive of certain situations in which differences affecting price comparability that might lead to an adjustment under Article 2.4 might not correspond precisely with the date of the export sale (e.g. credit and warranty expenses), and where conversion of all currency data as at the date of export sale might therefore distort a fair comparison."[339]

1.6.10 Article 2.4.2

1.6.10.1 "model zeroing" and "simple zeroing"

264. In *US – Zeroing (Japan)*, the Panel explained the concepts of "model zeroing" and "simple zeroing":

> "By 'model zeroing' Japan means the method whereby USDOC makes average-to-average comparisons of export price and normal value within individual 'averaging groups' established on the basis of physical characteristics ('models') and disregards any amounts by which average export prices for particular models exceed normal value in aggregating the results of these multiple comparisons to calculate a weighted average margin of dumping. Specifically, 'model zeroing' means that when USDOC aggregates the results of model-specific, average-to-average comparisons of normal value and export price into a weighted average margin of dumping, the numerator of that margin of dumping only includes the results of models for which the average export price is less than the normal value.
>
> By 'simple zeroing' Japan means the method whereby USDOC determines a weighted average margin of dumping based on average-to-transaction or transaction-to-transaction comparisons between export price and normal value and disregards any amounts by which export prices of individual transactions exceed normal value in aggregating the results of these multiple comparisons. Specifically, 'simple zeroing' means that when USDOC aggregates the results of comparisons of normal value and export price made on an average-to-transaction basis or on a transaction-to-transaction basis, the numerator of the weighted average margin of dumping only includes the

[335] Panel Report, *US – Stainless Steel (Korea)*, para. 6.25.
[336] Panel Report, *US – Stainless Steel (Korea)*, para. 6.44.
[337] Panel Report, *US – Stainless Steel (Korea)*, para. 6.45.
[338] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.198.
[339] Panel Report, *EC – Tube or Pipe Fittings*, para. 7.199.

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results of those comparisons in which individual export prices are less than the normal value.[340]"[341]

1.6.10.2 "margins"

265. In *EC – Bed Linen,* the Panel interpreted the word "margins" in Article 2.4.2 as meaning the individual margin of dumping determined for each of the investigated exporters and producers of the product under investigation, for that particular product.[342] The Appellate Body upheld this interpretation, stating that "[f]rom the wording of [Article 2.4.2], it is clear to us that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*."[343]

266. In *US – Softwood Lumber V*, the Appellate Body further clarified its position that "'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product".[344] On this basis, the Appellate Body rejected the argument that zeroing would be allowed as long as all comparable transactions had been taken into consideration at the model or type level:

> "It is clear that an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation. In our view, the results of the multiple comparisons at the sub-group level are, however, not 'margins of dumping' within the meaning of Article 2.4.2. Rather, those results reflect only intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. Thus, 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.
>
> We fail to see how an investigating authority could properly establish margins of dumping for the product under investigation as a whole without aggregating *all* of the 'results' of the multiple comparisons for *all* product types. There is no textual basis under Article 2.4.2 that would justify taking into account the 'results' of only some multiple comparisons in the process of calculating margins of dumping, while disregarding other 'results'. If 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. Thus we disagree with the United States that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons."[345]

267. The Panel in *US – Zeroing (Japan)* considered that "the language used in the first sentence of Article 2.4.2 of the *Anti-Dumping Agreement* warrants the conclusion that model zeroing is proscribed. This follows in particular from the requirement in the first sentence of Article 2.4.2 that the weighted average normal value be compared with a weighted average export price that reflects the prices of *all comparable export transactions* and from the fact that this sentence does not contain language that indicates that margins of dumping can be determined in respect of individual models of a product[.]"[346] The Panel concluded that zeroing procedures in the context of original investigations were, as such, inconsistent with Article 2.4.2 of the Anti-Dumping Agreement.[347]

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[340] *(footnote original)* Under both the model zeroing method and the simple zeroing method, the *denominator* of the weighted average overall margin of dumping calculated by USDOC always includes the total value of all export sales, including export sales at prices above the normal value.
[341] Panel Report, *US – Zeroing (Japan)*, paras. 7.2-7.3.
[342] Panel Report, *EC – Bed Linen,* para. 6.118.
[343] Appellate Body Report, *EC – Bed Linen*, para. 51.
[344] Appellate Body Report, *US – Softwood Lumber V*, para. 96
[345] Appellate Body Report, *US – Softwood Lumber V*, paras. 97–98.
[346] Panel Report, *US – Zeroing (Japan)*, para 7.82.
[347] Panel Report, *US – Zeroing (Japan)*, para. 7.85.

1.6.10.3 Weighted average normal value / weighted average export price, the first methodology

268. In *EC – Bed Linen* the Appellate Body examined the first method under Article 2.4.2 for establishing the existence of margins of dumping, i.e. the comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions. The Appellate Body found the European Communities' practice of "zeroing" inconsistent with this method because by, *inter alia*, zeroing the negative dumping margins, the European Communities had not taken fully into account the entirety of the prices of some export transactions:

> "[W]e recall that Article 2.4.2, first sentence, provides that 'the existence of margins of dumping' for the product under investigation shall normally be established according to one of two methods. At issue in this case is the first method set out in that provision, under which 'the existence of margins of dumping' must be established:
>
> > '… on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions …'
>
> Under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, we emphasize that Article 2.4.2 speaks of 'all' comparable export transactions. As explained above, when 'zeroing', the European Communities counted as zero the 'dumping margins' for those models where the 'dumping margin' was 'negative'. As the Panel correctly noted, for those models, the European Communities counted 'the weighted average export price to be equal to the weighted average normal value … despite the fact that it was, in reality, higher than the weighted average normal value.' 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, namely, those export transactions involving models of cotton-type bed linen where 'negative dumping margins' were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish 'the existence of margins of dumping' for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions – that is, for *all* transactions involving *all* models or types of the product under investigation. Furthermore, we are also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions – such as the practice of 'zeroing' at issue in this dispute – is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2.4.2."[348]

269. In *US – Softwood Lumber V*, the Appellate Body confirmed its view that an authority is not allowed to practise zeroing when using the weighted-average to weighted-average comparison methodology for calculating the margin of dumping:

> "Zeroing means, *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole."[349]

1.6.10.3.1 "comparable export transactions"

270. In *EC – Bed Linen*, the Appellate Body specifically addressed the term "comparable" used in Article 2.4.2, which the European Communities referred to as a basis for its appeal. More specifically, the European Communities claimed that Article 2.4.2 requires a comparison with a "weighted average of prices of all *comparable* export transactions" which, in the view of

[348] Appellate Body Report, *EC – Bed Linen*, paras. 54-55.
[349] Appellate Body Report, *US – Softwood Lumber V*, para. 101.

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the European Communities, was not the same as requiring a comparison with a weighted average of *all* export transactions:

> "In our view, the word 'comparable' in Article 2.4.2 does not affect, or diminish in any way, the obligation of investigating authorities to establish the existence of margins of dumping on the basis of 'a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions'. (emphasis added)
>
> The ordinary meaning of the word 'comparable' is 'able to be compared'. 'Comparable export transactions' within the meaning of Article 2.4.2 are, therefore, export transactions that are able to be compared. …
>
> … All types or models falling within the scope of a 'like' product must necessarily be 'comparable', and export transactions involving those types or models must therefore be considered 'comparable export transactions' within the meaning of Article 2.4.2."[350]

271. In support of its proposition that the term "comparable" in Article 2.4.2 did not detract from the obligation of investigating authorities to consider *all* relevant transactions, the Appellate Body in *EC – Bed Linen* referred to Article 2.4 as part of the context of Article 2.4.2:

> "Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'. Moreover, Article 2.4 sets forth specific obligations to make comparisons at the same level of trade and at, as nearly as possible, the same time. Article 2.4 also requires that 'due allowance' be made for differences affecting 'price comparability'. We note, in particular, that Article 2.4 requires investigating authorities to make due allowance for 'differences in … physical characteristics'.
>
> We note that, while the word 'comparable' in Article 2.4.2 relates to the comparability of export transactions, Article 2.4 deals more broadly with a 'fair comparison' between export price and normal value and 'price comparability'. Nevertheless, and with this qualification in mind, we see Article 2.4 as useful context sustaining the conclusions we draw from our analysis of the word 'comparable' in Article 2.4.2. In our view, the word 'comparable' in Article 2.4.2 relates back to both the general and the specific obligations of the investigating authorities when comparing the export price with the normal value. The European Communities argues on the basis of the 'due allowance' required by Article 2.4 for 'differences in physical characteristics' that distinctions can be made among different types or models of cotton-type bed linen when determining 'comparability'. But here again we fail to see how the European Communities can be permitted to see the physical characteristics of cotton-type bed linen in one way for one purpose and in another way for another."[351]

272. The Panel in *US – Shrimp (Ecuador)* (whose analysis was followed by three other panels cited below) drew on the analysis of the Appellate Body in *US – Softwood Lumber V* in determining that the United States had acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in using zeroing under the weighted average-to-weighted average methodology. The Panel explained the Appellate Body's reasoning in *US – Softwood Lumber V* thus:

> "The Appellate Body began its analysis with the text of Article 2.4.2 and noted that the question before it was the proper interpretation of the terms 'all comparable export transactions' and 'margins of dumping' in Article 2.4.2. In examining the arguments of the parties with respect to these phrases, the Appellate Body concluded that the parties' disagreement centred on whether a Member could take into account 'all' comparable export transactions only at the sub-group level, or whether such transactions also had to be taken into account when the results of the sub-group comparisons are aggregated.

[350] Appellate Body Report, *EC – Bed Linen*, paras. 56-58.
[351] Appellate Body Report, *EC – Bed Linen*, paras. 59-60.

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To examine that issue, the Appellate Body noted the definition of dumping in Article 2.1 of the *Anti-Dumping Agreement*. The Appellate Body found that 'it [was] clear from the texts of [Article VI:1 of the GATT 1994 and Article 2.1 of the *Anti-Dumping Agreement*] that dumping is defined in relation to a product as a whole as defined by the investigating authority'. The Appellate Body further considered that the definition of 'dumping' contained in Article 2.1 applies to the entire *Agreement*, including Article 2.4.2, and that '[d]umping', within the meaning of the *Anti-Dumping Agreement*, can therefore be found to exist only for the product under investigation as a whole, and cannot be found to exist only for a type, model, or category of that product.' Next, the Appellate Body relied on its Report in *EC - Bed Linen*, in which it stated that '[w]hatever the method used to calculate the margins of dumping ... these margins must be, and can only be, established for the *product* under investigation as a whole.' Thus, the Appellate Body noted that '[a]s with dumping, 'margins of dumping' can be found only for the product under investigation as a whole, and cannot be found to exist for a product type, model, or category of that product.' The Appellate Body therefore rejected the United States' arguments in that case that Article 2.4.2 does not apply to the aggregation of the results of multiple comparisons at the sub-group level; for the Appellate Body, while an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group levels are not margins of dumping within the meaning of Article 2.4.2; they merely reflect intermediate calculations made by an investigating authority in the context of establishing margins of dumping for the product under investigation. It is only on the basis of aggregating all such intermediate values that an investigating authority can establish margins of dumping for the product under investigation as a whole. On this basis, the Appellate Body held that zeroing, as applied by the USDOC in *US – Softwood Lumber V* :

> 'mean[t], *in effect*, that at least in the case of *some* export transactions, the export prices are treated as if they were less than what they actually are. Zeroing, therefore, does not take into account the *entirety* of the *prices* of *some* export transactions, namely, the prices of export transactions in those sub-groups in which the weighted average normal value is less than the weighted average export price. Zeroing thus inflates the margin of dumping for the product as a whole.'

The Appellate Body on this basis concluded that the treatment of comparisons for which the weighted average normal value is less than the weighted average export price as 'non-dumped' comparisons was not in accordance with the requirements of Article 2.4.2 of the *Anti-Dumping Agreement*. As a result, the Appellate Body upheld the Panel's finding that the United States had acted inconsistently with Article 2.4.2 of the *Anti-Dumping Agreement* in determining the existence of margins of dumping on the basis of a methodology incorporating the practice of zeroing."[352]

273. The Panel in *US – Shrimp (Thailand)* concluded that the issues raised by Thailand's claim were "identical in all material respects to those addressed by the Appellate Body in *Softwood Lumber V*".[353] Given that Thailand was found to have established a *prima facie* case that the United States had acted inconsistently with Article 2.4.2 because the US Department of Commerce had not calculated the dumping margins on the basis of the 'product as a whole' in that it "failed to take into account all comparable export transactions in calculating the margins of dumping"[354], the Panel ruled in favour of Thailand.

274. In *US – Anti-Dumping Measures on PET Bags*, the Panel also referred to (and adopted) the reasoning in the Panel Report in *US – Shrimp (Ecuador).* The Panel concluded that Thailand had established a *prima facie* case that the USDOC's methodology used to calculate the margins at issue was the same in all legally relevant respects as the methodology in *US – Softwood Lumber V.*

[352] Panel Report, *US - Shrimp (Ecuador)*, paras. 7.38–7.39, also quoted in the Panel Report, *US – Shrimp (Thailand)*, para. 7.33.
[353] Panel Report, *US –Shrimp (Thailand)*, para. 7.35.
[354] Panel Report, *US –Shrimp (Thailand)*, para. 7.35.

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The Panel concluded that the United States had acted inconsistently with its obligations under Article 2.4.2 by using the zeroing methodology in this manner.[355]

275. Similarly, the Panel in *US – Zeroing (Korea)* concluded that Korea had established a *prima facie* case that the methodology used by the USDOC in calculating the margins of dumping in the investigations at issue was the same in all legally relevant respects as the methodology in *US – Softwood Lumber V.* The Panel concluded that the United States had acted inconsistently with its obligations under Article 2.4.2 by using the zeroing methodology in this manner.[356]

1.6.10.3.2 Non-comparable types

276. In *EC – Bed Linen*, the Panel found that the European Communities "zeroing" practice was inconsistent with Article 2.4.2.[357] The European Communities appealed this finding on the ground that the word "comparable" in Article 2.4.2 indicates that, where the product under investigation consists of various "non-comparable" types or models, the investigating authorities should first calculate "margins of dumping" for each of the "non-comparable" types or models, and, then, at a subsequent stage, combine those "margins" in order to calculate an overall margin of dumping for the product under investigation. The Appellate Body disagreed with the European Communities:

> "We see nothing in Article 2.4.2 or in any other provision of the *Anti-Dumping Agreement* that provides for the establishment of 'the existence of margins of dumping' for *types or models* of the product under investigation; to the contrary, all references to the establishment of 'the existence of margins of dumping' are references to the *product* that is subject of the investigation. Likewise, we see nothing in Article 2.4.2 to support the notion that, in an anti-dumping investigation, two different stages are envisaged or distinguished in any way by this provision of the *Anti-Dumping Agreement*, nor to justify the distinctions the European Communities contends can be made among *types or models* of the same product on the basis of these 'two stages'. Whatever the method used to calculate the margins of dumping, in our view, these margins must be, and can only be, established for the *product* under investigation as a whole. We are unable to agree with the European Communities that Article 2.4.2 provides no guidance as to how to calculate an *overall* margin of dumping for the product under investigation."[358]

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277. In *US – Softwood Lumber V*, the Appellate Body stated that multiple averaging, using models or types, is as such permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation:

> "We agree with the participants in this dispute that multiple averaging is permitted under Article 2.4.2 to establish the existence of margins of dumping for the product under investigation. We disagree with those who suggest that the Appellate Body Report in *EC – Bed Linen* is premised on an assumption that multiple averaging is prohibited. The issue of multiple averaging was not before the Appellate Body in *EC – Bed Linen* and the reasoning of the Appellate Body in that case should therefore not be read as prohibiting that practice. This is not to say that *EC – Bed Linen* is not relevant in this appeal. Indeed, there are a number of relevant findings to which we refer to below. However, the Appellate Body did not rule on multiple averaging in that case and therefore it is incorrect to argue, as the United States does, that '[t]he agreement of both parties to this dispute and a unanimous Panel that Article 2.4.2 permits multiple comparisons is a fundamental departure from the premise' of the Appellate Body Report in *EC – Bed Linen*."[359]

278. In *EC – Fasteners (China) (Article 21.5 – China)*, the EU Commission had used the analogue country methodology and excluded from the scope of its dumping determinations product types, exported by the investigated Chinese producers, which did not match with the types sold by the

[355] Panel Report, *US – Anti-Dumping Measures on PET Bags*, paras. 7.18-7.25.
[356] Panel Report, *US – Zeroing (Korea)*, paras. 7.27-7.34.
[357] Panel Report, *EC – Bed Linen*, para. 7.1(g). For the description of the zeroing practice, see fn **Error! Bookmark not defined.**.
[358] Appellate Body Report, *EC – Bed Linen*, para. 53.
[359] Appellate Body Report, *US – Softwood Lumber V*, para. 81.

analogue country producer. In a finding upheld by the Appellate Body, and based largely on the case law regarding the practice of zeroing, the Panel found the Commission's approach to be inconsistent with Article 2.4.2:

> "In calculating margins of dumping for the Chinese producers in the review investigation at issue, the Commission did not take into consideration exports of models that did not match with any of the models sold by Pooja Forge. Nor were such exports included in the denominator when the Commission aggregated the results of model-specific calculations in determining the overall margin of dumping for the investigated product. In our view, given the definition of dumping in Article 2.1, a margin of dumping that excludes certain export transactions cannot be said to have been calculated for the investigated product as a whole. Such a calculation would therefore violate Article 2.4.2 of the Agreement which provides that 'margins of dumping' have to be established by comparing the weighted average normal value with a weighted average of prices of all comparable export transactions.
>
> …
>
> The IA cannot exclude export sales of certain product types from the scope of its dumping determinations on the grounds that such types are not comparable to any of the types in domestic sales that are used to determine the normal value. Obviously, the fact that all sales falling within the IA's like product definition have to be taken into consideration in calculating dumping margins will not necessarily make all product types exported to the investigating country directly comparable to product types that are sold domestically in an exporting company's market. The general obligation under Article 2.4 to make a fair comparison will still apply. To comply with this obligation, the IA will resort either to multiple averaging … or to individual adjustments or some combination of these two methods."[360]

279. On appeal, the Appellate Body reasoned that excluding, as the Commission did, from the scope of dumping determinations product types that were otherwise found to be "like", on the ground that they were not sold by the analogue country producer, was inconsistent with the requirements of Article 2.4.2:

> "The Commission's approach of first determining that all fasteners are 'like products', but then proceeding to exclude certain models sold by the Chinese producers on the basis that these models did not match with any of those sold by Pooja Forge, is not compatible with the requirement in Article 2.4.2 to establish margins of dumping by comparing the normal value with the price of 'all comparable export transactions'.
>
> Once the Commission had determined that these products fell within the scope of the 'like product', it could not exclude from the comparison, based on alleged lack of 'comparability', models for which no matching model sold by the analogue country producer could be identified."[361]

280. Whereas the Panel had declined to make any finding in this regard[362], the Appellate Body pointed out that the Commission's approach was also "difficult to reconcile with the notion of 'fair comparison' in Article 2.4."[363]

281. In the investigation at issue in *Colombia – Frozen Fries (Article 21.5 – EU)*, the Colombian investigating authority had used the simple average of weighted average normal values for particular product types, in calculating the normal value for a product type that did not have an exact match in the domestic sales of the relevant exporter. Colombia argued that this aspect of its authority's determination was not covered by Article 2.4.2, which the Panel rejected:

> "Colombia argues that not 'every analytical step' that an authority takes to establish normal value pursuant to the W-W methodology falls under Article 2.4.2. In particular,

[360] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 7.265 and 7.267.
[361] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.268-5.269.
[362] Panel Report, *EC – Fasteners (China) (Article 21.5 – China)*, para. 7.276.
[363] Appellate Body Report, *EC – Fasteners (China) (Article 21.5 – China)*, paras. 5.275-5.276.

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> Colombia argues that MINCIT's use of simple averaging was a part of the 'model matching' step, which it asserts is not covered by Article 2.4.2. As noted in paragraphs 7.53 and 7.55 above, we disagree. Averaging the selected domestic sales prices to derive a normal value for comparison with the weighted average export price is explicitly covered by Article 2.4.2. This holds regardless of whether the identification of domestic sales for this calculation falls under Article 2.4, Article 2.4.2, or both."[364]

282. In *Colombia – Frozen Fries (Article 21.5 – EU)*, the Panel found that the Colombian authority's method of calculating the normal value for a product type that did not have an exact match in the domestic sales of the relevant exporter was inconsistent with Article 2.4.2. In so finding, the Panel underlined that "whenever an authority seeks to establish the existence of margins of dumping via the W-W methodology, it must ensure that both the weighted average normal value and the weighted average export price are, in fact, weighted averages."[365] The Panel then stated:

> "We find that MINCIT, while purporting to make W-W comparisons, failed to use a 'weighted average normal value' when the normal value it compared with the weighted average export price was calculated as a simple average of intermediate weighted average normal values.
>
> We find that a normal value that has been determined on the basis of a simple average (including a simple average of a series of weighted averages) is not a 'weighted average normal value' within the meaning of Article 2.4.2. MINCIT's calculation of an intermediate weighted average normal value for each 'article' provides a normal value that takes into account the relative volumes of the various transactions in which the 'article' was sold domestically. However, MINCIT's calculation of a simple average of these intermediate weighted averages does not produce a weighted average. This is because a simple average does not account for volume differences, thereby overweighting transactions involving 'articles' sold in small volumes domestically and underweighting transactions involving 'articles' sold in large volumes domestically as compared to a 'weighted average normal value' calculated consistently with the explicit requirement of Article 2.4.2."[366]

283. In *Colombia – Frozen Fries (Article 21.5 – EU)*, the Panel completed its analysis by noting that the Colombian authorities could have used other alternatives that would have allowed them to make due allowances in the comparison between the normal value and the export price:

> "We turn to Colombia's argument that MINCIT's use of a simple average to determine normal value for the challenged comparisons was justified because it sought to give 'the same weight to the physical characteristics of each of the articles' in the same product group. Colombia further contends that using a weighted average of the weighted average domestic sales prices of all other articles in the same product type would 'give[] greater weight to some articles simply because they happened to be sold in greater volumes during the POI'. We are not persuaded by these arguments.
>
> We consider that where a group of domestic sales transactions have been identified as the basis for determining normal value to be compared with a weighted average export price using the W-W methodology as provided for in Article 2.4.2, the fact that the domestic sales transactions are not identical to the export transactions is not a basis for abrogating the obligation to compare a weighted average normal value with a weighted average export price. We consider that our interpretation is supported by the fact that Article 2.4, which Article 2.4.2 is 'subject to', provides that 'due allowance shall be made … for differences which affect price comparability'. We observe that if due allowances were made in accordance with Article 2.4, then Colombia's interests in according 'equal weight' to various physical characteristics of the domestic transactions and Colombia's concern about overweighting or underweighting certain articles based on sales volumes could both be addressed appropriately and consistently with the relevant obligations.

[364] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, para. 7.60.
[365] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, para. 7.65.
[366] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, paras. 7.66-7.67.

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> To the extent that the granting of due allowances presented problems, MINCIT had still other alternatives. For example, it may have been possible to identify a more focused group of domestic sales transactions for which granting due allowances would be less problematic. Alternatively, constructed value or third country sales could be used for determining normal value consistent with Article 2.2. Yet another alternative could be to utilize T-T comparisons for export transactions for which there are no matching articles sold in the domestic market by identifying the single closest match for each affected export transaction and making any necessary adjustments to account for any remaining differences that affect price comparability. We are mindful that our task is to determine whether MINCIT's methodology was consistent with Article 2.4.2, and not to prescribe a methodology that MINCIT should have adopted. Nevertheless, the availability of alternative approaches to addressing the issue that MINCIT identified in the underlying proceeding is relevant to addressing Colombia's interpretive argument and to confirming our understanding of Article 2.4.2. In sum, we are not convinced that the concerns raised are a sufficient basis to conclude that the circumstances of this case justified MINCIT proceeding with 'W-W' comparisons that were not consistent with the obligation to use a weighted average normal value as the comparator."[367]

1.6.10.3.3 Sampling of domestic transactions

284. The Panel in *Argentina – Poultry Anti-Dumping Duties* addressed the issue of whether or not a Member must include all domestic sales transactions when establishing "a weighted average normal value" for the purpose of Article 2.4.2:

> "In examining what is meant by 'a weighted average normal value', we attach particular importance to the meaning of the term 'normal value'. We note that Article 2.1 of the *AD Agreement* refers to normal value as 'the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'. Article 2.1 therefore defines normal value in terms of domestic sales transactions in the exporting Member (although Article 2.2 provides that alternative methods to establish normal value may be used in certain circumstances). Article 2.1 does not specify, however, whether or not all domestic sales transactions need be included. This issue is addressed by Article 2.2.1, which sets out the conditions to be met before domestic sales may be treated as not in 'the ordinary course of trade', and therefore excluded for the purpose of establishing normal value in accordance with Article 2.1. Article 2.2.1 states that domestic sales 'may be disregarded in determining normal value only if' the relevant conditions are met. We understand these provisions to mean that there are only specific circumstances in which domestic sales transactions may be excluded from normal value. We consider that these provisions constitute relevant context for interpreting the phrase 'a weighted average normal value', since they indicate that 'a weighted average normal value' is a weighted average of <u>all</u> domestic sales other than those which may be disregarded pursuant to Article 2.2.1 of the *AD Agreement*."[368]

285. The Panel in *Argentina – Poultry Anti-Dumping Duties* thus came to the conclusion that "the strict rules in Article 2 regarding the determination of normal value require that, in the usual case, normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade".[369]

1.6.10.3.4 Multiple averages

286. In *US – Stainless Steel (Korea)*, the Panel examined Korea's argument that Article 2.4.2 prohibits the following method used by the United States authorities: (i) dividing a period of investigation into two sub-periods corresponding to the pre- and post-devaluation periods; (ii) calculating a weighted average margin of dumping for each sub-period; and (iii) combining these weighted averages of margin of dumping, however, treating sub-periods where the average export price was higher than the average normal value as sub-periods of zero dumping. In this regard, the Panel rejected Korea's claim that Article 2.4.2 prohibits the use of multiple averaging *per se*:

[367] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, paras. 7.68-7.70.
[368] Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.272.
[369] Panel Report, Argentina – Poultry Anti-Dumping Duties, para. 7.274.

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> "Article 2.4.2 provides that the existence of dumping shall normally be established 'on the basis of a comparison of a weighted average normal value with a weighted average of all *comparable* export transactions' (emphasis added). The inclusion of the word 'comparable' is in our view highly significant, as in its ordinary meaning it indicates that a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions.[370] It flows from this conclusion that a Member is not required to compare a single weighted average normal value to a single weighted average export price in cases where certain export transactions are not comparable to transactions that represent the basis for the calculation of the normal value.
>
> We recall Korea's view that the reference in the singular to 'a weighted average normal value' means that the use of multiple averages is prohibited. In our view, however, the reference in the singular to 'a weighted average normal value' means simply that there must be a single weighted average normal value and export price in respect of comparable transactions. It does not mean that a Member is required to compare a single weighted average normal value to a single weighted average export price in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value."[371]

287. The Panel in *US – Stainless Steel (Korea)*, the Panel found support for its interpretation in the object and purpose of Article 2.4.2:

> "An examination of the context of the provision in question and of its object and purpose in our view provide further support for the above conclusion. The chapeau of Article 2.4 states that '[a] fair comparison shall be made between the export price and the normal value.' Whatever the relationship of the fair comparison language of the chapeau to the specific requirements of Article 2.4 – an issue of dispute between the parties – it is evident to us that the provisions of Article 2.4.2 must be read against the background of this basic principle. In fact, the provisions of Article 2.4.2 itself are 'subject to the provisions governing fair comparison in paragraph 4.' An interpretation of Article 2.4.2 that required a Member to compare transactions that were not comparable would run counter to this basic principle.
>
> Accordingly, we conclude – and by the later phases of this dispute the parties agreed – that Article 2.4.2 does not preclude the use of multiple averages *per se*. Rather, Article 2.4.2 requires a Member to compare a single weighted average normal value to a single weighted average export price in respect of all *comparable* transactions. A Member may however use multiple averages in cases where it has determined that non-comparable transactions are involved."[372]

288. Despite rejecting Korea's argument in *US – Stainless Steel (Korea)*, that Article 2.4.2 precludes the use of multiple averages *per se* (see paragraph 286 above), the Panel found a violation of Article 2.4.2 by the United States investigating authorities. The Panel examined whether the existence of significant differences in normal value over the course of an investigation is, in and of itself, a sufficient basis to conclude – as the United States authorities had done – that export and home market transactions at different points in the period of investigation are not "comparable":

> "In examining this question, we first note that the term 'comparable' has been defined to mean 'able to be compared (with)'. This definition however does not cast great light on the meaning of the term as used in Article 2 of the *AD Agreement*. Thus, we consider it useful to turn to the context in which this term appears. In this respect, we agree with the parties that the meaning of the term 'comparable' as used in Article 2.4.2 can best be established by an examination of other provisions of Article 2 of the *AD*

[370] *(footnote original)* We note that insertion of the word "comparable" into Article 2.4.2 represented the only modification to that Article between the date of the Draft Final Act and the text as adopted. *See Draft Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations*, MTN.TNC/W/FA, 20 December 1991. This suggests that its inclusion was not merely incidental but reflected careful consideration by the drafters.

[371] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.111-6.112.

[372] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.113-6.114.

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> *Agreement* that address the issue of comparability. We further note that the chapeau to Article 2.4 provides that the comparison between the export price and the normal value shall be made 'in respect of sales made at as nearly as possible the same time'. Thus, we consider it clear that the timing of sales may have implications in respect of the comparability of export and home market transactions.[373]
>
> This does not mean, however, that where an average to average comparison methodology is used, individual home market and export sales that are not made at the same time necessarily are not comparable and thus cannot be included in the weighted averages. To the contrary, it is in the very nature of an average to average comparison that, for example, transactions made at the beginning of the averaging period in the export market will be made at a different moment in time than sales in the home market made at the end of averaging period. If the drafters had considered that this situation would necessarily give rise to a problem of comparability, surely they would not have explicitly authorized the use of averaging in Article 2.4.2. Thus we consider that, in the context of weighted average to weighted average comparisons, the requirement that a comparison be made between sales made at as nearly as possible the same time requires *as a general matter* that the periods on the basis of which the weighted average normal value and the weighted average export price are calculated must be the same."[374]

1.6.10.3.5 Length of averaging periods

289. The Panel in *US – Stainless Steel (Korea)* rejected the United States' argument that the "same time" requirement of Article 2.4 implies a preference for shorter rather than longer averaging periods, and stated:

> "If the requirement to compare sales at 'as nearly as possible the same time' means that sales within an averaging period covering a [period of investigation ('POI')] are not comparable, then a Member presumably would be *obligated* to break a POI into as many sub-periods as possible. Yet to interpret the word 'comparable', when combined with the requirement that sales be compared 'at as nearly as possible the same time', to obligate Members to perform numerous average to average comparisons based on the shortest possible time periods would in effect read the Article 2.4.2 authorization to perform average to average comparisons out of the *AD Agreement,* leaving Members with only the second option, the comparison of normal values and export prices on a transaction-by-transaction basis.[375]"[376]

290. Having found that Members are not obliged to divide a period of investigation into as many sub-periods as possible, the Panel in *US – Stainless Steel (Korea)* nevertheless placed the following caveat:

> "We do not preclude that there may be factual circumstances where the use of multiple averaging periods could be appropriate in order to insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home

[373] *(footnote original)* As an additional contextual argument, Korea argues that devaluation cannot be considered to affect comparability because there is no provision in the *AD Agreement* specifying that sales made at one exchange rate cannot be compared with sales at another exchange rate. Rather, the only provision of the *AD Agreement* that addresses exchange rates is Article 2.4.1, which the United States concedes does not establish a limit on what sales may be considered comparable. We do not however place any weight on Korea's argument in this respect. In our view – and absent the unusual situation of multiple exchange rates – there will at any given moment in time be only one exchange rate. Thus, any problem of comparability does not relate to exchange rates *per se*, but rather to differences in timing of sales. Thus it is on this issue that we focus.

[374] Panel Report, *US – Stainless Steel (Korea)*, paras. 6.120-6.121.

[375] *(footnote original)* The United States' argument seems to be posited on its view that the best comparison for measuring dumping is a transaction-to-transaction comparison, and that average-to-average comparisons are a second-best approach allowed because of practical problems with the transaction-to-transaction methodology. *See* US answer to question 2 from the Panel posed at the second meeting of the Panel with the parties. We perceive no valid textual basis for such a conclusion, however. To the contrary, the *AD Agreement* sets forth two options for a comparison methodology – average-to-average and transaction-to transaction – and expresses no preference between them.

[376] Panel Report, *US – Stainless Steel (Korea)*, para. 6.122.

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> and export markets. We note that, where changes in normal value, export price or constructed export price during the course of the POI are combined with differences in the relative weights by volume within the POI of sales in the home market as compared to the export market, the use of weighted averages for the entire POI could indicate the existence of a margin of dumping that did not reflect the situation at any given moment within the POI.[377] In this situation a Member might in our view be justified in concluding that differences in timing of sales in the home and export markets give rise to a problem of comparability that could be addressed through multiple averaging periods.[378] We recall however that this situation only arises where two elements – a change in prices *and* differences in the relative weights by volume within the POI of sales in the home market as compared to the export market – exist. Thus, while a change in normal value, export price or constructed export price may be a *necessary* condition for the conclusion that the passage of time affects comparability in the case of an average-to-average comparison, the existence of such a change is not in itself a *sufficient* condition to conclude that the export transactions are not comparable to the normal value."[379]

1.6.10.4 Transaction normal value / Transaction export price, the second methodology

291. Addressing, for the first time, the issue of zeroing using the transaction-to-transaction methodology, the Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)*, further emphasized that the same approach needed to be followed for both the first and second methodologies to calculate a margin of dumping:

> "The first sentence of Article 2.4.2 sets out the two methodologies that 'shall normally' be used by investigating authorities to establish 'margins of dumping'. Although the transaction-to-transaction and weighted average-to-weighted average comparison methodologies are distinct, they fulfil the same function. They are also equivalent in the sense that Article 2.4.2 does not establish a hierarchy between the two. An investigating authority may choose between the two depending on which is most suitable for the particular investigation. Given that the two methodologies are alternative means for establishing 'margins of dumping' and that there is no hierarchy between them, it would be illogical to interpret the transaction-to-transaction comparison methodology in a manner that would lead to results that are systematically different from those obtained under the weighted average-to-weighted average methodology.
>
> In sum, the results of the transaction-specific comparisons cannot be considered 'margins of dumping' within the meaning of Article 2.4.2. The 'margins of dumping' established under the transaction-to-transaction comparison methodology provided in Article 2.4.2 result from the aggregation of the transaction-specific comparisons. Article 2.4.2 does not permit an investigating authority, when aggregating the results of transaction-specific comparisons, to disregard transactions in which export price exceeds normal value."[380]

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[377] *(footnote original)* A particularly dramatic example of this situation would arise where, during a substantial portion of the POI, there were *no* sales in one of the two markets.

[378] *(footnote original)* The combination of these two factors could even result in a situation where, although at any given moment in time throughout the POI, the exporter was charging an identical price (after all appropriate allowances had been made), a margin of dumping could nevertheless be found to exist. For example, imagine that there were two home market sales (HM-1 and HM-2) and two export sales (EX-1 and EX-2) during the POI. HM-1 and EX-1 occurred on day 1 and were both at a price of $10. HM-2 and EX-2 occurred on day 90 and were both at a price of $15. Thus, neither of the individual export transactions was dumped when compared to the simultaneous home market transactions. If all these sales were in the same volumes, then a weighted average to weighted average would also show no dumping. Assume however that HM-1 and EX-2 involved a volume of ten units, while HM-2 and EX-1 involved a volume of twenty units. In this case, the weighted average normal value would be (10 units x $10/unit) + (20 units x $15/unit) = $400/30 units = $13.33/unit. The weighted average export price would be (20 units x $10/unit) + (10 units x $15/unit) = $350/30 units = $11.27/unit. Thus, the weighted average margin of dumping would be 18 per cent.

[379] Panel Report, *US – Stainless Steel (Korea)*, para. 6.123.

[380] Appellate Body Report, US – Softwood Lumber V (Article 21.5 – Canada), paras. 93-94.

292. The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* said that transaction specific results are "mere steps in the comparison process" and that the "results of the transaction-specific comparisons are not, in themselves, "margins of dumping"."[381]

293. The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* also drew support from other Articles of the Anti-Dumping Agreement in finding that zeroing was not permissible when calculating margins of dumping on a transaction-to-transaction basis. The *de minimis* provision in Article 5.8 required aggregation; Article 6.10 reinforced, for the Appellate Body, the notion that "margins of dumping" were the result of an aggregation, in this case, of transaction-specific comparisons; and in Article 9.3 the margin of dumping determined in Article 2 operated as a ceiling for the total amount of anti-dumping duty that could be imposed on individual exporters or foreign producers. Again, this suggested that the margin of dumping was the result of an overall aggregation and did not refer to the results of transaction-specific comparisons.[382]

294. The Appellate Body in *US – Zeroing (Japan)* stated that it saw no reason to depart from its reasoning in *US – Softwood Lumber V (Article 21.5 – Canada)* regarding zeroing in the use of the transaction-to-transaction methodology for calculating a margin of dumping:

> "We fail to see why, if, for the purpose of establishing a margin of dumping, such a product is dealt with under the T-T comparison methodology in an original investigation, zeroing would be consistent with Article 2.4.2 of the *Anti-Dumping Agreement*. If anything, zeroing under the T-T comparison methodology would inflate the margin of dumping to an even greater extent as compared to model zeroing under the W-W comparison methodology. This is because zeroing under the T-T comparison methodology disregards the result of each comparison involving a transaction in which the export price exceeds the normal value, whereas under the W-W comparison methodology, zeroing occurs, as noted above, only across the sub-groups in the process of aggregation.
>
> We do not consider that the absence of the phrase 'all comparable export transactions' in the context of the T-T comparison methodology suggests that zeroing should be permissible under that methodology. Because transactions may be divided into groups under the W-W comparison methodology, the phrase 'all comparable export transactions' requires that each group include only transactions that are comparable and that no export transaction may be left out when determining margins of dumping under that methodology. Furthermore, the W-W comparison methodology involves the calculation of a weighted average export price. By contrast, under the T-T comparison methodology, all export transactions are taken into account on an individual basis and matched with the most appropriate transactions in the domestic market. Therefore, the phrase 'all comparable export transactions' is not pertinent to the T-T comparison methodology. Consequently, no inference may be drawn from the fact that these words do not appear in relation to this methodology."[383]

295. The Panel in *US – Orange Juice (Brazil)* examined a complaint against use of "simple zeroing" in two administrative reviews, in which individual export transaction prices were compared to a weighted-average normal value for a contemporaneous month; the computer programme sorted and aggregated transactions where the export price was below normal value on an importer-specific basis. The Panel concluded (following the Appellate Body) that "'dumping' cannot have a transaction-specific meaning".[384] It then concluded that "the entirety of Article 2.4, including its first sentence, must apply to discipline the 'comparison' between export price and normal value whenever undertaken during an anti-dumping proceeding including during duty assessment."[385] The Panel concluded that "simple zeroing" is inconsistent with the "fair comparison" requirement prescribed in Article 2.4:

> "We agree with the United States and the panel in *US – Softwood Lumber V (Article 21.5 – Canada)* that the meaning of the notion of 'fairness' as it is articulated in

[381] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 87.
[382] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 105-108.
[383] Appellate Body Report, *US – Zeroing (Japan)*, paras. 123-124.
[384] Panel Report, *US – Orange Juice (Brazil)*, para. 7.136.
[385] Panel Report, *US – Orange Juice (Brazil)*, para. 7.142.

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> Article 2.4 will depend upon the particular context in which it is intended to operate. In our view, the search for this context must, first and foremost, start with understanding precisely what it is that must be 'fair'. This, of course, is the 'comparison' between export price and normal value. Thus … accepting that the scope of the 'fair comparison' requirement extends beyond the subject matter of Article 2.4, does not establish a rule governing 'any and all anti-dumping calculations'. The very language of the first sentence of Article 2.4 explicitly limits its relevance to situations involving the 'comparison' between export price and normal value. For instance, the 'fair comparison' requirement does not extend to govern how an investigating authority establishes normal value. It is clear that this is comprehensively disciplined under Article 2.2 of the AD Agreement. Neither does the 'fair comparison' requirement regulate how to establish constructed export price, which is addressed in Article 2.3 of the AD Agreement. However, pursuant to the first sentence of Article 2.4, the 'comparison' between any export price and normal value, both individually established in accordance with the specific rules set out in Article 2, must be 'fair'.
>
> An investigating authority will compare export price with normal value for the purpose of determining the existence of dumping or the magnitude of a margin of dumping. This implies that the comparison between export price and normal value must be informed by the definition of 'dumping' that is contained in Article 2.1 of the AD Agreement. Above we have found that, on balance, and taking into account important systemic concerns, it is impermissible to compare export price with normal value in such a way that does not result in a determination of 'dumping' for the 'product as a whole'. In this light, a comparison methodology (such as 'simple zeroing') that ignores transactions, which if properly taken into account, would result in a lower margin of dumping, must be considered 'unfair' and therefore inconsistent with Article 2.4."[386]

1.6.10.5 Weighted average normal value / individual transactions export price, the third methodology

1.6.10.5.1 Scope of application of the third methodology

296. In *US – Washing Machines*, the Appellate Body upheld the Panel's finding that the third methodology only applied to the export transactions within the pattern found by the investigating authority pursuant to Article 2.4.2, second sentence, and not to all export transactions:

> "For the reasons set out above, we agree with the Panel that: (i) the use of the word 'individual' in the second sentence of Article 2.4.2 indicates that the W-T comparison methodology does not involve all export transactions, but only certain export transactions identified individually; and (ii) the 'individual export transactions' to which the W-T comparison methodology may be applied are those transactions falling within the relevant 'pattern'. Accordingly, we read the phrase 'individual export transactions' as referring to the universe of export transactions that justify the use of the W-T comparison methodology, namely, the 'pattern transactions'. Our interpretation gives meaning and effect to the second sentence of Article 2.4.2, whose function is to allow investigating authorities to identify and address 'targeted dumping'. It also accords with the object and purpose of the Anti-Dumping Agreement. Although the Anti-Dumping Agreement does not contain a preamble expressly setting out its object and purpose, it is apparent from the text of this Agreement that it deals with injurious dumping by allowing Members to take anti-dumping measures to counteract injurious dumping and imposing disciplines on the use of such anti-dumping measures."[387]

297. While the Panel in *US – Differential Pricing Methodology* agreed with past panels and the Appellate Body that the second sentence of Article 2.4.2 does not permit an investigating authority to apply the W-T methodology to all export transactions, it disagreed that non-pattern transactions

[386] Panel Report, *US – Orange Juice (Brazil),* paras. 7.152-153.
[387] Appellate Body Report, *US – Washing Machines*, para. 5.52. See also Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.177, 7.183 and 7.187.

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"may (or must) be excluded when an investigating authority makes dumping determinations pursuant to the second sentence". The Panel stated:

> "[A]n investigating authority must apply the W-W or the T-T methodology to those non-pattern transactions. The intermediate result calculated by applying the W-T methodology to pattern transactions must be aggregated with the intermediate result calculated by applying the W-W or the T-T methodology to the non-pattern transactions. The intermediate result based on non-pattern transactions may not be excluded, irrespective of whether that result is positive or negative."[388]

298. In reaching this conclusion, the Panel considered that the text of the explanation clause is worded specifically "and does not require an explanation with respect to export transactions falling outside the pattern because the second sentence does not contemplate the application of the W-T methodology outside the pattern".[389]

1.6.10.5.2 Identification of a pattern of prices

299. In *US – Washing Machines*, the Panel found that for purposes of Article 2.4.2 "the fact that prices differ in a regular and intelligible form may be discerned through a simple examination of the relevant numerical price values[]"[390] and that an investigating authority is not required to examine the reasons for such price differences.[391] On appeal, the Appellate Body pointed out that the word "significantly" in Article 2.4.2 had both quantitative and qualitative dimensions, and disagreed with the view that an authority can determine whether prices differ significantly on the basis of a purely numerical assessment:

> "Furthermore, the term 'significantly' has both quantitative and qualitative dimensions. Accordingly, assessing the extent of the differences in export prices to establish whether those export prices differ *significantly* for the purposes of the second sentence of Article 2.4.2 entails both quantitative and qualitative dimensions. As part of the qualitative assessment, circumstances pertaining to the nature of the product or the markets may be relevant for the assessment of whether differences are 'significant' in the circumstances of a particular case. The significance of differences may indeed be affected by objective market factors, such as the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. Hence, what may be deemed 'significant' price differences in one instance may fail to meet the same threshold when different variables are considered. For example, the Panel observed that, in a more price-competitive market, smaller differences may be significant. Unless the investigating authority considers such qualitative aspects, it will not know if and how these aspects are relevant to its assessment of whether prices differ significantly. Therefore, we disagree with the Panel to the extent it considered that an investigating authority may properly find that certain prices differ significantly within the meaning of the second sentence of Article 2.4.2 if they are notably greater in purely numerical terms."[392]

300. The Appellate Body in *US – Washing Machines* underlined, however, that Article 2.4.2 does not require authorities to examine the reasons for the price differences:

> "The words 'significantly' and 'pattern' in the second sentence of Article 2.4.2, however, do not imply an examination into the cause of (or reasons for) the differences in prices. The second sentence of Article 2.4.2 requires an investigating authority to find 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'. The text does not impose an additional requirement to ascertain whether the significant differences found to exist are unconnected with 'targeted dumping'. As the Panel correctly observed, in *US – Large Civil Aircraft (2nd complaint),* there was no suggestion by the Appellate Body that the qualitative dimension of the

[388] Panel Report, *US – Differential Pricing Methodology*, para. 7.78.
[389] Panel Report, *US – Differential Pricing Methodology*, para. 7.81.
[390] Panel Report, *US – Washing Machines*, para. 7.46.
[391] Panel Report, *US – Washing Machines*, para. 7.48.
[392] Appellate Body Report, *US – Washing Machines*, para. 5.63.

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> significance of lost sales extends to consideration of the cause of (or reasons for) those lost sales. Similarly, the Panel correctly observed that the *US – Upland Cotton* panel did not refer to the underlying cause of (or reasons for) price suppression as being relevant to the potential significance of the degree of price suppression. The text of the second sentence of Article 2.4.2 also does not imply an examination of the motivation for, or intent behind, the differences in prices. We thus see merit in the United States' argument that, under the second sentence of Article 2.4.2, the investigating authority is charged with finding whether a pattern of export prices exists, not whether an exporter or producer has intentionally patterned its export prices to 'target' and 'mask' dumping."[393]

301. The Appellate Body in *US – Anti-Dumping Methodologies (China)* found that the Panel had not erred by finding that the word "significantly" under Article 2.4.2 had both quantitative and qualitative dimensions, even though the Panel had not referred to "objective market factors":

> "The Panel Report in this dispute, which was circulated prior to the Appellate Body report in *US – Washing Machines*, does not refer explicitly to 'objective market factors' and does not list all the indicative objective market factors that the Appellate Body refers to in *US – Washing Machines*. Nevertheless, the Panel's reference to 'the circumstances surrounding an investigation' and to 'the nature of the product under investigation and the relevant industry' make it clear that the Panel considered that a qualitative assessment of significance under the second sentence of Article 2.4.2 involves the consideration of factors such as those that the Appellate Body mentioned as examples of 'objective market factors'."[394]

302. The Appellate Body in *US – Anti-Dumping Methodologies (China)* rejected the argument that a decline in cost of production should form part of an investigating authority's qualitative analysis under Article 2.4.2. However, the Appellate Body held that seasonality could in some cases be part of that analysis:

> "We therefore do not agree with China that a decline in production costs should form part of the investigating authority's qualitative analysis in assessing the significance of price differences under the pattern clause. Regarding seasonality, to the extent that seasonal variations in the prices of goods explain why export prices vary over time periods, they relate to the 'reasons' for the price differences and thus need not be considered under the pattern clause. Nevertheless, to the extent that seasonal price variations – which are inherent in the nature of a product, the industry at issue, or the market structure – speak to the significance, or lack thereof, of such price differences, they may be relevant to the qualitative assessment under the pattern clause of whether identified differences in export prices differ 'significantly'."[395]

303. The Appellate Body in *US – Anti-Dumping Methodologies (China)* added that "[w]hile the reasons behind differences in export prices are not part of the qualitative analysis that is required under the pattern clause in order to establish whether such differences are significant, such reasons may be relevant to an investigating authority's explanation of why the differences in export prices cannot be taken into account appropriately by the use of either the W-W or the T-T methodology."[396]

304. The Appellate Body in *US – Washing Machines* approved the Panel's view that "a 'pattern' can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods."[397] In other words, according to the Appellate Body, "'a pattern' has to be identified among different purchasers, or among different regions, or among different time periods, and cannot transcend these categories."[398] The Appellate Body also stated that although Article 2.4.2 does not specify this, a pattern would normally comprise prices that are significantly lower than other export prices among different purchasers, regions or time-periods:

[393] Appellate Body Report, *US – Washing Machines*, para. 5.65.
[394] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.64.
[395] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.68.
[396] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.69.
[397] Appellate Body Report, *US – Washing Machines*, para. 5.34.
[398] Appellate Body Report, *US – Washing Machines*, para. 5.33.

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> "The text of the second sentence of Article 2.4.2 does not expressly specify whether the prices need to differ significantly because they are *lower* than other prices, or whether they may differ because they are *higher* than other prices. Nor does the text of the second sentence of Article 2.4.2 specify whether those prices found to differ need to be below normal value. However, the Anti-Dumping Agreement as a whole is concerned with injurious 'dumping', and Article 2.4.2 sets out the methodologies that investigating authorities may use to establish margins of dumping. Article VI:1 of the GATT 1994 and Article 2.1 of the Anti-Dumping Agreement refer to export prices that are *lower* than normal value as 'dumped' prices. Significantly, the function of the second sentence of Article 2.4.2 is to allow investigating authorities to identify and address 'targeted dumping'. Therefore, although we recognize that a pattern may be identified in a variety of factual circumstances, we consider that the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2 comprises prices that are significantly *lower* than other export prices among different purchasers, regions or time periods. We fail to see how an investigating authority could identify and address 'targeted dumping' by considering significantly higher export prices. If the prices found to differ significantly are higher than other export prices, the other (lower) export prices would not 'mask' the (higher) dumped prices found to form the pattern."[399]

305. However, the Appellate Body pointed out that an authority may find more than one pattern in a given investigation and use the third methodology:

> "Our interpretation does not exclude the possibility that the same exporter or producer could be practicing more than one of the three types of 'targeted dumping'. We also do not exclude the possibility that a pattern of significantly differing prices to a certain category may overlap with a pattern of significantly differing prices to another category. For instance, the same transactions could 'target' certain purchasers in certain regions, in which case the investigating authority might find that a pattern of significantly differing prices among different purchasers and a pattern of significantly differing prices among different regions exist."[400]

306. However, the Panel in *US – Differential Pricing Methodology*, disagreed with the Appellate Body's primary reliance in *US – Washing Machines* "on contextual considerations in concluding that the pattern could only comprise export prices which differ significantly because they are significantly lower".[401] The Panel disagreed with the Appellate Body's finding as it considered that in determining the dumping margin under the second sentence of Article 2.4.2, an investigating authority "must apply the W-T methodology only to pattern transactions and exclude the non-pattern transactions". The Panel considered that "such a methodological approach is not consistent with Article 2.4.2 because this provision does not permit an investigating authority to exclude non-pattern transactions".[402]

307. In agreeing with the Appellate Body's focus in *US – Washing Machines* on export prices which "differ significantly", the Panel in *US – Differential Pricing Methodology* stated the following:

> "The text of the pattern clause does not suggest that the pattern comprises *any* lower- or higher-priced export transaction, or any export transaction priced above or below the normal value. The existence of such type of lower-priced and higher-priced export transactions would not be a sufficient basis to find a pattern because the pattern clause requires an investigating authority to find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and not significant differences or variations across the prices of all export transactions. It follows that if an investigating authority were to find that certain export prices do 'differ significantly among different purchasers, regions or time periods' and form the relevant pattern, that would not present the investigating authority with a *carte blanche* to include other export prices that do not 'differ significantly among different purchasers, regions or time periods' in the pattern. Thus, we consider that a pattern of export prices which 'differ significantly' among different purchasers, regions or time periods necessarily excludes

[399] Appellate Body Report, *US – Washing Machines*, para. 5.29.
[400] Appellate Body Report, *US – Washing Machines*, para. 5.35.
[401] Panel Report, *US – Differential Pricing Methodology*, para. 7.59.
[402] Panel Report, *US – Differential Pricing Methodology*, para. 7.60.

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> export prices which *do not* differ significantly among different purchasers, regions or time periods."[403]

308. The Panel in *US – Differential Pricing Methodology* further disagreed with the Appellate Body's finding in *US – Washing Machines* that prices that are too high or too low do not belong in the same pattern. The Panel stated:

> "The definition of pattern does not suggest that prices falling within a pattern need to differ in the same way, i.e. it need not comprise only lower-priced export sales, or only higher-priced export sales, to purchasers (or regions, or time periods). What is important is that the sequence of export prices should form a regular and intelligible sequence that is discernible in certain actions and capable of being understood. Export prices which 'differ significantly' because they are significantly higher or significantly lower could form such a sequence. Such a sequence of significantly higher and significantly lower export prices to purchasers, regions or time periods would stand out relative to export prices to other purchasers, regions or time periods because they 'differ significantly', and thus would be capable of being understood. Moreover, the word 'pattern' should not be viewed in isolation from the other parts of the text that specify what type *of* pattern an investigating authority must find. In so specifying, the pattern clause only requires that the pattern be *of* export prices which differ significantly, and does not prescribe whether they should differ because they are significantly higher or significantly lower relative to export prices to other purchasers, regions or time periods. Therefore, the pattern clause does not preclude an investigating authority from finding that the pattern includes export prices to purchasers, regions or time periods that 'differ significantly' because they are significantly higher relative to export prices to other purchasers, regions or time periods."[404]

309. The Panel went on to qualify this finding and, in disagreeing with the United States' assertion, stated that it should not be "misunderstood to mean that a pattern would comprise all export transactions of a foreign producer or exporter".[405] The Panel further clarified the application of the pattern clause, stating:

> "The pattern clause does not prescribe how an investigating authority must find a pattern. But it does require an investigating authority to find a pattern of export prices which differ significantly among different purchasers. It does not state that an investigating authority must find whether the weighted average export price to one purchaser differs significantly *from* the weighted average of export prices to all other purchasers (with the same rationale applying to regions and time periods as well). Irrespective of the methodology used to identify a pattern, the pattern ultimately discerned, based on an evaluation of all export sales of the concerned foreign producer or exporter, cannot include export prices which do not differ significantly among different purchasers, regions or time periods."[406]

310. The Appellate Body in *US – Anti-Dumping Methodologies (China)* agreed with the Panel's view that investigating authorities have discretion under Article 2.4.2 on how to identify a pattern of prices:

> "Under the second sentence of Article 2.4.2, it is the investigating authority that is tasked with establishing the existence of such a pattern. This provision, however, does not prescribe a particular method for identifying a pattern. We thus agree with the Panel that while the pattern clause 'specifies *what* an investigating authority should find … it does not prescribe *how* an investigating authority should make such a finding.' Accordingly, investigating authorities enjoy a margin of discretion regarding the methods or tools they wish to use in establishing the existence of a pattern. However, irrespective of the method used, investigating authorities are required to identify 'a pattern of export prices which differ significantly among different purchasers, regions

[403] Panel Report, *US – Differential Pricing Methodology*, para. 7.65.
[404] Panel Report, *US – Differential Pricing Methodology*, para. 7.61.
[405] Panel Report, *US – Differential Pricing Methodology*, para. 7.63.
[406] Panel Report, *US – Differential Pricing Methodology*, para. 7.64.

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> or time periods' within the meaning of the second sentence of Article 2.4.2 and consistently with their obligations under the Anti-Dumping Agreement."[407]

311. Furthermore, the Panel in *US – Differential Pricing Methodology* emphasized that "nothing in the pattern clause precludes an investigating authority from considering the extent of the price differences identified under the pattern clause. One would also expect an investigating authority to look at the overall pricing behaviour of a foreign producer or exporter to identify a pattern."[408]

312. The Panel in *US – Anti-Dumping Methodologies (China)* pointed out that "an investigating authority may find export prices which 'differ significantly' within the meaning of the pattern clause of Article 2.4.2 only through a comparison of high and low export prices which differ significantly from each other."[409] Further, the Panel stated that Article 2.4.2 does not require that only random or aberrational outliers among export prices form part of a pattern.[410] The Panel also found, in a finding upheld by the Appellate Body, that the fact that there is a large number of export transactions within a pattern does not necessarily render the identification of the pattern inconsistent with Article 2.4.2:

> "In our view, it cannot be said that an export price is not low or sufficiently low, just because a large number of export transactions are made at such low level of prices. It is entirely possible, for instance, that an exporter makes repeated low priced sales to its targeted purchaser. Such sales may be made in terms of a large number of export transactions or large quantities of sales through fewer export transactions. The same rationale applies in cases where the exporter makes repeated low-priced sales in targeted regions or time periods. Therefore, the fact that a large number of export transactions are made at low prices would not necessarily preclude an investigating authority from finding that such low prices differ significantly from other higher prices.
>
> Accordingly, we do not agree with China's contention that where a large number of export transactions are made at prices that are one standard deviation below the CONNUM-specific weighted average price, such prices cannot form the relevant pattern within the meaning of the pattern clause of Article 2.4.2."[411]

313. The Panel in *US – Anti-Dumping Methodologies (China)* found that the USDOC had violated Article 2.4.2 by identifying a pattern on the basis of a consideration of the prices outside the pattern which were higher than the prices within the pattern:

> "In this context, we note the United States' argument that because the USDOC applied the Nails test to identify a specific type of pattern, namely, a pattern of sufficiently low export prices in relation to other higher export prices, it was 'logical' that the price gap test would compare the export prices to an alleged target to higher export prices to non-targets. We are not persuaded by this argument for two reasons. First, the pattern clause of Article 2.4.2 does not permit an investigating authority to conclude that the pattern of export prices to the alleged target differs significantly from those to non-targets by considering only the export prices to non-targeted purchasers or time periods which are higher than those to the alleged target. In our view, for export prices to the alleged target to be low, they have to be low relative to export prices to all other non-targets … Faced with such a situation, an unbiased and objective investigating authority would be expected to take such lower non-target prices into consideration and evaluate whether the presence of such prices casts doubt on its finding of a pattern of export prices which differ significantly, within the meaning of the pattern clause of Article 2.4.2. However, the USDOC chose to disregard, without explanation, data on the record pertaining to such lower non-target prices. That, in our view, is neither an objective nor an unbiased evaluation of record evidence.
>
> Second, we recall that there is an element of subjectivity in the identification of the alleged target under the Nails test. In the challenged investigations, the domestic

[407] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.22.
[408] Panel Report, *US – Differential Pricing Methodology*, para. 7.46.
[409] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.55.
[410] Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.61.
[411] Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.62-7.63.

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> industry petitioner identified the alleged target before the USDOC applied the Nails test. Consequently, which purchaser or which time period would be the alleged target, and which would be the non-targets, was determined before the USDOC applied the Nails test. As the United States itself acknowledges, the petitioner's identification of the alleged target influenced which non-target prices would be considered under the price gap test and which would not be."[412]

314. The Appellate Body in *US – Anti-Dumping Methodologies (China)* agreed with the Panel's view that the pattern clause of Article 2.4.2 does not focus on price differences within the pattern, and that therefore investigating authorities can use either individual or average export prices in identifying a pattern:

> "As explained above, the distinguishing factor that allows an investigating authority to discern which export prices form part of the pattern is that the prices in the pattern differ significantly from the prices not in the pattern. In addition, the relevant difference is one 'among' different purchasers, regions or time periods. As explained above, the term 'among' in the pattern clause serves to specify the parameters in relation to which 'export prices which differ significantly' may be discerned, i.e. purchasers, regions or time periods. Thus, we consider that the pattern clause focuses on the price differences *among* different purchasers, regions or time periods; not the differences *within* the prices for the 'targeted' purchaser, region, or time period.
>
> We consider that this view is consistent with the function of the second sentence of Article 2.4.2, which is to allow investigating authorities to identify and address 'targeted dumping'. As a result, an investigating authority may rely on prices of individual export transactions or average prices in order to find a pattern, provided that the pattern meets the requirements stipulated in the pattern clause. In this regard, we agree with the Panel's conclusion that the pattern clause provides investigating authorities with discretion in relation to whether a pattern determination is to be based on individual export transaction prices or average prices."[413]

315. In coming to this conclusion, the Appellate Body rejected the argument that the phrase "prices of individual export transactions" in the first part of the pattern clause informs how a pattern should be determined:

> "The structure of the second sentence of Article 2.4.2 makes clear that this provision has two distinct parts serving different purposes. The first part clarifies that a normal value may be compared to prices of 'individual export transactions' in order to establish the existence of margins of dumping. This serves the purpose of distinguishing the W-T methodology from the normally applicable methodologies in the first sentence of Article 2.4.2. The second part of the second sentence deals with the conditions that have to be met for an investigating authority to have recourse to the W-T methodology. We are not convinced that the reference to 'prices of individual export transactions' in the first part of the second sentence directly informs or limits *how* a pattern is to be identified in the second part of the second sentence. China's argument effectively imports the phrase 'individual export transactions' into the pattern clause. Moreover, in our view, a pattern determined on the basis of average prices is nonetheless composed of individual export transactions to which the W-T methodology may be applied. In this respect, we agree with the United States that individual prices are not 'overlooked' by an investigating authority when those prices are included in the calculation of averages."[414]

316. In considering that both sentences of Article 2.4.2 are to be interpreted bearing in mind the context of Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, the Panel in *US – Differential Pricing Methodology* considered that "dumping determinations must be based on the totality of an exporter's transactions even when the conditions for the use of the W-T methodology under this second sentence are met". Furthermore, the Panel considered that Article 2.4.2 does not permit an investigating authority "to exclude the totality of an

[412] Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.89-7.90.
[413] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.82-5.83.
[414] Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, para. 5.88.

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exporter's transactions or the pricing behaviour outside the identified pattern when the conditions set out in the second sentence of Article 2.4.2 are met".[415] The Panel further stated in relation to the inclusion/exclusion of transactions that are not part of the pattern:

> "We are cognizant that in finding that an investigating authority must exclude non-pattern transactions while determining the dumped amount pursuant to the second sentence of Article 2.4.2, the Appellate Body stated that this sentence 'says nothing about including transactions that are not part of the pattern in the comparison process that is required to establish margins of dumping'. However, what is relevant is not that the text says nothing about *including* transactions that are not part of the pattern, but that the text says nothing about *excluding* transactions that are not part of the pattern, when an investigating authority determines the dumping margin for the product as a whole. The silence of the text on this matter may be contrasted with other provisions of the Anti-Dumping Agreement, including Articles 2.2.1, 2.2.2, and 2.3 of the Anti-Dumping Agreement, which set out specific rules on when an investigating authority may reject certain transactions or data. The existence of such specific rules in other parts of the Anti-Dumping Agreement suggests that if the drafters of the Anti-Dumping Agreement had intended to allow an investigating authority to disregard non-pattern transactions, which could well be the majority of the export transactions of a foreign producer or exporter, they would have provided rules to this effect. Therefore, the silence of the text in this regard appears deliberate."[416]

317. The Panel considers that its understanding of the text is consistent with what the Appellate Body considers to be the object and purpose of the Anti-Dumping Agreement; "to allow Members to deal with injurious dumping by allowing them to take anti-dumping measures to counteract injurious dumping and imposing disciplines on the use of such anti-dumping measures", whereas the methodological approach of the Appellate Body frustrates this purpose through disallowing an investigating authority to "calibrate the anti-dumping measures to respond to the actual level of injurious dumping, as reflected in the totality of the pricing behaviour of a foreign producer or exporter". [417]

318. The Panel further disagreed with the Appellate Body's approach with regards to the application of the W-W or T-T methodology to non-pattern transactions, stating that "reading the two sentences of Article 2.4.2 together, and in proper context, shows that neither the first sentence nor the second sentence permits an investigating authority to simply exclude non-pattern transactions."[418]

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1.6.10.5.3 Explanation clause

319. In *US – Washing Machines*, the Panel found that the explanation required under the last sentence of Article 2.4.2 could to be provided with regard to one of the two principal methodologies, not necessarily both.[419] The Appellate Body reversed this finding, stressing the exceptional nature of the third methodology. In its reasoning, the Appellate Body also disagreed with the Panel's view that requiring an explanation with regard to both of the principal methodologies would deprive investigating authorities of the initial discretion to choose between the two principal methodologies:

> "Furthermore, the W-T comparison methodology in the second sentence of Article 2.4.2 is an exception to the comparison methodologies that are set out in the first sentence and are normally to be used. Interpreting the second sentence of Article 2.4.2 as requiring that an explanation be provided with respect to both the W-W and the T-T comparison methodologies gives a proper recognition to the text of that provision and to the distinction between the normally applicable methodologies in the first sentence of Article 2.4.2 and the exceptional W-T comparison methodology in the second sentence. If the W-T comparison methodology were to apply in an instance where an explanation is provided with respect to one of the two normally applicable comparison methodologies, but the other could appropriately take the relevant price

[415] Panel Report, *US – Differential Pricing Methodology*, para. 7.88.
[416] Panel Report, *US – Differential Pricing Methodology*, para. 7.91.
[417] Panel Report, *US – Differential Pricing Methodology*, para. 7.93.
[418] Panel Report, *US – Differential Pricing Methodology*, para. 7.94.
[419] Panel Report, *US – Washing Machines*, para. 7.79.

> differences into account, the W-T comparison methodology would no longer be used as an exception. Although the W-W and T-T comparison methodologies are likely to yield substantially equivalent results, the possibility that, in a particular case, they might yield different results and might impact differently the possible use of the W-T comparison methodology, should not be entirely excluded.
>
> Finally, we disagree with the Panel's reasoning that the investigating authority's 'initial discretion' between the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2 would be undermined by requiring that an explanation be provided with respect to both these methodologies. We recall that the W-W and the T-T comparison methodologies 'fulfil the same function' and that there is no 'hierarchy between the two'. As such, an investigating authority may choose between these two methodologies 'depending on which is most suitable for the particular investigation'. However, we consider that the investigating authority's option between the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2 is unrelated to the question of whether these two methodologies are not appropriate to unmask 'targeted dumping' such that the investigating authority contemplates the application of the W-T comparison methodology. Requiring that an explanation be provided in respect of both the W-W and T-T comparison methodologies, when the application of the W-T comparison methodology is considered under the second sentence of Article 2.4.2, does not mean that the investigating authority is deprived of its discretion should it decide to apply the first sentence of Article 2.4.2 instead of turning to the W-T comparison methodology in the second sentence."[420]

320. The Appellate Body also added, however, that "where the W-W and T-T comparison methodologies would yield substantially equivalent results and where an explanation has been provided with respect to one of these two methodologies, the explanation to be included with respect to the other may not need to be as elaborate."[421]

321. The Panel in *US – Anti-Dumping Methodologies (China)* found that the USDOC had acted inconsistently with Article 2.4.2 in the three investigations at issue because its explanations regarding the use of the third methodology were premised on the use of zeroing, a practice not allowed under Article 2.4.2.[422]

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1.6.10.5.4 Systemic disregarding

322. One issue that arose in *US – Washing Machines* was whether Article 2.4.2 allowed the so-called "systemic disregarding" in cases where an investigating authority applied the third methodology to the export transactions within the pattern found, and one of the two principal methodologies to the transactions outside the pattern. Systemic disregarding arose in the specific situation where the investigating authority combined the results of these two sets of calculations in calculating the final margin of dumping for the investigated product. The Panel found that systemic disregarding was allowed under Article 2.4.2 because:

> "In a situation where an authority chooses to apply the W-T comparison methodology to pattern transactions and the W-W (or T-T) comparison methodology to non-pattern transactions, we see no utility in allowing an investigating authority to use the W-T comparison methodology to zoom in and have particular regard to the exporter's pricing behaviour in respect of pattern transactions, after ensuring compliance with the relevant conditions, if the authority is subsequently required to zoom out from that specific pricing behaviour and give full effect to the exporter's pricing behaviour in respect of non-pattern transactions when making its overall determination of dumping. After allowing an authority to unmask dumping in respect of pattern transactions, it makes no sense to require that authority to then *re-mask* such dumping by providing

[420] Appellate Body Report, *US – Washing Machines*, paras. 5.74-5.75. See also Panel Report, *US – Anti-Dumping Methodologies (China)*, para. 7.157.
[421] Appellate Body Report, *US – Washing Machines*, para. 5.76.
[422] Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.145-7.146.

> offsets for negative dumping in respect of non-pattern transactions. Such offsets would be at odds with the object and purpose of the second sentence."[423]

323. In finding that systemic disregarding was allowed under Article 2.4.2, the Panel in *US – Washing Machines* also relied on the fact that "[t]he exclusion of 'systemic disregarding' would also lead to mathematical equivalence with the results of a straightforward application of the W-W comparison methodology to all transactions."[424]

324. On appeal, the Appellate Body took a different approach, and disagreed with the Panel's view that systemic disregarding is allowed under the second sentence of Article 2.4.2. First of all, the Appellate Body found that when the third methodology is used, dumping will be determined on the basis of export transactions within the pattern found by the investigating authority:

> "The establishment of dumping and margins of dumping, for the product under investigation 'as a whole' and by taking into account all export transactions of a given exporter or foreign producer, is to be carried out in respect of the applicable 'universe of export transactions' for each of the comparison methodologies set forth in Article 2.4.2. It is in the context of establishing margins of dumping for the product under investigation 'as a whole' under the normally applicable W-W and T-T comparison methodologies that the Appellate Body has consistently found that, under the first sentence of Article 2.4.2, an investigating authority is under an obligation to consider the entire 'universe of export transactions' for a given exporter or foreign producer. However, and as the Appellate Body has previously stated, under the W-T comparison methodology set forth in the second sentence of Article 2.4.2, the applicable 'universe of export transactions' is more limited than those under the W-W and T-T comparison methodologies.
>
> Once the applicable 'universe of export transactions' has been determined under the second sentence of Article 2.4.2 for the purposes of the application of the W-T comparison methodology, dumping and margins of dumping pertaining to an exporter or foreign producer and to the product under investigation are limited to this identified 'universe of export transactions', i.e. the 'pattern transactions'."[425]

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325. The Appellate Body also stated that under the third methodology, the numerator will comprise only pattern transactions whereas the denominator will include all export transactions of the relevant exporter or foreign producer:

> "Under the W-T comparison methodology provided in the second sentence of Article 2.4.2, the margin of dumping, which is expressed as a percentage of the total value of export transactions of an exporter or foreign producer, would be established by considering 'pattern transactions', while excluding 'non-pattern transactions' in the numerator of the equation. The denominator, however, will reflect all export transactions of an exporter or foreign producer. In so doing, while 'targeted dumping' is identified and addressed by including in the numerator the 'pattern transactions', the denominator, in reflecting the value of *all* export transactions of the 'like' product by a given exporter or foreign producer, ensures that, for the universe of 'pattern transactions' to which the W-T comparison methodology is applied, the margin of dumping is calculated for that exporter or foreign producer and for the product under investigation 'as a whole'. This exercise is, therefore, consistent with the concepts of 'dumping' and 'margins of dumping' as pertaining to an exporter or foreign producer and to the product under investigation 'as a whole' and with the function of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement as identifying and addressing 'targeted dumping'."[426]

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[423] Panel Report, *US – Washing Machines*, para. 7.162.
[424] Panel Report, *US – Washing Machines*, para. 7.164.
[425] Appellate Body Report, *US – Washing Machines*, paras. 5.104-5.105.
[426] Appellate Body Report, *US – Washing Machines*, para. 5.116.

326. As a result of these findings, the Appellate Body also found that Article 2.4.2 did not allow investigating authorities to combine different comparison methodologies, and to resort to systemic disregarding, when using the third methodology:

> "The second sentence of Article 2.4.2 does not envisage 'systemic disregarding' as described by the Panel. This provision does not provide for a mechanism whereby an investigating authority would conduct separate comparisons for 'pattern transactions' under the W-T comparison methodology and for 'non-pattern transactions' under the W-W or T-T comparison methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result, or aggregate it with the W-T comparison results for the 'pattern transactions' if it yields an overall positive comparison result. This is further supported by our conclusion above that, if the conditions set forth in the second sentence of Article 2.4.2 are met, an investigating authority is allowed to establish margins of dumping by applying the W-T comparison methodology only to 'pattern transactions', while excluding from consideration 'non-pattern transactions'.
>
> Hence, we conclude that Article 2.4.2 does not permit the combining of comparison methodologies for the purposes of establishing dumping and margins of dumping in accordance with the second sentence."[427]

327. The Appellate Body therefore also disagreed with the Panel's view that the exclusion of systemic disregarding in the application of the third methodology would lead to mathematical equivalence with the application of the W-W methodology:

> "Mathematical equivalence or substantial equivalence arises only if one were to take the view that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement envisages the combining of comparison methodologies, thereby requiring an investigating authority to aggregate the results of the W-T comparison methodology applied to 'pattern transactions' with the results of the W-W comparison methodology applied to 'non-pattern transactions'. In contrast, we have rejected an interpretation of the second sentence of Article 2.4.2 as permitting the combination of comparison methodologies."[428]

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328. Finally, the Appellate Body in *US – Washing Machines* declared moot the Panel's finding that systematic disregarding was not inconsistent with the fair comparison obligation set forth in Article 2.4:

> "In light of these considerations, we conclude that the establishment of margins of dumping by comparing a weighted average normal value with export prices of 'pattern transactions', while excluding 'non-pattern transactions' from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer, is consistent with the 'fair comparison' requirement in Article 2.4. Having concluded that the second sentence of Article 2.4.2 does not permit an investigating authority to combine the W-T comparison methodology with the W-W or T-T comparison methodology and, thus, does not provide for 'systemic disregarding' as described by the Panel, we moot the Panel's finding, in paragraph 8.1.a.xi of its Report, that 'Korea failed to establish that the United States' use of 'systemic disregarding' under the DPM is 'as such' inconsistent with Article 2.4' of the Anti-Dumping Agreement."[429]

1.6.10.5.5 Zeroing in the application of the third methodology

329. The Appellate Body in *US – Washing Machines* upheld the Panel's finding that zeroing is not allowed in the application of the third methodology to the export transactions within the pattern found by the investigating authority:

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[427] Appellate Body Report, *US – Washing Machines*, paras. 5.123-5.124. See also Appellate Body Report, *US – Anti-Dumping Methodologies (China)*, paras. 5.106-5.108.
[428] Appellate Body Report, *US – Washing Machines*, para. 5.125.
[429] Appellate Body Report, *US – Washing Machines*, para. 5.140.

> "We have concluded above that, under the second sentence of Article 2.4.2, dumping and margins of dumping pertaining to all export transactions of an exporter or foreign producer and to the product under investigation are limited to 'pattern transactions'. The exceptional W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted average normal value and the entire universe of export transactions that fall within the pattern as properly identified under that provision, irrespective of whether the export price of individual 'pattern transactions' is above or below normal value. While the results of the transaction-specific comparisons of weighted average normal value and each individual export price falling within the pattern will be intermediate results, the aggregation of *all* these results is required and will determine dumping and margins of dumping for the product under investigation as it relates to the identified 'pattern'. Zeroing the negative intermediate comparison results within the pattern is neither necessary to address 'targeted dumping', nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the 'universe of export transactions' identified under the second sentence of Article 2.4.2."[430]

330. In finding that zeroing was not allowed in the calculation of the margin of dumping by applying the third methodology to the pattern found by the investigating authority, the Appellate Body in *US – Washing Machines* rejected the United States' mathematical equivalence argument:

> "The mere fact that the result of the application of the W-T comparison methodology to 'pattern transactions' may be equivalent to the result of comparing the weighted average normal value with the weighted average export price of all 'pattern transactions', is neither relevant under the second sentence that provides for the application of the W-T comparison methodology to 'pattern transactions' only, nor does it read the W-T comparison methodology out of the second sentence of Article 2.4.2. As we have explained above, the function of the second sentence of Article 2.4.2 is to allow an investigating authority to address 'targeted dumping' by identifying a 'pattern of export prices which differ significantly' and to which the W-T comparison methodology is applied. Once the pattern of export prices within the meaning of the second sentence has been identified by the investigating authority, the fact that the application of the W-T comparison methodology to that pattern of export prices leads to equivalent results as the application of the W-W comparison methodology to the same pattern, neither undermines the *effet utile* of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, nor does it lead to equivalent results between the application of the symmetrical comparison methodologies normally used under the first sentence to the universe of *all* export transactions and the application of the W-T comparison methodology used under the second sentence of Article 2.4.2 to the limited universe of 'pattern transactions'."[431]

331. The Panel in *US – Washing Machines*, in findings upheld by the Appellate Body, found the use of zeroing when applying the third methodology to be inconsistent with the fair comparison requirement of Article 2.4, and with Article 9.3.[432]

1.6.10.5.6 Mathematical equivalence

332. The second sentence of Article 2.4.2 provides for a departure from the two comparison methodologies provided for in the first sentence of that provision "if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". Before the Panel in *US – Softwood Lumber V (Article 21.5 – Canada)* the United States asserted that a prohibition of zeroing in the context of the W-T methodology (which, it argued, would be the case should previous Appellate Body interpretations of "dumping" and "margins of dumping" apply to the second sentence of Article 2.4.2), would mean that the margin of dumping using the W-T methodology would be mathematically equivalent to the margin of dumping established using the

[430] Appellate Body Report, *US – Washing Machines*, para. 5.160. See also Panel Report, *US – Anti-Dumping Methodologies (China)*, paras. 7.208-7.209.
[431] Appellate Body Report, *US – Washing Machines*, para. 5.165.
[432] Panel Report, *US – Washing Machines*, paras. 7.206 and 7.208.

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W-W methodology, thereby depriving the second sentence of Article 2.4.2 of effect.[433] The Panel accepted the argument. On appeal the Appellate Body rejected it:

> "We disagree with the Panel's analysis of the 'mathematical equivalence' argument for several reasons. First, the United States acknowledges that it has never applied the methodology provided in the second sentence of Article 2.4.2, nor has it provided examples of how other WTO Members have applied this methodology. Thus, the United States' argument on 'mathematical equivalence' rests on a non-tested hypothesis. Secondly, we note that the methodology in the second sentence of Article 2.4.2 is an exception. Article 2.4.2 clearly provides that investigating authorities 'shall normally' use one of the two methodologies set out in the first sentence of that provision. Neither the participants, nor the third participants, disagree with this description of the relationship between the two sentences of Article 2.4.2."[434]

333. The Panel in *US – Softwood Lumber V (Article 21.5 – Canada)* was interested in exploring ways in which the second sentence of Article 2.4.2 continued to have meaning in and of itself. On appeal the Appellate Body considered the Panel's approach to be misguided:

> "One part of a provision setting forth a methodology is not rendered *inutile* simply because, in a specific set of circumstances, its application would produce results that are equivalent to those obtained from the application of a comparison methodology set out in another part of that provision."[435]

334. The Appellate Body in *US – Zeroing (Japan)* held the view that "an investigating authority may limit the application of the W-T comparison methodology to the prices of export transactions falling within the relevant pattern."[436] Subsequently, the Panel in *US – Stainless Steel (Mexico)* thought this approach of the Appellate Body left certain questions unanswered:

> "In light of the text of Article 2.4.2 it is not evident to us that dumping determinations in the third methodology could be limited to the subset of the export transactions that fall within the relevant price pattern … assuming that this proposition does in fact have a textual basis in the Agreement, the Appellate Body did not explain how the authorities would treat the remaining export transactions."[437]

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335. The Appellate Body in *US – Softwood Lumber V (Article 21.5 – Canada)* dismissed the notion that a general prohibition on zeroing would render the third methodology inutile. Nor did the Appellate Body think the second sentence of Article 2.4.2 provided contextual support for a finding that zeroing was permissible under the transaction-to-transaction comparison methodology:

> "[E]ven if W-W and W-T methodologies were to yield equivalent results in certain situations, this would not be sufficient to compel a finding that zeroing is permissible under the T-T comparison methodology, because the mathematical equivalence argument does not relate to this methodology."[438]

336. In the view of the Appellate Body in *US – Stainless Steel (Mexico)* the "mathematical equivalence" argument worked only under a specific set of assumptions. There was uncertainty how the W-T methodology would be applied in practice.[439] The Appellate Body noted that "it could be argued, in reverse, that permitting zeroing under the first sentence of Article 2.4.2 'would enable investigating authorities to capture pricing patterns constituting 'targeted dumping, thus rendering the third methodology inutile.'"[440] The Appellate Body emphasized that it had so far not ruled on the

[433] Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 5.33.
[434] Panel Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 97.
[435] Appellate Body Report, *US – Softwood Lumber V (Article 21.5 – Canada)*, para. 99.
[436] Appellate Body Report, *US – Zeroing (Japan)*, para. 135.
[437] Panel Report, *US – Stainless Steel (Mexico)*, para. 7.139.
[438] Appellate Body Report, *US – Zeroing (Japan),* para. 1.33.
[439] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 126.
[440] Appellate Body Report, *US – Stainless Steel (Mexico)*, quoting also *US –Zeroing (Japan)*, para 127.

question of whether zeroing was permissible under the W-T methodology. Its analysis was confined to addressing contextual arguments.[441]

337. The Panel in *US – Differential Pricing Methodology* disagreed with prior panels and the Appellate Body, concluding that an investigating authority is "permitted to use zeroing while applying the W-T methodology to pattern transactions", and, in reaching this conclusion, stated:

> "The W-T methodology is distinct from the 'normal' methodologies provided in the first sentence of Article 2.4.2. It is an exception, and unlike the two normal methodologies, its function is to unmask targeted dumping. Thus, unlike the W-W and T-T methodologies, which as noted in paragraph 7.19 above, fulfil the same function and are meant to give systemically similar results, the W-T methodology fulfils a different function, and is not meant to give results that are systemically similar to that obtained under either the W-W methodology or the T-T methodology.
>
> However, if one of the two normal methodologies, i.e. the W-W methodology, systemically and in every case gives a result that is mathematically equivalent to the dumping margin determined pursuant to the second sentence of Article 2.4.2, this would suggest that the W-T methodology is unable to fulfil its function. We consider such type of mathematical equivalence to be a symptom of an underlying problem, which is the inability of the W-T methodology to unmask targeted dumping. Certain adjustments to the examined data may well *break* mathematical equivalence in some cases. For example, as Canada notes, if in using a mixed W-W and W-T methodology an investigating authority changes the temporal bases of the normal value used under the W-W and W-T methodologies respectively, the resultant overall dumping margin may be different from that calculated by applying the W-W methodology to all export transactions. But Canada (or any third party) does not assert, and we do not consider, that the Anti-Dumping Agreement requires an investigating authority to change the normal value in this manner. More to the point, we do not see, and Canada does not show, how such a change in the temporal basis for normal value calculations would allow an investigating authority to unmask targeted dumping. Thus, while adjustments of these types may well break mathematical equivalence, such type of adjustments would only make the symptom, rather than the underlying problem, disappear.
>
> Considering the *raison d'être* of the W-T methodology is to unmask targeted dumping, the inability of this methodology to do so will render this methodology *inutile*. We recall that an interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility. Therefore, contextual considerations also support our view that the second sentence of Article 2.4.2 does not prohibit zeroing under the W-T methodology. Based on the above, we find that an investigating authority is permitted to use zeroing while applying the W-T methodology to the pattern transactions."[442]

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1.6.10.5.7 Targeted dumping

338. The Appellate Body in *EC – Bed Linen* rejected the European Communities appeal that the Panel's interpretation would not allow Members to counter dumping "targeted" to certain types of the product under investigation. With respect to the notion of "targeted" dumping, the Appellate Body referred to Article 2.4.2, second sentence, and stated:

> "This provision allows Members, in structuring their anti-dumping investigations, to address three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods. However, neither Article 2.4.2, second sentence, nor any other provision of the *Anti-Dumping Agreement* refers to dumping 'targeted' to certain 'models' or 'types' of the same product under investigation. It seems to us that, had the drafters of the *Anti-Dumping Agreement* intended to authorize Members to respond to such kind of 'targeted' dumping, they would have done so explicitly in Article 2.4.2, second sentence.

[441] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 127.
[442] Panel Report, *US – Differential Pricing Methodology*, paras. 7.104-7.106.

> The European Communities has not demonstrated that any provision of the Agreement implies that targeted dumping may be examined in relation to specific types or models of the product under investigation. Furthermore, we are bound to add that, if the European Communities wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the product under investigation in a narrower way.[443]"[444]

339. In *US – Washing Machines*, the Appellate Body pointed out that Article 2.4.2 allows investigating authorities to identify and address "targeted dumping":

> "The second sentence of Article 2.4.2 allows investigating authorities to address pricing behaviour that is focused on, or 'targeted' to, purchasers, regions, or time periods by having recourse to the W-T comparison methodology. The function of the second sentence of Article 2.4.2 is, therefore, to enable investigating authorities to identify so-called 'targeted dumping' and to address it appropriately.[445]"[446]

340. In considering the silence of the text in Article 2.4.2 on export prices which "differ significantly", the Panel in *US – Differential Pricing Methodology* recognized that the "silence of the text is not dispositive".[447] The Panel stated:

> "[T]he silence of the text on whether the export prices that differ significantly must do so because they are significantly lower or significantly higher is explained by the function of the second sentence of Article 2.4.2, which is to unmask dumping targeted to certain purchasers, regions or time periods. The text of the pattern clause supports the view that targeted dumping is masked when significantly lower prices to certain purchasers, or certain regions, or in certain time periods are masked by significantly higher export prices to certain other purchasers, or to certain other regions, or in certain other time periods. In particular, the text permits an investigating authority to find a pattern, which comprises export prices to purchasers, regions or time periods that are (a) significantly lower and thus *may be masked*; and (b) significantly higher and thus *may be masking those lower-priced export sales*. Having identified such a pattern, an investigating authority is permitted, as noted in paragraph 7.99 below, to unmask targeted dumping reflected in the pattern by applying the W-T methodology to those export transactions that fall within the pattern (while still being required to apply a normal W-W or T-T methodology to the non-pattern transactions).
>
> To successfully unmask targeted dumping reflected in the pattern transactions, an investigating authority should be permitted to adopt a methodology that deals with such significantly higher-priced export sales, which may be masking the significantly lower-priced export sales, as well as those lower-priced sales, which may be masked. The second sentence permits an investigating authority to do so by applying the W-T methodology to a pattern that includes both these types of export sales. Thus, the silence of the text on whether export prices must 'differ significantly' because they are

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[443] *(footnote original)* The European Communities also argues in its appellant's submission, paras. 42-45, that the Panel's interpretation of Article 2.4.2 would disadvantage those importing Members which collect anti-dumping duties on a "prospective" basis when compared to those importing Members which collect anti-dumping duties on a "retrospective" basis. We note, though, that Article 2.4.2 is not concerned with the collection of anti-dumping duties, but rather with the determination of "the existence of margins of dumping". Rules relating to the "prospective" and "retrospective" collection of anti-dumping duties are set forth in Article 9 of the *Anti-Dumping Agreement*. The European Communities has not shown how and to what extent these rules on the "prospective" and "retrospective" collection of anti-dumping duties bear on the issue of the establishment of "the existence of dumping margins" under Article 2.4.2.

[444] Appellate Body Report, *EC – Bed Linen*, para. 62.

[445] *(footnote original)* The second sentence of Article 2.4.2 does not expressly refer to "targeted dumping". However, the notion of "targeted dumping" appears to be implied in the reference in the second sentence of Article 2.4.2 to "a pattern of export prices which differ significantly among different purchasers, regions or time periods".

[446] Appellate Body Report, *US – Washing Machines*, para. 5.17.

[447] Panel Report, *US – Differential Pricing Methodology*, para. 7.56.

> significantly higher or significantly lower is explained by the function of the second sentence of Article 2.4.2."[448]

1.6.10.6 "Zeroing procedures" as a measure that can be challenged "as such"

341. The Panel in *US – Zeroing (Japan)* considered that the evidence before it was sufficient to identify the precise content of what Japan termed "zeroing procedures", and that those procedures were a rule or norm of general and prospective application:

> "We therefore consider that the evidence before us is sufficient to identify the precise content of what Japan terms 'zeroing procedures', that these procedures are attributable to the United States and that they are a rule or norm of general and prospective application. While we acknowledge that to establish a norm in part on the basis of inferential reasoning is highly unusual, we consider that it is justified in the circumstances of this case. In the Panel's view, this norm can be characterized as an 'administrative procedure' within the meaning of Article 18.4 of the AD Agreement. Our characterization of the zeroing procedures is consistent with the conclusion reached by the Appellate Body in US – Zeroing (EC) that the zeroing methodology, as it relates to original investigations in which the average-to-average comparison method is used, can be challenged as such.
>
> Since we have been able to discern with precision the specific content of a rule or norm with respect to how USDOC treats export prices higher than the normal value in calculating margins of dumping, we do not consider that it is of any relevance that the term 'zeroing procedures' is not used in the anti-dumping legislation or practice of the United States."[449]

342. The Appellate Body, in *US – Zeroing (EC),* concluded that "the zeroing methodology, as it relates to original investigations in which the weighted-average-to-weighted-average comparison method is used to calculate margins of dumping, can be challenged, as such, in WTO dispute settlement."[450]

343. The Appellate Body Report in *US – Continued Zeroing*, examining a claim regarding the zeroing methodology, found that "the continued use of the zeroing methodology in successive proceedings in which duties resulting from the 18 anti-dumping duty orders are maintained, constitute 'measures' that can be challenged in WTO dispute settlement."[451]

> "[T]he measures at issue consist of neither the zeroing methodology as a rule or norm of general and prospective application, nor discrete applications of the zeroing methodology in particular determinations; rather, they are the use of the zeroing methodology in successive proceedings, in each of the 18 cases, by which duties are maintained over a period of time. We see no reason to exclude ongoing conduct that consists of the use of the zeroing methodology from challenge in WTO dispute settlement. The successive determinations by which duties are maintained are connected stages in each of the 18 cases involving imposition, assessment, and collection of duties under the same anti-dumping duty order. The use of the zeroing methodology in a string of these stages is the allegedly unchanged component of each of the 18 measures at issue."[452]

1.6.10.7 Zeroing as an allowance or adjustment

344. The Panel in *US – Zeroing (EC)* found that zeroing, as applied by the United States Department of Commerce in the administrative reviews at issue, was not inconsistent with the first

[448] Panel Report, *US – Differential Pricing Methodology*, paras. 7.57-7.58.
[449] Panel Report, *US – Zeroing (Japan)*, paras. 7.55-7.56. See also Appellate Body Report, *US – Zeroing (Japan)*, paras. 78-88, and 96.
[450] Appellate Body Report, *US – Zeroing (EC)*, para. 205.
[451] Appellate Body Report, *US – Continued Zeroing*, para. 185.
[452] Appellate Body Report, *US – Continued Zeroing*, para. 181.

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sentence of Article 2.4 of the Anti-Dumping Agreement. The Appellate Body declared this finding "moot, and of no legal effect"[453], given its finding of violation of Article 9.3 and Article VI:2.

345. The Appellate Body in *US – Zeroing (EC)* upheld the Panel's finding that zeroing is not an impermissible allowance or adjustment under Article 2.4, third to fifth sentences[454] and that "conceptually, zeroing is not an adjustment or an allowance falling within the scope of Article 2.4, third to fifth sentences", concluding that:

> "[D]isregarding a result when the export price exceeds the normal value (zeroing) cannot be characterized as an allowance or an adjustment covered by the third sentence of Article 2.4, including its a contrario application Indeed, this is not undertaken to adjust to a difference relating to a characteristic of the export transaction in comparison with a domestic transaction."[455]

1.6.11 Relationship between Articles 2.4 and 2.4.2

346. In *Colombia – Frozen Fries (Article 21.5 – EU)*, Colombia asked the Panel to dismiss the European Union's claim under Article 2.4.2, arguing that the mentioned claim challenged the aspects of the measure that was subject to the legal obligation under Article 2.4.[456] The Panel disagreed:

> "The European Union's allegations objectively set forth an Article 2.4.2 claim that challenges the methodology that MINCIT applied to establish the existence of margins of dumping when it could not identify an exact domestic match with an article sold on the export market. We appreciate that Colombia explains that MINCIT was 'trying to determine a proper match for exported articles that were not sold on the domestic market, so as to ensure a 'fair comparison'' pursuant to Article 2.4. We are of the view, however, that this explanation does not preclude the Panel from considering whether MINCIT's determination of normal value when applying the W-W comparison methodology complies with Article 2.4.2.
>
> We find that a methodology that an authority applies to determine margins of dumping is not rendered 'unreviewable' under Article 2.4.2 or 'not subject to' Article 2.4.2 because the methodology was motivated by concerns that relate to the fair comparison requirement of Article 2.4.
>
> …
>
> Although Colombia characterizes these calculations as part of its 'model matching' step, we view them as functionally distinct from the step involving the identification of matching domestic transactions. Given that Article 2.4.2 expressly requires that the W-W methodology consists of a comparison between a 'weighted average normal value' and a weighted average export price, we consider this calculation step to fall within the scope of the obligations set out in that provision. We understand the European Union's claim under Article 2.4.2 to assert that a normal value calculated in this manner cannot serve as a valid comparator under the W-W comparison methodology. Accordingly, we conclude that the European Union's claim under Article 2.4.2 challenges this aspect of MINCIT's methodology, and that the obligations of Article 2.4.2 are applicable to it."[457]

1.7 Article 2.6

347. The Panel in *US – Lumber V* considered that the "like product" to the product under consideration has to be determined on the basis of Article 2.6, but that this provision does not provide any guidance on the way in which the "product under investigation" is to be determined:

> "Article 2.6 therefore defines the basis on which the product to be compared to the 'product under consideration' is to be determined, that is, a product which is either

[453] Appellate Body Report, *US – Zeroing (EC)*, para. 147.
[454] Appellate Body Report, *US – Zeroing (EC)*, para. 159.
[455] Appellate Body Report, *US – Zeroing (EC)*, para. 158.
[456] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, paras. 7.36-7.39.
[457] Panel Report, *Colombia – Frozen Fries (Article 21.5 – EU)*, paras. 7.46-7.47 and 7.53.

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> identical to the product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. As the definition of 'like product' implies a comparison with another product, it seems clear to us that the starting point can only be the 'other product', being the allegedly dumped product. Therefore, once the product under consideration is defined, the 'like product' to the product under consideration has to be determined on the basis of Article 2.6. However, in our analysis of the *AD Agreement*, we could not find any guidance on the way in which the 'product under consideration' should be determined."[458]

348. The Panel in *EC – Salmon (Norway)* rejected Norway's argument that in defining "like product", Article 2.6 required an assessment of "likeness" in respect of the product under consideration "as a whole" and that this required a comparison of all product categories considered as potentially "like product".[459] The Panel continued:

> "In the context of Article 2.6, this logic could be understood to mean that where the product under consideration consists of different sub-categories, the investigating authority, in assessing the question of like product, must take into account each and every sub-category, and may not ignore any. It cannot, however, be stretched to require that an investigating authority assess whether each category or group of goods **within** the product under consideration is 'like' each other category or group of goods."[460]

349. In *EC – Fasteners (China)*, the Panel also rejected an argument that Articles 2.1 and 2.6 together required the product under consideration in an investigation to be defined so as to only include products that are "like" within the meaning of Article 2.6. The Panel found:

> "[T]he subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the term 'like product' for purposes of the AD Agreement. … China's position would, in our view, require that any difference between categories of goods, and potentially even between individual goods, within a product under consideration would require that each such category or individual good be treated individually, as a separate product under consideration. This would be problematic, as, given that a 'domestic industry' for purposes of the AD Agreement is defined as producers of a like product, such a fragmented product under consideration, and correspondingly fragmented like products, would result in the definition of, and determination of injury to, multiple, narrowly defined 'industries' which may bear little if any resemblance to the economic realities of the production of those goods in the importing country.
>
> … While it seems self-evident to us that an investigating authority must, at the time it initiates an anti-dumping investigation, make a decision as to the scope of that investigation, and give notice of the 'product involved', we are not persuaded that either Article 2.1 or Article 2.6 of the AD Agreement establishes a requirement for making an elaborated determination in that regard."[461]

350. In *EU – Footwear (China)*, the Panel rejected China's argument that by excluding products above a certain price level from the product under consideration the European Union acted inconsistently with Article 2.6 of the Anti-Dumping Agreement:

> "Based on the foregoing, it is clear to us that the Commission determined that STAF of not less than €7.50 was excluded from the product under consideration in the original investigation. This is not, however, a determination of like product under Article 2.6 of the AD Agreement. We agree with the several previous panels which have concluded that Article 2.6 of the AD Agreement does not apply to the determination of the scope of the product under consideration. Thus, the European Union's determination excluding

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[458] Panel Report, *US – Softwood Lumber V*, para. 7.153.
[459] Panel Report, *EC – Salmon (Norway)*, para. 7.52.
[460] Panel Report, *EC – Salmon (Norway)*, para. 7.55. See also paragraph 9 above.
[461] Panel Report, *EC – Fasteners (China)*, paras. 7.267-7.268.

> STAF of not less than €7.50 from the product under consideration is not subject to Article 2.6 of the AD Agreement, and we therefore conclude that China's claim is without legal basis."[462]

351. In *Korea – Pneumatic Valves*, Japan argued that there was no market interaction between the dumped imports and the domestic like product, thus undermining the investigating authority's price suppression and depression analyses. In the context of examining this claim under Article 3.5, the Panel considered the definition of "like products" in Article 2.6:

> "In considering the price effects of dumped imports, nothing in the Anti-Dumping Agreement stipulates how an investigating authority should proceed. Certainly there is nothing that would explicitly require an investigating authority to consider the degree or nature of competition between the dumped imports and the domestic like product. We recall that Article 2.6 of the Anti-Dumping Agreement defines the like product as a product which is either 'alike in all respects' to, or has 'characteristics closely resembling' those of the imported products subject to the investigation. Based on this definition, it would be expected that allegedly dumped imports compete with the domestic like product. Indeed, if they did not, it is difficult to imagine on what basis a domestic industry could properly allege that dumped imports were causing injury to the domestic industry producing the like product, so as to justify the initiation of an investigation. However, the fact that allegedly dumped imports compete with the domestic like product in this broader sense does not necessarily mean that the dumped imports will have an effect on domestic like product prices. Competition in the market for the goods in question may depend on a multitude of factors."[463]

352. See also paragraph 35 above.

1.8 Article 2.7

353. As the Appellate Body remarked in *EC – Fasteners (China)*, "Article 2.7 of the *Anti-Dumping Agreement* states that Article 2 is without prejudice to the second *Ad* Note to Article VI:1 of the GATT 1994, and thus incorporates the second *Ad* Note to Article VI:1 into the *Anti-Dumping Agreement*."[464]

354. The Appellate Body suggested that this *Ad* Note does not apply to an economy where the State does not have a monopoly of trade and the State does not fix all domestic prices. The Appellate Body also noted that the second *Ad* Note provides flexibility only in respect of determination of normal value, not the rules regarding determination of export prices or calculation of dumping margins.

> "We observe that the second *Ad* Note to Article VI:1 refers to a 'country which has a complete or substantially complete monopoly of its trade' and 'where all domestic prices are fixed by the State'. This appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices. The second *Ad* Note to Article VI:1 would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State.
>
> Furthermore, the reference in the second *Ad* Note to Article VI:1 to a strict 'comparison with domestic prices' not always being 'appropriate' provides flexibility only in respect of the determination of normal value. The recognition of special difficulties in determining price comparability in the second *Ad* Note to Article VI:1 does not mean that importing Members may depart from the provisions regarding the determination of export prices and the calculation of dumping margins and anti-dumping duties set forth in the *Anti-Dumping Agreement* and in the GATT 1994. While the second *Ad* Note to Article VI:1 refers to difficulties in determining price comparability in general, the text of this provision clarifies that these difficulties relate exclusively to the normal value side of the comparison. This is indicated by the operative part in the third sentence of

[462] Panel Report, *EU – Footwear (China)*, para. 7.312.
[463] Panel Report, *Korea – Pneumatic Valves*, para. 7.275.
[464] Appellate Body Report, *EC – Fasteners (China)*, para. 285.

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> this provision, which only allows importing Members to depart from a 'strict comparison with *domestic* prices'."[465]

1.9 Relationship with other provisions of the Anti-Dumping Agreement

1.9.1 Article 2.1

355. With respect to the relationship between Article 2.1 and Article 2.6, the Panel in *EC – Salmon (Norway)* thought it noteworthy that, while the Anti-Dumping Agreement specifically defined "like product", there was no specific definition of "product under consideration":

> "In our view, this consideration supports the conclusion that it would be absurd to impose the definition of like product from Article 2.6 onto the undefined term product under consideration. We simply see no basis in the text of Articles 2.1 and 2.6 for the obligations Norway seeks to impose on investigating authorities with respect to product under consideration."[466]

356. See also paragraphs 9 and 349 above.

1.9.2 Article 6

357. With respect to the relationship between Article 6.8 and Articles 2.2 and 2.4, the Panel in *US – Steel Plate*, having found a violation of Article 6.8, considered it unnecessary to determine, in addition, whether the circumstances of that violation also constituted a violation of Article 2.4 (and Article 9.3, and Articles VI:1 and 2 of GATT 1994). In the Panel's view, findings on these claims would serve no useful purpose, as they would neither assist the Member found to be in violation of its obligations to implement the ruling of the Panel, nor would they add to the overall understanding of the obligations found to have been violated. The Panel also declined to rule on India's claim under Article 2.2.[467]

1.10 Relationship with other WTO Agreements

1.10.1 Article VI of the GATT 1994

358. The Panel in *US – 1916 Act (EC)* found that where the complainant had not established a *prima facie* case of violation of Article 2.1 and 2.2, "[t]he fact that we found a violation of Article VI:1 of the *GATT 1994* is not as such sufficient to conclude that Articles 2.1 and 2.2 of the Anti-Dumping Agreement have been breached, in the absence of more specific arguments and evidence."[468]

359. The Appellate Body in *EC – Tube or Pipe Fittings* considered that the "precise rules relating to the determination as to whether there is dumping and, if dumping exists, how the dumping margin is to be calculated, are set out, not in Article VI:2 of the GATT 1994, but rather in Article 2 of the *Anti-Dumping Agreement*, which is the agreement on the implementation of Article VI of the GATT 1994." The Appellate Body in this case rejected the argument that the opening sentence of Article VI:2 of GATT 1994, "in order to offset or prevent dumping" imposed an obligation on an investigating authority to select a particular comparison methodology under Article 2.4.2 of the Anti-Dumping Agreement:

> "In our view, therefore, Article 2 is a more appropriate source than the opening phrase '[i]n order to offset or prevent dumping' of Article VI:2, for ascertaining specifically what is required for the proper determination of dumping by an investigating authority. We are unable to see an obligation flowing from the opening phrase of Article VI:2 of the GATT 1994 to Article 2 of the *Anti-Dumping Agreement* that the determination of dumping must be based on the standard of a 'reasonable assumption for the future', or

[465] Appellate Body Report, *EC – Fasteners (China)*, fn 459 to para. 285.
[466] Panel Report, *EC – Salmon (Norway)*, para. 7.59.
[467] Panel Report, *US – Steel Plate*, para. 7.103.
[468] Panel Report, *US – 1916 Act (EC)*, para. 6.209.

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that this, in turn, would require that a particular methodology be chosen under Article 2.4.2."[469]

1.10.2 Article X of the GATT 1994

360. The Panel in *US – Stainless Steel (Korea)* touched on the relationship between Article X:3(a) of the GATT 1994 and Article 2.4.1 of the AD Agreement. See the Section on Article X of the GATT 1994.

1.10.3 Article 14(d) of the SCM Agreement

361. The Panel in *Ukraine – Ammonium Nitrate*, in a finding upheld by the Appellate Body, disagreed with Ukraine's argument regarding the relevance of the Appellate Body's findings under Article 14(d) of the SCM Agreement to the interpretation of Article 2.2 of the Anti-Dumping Agreement concerning the determination of costs of production. The Panel found that "cost calculation under Article 2.2 of the Anti-Dumping Agreement, and benefit calculation under Article 14(d) of the SCM Agreement are different, and should not be conflated".[470] The Appellate Body acknowledged certain textual similarities between the two provisions and confirmed their different functions:

> "Article 2.2 refers to the cost of production 'in the country of origin' and Article 14(d) to the adequacy of remuneration to be determined in relation to prevailing market conditions 'in the country of provision'. Article 14(d), however, also contains the phrase 'in relation to prevailing market conditions', which is not found in Article 2.2. Importantly, these two provisions do not serve the same function. The function of Article 14(d) of the SCM Agreement is to ascertain the benefit conferred on the recipient of a subsidy by, *inter alia*, the governmental provision of goods and services. By contrast, Article 2.2 of the Anti-Dumping Agreement concerns the establishment of normal value when it cannot be determined on the basis of domestic sales. In light of these differences, the Appellate Body's findings with respect to Article 14(d) of the SCM Agreement in *US – Softwood Lumber IV* do not speak to the costs that may be used to construct normal value under Article 2.2 of the Anti-Dumping Agreement. Therefore, in our view, the Panel did not err in its interpretation of Article 2.2 in considering that these Appellate Body findings were not relevant to its interpretative exercise. In light of the foregoing, we reject Ukraine's claim challenging the Panel's interpretation of Article 2.2 of the Anti-Dumping Agreement."[471]

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1.10.4 Protocols of Accession

362. In *EC – Fasteners (China)*, the European Union argued that Section 15 of the Protocol of Accession of China allowed the European Union to treat China as a non-market economy (NME) for the purpose of applying Article 9(5) of the EU's Basic AD Regulation and "permits a flexible application of the rules". China responded that Section 15 was only a temporary and limited derogation from the rules.[472] The Panel and the Appellate Body agreed that Section 15 derogates only from the rules on determining normal value, not other rules under the Anti-Dumping Agreement and under the GATT 1994. The Appellate Body explained the textual basis for this view, as follows:

> "Section 15 of China's Accession Protocol contains a similar acknowledgment of the difficulties in determining price comparability as the one contained in the second *Ad* Note to Article VI:1 of the GATT 1994, in respect of imports from China. …
>
> …
>
> [P]aragraph 15(a) of China's Accession Protocol places the burden on the Chinese producers clearly to show that market economy conditions prevail in the industry producing the like product with respect to its manufacture, production, and sale. If such a showing is made, the importing Member shall use Chinese prices and costs in determining price comparability. Like the second *Ad* Note to Article VI:1 of the GATT

[469] Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 76.
[470] Panel Report, *Ukraine – Ammonium Nitrate*, para. 7.102.
[471] Appellate Body Report, *Ukraine – Ammonium Nitrate*, para. 6.118.
[472] Appellate Body Report, *EC – Fasteners (China)*, para. 284.

> 1994, paragraph 15(a) of China's Accession Protocol permits importing Members to derogate from a strict comparison with domestic prices or costs in China, that is, in respect of the determination of the normal value. This is indicated by the text of paragraph 15(a), which, in respect of the determination of price comparability, refers to '*Chinese* prices or costs' or 'a methodology that is not based on a strict comparison with *domestic* prices or costs in China'.
>
> We do not consider that the references in paragraph 15(a)(i) and (ii) to producers having to show that 'market economy conditions prevail … with regard to the manufacture, production and *sale'* of a product means that paragraph 15(a) permits any derogations also with respect to the determination of export prices. We reach this conclusion because, when producers are not able to show that market economy conditions prevail (including with regard to the *sale* of the product), paragraph 15(a) makes it clear that all an importing WTO Member is allowed to do as a consequence is to 'use a methodology that is not based on a strict comparison with *domestic prices or costs in China'*."[473]

363. The Appellate Body in *EC – Fasteners (China)* then noted that the provision of China's Accession Protocol that allowed WTO members to disregard domestic prices or costs in China in determining normal value was time limited:

> "Paragraph 15(d) of China's Accession Protocol establishes that the provisions of paragraph 15(a) expire 15 years after the date of China's accession (that is, 11 December 2016). It also provides that other WTO Members shall grant before that date the early termination of paragraph 15(a) with respect to China's entire economy or specific sectors or industries if China demonstrates under the law of the importing WTO Member 'that it is a market economy' or that 'market economy conditions prevail in a particular industry or sector'. Since paragraph 15(d) provides for rules on the termination of paragraph 15(a), its scope of application cannot be wider than that of paragraph 15(a). Both paragraphs concern exclusively the determination of normal value. In other words, paragraph 15(a) contains special rules for the determination of normal value in anti-dumping investigations involving China. Paragraph 15(d) in turn establishes that these special rules will expire in 2016 and sets out certain conditions that may lead to the early termination of these special rules before 2016."[474]

364. On this basis, the Appellate Body in *EC – Fasteners (China)* concluded:

> "In our view, therefore, Section 15 of China's Accession Protocol does not authorize WTO Members to treat China differently from other Members except for the determination of price comparability in respect of domestic prices and costs in China, which relates to the determination of normal value. We consider that, while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the *Anti-Dumping Agreement* and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties."[475]

365. Similarly, in *US – Shrimp (Viet Nam)*, in connection with a claim by Viet Nam regarding the application of the "all others" rate in an anti-dumping proceeding, the United States argued that paragraphs 254 and 255 of Vietnam's Accession Working Party Report recognized that in the case of imports of Vietnamese origin into a WTO Member, "special difficulties" could exist in determining cost and price comparability" in anti-dumping investigations, and therefore the importing Member may use a methodology that is not based on a strict comparison with prices or costs in Viet Nam under certain circumstances. The Panel noted the relevant provisions in the Working Party Report,

[473] Appellate Body Report, *EC – Fasteners (China)*, paras. 285 and 287-288.
[474] Appellate Body Report, *EC – Fasteners (China)*, para. 289.
[475] Appellate Body Report, *EC – Fasteners (China)*, para. 290.

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and found that these provisions only affect calculation of normal value, but do not modify any other provisions from the Agreement, such as Article 9.4:

> "[B]ecause of difficulties resulting from the fact that Viet Nam was still continuing the process of transition towards a full market economy, Members agreed that investigating authorities need not necessarily calculate normal value on the basis of domestic prices in Viet Nam, as would otherwise be required by Article 2 of the Anti-Dumping Agreement. However, we see nothing in paragraphs 254 and 255 of the Working Party Report, or any other provision thereof, indicating that the interpretation and/or application of any other provision of the Anti-Dumping Agreement, including Article 9.4, should be modified to accommodate any special difficulties that might arise in a proceeding involving imports from Viet Nam. In particular, there is nothing in the Working Party Report indicating that an investigating authority is entitled to render application of an 'all others' rate subject to some additional requirement not provided for in Article 9.4. Furthermore, whereas sub-paragraphs (i) and (ii) of paragraph 255 allow an investigating authority to modify its investigation depending on whether 'producers under investigation' can or cannot 'clearly show that market economy conditions prevail' in the relevant industry, the investigating authority may only do so in respect of price comparability. Sub-paragraphs (i) and (ii) of paragraph 255 do not allow an investigating authority to assign 'all others' rates to non-selected respondents on the basis of whether or not market conditions prevail."[476]

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[476] Panel Report, *US – Shrimp (Viet Nam)*, para. 7.251. See also the Section on Article 9.4.