# MASTER THESIS

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„Adjudication of WTO Anti-dumping Disputes: A Report-By-Report Study of Consistency "


verfasst von / submitted by

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# List of Abbreviations

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| GATT | General Agreement on Tariffs and Trade |
| WTO | World Trade Organization |
| ADA | Anti Dumping Agreement (Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994) |
| US | United States |
| EC | European Communities |
| EU | European Union |
| DSU | Dispute Settlement Understanding (Understanding on Rules and Procedures Governing the Settlement of Disputes) |
| DPM | Differential Pricing Methodology |
| PCN | Product Control Number |
| SG&A | Selling, General and Administrative (expenses) |
| Q&V | Quantity and Value (data) |
| CSI | California Steel Industries |
| FHL | *Fiskeri- og Havbruksnæringens Landsforening* (Norwegian Seafood Federation) |

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# 1. Introduction

## 1.1. Background

This thesis would attempt to discuss the consistency in the adjudication of WTO anti-dumping disputes. For the purposes of this thesis, consistency is to be looked at in the context of precedent-following. This chapter would firstly set out the significance of consistency as discussed by previous scholars, in the general context of municipal legal system(s), and more specifically in the context of the GATT/WTO system. Second, the unique opportunity for research presented by WTO anti-dumping adjudication would be set out.

In a given legal system, it is useful to note that there are in general three different ways that precedents can operate:[1] it may simply authorize a judge to consider previous decisions as part of general legal material in an effort to ascertain the law; or it may oblige the judge to decide the case in the same way as a previous case unless the judge can give a good reason for not doing so; or it may even oblige the judge to decide the case in the same way as the previous case, even if the judge has good reason for not doing so. The same scholar then gave a summary of how the three ways are applied in different legal systems:[2] continental systems principally apply the first way (but occasionally inclining to the second and in some areas to the third), while common law courts follow the third way (also called the doctrine of binding precedent). However even in common law courts, the highest courts still reserve the right to depart from their previous decisions: former decisions normally bound them, but they have the power to depart 'when it appears right to do so', signifying that they are not strictly bound.

The different understanding and the difference of weight attached to precedent is illustrated also by Robert Henry when he contrasted what he saw as the Common Law's doctrine of stare decisis with the Civil Law's *jurisprudence constante*.[3] To Henry, the Common Law's concept of binding precedents result from the features of the Common Law, namely absence of codes and the presence of the concept of judge-made law. In

[1] Mohamed Shahabuddeen, *Precedent in the World Court* (digital edition, Cambridge University Press 2007) 9 citing Rupert Cross and J W Harris, *Precedent in English Law,* (4th edn, Oxford 1991) 4.
[2] ibid 9-10.
[3] Robert L Henry, 'Jurisprudence Constante and Stare Decisis Contrasted' (1929) 15 American Bar Association Journal 11.

This distinction is also notable when discussing the specific situation of the WTO later on.

contrast, precedents are as a principle not binding in the Civil law world. To Henry, the Civil Law system, with its codes and lack of the absence of the concept of judge-made law, allows the law to consist of a few general principles (contained in the codified legal instrument) with which people are familiar. This is in contrast to the Common Law situation which, to him, has become complex, confused, and rigid in comparison.

Reasons for following precedents have been expounded by many legal scholars. Frederick Schauer in his 1987 article set out several common ones.[4] The first is the argument from fairness, often expressed in terms of 'treating like cases alike'. From this, Schauer observed, a principle emerges that decisions that are not consistent are unfair, unjust, or simply wrong. The second is the argument from predictability[5] which argues that when decision makers decide 'this' case in the same way as the last, parties will be able to anticipate the future, helping members of society to plan their lives. The third is the argument from strengthened decision-making:[6] it renders the process of decision making more efficient (because it allows less reconsideration of questions already considered) and stronger (by creating 'an aura of similarity', externally the credibility of the institution is improved and internally the decision-making environment is strengthened).

Precedent-following can also be seen, as an article from Jeremy Waldron attempts to show, from the angle of rule of law.[7] Having separated some common justifications for precedent-following as having little to do with rule of law,[8] Waldron posited contexts for which precedent are more relevant for rule of law: the quest for predictability and the principle of generality. Predictability as a component of rule of law is not intended to be an overriding value: instead, rule of law demands a particular sort of predictability, namely what he called principled predictability.[9] A principled predictability arises when the public can see that a case is underpinned by a general norm[10] and subsequent judges faced with similar cases, treats the precedent as a genuine legal norm, so that the court in general is seen as an institution that decides cases on a general basis,

[4] Frederick Schauer, `Precedent` (1987) 39(3) Stanford Law Review 571.
[5] ibid 597.
[6] ibid 599.
[7] Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 Michigan Law Review 1 3.
[8] Namely that of (1) simply saying that precedents should be followed because "we are no wiser than our ancestors", (2) that of decisional efficiency, (3) that of agenda limitation, and (4) that of system-legitimacy. ibid 4 citing Henry Monaghan, 'Stare Decisis and Constitutional Adjudication' (1988) 723 Columbia Law Review 744-752 and Schauer (n 4).
[9] ibid 14.
[10] ibid 18.

rather than just as an institutional environment in which individuals make particularized case-by-case determinations.[11]

Precedent-following is not something to be taken without caution, however. Schauer, having expounded several arguments in favor of precedents, remarked that the arguments share a focus on 'stability for stability's sake' in which he does not necessarily believe. [12] Christopher Peters fiercely argued against the line of thinking that there is an inherent value in being consistent.[13] Robert Henry decries how the Common Law has become complex, confused and rigid, in contrast to the more simple, certain and adaptable Civil Law, due in large part to the Common Law's excessive attention to stare decisis, which he contrasted with the Civil Law's concept of *jurisprudence constante*.[14] The Common Law's understanding of precedent, Henry argues, 'causes mistakes to accumulate and slavishly followed' (as law).[15]

In the context of international bodies, one of the reasons for following precedents seems to be a variant of the argument from strengthened decision making identified in Schauer's article, with more emphasis on the strength aspect rather than efficiency (in other words, its value lies in the improved credibility of the institution brought about by the 'aura of similarity'). It has been remarked by Judge Shahabuddeen (formerly of the International Court of Justice) that precedent-following can preserve an international body´s political credibility: courts are often suspected of being swayed by political motivation, and such suspicion can be dispelled if it can be shown that the court delivers its judgment according to strictly legal criteria.[16] Indeed, precedent has been described as '[a] device by which a sequence of cases dealing with the same problem may be called law rather than will, rules rather than results.'[17] This stronger emphasis on political credibility is not unreasonable. Unlike municipal courts which largely do not have to worry about its political legitimacy being questioned – largely because it has the force of the state behind it - international bodies are more fragile: its members are generally states which are themselves sovereign, each jealously holding on to its sovereignty. The WTO is no exception. Fears of supranationalism almost prevented the

[11] ibid 23.
[12] Schauer (n 4) 602.
[13] Christopher J Peters, 'Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis' (1996) 105 Yale Law Journal 2031.
[14] Henry (n 3).
[15] ibid 13.
[16] Shahabuddeen (n 1) 4.
[17] Frank H Easterbrook, 'Stability and Reliability in Judicial Decisions' (1988) 73 Cornell Law Review 422.

transition from GATT to WTO: it took 3 years for the US to be persuaded to agree on the establishment of the organization.[18] Back in the GATT days – before the WTO came into being – it had been remarked that '…[t]he "contracting parties" to the GATT, did not want a group of lawyers in the Geneva headquarters telling them what they could do, or could not do'.[19] Even after its inception, the WTO has also been portrayed as being 'pathologically secretive, conspiratorial and unaccountable to sovereign states and their electorate'.[20]

There is a perceptible weight attached to precedents in the WTO. In an often-cited report, the Appellate Body stated that '[f]ollowing the Appellate Body's conclusions in earlier disputes is not only appropriate, but is what would be expected from panels, especially where the issues are the same.'[21] Reporting on the then-head of the Appellate Body secretariat, another scholar remarked:

> His arguments are generally perceived as stemming from a passion to safeguard institutional respectability — in particular, ensuring that new rulings follow principles set forth in prior cases — rather than pursuing some political agenda. His overriding goal, in other words, is that the Appellate Body should be consistent.[22]

However it should also be cautioned that this does not mean that there is a strict rule of binding precedent, as was also emphasized in another Appellate Body report.[23] One scholar concluded that reports under the dispute settlement system do carry precedential effect in practice.[24] This means that the formal structure of the WTO itself is

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[18] Peter Van den Bossche and Werner Zdouc, *The Law and Polic of the World Trade Organization Text Cases and Materials* (4th edn, Cambridge University Press 2017) 86.
[19] Stuart Robinson 'Legal work in the GATT, 1969-91' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 109.
[20] Van den Bossche and Zdouc (n 18) 81 citing G de Jonquières, 'Prime Target or Protests: WTO Ministerial Conference', *Financial Times*, 24 September 1999.
[21] WTO, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Report of the Appellate Body* (29 November 2004) WT/DS268/AB/R para 188.
[22] Paul Blustein, 'China Inc. in the WTO Dock Tales from a System under Fire' (2017) 158 Centre for International Governance Innovation Papers <www.cigionline.org/sites/default/files/documents/Paper%20no.158webPDF.pdf> accessed 16 October 2021.
[23] WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) WT/DS344/AB/R para 158.
[24] Zachary Flowers, 'The Role of Precedent and *Stare Decisis* in the World Trade Organization's Dispute Settlement Body' (2019) 47(2) International Journal of Legal Information 90 104.

It was also remarked that the application in the WTO is more akin to the doctrine of *jurisprudence constante* of civil law jurisdictions rather than the *stare decisis* doctrine of common law jurisdictions.

more akin to Robert Henry's understanding of *jurisprudence constante* than it is to the Common Law conception of stare decisis.[25] The background is also similar in that it is rooted in the reluctance to give courts too much power: the nineteenth century Europe wary of courts that were manipulated by the king before the French revolution[26] and the WTO due to fears of supranationalism.[27] As for the rationale behind the preference for precedent, the situation of the WTO seem to fit the argument from strengthened decision-making with emphasis on strength and with Judge Shahabuddeen's observation on the need for international bodies to preserve its political credibility.

Seeing the current appreciation of precedent in the WTO, it may come as a surprise that such had not always been the case. Consistency and awareness of precedents can be said to be the legal profession's signature contribution to the GATT/WTO system. In resolving disputes in the early days of the GATT, ad hoc diplomatic negotiations were *preferred* over more 'legalistic' means of resolving disputes.[28] Describing the situation during the GATT era, a former member and chairperson of the Appellate Body remarked 'disputes were seen as discrete items with limited carry-over from one case to the next.'[29] In the 1970s, GATT members started criticizing the lack of legal consistency of panel reports,[30] with one panel report – the *Spain-Soyabean Oil* report of 1981 – prompting the comment that the GATT system had 'run up against the limits of what was possible without lawyers.'[31] Even during the Uruguay Round negotiations, it was still a debatable issue whether it is desirable or inevitable that panel interpretations lead to a consistent 'case law'.[32]

The move away from the old case-by-case approach to a system of rule by law, was not cemented until the creation of the Appellate Body.[33] Indeed, commenting on

[25] See Henry (n 3).
[26] Vincy Fon and Francesco Parisi, 'Judicial Precedents in Civil Law Systems: A Dynamic Analysis' (2004) International Review of Law and Economics (forthcoming).
[27] Van den Bossche (n 18) 86.
[28] Frieder Roessler 'The role of law in international trade relations and the establishment of the Legal Affairs Division of the GATT' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015).
[29] Jennifer Hillman 'Moving towards an international rule of law? The role of the GATT and the WTO in its development' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 66.
[30] ibid 29.
[31] Amelia Porges 'The Legal Affairs Division and law in the GATT and the Uruguay Round' in Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 226.
[32] Negotiating Group on Dispute Settlement Meeting of 6 April 1987, Note by the Secretariat, MTN.GNG/NG13/1 3.
[33] Gabrielle Marceau (ed), *A History of Law and Lawyers in the GATT/WTO* (Cambridge University Press 2015) 46.

the genesis of the Appellate Body, a former member of the Appellate Body remarked that the body was:

> [e]stablished in part to address the concerns of some countries that in moving to a binding dispute settlement process, in which reports of panels could not be blocked from being adopted, there needed to be a guard against 'rogue' panels and a check on the consistency of the legal interpretations across a number of panels addressing the same legal questions.[34]

The contrast between the ad-hoc style of dispute resolution during the GATT era and the dispute resolution during the WTO era which is intended to be more 'legalistic' arguably renders more pertinent the remark from Waldron on the principle of generality as part of the rule of law as mentioned earlier. In turn, it also renders more pertinent the matter of consistency (in the sense of precedent-following) in the WTO system of adjudication. The move can be seen as one aimed at ensuring that the WTO system is seen as an institution that decides cases on a general basis, rather than as freestanding particulars. It is fitting to attempt to see how much success the adjudication system had after 25 years of practice.

Being a WTO judge has been described as an unenviable position:[35] one the one hand they are expected to clarify provisions which the drafters knowingly drafted in broad – even ambiguous terms,[36] and yet it is also bound against judicial activism.[37] Charges of judicial activism against the WTO dispute settlement system has nevertheless not stopped. The most well-known is that coming from the US, of which Raj Bhala has identified two core elements.[38] The first element is that the Appellate Body members and panelists use methods to interpret WTO treaty texts that go beyond a strict, narrow emphasis on the plain meaning of disputed terms in those texts. The second is that the Appellate Body members and panelists follow prior decisions as if they were

[34] Hillman (n 29) 69.
[35] Petros C Mavroidis, 'Licence to Adjudicate: A Critical Evaluation of the Work of the WTO Appellate Body So Far' in James C Hartigan (ed), *Trade Disputes and the Dispute Settlement Understanding of the WTO: An Interdisciplinary Assessment* (Emerald Group Publishing 2009) 78.
[36] WTO, *A Handbook on the WTO Dispute Settlement System* (2nd edn, Cambridge University Press 2017) 8.
[37] Van den Bossche and Zdouc (n 18) 190.
[38] Raj Bhala, 'Why the WTO Adjudicatory Crisis Will Not Be Easily Solved: Defining and Responding to "Judicial Activism"' in Chang-fa Lo and others (eds), *The Appellate Body of the WTO and Its Reform* (Springer 2020) 113.

precedent, adhering to *stare decisis* in a de facto, albeit not de jure, sense. The second kind of charge can be seen, for example, in the view that treating Appellate Body reports as precedents mean that '[p]anels are simply to abdicate their responsibility to conduct an objective assessment of the matters before them and just follow prior Appellate Body reports', as put by Ambassador Robert E. Lighthizer in a 2018 statement.[39] Considering the fear of supranationalism and the occasional portrayal of the WTO as a secretive, unaccountable shadow world government, for the WTO to have a demonstrably capricious adjudicatory system is surely not a supporting factor as to its credibility. This confirms Judge Shahabuddeen's remark about the link between precedents and the body's political credibility.

Having discussed the relevance of consistency in the WTO system, the opportunity for research presented by the adjudication of anti-dumping disputes in the WTO system over the years would be set out. From 1995 until the end of 2020, 137 requests for consultations have cited the ADA. The 137 requests for consultations represent almost a quarter of all the requests for consultations received by the WTO dispute settlement system. That puts the ADA second only to the GATT itself as the most-cited agreement in requests for consultations.[40] Up until the end of 2020, 67 anti-dumping disputes have been adjudicated[41], with 34 resulting in the issuance of Appellate Body reports. In other words, a substantial body of cases (if not strictly speaking 'case law') on disputes regarding ADA has accumulated. Considering the number of disputes relative to other trade topics, ADA disputes present a very good opportunity to do a stock taking exercise of the discussions contained in the reports generated by the WTO dispute settlement panels and Appellate Body, including the aspect of consistency and continuity of panel and Appellate Body reports. On the other hand, the volume of WTO anti-dumping disputes is not yet as large as that of municipal courts (which may comprise tens of thousands of decisions), thus the possibility of a more or less 'human' report-by-report approach is still open, without needing to resort to software-based textual or statistical analysis. Having been the subject of such a large number of disputes,

[39] Robert E. Lighthizer, 'The President's Trade Policy Agenda' < https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20I.pdf > accessed 1 November 2021.
[40] WTO, 'Dispute Settlement Activity – Some Figures' <www.wto.org/english/tratop_e/dispu_e/dispustats_e.htm> accessed 1 July 2021.
[41] However only 65 panel reports contain a discussion on the ADA, considering that in two cases – DS379 and DS449 – the complainant dropped all claims relating to the ADA during the adjudication process.

ADA disputes have received ample attention from researchers, but never from the angle taken by this thesis.

Since 1953,[42] the GATT has been publishing the Analytical Index, a compilation of legal material conceived to guide the interpretation of the provisions of the GATT. The publication of the Analytical Index has been taken over by the WTO and in its present form, the Analytical Index sets out the summaries of the panel and Appellate Body practice on a given WTO Agreement, including the ADA.[43] While an incredibly valuable resource for studying the practice of the panel and Appellate Body, the Analytical Index does not go through the panel and Appellate Body's practice in a report-by-report fashion, nor does it attempt to analyze the continuity and consistency from one report to another.

Precedent-following has been a widely-discussed topic in the legal community, both in the context of municipal law[44] and public international law in the context of the International Court of Justice.[45] A report-by-report approach is useful because of its ability to reduce the perception of bias or subjectivity, especially in the selection of panel or Appellate Body report, since all relevant reports shall be considered. A similar report-by-report approach has also been used by Judge Oda, albeit in the context of the International Court of Justice, and not for examining consistency.[46] A stock-taking exercise on the work of the WTO Appellate Body has also been done, albeit without using a report-by-report approach.[47]

It is this gap of a report-by-report study of consistency and continuity in the context of the adjudication of anti-dumping disputes in the WTO that the thesis would attempt to fill.

### 1.2. Limitation of Scope

[42] Marceau (n 33) 17.
[43] The Index is nowadays published exclusively in electronic format. The chapter on anti-dumping is accessible through the following web page:< https://www.wto.org/english/res_e/publications_e/ai17_e/anti_dumping_e.htm> accessed on 21 September 2021.
[44] See for example Schauer (n 4).
[45] See for example Shahabuddeen (n 1).
[46] Shigeru Oda, `The Compulsory Jurisdiction of the International Court of Justice: A Myth? A Statistical Analysis of Contentious Cases` (2000) 49(2) International and Comparative Law Quarterly 252.
[47] Mavroidis (n 35).

In line with the aim of the thesis, the discussion shall not cover every dispute regarding the ADA, but only those which have been adjudicated, meaning those disputes for which at least a panel report has been issued.[48] This also means that disputes which have not reached the adjudication stage, either due to the parties being able to resolve their dispute without using adjudication, or due to other reasons, shall be excluded.

The discussion shall be further limited only to those topics within the ADA which are the most frequently adjudicated. An examination of consistency and continuity makes more sense if conducted upon matters which are disputed frequently, as opposed to one-off issues which are only discussed in one or two panel reports. Also, arguably, it can be inferred that WTO members hold particularly strong views on such most frequently adjudicated topics, considering that, to reach the adjudication stage, a dispute must not have been resolved by negotiation.

As to the ADA articles considered, the discussion shall not include ADA articles which set out direct rules on the aspects of a WTO members' anti-dumping measure, thus excluding Article 1 ADA which is dependent on other rules (itself lacking in independent rule) since it simply provides that anti-dumping measures shall be applied only under the circumstances provided for in Article VI GATT 1994 and pursuant to investigations initiated and conducted according to the ADA.

Further, as an article in the ADA may contain several rules expressed in separate paragraphs, then for the purposes of this thesis, a topic shall be understood as a specific rule contained in a paragraph.

### 1.3. Central Research Questions

Considering the background, opportunity for research, and the limitation of scope set out above, two central research questions arise, namely:

a. From 1995 to 2020, which two aspects of WTO members' anti-dumping measures have been the most frequently adjudicated?; and

b. How consistent have the findings of the WTO panel and Appellate Body been on those most frequently adjudicated aspects of WTO members' anti-dumping measures?

[48] Adjudication has been understood to begin with the panel process which, barring amicable settlement in the process, would result in the issuance of a panel report. See WTO, *A Handbook* (n 36) 49.

### 1.4. Research Design

To aid in answering the research questions, an inventory of all panel reports regarding the ADA in the form of a spreadsheet shall be generated and put as an annex to the thesis. The spreadsheet shall identify the (1) case number, (2) ADA article number mentioned in the request for consultations, (3) ADA article number mentioned in the request for panel, and (3) the ADA article number mentioned in the panel reports themselves. This spreadsheet shall be available as Annex 1A to the thesis. In avoidance of doubt, the calculation of occurrences is based on panel reports, without taking into account the number of Appellate Body reports. The points of contention among the parties would have been established at the panel stage, and the scope of appeal cannot then go beyond the substantive points of the panel stage. Therefore, for the purposes of identifying the answer of the first research question, a case number - even if also containing an Appellate Body report – is to be treated as singular. As will be explained later on in this chapter, the purpose of the second research question is different from the first research question, warranting a different treatment with respect to panel reports and Appellate Body reports.

For the first research question, the number of occurrences of each ADA article number in the panel reports shall be counted and the two ADA article which occur the most, shall be identified. Afterwards, in line with the limitation of scope, for the two ADA article which occur the most frequently, the paragraph number under which the ADA article occur shall be identified, and the number of occurrences shall be counted, such that for each article, the most frequently occurring paragraph number shall be identified. The list of cases that discuss these most frequently occurring paragraph numbers shall be available in a spreadsheet as Annex 1B (for the most frequently occurring paragraph of the most frequently occurring ADA article number) and Annex 1C (for the most frequently occurring paragraph of the second most frequently occurring ADA article number) to the thesis. Another spreadsheet containing the dates of circulation of panel and appellate body reports on the most frequently occurring paragraph shall be available as Annex 1D and 1E of the thesis.

For the second research question, as the focus is on the consistency of the dispute settlement system, a panel report is to be considered separately from an Appellate Body report from the same case number. This is to ensure that the consistency across the

adjudicative stages (panel stage and appeal stage) can be appreciated. A tagging exercise will be conducted. This is to account for the rich variation of disputes. Especially for disputes concerning Article 2.4 ADA, the object of disputes lies, on closer inspection, not at the level of entire paragraphs. Instead, the object of disputes often lies at the level of individual sentences within the paragraph. Subsequently the discussion by the respective panel or the Appellate Body branch off to so many directions that a blanket analysis simply on the totality of Article 2.4 disputes is bound to fail to capture the nuances of these disputes. As briefly mentioned previously, a discussion of consistency makes more sense if conducted upon decisions on cases of similar issues or questions. Another layer of categorization is therefore called for, but the level of detail allowed by the objective guidance of paragraph numbers provided by the drafters of the ADA, has been exhausted. The tags point to topics *within* Articles 2.4 and 6.8 ADA. In Annex 2 to this thesis, these 'tags' can be seen for almost all panel and Appellate Body report. This tagging exercise is an admittedly somewhat arbitrary exercise which will no doubt be subject to objections, be it to the universe of possible 'tags', the level of specificity of the tags, or indeed how well a tag fits with the a given report.

Still, not all reports can be assigned a tag. Some reports do not contain extensive discussion on the relevant ADA article. For example, in the Appellate Body report on DS343 (*US – Shrimp (Thailand)*),[49] the Complainant did not appeal the claim related to Article 2.4 ADA, and as a result, the Appellate Body report does not contain a discussion on that provision. Yet other reports contain one-off questions which do not recur in subsequent cases until the end of 2020. For example, in DS179 (*US – Stainless Steel*),[50] it was argued that the practice of dividing the period of investigation for the purpose of calculating the dumping margin into two averaging period was contrary to the first sentence of Article 2.4 ADA. The panel held that the consistency of a determination of dumping with the 'fair comparison' requirement cannot depend on how the determination is used in the context of an analysis of injury, which was governed under Article 3 ADA. With respect to these cases, it is not possible to have issues of consistency. The summarized holdings on such uncategorizable questions such as these can be found in Annex 2.

[49] WTO, *United States – Measures Relating to Shrimp from Thailand – Report of the Appellate Body* (16 July 2008) WT/DS343/AB/R.
[50] WTO, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea – Report of the Panel* (22 December 2000) WT/DS179/R.

### 1.5. Structure

The first chapter contains a short discussion on the relevance of consistency in the WTO system of adjudication, opportunity for research, identification of research questions, limitation of scope and the research design.

The second chapter shall contain the discussion of the first research question. The discussion on the second research question can be found in the third chapter. The fourth chapter shall contain the conclusion derived from the discussion of the research questions.

# 2. The Most-Frequently Adjudicated Aspects of Anti-dumping Measures

Put simply, the two most-frequently adjudicated aspects of WTO members' anti-dumping measures are matters pertaining to fair comparison under Article 2.4 ADA (with 29 occurrences), and matters pertaining to the usage of facts available under Article 6.8 ADA (with 22 occurrences).

Some nuances need to be further clarified. The tabulation conducted in arriving at the above conclusion can be read as Annex 1A to this thesis. In Annex 1A it can be noted that, within the temporal scope set out for the thesis (from 1995 to 2020), the number of occurrences (in panel reports) of Article 3 and Article 6 is the same: 34 times. The selection of Article 6 as the ADA article going to the next stage of examining the occurrence of specific paragraphs thereunder (instead of article 3), is then admittedly somewhat arbitrary. However, to expand the scope of the thesis to cover all three most—frequently adjudicated ADA articles (namely articles 2, 3, and 6) in a report-by-report fashion would not only be inconsistent with the limitation of scope set out in the first chapter but would also risk making it all the more difficult to ensure the timely completion of the thesis. The selection of Article 6 instead of Article 3 is based on the fact that, if we take into account the panel reports issued in 2021 (case numbers DS538 and DS539), there would be 36 occurrences of Article 6, and 35 occurrences of Article 3, thus from 1995 until the time of writing of this thesis, Article 6 occurs marginally more often than article 3.[51]

Of the 65 panel reports which discuss the ADA,[52] 66% (43 panel reports) discuss either Article 2.4 ADA, or Article 6.8 ADA, or both (that is, inclusive of the 8 panel reports[53] which discuss both Article 2.4 ADA and Article 6.8 ADA). At the appellate level, of the 34 Appellate Body reports which discuss the ADA, 44% (15 reports) discuss either Article 2.4 ADA or Article 6.8 ADA or both. Put another way, from 1995

[51] It should be cautioned, however, that cases DS538 and DS539, for which panel reports were circulated in 2021, would still be excluded from examination for the second research question, since the time of issuance of their panel reports are beyond the temporal scope set out for the thesis

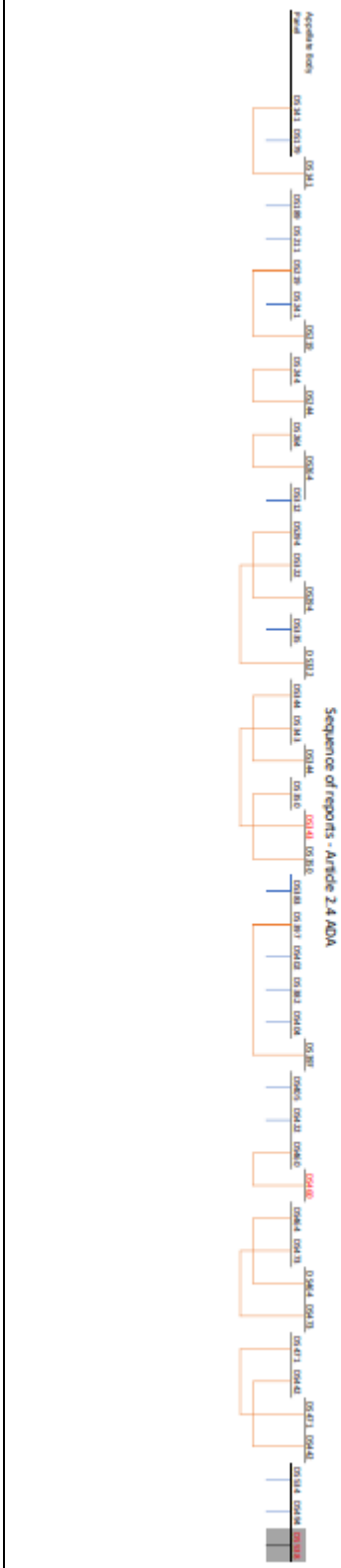
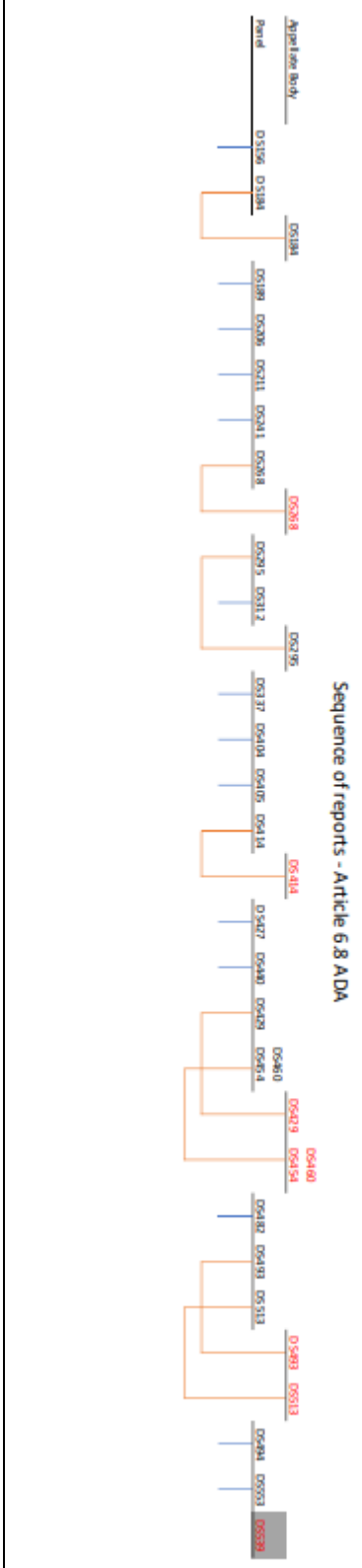
[52] In two cases – DS379 and DS449 – the complainant dropped all claims relating to the ADA during the adjudication process, and by consequence, the panel reports on those cases do not contain a discussion on the ADA.

[53] These are the panel reports on cases DS189, DS211, DS241, DS312, DS404, DS405, DS460, and DS494

to 2020, there has been a roughly 2 out of 3 chance that a given ADA-related panel report would contain a discussion on either Article 2.4 ADA or Article 6.8 ADA.

Next, the tabulation used for answering the first research question can aid the discussion on the second research question. Considering that the second research question deals with the consistency of reports over time, it is crucial that the sequence of the dates of issuance of the reports (both of the panel and the Appellate Body) is systematized. With that in mind, in tabulating the cases mentioning articles 2.4 and 6.8, the date of circulation is also factored in. The sequence in general goes in line with the case numbers (in other words, the larger the case number, the more recently the panel report is issued), but this is not always the case. For example, two panel reports discussing Article 2.4 ADA, DS312 and DS294 do not follow this general trend: the report for DS294 is circulated *after* the report for DS312 is circulated.[54] Another complication is the circulation of Appellate Body reports which can occur after several further panel reports have been circulated, making it difficult to keep track of the sequence in which reports are circulated. To aid the next part of the thesis, the sequence of reports (both panel and Appellate Body) of cases mentioning article 2.4 and 6.8 ADA are set out in the figures below in graphical form for easy reference. The Appellate Body reports denoted in red text signify those Appellate Body reports which do not contain extensive discussions of the respective ADA paragraphs (2.4 or 6.8), either because the relevant paragraph was not made part of the appeal, or because the appeal was conditional and the relevant condition was not fulfilled.

[54] The panel report for case number DS294 was circulated on 4 August 2005, while the panel report for case number DS312 was circulated on 24 June 2005.

| *Figure 1: sequence of reports – Article 2.4* | *Figure 2: sequence of reports – Article 6.8* |
| --- | --- |
|  |  |

# 3. Consistency of the Findings on the Most Frequently Adjudicated Aspects of Anti-Dumping Measures

## 3.1. Preliminary Remarks

In contrast to the first research question, the answer to the second research question cannot be reduced to simple, uncontroversial statistics.

There can be many ways that panel and Appellate Body reports interact in terms of consistency. It is conceivable to assign discrete terms to these interactions, for example calling events where a panel report deviates from a preceding panel report as 'panel-panel deviations'; events where an Appellate Body report affirms a preceding panel repot as 'affirmations'; events where an Appellate Body report overturns a preceding panel report as 'overturnings'; events where a panel report deviates from a preceding Appellate Body report as 'AB-panel deviations'; and events where an Appellate Body deviates from a preceding Appellate Body report as 'AB-AB deviations'; and to present a numerical tally as to how many times each of these terms occur.

Unfortunately, it is not always the case that these terms can be applied in a straightforward manner. Panels and the Appellate Body often take different angles to analyze the questions before it, or their reports may not interact meaningfully enough with existing precedents on similar questions to assess the consistency. Still another difficulty with assigning discrete terms to these reports is that, in some cases, the precedents themselves preclude a legalistic approach, favoring a case-by-case analysis on the facts of the case instead.[55] This means that, by its very nature, concerns of consistency may not always arise. For the interest of transparency, summaries of the panel and Appellate Body findings will be included in answering the second research question. The systematized summaries of the findings on Article 2.4 will be set out in section 3.2, while those on Article 6.8 will be set out in section 3.3. The discussion in this chapter (both on cases involving Article 2.4 ADA and cases involving Article 6.8 ADA) will be summarized in the form of an overall conclusion which can be found in chapter 4.

[55] Notably with the reports under the tag "fair comparison (due allowance)" discussed later below.

### 3.2 Article 2.4 ADA

These disputes involve Article 2.4 ADA and one of the two sub-paragraphs of that provision, namely Article 2.4.2. Article 2.4 reads: 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 in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties.

Article 2.4.2 reads: 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.

These provisions, as part of the ADA, are disciplines on WTO members' anti-dumping investigation, a process where the member tries to ascertain whether dumping is taking place and causing injury to the domestic industry of the country importing the

allegedly dumped products.[56] Dumping itself is a situation of international price discrimination where the price of a product when sold to the importing country is less than the price of the same product when sold in the market of the exporting country.[57] As formulated by Judith Czako and others, anti-dumping investigations consist of (i) establishing a 'normal value' of the product when sold in the domestic market of the exporting country; (ii) establishing the export price of the product; (iii) comparing the export price with the normal value established; and (iv) ascertaining whether the domestic industry of the importing country is suffering injury as a result of the dumped imports.[58] Article 2.4 mainly concerns (iii) above (comparing the export price with the normal value).

As the most-frequently adjudicated ADA paragraph, reports on cases involving this paragraph presents a rich variety of disputes, arguably much more so than shown by reports on cases involving the second most-frequently adjudicated ADA paragraph (Article 6.8 ADA).

Seven tags are discerned from the reports on disputes related to Article 2.4 ADA. These are:

- 'fair comparison (compatibility with zeroing)'
- 'fair comparison (non-original investigation)'
- 'fair comparison (due allowance)'
- 'fair comparison (unreasonable burden)'
- 'zeroing (first sentence)'
- 'zeroing (second sentence)'
- 'resort to second sentence Article 2.4.2'

The reports pertaining to the head of Article 2.4 itself are going to be discussed first. These are represented with the tags 'fair comparison' along with the more specific tags.

### 3.2.1 'fair comparison (compatibility with zeroing)'

[56] Judith Czako, Johann Human and Jorge Miranda, *A Handbook on Anti-Dumping Investigations* (Cambridge University Press 2003) 1.
[57] ibid.
[58] ibid.

These cases pertain the very first sentence of Article 2.4 ADA, which reads 'A fair comparison shall be made between the export price and the normal value'.

The Appellate Body report on DS141 (*EC – Bed Linen*)[59] was not strictly speaking a finding on a 'fair comparison' dispute based on the first sentence of Article 2.4 ADA as the Complainant did not raise a claim on that provision. Yet the Appellate Body did state in passing 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…[60]

This remark is then relied upon by parties intending to claim that, by maintaining zeroing, a WTO member has also acted inconsistently with the fair comparison requirement in Article 2.4.

In DS244 (*US – Corrosion-Resistant Steel Sunset Review*),[61] the Complainant argued that the Respondent has acted inconsistently with Article 2.4 ADA in relying upon dumping margins calculated on the basis of 'zeroing'. This case involves the 'sunset review' of the imposition of an anti-dumping duty which was levied before the ADA came into force. Elsewhere in the report, the panel concluded that the disciplines of Article 2 ADA do not apply in making the analysis under Article 11 ADA, and therefore did not examine further the claim based on Article 2.4 ADA.[62] However, the panel did state in passing that the zeroing methodology has the potential of increasing the dumping margin – in relation to a dumping methodology that gives full credit to negative dumping margins -- because it does not allow for an offset for negative dumping margins in the calculation of the overall margin.[63] It further observed that zeroing may affect the finding as to the very existence of dumping; it may lead to an affirmative

[59] WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Report of the Appellate Body* (1 March 2001) WT/DS141/AB/R.
[60] ibid para 55.
[61] WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan – Report of the Panel* (14 August 2003) WT/DS244/R.
[62] ibid para 7.168.
[63] ibid para 7.159.

determination that dumping exists where no dumping would have been established in the absence of zeroing.[64]

At the appeal stage of DS244, the Appellate Body revisited the claim based on Article 2.4 ADA.[65] It expressed the same concern as the panel: zeroing will tend to inflate the margins and may also lead to an affirmative determination that dumping exists where no dumping would have been established in the absence of zeroing.[66] The Appellate Body further remarked that the inherent bias in a zeroing methodology of the kind at issue may distort not only the magnitude of a dumping margin, but also a finding of the very existence of dumping.[67] However, ultimately the Appellate Body also did not make a legal finding on this matter because there was not enough factual finding in the panel report at issue to complete the analysis on whether the Respondent acted inconsistently with Article 2.4 ADA.[68]

In DS294 (*US – Zeroing (EC)*)[69], the Complainant argued that zeroing under the weighted average-to-transaction methodology for the purpose of administrative reviews is inconsistent with Article 2.4 ADA, specifically the 'fair treatment' requirement. The Complainant's argument is, among others, that the 'fairness' standard means the requirement of giving a symmetrical treatment. The panel disagreed: it reasoned that the standard of 'fairness' must be understood with regards to the four corners of the ADA (and not based on an external factor or dictionary meaning).[70] The panel regards Article 2.4.2, 5, and 9 of the ADA as the appropriate standards to determine the content of the fairness standard.[71] Contrary to the Complainant, it concluded that the negotiators of the ADA did not treat asymmetry as a practice to be banned in all circumstances: first, it noted that Article 2.4.2 in fact permits the use of an asymmetrical methodology (namely the weighted average-to-transaction methodology in the second sentence).[72]

[64] ibid.
[65] WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan – Report of the Appellate Body* (15 December 2003) WT/DS244/AB/R.
[66] ibid para 135.
[67] ibid.
[68] ibid para 138.
[69] WTO, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Report of the Panel* (31 October 2005) WT/DS294/R.
[70] ibid para 7.260.
[71] ibid paras 7.262 7.263 7.264.
[72] ibid para 7.263.

Second, it noted that the negotiators of the ADA did not extend the application of Article 2.4.2 beyond investigations within the meaning of Article 5 ADA.[73] Third, it noted that Article 9 permits importer-specific duties, further implying that symmetry is not required in all matters.[74]

The panel in DS294 also reasoned on the basis of effective treaty interpretation: if the 'fair comparison' requirement is interpreted to entail a prohibition of asymmetry and zeroing, it would deprive other ADA provisions of their useful effect.[75] It observed Article 2.4.2 ADA (particularly the second sentence) and noted the function it was made for. It provides an asymmetrical comparison methodology as an alternative to the 'normal' methodologies[76] because the 'normal' methodologies may mask targeted dumping. If zeroing is regarded as not fulfilling the 'fairness' standard in all cases, including in cases where a WTO member would be required to offset the pattern of below-normal-value export prices by others above normal value, then the second sentence of Article 2.4.2 would be denied of the very function for which it was created.[77] The present panel also employed the reasoning based on mathematical equivalence to conclude that the second sentence would be rendered ineffective: according to the panel, under such an interpretation, '[t]he alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that is *identical* to that of the first, average-to-average, methodology.'[78] The panel later found that the Respondent did not act inconsistently with Article 2.4 ADA.[79]

It should be kept in mind that, while the main conclusion contradicted the remark made by the Appellate Body in DS141, it is technically true that the Appellate Body in DS141 did not make a legal finding on this matter. Because of this vacuum, the panel's finding on DS294 was arguably the first real legal finding on the matter of the compatibility of zeroing with the fair comparison requirement of Article 2.4 ADA.

[73] ibid. This was concluded from the existence of the phrase "the existence of margins of dumping during the investigation phase" in Article 2.4.2 ADA.
[74] ibid para 7.264.
[75] ibid para 7.265.
[76] Namely the weighted average-to-weighted average and the transaction-to-transaction methodologies provided for in the first sentence of Article 2.4.2 ADA.
[77] *US – Zeroing (EC) (Report of the Panel)* (n 69) para 7.266.
[78] ibid.
[79] ibid para 7.284.

An Appellate Body report on DS294 was issued,[80] but the Appellate Body felt that it was not necessary to address the panel's finding on this matter, and simply declared moot the panel's finding.[81]

The panel in DS322 (*US – Zeroing (Japan)*)[82] was also faced with the argument that zeroing is fundamentally unfair and therefore incompatible with Article 2.4 ADA (especially the fairness requirement). This panel, like the panel in DS294, also noted that until then, the Appellate Body had not made a legal finding that the use of zeroing is inconsistent with Article 2.4 ADA.[83] According to the panel, the standard of fairness underlying the 'fair comparison' requirement may not be interpreted in a manner that renders more specific provisions of the ADA completely inoperative.[84] Repeating its view in the present case, the 'fair comparison' requirement cannot be interpreted to create a general prohibition of zeroing, as such a general prohibition would be inconsistent with the principle of effective treaty interpretation, especially because it would render the average-to-transaction method indistinguishable from the average-to-average method, thus depriving that method of its effect.[85] This reasoning closely resembles the 'mathematical equivalence' reasoning and the reasoning based on effective treaty interpretation employed by the panel in DS294. The panel in this case ultimately held that by maintaining simple zeroing in original investigations, the Respondent's authority does not act inconsistently with Article 2.4 ADA.[86] The Complainant also advanced a claim in the context of periodic reviews and new shipper reviews, and the panel simply repeated the reasoning it employed for original investigations before finding that the Respondent's authority did not act inconsistently with Article 2.4 ADA.[87]

In the context of the 'fairness' requirement of Article 2.4 ADA, the panels in DS294 and DS322 heavily emphasised the absence of legal finding by the Appellate Body regarding Article 2.4 ADA in this matter. That would change with the issuance of the Appellate Body report on DS322. Unlike on DS294, the Appellate Body on DS322 tackled the panel's reasoning head on.

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[80] WTO, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Report of the Appellate Body* (18 April 2006) WT/DS294/AB/R.
[81] ibid para 147.
[82] WTO, *United States – Measures Relating to Zeroing and Sunset Reviews – Report of the Panel* (20 September 2006) WT/DS322/R.
[83] ibid para 7.157.
[84] ibid para 7.158.
[85] ibid para 7.159.
[86] ibid para 7.161.
[87] ibid para 7.218-19.

The foundation for the DS322 Appellate Body in addressing the panel's reasoning can be found in an Appellate Body report resulting from an Article 21.5 DSU proceeding.[88] In contrast to the panel in DS294 (which rejected the reference to the dictionary meaning to establish the meaning of 'fairness' under Article 2.4 ADA), the Appellate Body in this report used the dictionary meaning of the term 'fair'. It understood the term to connote impartiality, even-handedness, or lack of bias.[89] It went on to apply this to the practice of zeroing. It found that the use of zeroing under the transaction-to-transaction methodology artificially inflates the magnitude of dumping, resulting in higher margins of dumping and making a positive determination more likely, then concluded that this way of calculating cannot be described as impartial, even-handed or unbiased.[90] It ultimately found that zeroing does not satisfy the 'fair comparison' requirement under Article 2.4 ADA.[91]

The Appellate Body on DS322 (*US – Zeroing (Japan)*)[92] cited and used the reasoning mentioned in the previous paragraph to find that zeroing in transaction-to-transaction comparisons in original investigations is inconsistent with the fair comparison requirement in Article 2.4 ADA.[93] It ultimately reversed the panel's finding in this regard.[94] The DS322 Appellate Body report also contains other passages which will be revisited in future disputes. It holds that, throughout the ADA: (1) the terms 'dumping' and 'dumped imports' always relate to a 'product' and to an exporter/producer, (2) they must be determined in respect of each known (and examined) exporter/producer, (3) duties can only be levied if dumped imports cause or threaten to cause material injury to domestic industry producing like products, and (4) duties can be levied only in an amount not exceeding the margins of dumping established for each exporter/producer.[95]

For periodic reviews and new shipper reviews, the Appellate Body emphasized the fourth concept - that duties cannot exceed the margin of dumping – in concluding that a method that results in such excessive duties falls short of the Article 2.4 'fair

[88] WTO, *United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada* (15 August 2006) WT/DS264/AB/RW.
[89] ibid para 138 citing W R Trumble, A Stevenson (eds), *Shorter Oxford English Dictionary* (5th edn Oxford University Press 2002) 915.
[90] *US – Softwood Lumber V (Article 21.5 - Canada)* (Report of the Appellate Body) (n 88) para 142.
[91] ibid.
[92] WTO, *United States – Measures Relating to Zeroing and Sunset Reviews – Report of the Appellate Body* (9 January 2007) WT/DS322/AB/R.
[93] ibid para 146.
[94]ibid para 147.
[95] ibid paras 108-14.

comparison' requirement.[96] It also reversed the panel's finding in the context of periodic reviews and new shipper reviews,[97] making this report an event of overturning on both counts.

There is also a passage pertinent to the relationship between the transaction-to-transaction and the weighted average-to-transaction methodology. In tackling the DS322 panel's reasoning on effective treaty interpretation, the Appellate Body in DS322 reasoned that the panel wrongly assumed that the 'universe of export transactions' in the two methodologies is the same.[98] To the Appellate Body, the second sentence focuses on 'pattern transactions', which is more limited than the universe of transactions under the 'normal' methodologies. The Appellate Body also held that authorities may limit the application of the weighted average-to-transaction methodology to pattern transactions only.[99]

The Appellate Body's finding on DS322 has surely been known by the panel members in DS344 (*US – Stainless Steel (Mexico)*).[100] The Complainant in this case also happened to advance a claim of inconsistency with Article 2.4 ADA. The panel in DS344 noted that such a breach is premised upon the assumption that there is a prohibition of simple zeroing in periodic reviews. The present panel disagreed with the assertion that investigating authorities are required under the relevant articles to base their dumping determination on an aggregation of all export transactions from each exporter.[101] The panel employed the reasoning based on effective treaty interpretation, together with the 'mathematical equivalence' reasoning, as employed by the panel in DS294, maintaining that the Appellate Body has not invalidated the 'mathematical equivalence' problem.[102] The present panel also noted that the Appellate Body never explained how the texts of Articles VI:1 And VI:2 GATT 1994 and Article 2.1 ADA necessarily require the interpretation that the words 'product' or 'products' used in the definition of 'dumping' may only be interpreted as referring to the product under consideration as a whole, not to individual export transactions.[103] It ultimately rejected Mexico's claim that simple zeroing in periodic reviews is inherently inconsistent with

[96] ibid para 168.
[97] ibid para 169.
[98] ibid paras 134-35.
[99] ibid.
[100] WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Panel* (20 December 2007) WT/DS344/R.
[101] ibid para 7.145.
[102] ibid para 7.139.
[103] ibid para 7.121.

the fair comparison requirement under Article 2.4 ADA.[104] With the Appellate Body report on DS322 as a background, the panel's finding on DS344 can be classified as an AB-panel deviation.

The Appellate Body's report on DS344[105] did address the matter of the compatibility of zeroing with the fair comparison requirement in Article 2.4 ADA. To recall, the panel relied on the 'mathematical equivalence' reasoning. The Appellate Body referred to the Complainant's assertion in its appeal which stated that, if the determination of weighted average normal values was based on different time periods, dumping margin calculations under these two methodologies would yield different mathematical results, duly noting that the Respondent did not contest that assertion.[106] It then set out its own view that '[t]he "mathematical equivalence" argument works only under a specific set of assumptions, and that there is uncertainty as to how the [weighted average-to-transaction] comparison methodology would be applied in practice.'[107] The Appellate Body ultimately reversed the panel's finding on this matter.[108] The Appellate Body's report on DS344, therefore, is an event of overturning.

The DS344 Appellate Body report was naturally the first Appellate Body response to the (Appellate Body-defying) DS344 panel report.

The same question came before the panel on DS350 (*US – Continued Zeroing)*),[109] but the panel in this case applied judicial economy and did not rule on the claim based on Article 2.4 ADA.[110] The report did, however, contain several notable passages, which are also relevant for the tag 'zeroing (second sentence)': First, the panel expressed that the reasonings of the panels in (*US – Zeroing (EC)*), DS322 *US – Zeroing (Japan),* and DS344 *US – Stainless Steel (Mexico)* to be 'persuasive', in contrast to the reasoning of the Appellate Body.[111] Secondly, however, it also raised its 'systemic concerns' about agreeing with the panels, and ultimately took the view that agreeing with the Appellate Body would enable prompt resolution of disputes and serve the goals of

[104] ibid para 7.145.
[105] WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) WT/DS344/AB/R.

[106] ibid para 126.
[107] ibid.
[108] ibid para 143.
[109] WTO, *United States – Continued Existence and Application of Zeroing Methodology – Report of the Panel* (1 October 2008) WT/DS350/R.
[110] ibid para 7.183.
[111] ibid para 7.169.

the DSU itself.[112] These systemic concerns would also be taken up by the next panel handling a similar issue in DS382. As a matter of legal finding, however, this report cannot be classified as an AB-panel deviation nor panel-panel deviation (if anything this panel report is remarkable not for its deviation, but for how it follows an existing Appellate Body precedent).

It is startling how the DS350 panel (and also to an extent the DS382 panel, as will be set out further in the following paragraph) acknowledged that the better legal reasoning is that of the panels yet concluded that it is better to follow the Appellate Body based on what it called 'systemic concerns'. This teeters on the edge of the hard conception of precedent mentioned in the first chapter of the thesis (or the Common Law concept of stare decisis) where a judge considers himself obliged to decide the case in the same way as the previous case, even if the judge has good reason for not doing so.[113]

In DS382 (*US – Orange Juice (Brazil)*)[114], the Complainant (Brazil) argues that the use of zeroing to calculate an exporter's margin of dumping in any stage of an anti-dumping proceeding infringes the requirement that a 'fair comparison shall be made between export price and normal value' as provided by Article 2.4 ADA.

Seeing that Brazil's argument is based on the view that 'dumping' is defined generally in relation to the 'product as a whole', the panel firstly attempted to look for objective context within the ADA and the GATT itself: it looked at Articles 2.1, 3, 5.8, 6.10, 8.1, 9.1, 9.3, and 9.5 ADA, the view that 'dumping' is an exporter-specific and not an importer-specific concept, it also looked at Article VIII:3 and Ad Note Article VI:1 GATT 1994, mathematical equivalence under Article 2.4.2 ADA, even the historical background of the ADA.[115] The panel failed to satisfy itself that the ADA entertains only one exclusive definition of 'dumping'.[116]

It then looked externally, beyond the text of the agreements, and into dispute settlement precedents. The panel noted two currents of thought on this matter: the panels in DS294 (*US – Zeroing (EC)*), DS322 *US – Zeroing (Japan),* and DS344 *US – Stainless Steel (Mexico)* have taken the view that the ADA does not exclusively define

[112] ibid para 7.182.
[113] Shahabuddeen (n 1).
[114] WTO, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil – Report of the Panel* (25 March 2011) WT/DS382/R.
[115] ibid paras 7.92-7.130.
[116] ibid para 7.131.

'dumping' in relation to the 'product as a whole'. On the other hand, the Appellate Body in all previous instances have found that the only permissible interpretation of the notion of 'dumping' is that it relates to the 'product as a whole'.[117] Having established that there is an objective lack of clarity in the current definition of 'dumping' in the ADA, the present panel opined that to follow the Appellate Body's adopted findings (that is, to read Article 2.4 ADA as defining dumping in relation to the 'product as a whole') would best serve the goals of the DSU. In doing so, it had regard to the integrity and effectiveness of the WTO dispute settlement system, and its belief that WTO members have a strong systemic interest in seeing that a lasting resolution to the 'zeroing' controversy be found sooner rather than later.[118]

Moving to the consideration on Article 2.4 itself, the present panel based its decision on its systemic concern identified in the previous paragraph. It concluded that 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'.[119] Further, a comparison methodology (such as 'simple zeroing') which 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. It then ultimately concluded that 'simple zeroing' is inconsistent with the 'fair comparison' requirement prescribed in Article 2.4 ADA.[120]

The panel went on to consider whether the zeroing practices in the administrative reviews are also inconsistent with Article 2.4 ADA. A peculiar fact of this case is that the dumping margin is determined at 0%. The Respondent (the US) argued that, because the margin is *de minimis*, it cannot be considered to infringe Article 2.4, since it cannot be said to be 'artificially inflated' or 'inherently unfair'. The panel disagreed: the obligation under Article 2.4 is focused on the comparison between export price and normal value, and not on the impact of the comparison.[121] The panel concluded that by using 'simple zeroing' in the first administrative review, the US failed to perform a 'fair comparison' under Article 2.4 ADA.[122] The same rationale and conclusion were also applied on the second administrative review.[123]

[117] ibid para 7.130.
[118] ibid paras 7.134-35.
[119] ibid para 7.153.
[120] ibid.
[121] ibid para 7.156.
[122] ibid.
[123] ibid paras 7.160-61.

In DS404 (*US – Shrimp (Viet Nam)*)[124], the Complainant (Vietnam) claimed that the Respondent (the US) acted inconsistently with Article 2.4 ADA because its authority applied zeroing to calculate the dumping margins of some respondents in administrative reviews. In the administrative reviews at issue, in the end, no anti-dumping duties were ultimately assessed. As in *US – Orange Juice (Brazil)*, the Respondent argued that, since the effect is in the end negligible, then incompatibility with the fair comparison obligation also cannot be found. The DS404 panel noted the reasoning employed in the Appellate Body reports, and adopted it as its own.[125] This also applies even if no duties are actually assessed, since according to the Appellate Body's reasoning in its report on DS244, the bias in zeroing is inherent because it tends to artificially inflate the dumping margins.[126] The panel ultimately found that the US acted inconsistently with Article 2.4 ADA because the US authority used zeroing to calculate the dumping margins of individually-examined exporters in the administrative reviews at issue.[127] This panel finding is a straightforward case of precedent-following, as the reasoning was directly adopted from an existing Appellate Body report. The conclusion that incompatibility with the fair comparison obligation still stands even if no duties are actually assessed, is also in principle the same as the conclusion reached by the panel in *US – Orange Juice (Brazil)*.

The panel on DS464 (*US – Washing Machines*)[128] deals with the question of systemic disregarding under the DPM and zeroing in the context of the weighted average-to-transaction methodology.

The aspect of the DPM aspect which constitutes Korea's claim pertains to what it calls systemic disregarding, where two methodologies were mixed: the weighted average-to-transaction methodology used for pattern transactions, and the weighted average-to-weighted average methodology for non-pattern transactions.[129] The panel observed that authorities are allowed to use the weighted average-to-transaction methodology to focus on pattern transactions, and the mixing of methodologies is to the panel not prohibited.[130] It then rejected Korea's argument that the systemic disregarding is

[124] WTO, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Report of the Panel* (11 July 2011) WT/DS404/R.
[125] ibid para 7.93.
[126] ibid paras 7.94-7.95.
[127] ibid para 7.97.
[128] WTO, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Report of the Panel* (11 March 2016) WT/DS464/R.
[129] ibid para 7.161.
[130] ibid para 7.169.

unfair and contrary to Article 2.4 ADA by inflating the dumping margin and ignores the negative amount of dumping for non-pattern transactions.[131]

For the zeroing aspect, the panel noted in particular the Appellate Body's report on the DS322 case which underlined the incompatibility of a methodology resulting in duties exceeding the dumping margin, with the fair comparison requirement of Article 2.4 ADA.[132] It then proffered its own reasoning thus:

> …[t]he use of zeroing in the context of the [weighted average-to-transaction] comparison methodology would not lead to a fair comparison, since individual pattern transactions priced above normal value would not be properly taken into account when an authority has particular regard to the exporter's pricing behaviour within that pattern.[133]

The panel ultimately found that the use of zeroing in the context of the weighted average-to-transaction methodology is inconsistent with Article 2.4 ADA, 'as such' and as applied in the investigation at issue.[134] As this panel essentially relied on the Appellate Body's reasoning (particularly on DS322) for its own finding, this report cannot be said to deviate from the Appellate Body.

DS464 went to the appeal stage, and the findings on both systemic disregarding under the DPM and zeroing, were appealed.[135]

The DPM aspect (systemic disregarding) was discussed first. The Appellate Body noted that the fair comparison obligation under Article 2.4 applies to the 'universe of export transactions' relevant to each methodology. In the case of the weighted average-to-transaction methodology, the universe of export transaction is limited to 'pattern transactions' only. [136] The exclusion of 'non-pattern transactions' is in line with the 'fair comparison' requirement under Article 2.4 ADA.[137] In rejecting Korea's claim that the systematic disregarding practice fails the 'fair comparison' requirement of Article 2.4 ADA, the panel relied on its understanding that mixing methodologies is allowed, but

[131] ibid.
[132] ibid para 7.206 citing *US – Zeroing (Japan) (Report of the Appellate Body)* (n 92) para 168.
[133] ibid.
[134] ibid.
[135] WTO, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Report of the Appellate Body* (7 September 2016) WT/DS464/AB/R.
[136] ibid para 5.138.
[137] ibid.

the Appellate Body is of the view that mixing methodologies is *not* allowed, and rendered moot the panel's finding in this regard.[138]

Next, the zeroing aspect was discussed. The Appellate Body recalled that, although it may use the weighted average-to-transaction methodology to focus on pattern transactions, an investigating authority is not allowed to use zeroing *within* the identified 'pattern'.[139] The present Appellate Body noted that by setting to zero 'individual export transactions' that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form the applicable 'universe of export transactions' as required under the second sentence of Article 2.4.2, thus failing to make a 'fair comparison' within the meaning of Article 2.4.[140] The Appellate Body ultimately upheld the panel's finding on zeroing under Article 2.4 ADA, in affirmation of the panel's finding before it.[141]

The same question came again before the panel in DS534 (*US – Differential Pricing Methodology*).[142] The panel acknowledged the Appellate Body's finding in the DS464 case (*US – Washing Machines*). It noted however that such a finding was dependent on the finding that zeroing is impermissible under the second sentence of Article 2.4.2.[143] Elsewhere in its report, the DS534 panel had found that the second sentence of Article 2.4.2 ADA *permits* zeroing under the weighted average-to-transaction methodology, to the extent that this methodology is limited to pattern transaction.[144] The panel found that the Complainant has not established that the Respondent's authority acted inconsistently with Article 2.4 ADA.[145] This finding on the matter of fair comparison, as was the finding in the broader matter of zeroing under Article 2.4.2, was a case of AB-panel deviation. This was the last report within the time period covered for this thesis (the end of 2020).

### 3.2.2 'fair comparison (non-original investigation)'

[138] ibid para 5.140.
[139] ibid para 5.178.
[140] ibid para 5.180.
[141] ibid para 5.182.
[142] WTO, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada – Report of the Panel* (9 April 2019) WT/DS534/R.
[143] ibid para 7.110.
[144] ibid para 7.111.
[145] ibid para 7.112.

These disputes are a subset of 'fair comparison' disputes which pertain the first sentence of Article 2.4 ADA. The distinguishing factor is that, in these cases, the main claim is on Article 11 ADA on administrative and sunset reviews of the application of the anti-dumping measure, but the Complainant launches a separate claim of inconsistency with Article 2.4 ADA. In other words, Article 2.4 ADA was brought in under the main claim which was based on Article 11 ADA.

To recall, the Appellate Body in DS141 had stated in passing that a comparison between export price and normal value that does not take fully into account the prices of all comparable export transaction (such as zeroing) is not a 'fair comparison' between export price and normal value.[146]

In DS244 (*US - Corrosion-Resistant Steel Sunset Review*),[147] the Respondent had applied dumping duties before the coming into force of the ADA. The dumping duties, and later the administrative review, were calculated with zeroing. When time came for a sunset review of the duties, the margins from the administrative reviews were again relied upon. The argument is that, because the margins had been calculated with zeroing, the reliance on the margins is inconsistent with Article 2.4 ADA because the authority did not ensure that such margins were WTO-consistent before relying on it. The panel did not examine this claim further, having reasoned that the disciplines in Article 2 ADA do not apply in making the analysis under Article 11 ADA.[148]

DS244 did go before the Appellate Body[149], which took issue with the panel's decision not to examine the claim. It held that, *should* investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must confirm to the disciplines of Article 2.4 ADA, and *if* the margins used in the previous reviews were flawed because they were calculated in a manner inconsistent with Article 2.4 ADA, then there would be not only an inconsistency with Article 2.4 ADA, but also with Article 11.3 ADA.[150] However, the Appellate Body found itself unable to rule on whether the Respondent acted inconsistently with Article 2.4 ADA because it did not see enough factual basis in the panel report to determine whether the methodology employed by the Respondent was equivalent in effect to the

[146] WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Report of the Appellate Body* (1 March 2001) WT/DS141/AB/R 55.
[147] *US - Corrosion-Resistant Steel Sunset Review* (Report of the Panel) (n 61).
[148] ibid para 7.168.
[149] *US - Corrosion-Resistant Steel Sunset Review* (Report of the Appellate Body) (n 65).
[150] ibid para 127.

methodology used in DS141.[151] The Appellate Body in DS244 overturned the panel's holding regarding the applicability of Article 2.4 ADA to an analysis of Article 11 ADA which relies upon margin of dumping, albeit without making a distinct legal finding on that matter.

Following DS244, three cases where the compatibility of the fair comparison requirement in the context of non-original investigations came before the panels (DS294, DS322, and DS344). However, in these three cases, the topic of zeroing (rather than the fair comparison requirement) is the central topic. The findings on these cases are already set out in chapter 3.2.1. To avoid repetition, it is advised to refer to chapter 3.2.1 for further explanation regarding these cases. In short, in DS294 (*US – Zeroing (EC)*)[152], the panel reasoned, among others, that the negotiators of the ADA did not extend the application of Article 2.4.2 beyond investigations within the meaning of Article 5 ADA, because Article 2.4.2 ADA itself contains the phrase 'the existence of margins of dumping *during the investigation phase*' (emphasis provided)[153] before concluding that the Respondent did not act inconsistently with Article 2.4 ADA.[154] The panel report is an AB-panel deviation since the Appellate Body report on DS244 was of the position that Article 2.4 applies to non-original investigations.[155] An Appellate Body report on DS294 was issued,[156] but the Appellate Body felt that it was not necessary to address the panel's finding on this matter, and simply declared moot the panel's finding.[157] Then in DS322 (*US – Zeroing (Japan)*),[158] the panel found that the simple zeroing in periodic review and new shipper reviews was not inconsistent with Article 2.4 ADA, based on the principle that there cannot be a general prohibition of zeroing, which in turn is based among others on effective treaty interpretation.[159] Because the DS294 Appellate Body report did not hold a legal finding, the panel finding in turn cannot be classified as an AB-panel deviation (discounting the DS141 Appellate Body report). The DS322 panel holding was at any rate reversed by the Appellate Body based on the concept that duties cannot exceed the margin of dumping and a method that

[151] ibid para 138.
[152] *US – Zeroing (EC)* (Report of the Panel) (n 69).
[153] ibid para 7.263.
[154] ibid para 7.284.
[155] See *US - Corrosion-Resistant Steel Sunset Review* (Report of the Appellate Body) (n 65) para 127.
[156] *US – Zeroing (EC)* (Report of the Appellate Body) (n 80).
[157] ibid para 147.
[158] *US – Zeroing (Japan)* (Report of the Panel) (n 82).
[159] ibid para 7.218-19.

results in such excessive duties falls short of the Article 2.4 'fair comparison' requirement.[160] Next in DS344 (*US – Stainless Steel (Mexico)*)[161] the panel rejected the Complainant's claim that simple zeroing in periodic reviews is inherently inconsistent with the fair comparison requirement under Article 2.4 ADA,[162] (employing, among others, reasoning based on mathematical equivalence) which was not in line with the DS322 Appellate Body report. This AB-panel deviation was then addressed by the Appellate Body which overturned the panel's finding by pointing out that the mathematical equivalence argument only works under a specific set of assumption and the practice of the weighted average-to-transaction methodology is uncertain.[163]

The argument that reviews which are not original investigations should conform to the disciplines of Article 2.4 was again launched in DS494 (*EU – Cost Adjustment Methodologies II (Russia)*).[164] The Complainant relied on the Appellate Body report on DS244 in asserting that in the case that investigating authorities choose to rely upon dumping margins in making their likelihood determination, the calculation of these margins must conform to the disciplines of Article 2.4. The panel in DS494 agreed with the Complainant (and therefore the DS244 Appellate Body).[165] However, the panel looked at the facts of the case and noted that the Respondent did *not* rely upon dumping margins in the expiry review.[166] It then declined to rule on the matter.[167] The Appellate Body's precedent is put in a conditional language, leaving a margin of appreciation of the facts at hand, enabling a panel applying the precedent to come to the conclusion that there was no violation of Article 2.4 ADA if the facts do not support the claim. This holding is therefore still consistent with the Appellate Body's statement in the report on DS244, duly noting the conditionality of the reliance on a margin of dumping.

If the panels and the Appellate Body are seen collectively, consistency within this tag is rather lacking. The tag began with an overturning in DS244, and then on the very next occurrence (in DS294) the panel went against the DS244 Appellate Body position. Then in the next two cases (DS322 and DS344) the panels persisted in taking

[160] *US – Zeroing (Japan)* (Report of the Appellate Body) (n 92) para 168-69.
[161] *US – Stainless Steel (Mexico)* (Report of the Panel) (n 100).
[162] ibid para 7.145.
[163] *US – Stainless Steel (Mexico)* (Report of the Appellate Body) (n 105) paras 126 and 143.

[164] WTO, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint) – Report of the Panel* (24 July 2020) WT/DS494/R.
[165] ibid para 7.514.
[166] ibid paras 7.525-26.
[167] ibid para 7.528.

positions at odds with the Appellate Body. Then at the last case in the series (DS494), the legal position of the DS244 Appellate Body report was followed (although the facts led the panel to a distinct conclusion).

### 3.2.3 'fair comparison (due allowance)'

These disputes are a subset of 'fair comparison' disputes which emphasize the third sentence of Article 2.4 ADA, which states that 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.

Many of these cases involve an authority's failure to make such due allowance when one is due. In the case numbered DS189 (*Argentina – Ceramic Tiles*),[168] the authority allegedly failed to make a due allowance for physical differences among various models of ceramic tiles. The authority in this case only distinguishes among ceramic tiles according to one parameter, namely size. However, in addition to size, ceramic tiles may be distinguished on the basis of other characteristics, such as degree of processing (polished / unpolished), and quality.[169] The Respondent's authority was considered to have acted inconsistently with Article 2.4 ADA by failing to make adjustments for physical differences affecting price comparability.[170] It is notable that the approach is an objective one: the panel observed the nature of the market and noticed the kinds of characteristics – physical differences – which may affect price comparability.

The panel in a subsequent case, numbered DS211 (*Egypt – Steel Rebar*)[171] added one important insight into the interpretation of this portion of Article 2.4. The panel highlighted the phrase 'in each case, on its merits' in that provision and concluded that this provision cannot be read purely based on legal interpretation which would apply in all cases regardless of the facts; it requires a case-by-case analysis.[172] Also, it means that to determine what types of adjustment which must be made is something of

[168] WTO, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy – Report of the Panel* (28 September 2001) WT/DS189/R.
[169] ibid para 6.114.
[170] ibid para 6.117.
[171] WTO, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey – Report of the Panel* (8 August 2002) WT/DS211/R.
[172] ibid paras 7.349-52.

a dialogue between the exporters and the investigating authority, which can result in different results in different cases.[173] This case involved an alleged failure to make credit cost adjustments to normal value for differences in payment terms. Notably, such adjustment was made to the export price, but not on the normal value. However, it was found that, during the course of the investigation, the Respondent's authority stated to the Complainant that a constructed normal value which has not been adjusted for credit costs is going to be used, and the Complainant did not raise an objection then.[174] The panel then concluded that the Complainant has not established a prima facie violation of Article 2.4 ADA.[175]

The case numbered DS219 (*EC – Tube or Pipe Fittings*)[176] showed a similar issue: the Respondent was argued to have breached Article 2.4 ADA because its authority denied a request to make allowances for indirect taxation for a particular exporter. This panel further elaborated the 'dialogue' - as was called by the panel in *Egypt – Steel Rebar* – between the exporters and the investigating authority. The exporter is to substantiate their request for an adjustment in a constructive manner, and the authority must at least evaluate the identified differences in taxation, with a view to determining whether or not an adjustment is required to ensure a fair comparison between normal value and export price.[177] The facts showed that the authority did ask the exporter for clarification as to its requested adjustment, because to the authority, the value of the tax credit that the exporter used as a basis for requesting the adjustment was doubtful, not consistently booked, and wrongly calculated. The authority made known these views and the exporter had an opportunity to fix these deficiencies.[178] The panel ultimately held that the Complainant has failed to establish that the Respondent has violated Article 2.4 ADA.[179] Although not a direct overlap, this holding can still be said to be consistent with the holding of the previous panel (DS211). This case did go into the appeal stage, but at any rate the matter concerning Article 2.4 was not argued before the Appellate Body.

[173] ibid para 7.352.
[174] ibid paras 7.354-86.
[175] ibid para 7.387.
[176] WTO, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube Or Pipe Fittings from Brazil – Report of the Panel* (7 March 2003) WT/DS219/R.
[177] ibid paras 7.157-58.
[178] ibid paras 7.160-64.
[179] ibid para 7.166.

In DS241 (*Argentina – Poultry Anti-Dumping Duties*)[180], the Complainant (Brazil) argued that the Respondent's (Argentina) authority failed to give due allowance – similar to the circumstances at the *Argentina – Ceramic Tiles* case – and the Respondent also gave a similar argument as was made in *Argentina – Ceramic Tiles,* namely that the exporter's requests did not have enough substance. The panel made a factual analysis and found that the exporter did in fact make some documentary evidence in support of its request for due allowance.[181] This, the panel opined, is enough substance to merit an adjustment to be made, and found that the Argentinian authority has acted inconsistently with Article 2.4 ADA.[182]

The next case where this matter came into play was the case numbered DS264 (*US – Softwood Lumber V*).[183] The panel cited the DS219 panel report that an authority must at least evaluate identified differences, but elaborated on that point by adding that Article 2.4 '[d]oes 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.'[184] If all differences must be considered, then the qualificative phrase 'which affect price comparability' would be pointless.[185] The panel then attempts to summarize the obligations of the authority under Article 2.4 ADA: it is not true that the investigating authority must grant any claimed adjustment, but if it has the requisite evidence substantiating a claimed adjustment, it should not reject that claimed adjustment. Further, Article 2.4 ADA does not impose any particular method for examining whether a given difference would affect price comparability. [186]

The panel then went on to do a factual analysis. It noted that one of the Canadian exporters submitted graphs with monthly average prices for lumbers of different dimensions. According to the panel, what the exporter has done was, at most, to advance a possible methodology to assess the cost and pricing data it had submitted. It was not considered as a request to the US authority to analyze the data in the manner in which the exporter had presented it, nor did the exporter give reasons why the authority should

[180] WTO, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel* (22 April 2003) WT/DS241/R.
[181] ibid para 7.238.
[182] ibid para 7.240.
[183] WTO, *United States – Final Dumping Determination on Softwood Lumber from Canada – Report of the Panel* (13 April 2004) WT/DS264/R.
[184] ibid para 7.165.
[185] ibid.
[186] ibid para 7.167.

have analyzed it in any particular manner.[187] According to the panel, had the exporters argued that the US authority should have examined data in a particular way, in light of the specific facts of the case, and had the US authority analysed that data in an unreasonable manner, thus determining that differences in dimension were not demonstrated to have affected price comparability, the panel might have found that the US acted inconsistently with Article 2.4. ADA. This, according to the panel, was not the case.[188] The panel ultimately held that there was no violation of Article 2.4 ADA.[189]

Another aspect of due allowance also became an issue. One of the Canadian exporters engaged in futures contracts, and the profits from the futures trade is booked as an offset to direct selling expenses. At the preliminary stage, the US authority refused to make the adjustment, because in its view those profits is an investment revenue, not a direct selling expense. At the definitive stage, the US authority refused again because those profits did not result from actual sale of lumber. Then the exporter asked the authority to instead apply the profits as an offset to financial expenses because the futures activities are integral parts of their core business and not speculative investments. The authority refused again, stating that it is precisely because it is part of the exporter's core business (and not an investment) that they refuse to use the profits to offset financial expenses.

The panel examined the text of Article 2.4 ADA to analyse the arguments, and held that adjustments made under that article must start with determining whether a *difference* between the export price and the normal value (arising from physical differences, conditions and terms of sale, or other factors), and whether that difference affect the *comparability* between values in the two markets.[190] Canada then argued that the exporter engaged in the futures trade only in the US and that the activity was a deliberate effort to affect pricing of its products sold in the US markets only. The panel is not convinced: although the trading platform is located in the US, the buyers and sellers in that platform can also come from Canada, and it is possible that the products be delivered to Canada as well. In other words, the futures trade cannot be isolated to only the US.[191] The panel ultimately held that Canada has failed to demonstrate that there is a difference that affect price comparability, that would warrant an unbiased and objective

[187] ibid para 7.182.
[188] ibid para 7.183.
[189] ibid para 7.184.
[190] ibid para 7.356.
[191] ibid para 7.364.

authority to grant the requested adjustment. The panel held that the US did not violate Article 2.4 ADA.[192]

This holding is again not in conflict with existing panel holdings, if only for the apparent tendency for panels to set a high standard for exporters in the exporter's obligation to substantiate their request for making due allowance.

The next case with a similar dispute is that numbered DS312 (*Korea – Certain Paper*).[193] This case involved an alleged failure in making due allowance for certain differences in selling expenses between their respective markets. For sales to the domestic market of the producer (Indonesia) sales are made through a distributor, while for the export sales to the Respondent state (Korea), they sell directly to customers. The distributor for the domestic market charges some amount to the producers. Indonesia claims that these extra charges should be the subject of adjustment from the Korean authorities. Korea argued that the never received evidence that the involvement of the distributor gave rise to a difference that affected price comparability as set out under Article 2.4 ADA. The panel sets the threshold for a prima facie case: that there was a difference and that the difference affected price comparability between the normal value and the export price for which the Korean authority failed to make an adjustment.[194]

According to the panel, the fact that a trading company handles domestic or export sales of the subject product 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 ADA.[195] Having examined the facts, the panel considered that Indonesia's submissions had not been enough to demonstrate that the distributor's involvement created a difference between the normal values and the export prices of the Indonesian producers which affect price comparability. The panel was also not convinced that there were sales-related services rendered by the distributor with respect to domestic sales of the Indonesian producers, which were not rendered in the export sales to Korea. The panel ultimately rejected Indonesia's claim.[196]

[192] ibid para 7.365.
[193] WTO, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Report of the Panel* (28 October 2005) WT/DS312/R.
[194] ibid paras 7.135-8.
[195] ibid para 7.147.
[196] ibid.

This panel seems to apply a more objective view. Instead of looking at the actions taken by the exporter and the authority, the panel observed the fact of the involvement of a distributor in sales activities in one side of the market only, and analyzed whether it necessarily affects price comparability. However, the finding still cannot be classified as a deviation: the appreciation of the facts of the case leaves panels with flexibility as to the reaching of conclusions.

In the case numbered DS397 (*EC – Fasteners (China)*)[197], the authority changed its system of categorization of the relevant product. Initially, the information request sent by the authority was based on Product Control Numbers ('PCN'), but then, because the Complainant (China) was not a market economy, an analogue third country was used, and the producer from the analogue country did not use PCN. The Respondent's (EU) authority used the categorization used by the analogue country instead. China argued that the EC failed to make adjustments for quality differences and physical characteristics which were included in the PCNs, but not reflected in the factors on which product categories for the comparison were ultimately based and which affected price comparability. China asserted that all factors under the PCN affect price comparability. The panel used a similar threshold as was applied by the DS312 panel: that an adjustment should have been made with respect to a difference that was demonstrated to affect price comparability, and that the EC's authority failed to make the adjustment.[198] The panel observed the nature of PCNs and concluded that there is no inherent reason to conclude that every element of the PCN necessarily reflects a difference which affects price comparability.[199] Next, the behavior of the Chinese producer/exporter itself was observed. None of the Chinese producers argued that there were factors which affected price comparability other than those used by the authority.[200] One producer did send a letter referring to the issue of quality differences, but it did not indicate that any evidence was proffered to the authority to demonstrate that this alleged quality difference affected price comparability.[201] The panel ultimately rejected China's claim.[202]

This panel used both objective observation (observing the nature of the elements of the PCN) and subjective observation (the conduct of the exporter/producer), but both

[197] WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Panel* (3 December 2010) WT/DS397/R.
[198] ibid para 7.298 citing *Korea – Certain Paper* (Report of the Panel) (n 193) paras 7.135-8.
[199] ibid para 7.302.
[200] ibid para 7.306.
[201] ibid para 7.311.
[202] ibid.

were still similar to the tendency of past panels: skepticism as to whether a fact affects price comparability, and a high burden of effort for the interested party to demonstrate that their request is merited.

DS397 did go to the appeal stage, resulting in the circulation of an Appellate Body report.[203] The Appellate Body took issue with the panel's remark that none of the Chinese producers argued to the authority, which the panel used as a basis to reject China's argument that the authority violated Article 2.4 ADA by failing to make necessary adjustments. The Appellate Body found elsewhere in the report that the panel in fact found that the Chinese producers were informed very late in the proceedings of the product types that formed the basis for the comparisons underlying the authority's dumping determinations, precluding the Chinese producers from requesting any adjustments for purposes of ensuring a fair comparison.[204] This means that the 'absence' of a request from Chinese producers for adjustments on the basis of the PCN characteristics should not have prevented a finding of inconsistency under Article 2.4. This, to the Appellate Body, showed that the panel failed to consider the last sentence of Article 2.4 in that exporters have the right to ensure that the authority conducts a fair comparison.[205] The Appellate Body concluded that the panel erred in its application of Article 2.4 in this regard.[206] This is an instance of overturning. Arguably, the Appellate Body can be said to have judged that the DS397 panel's perception of the interested party's duty as being too high, and the authority's duty too low.

In DS405 (*EC – Footwear (China)*)[207], the same threshold as used by the panels in DS312 and DS397 was repeated: due allowance should have been made with respect to (i) a difference (ii) that was demonstrated to affect price comparability between the normal value and the export price and (iii) that the investigating authority failed to make the adjustment.[208] The Complainant (China) claims that the Respondent (the EC) has acted inconsistently with Article 2.4 ADA (among others) by using a broad Product Control Number (PCN) system for the classification of different product types which

[203] WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Appellate Body* (15 July 2011) WT/DS397/AB/R.
[204] ibid para 515 citing *EC – Fasteners (China)* (Report of the Panel) (n 197) para 7.306.
[205] ibid.
[206] ibid.
[207] WTO, *European Union – Anti-Dumping Measures on Certain Footwear from China – Report of the Panel* (28 October 2011) WT/DS405/R.
[208] ibid para 7.278 citing *Korea – Certain Paper* (Report of the Panel) (n 193) para 7.138 and *EC – Fasteners (China)* (Report of the Panel) (n 197) para 7.298.

led to the classification of extremely different footwear types under a single PCN category and thereby precluded a fair comparison between the export price and normal value, as well as domestic market prices for the purpose of the dumping margin calculation. The panel does not agree that the PCN methodology, by being extremely broad, failed to capture all the differences affecting price comparability and thus precluding a 'fair comparison' between the export prices and analogue country prices. To the panel, 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.[209] The panel is not convinced by China's argument that, because of the hundreds of different kinds of types/models of footwear within a PCN category, exporters could not quantify the differences which allegedly affected price comparability.[210] It ultimately held that China has failed to demonstrate that the EC acted inconsistently with Article 2.4 ADA.[211] This threshold and standard for the conduct of interested parties is similar to that of previous panels.

In DS460 (*China – HP – SSST (EU)*)[212], the Complainant (The EU) claimed that the Respondent (China) has acted inconsistently with that article by failing to account for differences in physical characteristics between certain goods (stainless steel seamless tubes) sold in the EU and goods exported to China. The physical characteristic specifically is the thickness of the tube's outer diameter, which the EU claims affects price comparability. The EU's argument is that of overinclusion: sales of thin tubes which are more expensive to make and not used in primary boiler systems, were included by the Chinese authority's calculation of normal value, because such sales are not comparable, without adjustment, to the tubes exported to China. China argued that the EU producer in question made contradictory and incoherent statements regarding the physical difference and never lodged any substantiated request in relation to a fair comparison concerning the relevant sales.

[209] ibid para 7.283.
[210] ibid.
[211] ibid para 7.287.
[212] WTO, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SST") from the European Union – Report of the Panel* (13 February 2015) WT/DS460/R.

The DS460 panel noted that the producer's initial questionnaire response did not request any adjustments for differences in physical characteristics, but later in the comments to the preliminary dumping disclosure, the producer stated that the authority should not have included certain sales.[213] The panel considered that the producer did request an adjustment under Article 2.4 ADA to reflect physical differences affecting price comparability.[214] To the panel, an objective and impartial investigating authority would not have assessed the physical differences and the information provided by the producer in the framework of exclusion from the scope of products under consideration. The authority should at least acknowledge the fact that an adjustment was being sought, then consider whether adjustment was warranted and the necessary information had been provided.[215] The panel also noted that it was not demonstrated to the panel that the Chinese authority rejected the producer's request for want of substance. Thus the panel found that China's argument's relating to a lack of substantiated request constitute ex post rationalization, which the panel considered itself bound not to consider when examining the claim.[216] The panel ultimately held that China acted inconsistently with Article 2.4 ADA.[217] The standard of conduct of the exporter/producer seems to be more relaxed in this case. However, it is still hard to conclude that an inconsistency exists, since the standard is a fact-sensitive one, opening the possibility of reaching different conclusions for different cases.

If anything, the legacy from DS211 (*Egypt – Steel Rebar*) - of favoring a case-by-case analysis over a legalistic interpretation, and seeing the process of determining what adjustments are to be made as a dialogue between the interested party and the authority - seems to be the common thread in this series of cases. This stance (as will be seen further below) would be indirectly affirmed by the Appellate Body in DS473. Elaborations on that theme were made every now and then (such as the clarification of the duty of the authority to at least evaluate the identified differences with a view to determining whether or not an adjustment is required to ensure a fair comparison, added by the panel in DS219), but no direct disagreement with a previous panel on this general stance can be identified.

[213] ibid para 7.79.
[214] ibid para 7.83.
[215] ibid.
[216] ibid para 7.84-5
[217] ibid para 7.86.

Another kind of dispute is somewhat the opposite of the series of cases discussed under the previous portion: where the authority was claimed to have applied an adjustment where they should not have done so. To recall, Article 2.4 ADA mentions five kinds of difference which would justify making an allowance: terms of sale, taxation, levels of trade, quantities, and physical characteristics.

DS179 (*US – Stainless Steel*)[218] involved a rather unique set of circumstances. The Complainant's (Korea) exporter has a buyer in the Respondent state (US) that declared bankruptcy and failed to pay for its orders. The US authority included these sales in its margin analysis, and labels them as 'direct selling expenses'. Korea argues that labelling unpaid sales as direct selling expenses is not allowed under Article 2.4 ADA: that article only allows adjustments that affect price comparability, and the cost of unpaid sales do not affect price comparability. The US argued that its treatment of the unpaid sales fall under 'terms of sale'. The panel disagreed: the failure of a customer to pay is not a condition or term of sale.[219] In the middle of hearings, the US later also argues that 'terms and conditions of sale' may be understood as the 'mode or circumstances' where the sales were made, for example 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. The panel was again not convinced: allowances under Article 2.4 ADA must be read with price comparability in mind. The panel remarked thus:

> 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 ADA.[220]

Considering the rather unique set of circumstances of this case, it is unlikely that a similar issue would present itself before a subsequent panel. Therefore this finding presents a limited concern of consistency.

[218] *US – Stainless Steel* (Report of the Panel) (n 100).
[219] ibid para 6.75.
[220] ibid para 6.77.

In DS294 (*US – Zeroing (EC)*)[221], the Complainant (the EC) argued that the conduct of zeroing by the Respondent's (US) authority amounts to an allowance or adjustment for a difference other than a difference affecting price comparability. The panel noted that the EC's argument asserts that 'a pattern of export prices which differ significantly among different purchasers, regions or time periods' which is contained in the second sentence of Article 2.4.2, can be regarded as one of the five factors which affect price comparability under Article 2.4 ADA. The panel warned that the argument misinterprets the concept of 'price comparability' under Article 2.4 ADA.[222] The panel noted that differences in price comparability under Article 2.4 are differences between the domestic market products and export product with respect to factors such as level of trade, taxation, quantities, etc. Differences in prices in the export market between regions, purchasers and time-periods is conceptually wholly irrelevant to, and outside the scope of, Article 2.4 since it has nothing to do with regard to such factors.[223] The panel dismissed the EC's argument that zeroing is an Article 2.4 ADA as an allowance or adjustment for a difference other than a difference affecting price comparability.[224]

DS294 went to appeal, resulting in the issuance of an Appellate Body report.[225] The Appellate Body is of the view that, if allowances could be made for differences not affecting price comparability, then the purpose of the requirement of the third sentence of Article 2.4 ADA would be undermined.[226] The US practice is comparing the export price of individual transactions with the normal value, and then aggregating the results of these comparisons. In the aggregation process, the US authority disregards the results when the export price exceeds the normal value. According to the Appellate Body, this is not an allowance or an adjustment covered by the third sentence of Article 2.4 ADA, including it's *a contrario* application.[227] This is because differences 'which affect price comparability' are differences in characteristics of the compared transactions that have an impact, or are likely to have an impact, on the price of the transaction. *A contrario,* only those adjustments made in relation to differences in characteristics of the compared transactions that do not affect price comparability, (that is, those which do not have an impact, or are unlikely to have an impact, on the price of the transaction) are

[221] *US – Zeroing (EC)* (Report of the Panel) (n 69).
[222] ibid para 7.279.
[223] ibid.
[224] ibid para 7.280.
[225] *US – Zeroing (EC)* (Report of the Appellate Body) (n 80).
[226] ibid para 156.
[227] ibid para 158.

prohibited.[228] Zeroing, however, *is* an adjustment or allowance made in relation to differences in price between export transactions and domestic transactions. The Appellate Body upholds the panel's finding that zeroing is not an impermissible allowance or adjustment under Article 2.4 ADA.[229]

Through the panel and appeal stages of DS294, we can see a consistent stance: zeroing is not an impermissible allowance or adjustment under Article 2.4 ADA. It is not that zeroing is *consistent* with Article 2.4 ADA, it is simply that classifying zeroing as an allowance in the sense of the third sentence of Article 2.4 is not a valid argument in the first place.

Besides zeroing, another conduct which has not been deemed to fall under the third sentence of Article 2.4 ADA is the decision to use a reference price from a ministry, instead of the actual market price, in constructing a constructed normal value. This matter surfaced in the case numbered DS473 (*EU - Biodiesel*).[230] The panel first noted that Article 2.4 ADA concerns the comparison between the normal value and the export price: it does not concern the basis for and basic establishment of the export price and normal value (as stated by the panel in the DS211 case) or the determination of the component elements of the comparison to be made – that is normal value and export price (as stated by the panel in the DS405 case).[231] However, the panel was also mindful that in the context of a constructed normal value, it may be necessary to make 'due allowance' in order to comply with the fair comparison obligation under Article 2.4 ADA. To the panel, the decision to use the reference price from the Ministry of Agriculture is not a difference which affects price comparability under Article 2.4 ADA: it does not relate to a difference in the characteristics of the domestic vs. export transactions being compared. It was a methodological approach that affected the *price* of biodiesel, but it did not affect the *price comparability* of the normal value and export price.[232]

In its reasoning, the present panel referred to the Appellate Body reports on the *EC – Fasteners (China) (Article 21.5 – China)* and the *US – Zeroing (EC)* cases which the panel read as consistent with the general proposition that differences arising from

[228] ibid para 157.
[229] ibid para 159.
[230] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina – Report of the Panel* (29 March 2016) WT/DS473/R.
[231] ibid para 7.296.
[232] ibid para 7.302.

the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 ADA as 'differences affecting price comparability'.[233] The panel ultimately found that Argentina has not established that the EU has acted inconsistently with Article 2.4 ADA by failing to make a 'fair comparison' between the normal value and export price.[234]

DS473 did go before the Appellate Body, and the Appellate Body in its report[235] addressed the panel's reference to the *EC – Fasteners (China) (Article 21.5 – China)* Appellate Body report: the Appellate Body corrected the panel in so far as referring to the existence of a 'general proposition' that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 ADA as 'differences affecting price comparability'. The Appellate Body does not share this understanding.[236] To the Appellate Body, that report 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 text of Article 2.4 itself makes clear that due allowance shall be made in each case, *on its merits*, which indicates that the need to make due allowance must be assessed in light of the specific circumstances of each case.[237] This, then, is an overturning of the immediate panel report and an indirect affirmation of the stance of the DS211 panel mentioned earlier.

Another dispute involving an authority applying an adjustment where they should not have done so is the case numbered DS442 (*EU – Fatty Alcohols (Indonesia)*).[238] The producer granted a mark-up to its trader, which also happens to be a related party. The authority determined that this mark-up was a difference affecting price comparability of the product under investigation, and made allowances to account for it. The Complainant (Indonesia) argued that the mark-up was a simple allocation or shifting of funds from one pocket to another within effectively *the same 'economic entity'* instead of a trading commission as how the Respondent's (EU) authority saw it. The panel disagreed.[239] It is not convinced that the existence of a single economic entity is

[233] ibid para 7.303.
[234] ibid para 7.306.
[235] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina – Report of the Appellate Body* (6 October 2016) WT/DS473/AB/R.
[236] ibid para 6.87.
[237] ibid.
[238] WTO, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia – Report of the Panel* (16 December 2016) WT/DS442/R.
[239] ibid para 7.103.

dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4 ADA. To the panel, it is possible that two entities could transact for goods and services at arms-length, regardless of how closely intertwined their control and ownership might be.[240] Instead, to the panel, 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.[241] This is in line with the understanding that allowances made under Article 2.4 ADA require a case-specific analysis.

DS442 also went to the appeal stage[242] and in its appeal, Indonesia claimed that the panel erred in this regard. Indonesia cited the Appellate Body's reports on *US – Hot-Rolled Steel*, the panel on *Korea – Certain Paper*, and the Appellate Body in *EC – Fasteners (China)*. The Appellate Body found the reliance unconvincing: *US – Hot-Rolled Steel* in fact reinforced the view that the focus of the authority's assessment is not on the nature of the relationship between related companies per se, but rather on whether that relationship can be demonstrated to be a factor that impacts the prices of the relevant transactions.[243] The last two reports pertained to Article 6.10 and the Appellate Body was not persuaded that these reports apply to the understanding of Article 2.4 ADA.[244] The Appellate Body ultimately found that Indonesia has not demonstrated that the panel erred in its interpretation of Article 2.4 ADA, but quickly noted that it was not ruling that the nature and degree of affiliation between related companies is irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price. Nor did it rule, in the abstract, on the circumstances in which an inquiry into the nature of the relationship between transacting entities will suffice or be determinative of the issue of whether allowances should be made pursuant to Article 2.4 ADA.[245]

[240] ibid.
[241] ibid para 7.106.
[242] WTO, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia – Report of the Appellate Body* (5 September 2017) WT/DS442/AB/R.
[243] ibid para 5.40.
[244] ibid para 5.42.
[245] ibid paras 5.44-5.

DS442 was the last in this series of cases, and by its disclaimer, the Appellate Body (as it did in DS473) made sure to avoid making sweeping, abstract statement. The stance that these matters need a case-by-case analysis, instead of a rigid, legalistic one, has survived – if it could be called so – since its inception at the panel report of DS211 (*Egypt – Steel Rebar*). If anything, it was the panels which try to set a sweeping abstract rule for future disputes, and it was the Appellate Body which quashes such attempts.

### 3.2.4 'fair comparison (unreasonable burden)'

These disputes involve a particular argument made by a Complainant, which involves the very last sentence of Article 2.4 ADA, which reads: 'The authorities 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'. More specifically, an authority's conduct which imposes an unreasonable burden of proof on an interested party, is inconsistent with Article 2.4 ADA.

In DS211 (*Egypt – Steel Rebar*)[246], the Complainant argued that the Respondent's practice of waiting until late in the investigation to raise issues requiring the submission of new factual information, and then imposing an unduly burdensome verification requirement, is inconsistent with Article 2.4 ADA because it imposes an 'unreasonable burden of proof' on the Complainant's exporters. The panel in DS211 noted that the emphasis of the paragraph is on the *comparison* of export price and normal value, instead of the establishment of the normal value as such.[247] The claim was dismissed.[248]

The next time a similar argument was raised, in DS241 (*Argentina – Poultry Anti-Dumping Duties*).[249] The panel in DS241 cited the panel in DS211 in stating that Article 2.4 ADA has to do with ensuring a fair comparison (instead of the process of establishing the value) and dismissed the Complainant's claim.[250] The fact that the panel directly cites the panel report where an existing precedent was stated, makes this instance a relatively straightforward case of precedent-following.

[246] *Egypt – Steel Rebar* (Report of the Panel) (n 171).
[247] ibid para 7.335.
[248] ibid para 7.337.
[249] *Argentina – Poultry Anti-Dumping Duties* (Report of the Panel) (n 180).
[250] ibid para 7.264-6.

In the case numbered DS405 (*EC – Footwear (China)*)[251] the Complainant (China) claims that the Respondent (the EC) has acted inconsistently with Article 2.4 ADA (among others) by failing to examine the applications for market economy treatment of non-sampled cooperating Chinese exporting producers in the original investigation. China asserted that the authority received 140 timely applications for market economy treatment, but only examined the applications of companies selected for the sample. The specific relation with Article 2.4 ADA lies in the claim that the EU effectively requires the producers under investigation to undertake a massive amount of work to complete the form for the application for market economy treatment within an extremely short deadline, only to not consider the information submitted. This, China argues, violates the principle of good faith and fundamental fairness. The EU argues that Article 2.4 ADA does not regulate sampling or how normal value should be established in cases of imports from China, and that China has failed to make a *prima facie* case on that issue. The panel agrees with the EC that Article 2.4 ADA does not establish any requirements with respect to either sampling or the establishment of normal value, and ultimately held that Article 2.4 ADA does not constitute a legal basis for China's claims.[252]

This kind of argument was never used again in subsequent disputes, and the findings of the panels faced with this argument have been consistent.

### 3.2.5 'zeroing (first sentence)'

These disputes pertain Article 2.4.2 ADA, more specifically zeroing in cases where one of the two 'normal' or 'symmetric' methodologies (namely the weighted average-to-weighted average or transaction-to-transaction methodology) was used. The relevant portion of Article 2.4.2 ADA reads:

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.

[251] *EC – Footwear (China)* (Report of the Panel) (n 207).
[252] ibid para 7.189.

The first case in the series is numbered DS141 (*EC -Bed Linen*).[253] In this case, the zeroing practice at issue consisted of the following: first, the relevant product (bed linen) is categorized into 'types' of bed linen, and for each such type of bed linen, the weighted average normal value and the weighted average export price was established and compared. These are to become the 'cases' of positive and negative dumping margins: the different margins are arrived at, after dividing bed linen in general into different types or models. The Respondent argued that, since Article 2.4.2 AD is directed at 'dumping', cases where a type of bed linen which export price is higher than normal value, do not have to be taken into account, since there is no 'dumping' for that type of bed linen.

The panel focused on the phrase 'a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions', especially on the second part ('…*all* comparable export transactions'): by counting as zero the instances of 'negative' margin, the Respondent effectively changed the prices of the export transactions in those comparisons, resulting in a comparison that fails to reflect all comparable export prices and thus contrary to Article 2.4.2 ADA.[254]

At the appeal stage[255], the same conclusion was reached with respect to zeroing, with an additional angle of reasoning: the Appellate Body considered that the determination of the existence of dumping applies to a *product*, and not (as in the EC's practice) to *types* or *models* of a product.[256]

The same issue surfaced again at the case numbered DS219 (*EC – Tube or Pipe Fittings*)[257] and the panel heavily relied on the panel and Appellate Body reports on DS141, finding that the respondent has failed to consider the weighted average of *all comparable transactions* as obliged by Article 2.4.2 ADA.[258] The discussion in the DS219 panel report was brief and did not venture to any novel direction. DS219 was the first time a panel was faced with a precedent on the use of zeroing under the first sentence of Article 2.4.2. The finding of the DS219 panel was a relatively straightforward case of precedent-following.

[253] WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Report of the Panel* (30 October 2000) WT/DS141/R.
[254] ibid paras 6.115-9.
[255] *EC – Bed Linen* (Report of the Appellate Body) (n 59).
[256] ibid paras 51 57 62.
[257] *EC – Tube or Pipe Fittings* (Report of the Panel) (n 176).
[258] ibid paras 7.216-9.

The case numbered DS264 (*US – Softwood Lumber V*)[259] also dealt with similar practice as in DS141, of sub-dividing the products into groups first, then the 'dumping margins' for each type is established, then at the second stage, the 'margins' for each type is then aggregated. The justification from the Respondent took the angle that Article 2.4.2 only governed the first stage of the process (that is, the establishment of dumping margins for each type), because the ADA does not give any guidance as to the second stage (the overall aggregation) of the process. The panel is of the view that the process of determining the dumping margin is a continuous process, however many stages the determination is broken down into.[260] The text of the ADA intently put the term 'all' in 'all comparable export transaction', and it would not be consistent with the view of continuity if in the second stage (the aggregation) the authority is to be allowed to ignore that very same obligation through the use of zeroing.[261] The panel ultimately held that the Respondent has violated Article 2.4.2 ADA by not taking into account all comparable export transactions.[262]

At the appeal stage[263], the reasoning from DS141 was confirmed: that 'margins of dumping' and 'dumping' can only occur with respect to *products* as a whole, and not on *types, categories,* or *models* of a product.[264] Responding to the Respondent's argument that prohibition of zeroing would amount to a requirement to compare 'dumped' and 'non-dumped' transaction (thus compelling the consideration of transaction which are not comparable), the Appellate Body reasoned that results of comparisons at the sub-group level do not constitute margins of dumping, and results of the comparisons in which the weighted average normal value is less than the weighted average export price could not be excluded in calculating a margin of dumping for the product under investigation as a whole.[265] The panel and appeal stages of DS264 still reflect the same stance since DS141.

*US – Softwood Lumber V* would also play a crucial part in an example of some of the most straightforward examples of precedent-following. This can be seen in a

[259] *US – Softwood Lumber V* (Report of the Panel) (n 183).
[260] ibid para 7.214.
[261] ibid para 7.216.
[262] ibid para 7.224.
[263] *US – Softwood Lumber V* (Report of the Appellate Body) (n 183).
[264] ibid para 96.
[265] ibid paras 99 102.

series of five cases, DS335 (*US – Shrimp (Ecuador)*)[266], DS343 (*US – Shrimp (Thailand)*)[267], DS383 (*US – Anti-Dumping Measures on PET Bags*)[268], DS402 (*US – Zeroing (Korea)*)[269], and DS422 (*US – Shrimp and Sawblades*).[270] In all these cases, the Complainant argued that the Respondent has conducted a form of zeroing that is the same as that put into question in the DS264 case (*US – Softwood Lumber V*), specifically referring to the Appellate Body report. The panel in DS335 noticed that there is consistent line of Appellate Body reports from DS141 to DS294 that holds that 'zeroing' in the context of the weighted average-to-weighted average methodology in original investigations is inconsistent with Article 2.4.2 ADA.[271]

The panels in these cases simply examined the facts at hand to determine whether the practice is at least *prima facie* the same as that discussed in DS264, and adapt the Appellate Body's reasoning in that case to resolve the present dispute. In all of these cases, the panel was satisfied that the facts at hand are at least *prima facie* the same as the form of zeroing at issue in DS264, and found the Respondent has acted inconsistently with Article 2.4.2 ADA. The Complainant in (DS343) heavily cited the panel report of the earlier case (DS335) in its pleading, and the Complainant in DS383 in turn cited both DS335 and DS343. The panel in DS402 also heavily cited the panel report on DS335, having recognized that the circumstances of the case before it is the same with DS335. The reports for these disputes are also some of the shortest reports of ADA disputes, with 17 pages for DS335 and 11 pages for DS383 (excluding annexes).

Apart from the five cases mentioned previously (*US – Shrimp (Ecuador)*, *US – Shrimp (Thailand)*, *US – Anti-Dumping Measures on PET Bags*, *US – Zeroing (Korea)*, and *US – Shrimp and Sawblades*), the issue of zeroing in the context of the first sentence of Article 2.4.2 ADA still surface. Around the time that the report for the DS294 (*US – Zeroing (EC)*)[272] case was issued, the distinction between zeroing in the context of the

[266] WTO, *United States – Anti-Dumping Measure on Shrimp from Ecuador – Report of the Panel* (30 January 2007) WT/DS335/R.
[267] WTO, *United States – Measures Relating to Shrimp from Thailand – Report of the Panel* (29 February 2008) WT/DS343/R.
[268] WTO, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand – Report of the Panel* (22 January 2010) WT/DS383/R.
[269] WTO, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea – Report of the Panel* (18 January 2011) WT/DS402/R.
[270] WTO, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China – Report of the Panel* (8 June 2012) WT/DS422/R.
[271] *US – Shrimp (Ecuador)* (Report of the Panel) (n 266) para 7.40.
[272] *US – Zeroing (EC)* (Report of the Panel) (n 69).

first sentence and the second sentence of Article 2.4.2 ADA began to become more emphasized. The stance regarding zeroing in the context of the first sentence, however, is still unchanged.

In that case, the Respondent was found to be in breach of Article 2.4.2 by not including (in the numerator[273] for the purposes of calculating the weighted average dumping margins) any amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups.[274] While the case did go to the appeal stage, no legal finding was made on the aspect of zeroing under the first sentence of Article 2.4.2 ADA.

In the case numbered DS322 (*US – Zeroing (Japan)*)[275], the usage of zeroing in the weighted average-to-weighted average method (termed 'model zeroing' by the Complainant) was found to be inconsistent with Article 2.4.2 ADA for the reason cited in previous reports: the phrase 'all comparable export transaction' does not apply to individual models, but to the product as a whole.[276]

However, the panel reached a different conclusion with respect to what the Complainant termed 'simple zeroing' in the context of the transaction-to-transaction methodology. The panel noted that the transaction-to-transaction methodology is distinguished by its focus on individual transactions, and because dumping occurs when the export price is less than normal value, the existence of such a methodology means that it is possible to treat transactions where export prices are less than normal value as being more relevant than the opposite is true.[277] Also in the transaction-to-transaction methodology, to the panel is of the view that 'margins of dumping' can mean the total amount by which transaction-specific export prices are less than transaction-specific normal values (with the implication that there is no need to include the results of comparisons where export price exceeds normal value).[278] The panel ultimately found that by maintaining simple zeroing in original investigation, the authority does not act inconsistently with (among others) Article 2.4.2 ADA.[279]

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[273] In expressing a fraction, the numerator is the number above the line. For example, in the fraction 2/3 (two-thirds), the numerator is the number two, while the other number – the number below the line – is the denominator, namely the number three.
[274] *US – Zeroing (EC)* (Report of the Panel) (n 69) para 7.32.
[275] *US – Zeroing (Japan)* (Report of the Panel) (n 82).
[276] ibid para 7.82-6.
[277] ibid para 7.119.
[278] ibid.
[279] ibid para 7.143.

DS322 did go to the appeal stage.[280] The finding on 'model zeroing' under the weighted average-to-weighted average method was not appealed.[281] The Appellate Body then addressed the question of zeroing under the transaction-to-transaction methodology. The Appellate Body could not see why zeroing would be consistent with Article 2.4.2 ADA: to the Appellate Body, if anything, under that methodology, the margin of dumping would be inflated to an even greater extent compared to when the weighted average-to-weighted average methodology is used.[282] The Appellate Body highlighted that the ADA 'does not contemplate the determination of dumping at the level of specific models or transactions', and ultimately disagreed with the panel's holding that margins of dumping in the transaction-to-transaction methodology can mean the total amount by which transaction-specific export prices are less than transaction-specific normal value.[283] This is an instance of overturning.

The thread continued with the case numbered DS344 (*US – Stainless Steel (Mexico)*).[284] The Complainant heavily cited the reports on DS264 in support of its argument. The panel expressed no disagreement with the DS264 findings for this specific aspect (zeroing under the first sentence) and found that the practice of 'model zeroing' in the context of the first sentence of Article 2.4.2 was found to be inconsistent with that provision.[285] The case did go to the appeal stage, but the specific aspect of zeroing under the first sentence of Article 2.4.2 ADA was not a subject of appeal.

The matter of 'model zeroing' under the first sentence of Article 2.4.2 surfaced again at the case numbered DS350 (*US – Continued Zeroing*).[286] The panel in DS350 cited heavily from the Appellate Body report on DS264 and expressed its agreement with the Appellate Body that the phrase 'all comparable export transactions' under Article 2.4.2 ADA requires the authorities to take into consideration of the weighted average of the prices of all comparable export transactions in the calculation of dumping margins using the weighted average-to-weighted average method.[287] It clarified that the practice of model zeroing conflicts with that obligation because it excludes from the calculation of the margin of dumping for the product under consideration the results of

[280] *US – Zeroing (Japan)* (Report of the Appellate Body) (n 92).
[281] ibid para 99.
[282] ibid para 123.
[283] ibid paras 127-8.
[284] *US – Stainless Steel (Mexico)* (Report of the Panel) (n 100).
[285] ibid paras 7.62-3.
[286] *US – Continued Zeroing* (Report of the Panel) (n 109).
[287] ibid para 7.111.

model-specific comparisons where the price exceeds the normal value. It ultimately found that model zeroing is inconsistent with the obligation under Article 2.4.2 ADA.[288]

In looking at this tag, it is notable that the reasoning in DS264 (*US – Softwood Lumber V*), especially the reasoning contained in the Appellate Body report, has been used again and again in the context of the first sentence of Article 2.4.2 (what was termed 'model zeroing' by the Complainant in *US – Zeroing (Japan)*). However, while the precedent-following in *US – Shrimp (Ecuador)*, *US – Shrimp (Thailand)*, *(US – Anti-Dumping Measures on PET Bags*, *US – Zeroing (Korea)*, and *US – Shrimp and Sawblades*, were straightforward, the discussions in *US – Zeroing (EC)*, *US – Zeroing (Japan)*, and *US – Stainless Steel (Mexico)* were less than straightforward because these cases also contain discussions regarding the use of zeroing in the context of the second sentence of Article 2.4.2 ADA (that is, when the weighted average-to-transaction methodology is used – also sometimes referred to as 'simple zeroing' by the parties). The treatment of zeroing in the context of the second sentence of Article 2.4.2 is set out in the section that follows.

### 3.2.6 'zeroing (second sentence)'

These disputes pertain Article 2.4.2 ADA, more specifically zeroing in cases where the 'asymmetric' methodology provided for in the second sentence of Article 2.4.2 ADA (namely the weighted average-to-transaction methodology) was used. The relevant portion of Article 2.4.2 ADA reads:

> 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

[288] ibid.

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.

As hinted at the previous section, the distinction between the two 'symmetrical' methodologies and the 'asymmetric' methodology in matters pertaining zeroing, began to be emphasized around the time the report for the DS294 (*US – Zeroing (EC)*) case was issued.[289] Although the crucial points in this case regarding zeroing was not made under the discussion of Article 2.4.2 itself,[290] it is nevertheless a notable case for the discussion of Article 2.4.2. To recall, in that case, the panel's holding on zeroing under the weighted average-to-weighted average method was in line with previous holdings (that is, the holding that not including amounts by which average export prices in individual averaging groups exceeded the average normal value for such groups in the numerator when calculating the weighted average dumping margins, is in breach of Article 2.4.2).[291] However, when the Complainant in DS294 claimed that the zeroing in the administrative review which uses the asymmetric methodology - the weighted average-to-transaction methodology - was also inconsistent with Article 2.4 ADA, the panel went a different way. The panel in DS294 was quick to differentiate the case it handled with the case handled by the Appellate Body in DS141 (*EC – Bed Linen*), especially because that case was a dispute in the context of the weighted average-to-weighted average methodology, putting into question whether the Appellate Body's statement in that case is to be understood to apply to other methodologies as well.[292] The panel in DS294 also put forth the form of reasoning which would be a point of contention in many similar cases to come: the reasoning based on effective treaty interpretation (and the 'mathematical equivalence' reasoning which supports it).

Zeroing in the context of the second sentence became an issue of effective treaty interpretation as follows: Article 2.4.2 ADA in its second sentence was provided to enable authorities to 'unmask' targeted dumping, and it provides for an asymmetrical

[289] *US – Zeroing (EC)* (Report of the Panel) (n 69).
[290] Because the claim directly on Article 2.4.2 was dismissed on the ground that the scope of Article 2.4.2 ADA is limited to investigations and not administrative reviews, the panel's reasoning on zeroing under the "asymmetric" methodology was to be found instead in the discussion of the claim on Article 2.4 ADA.
[291] ibid para 7.32.
[292] ibid para 7.271.

comparison methodology as an alternative to the 'normal' methodologies because the 'normal' methodologies may mask targeted dumping. If zeroing is regarded as not fulfilling the 'fairness' standard in all cases, including in cases where a WTO member would be required to offset the pattern of below-normal-value export prices by others above normal value, then the second sentence of Article 2.4.2 would be denied of the very function for which it was created. Further, if zeroing is prohibited, the alternative asymmetrical comparison methodology would as a matter of mathematics produce a result that was identical to that of the first, average-to-average, methodology.[293]

The issue of effective treaty interpretation itself is based on a reasoning from the Appellate Body in a very early case (*United States – Standards for Reformulated and Conventional Gasoline*),[294] namely that based on the 'general rule of interpretation' under the Vienna Convention of the Law of Treaties, 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.[295]

It is notable that the panel in DS294 set forth its reasoning on the understanding that the dispute it handled was different from the dispute handled by the Appellate Body in DS141, and that it understood the Appellate Body in that case as leaving open the question before the DS294 panel itself. At the appeal level, the question of zeroing was discussed not under a claim based on Article 2.4, but Article 9.3. Even then, the Appellate Body still declined to express any views on whether Article 2.4.2 ADA is applicable to administrative reviews under Article 9.3 ADA.[296]

The next panel, which handled the case numbered DS322 (*US – Zeroing (Japan)*),[297] was more direct: in a discussion of a claim under Article 2.4.2, it chose not to adapt the reasoning employed by the Appellate Body on DS264 and DS294. The DS322 panel employed the reasoning set forth by the DS294 panel: a general prohibition of zeroing conflicts with effective treaty interpretation because if zeroing is prohibited in the weighted average-to-transaction methodology, its use would yield identical result

[293] ibid para 7.266.
[294] WTO, *United States – Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (29 April 1996) WT/DS2/AB/R 23.
[295] ibid para 250.
[296] WTO, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Report of the Appellate Body* (18 April 2006) WT/DS294/AB/R.
[297] *US – Zeroing (Japan)* (Report of the Panel) (n 82).

to that of a weighted average-to-weighted average comparison, rendering the weighted average-to-transaction methodology redundant.[298]

At the appeal stage of DS322[299], the Appellate Body addressed the panel's reasoning that, if zeroing is prohibited in all comparison methodologies, application of the second sentence of Article 2.4.2 ADA would always yield results that would be 'mathematically equivalent' to those obtained by applying the weighted average-to-weighted average comparison methodology, thereby rendering the second sentence of Article 2.4.2 ADA *inutile*. In rejecting this reasoning, the DS322 Appellate Body cited the Appellate Body report for the Article 21.5 action on the DS264 case. It stated that:

> …[o]ne 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.[300]

The Appellate Body also disagreed with the panel's the false assumption that the universe of transactions to which the transaction-to-transaction and weighted average-to-transaction methodologies apply are the same.[301] The weighted average-to-transaction method only applies to those transactions which fall into a particular pricing pattern, which would be more limited than the universe of export transactions to which the methodologies in the first sentence of Article 2.4.2 ADA apply.[302]

The Appellate Body report on DS322 is notable because it represented the Appellate Body's attempt at 'correcting' the panel with regard to zeroing under the second sentence of Article 2.4.2 in a claim directly citing that provision. This means that the subsequent panel handling the same issue has been given an Appellate Body precedent on the matter.

That subsequent panel was the panel on DS344 (*US – Stainless Steel (Mexico)*).[303] This panel disagreed with the line of reasoning developed by the Appellate

[298] ibid para 7.127.
[299] *US – Zeroing (Japan)* (Report of the Appellate Body) (n 92).
[300] ibid para 133 citing *US – Softwood Lumber V (Article 21.5 – Canada)* (Report of the Appellate Body) (n 90).
[301] ibid para 134.
[302] ibid.
[303] *US – Stainless Steel (Mexico)* (Report of the Panel) (n 100).

Body. To recall, the Appellate Body's reasoning pertains to the definition of the concepts of 'dumping' and 'margins of dumping' in Article 2.1 ADA: according to the Appellate Body, the margin of dumping has to be determined for the product under consideration as a whole. Accordingly, the results of the comparisons made at an intermediate stage before aggregating them in order to calculate the margin of dumping for the product as a whole are not margins of dumping. Likewise, the margin of dumping has to be calculated in respect of the exporter or the foreign producer subject to the anti-dumping proceeding, not the importer importing the product. It follows that dumping cannot be calculated on a transaction-specific basis; it has to be based on all exports of the subject product made in the period of review from the exporter or the foreign producer subject to the proceeding.

The DS344 panel disagreed with these propositions. It noted that the expression 'product as a whole' does not appear in the text of Article 2.1 ADA: it has been developed in WTO dispute settlement.[304] It is not convinced that the treaty provisions necessarily compel a definition of 'dumping' based on an aggregation of all export transactions. It agreed, instead, with the panel on the case DS322 in viewing that the terms 'export price of a product exported from one country to another' in Article 2.1 ADA can reasonably be interpreted to mean the price of the product in a particular export transaction.[305] The present panel is also of the opinion that, in disagreeing with the panel's reasoning on that case, the Appellate Body did not provide a convincing response: it did not explain how the texts of Article 2.1 ADA necessarily require the interpretation that the words 'product' or 'products' used in the definition of dumping may only be interpreted as referring to the product under consideration as a whole, not to individual export transactions.[306]

The DS344 panel also disagreed with the Appellate Body's reasoning that generally prohibits zeroing (that is, that dumping has to be calculated with respect to individual exporters or foreign products). It noted that he obligation to pay anti-dumping duties is 'not incurred on the basis of a comparison of an exporter's total sales, but on the basis of an individual sale between the exporter and its importer, and therefore is a transaction-specific liability.'[307]

[304] ibid para 7.117.
[305] ibid citing *US – Zeroing (Japan)* (Report of the Panel) (n 82) para 7.106.
[306] ibid para 7.118.
[307] ibid para 7.124.

Further, the present panel reiterated the reasoning of the mathematical equivalence between the weighted average-to-weighted average methodology and the weighted average-to-transaction methodology. It was observed that a mathematical equivalence between the two methods would result if zeroing is prohibited, therefore rendering the latter methodology inutile.[308] It noted that the Appellate Body in the DS322 case disagreed with the proposition. To recall, the Appellate Body's reasoning is that the weighted average-to transaction method is emphasized for transactions of a particular pattern, which is necessarily more limited than the universe of export transactions to which the first two methods are applied. To the present panel, the Appellate Body's approach failed to invalidate the mathematical equivalence problem.[309] There are two reasons why the present panel is of that view. The first is that, according to the present panel, the Appellate Body had not pointed to any textual basis for the proposition that the export transactions to be used in the average-to-transaction methodology would necessarily be more limited than those in the first two methodologies. The second is that the Appellate Body did not explain how the authorities would treat the remaining export transactions.[310]

The panel went even further and diligently noted several potential consequences of a general prohibition on zeroing. First it noted that it would lead to importers with high margins of dumping being favored at the expense of importers who do not dump or who dump at lower margin. Second, it noted that the fact that some imports are made at non-dumped prices would not change the fact that the domestic industry is injured, thus a general prohibition of zeroing would preclude the achievement of the function of anti-dumping duties. It also notes that a general prohibition on zeroing would render the administration of prospective normal value systems impractical.[311]

The panel report alarmed a commentator, as it was an open rejection of the Appellate Body's 'case law',[312] expressing his concerns that two conflicting case laws would co-exist in the area of zeroing had the Respondent chosen not to appeal. The article expressed an expectation that the Appellate Body is going to reject the panel ruling, so as to cohere with the Appellate Body's own case law.

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[308] ibid para 7.136.
[309] ibid para 7.139.
[310] ibid.
[311] ibid paras 7.146-8.
[312] Sungjoon Cho, 'A WTO Panel Openly Rejects the Appellate Body's "Zeroing" Case Law' (2008) 12(3) American Society of International Law Insights <https://www.asil.org/insights/volume/12/issue/3/wto-panel-openly-rejects-appellate-bodys-zeroing-case-law> accessed 15 October 2021.

The DS344 Appellate Body indeed rejected the panel's reasoning.[313] On the 'effective treaty interpretation' reasoning employed by the panel, the Appellate Body noted that the 'mathematical equivalence' argument works only under a specific set of assumptions, and that there is uncertainty as to how the weighted average-to-transaction methodology would be applied in practice.[314] Having set out its view, however, the Appellate Body was quick to note that the issue of whether zeroing is permissible under the methodology under the second sentence of Article 2.4.2, is not an issue before it in the appeal at hand.[315]

The panel at DS350 (*US – Continued Zeroing*)[316] did not make a legal finding on Article 2.4.2 ADA regarding zeroing in the context of the use of the weighted average-to-transaction methodology (referred as 'simple zeroing'). However, the panel report did contain some discussion around that matter. Regarding the mathematical equivalence argument, the panel stated that it tends to agree with the views expressed by the Respondent (the US) in this case, and the panel in DS344 (*US – Stainless Steel (Mexico*).[317]

In addition to sharing the concern raised by the panel in DS344, the DS350 panel also noted that the Appellate Body in its report of that case (DS344) did not address the panel's concern. This present panel stated that it found the reasoning of earlier panels to be persuasive.

After setting out the above, the present panel began to explain the systemic concern that it has. It noted that, after all, the Appellate Body reports have been adopted by the DSB and these reports have consistently reversed the findings in previous panel reports that simple zeroing in periodic reviews is not WTO-inconsistent.[318] This is coupled with the panel's concern about the goals of the WTO itself and the DSU within it. The panel concluded that following the consistent *adopted jurisprudence* on the legal

[313] *US – Stainless Steel (Mexico)* (Report of the Appellate Body) (n 105).
[314] ibid para 126.
[315] ibid para 127.
[316] *US – Continued Zeroing* (Report of the Panel) (n 109).
[317] ibid para 7.168. This view that the present panel shares is the view that a general prohibition of zeroing would cause the third methodology (the methodology under the second sentence of Article 2.4.2 ADA – the weighted average-to-transaction methodology) would yield the same mathematical result as the first methodology (the methodology under the first sentence of Article 2.4.2 ADA – the weighted average-to-weighted average methodology). That, in turn, would render the second sentence of Article 2.4.2 ADA inutile, running counter to the principle of effective treaty interpretation.
[318] ibid para 7.179-82.

issues before it, will further the interests of providing prompt resolution of disputes, and will best serve the goals of the DSU itself.[319]

The Appellate Body on the DS350 (*US – Continued Zeroing*)[320] (although Article 2.4 itself was not a direct base of appeal in that case) also discussed the second sentence of Article 2.4.2 ADA because one of the parties (the US) invoked the reasoning based on mathematical equivalence). The DS350 Appellate Body noted that the fact that the equivalence problem persists under certain circumstances, is insufficient to conclude that the second sentence of Article 2.4.2 is thus rendered ineffective. Therefore, mathematical equivalence is inconclusive as to whether a transaction-specific or product-wide definition of dumping is required.[321] It is notable that in the DS322 case and the DS350, the Appellate Body 'neutralized' some of the panel's reasoning, but did not make a definitive prohibition of zeroing in the context of the 'asymmetric' methodology under the second sentence of Article 2.4.2 itself.

The Complainant in the case numbered DS464 (*US – Washing Machines*)[322] alleged that there was a new form of zeroing which specifically occurs in the context of the weighted average-to-transaction methodology, which it termed 'systematic disregarding'. In certain situations, the DPM[323] provides for a combined methodology wherein the weighted average-to-weighted average methodology is applied to non-pattern transactions, while the weighted average-to-transaction methodology is applied to pattern transactions. Where a negative amount of dumping is determined for non-pattern transactions, the DPM sets such amount to zero, so that it does not offset any of the positive dumping established in respect of pattern transactions. The panel is of the opinion that, since the second sentence involves particular emphasis on the exporter's pricing behavior in respect of pattern transactions, the *entirety* of the evidence of dumping in respect of that pattern must be taken into account.[324] The panel also does not see anything in the text of the second sentence to suggest that the authority is entitled to disregard evidence pertaining to pattern transactions where the export price is above normal value. To the contrary, the phrase 'individual export transactions' suggests that

[319] ibid.
[320] WTO, *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R.
[321] ibid para 298.
[322] *US – Washing Machines* (Report of the Panel) (n 128).
[323] Differential Pricing Methodology; a methodology used by the Respondent in this case – the US - to determine whether to use the "asymmetric" methodology in the second sentence of Article 2.4.2 ADA.
[324] *US – Washing Machines* (Report of the Panel) (n 128) para 7.190.

each and every pattern transaction should be fully taken into account in the assessment of the exporter's pricing behavior in respect of that pattern.[325] The panel ultimately held that the use of zeroing when applying the weighted average-to-transaction methodology is inconsistent with the second sentence of Article 2.4.2 ADA.[326]

Due to the emphasis on the distinction between zeroing in the context of the two 'symmetrical' methodologies and zeroing in the context of the 'asymmetric' methodology, this panel was also the first to have the opportunity to proclaim such a finding on this matter. As the finding is also appealed, the Appellate Body then had the opportunity to either uphold or reject this finding.

At the appeal stage of DS464,[327] the Appellate Body affirmed the panel's decision to reject the 'mathematical equivalence' argument. The reasoning employed in rejecting it is the same one as used in the Appellate Body report in DS322 (*US – Zeroing (Japan)*): the weighted average-to-weighted average methodology operate on a different 'universe of export transaction' to that on which the weighted average-to-transaction methodology operates.[328] Because the universe of export transaction is different, comparing normal value with 'pattern transactions' only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the weighted average-to weighted average comparison methodology to all export transactions. The Appellate Body ultimately upheld the panel's finding that zeroing in the weighted average-to-transaction methodology is inconsistent with Article 2.4.2 ADA.[329]

The subsequent panel was the panel handling the case numbered DS471 (*US – Anti-Dumping Methodologies (China)*).[330] Perhaps because the Appellate Body report in DS363 had not been circulated when the panel report was being drafted, the DS471 panel stated that as of then, the Appellate Body has not dealt with zeroing in the context of the weighted average-to-transaction methodology.[331] The DS471 panel, however, is of the view that the principles identified in past cases are also relevant for the present

[325] ibid.
[326] ibid para 7.192.
[327] *US – Washing Machines* (Report of the Appellate Body) (n 135).
[328] ibid para 6.9.
[329] ibid para 6.9a.
[330] WTO, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China – Report of the Panel* (19 October 2016) WT/DS471/R.
[331] ibid para 7.203.

context. This, the panel reasoned, is because the weighted average-to-transaction methodology also serves to find the existence of margins of dumping, and that the term 'margins of dumping' has the same meaning throughout the ADA, that they have to be calculated for the investigated product as a whole. It found that Article 2.4.2 prohibits zeroing under the weighted average-to-transaction methodology.[332] While the DS471 panel apparently is not aware of the Appellate Body report on DS464, it did refer to the panel report on DS464, which was in any event eventually upheld by the Appellate Body. The consistency of zeroing under the weighted average-to-transaction methodology was not appealed in DS471. The aspect of zeroing under the second sentence of Article 2.4.2 ADA was not a subject of appeal.

This panel report illustrates a potential timing problem: the DS471 panel is in the fortunate position of the DS464 Appellate Body holding affirming the DS464 panel holding. However, it is theoretically possible that the DS464 Appellate Body report rules otherwise. In that event, the DS471 panel would then inadvertently rule contrary to the Appellate Body. In the end, this is practically of little concern since the parties to the DS471 dispute can (as they indeed do) go before the Appellate Body to appeal, thus giving the Appellate Body the opportunity to revisit the panel's reasoning.

The issue surfaced again in the case numbered DS534 (*US – Differential Pricing Methodology*).[333] This panel *accepted* the mathematical equivalence argument (which the Appellate Body had rejected in its latest report, namely that on DS464): if the conditions set out in the second sentence of Article 2.4.2 are met, an investigating authority is permitted to apply the weighted average-to-transaction methodology to the pattern transactions, but must apply the weighted average-to-weighted average or transaction-to-transaction methodology to the non-pattern transactions.[334] The result is that the dumping margin determined pursuant to the second sentence where the weighted average-to-transaction methodology is applied to pattern transactions (without zeroing) and the weighted average-to-weighted average methodology is applied to non-pattern transactions (without zeroing) will 'in every case be mathematically equivalent' to the dumping margin based on the application of the weighted average-to-weighted average methodology to all export transactions, provided the weighted average normal values

[332] ibid para 7.208-9.
[333] *US – Differential Pricing Methodology* (Report of the Panel) (n 142).
[334] ibid para 7.99.

used under the weighted average-to-weighted average and weighted average-to-transaction methodologies are the same.[335]

Having accepted the mathematical equivalence argument, the panel noted that, unlike the two normal methodologies, the weighted average to-transaction methodology fulfils a different function, and is not meant to give results that are systematically similar to that obtained under either one of the normal methodologies. Therefore, if one of the normal methodologies (the weighted average-to-weighted average methodology) systematically and in every case gives a result that is mathematically equivalent to the dumping margin determined under the second sentence, this would suggest that the weighted average-to transaction methodology is unable to fulfil its function. On this basis, the panel concluded that an authority is permitted to used zeroing while applying the weighted average-to-transaction methodology to the pattern transactions.[336] This holding, as the panel itself acknowledged, is at odds with the holding of the panel and Appellate Body in DS464 and DS471. It justified its holding by stating that this is due to their objective assessment of the facts of the case, and the applicability of, and conformity with, the relevant covered agreements. It also added that it found convincing or cogent reasons to arrive at conclusions different from those other reports.[337] This is another case of AB-panel deviation, following the panel report on DS344 (*US – Stainless Steel (Mexico)*). This report is under appeal, but as at the time of writing of this thesis, the Appellate Body report on this case has not been issued.

To recall, when the panel report on *US – Stainless Steel (Mexico)* was issued, it was expected that the Appellate Body would reject the panel's reasoning. The deviation between the Appellate Body's findings and the panel's findings on DS534 lies, however, in a different context. This panel report was issued on 9 April 2019, a time when the appointment of new Appellate Body members had been persistently blocked by the US, prompting a scholar to predict the demise of a functioning WTO Appellate Body by the end of 2019.[338] This means that, absent a return of a functioning Appellate Body, the issuance of a report rejecting the reasoning of the DS534 panel is practically impossible (although it should also be noted that the DS534 panel itself is formally under appeal at the time of writing of this thesis).

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[335] ibid para 7.100.
[336] ibid para 7.104-6.
[337] ibid para 7.107.
[338] Joost Pauwelyn, 'WTO Dispute Settlement Post 2019: What to Expect? What Choice to Make?' (2019) < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3415964> accessed 26 November 2021.

### 3.2.7 'resort to second sentence Article 2.4.2'

In these disputes, the process in deciding to use the 'alternative' weighted average-to-transaction methodology instead of the two 'normal' methodologies (weighted average-to-weighted average or transaction-to-transaction) is at issue. Reference will often be made to certain clauses in the second sentence of Article 2.4.2 ADA, which has been 'nicknamed' during the dispute resolution process.

The second sentence in full reads as follows:

> *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** (emphasis provided).

The so-called methodology clause is the italicized part: 'A normal value established on a weighted average basis may be compared to prices of individual export transactions.'

The so-called pattern clause is the underlined part: '[i]f the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods.'

The so-called explanation clause is the part in bold text: '[i]f 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.'

Three cases belong to this tag: DS464, DS471, and DS534.

In DS464 (*US – Washing Machines*),[339] the Complainant (Korea) launched claims pertaining the methodology clause, the pattern clause, and the explanation clause.

[339] *US – Washing Machines* (Report of the Panel) (n 128).

The claim pertaining to the methodology clause[340] is discussed first. Korea claims that the US authority has acted inconsistently with Article 2.4.2 ADA because it applied the weighted average-to-transaction methodology to *all* export transactions, while according to Korea, that methodology may only be applied to transactions falling within the relevant pattern. The panel's reading of that article is that the term 'individual' in the phrase 'prices of individual export transactions' indicates that the weighted average-to-transaction methodology will not involve all export transactions, but *only certain export transactions* identified individually.[341] The panel concluded that the weighted average-to-transaction methodology should only be applied to transactions that constitute the pattern of export prices which differ significantly among different purchasers, regions or time periods. It ultimately found that the US authority has acted inconsistently with Article 2.4.2 ADA by applying that methodology to all transactions.[342]

The pattern clause[343] is discussed next. Korea put into question the practice of applying purely quantitative criteria in determining the existence of 'patterns of export prices' without any qualitative assessment of why prices differ. The panel disagreed: according to the panel, a regular series of price variation relating to a particular purchaser, region or time period may be detected on the basis of an objective assessment of the data, even if one does not know the reason for, or purpose behind, such variation.[344] The panel ultimately rejected Korea's claim that the US authority acted inconsistently with the second sentence Article 2.4.2 ADA by determining the existence of a pattern of export prices which differ significantly among purchaser, regions or time periods, on the basis of purely quantitative criteria.[345]

Then the explanation clause[346] is discussed. Korea contends that the authority should have explained why the 'normal' methodologies (weighted average-to-weighted average and transaction-to-transaction) cannot take appropriate account of the price difference, thus justifying the use of the weighted average-to-transaction methodology. To the present panel, the explanation clause is needed because there may be factors other

[340] "A normal value established on a weighted average basis may be compared to prices of individual export transactions."
[341] *US – Washing Machines* (Report of the Panel) (n 128) para 7.22.
[342] ibid paras 7.28-9.
[343] "[i]f the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods."
[344] *US – Washing Machines* (Report of the Panel) (n 128) para 7.47.
[345] ibid para 7.52.
[346] "[i]f 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."

than targeted dumping that may cause export prices to differ among different purchasers, regions or time periods. Keeping in mind that the object of the second sentence is the unmasking of targeted dumping, the panel opined that merely pointing to the inherent inability of the weighted average-to-weighted average methodology to unmask targeted dumping is not by itself an 'explanation' as to why that methodology is not suitable.[347] It is also not convinced that the comparison of dumping margin between the weighted average-to-weighted average and the weighted average-to-transaction methodology is a proper account of the factual circumstances. The use of the second sentence may result in a higher margin of dumping even in cases where the pattern of significantly differing export prices has nothing to do with targeting conduct by the exporter.[348] To the panel, the appropriateness standard set forth in the explanation clause requires an authority to examine these factual circumstances, in order to avoid the second sentence being applied in factual circumstances that have nothing to do with targeted dumping.[349] The panel ultimately found that the US authority acted inconsistently with the explanation clause of the second sentence of Article 2.4.2 ADA.[350] It noted also that it is not making a finding that the factual circumstances of the investigation indicate that the relevant price differences were caused by something other than targeted dumping, and that the panel is simply finding that the authority's failure to consider that possibility is inconsistent with the requirements of the explanation clause.[351]

Korea also argued that the US authority also acted inconsistently with the explanation clause because it only gave an explanation of the unsuitability of the weighted average-to-weighted average methodology, and failed to explain why the transaction-to-transaction methodology was not suitable. The panel disagreed. The language of the clause points to the need of explanation in respect of one type of comparison, either weighted average-to-weighted average or transaction-to-transaction.[352] Besides, the choice between either of the two normal methodologies would likely be made before the application of the second sentence, so it would be anomalous for the authority, having decided on one methodology, to later have to consider the other normal methodology because it considered using the weighted average-to-transaction methodology.[353]

[347] *US – Washing Machines* (Report of the Panel) (n 128) para 7.74.
[348] ibid para 7.75.
[349] ibid para 7.76.
[350] ibid para 7.77.
[351] ibid.
[352] ibid para 7.79.
[353] ibid para 7.80.

Next, the panel addressed the claims pertaining to the DPM. Korea argued that the DPM aggregates random, unrelated price differences without properly identifying a pattern of export prices which differ significantly among different purchasers, regions or time periods as required by Article 2.4.2 ADA. According to the panel, the phrase 'among different purchasers, regions or time periods' determines the question of how the relevant 'pattern' must be identified. The use of the disjunctive 'or' in this phrase is significant, as its ordinary meaning indicates that a 'pattern' can only be found in prices that differ significantly either (1) among purchasers, or (2) among regions, or (3) among time periods. This excludes the possibility of establishing a 'pattern' *across* the three categories cumulatively.[354] Because the DPM method identifies one single pattern by aggregating six different types of price variation, the panel found that it is inconsistent with the text of the second sentence of Article 2.4.2 ADA: the DPM identifies a 'pattern' or export prices across different categories, rather than among the constituents of each category.[355]

These matters were appealed and addressed in the Appellate Body report on this case.[356] Firstly, the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2 ADA was discussed. In its appeal, the US claimed that the panel erred in concluding that the relevant pattern comprises only low-priced export transactions to each particular 'target' (be it a purchaser, region, or time period), while other higher-priced export transactions to other purchasers, regions, or time periods are 'non-pattern' transactions. The US contends that a pattern includes both lower and higher export prices that differ significantly from each other. It also submits that the relevant 'pattern' is one that would transcend multiple purchasers, regions, or time periods, allowing the authority to find a pattern of export prices which differ significantly among different purchasers, different regions, or different time period, or any combination of these categories. The Appellate Body noted that while Article 2.4.2 ADA does not expressly specify whether the prices need to differ significantly because they are lower than other prices, or need to be below normal value, the ADA as a whole is concerned with injurious dumping, and other provisions refer to export prices that are lower than normal value as 'dumped' prices. Therefore, the Appellate Body considered that the relevant 'pattern' for the pur-

[354] ibid para 7.141.
[355] ibid para 7.147.
[356] *US – Washing Machines* (Report of the Appellate Body) (n 135).

poses of the second sentence of Article 2.4.2 ADA comprises prices that are significantly lower than other export prices among different purchasers, regions or time periods, and *not* higher export prices.[357]

As to whether a pattern can be found to exist across purchasers, regions, or time periods, the Appellate Body highlighted the phrase 'among different purchasers, regions or time periods.' As a pattern must be regular and intelligible and thus cannot merely reflect random price variation, an investigating authority is required to identify a regular series of price variation relating on oner or more particular purchasers, or one of more particular regions, or one or more particular time periods to find a pattern. A single 'pattern' comprising prices that are found to be significantly different from other prices *across* different categories would effectively be composed of prices that do *not* form a regular and intelligible sequence. A pattern has to be identified among different purchasers, or among different regions, or among different time periods, and cannot transcend these categories.[358] It upheld the panel's conclusion in this regard.[359]

The second pertains to the DPM's inconsistency with Article 2.4.2 ADA due to it aggregating random and unrelated price variations, thus not properly establishing a pattern of export prices which differ significantly among different purchasers, regions or time periods. To recall, the panel found that the DPM is inconsistent as such with second sentence of Article 2.4.2 ADA in this respect. The Appellate Body had found that a pattern can only be found in prices which differ significantly either among purchasers, or among regions, or among time periods, not across these categories.[360] The Appellate Body has also found that the relevant 'pattern' for the purposes of the second sentence of Article 2.4.2 ADA is comprised of the export prices to one or more particular purchasers which differ significantly from the prices to the other purchasers because they are *lower* than those other prices.[361] It was undisputed that the DPM aggregates prices found to differ among different purchasers, among different regions, and among different time periods for the purposes of identifying a single pattern (effectively identifying a pattern across different categories). It was also undisputed that the DPM

[357] ibid para 5.29.
[358] ibid paras 5.31-3.
[359] ibid para 5.36-7.
[360] ibid paras 5.31-3.
[361] ibid paras 5.29.

aggregates prices that are higher and lower than other export prices within a given category. Considering these factors, the Appellate Body upheld the panel's finding in this respect, that the DPM is inconsistent as such with Article 2.4.2 ADA.[362]

The third pertains to whether the weighted average-to-transaction methodology should only be applied to 'pattern transactions'. The Appellate Body agreed with the panel that the use of the word 'individual' in the second sentence of Article 2.4.2 ADA indicates that the weighted average-to-transaction methodology does not involve *all* export transactions, but only certain transactions identified individually.[363] Also, the 'individual export transactions' to which the weighted average-to-transaction method may be applied are those transactions falling within the relevant 'pattern'. Therefore, the phrase 'individual export transactions' refer to the universe of export transactions that justify the use of the methodology, namely the 'pattern transactions'. The Appellate Body found support in the object and purpose of the ADA, namely dealing with injurious dumping. The Appellate Body ultimately considered that the weighted average-to-transaction comparison methodology should only be applied to those transactions that justify its use, namely those transaction forming the relevant 'pattern' and upheld the panel's finding.[364]

The fourth pertains to the extent to which price differences are to be assessed quantitatively, qualitatively, and in light of the 'reasons' for the price differences. The Appellate Body highlighted the words 'significantly' and 'pattern' in the second sentence of Article 2.4.2 ADA. While it did not consider that these words imply an examination into the cause of (or reasons for) differences in prices, it also considered that the term 'significantly' has both quantitative and qualitative dimensions.[365] The investigating authority is, however, not required to consider the cause of (or reasons for) the price differences.[366] Thus the Appellate Body disagreed to an extent with the panel, namely that an investigating authority may properly find that certain prices differ significantly within the meaning of the second sentence of Article 2.4.2 ADA if they are notably greater in purely numerical terms. It reversed the panel's findings to that limited extent.[367]

[362] ibid para 5.43.
[363] ibid para 5.52.
[364] ibid para 5.56.
[365] ibid para 5.63.
[366] ibid para 5.65.
[367] ibid para 5.56.

The fifth pertains to whether an explanation needs to be provided with respect to both the weighted average-to-weighted average and the transaction-to-transaction comparison methodologies. The Appellate Body disagreed with the panel that the indefinite article 'a' and the singular form of the word 'comparison' suggest that an explanation with regard to one of the two normally applicable methodologies suffices. The Appellate Body looked to the equally authentic French version which referred to '*les méthodes de comparaison*', using a definite article ('*les*') and 'comparison methods' in the plural form.[368] Further, the Appellate Body reasoned that, to require that explanation be given with respect to both 'normal' methodologies gives a proper recognition to the text and to the distinction between the normally applicable methods in the first sentence and the exceptional method in the second sentence.[369] The Appellate Body also disagreed with the panel that the investigating authority's 'initial discretion' between the two 'normal' methodologies would be undermined by requiring that an explanation be provided with respect to both these methodologies: To the Appellate Body, the investigating authority's option is unrelated to the question of whether these two methodologies are not appropriate to unmask 'targeted dumping'.[370] Also, requiring them to provide explanation with respect to both methodologies does not deprive the authority from the discretion should it decide to apply the first sentence of Article 2.4.2 ADA instead of using the methodology in the second sentence. The Appellate Body ultimately considered that an investigating authority has to explain why *both* the weighted average-to-weighted average and the transaction-to-transaction comparison methodologies cannot take into account appropriately the differences in export prices that form the pattern.[371] It reversed the panel's findings in this regard.[372]

The next case is numbered DS471 (*US – Anti-Dumping Methodologies (China)*).[373] First, the Complainant (China) argued that when an investigating authority seeks to find whether the pattern of export prices 'differ significantly' within the meaning of the pattern clause of Article 2.4.2, it should not just focus on how large the quantitative or numerical differences in export prices are but also examine whether those differences are qualitatively significant. The panel noted that the language of Article

[368] ibid para 5.73.
[369] ibid para 5.74.
[370] ibid para 5.75.
[371] ibid para 5.76.
[372] ibid para 5.77.
[373] *US – Anti-Dumping Methodologies (China)* (Report of the Panel) (n 330)

2.4.2 ADA, an investigating authority would first take into account the size of the numerical differences. In other words, whether or not the differences in export prices are significant is an enquiry concerning the magnitude of such differences and how such prices differ, rather than the *reasons* for such differences.[374] The panel saw no textual basis in Article 2.4.2 to suggest that an investigating authority is required to examine the reasons for the differences in export prices forming the relevant pattern. However the panel also cautioned that it is not true that numerical or quantitative differences alone can, in all factual circumstances, lead to the conclusion that the identified differences in export prices are significant within the meaning of the pattern clause of Article 2.4.2. An authority is required to consider *how* the prices differ and not *why* they differ.[375] The present panel also noted that the panel in the *US – Washing Machines* case also examined the same issue and concluded that there is no requirement under the pattern clause of Article 2.4.2 to examine the reasons for the quantitatively large differences in export prices forming the relevant pattern. The present panel also agreed with the panel in that case in stating that an authority may properly find that certain prices differ significantly, within the meaning of the pattern clause of Article 2.4.2 if they are notably greater, in purely numerical terms, irrespective of the reasons for those differences.[376] Ultimately, the present panel found that the authority was not required to consider the reasons for the differences in export prices forming the relevant pattern in order to determine whether those differences were qualitatively significant under the pattern clause of Article 2.4.2 ADA, and rejected China's claim in this respect.[377]

China also argued that, by making its determination under the test on the basis of purchaser or time period averages instead of the individual export transaction prices which made up those averages, the US authority has acted inconsistently with Article 2.4.2 ADA. The panel turned to the text first. It noted that the text does not clarify whether an investigating authority should rely on individual export transaction prices or purchaser or time period averages thereof in a determination of a pattern of export

[374] ibid para 7.108.
[375] ibid para 7.112.
[376] Notably, in the Appellate Body report on the US – Washing Machines case which was issued before this panel report was issued, the Appellate Body stated its reservation about this specific point.
[377] *US – Anti-Dumping Methodologies (China)* (Report of the Panel) (n 330) para 7.114.

prices. It also saw no explicit prohibition on the use of purchaser or time period averages. The panel ultimately found that the US authority did not act inconsistently with the pattern clause of Article 2.4.2 ADA.[378]

Second, China put forth a claim under the explanation clause of Article 2.4.2 ADA. China asserted that Article 2.4.2 ADA requires an investigating authority to provide an explanation as to why the weighted average-to-weighted average *as well as* the transaction-to-transaction methodology cannot take into account appropriately the significant differences in the relevant export prices. The present panel disagreed with the panel in the *US – Washing Machines* case and found that the explanation clause of Article 2.4.2 ADA requires an investigating authority to provide an explanation to both the weighted average-to-weighted average and the transaction-to-transaction methodology, instead of either of them.[379] The first reason is that the use of 'or' does not necessarily suggest that it is sufficient to provide an explanation which engages with only one of the two normal methodologies. This is because the use of the conjunction 'and' instead of 'or' would have made no grammatical sense. Also, the reference to 'a comparison' (in singular) does not mean that an explanation with regard to one of the two normal methodologies would satisfy the requirements of the explanation clause of Article 2.4.2 ADA: the present panel found support in the French text of the ADA which does not use the indefinite article '*une*', the equivalent of the article 'a' in English, but uses the French definitive article '*les*'.[380] The panel also found support in the context of the explanation clause, and the object and purpose of the ADA as a whole. The weighted average-to-transaction methodology is recognized as an exception to the normal methodologies, therefore when an investigating authority resorts to this exceptional methodology, it must explain why neither of the two normal methodologies can take into account appropriately the significant differences in the relevant export prices.[381] Ultimately, the panel found that the US authority acted inconsistently with the explanation clause of Article 2.4.2 ADA because it failed to provide an explanation as to why neither the weighted average-to-weighted average nor the transaction-to-transaction methodology could take into account appropriately the significant differences in the relevant export prices, within the meaning of that clause.[382] This panel came to the same

[378] ibid para 7.128.
[379] ibid para 7.152.
[380] ibid.
[381] ibid para 7.153.
[382] ibid para 7.157.

conclusion as the Appellate Body on the *US – Washing Machines* case (which reversed the panel's finding on this matter), but notably without citing the Appellate Body report.

Third, China put into question the US authority's application of the weighted average-to-transaction methodology to all export transactions. The panel noted that a previous panel has grappled with the same issue (in the *US – Washing Machines* case). The present panel shared the understanding of that panel. Citing the Appellate Body on the *US – Zeroing (Japan)* case, the present panel stated that the relevant 'pattern' is a pattern of export prices to one or more purchaser, or regions, or time periods, which differ significantly from export prices to other purchasers, or regions or time periods which fall outside the pattern (thus the universe of transaction will be limited to only those which fall *within* the pattern).[383] The panel ultimately held that the US authority acted inconsistently with the second sentence of Article 2.4.2 ADA in the investigations at issue.[384]

DS471 went to the appeal stage, resulting in the issuance of an Appellate Body report.[385] One of the aspects appealed was regarding the requirement to consider objective market factors in determining whether relevant pricing differences are significant. The Appellate Body agreed with the panel to the extent that their statements are understood as suggesting that the term 'significantly' in Article 2.4.2 ADA implies that, in all circumstances, a qualitative analysis is also required.[386] The Appellate Body ultimately considered that the panel did not err in finding that investigating authorities are not required to examine the reasons for the relevant differences in export prices, or whether those differences are unconnected to 'targeted dumping', in order to assess whether export prices differ 'significantly'. The Appellate Body also noted that the panel correctly concluded that an investigating authority should undertake a qualitative analysis of the significance of export price differences. It ultimately upheld the panel's findings in this regard.[387]

The third aspect was the panel's finding that China had not established that the US acted inconsistently with Article 2.4.2 in the three challenged investigations by determining the relevant pattern on the basis of averages, as opposed to individual export

[383] ibid para 7.178 citing *US – Zeroing (Japan)* (Report of the Appellate Body) (n 92) para 135.
[384] ibid para 7.187.
[385] WTO, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China – Report of the Appellate Body* (11 May 2017) WT/DS471/AB/R.
[386] ibid para 5.58.
[387] ibid para 5.71.

transaction prices. The present Appellate Body considered 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.[388] In addition, the Appellate Body agreed with the panel that when a pattern is determined through the use of averages, the pattern itself will consist of individual export transactions.[389] To the Appellate Body, the pattern clause allows an authority to rely on individual export transaction prices or average prices in order to find a pattern (in other words, the authority is given a discretion). The Appellate Body found in the end that the panel did not err in this regard.[390]

The latest case with this kind of dispute is that numbered DS534 (*US – Differential Pricing Methodology*).[391] The first claim pertains to the application of the DPM. Canada claimed that the US authority failed to identify a 'pattern' as provided under the second sentence of Article 2.4.2 ADA. Factually it was agreed that what the authority found was a single pattern of export prices which differed significantly among different purchaser, regions and time periods. Also, this pattern included export prices to purchasers, regions or time periods that differed significantly because they were significantly higher than export prices to other purchasers, regions or time periods. Canada claimed that such is not a pattern within the meaning of the second sentence. The panel saw nothing in the pattern clause which suggests that, having identified significant differences in export prices among different purchasers, or different regions, or different time periods, an investigating authority is permitted to aggregate those differences to find one single pattern.[392] Also, the use of the conjunction 'or' in the specific context of the pattern clause (that is, along with the use of the words 'among' and 'pattern') confirms that the identified pattern must be one of export prices which differ significantly among categories of the same type (that is, different purchasers, different regions, or different time periods).[393] The panel ultimately found that the US authority has acted inconsistently with the second sentence of Article 2.4.2 ADA because it aggregated differences in export prices across unrelated categories (that is, purchaser, regions and time periods) to identify a single pattern of export prices.[394]

[388] ibid para 5.82.
[389] ibid para 5.85.
[390] ibid para 5.101.
[391] *US – Differential Pricing Methodology* (Report of the Panel) (n 142).
[392] ibid para 7.45.
[393] ibid.
[394] ibid para 7.49.

As to the question of whether a pattern can include export prices to purchasers, regions or time periods that differ significantly because they are *higher* relative to export prices to other purchasers, regions or time periods, Canada sought support from the Appellate Body report on the *US – Washing Machines* case. There, the Appellate Body concluded that the pattern must be limited to the export transactions to those purchasers, regions or time periods whose prices are found to differ significantly because they are significantly *lower* than export prices to other purchasers, regions or time periods. The panel noted that the pattern clause does not qualify the export prices which 'differ significantly' by requiring that they differ only because they are significantly lower (in other words, the text is silent on this matter). The panel reached a different conclusion. To the present panel, the silence of the text is explained by the function of the second sentence of Article 2.4.2 ADA, namely to unmask dumping targeted to certain purchasers, regions or time periods.[395] Therefore, to the present panel, 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.[396] The panel, however, noted that its findings should not be misunderstood to mean that a pattern would comprise *all* export transactions of a foreign producer or exporter: it still should not include export prices which do not differ significantly among different purchasers, regions or time periods.[397] The panel ultimately found that Canada has not established that the US authority acted inconsistently with the second sentence of Article 2.4.2 ADA by including, in the pattern, export transactions to those purchasers, regions or time periods whose prices differed significantly because they were significantly *higher* relative to export prices to other purchasers, regions or time periods.[398]

On this count (finding that pattern transactions can include transactions which differ by having higher prices), this panel finding is an AB-panel deviation. As discussed under the tag 'zeroing (second sentence)', this report is under appeal at the time of writing of this thesis.

### 3.3 Article 6.8 ADA

[395] ibid para 7.57.
[396] ibid.
[397] ibid para 7.65.
[398] ibid para 7.66.

These disputes concern Article 6.8 ADA, which reads:

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

Annex II (with the heading 'Best Information Available in Terms of Paragraph 8 of Article 6') consists of seven paragraphs.

Paragraph 1 reads:

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party, and the manner in which that information should be structured by the interested party in its response. The authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available, including those contained in the application for the initiation of the investigation by the domestic industry.

Paragraph 2 reads:

> The authorities may also request that an interested party provide its response in a particular medium (e.g. computer tape) or computer language. Where such a request is made, the authorities should consider the reasonable ability of the interested party to respond in the preferred medium or computer language, and should not request the party to use for its response a computer system other than that used by the party. The authority should not maintain a request for a computerized response if the interested party does not maintain computerized accounts and if presenting the response as requested would result in an unreasonable extra burden on the interested

> party, e.g. it would entail unreasonable additional cost and trouble. The authorities should not maintain a request for a response in a particular medium or computer language if the interested party does not maintain its computerized accounts in such medium or computer language and if presenting the response as requested would result in an unreasonable extra burden on the interested party, e.g. it would entail unreasonable additional cost and trouble.

Paragraph 3 reads:

> All information which is verifiable, which is appropriately submitted so that it can be used in the investigation without undue difficulties, which is supplied in a timely fashion, and, where applicable, which is supplied in a medium or computer language requested by the authorities, should be taken into account when determinations are made. If a party does not respond in the preferred medium or computer language but the authorities find that the circumstances set out in paragraph 2 have been satisfied, the failure to respond in the preferred medium or computer language should not be considered to significantly impede the investigation.

Paragraph 4 reads: 'Where the authorities do not have the ability to process information if provided in a particular medium (e.g. computer tape), the information should be supplied in the form of written material or any other form acceptable to the authorities.'

Paragraph 5 reads: 'Even though the information provided may not be ideal in all respects, this should not justify the authorities from disregarding it, provided the interested party has acted to the best of its ability.'

Paragraph 6 reads:

> If evidence or information is not accepted, the supplying party should be informed forthwith of the reasons therefor, and should have an opportunity to provide further explanations within a reasonable period, due account being taken of the time-limits of the investigation. If the explanations are con-

> sidered by the authorities as not being satisfactory, the reasons for the rejection of such evidence or information should be given in any published determinations.

Paragraph 7 reads:

> If the authorities have to base their findings, including those with respect to normal value, on information from a secondary source, including the information supplied in the application for the initiation of the investigation, they should do so with special circumspection. In such cases, the authorities should, where practicable, check the information from other independent sources at their disposal, such as published price lists, official import statistics and customs returns, and from the information obtained from other interested parties during the investigation. It is clear, however, that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less favourable to the party than if the party did cooperate.

Article 6.8 ADA mainly concerns the establishment of normal value and export price (items (i) and (ii) in Czako's formulation of what anti-dumping investigations involve).[399]

The same tagging exercise has also been made in respect to cases concerning Article 6.8. As was the case with disputes concerning Article 2.4, some disputes contain arguments or circumstances which do not surface again in subsequent disputes, giving no opportunity to discuss the continuity of the findings. No tag was assigned to these disputes.

### 3.3.1 'level of duty to cooperate'

In these disputes, the respective duties of the interested parties on the one hand, and the authority on the other hand, regarding the use of best information available under Article 6.8 ADA are at issue.

[399] Czako (n 56).

In DS156 (*Guatemala – Cement II*)[400], the Complainant (Mexico) claimed that resort to best information available by the Respondent's (Guatemala) authority was not justified because the Mexican producer did not deny access to the necessary information, nor significantly impede the investigation efforts. The facts of the case showed that the Guatemalan authority sent a letter to the Mexican producer informing that its verification team would include three non-governmental experts. The producer raised concerns about the experts because they had represented US domestic industry in US anti-dumping proceedings on cement from Mexico, thus raising concerns of conflicts of interest. To the panel, it is entirely reasonable for the producer to object to the inclusion of the non-governmental experts: to the panel, it is unlikely that these experts who had acted against Mexican cement producers in the context of US proceeding could completely detach themselves from their previous functions.

The panel remarked that the ADA does not require cooperation by interested parties at any cost. The consequences provided by Article 6.8 ADA for failing to cooperate only arise *if* the authority itself has acted in a reasonable, objective and impartial manner.[401] The panel ultimately held that the Guatemalan authority violated Article 6.8 ADA in this regard.[402]

In DS184 (*US – Hot-Rolled Steel*)[403], a producer in the Complainant state (Japan) makes a substantial portion of its sales to the Respondent state (US) through a joint venture company in which it owned 50% share ('CSI'). CSI was also a petitioner in the anti-dumping investigation against Japan, despite itself being an affiliate of the Japanese producer. The producer requested to be excused from responding to the specific section of the questionnaire, asserting it was unable to provide the requested information, as it did not control CSI and could not obtain the necessary information from that company. The US authority determined to apply adverse facts available in determining the dumping margin attributable to sales to CSI.

The panel noted that the disagreement focused on paragraph 7 of Annex II which provides that if an interested party does not cooperate and thus relevant information is being withheld from the authorities, this situation could lead to a result which is less

[400] WTO, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico – Report of the Panel* (24 October 2000) WT/DS156/R.
[401] ibid para 8.251.
[402] ibid para 8.253.
[403] WTO, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Panel* (28 February 2001) WT/DS184/R.

favourable to the party than if the party did not cooperate. Looking to the facts of the case, the panel is of the view that an unbiased and objective investigating authority could not reasonably have reached the conclusion that the producer had failed to cooperate and that relevant information was thus being withheld. The panel noted that 'cooperate' has been defined as 'work together for the same purpose or in the same task', and the US authority's stance went far beyond any reasonable understanding of any obligation to cooperate implied by paragraph 7 of Annex II.[404] The panel noted that, crucially, CSI was a petitioner in the investigation and had interests directly opposed to those of the producer. Even the US authority's own conclusion that the producer 'acquiesced' in CSI's refusal to provide the requested information, suggests that the producer was not able to direct CSI's actions in this regard.

While it is conceivable that the producer could have undertaken certain measures under the Shareholders' Agreement with the possible result of forcing CSI to provide the requested information, to the panel such actions would have inevitably disrupted the on-going joint venture.[405] To the panel, no objective and unbiased authority faced with these facts could have concluded that the failure to take such measures justified the conclusion that the producer had failed to cooperate. The panel ultimately held that the US authority acted inconsistently with Article 6.8 ADA and Annex II paragraph 7 ADA in applying adverse facts available in making its determination.[406] This finding does not conflict with the finding of the previous panel.

DS184 went to the appeal stage, resulting in the issuance of an Appellate Body report.[407] In its appeal, the US asserted that the factual record supports the authority's finding that the producer failed to cooperate: the producer had certain contractual rights available to it to secure cooperation of CSI and the producer did not exercise those rights. The producer also failed to seek assistance from the Brazilian company, with which it partnered in the joint venture, in obtaining the necessary information from CSI.

The Appellate Body examined the meaning of the word 'cooperate' in paragraph 7 Annex II ADA and noted that the degree of cooperation that investigating authorities are entitled to expect from an interested party in order to preclude the possi-

[404] ibid para 7.73.
[405] ibid.
[406] ibid para 7.74.
[407] WTO, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body* (24 July 2001) WT/DS184/AB/R.

bility of a 'less favourable' outcome is not indicated. The context provided by paragraph 5 of Annex II which prohibits investigating authorities from discarding less-than-ideal information if the interested party that supplied the information has acted to 'the best of its ability' suggested that the level which can be expected from an interested party is a high one. [408] However, the Appellate Body also noted the context from paragraph 2 Annex II which authorizes authorities to request responses to questionnaires in a particular medium yet also stated that such a request should not be maintained if complying with that request would impose an 'unreasonable extra burden' on the interested party.[409] These contextual provision, to the Appellate Body, reflected a careful balance between the interests of investigating authorities and exporters.[410] Looking at the facts of the case, to the Appellate Body, the US authority seemed to have expected the producer to exhaust all legal means at its disposal to compel CSI to divulge the requested information.[411] The Appellate Body ultimately agreed with and upheld the panel's finding in this matter.[412] This finding affirms and builds on the finding of the panel.

In DS189 (*Argentina – Ceramic Tiles*)[413], it was the authority's duty that was clarified. The Complainant in this case (the EC) argued that the authority of the Respondent state (Argentina) failed to comply with Article 6.8 and paragraph 6 Annex II ADA because it never informed the exporters that their responses had been rejected, nor did the authority explain why the information was rejected. The panel accepted the argument that the authority acted inconsistently with Article 6.8 and paragraph 6 Annex II ADA by failing to inform the exporters why certain information was not accepted, failing to provide the exporters an opportunity to provide further explanations, and failing to give the reasons for rejection in any published determinations.[414] This finding did not go against the existing panel findings, but rather builds on the body of reasoning by addressing the obligation on the authority's side.

In DS211 (*Egypt – Steel Rebar*)[415], the authority of the Respondent state (Egypt) resorted to facts available after initially questioning and then rejecting the cost data from three out of five of the Complainant's (Turkey) interested parties. The panel noted

[408] ibid para 100.
[409] ibid para 101.
[410] ibid para 102.
[411] ibid para 108.
[412] ibid para 110.
[413] *Argentina – Ceramic Tiles* (Report of the Panel) (n 168).
[414] ibid para 6.80.
[415] *Egypt – Steel Rebar* (Report of the Panel) (n 171).

that the data was in the interested parties' possession and could have been submitted without undue difficulty.[416] These three respondents were found by the panel not to have 'acted to the best of its ability' under paragraph 5 Annex II ADA, and concluded that the authority's resort to facts available was justified.[417]

For the other two respondents, the panel noted that the records show that these respondents did respond in a timely manner with largely complete data, but the Egyptian authority nevertheless found that they had failed to provide necessary information, and further did not inform these companies of this finding, nor give them an opportunity to provide further explanations.[418] In respect of the two remaining respondents, a violation of Article 6.8 and paragraph 6 Annex II ADA was found.[419] The findings on this report did not conflict with the existing precedents.

In DS241 (*Argentina – Poultry Anti-Dumping Duties*)[420], the authority of the Respondent state (Argentina) declined to use the normal value data submitted by two exporters of the Complainant state (Brazil). One of the exporters had not accredited itself in accordance with domestic legislation. The authority informed that exporter that, to appear before the authority, the exporter had to have authorized legal status in conformity with the relevant laws. However, the exporter did not pursue this matter any further with the authority. The panel saw no provision in the ADA which expressly disallows an investigating authority from imposing basic procedural requirements such as accreditation.[421]

The panel interpreted in particular the phrase 'all information which is … appropriately submitted' in paragraph 3 Annex II ADA to also cover information which is submitted in accordance with relevant procedural provisions of domestic laws: to the panel, paragraph 3 Annex II ADA can be interpreted to mean that information not 'appropriately submitted' in accordance with relevant procedural provisions of WTO members' domestic laws may be disregarded. Therefore, this argument of Brazil's was rejected.[422] Brazil then argued based on paragraph 7 Annex II ADA, that 'special circumspection' must be used in using data from other sources, and that the data from the Brazilian respondent was more accurate than the normal value data from other sources.

[416] ibid para 7.245.
[417] ibid para 7.248.
[418] ibid para 7.265.
[419] ibid para 7.266.
[420] *Argentina – Poultry Anti-Dumping Duties* (Report of the Panel) (n 180).
[421] ibid para 7.191.
[422] ibid.

To the panel, once data from the exporter cannot be used in accordance with Article 6.8 and Annex II ADA, the authority is entitled to use information from other sources.[423] This finding did not contradict nor follow existing precedent. The circumstance is quite unique in that the exporter failed to get accredited to comply with relevant legislations.

DS295 (*Mexico – Anti-Dumping Measures on Rice*)[424] is quite an important case. The authority of the Respondent state (Mexico) had used data from the Mexican applicant for the imposition of the anti-dumping duty, which resulted in a dumping margin of 10.18% which is much higher than any margin calculated for the exporters that were individually examined. Notably, the firm did not export the subject product during the period of investigation, so it did not provide export price information. The Mexican authority argued that since no information was given, the authority was entitled to resort to facts available for the calculation of the margin of dumping. Also, because there was no information given, Mexico argued that paragraphs 3 and 5 Annex II were not breached. Mexico also did not consider that its authority's use of facts available to have been inconsistent with paragraph 7 Annex II because all it did was to calculate a duty based on the facts available.

The panel firstly noted the word 'best' in the heading of Annex II (which in full reads 'Best Information Available in Terms of Paragraph 8 of Article 6'). To the panel, it means that the information has to be not simply correct of useful *per se*, but the most fitting or 'most appropriate' information available in the case at hand.[425] For the conditions of Article 6.8 and Annex II ADA to be complied with, there can be no better information available to be used in the particular circumstances. To the panel, '[a]n evaluative, comparative assessment' is required.[426]

Looking to the facts of the case, the panel found no basis to consider that the authority made any attempt to check the applicant's information against information obtained from other interested parties or undertook the evaluative, comparative assessment that would have enabled the authority to assess whether the information provided by the applicant was indeed the best information available.[427] Further, there was also

[423] ibid para 7.193.
[424] WTO, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Report of the Panel* (6 June 2005) WT/DS295/R.
[425] ibid para 7.166.
[426] ibid.
[427] ibid para 7.167.

nothing to demonstrate that any attempt was made to examine the applicant's information to assess whether this information was the most fitting or appropriate for making determinations with regard to the US firm, thus it cannot be said that 'special circumspection' was applied.[428] The panel ultimately found that the Mexican authority calculated a margin of dumping on the basis of facts available for the US firm in a manner which is not consistent with Article 6.8 ADA read in light of paragraph 7 Annex II ADA.[429]

Still in DS295, an as-such claim was also made with respect to a legislation. The legislation obliges the authority to determine a countervailing duty on the basis of the highest margin of price discrimination or subsidization obtained from the facts available in (among others) a situation where the producers fail to appear at the investigation, and a situation where the producers have not exported the product subject to investigation during the investigation period. Regarding the first situation (where the producers fail to appear at the investigation), the panel remarked that the use of facts available with regards to parties which fail to appear could as such be permitted by Article 6.8 ADA if the investigating authority has made a reasonable effort to ensure that all interested parties are informed of the information required. However, a rule which provides for the indiscriminate use of the highest margin based on the facts available in each case of failure to appear, is inconsistent with the requirement that the facts used to replace the missing data be the best and most appropriate information available.[430] For the same reason, this also applies to the other situation (where the producers have not exported the product subject to investigation during the investigation period) since in that case, an indiscriminate requirement to use the highest margin, rather than the margin that results from the use of the information available that is really the 'best' one.[431] In conclusion, the panel found that the Mexican legislation is inconsistent with Article 6.8 and paragraphs 1, 3, 5, 7 Annex II ADA.[432]

These findings did not contradict existing precedent as it built on the body of precedent by clarifying the existence of the obligation to make an 'evaluative, comparative assessment' on the authority in using facts available, to ensure that the information is indeed the 'best' information. This had not been clarified by previous panels.

[428] ibid.
[429] ibid para 7.168.
[430] ibid para 7.239.
[431] ibid para 7.241.
[432] ibid para 7.242.

DS312 (*Korea – Certain Paper*)[433] contains three topics regarding the standard of obligations of authority and interested parties.

First, the Complainant (Indonesia) argued that the authority of the Respondent state (Korea) acted inconsistently with Article 6.8 and paragraph 6 Annex II ADA by not informing the interested parties of its decisions to reject their domestic sales data and giving them an opportunity to provide further explanations and rectify their failure. The panel looked at the facts of the case and noted that the Korean authority's provisional report on investigation of preliminary dumping margins clearly indicated that the authority decided to base its determinations on facts available because the respondents had failed to submit the relevant cost data.[434] The same was also said about the preliminary dumping report sent to the interested party. Indonesia also argued that the authority should have given the right to submit further information to cure the defects in the submitted domestic sales data: in Indonesia's view, paragraph 6 Annex II requires the authority to give the interested party whose information is rejected, the opportunity to submit further evidence. The panel also disagreed: to the panel, what paragraph 6 requires is that the authority has to give the interested party whose information is rejected, the opportunity to explain to the authority why the information has to be taken into consideration. It does not, according to the panel, give the interested party a second chance to submit information.[435] The panel ultimately found that the authority did not act inconsistently with Article 6.8 and paragraph 6 Annex II ADA in this respect.[436]

This finding did not contradict but rather further clarified the obligation under paragraph 6 Annex II ADA in that it does not give the interested party a second chance to submit information. This had not been touched by previous panels, and therefore the finding cannot be classified as a deviation.

The other two discussions revolve around the duty of special circumspection under paragraph 7 Annex II ADA. One aspect involves Selling, General and Administrative ('SG&A') and financial expenses data used for constructing a constructed normal value with respect to an Indonesian distributor. The figures of these expenses were derived from companies other than the producers which sell to the distributor, 'Company A' and 'Company B', but for different expenses: 'Company A' for SG&A, and

[433] *Korea – Certain Paper* (Report of the Panel) (n 193).
[434] ibid para 7.80.
[435] ibid para 7.85.
[436] ibid para 7.86.

'Company B' for financial expenses. Company A, like the distributor, is a trading company, while Company B is manufacturer. Indonesia's argument in respect of SG&A expense was rejected because Indonesia left unrebutted Korea's argument that the authority only used sales-related administrative expenses of Company A.

For the financial expenses, Indonesia highlighted that Company B was a manufacturer of the product. Indonesia questioned the authority's decision because the financial expense of Company A is zero but was not used. While the authority is generally not precluded, for instance, from using the interest expenses of a producing company as proxy for those of a trading company, reasons for that course of action must be adequately explained in the determinations.[437] In the present case, no explanation was given as to why, while in possession of data from a company which activity is more similar to the distributor (Company A), the authority chose to use the data from a company which activity is less similar to the distributor (Company B) instead. The panel found that the authority acted inconsistently with Article 6.8 and paragraph 7 Annex II ADA in respect of the financial expenses.[438] This finding builds on existing precedent by clarifying that the authority must also give an explanation regarding its decision to use one set of data instead of another.

Finally, Indonesia argued that the Korean authority violated Article 6.8 and paragraph 7 Annex II ADA by relying exclusively on the information provided by the (Korean) applicants in the calculation of an Indonesian producer's dumping margin and by failing to compare that information against data submitted by other investigated exporters. Korea argued that in certain cases, the fulfilment of the obligation under Article 5.3[439] may also suffice to meet the requirements of paragraph 7 Annex II. The panel considered that the obligations set forth under Article 5.3 and paragraph 7 Annex II ADA to be different. The stages of investigation are different (one is on the initiation, and the other on the final determination), the standards are different (one is 'adequate and accurate' so as to justify initiation, and the other is that the information from secondary sources be compared against that from other independent sources). While the information from the Korean applicants may turn out to be reliable, the fact remains that the Korean authority is bound by the obligation to take the procedural step under

[437] ibid para 7.110.
[438] ibid para 7.111.
[439] The provision reads: "The authorities shall examine the accuracy and adequacy of the evidence provided in the application to determine whether there is sufficient evidence to justify the initiation of an investigation".

paragraph 7 Annex II to confirm the reliability of that information.[440] As Korea has not established as a matter of fact that its authority compared the normal value figure for the Indonesian party against other independent sources, the panel concluded that the authority has acted inconsistently with Article 6.8 and paragraph 7 Annex II ADA by failing to fulfil its obligation to corroborate the secondary-source information.[441] This finding can arguably be considered as yet another elaboration on the duty of ensuring that the information is the 'best' information, as set forth by the panel in DS295. This finding cannot be classified as a deviation.

The Appellate Body report on DS295 came next.[442] Mexico appealed the panel's finding on the as-such consistency of its legislation. The Appellate Body noted that the agency's discretion with respect to the facts that it may use when faced with missing information is not unlimited. First, the facts should be the 'best' one. In this regard, the Appellate Body fully agreed with the panel in that (among others) the term 'best' information requires an evaluative, comparative assessment. Second, when culling necessary information from secondary sources, the agency should ascertain for itself the reliability and accuracy of such information by checking it against information contained in other independent sources at its disposal including material submitted by interested parties – this is compelled by the 'special circumspection' obligation. Recourse to facts available does not permit an authority to use any information in whatever way it chooses.

Looking at the legislation itself, to the Appellate Body, it appeared to require the agency to apply indiscriminately such a margin – that is, the highest that could be calculated on the basis of the facts available – to certain foreign producers or exporters even in instances where the producer is not sent a questionnaire (for example the case of foreign producers that do not appear in an investigation). [443] The legislation further appeared to not permit the agency to use any information that might be provided by a foreign producer or exporter, where the use of such information would result in a margin lower than the highest facts available margin. Nor did it appear to allow the agency to engage in the 'evaluative, comparative assessment' necessary in order to determine

[440] *Korea – Certain Paper* (Report of the Panel) (n 193) para 7.125.
[441] ibid para 7.126.
[442] WTO, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Report of the Appellate Body* (29 November 2005) WT/DS295/AB/R.
[443] ibid para 296.

which facts are 'best' to fill in the missing information.[444] Further still, the legislation requires the authority to use those facts necessary to arrive at the highest margin that can be calculated, even if those facts might be deemed unreliable by the agency after exercising 'special circumspection'. Therefore, in all situations of incomplete information (including cases where the producers do not appear in the investigation or where the producers do not export the subject merchandise during the period of investigation), the legislation prevents the authority from engaging in the reasoned and selective use of the facts available as directed by Article 6.8 and Annex II ADA.[445] The Appellate Body ultimately upheld the panel's finding that the legislation is inconsistent as such with Article 6.8 and paragraphs 1, 3, 5, 7 Annex II ADA.[446] This is a case of affirmation on the panel's finding.

In DS482 (*Canada – Welded Pipe*)[447], the Complainant (Chinese Taipei) launched a claim pertaining the rate applied by the Respondent's (Canada) authority to 'all other exporters' which was argued to be not compatible with Article 6.8 and paragraph 7 Annex II ADA. The claim is not on the resort to facts available *per se*, but rather the nature of the available facts that the authority relied on and the methodology followed in determining the facts available. The margin and rate were determined using the highest amount by which the normal value exceeded the export price on an individual transaction for a cooperating producer from any country subject to the investigation.

In this regard, Chinese Taipei argued, among others, that the reliance on the highest transaction-specific amount of dumping was done without evaluating and assessing in a comparative manner the available information on file to identify the 'best information available' to reasonable replace the missing information.

The panel cited the panel report on DS295 (*Mexico – Anti-Dumping Measures on Rice*) – that the term 'best information' means information most fitting or 'most appropriate', entailing an evaluative, comparative assessment.[448] The present panel looked at the available records of the investigation at issue, and concluded that it did

[444] ibid para 297.
[445] ibid.
[446] ibid para 298.
[447] WTO, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – Report of the Panel* (21 December 2016) WT/DS482/R.
[448] ibid para 7.133 citing *Mexico – Anti-Dumping Measures on Rice* (Report of the Panel) (n 424) para 7.312.

not show that the Canadian authority conducted a comparative evaluation and assessment of all the facts on record. Canada argued that its conduct was aimed at incentivizing cooperation and preventing circumvention. On this argument, the panel is of the view that singling out the highest transaction-specific amount from a cooperating exporter without any comparative evaluation and assessment, and without any form of explanation, is 'beyond what is appropriate and necessary to achieve such objectives.'[449] The panel ultimately found that the authority acted in a manner inconsistent with Article 6.8 and paragraph 7 Annex II ADA.[450] This finding is a straightforward continuation of the principles of the panel report on DS295.

DS513 (*Morocco – Hot-Rolled Steel (Turkey)*)[451] involved a situation where a discrepancy of sales figures existed. the two producers of the Complainant state (Turkey) reported 18,800 tonnes of export to the Respondent state (Morocco) during the relevant period, but the Moroccan import statistics registered 29,000 tonnes of imports from Turkey. Based on this discrepancy, the authority then rejected all of the producers' reported information and established their margins of dumping using the rate from the Moroccan petitioners as facts available. The producers then submitted (within the deadline for disclosure comments) movement certificates, customs invoices and commercial invoices which the producers thought demonstrated that they had reported the allegedly unreported export sales in their original questionnaire responses, but in the final determination, the Moroccan authority maintained the use of facts available, due to 'doubts and uncertainty' it faced in this regard.

The panel is of the view that the authority's inability to make an affirmative determination of under-reporting by the producers resulted from the authority's own failure to engage meaningfully with the producers on the issue.[452] The present panel reminded the parties of the Appellate Body report on *US – Hot-Rolled Steel* which stated that the authority and the interested party must cooperate and the cooperation is a two-way process involving joint effort. Therefore, a failure by an interested party to cooperate only gives rise to the consequences under Article 6.8 if the authority itself

[449] ibid para 7.143.
[450] ibid para 7.144.
[451] WTO, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey – Report of the Panel* (31 October 2018) WT/DS513/R.
[452] ibid para 7.92.

acted in a reasonable, objective, and impartial manner.[453] In addition to failing to meaningfully engage with the producers, the authority also did not provide explanations as to why the alleged failure to report certain sales rendered the sales data from the producers unusable. The panel ultimately found that the Moroccan authority's recourse to facts available was inconsistent with Article 6.8.[454] This finding is another case of a continuation of an existing panel report, this time on the DS184 case. The case did go to the appeal stage, but the claims on Article 6.8 ADA were not made part of the appeal and therefore the Appellate Body report did not contain a discussion on Article 6.8 ADA.

In DS553 (*Korea – Stainless Steel Bars*),[455] the Complainant (Japan) claimed that the authority of the Respondent (Korea) acted inconsistently with Article 6.8 and paragraphs 3 and 7 Annex II ADA by erroneously having recourse to 'facts available' to determine the production and export capacity of the Japanese exporters.

It was recalled that Article 6.8 pertains only to information that satisfies certain criteria, in particular, it pertains only to 'necessary information'. The panel understood 'necessary information' as information that is missing from the record and is possessed by an interested party, and that has been therefore requested by the authorities.[456] Initially the production capacity data for the product under investigation was requested from the Japanese exporters because it was missing from the records. However, the Korean authority subsequently changed its preferred parameters for the production capacity data, such that a production capacity data applying to a broader product scope (encompassing more than the product under investigation – namely excluded products and other stainless steel products), which the Korean authority already had, was used.

The panel noted that, while nothing in the ADA prevents an authority from adjusting its parameters or methodology for 'necessary information' during a review, an interested party could only be treated as failing to provide information under Article 6.8 if it is afforded the opportunity to respond to the new parameters or methodology, and to provide updated data where appropriate. If an interested party is not told of the new parameters or methodology, then it cannot plausibly be said to have 'refused access

[453] ibid.
[454] ibid para 7.104.
[455] WTO, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars – Report of the Panel* (30 November 2020) WT/DS553/R.
[456] ibid para 7.185.

to, or otherwise not provided the necessary information'.[457] However Korea argued that information on production capacity was not missing from the record and therefore did not comprise 'necessary information' since the authority already possessed the Japan-wide production capacity data. The panel disagreed. At the point in time at which the authority sent the initial questionnaires to the Japanese exporters, it is clear from those questionnaires that the preferred methodology – and what was warned would result in recourse to the facts available if not provided – concerned production capacity data on the 'product under investigation'. The production capacity data later used does not pertain to the 'product under investigation', but rather to a broader product scope encompassing excluded products and other stainless steel products. Thus, the presence of the broader data on the record at the time the initial questionnaires were sent to the Japanese exporters would not demonstrate that the relevant information was already on the record, and hence not 'missing' or 'necessary information' in the sense of Article 6.8.[458]

Korea then argued that at any rate every single condition for resorting to facts available under Article 6.8 has been met. However, the panel agreed with Japan that, although an authority has discretion to decide what information is needed to complete its investigation, it is not fair to reject the Japanese party's data based on an alleged failure to submit certain information when the authority did not clarify what data should have been submitted. Since the authority failed to adequately inform the Japanese exporters of its updated parameters for the 'necessary information', the Japanese exporter cannot be said to have 'not provided, or otherwise refused access to, necessary information'.[459] The panel ultimately found that the authority acted inconsistently with Article 6.8 by having recourse to 'facts available' in respect of Japan's production capacity.[460]

### 3.3.2 'reasonable period'

These disputes involve a producer/exporter which submitted information after the deadline for which the information was requested, has lapsed, prompting the Respondent to argue that the authority was justified in rejecting such information because it was not 'supplied in a timely fashion' as required by paragraph 3 Annex II ADA.

[457] ibid para 7.188.
[458] ibid para 7.189.
[459] ibid para 7.195-6.
[460] ibid.

The first case involving this question was DS184 (*US – Hot-Rolled Steel*).[461] The Respondent (the US) argued that the information was submitted to its authority after the deadlines for response to the questionnaires in which the information was requested has lapsed (but before verification). The panel noted that deadlines are not provided in the ADA; the ADA established that facts available may be used if necessary information is not provided within a reasonable period, but a rigid adherence to deadlines does not in all cases suffice as the basis for a conclusion that information was not submitted within a reasonable period.[462] Factually, the panel also noted that the information was not a new information that had never been previously provided and would require extensive verification: therefore, to the panel, sufficient time was available for the authority to allow its verification and use in the calculation of the producer's dumping margin.[463] The panel concluded that the US authority acted inconsistently with Article 6.8 ADA in applying facts available in making its determination.[464]

DS184 went to the appeal stage[465], and the same issue was made part of the appeal. To the Appellate Body, under paragraph 3 of Annex II, authorities should not be entitled to reject information as untimely if the information is submitted within a reasonable period of time: the phrase 'in a timely fashion' in paragraph 3 of Annex II refers to a 'reasonable period'. The meaning of 'reasonable period' itself, to the Appellate Body, 'implies a degree of flexibility that involves consideration of all of the circumstances of a particular case.'[466] The Appellate Body also set out six factors which should be considered when determining whether information is submitted within a reasonable period, namely: (1) the nature and quantity of the information submitted; (2) the difficulties encountered by an investigated exporter in obtaining the information; (3) the verifiability of the information and the ease with which it can be used by the investigating authorities in making their determination; (4) whether other interested parties are likely to be prejudiced if the information is used; (5) whether acceptance of the information would compromise the ability of the investigating authorities to conduct the investigation expeditiously; and (6) the number of days by which the investigated exporter missed the applicable time-limit.[467] In this case, the authority rejected

[461] *US – Hot-Rolled Steel* (Report of the Panel) (n 403).
[462] ibid para 7.54.
[463] ibid para 7.55.
[464] ibid para 7.59.
[465] *US – Hot-Rolled Steel* (Report of the Appellate Body) (n 407).
[466] ibid para 84.
[467] ibid para 85.

the information submitted by the producer for the sole reason that they were submitted after the deadline for submission, without considering any other facts and circumstances. The Appellate Body upheld the panel's finding.[468] It is clarified that authorities are not free to arbitrarily stick to pre-established deadlines as the basis of rejecting information for reasons of timeliness.[469] This is a case of affirmation with additional reasoning.

In DS241 (*Argentina – Poultry Anti-Dumping Duties*)[470], an exporter submitted a questionnaire reply after the deadline initially provided by the authority. The Complainant (Brazil) relied on the panel report on *US – Hot Rolled Steel* which stated in essence that 'reasonable period' is not always the same with the pre-established deadlines. The panel was however of the view that the exporter did not submit the necessary information within a reasonable period.[471] The panel noted that the ADA imposes a deadline for the conclusion of an investigation in Article 5.10 (within one year in normal circumstances, and in any case no longer than 18 months after initiation), therefore in this case a deadline is necessary, if the investigation is to comply with the timeframe provided for in Article 5.10.[472] Factually, there was no indication that the producer at issue informed the authority of the difficulties of submitting documentary evidence requested, until approximately seven months after the initiation of the investigation. The panel rejected Brazil's claim in this matter.[473] While the legal finding favoured the Respondent (unlike the DS184 panel and Appellate Body findings which favoured the Complainant), this finding cannot be classified as an AB-panel deviation, since the precedent itself points to flexibility and case-by-case examination, and crucially, does not preclude the relevance of deadlines in all cases.

In DS312[474], the panel cited the six factors formulated by the Appellate Body in *US – Hot-Rolled Steel* and applied it to the facts of the case at hand.[475] The nature and quantity of the financial statement information was not significant (it consisted of two pages). No significant difficulties encountered by the interested party because it was able after all to submit the statements. There was no indication that interested parties

[468] ibid para 90.
[469] ibid para 89.
[470] *Argentina – Poultry Anti-Dumping Duties* (Report of the Panel) (n 420).
[471] ibid para 7.196.
[472] ibid.
[473] ibid.
[474] *Korea – Certain Paper* (Report of the Panel) (n 193).
[475] ibid paras 7.49-55.

could have been prejudiced if the information was used. The number of days of delay was also significant enough to prevent an expeditious investigation. It concluded that the interested party's submission of financial statements was not made within a reasonable period as set out in Article 6.8, and that the Respondent's authority was entitled to disregard the financial statements and resort to facts available. The panel found that the authority did not act inconsistently with Article 6.8 in resorting to facts available.[476] As was the case with the panel report on DS241, because the panel kept the usage of a case-by-case examination, this panel report cannot be classified as an AB-panel deviation, nor a panel-panel deviation.

The six factors formulated by the Appellate Body in *US – Hot-Rolled Steel* was cited by the panel in DS337 (*EC – Salmon (Norway)*)[477], but did not seem to consider these factors one by one to the facts. In this case, the EC contended that the information was not supplied in a timely fashion because it was supplied *after* an on-the-spot investigation. The panel simply noted that the authority never indicated that information submitted after the on-the-spot investigation would not be taken into account. The panel also noted that the authority continued to gather additional information well after the Complainant's producer submitted its information.[478] The panel then found that the authority could not have objectively concluded that the relevant cost information had not been supplied in a timely fashion. The panel ultimately found that the authority had acted inconsistently with Article 6.8 and paragraph 3 Annex II ADA on this matter.[479] This finding did not follow nor deviate from the existing precedents.

### 3.3.3 'unexamined or unknown producers/exporters'

In these disputes, the Complainants claim that Article 6.8 has been breached because the Respondent has resorted to using facts available on parties that the authority did not conduct examination on. Paragraph 1 Annex II ADA is often found relevant in this matter. The relevant portion of the paragraph reads:

[476] ibid para 7.56.
[477] WTO, *European Communities –Anti-Dumping Measure on Farmed Salmon from Norway – Report of the Panel* (16 November 2007) WT/DS337/R.
[478] ibid para 7.371.
[479] ibid para 7.372.

> As soon as possible after the initiation of the investigation, the investigating authorities should specify in detail the information required from any interested party…the authorities should also ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available…

In DS295 (*Mexico – Anti-Dumping Measures on Rice*))[480], the authority of the Respondent (Mexico) only conducted individual examination of only three exporters from the Complainant state (the US), and applied the dumping margin based on adverse facts available to all other exporters on which the authority did not conduct individual examinations. The panel highlighted the fact that the Mexican authority did not properly notify and inform all interested parties that were known or could reasonably have been known to the authority, and also remarked that the authority '[i]s not allowed to rely on the initiative of the interested parties for the fulfilment of obligations which are really its own.'[481] Because of that, the panel ultimately found that Mexico acted in a manner which is inconsistent with Article 6.8 and paragraph 1 Annex II ADA (especially the duty to specify the information required and the duty to ensure that the party is aware that if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of the facts available).[482]

The matter went into appeal, resulting in the issuance of an Appellate Body report.[483] In its appeal, Mexico argued that it was entitled to calculate a margin of dumping based on facts available for the unexamined exporters and producers, because it had met its obligations under Articles 6.1[484] and 6.10[485] ADA. Further, the firms that were not investigated, had failed to provide the necessary information. To the Appellate Body, the use of facts from the petitioner's application is conditioned on making the interested party aware that these are the consequences of not supplying the information within a reasonable time. It further remarked: 'In other words, an exporter shall be given

[480] *Mexico – Anti-Dumping Measures on Rice* (Report of the Panel) (n 424).
[481] ibid para 7.199.
[482] ibid para 7.200.
[483] *Mexico – Anti-Dumping Measures on Rice* (Report of the Appellate Body) (n 442).
[484] The provision reads as follows: "All interested parties in an anti-dumping investigation shall be given notice of the information which the authorities require and ample opportunity to present in writing all evidence which they consider relevant in respect of the investigation in question".
[485] Which in essence lays down that, as a rule, the authorities shall determine an individual margin of dumping for each known exporter or producer.

the opportunity to provide the information required by the investigating authority before the latter resorts to potentially adverse facts available.'[486] Exporters unknown to the authority (and therefore is not notified of the information required to be submitted to the authority) is denied such an opportunity.[487] Accordingly, an authority that uses facts available in the application for the initiation of the investigation against an exporter that was not given notice of the information that the authority requires, acts in a manner inconsistent with paragraph 1 Annex II ADA and Article 6.8 ADA. As that is the case shown by the facts, the Appellate Body upheld the panel's finding on this matter.[488] This finding is a case of affirmation.

In DS337 (*EC – Salmon (Norway)*)[489], the Respondent's (EC) authority applied a uniform margin of dumping of 20.9% (derived from the highest individual dumping margin established for an investigated company), to companies which did not make themselves known to the EC's authority by responding to the sampling questionnaire it issued (in short, 'non-cooperating companies').

The pool of non-cooperating companies was divided into two groups to account to a particular fact, namely that the authority met with a representative of the Norwegian Seafood Federation ('FHL') to discuss the initiation of the investigation. In response to the request for information made in the notice of initiation, the authority received information from 102 companies, including the responses of 89 companies to the sampling questionnaire coordinated through the FHL. FHL then identified 88 companies that were treated as non-cooperating, and 67 of these companies did not receive a sampling form. 33 of the 67 were not members of the FHL at the time the form was distributed, while the rest (34) were members of the FHL. Therefore, the groups of non-cooperating companies are, first, the group of companies which are members of the FHL, and second, the group of companies which are not members of the FHL. The panel's finding differs with respect to each group.

The panel first cited the Appellate Body report on DS295 (*Mexico – Anti-Dumping Measures on Rice*), and the EC argued that the facts are not the same with DS295: in DS295, the authority only notified those exporting companies that had been identified in the petition, as well as two companies that had made themselves known, without

[486] *Mexico – Anti-Dumping Measures on Rice* (Report of the Appellate Body) (n 442) para 259.
[487] ibid.
[488] ibid para 261.
[489] *EC – Salmon (Norway)* (Report of the Panel) (n 477).

making any further effort to contact any other companies that might be concerned. In the present case, the authority contacted all of the companies in the industry that it knew of, with the assistance of the FHL, which had received a copy of the notice of initiation which set out an explicit warning of the possible use of 'facts available' in the event of non-cooperation. The EC contends that the FHL served as a channel of communication between the authority and the Norwegian producers and exporters.

Looking to the facts, the EC argued that the authority should not be faulted for relying on facts available because the FHL had effectively undertaken to ensure that all relevant companies would be informed of the investigation.

The panel believed that the facts demonstrate that the authority did enough to comply with the requirements of paragraph 1 Annex II in respect of the 34 out of 67 companies that were members of the FHL. The panel could not see a reason why the authority could not have relied upon the FHL to communicate its request and warning to its members.[490]

However, for the 33 out of 67 companies which were not members of FHL, the panel is of the view that the authority has failed to provide these companies with the relevant notices required under paragraph 1 Annex II. Therefore, the application of 'facts available' to these companies which were not members of the FHL, the panel found that it acted inconsistently with paragraph 1 Annex II and therefore Article 6.8 ADA.[491] The core reasoning of this finding cannot be categorized as a deviation from the DS295 Appellate Body report, as how much an authority can rely on an industry association which had undertaken to notify relevant parties, had not been addressed in DS295. Splitting the pool of uninvestigated (or non-cooperating) companies into two groups, as the panel did in this case, arguably only served to fully capture the nuances of the principal reasoning of the DS295 Appellate Body report.

DS404 (*US – Shrimp (Viet Nam)*)[492] involved a category of companies designated as 'Vietnam-wide entity'. This entity resulted from the treatment of Vietnam as a non-market economy, resulting in the application, by the US authority, of a rebuttable presumption that all shrimp exporting companies are controlled by the Government of Viet

[490] ibid para 7.461.
[491] ibid para 7.462.
[492] WTO, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Report of the Panel* (11 July 2011) WT/DS404/R.

Nam, such that they may be treated as operating units of a single, government-controlled Vietnam-wide entity. Exporting companies that could establish their eligibility for a separate rate, on the basis of their independence from government control, were either selected for individual examination, or assigned the 'all others' rate. The claims specifically pertain the second and third administrative reviews conducted by the US authority.

In the second administrative review, the authority applied a facts available rate to the Vietnam-wide entity on the basis of non-cooperation by both the Vietnam-wide entity - and the 35 exporting companies subject to the Vietnam-entity rate – which have not been selected for individual examination. A crucial fact is that, in the notice of initiation of the administrative review, the authority had stated that it would allow only those respondents with separate rate status to be included in the sampling pool. This means that non-separate rate respondents were pre-determined not to be selected for individual examination in the second administrative review before any question of non-cooperation by non-selected respondents could have arisen. To recall, the authority applied a facts available rate on the basis of non-cooperation. The panel did not consider that there is any reasonable basis on which the authority could subsequently refer to non-cooperation by non-separate respondents as the reason for not having applied an 'all others' rate to the Vietnam-wide entity.[493] The panel did not consider that the authority could properly have designated the data on quantity and value ('Q&V data') from non-separate rate respondents as 'necessary' in the meaning of Article 6.8 ADA, as the non-separate respondents are not eligible for individual examination before any question of non-cooperation could have arisen.[494] Thus, the authority's application of a facts available rate to the Vietnam-wide entity in the second administrative review was not consistent with Article 6.8 ADA.[495]

It may be questioned why the panel in this instance did not use the reasoning based on the obligation under paragraph 1 Annex II ADA (namely to specify in detail the information required from any interested party, or to ensure that the party is aware of the consequences of not supplying the information within a reasonable time). It may be explained by the unique circumstances of this case in that it involves an administrative review, instead of an original investigation. At any rate, this panel report did not

[493] ibid para 7.265.
[494] ibid para 7.274.
[495] ibid.

engage in a meaningful enough way with the existing precedents to determine whether it deviated from such existing precedents.

In DS414 (*China - GOES*)[496], the Respondent (China) argued that it had sufficiently notified all exporters/producers of the investigation and its requirement, by way of providing the notice of initiation to the Complainant state (the US), to two US entities, posting it on the authority's website, and placing it in its reading room. A crucial fact is that, apart from the two entities notified, there were no other exporters of the relevant product in existence during the period of investigation. China is aware of the Appellate Body's decision on DS295 (*Mexico – Anti-Dumping Measures on Rice*), but it argued that the present case is different. In DS295, the authority was apparently dealing with many other known exporters; a rice association entered on behalf of those other exporters that were not individually investigated. Therefore, China argued, it is unclear to what extent the Appellate Body considered the significance of the lack of any other exporters or producers, as was the case in the case at hand, when it issued its findings. China also highlighted the implication of the decision on DS295. It could not reconcile the findings with the need to encourage co-operation by unknown respondents, and with the absence of any guidance in the ADA on how unknown respondents should be treated, when the authority must also assign individual dumping margins under Article 6.10 ADA.

The panel also recognized that the ADA does not include explicit guidance regarding the form in which the notice required by Annex II must be provided to interested parties, but it also pointed to the provision under paragraph 1 Annex II that the authorities should 'ensure that the party is aware'.[497] That provision, arguably, cannot be complied with by posting a notice in a public place or on the internet. Even then, the notice of initiation did not specify in detail the information required of these interested parties. The panel concluded that China's first argument could not be accepted.[498]

As to the second argument, it is notable that, apart from the two entities it notified, there were no other exporters of the relevant product in existence during the period of

[496] WTO, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Report of the Panel* (15 June 2012) WT/DS414/R.
[497] ibid para 7.386.
[498] ibid.

investigation. The panel then questions how non-existent exporters could possibly refuse to provide information or impede investigation.[499] The panel pointed to the Appellate Body report on DS295 and took it to mean that an exporter must be given the opportunity to provide the information required by the authority, before the authority resorts to the use of facts available.[500] An exporter that is unknown to the authority, and therefore not notified of the information required of it, is denied the opportunity to provide the information. Such application of facts available to such exporter is inconsistent with paragraph 1 Annex II ADA and therefore Article 6.8 ADA. The present panel also pointed out that a similar conclusion was reached by the panel in DS189.[501]

As to China's argument that the position in DS295 is incompatible with the need to encourage unknown respondents to cooperate, the panel noted that paragraph 7 Annex II provides that authorities should use 'special circumspection' when basing their findings on information from a secondary source: the authorities' discretion is not unlimited.[502] Even the obligation under Article 6.10 to assign individual margins of dumping cannot justify a violation of the express terms of Article 6.8 ADA, which establishes clear conditions regarding when it is permissible to resort to the use of facts available.[503] The panel ultimately found that China acted inconsistently with Article 6.8 and paragraph 1 Annex II ADA.[504] As can be inferred from the many references the panel made to the Appellate Body report on DS295 (and how the panel rejected China's attempt at distinguishing the present case from DS295), this finding is consistent with the existing Appellate Body precedent. While this case (*China – GOES*) did go to the appeal stage, claims regarding Article 6.8 ADA were not made part of the appeal, so the report does not contain discussions of that provision.

In DS427 (*China – Broiler Products*)[505], the authority of the Respondent (China) posted a public notice on a website, placed in in a reading room of the authority, and sent a letter to the Complainant's (US) embassy. China then argued that the notice is comprehensive: it made clear that all producers should register and would be subject to fact available rate if they failed to register and/or fully participate in the investigation.

[499] ibid para 7.387.
[500] ibid para 7.388 citing *Mexico – Anti-Dumping Measures on Rice* (Report of the Appellate Body) (n 442) paras 259-60.
[501] ibid.
[502] ibid.
[503] ibid para 7.391.
[504] ibid para 7.393-4.
[505] WTO, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Report of the Panel* (2 August 2013) WT/DS427/R.

China also asked the present panel to reconsider the DS414 panel's statement that internet distribution arguably does not provide sufficient notice.

The panel firstly noted that Article 6.8 must be interpreted in context. Article VI GATT 1994 and the ADA permit the imposition of anti-dumping duty with respect to all imports that are found to have been dumped and to have caused injury. To the present panel, the fact that injury is determined on the basis of an assessment of all imports of the subject product justifies the application of duties to all such imports, including those from the producers/exporters who were not individually identified.[506]

As to the argument that a public notice is not sufficient, the present panel contrasted the present case with DS295, which the US cited in its argument. To the present panel, the Appellate Body in that report did not establish a general rule that in all circumstances a request for information must be conveyed through a 'targeted' or individualized communication.[507] Also, to the panel, the facts in DS295 differ from the present case. In the present case, the authority published a notice of initiation which contained a description of the information required and the consequences of not providing such information, whereas in DS295, there is no indication that the public notice warned interested parties that the authority would resort to facts available in case of failure to submit the information, if any was in fact requested. The present panel pointed out that the US' interpretation would '[m]ake it difficult, if not impossible, for a WTO member to determine an appropriate anti-dumping duty rate for certain unknown producers/exporters and thus apply anti-dumping measures with respect to their imports.'[508] Moreover, the panel pointed out, it could create an incentive for an exporter/producer not to cooperate with the investigation as it would benefit from the consequences of its non-cooperation.[509]

Looking to the facts of the case, the panel noted that the notice of initiation posted on the authority's website communicates the information required from interested parties, including producers/exporters, included a warning that facts available could be resorted to in the case of failure to register, and that the failure to register and provide the required information meant that the authority had no basis on which to determine their margin of dumping. The panel considered that, in this case, the authority fulfilled

[506] ibid para 7.302.
[507] ibid para 7.304.
[508] ibid para 7.305.
[509] ibid.

the conditions set forth under Article 6.8 and Annex II, and that its resort to facts available is justifiable.[510] This is at least a case of panel-panel deviation, especially considering that this panel adopted the argument rejected by the panel in *China – GOES* (that an incentive not to cooperate will be created), as part of the present panel's reasoning.

In DS440 (*China – Autos (US)*)[511], the Respondent's (China) authority had calculated individual dumping margins for five exporters from the Complainant state (US), and then determined the residual duty rate for all other US exporters. Following the initiation of the investigation, the Chinese authority sent questionnaires only to the exporters that the petitioners had identified in the petition, without making a further effort to identify other exporters.

The panel first recalled that the ADA does not provide any guidance for how an authority is to 'specify in detail' the information it requires.[512] The panel is of the view that a residual duty rate may be determined on the basis of facts available if the record of the investigation shows that the authority took all reasonable steps that might be expected from an objective and unbiased authority to specify in detail the information requested from unknown producers. The present panel did not preclude that such specification may be made through a public notification.[513]

The panel is of the view that the Chinese authority's efforts were not sufficient. What matters is that the authority specify in detail to the unknown exporters the information required from them for the determination of the residual duty rate. This, the panel reasoned, is a matter of due process: a determination affecting an interested party should be made on the basis of information relevant to the issue and the party. A party must first be given the opportunity to provide the necessary information, before a determination can be justifiably made on the basis of facts available.[514] To the present panel, that means that in principle, there is a parallel between the scope of information requested and not provided by an interested party on the one hand, and the scope of facts available used by the authority in place of the missing information to make necessary determinations, on the other hand.[515] In this case, the scope in the notice of initiation and registration form is different to the scope for the residual duty rate: the notice

[510] ibid paras 7.306-7.
[511] WTO, *China – Anti-Dumping and Countervailing Duty Measures on Certain Automobiles from the United States – Report of the Panel* (23 May 2014) WT/DS440/R.
[512] ibid para 7.129.
[513] ibid para 7.130.
[514] ibid para 7.134.
[515] ibid.

of initiation and registration form only request the identity of the companies and the volume and value of their exports to China, while the information required to determine dumping margins is far different from those in type or scope.[516]

To China, non-registration demonstrates a failure to cooperate, and determinations may then be made on the basis of facts available. The panel is not convinced. First, the panel noted that Article 6.8 does not condition the use of facts available on a failure to cooperate by declining to participate in an investigation. China's interpretation would mean that the authority decides at the outset of the process, before dispatching dumping questionnaires, or otherwise specifying the information that will be necessary to make the determinations required for the imposition of duty, which foreign producers will be found to have refused access to, or otherwise not provided necessary information within a reasonable time, all without those producers having been made aware of what the necessary information is.[517] It also results in certain producers being deprived of the opportunity to provide information very early in the investigation, without having been informed of the full extent of the information requested.[518] The panel ultimately found that China acted inconsistently with its obligations under Article 6.8 and paragraph 1 Annex II ADA in this matter.[519]

In DS454/DS460 (*China – HP-SSST*)[520], the Respondent's (China) authority applied 'all others' rates that were based on the highest margins of dumping for the cooperating Respondent's (EU and Japan) exporters. The Complainants jointly argue that the Chinese authorities has failed to fulfil the requirements of Article 6.8 and paragraph 1 Annex II in applying facts available to determine the 'all others' rates, since the authority had failed to specify in detail the information required of the unknown exporters, or ensure that unknown exporters were aware that, if information is not supplied within a reasonable time, the authorities will be free to make determinations on the basis of facts available (as provided in paragraph 1 Annex II).

The Complainants put forth the Appellate Body report on DS295 in stating that an exporter must be given the opportunity to provide information required by the authority before resort to potentially adverse facts available can be had. The Complainants in turn argued that the Appellate Body in DS414 (*China – GOES*) relied on DS295 to

[516] ibid para 7.136.
[517] ibid para 7.138.
[518] ibid.
[519] ibid para 7.140.
[520] *China – HP – SSST (EU)* (Report of the Panel) (n 212).

find that the authority had improperly applied facts available for failure to inform interested parties of the necessary information required of them. China relied on the panel report on DS427 (*China – Broiler Products*) in arguing that the reference to the use of facts available for non-cooperating exporters in the notice of initiation was sufficient for the purposes of Article 6.8 and paragraph 1 Annex II. China also distinguished the present case with DS414 because, in addition to the notice of initiation, the authority also posted the exporters' questionnaire on its website. The panel noted the DS427 report which stated that requiring an authority to establish that unknown exporters had actually failed to cooperate with the investigation would 'make it difficult, if not impossible, for a WTO member to determine an appropriate anti-dumping duty rate for certain unknown producers/exporters.'[521] The present panel also noted the fact that in all three cases (including the present one), the Chinese authority published a notice of initiation calling on interested parties to register for the investigation, along with the explanation that failure to register entails the authority's right to make determinations on the basis of facts available.

The panel further noted what it saw as a crucial fact of the present case, namely that the authority published the questionnaire on its website. To the present panel, that means that unknown exporters were on notice of what information was required of them, and the consequences of failing to provide that information. To the present panel, this satisfied the requirement to 'specify in detail the information required' under paragraph 1 Annex II.[522] Japan further argued that the Chinese authority provided no official public notice that the questionnaire would be available on its website. The panel noted the panel report on DS427 which stated that neither Article 6.8 nor Annex II ADA specifies what form the authority's request for information should take. On the one hand, the panel acknowledged that there may be more effective means through which the Chinese authority could have informed interested parties. On the other hand, the panel also pointed out that:

[t]he publication of the authority's web address in the notice of initiation and the subsequent posting of its questionnaire at that address, meant that it was not unduly

[521] ibid para 7.215 citing *China – Broiler Products* (Report of the Panel) (n 505) para 7.305.
[522] ibid para 7.218.

difficult for interested parties that had not registered, to ascertain the information being sought by the authority.[523]

The panel ultimately rejected the Complainants' claim that the Chinese authority failed to comply with the requirements of Article 6.8 and paragraph 1 Annex II when it applied facts available to determine the 'all others' rate.[524] This case did go to the appeal stage, but the EU's appeal on Article 6.8 and paragraphs 3 and 6 Annex II ADA was conditional upon the Appellate Body reversing the panel's finding on the claim under another provision, and the Appellate Body did not reverse that finding. Therefore, the appeal was not addressed and the report did not contain a discussion on Article 6.8.

This case is an interesting demonstration of the emergence of two strands of reasoning, one being the strand of reasoning from the Appellate Body report on DS295 and the panel report on DS414, and the other being the strand of reasoning from the panel report on DS427. Indeed, the opposing parties cite each strand to support their respective arguments. It may also be notable that, since the DS295 case (*Mexico – Anti-Dumping Measures on Rice*), the Appellate Body had not had an opportunity to revisit this issue, due either to the scope of the appeal not covering Article 6.8, or to the nature of the Article 6.8 appeal to be conditional and the condition not being fulfilled. Also noteworthy is the fact that reports adopting both strands of reasoning have been adopted by the DSB: the Appellate Body report on DS295 adopted on 20 December 2005,[525] the panel report on DS414 adopted on 16 November 2012 without the Article 6.8 claim being appealed,[526] and the panel report on DS427 has been adopted on 25 September 2013.[527]

### 3.3.4 'threshold issue – reliance on facts available'

[523] ibid para 7.219.
[524] ibid para 7.220.
[525] WTO, 'DS295: Mexico – Definitive Anti-Dumping Measures on Beef and Rice' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds295_e.htm> accessed 8 January 2022.
[526] WTO, 'DS414: China — Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the United States' < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds414_e.htm > accessed 8 January 2022.
[527] WTO, 'DS427: China — Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States' <https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds427_e.htm> accessed 8 January 2022.

In these disputes, the Respondents claim that its authority was not relying on facts available.

In DS337 (*EC - Salmon (Norway)*)[528], the Respondent (the EC) claimed that its authority did not rely on facts available. It asserted that it is possible to interpret Article 6.8 as leaving open the possibility for an authority to rely upon information other than 'facts available' when an interested party has provided imperfect information.

The panel highlighted paragraph 3 Annex II and infer from it that, when the conditions for resorting to facts available have not been established, the specific information from the interested party must be taken into account by the authority.[529] The present panel cited the panel reports on *US – Hot-Rolled Steel* and *US – Steel Plate* to support its reading.[530] It did not agree with the EC that Article 6.8 envisages the possibility that an authority may rely upon information other than that submitted by an interested party in response to a specific request for information even when the conditions for disregarding that information and using 'facts available' under Article 6.8 have not been established.[531]

Still in its argument that the authority did not rely on 'facts available', EC further argued that Article 6.8 makes the use of 'facts available' permissible and not mandatory. While the panel agreed that Article 6.8 does not oblige the authority to use 'facts available', the flexibility afforded by the word 'may' must be understood in the context of two possible choices: using 'facts available' to fill the information gap created by the lack of 'necessary information', or not using 'facts available' and carry on, to the extent possible, to rely on information submitted by the interested party that has resulted in the conditions for using 'facts available' to be established. No other possibility exists, when the conditions for using 'facts available' have been satisfied.[532] This also means that whenever an interested party submits specific information that an investigating authority has requested for the purpose of making a determination, and the conditions for resorting to 'facts available' have not been established, the investigating authority will

[528] *EC - Salmon (Norway)* (Report of the Panel) (n 477).
[529] ibid para 7.346.
[530] ibid citing *US – Hot-Rolled Steel* (Report of the Appellate Body) (n 407) para 81 and WTO, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India – Report of the Panel* (28 June 2002) WT/DS206/R para 7.55.
[531] ibid para 7.347.
[532] ibid para 7.348.

not be entitled to disregard the submitted information and use information from another source to make the determination. The panel ultimately rejected the EC's argument.[533]

DS404 (*US – Shrimp (Viet Nam)*)[534] involved a category of companies designated as 'Vietnam-wide entity'. This entity resulted from the treatment of Vietnam as a non-market economy, resulting in the application, by the US authority, of a rebuttable presumption that all shrimp exporting companies are controlled by the Government of Viet Nam, such that they may be treated as operating units of a single, government-controlled Vietnam-wide entity. Exporting companies that could establish their eligibility for a separate rate, on the basis of their independence from government control, were either selected for individual examination, or assigned the 'all others' rate. The claims specifically pertain the second and third administrative reviews conducted by the US authority.

In the third administrative review, the US argued that it did not apply a facts available rate to the Vietnam-wide entity; instead it argued that it applied to the Vietnam-wide entity the same rate applied to it in the most recently completed proceeding, because that was the only rate ever determined for the Vietnam-wide entity in the proceeding. Vietnam pointed out that the rate resulted from the application of adverse facts available, so the facts available nature of the rate does not change. The facts showed also that in the third administrative review, the authority did not seek any quantity and value ('Q&V') data from any exporting entity.

The panel pointed out that, had it taken a formalistic approach regarding the third administrative review, it would have concluded that the rate assigned to the Vietnam-wide entity was not based on facts available (because there was no indication by the authority that it was applying facts available).[535] However, the panel decided to take a less formalistic view, and agreed with Viet Nam's argument that there are only three possible kinds of rate under the ADA: an individual rate under Article 2, an 'all others' rate under Article 9.4, or a facts available rate under Article 6.8. Since the rate in the third administrative review was not established under either Article 2 or Article 9.4, the only remaining possibility is a rate under Article 6.8.[536] Further, the panel noted that the rate in the third review was the same as the rate at the second review which had

[533] ibid paras 7.351-2.
[534] *US – Shrimp (Viet Nam)* (Report of the Panel) (n 124).
[535] ibid para 7.277.
[536] ibid para 7.278.

been determined on facts available (25.76 per cent): to fail to treat this rate as a facts available rate '[w]ould elevate form over substance, and ignore the true factual circumstances surrounding the assignment of that rate.'[537] Regarding the application of the criteria under Article 6.8 itself, the panel again highlighted that in the third administrative review, the authority did not request Q&V data from any exporting entity. Therefore, there is no basis for a valid finding of non-cooperation, and no basis for a valid application of facts available under Article 6.8. Therefore, the panel found that the rate assigned to the Vietnam-wide entity in the third administrative review was not consistent with Article 6.8 ADA.[538] This finding does not interact with the panel report on *EC – Salmon (Norway)* on this specific matter in a meaningful enough way to determine definitely whether it deviated from the holding in that case.

In DS429 (*US – Shrimp II (Viet Nam)*)[539], the Vietnam-wide entity was again the issue.[540] In this case number, the claims pertain the fourth, fifth, and sixth administrative reviews. Formally the records for these subsequent reviews do not contain reference to the authority determining a rate based on facts available, nor any reference to the authority having made a finding that the Viet Nam-wide entity or any of its constituent parts failed to provide information. Notably, the records for these subsequent reviews also show that, since no additional information was placed with respect to certain entities which did not demonstrate that they operate free of government control – thus eligible for individual rates – the authority is applying a single anti-dumping rate which is the Vietnam-wide entity rate to all exporters of subject merchandise from Vietnam.

The present panel observed the language of Article 6.8 and highlighted the phrase 'determinations, affirmative or negative…on the basis of facts available'. In the present case, the panel noted that in the fourth, fifth, and sixth administrative reviews, the authority did not make such 'determinations, affirmative or negative…on the basis of facts available': for the present panel, continuing to apply a rate determined in an earlier proceeding '[i]s not the same as making a determination in the later proceeding, and therefore, does not give rise to a possible violation of Article 6.8.'[541]

[537] ibid para 7.279.
[538] ibid para 7.280.
[539] WTO, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Report of the Panel* (17 November 2014) WT/DS429/R.
[540] More on Vietnam-wide entity can be read in the discussion on the panel report on DS404.
[541] *US – Shrimp II (Viet Nam)* (Report of the Panel) (n 539) para 7.233.

The present panel explicitly stated its disagreement with the panel in DS404. While the DS404 panel stated that to fail to treat the subsequent-review rate as facts available rate would elevate form over substance, and ignore the true factual circumstances surrounding the assignment of the rate, the present panel highlighted instead that the application of Article 6.8 is triggered by an investigating authority resorting to 'facts available' in making a determination.[542] Because in the present case the authority did not make a determination within the meaning of Article 6.8, the panel was unable to find that the authority made a determination on the basis of facts available.[543] The panel ultimately found that Viet Nam has failed to establish that the rate applied to the Viet Nam-wide entity in the administrative reviews at issue is inconsistent with Article 6.8 and Annex II ADA.[544] This is a case of panel-panel deviation.

In DS494 (*EU – Cost Adjustment Methodologies II (Russia)*),[545] the Complainant (Russia) claimed that by refusing to use export price data from a Russian exporter in a likelihood of recurrence analysis, the authority of the Respondent (the EU) has violated Article 6.8 ADA. The panel noted that nothing on the record indicates that the EU had recourse to 'facts available' to replace the missing facts in order to reach its determination.[546] The authority in fact proceeded to base its determination of likelihood of recurrence on other indicators. The panel ultimately found that Russia's claim is not sufficiently supported by evidence on the record and rejected it.[547]

The Respondent in DS553 (*Korea – Stainless Steel Bars*)[548] also claimed that their authority did not rely on facts available, but in this case, the facts did not actually support the argument. The records showed that the authority rejected the Complainant's exporters' figures because those exporters had failed to cooperate with the investigation by repeatedly ignoring the requests to submit materials, and by providing only edited data.[549] No problem of inconsistency of legal holding can be attributed to this finding.

The cases in this series each have circumstances distinct enough from each other which may explain the divergent angles the respective panels took to assess the matter

[542] ibid para 7.235.
[543] ibid.
[544] ibid para 7.236.
[545] *EU – Cost Adjustment Methodologies II (Russia)* (Report of the Panel) (n 164).
[546] ibid para 7.666.
[547] ibid para 7.672.
[548] WTO, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars – Report of the Panel* (30 November 2020) WT/DS553/R.
[549] ibid para 7.194.

before them. It does, however, contain one clear case of panel-panel deviation between the DS404 panel and the DS429 panel.

As mentioned at the beginning of this chapter, the discussions in this chapter (on both Article 2.4 and 6.8 ADA) will be summarized in the form of an overall conclusion which can be found in chapter 4.

# 4. Conclusion

From the first chapter, we have established that the two most-frequently adjudicated aspects of WTO members' anti-dumping measures are matters pertaining to fair comparison under Article 2.4 ADA (with 29 occurrences), and matters pertaining to the usage of facts available under Article 6.8 ADA (with 22 occurrences). Many factors can explain emergence of these aspects as the most-frequently adjudicated. It may be that the WTO members find the norms contained in these paragraphs to be most important. It may be that the text of these paragraphs are considered the most unclear or ambiguous. The incontrovertible fact remains, and it is what transpired after 25 years of the WTO's existence. This result also frames the answer to the second research question.

The answer to the second research question cannot be reduced to the same level of simplicity as the answer to the first research question. Also, for all the reduction in selection bias that this thesis promised, there is after all still some subjectivity which has not been avoided here, namely in the tagging exercise.

At any rate, it can be safely concluded in any event that the findings of the WTO panel and Appellate Body (collectively) on the aspects identified in the first research question have fallen short of *absolute* consistency.

Some very notable instances of AB-panel deviation have been identified, for instance panel's finding on DS344 (*US – Stainless Steel (Mexico)*). This matter pertains zeroing in the context of the second sentence of Article 2.4.2 ADA and the fair comparison requirement under Article 2.4 ADA.

A relatively recent panel holding representing an instance of AB-panel deviation was also identified, namely on DS534 (*US – Differential Pricing Methodology*). As has been mentioned in the previous section, the DS534 panel report is in a different context from the DS344 panel report, because the DS534 panel report is circulated during a time when there is practically no more functioning Appellate Body to overturn the finding. While the DS534 panel report is formally under appeal, in practice no Appellate Body report is forthcoming anytime soon, and the formal legal status was also left uncertain since it cannot be adopted by the WTO DSB.

The tag 'fair comparison (non-original investigation)' – set out in chapter 3.2.2 – was rife with panels taking opposite positions to the Appellate Body (or the Appellate Body consistently having to correct the panel's position, depending on the point of view). A sign of stability only came at the last case of the series, *EU – Cost Adjustment Methodologies II (Russia)*.

In addition, the emergence of two strands of reasoning under different panel reports have also been identified in the context of Article 6.8 ADA under the tag 'unexamined or unknown producers/exporters'. One strand was that put forth by the Appellate Body on DS295 and followed by the panel on DS414, while the other strand being that employed by the panel on DS427. As was also mentioned in the discussion under the relevant tag, the reports containing both of the diverging strands of reasoning have all been adopted by the DSB, arguably lending them equal legitimacy.

Still in the context of Article 6.8 ADA, a panel-panel deviation (with an explicit statement of disagreement) was also found between the panel report on DS404 and the panel report on DS429 under the tag 'threshold issue – reliance on facts available'. The respective reports have also been adopted by the DSB: the panel report on DS404 on 2 September 2011[550] and the panel report on DS429 on 22 April 2015 without the Article 6.8 claim being appealed.[551]

A striking difference between the handling of Article 2.4 disputes and Article 6.8 disputes is that the Appellate Body had not had much opportunity to revisit the findings on the latter.

The report-by-report approach enabled us to put these instances in the broader context and more or less dissipates lingering doubts as to the existence of selection bias (with the caveat of the tagging exercise in mind). As can be seen from the discussion in this chapter, clear-cut disagreements, while striking, are but a small proportion of all adjudication reports on the ADA.

However, to then hastily conclude that all the remaining panels and Appellate Body have been cases of straightforward precedent-following would also be a mistake. Instances of precedent-following have not always been clear-cut.

[550] WTO, 'DS404: United States — Anti-dumping Measures on Certain Shrimp from Viet Nam' < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds404_e.htm> accessed on 8 January 2022.
[551] WTO, 'DS429: United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam' < https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds429_e.htm> accessed on 8 January 2022.

There was of course a perfect record of consistency for disputes on Article 2.4 ADA, under the tag 'fair comparison (unreasonable burden)', but it involved only two panel reports (DS211 and DS241). A more notable instance where panels follow an Appellate Body reasoning in a very straightforward manner can be seen in the series of five cases under the tag 'zeroing (first sentence)' (DS335, DS343, DS383, DS402, and DS422) where the panels adopted the existing Appellate Body reasoning in DS264 after a short discussion of whether the facts of the case match those of DS264.[552] There was also instances where panels seem to treat the Appellate Body finding as binding precedent to be followed despite good reason for not doing so, namely in the panel finding on DS350 discussed in section 3.2.1. However, these instances also make up an equally small proportion of all adjudication reports on the ADA. Taking into account the remaining reports, precedent-following rarely happens in such a straightforward manner as the above-mentioned instances. There being no clearly discernible issue of consistency does not automatically imply that precedents have been followed blindly. This discovery lessens the force somewhat, of the view put forth by a US Trade Representative set out in the first chapter of this thesis, namely that the panels are to 'abdicate their responsibility to conduct an objective assessment of the matters before them and just follow prior Appellate Body reports'.[553] It is unfair to let the DS350 panel characterize all other panels.

A panel report can disagree with or simply adopt the reasoning of existing precedents, but those are not the only possibilities. Subsequent reports can also build on the existing precedent, clarifying new aspects of the abstract rule in the context of the particular case at hand without rejecting or following existing precedents in a strict manner. The cases under the tag 'fair comparison (due allowance)' in the context of Article 2.4 ADA and the cases under the tag 'level of duty to cooperate' in the context of Article 6.8 ADA illustrates this kind of situation.

The nature of the provision plays a part in this. As the panel in DS211 put it, the provision at issue cannot be read purely based on legal interpretation, but requires instead a case-by-case analysis. In support of its reading, the panel pointed to the text: ' due allowance shall be made *in each case, on its merits*, for differences which affect price comparability' (emphasis provided). Faced with such an indeterminate text, panels cannot be fairly expected to come to the same conclusion every time.

[552] Chapter 3.2.5 of this thesis.
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Waldron J, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111 Michigan Law Review 1

# Zusammenfassung

In jedem Rechtssystem mit einem rechtsprechenden Gremium sind die Konsistenz des Urteils und die Behandlung bestehender Präzedenzfälle durch nachfolgende Richter Dauerthemen. In internationalen Gremien ist Konsistenz wertvoll für die politische Glaubwürdigkeit des Gremiums, weil es zeigt, dass das Gremium sachlich und grundsätzlich entscheidet, statt einem kapriziösen subjektiven Willen zu folgen, der sich von Fall zu Fall ändert. Gleiches gilt auch für die WTO und ihr Streitbeilegungssystem. Dem WTO-Streitbeilegungssystem wird "justizieller Aktivismus" vorgeworfen, indem es (1) die Regeln zu weit auslegt und (2) früheren Entscheidungen folgt, als wären sie bindende Präzedenzfälle. Aus diesem Grund ist die Untersuchung der Kohärenz der Streitbeilegungsgremien der WTO wichtig. Eine Untersuchung der Kohärenz ist am sinnvollsten in Bereichen, in denen die gleiche Art von Streitigkeiten am häufigsten mit dem Rechtsprechungssystem konfrontiert ist. Streitigkeiten über die Berufung auf das ADA (Anti-Dumping Abkommen - das Disziplinen zu Antidumping-Untersuchungen durch WTO-Mitglieder enthält) stellten sich als eine der Arten von Streitigkeiten heraus, die am häufigsten im WTO-Streitbeilegungssystem auftreten. Frühere Diskussionen über das Streitbeilegungssystem der WTO beinhalten in der Regel eine Handvoll Fälle, die der Autor handverlesen hat. Dies führt zu potenziellen Selektionsverzerrungen und beraubt die Diskussion ihres breiteren Kontexts. Aus diesem Grund wird ein Bericht-für-Bericht-Ansatz gewählt. Um die Fokussierung der Studie zu verstärken, wurde auch versucht, nur die beiden am häufigsten entschiedenen Aspekte in WTO-Antidumpingstreitigkeiten zu identifizieren. Bei diesen Streitigkeiten handelt es sich um Streitigkeiten zu Art. 2.4 und 6.8 ADA. Leider kann die Subjektivität nicht vollständig vermieden werden, da die „Tagging“ eine subjektive Auswahl erfordert. Nachdem die WTO-Anti-Dumping-Streitigkeiten Bericht für Bericht untersucht wurden, wurde festgestellt, dass das Streitbeilegungssystem nicht absolut kohärent war. Es gab auch Fälle, in denen eine Entscheidung auf eine frühere Entscheidung folgte, obwohl es gute Gründe gab, dies nicht zu tun. Entgegen dem breiteren Kontext, der sich aus der Prüfung aller relevanten Berichte ergibt, machen diese Fälle jedoch nur einen kleinen Teil der Gesamtheit des Falls aus. Die Stichhaltigkeit des Vorwurfs des „gerichtlichen Aktivismus“ wird in beiden Fällen reduziert.

# Abstract

In any legal system with an adjudicative body, consistency of judgment and how subsequent judges treat existing precedents are perennial concerns. In international bodies, consistency is valuable for the body's political credibility because it shows that the body decides in an objective, principled manner instead of following a capricious subjective will that changes from case to case. The same also applies to the WTO and its dispute settlement system. The concern is made more acute by the recent charge that the WTO dispute settlement system engages in judicial activism by (1) interpreting the rules too broadly and (2) by following prior decisions as if they were binding precedents, thus abdicating their responsibility to conduct an objective assessment of the case. This is why the study of the consistency of the WTO's dispute settlement bodies is important. A study of consistency makes most sense in areas where the same type of disputes faces the adjudicative system the most frequently. Disputes citing the ADA (containing disciplines on anti-dumping investigations by WTO members) emerged as one of the types dispute which come most frequently on the WTO dispute settlement system. Previous discussions on the WTO's dispute settlement system tend to involve a handful of cases hand-picked by the author. This introduces the potential for selection bias and deprive the discussion of their broader context. That is why a report-by-report approach is chosen. To enhance the focus of the study, an effort was also made to identify only the two most-frequently adjudicated aspects among WTO anti-dumping disputes. These disputes are disputes concerning Article 2.4 and 6.8 of the ADA. Unfortunately, subjectivity cannot be completely avoided since the tagging exercise requires subjective selection. After studying WTO anti-dumping disputes in a report-by-report fashion, it was found that the dispute settlement system did fall short of absolute consistency. There were also instances where a decision follows a prior decision even when it had good reason not to do so. However, against the broader context provided by examining all relevant reports, these instances constitute only a small proportion of the totality of the case. The charge of judicial activism is weakened on both counts.

Annex 1A

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Inventory of ADA articles mentioned in Requests for Consultations, Requests for Panel, and circulated Panel reports

| | | ADA articles cited in | | |
|---|---|---|---|---|
| No. | Case No. | request for consultation | panel request | panel report |
| 1 | DS60 | 02, 03, 05, 06, 07, Annex one | 02, 03, 05, 06, 07, Annex one | 05 |
| 2 | DS99 | 02, 03,05, 06, 11, 17 | 02, 03, 05, 06, 11, 17 | 02, 05, 06, 11 |
| 3 | DS122 | 02, 03, 05, 06 | 02, 03, 05, 06 | 02, 03, 05 |
| 4 | DS132 | 02, 03, 04, 05, 06, 07, 09, 10, 12 | 01, 02, 03, 04, 05, 06, 07, 10, 12 | 03, 05, 07, 10, 12 |
| 5 | DS136 | 01, 02, 03, 04, 05 | 01, 02, 03, 04, 05 | 01, 04, 05 |
| 6 | DS141 | 02, 03, 04, 05, 06, 12, 15 | 02, 03, 04, 05, 15, 12 | 02, 03, 05, 12, 15 |
| 7 | DS156 | 01, 02, 03, 05, 06, 07, 09, 12, 18, Annex one, Annex two | 01, 02, 03, 05, 06, 07, 09, 12, 18 | 03, 05, 06, 12 |
| 8 | DS162 | 01, 02, 03, 04, 05, 09, 11, 18 | 01, 02, 03, 04, 05, 09, 11, 18 | 01, 04,05, 18 |
| 9 | DS179 | 02, 06, 12 | 02, 06, 12 | 02, 04, 12 |
| 10 | DS184 | 02, 03, 04, 06, 09, 10, 18, Annex one, Annex two | 02, 03, 04, 06, 09, 10, 18, Annex one, Annex two | 02, 03, 04, 06, 09, 10, 18 |
| 11 | DS189 | 02, 06, Annex two | 02, 06, Annex two | 02, 06 |
| 12 | DS206 | 01, 02, 03, 05, 06, 09, 12, 15, 18, Annex two | 02, 06, 09, 15, 18, Annex two | 06, 15 |
| 13 | DS211 | 02, 03, 06, Annex one, Annex two | 02, 03, 06, Annex one, Annex two | 02, 03, 06 |
| 14 | DS217 | 01, 05, 08, 18 | 01, 05, 08, 18 | 05, 08, 15, 18 |
| 15 | DS219 | 01, 02, 03, 04, 05, 06, 07, 09, 11, 12, 15 | 01, 02, 03, 04, 05, 06, 07, 09, 11, 12, 15 | 01, 02, 03, 06, 11, 12 |
| 16 | DS221 | 01, 09, 11, 18 | 01, 09, 11, 18 | 01, 09, 11, 18 |
| 17 | DS234 | 01, 05, 08, 18 | 01, 05, 08, 18 | 05, 08, 15, 18 |
| 18 | DS241 | 01, 02, 03, 04, 05, 06, 09, 12, Annex two | 01, 02, 03, 04, 05, 06, 09, 12, Annex two | 02, 03, 04, 05, 06, 09, 12 |
| 19 | DS244 | 02, 03, 05, 06, 11, 12, 18, Annex two | 02, 03, 05, 06, 11, 12, 18, Annex two | 02, 05, 06, 11, 12, 18 |
| 20 | DS264 | 01, 02, 04, 05, 06, 09, 18 | 01, 02, 04, 05, 09, 18 | 02, 05, 09, 18 |
| 21 | DS268 | 01, 02, 03, 05, 06, 11, 12, 18, Annex two | 01, 02, 03, 06, 11, 12, 18, Annex two | 03, 06, 11 |
| 22 | DS277 | 01, 03, 12, 18 | 01, 03, 12, 18 | 03 |
| 23 | DS282 | 01, 02, 03, 06, 11, 18 | 01, 02, 03, 06, 11, 18 | 03, 11 |
| 24 | DS294 | 01, 02, 03, 05, 09, 11, 18 | 01, 02, 03, 05, 09, 11, 18 | 01, 02, 05, 09, 11, 18 |
| 25 | DS295 | 01, 03, 04, 05, 06, 07, 09, 10, 11, 12, 18, Annex two | 01, 03, 04, 05, 06, 09, 11, 12, 18 | 03, 05, 06, 09, 11 |
| 26 | DS312 | 01, 02, 03, 04, 05, 06, 09, 12, Annex one, Annex two | 02, 03, 04, 05, 06, 09, 12, Annex one, Annex two | 02, 03, 04, 06, 12 |
| 27 | DS322 | 01, 02, 03, 05, 06, 09, 11, 18 | 01, 02, 03, 05, 09, 11, 18 | 01, 02, 03, 05, 09, 11, 18 |
| 28 | DS331 | 01, 02, 03, 04, 05, 06, 09, 12, 12, 18, Annex two | 01, 02, 03, 04, 05, 06, 09, 12, 18 | 03, 05, 06 |

| | | ADA articles cited in | | |
|---|---|---|---|---|
| No. | Case No. | request for consultation | panel request | panel report |
| 29 | DS335 | 01, 02, 05, 06, 09, 18 | 2 | 02 |
| 30 | DS337 | 01, 02, 03, 04, 05, 06, 09, 12, 18, Annex one, Annex two | 02, 03, 04, 05, 06, 09, 12, 18, Annex one, Annex two | 02, 03, 04, 05, 06, 09, 12 |
| 31 | DS343 | 01, 02, 03, 05, 07, 09, 18 | 02, 07, 09, 18 | 02, 18 |
| 32 | DS344 | 01, 02, 05, 06, 09, 11, 18 | 01, 02, 09, 18 | 02, 09 |
| 33 | DS345 | 01, 02, 07, 09, 18 | 01, 02, 07, 09, 18 | 01, 07, 18 |
| 34 | DS350 | 01, 02, 05, 09, 11, 18 | 01, 02, 05, 09, 11, 18 | 02, 09, 11 |
| 35 | DS379 | 01, 02, 06, 09, 18, Annex two | 01, 02, 06, 09, 18, Annex two | 0 (Complainant dropped all claims relating to ADA) |
| 36 | DS382 | 01, 02, 09, 11, 18 | 2 | 02 |
| 37 | DS383 | 2 | 2 | 02 |
| 38 | DS397 | 01, 02, 03, 04, 05, 06, 09, 12, 17, 18 | 02, 03, 04, 05, 06, 09 | 02, 03, 04, 05, 06, 09, 18 |
| 39 | DS402 | 01, 02, 05 | 2 | 02 |
| 40 | DS404 | 01, 02, 05, 06, 09, 11, 18, Annex two | 01, 02, 05, 06, 09, 11, 18, Annex two | 02, 06, 09, 11 |
| 41 | DS405 | 01, 02, 03, 05, 06, 09, 11, 12, 17, 18 | 01, 02, 03, 06, 09, 11, 12, 17, 18 | 02, 03, 06, 09, 11, 12, 18 |
| 42 | DS414 | 01, 03, 06, 12, Annex two | 01, 03, 06, 12, Annex two | 03, 06, 12 |
| 43 | DS422 | 01, 02, 05, 09, 11 | 2 | 02 |
| 44 | DS425 | 02, 03, 06, 12 | 03, 06, 12 | 03, 06, 12 |
| 45 | DS427 | 01, 02, 03, 04, 05, 06, 12, Annex two | 01, 02, 03, 06, 12, Annex two | 01, 02, 03, 04, 06, 12 |
| 46 | DS429 | 01, 02, 06, 09, 11, 17, Annex two | 01, 02, 09, 11, 18 | 01, 06, 09, 11, 18 |
| 47 | DS440 | 01, 03, 04, 05, 06, Annex two | 01, 03, 04, 05, 06, 12, Annex two | 01, 03, 04, 06, 12 |
| 48 | DS442 | 01, 02, 03, 04, 05, 06, 09, 18 | 01, 02, 03, 04, 05, 06, 09, 18 | 02, 03, 06 |
| 49 | DS449 | 09, 11 | 09, 11 | 0 (Complainant dropped all claims relating to ADA) |
| 50 | DS454 | 01, 03, 05, 06, 07, 12, Annex two | 03, 06, 07, 12 | 01, 03, 06, 07, 12 |
| 51 | DS460 | 01, 02, 03, 06, 07, 12, Annex one, Annex two | 01, 02, 03, 06, 07, 12, Annex one, Annex two | 01, 02, 03, 06, 07, 12 |
| 52 | DS464 | 01, 02, 05, 09, 11, 18 | 01, 02, 09, 11 | 02, 09 |
| 53 | DS471 | 02, 06, 09, Annex two | 02, 06, 09, Annex two | 02, 06, 09 |
| 54 | DS473 | 02, 03, 06, 09, 18 | 01, 02, 03, 09, 18 | 02, 03, 09, 18 |
| 55 | DS479 | 01, 02, 03, 04, 06, 09, 12, 18, Annex two | 01, 03, 04, 06, 12, 18 | 01, 03, 04, 06, 18 |
| 56 | DS480 | 01, 02, 03, 06, 07, 09, 15, 18 | 01, 02, 03, 06, 07, 09 | 02, 03, 07, 09 |

| | | ADA articles cited in | | |
|---|---|---|---|---|
| No. | Case No. | request for consultation | panel request | panel report |
| 57 | DS482 | 01, 02, 03, 05, 06, 07, 09, 18, Annex two | 01, 02, 03, 05, 06, 07, 09, 18, Annex two | 01, 03, 05, 06, 07, 09, 18 |
| 58 | DS483 | 01, 02, 03, 04, 06, 08, 09, 12, Annex two | 01, 02, 03, 04, 06, 09, 12, Annex two | 03 |
| 59 | DS488 | 01, 02, 06, 12, 18 | 01, 02, 06, 09, 12, 18 | 02, 06, 12, 18 |
| 60 | DS491 | 01, 03, 15 | 01, 03 | 03 |
| 61 | DS493 | 01, 02, 05, 06, 09, 11, 18, Annex two | 02, 03, 05, 06, 11, 12, 17, 18, Annex two | 02, 05, 06, 11, Annex two |
| 62 | DS494 | 01, 02, 03, 05, 06, 09, 11, 17, 18, Annex two | 01, 02, 03, 04, 05, 06, 09, 11, 12, 18 | 01, 02, 03, 04, 06, 09, 11, 12, 18, Annex two |
| 63 | DS504 | 01, 03, 06, 12 | 01, 03, 04, 06, 12 | 01, 03, 06 |
| 64 | DS513 | 03, 06, 18, Annex two | 01, 03, 05, 06, 18, Annex two | 03, 05, 06 |
| 65 | DS529 | 2 | 02, 09 | 02 |
| 66 | DS534 | 01, 02 | 01, 02 | 02 |
| 67 | DS538 | 01, 02, 03, 05, 06, 09, 11, 12, 18, Annex two | 01, 02, 03, 05, 06, 09, 11, 12, 18, Annex two | (panel report issued in 2021) |
| 68 | DS539 | 01, 02, 03, 05, 06, 09, 11, 18, Annex one, Annex two | 01, 02, 03, 05, 06, 09, 11, 18, Annex one, Annex two | (panel report issued in 2021) |
| 69 | DS553 | 01, 06, 11, 12, Annex two | 06, 11, 12, Annex two | 06, 11, Annex two |

| | No. of occurrence in request for consultations | No. of occurrence in panel request | No. of occurrence in panel report |
|---|---|---|---|
| Article 1 | 52 | 43 | 16 |
| Article 2 | 54 | 49 | 40 |
| Article 3 | 44 | 43 | 34 |
| Article 4 | 18 | 19 | 12 |
| Article 5 | 41 | 31 | 22 |
| Article 6 | 50 | 43 | 34 |
| Article 7 | 11 | 10 | 6 |
| Article 8 | 3 | 2 | 2 |
| Article 9 | 40 | 36 | 20 |
| Article 10 | 3 | 2 | 2 |
| Article 11 | 24 | 21 | 16 |
| Article 12 | 28 | 28 | 18 |
| Article 13 | 0 | 0 | 0 |
| Article 14 | 0 | 0 | 0 |
| Article 15 | 5 | 3 | 4 |
| Article 16 | 0 | 0 | 0 |
| Article 17 | 5 | 3 | 0 |
| Article 18 | 39 | 35 | 19 |
| Annex one | 8 | 7 | 0 |
| Annex two | 30 | 23 | 3 |

Annex 1B

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List of cases discussing Article 2 ADA

| No. | Case No. | Article No. | Paragraph No. |
|---|---|---|---|
| 1 | DS99 | 2.2.1.1 | 02 |
| 2 | DS122 | 2 | 00 |
| 3 | DS141 | 2.2, 2.2.2, 2.4.2 | 02, 04 |
| 4 | DS179 | 2.4.1, 2.4 | 04 |
| 5 | DS184 | 2.1 | 01 |
| 6 | DS189 | 2.4 | 04 |
| 7 | DS211 | 2.2.1.1, 2.2, 2.4 | 02, 04 |
| 8 | DS219 | 2.2, 2.2.2, 2.4, 2.4.1, 2.4.2 | 02, 04 |
| 9 | DS241 | 2.4 | 04 |
| 10 | DS244 | 2.4 | 04 |
| 11 | DS264 | 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4.2, 2.6 | 02, 04, 06 |
| 12 | DS294 | 2.4, 2.4.2, | 04 |
| 13 | DS312 | 2.2, 2.4, 2.6 | 02, 04, 06 |
| 14 | DS322 | 2, 2.1, 2.4.2, 2.4 | 00, 01, 04 |
| 15 | DS335 | 2.4.2 | 04 |
| 16 | DS337 | 2.1, 2.2, 2.2.1.1, 2.2.2, 2.2.2(iii), 2.6 | 01, 02, 06 |
| 17 | DS343 | 2.4.2 | 04 |
| 18 | DS344 | 2.1, 2.4, 2.4.2 | 01, 04 |
| 19 | DS350 | 2.4.2 | 04 |
| 20 | DS382 | 2.4 | 04 |
| 21 | DS383 | 2.4.2 | 04 |
| 22 | DS397 | 2.1, 2.4, 2.6, | 01, 04, 06 |
| 23 | DS402 | 2.4.2 | 04 |
| 24 | DS404 | 2.4 | 04 |
| 25 | DS405 | 2.1, 2.2.2(iii), 2.4, 2.6 | 01, 02, 04, 06 |
| 26 | DS422 | 2.4.2 | 04 |
| 27 | DS427 | 2.2.1.1, | 02 |
| 28 | DS442 | 2.3, 2.4 | 03, 04 |
| 29 | DS460 | 2.2.2, 2.4 | 02, 04 |
| 30 | DS464 | 2.4, 2.4.2 | 04 |
| 31 | DS471 | 2.4.2 | 04 |
| 32 | DS473 | 2.2.1.1, 2.2, 2.2.2(iii), 2.4 | 02, 04 |
| 33 | DS480 | 2.2, 2.2.1.1, 2.2.2(iii), 2.3 | 02, 03 |
| 34 | DS488 | 2.2, 2.2.1.1, 2.2.2, 2.2.2(i), 2.2.2(iii), 2.3 | 02, 03 |

| No. | Case No. | Article No. | Paragraph No. |
|---|---|---|---|
| 35 | DS493 | 2.1, 2.2, 2.2.1, 2.2.1.1 | 01, 02 |
| 36 | DS494 | 2.1, 2.2, 2.2.1.1, 2.4, 2.6 | 01, 02, 04, 06 |
| 37 | DS529 | 2.2, 2.2.1.1 | 02 |
| 38 | DS534 | 2.4.2 | 04 |
| 39 | DS538 | 2.1, 2.2, 2.2.1, 2.2.1.1, 2.2.2, 2.4 | panel report issued in 2021 |

| Article No. | Paragraph No. |
|---|---|
| Article No. | No. of occurrence |
| Article 2 | 2 |
| Article 2.1 | 8 |
| Article 2.2 | 17 |
| Article 2.3 | 3 |
| Article 2.4 | 29 |
| Article 2.5 | 0 |
| Article 2.6 | 6 |

Annex 1C

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List of cases discussing Article 6 ADA

| No. | Case No. | Article No. | Paragraph No. |
|---|---|---|---|
| 1 | DS99 | 6.6 | 06 |
| 2 | DS156 | 6.1.2, 6.1.3, 6.2, 6.5, 6.5.1, 6.8, 6.9 | 01, 02, 05, 08, 09 |
| 3 | DS184 | 6.8 | 08 |
| 4 | DS189 | 6.8, 6.9, 6.10 | 08, 09, 10 |
| 5 | DS206 | 6.8 | 08 |
| 6 | DS211 | 6.1, 6.2, 6.7, 6.8 | 01, 02, 07, 08 |
| 7 | DS219 | 6.2, 6.4, 6.6 | 02, 04, 06 |
| 8 | DS241 | 6.1.1, 6.1.2, 6.1.3, 6.8, 6.9 | 01, 08, 09 |
| 9 | DS244 | 6.1, 6.2, 6.6, 6.10 | 01, 02, 06, 10 |
| 10 | DS268 | 6.1, 6.2, 6.8 | 01, 02, 08 |
| 11 | DS295 | 6.1, 6.1.1, 6.8 | 01, 08 |
| 12 | DS312 | 6.2, 6.4, 6.5, 6.7, 6.8, 6.9, 6.10 | 02, 04, 05, 07, 08, 09, 10 |
| 13 | DS331 | 6.5 | 05 |
| 14 | DS337 | 6.2, 6.4, 6.8, 6.9, 6.10 | 02, 04, 08, 09, 10 |
| 15 | DS397 | 6.1.1, 6.2, 6.4, 6.5, 6.5.1, 6.10 | 01, 02, 04, 05, 10 |
| 16 | DS404 | 6.8, 6.10, 6.10.2 | 08, 10 |
| 17 | DS405 | 6.9, 6.10, 6.10.2 | 01, 02, 04, 05, 08, 09, 10 |
| 18 | DS414 | 6.5.1, 6.8, 6.9 | 05, 08, 09 |
| 19 | DS425 | 6.2, 6.5, 6.5.1, 6.9 | 02, 05, 09 |
| 20 | DS427 | 6.2, 6.5.1, 6.8, 6.9 | 02, 05, 08, 09 |
| 21 | DS429 | 6.8, 6.10 | 08, 10 |
| 22 | DS440 | 6.5.1, 6.8, 6.9 | 05, 08, 09 |
| 23 | DS442 | 6.7 | 07 |
| 24 | DS454 | 6.5, 6.5.1, 6.9 | 05, 09 |
| 25 | DS460 | 6.5, 6.5.1, 6.7, 6.8, 6.9 | 05, 07, 08, 09 |
| 26 | DS471 | 6.10 | 10 |
| 27 | DS479 | 6.5, 6.9 | 05, 09 |
| 28 | DS482 | 6.8, 6.10 | 08, 10 |
| 29 | DS488 | 6.2, 6.4, 6.9, 6.10, 6.10.2 | 02, 04, 09, 10 |
| 30 | DS493 | 6.2, 6.8, 6.9 | 02, 08, 09 |
| 31 | DS494 | 6.1.2, 6.1.3, 6.5, 6.5.1, 6.8, 6.9, 6.10 | 01, 05, 08, 09, 10 |
| 32 | DS504 | 6.5, 6.5.1 | 05 |
| 33 | DS513 | 6.8, 6.9 | 08, 09 |
| 34 | DS538 | 6.2 | panel report issued in 2021 |

| No. | Case No. | Article No. | Paragraph No. |
|---|---|---|---|
| 35 | DS539 | 6.8 | panel report issued in 2021 |
| 36 | DS553 | 6.5, 6.8 | 05, 08 |

| Article No. | Paragraph No. |
|---|---|
| Article No. | No. of occurrence |
| Article 6.1 | 9 |
| Article 6.2 | 15 |
| Article 6.3 | 0 |
| Article 6.4 | 6 |
| Article 6.5 | 15 |
| Article 6.6 | 3 |
| Article 6.7 | 4 |
| Article 6.8 | 22 |
| Article 6.9 | 17 |
| Article 6.10 | 12 |

Annex 1D

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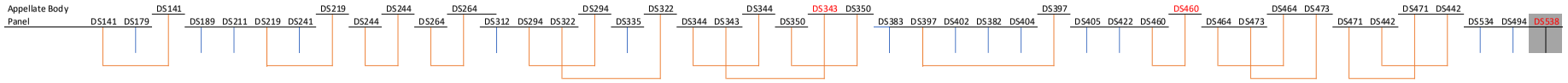
Circulation dates of panel and appellate body reports discussing Article 2.4 ADA

| No. | case number | circulation (panel) | circulation (AB) | note |
|---|---|---|---|---|
| 1 | DS141 | 30 October 2000 | 01 March 2001 | |
| 2 | DS179 | 09 November 2000 | | |
| 3 | DS189 | 25 July 2001 | | |
| 4 | DS211 | 21 May 2002 | | |
| 5 | DS219 | 07 October 2002 | 22 July 2003 | |
| 6 | DS241 | 25 February 2003 | | |
| 7 | DS244 | 31 March 2003 | 15 December 2003 | |
| 8 | DS264 | 16 January 2004 | 11 August 2004 | |
| 9 | DS312 | 24 June 2005 | | |
| 10 | DS294 | 04 August 2005 | 18 April 2006 | |
| 11 | DS322 | 08 March 2006 | 09 January 2007 | |
| 12 | DS335 | 04 December 2006 | | |
| 13 | DS344 | 05 October 2007 | 30 April 2008 | |
| 14 | DS343 | 09 October 2007 | 16 July 2008 | Article 2.4 not appealed |
| 15 | DS350 | 27 June 2008 | 04 February 2009 | |
| 16 | DS383 | 11 December 2009 | | |
| 17 | DS397 | 10 August 2010 | 15 July 2011 | |
| 18 | DS402 | 29 November 2010 | | |
| 19 | DS382 | 25 March 2011 | | |
| 20 | DS404 | 07 April 2011 | | |
| 21 | DS405 | 28 October 2011 | | |
| 22 | DS422 | 08 June 2012 | | |
| 23 | DS460 | 13 February 2015 | 14 October 2015 | Article 2.4 not appealed |
| 24 | DS464 | 11 March 2016 | 07 September 2016 | |
| 25 | DS473 | 29 March 2016 | 06 October 2016 | |
| 26 | DS471 | 19 October 2016 | 11 May 2017 | |
| 27 | DS442 | 16 December 2016 | 05 September 2017 | |
| 28 | DS534 | 09 April 2019 | | |
| 29 | DS494 | 24 July 2020 | | |
| 30 | DS538 | 18 January 2021 | | panel report issued in 2021 |

Sequence of reports - Article 2.4 ADA



Annex 1E

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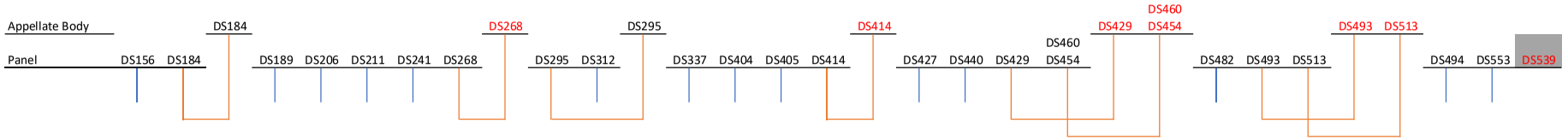
Circulation dates of panel and appellate body reports discussing Article 6.8 ADA

| No. | case number | circulation (panel) | circulation (AB) | note |
|---|---|---|---|---|
| 1 | DS156 | 24 October 2000 | | |
| 2 | DS184 | 22 January 2001 | 24 July 2001 | |
| 3 | DS189 | 25 July 2001 | | |
| 4 | DS206 | 03 May 2002 | | |
| 5 | DS211 | 21 May 2002 | | |
| 6 | DS241 | 25 February 2003 | | |
| 7 | DS268 | 07 May 2004 | 29 November 2004 | Article 6.8 not appealed |
| 8 | DS295 | 11 March 2005 | 29 November 2005 | |
| 9 | DS312 | 24 June 2005 | | |
| 10 | DS337 | 02 July 2007 | | |
| 11 | DS404 | 07 April 2011 | | |
| 12 | DS405 | 28 October 2011 | | |
| 13 | DS414 | 15 June 2012 | 18 October 2012 | Article 6.8 not appealed |
| 14 | DS427 | 02 August 2013 | | |
| 15 | DS440 | 23 May 2014 | | |
| 16 | DS429 | 17 November 2014 | 07 April 2015 | Article 6.8 not appealed |
| 17 | DS460 | 13 February 2015 | 14 October 2015 | Article 6.8 appealed conditionally and the condition was not fulfilled |
| 18 | DS482 | 21 December 2016 | | |
| 19 | DS493 | 20 July 2018 | 12 September 2019 | Article 6.8 not appealed |
| 20 | DS513 | 31 October 2018 | 10 December 2019 | Article 6.8 not appealed |
| 21 | DS494 | 24 July 2020 | | |
| 22 | DS553 | 30 November 2020 | | |
| 23 | DS539 | 21 January 2021 | | |

# Sequence of reports - Article 6.8 ADA



Annex 2

-

Tags and Uncategorized Questions

# Part 1:

# Article 2.4 ADA

**DS141 panel report**[1]

| | |
|---|---|
| Short title | EC – Bed Linen |
| Complainant | India |
| Respondent | EC |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

**DS179 panel report**[2]

| | |
|---|---|
| Short title | US – Stainless Steel |
| Complainant | Korea |
| Respondent | US |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis. The questions on Article 2.4 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

The first claim is on the matter of double conversion of currency. Korea claimed the inconsistency of this aspect with Articles 2.4.1 and 2.4 ADA. The aspect complained about by the Complainant (Korea) is the practice of the Respondent (the US) of converting the dollar amounts appearing in the invoices into won at one exchange rate and converting them back into dollars at a different exchange rate. According to Korea, this is unnecessary (as the United States could have simply used the original dollar prices in the invoices) and thus contrary to Article 2.4.1 ADA which according to Korea prohibits "unnecessary" currency conversion.

[1] WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Report of the Panel* (30 October 2000) WT/DS141/R.
[2] WTO, *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea – Report of the Panel* (22 December 2000) WT/DS179/R.

The Panel in this matter opined that it is *self evident* that currency conversions are permitted where they are required in order to effect a comparison between the export price and the normal value, so if the prices being compared are already in the same currency, the currency conversion is not "required" and thus not permissible under Article 2.4.1.[3]

There are two separate investigations done by the United States in which the unnecessary double conversion was alleged by Korea. After examining the facts of the case, the Panel concluded that the United States did not in fact do such unnecessary double conversion as alleged by Korea in one investigation, and did do so in the other investigation.[4]

As to Korea's claim that the double conversion was inconsistent with the meaning of fair comparison under Article 2.4 ADA, the panel exercised judicial economy and did not examine it.[5]

The third claim relates to the practice of "multiple averaging". Korea claimed inconsistency with Article 2.4.1, 2.4 and 2.4.2 ADA. The fact showed that the US authority divided the period of investigation for the purpose of calculating the dumping margin into two averaging period. This was done to take into account a major devaluation in Korea's currency; the division was between pre- and post-devaluation, and the authority calculated a separate weighted average dumping margin for each period. Crucially, sub-periods where dumping margins were negative were treated as sub period of zero dumping.

As to the claim of inconsistency with Article 2.4.1, to recall, the situation is where the Korean currency was depreciating. Korea argued that Article 2.4.1 only sets rules that apply to situations when the exporting country's currency has been appreciating, and it does not permit any adjustment to account for a depreciation of the exporting country's currency. The panel saw nothing in Article 2.4.1 that would prohibit a WTO member from addressing a situation arising from a currency depreciation. The panel was also of the view that, even if the requirement that a WTO member is required under that provision to take certain actions in the case of currency appreciation, still does not mean that WTO members are prohibited from taking any action to

[3] ibid para 6.11.
[4] ibid paras 6.31, 6.39, and 6.41.
[5] ibid para 6.45.

address a situation arising from a currency depreciation.[6] The panel ultimately held that the US did not act inconsistently with Article 2.4.1 ADA in this regard.[7]

Korea also argued that the averaging methodology employed by the US was inconsistent with the "fair comparison" requirement under Article 2.4 ADA because the allegations of injury by petitioners and the analysis of injury by the US authority focused on post-devaluation imports. The panel disagreed. To the panel, the consistency of a determination of dumping with the "fair comparison" requirement of Article 2.4 ADA cannot depend on how the determination is used in the context of an analysis of injury, which was governed under Article 3 ADA. To the panel, the issue raised by Korea relates not to the consistency of the calculation methodology with Article 2, but rather with Article 3.5.[8] The panel ultimately held that the US' use of multiple averaging periods was not inconsistent with the first sentence of the chapeau of Article 2.4 ADA.[9]

Korea also argued that, under Article 2.4.2 ADA, multiple averages should not be compared with multiple averages. Authorities may only either (i) compare a single weighted average normal value with a single weighted average export price, or (ii) compare individual home market transactions to individual export transactions. Korea sought support in the text: first, the article refers to *a* weighted average (it noted that the drafters chose a singular form). The article also refers to *all* comparable transactions, implying that only one average should result. The US argues on the basis of comparability: if incomparable transactions are included in the average, then the dumping margin would be based upon factors not related to dumping. An authority can, therefore, make multiple averages to ensure that comparisons are not distorted by averaging non-comparable transactions (such as transactions involving different models or transactions at different levels of trade).

The panel agrees with the US: Article 2.4.2 ADA does not prohibit multiple averaging per se, because it mandates the consideration of *comparable* transactions, so a weighted average normal value is not to be compared to a weighted average export price that includes non-comparable export transactions. The panel also rejected Korea's reference to the singular "a" in Article 2.4.2 ADA's reference to weighted average normal value. To the panel, it does not mean

[6] ibid para 6.130
[7] ibid para 6.131.
[8] ibid para 6.135.
[9] ibid para 6.136.

that a WTO member is required to compare a single weighted average normal value to a single weighted average export price even in cases where some of the export transactions are not comparable to the transactions that represent the basis for the normal value.[10] The panel, and later on also both parties, conclude that multiple averaging is not per se prohibited by Article 2.4.2 ADA.[11]

Next, the panel considered whether the devaluation in Korea's currency has indeed rendered the normal values during the pre- and post- devaluation period not comparable with each other. The panel looked to other ADA articles to obtain context that can help illuminate the meaning of Article 2.4.2 ADA. It notes that the chapeau to Article 2.4 ADA provides that the comparison shall be made "in respect of sales made at as nearly as possible the same time", implying that timing of sales may have implications on comparability.[12] But this does not mean that authorities are *obliged* to break the period of investigations into as many short periods as possible: that would effectively result in authorities being left only with the transaction-to-transaction methodology.[13]

The panel then set forth a hypothetical situation where an authority would be justified in concluding that differences in timing of sales may give rise to a problem of comparability: that in which a change in prices *and* differences in the relative weights by volume of sales at home and abroad exist[14]. In the case at hand, however, only a change in price exists: therefore, there is no permissible determination of non-comparability. The US was ultimately found to have acted inconsistently with Article 2.4.2 ADA in this regard.[15]

**DS141 Appellate Body report[16]**

| | |
|---|---|
| Short title | EC – Bed Linen |
| Complainant | India |
| Respondent | EC |

[10] ibid para 6.112.
[11] ibid para 6.114.
[12] ibid para 6.120.
[13] ibid para 6.121.
[14] An extreme scenario given by the panel is where during a substantial portion of the period of investigation, there were *no sales at all* in one of the two markets. That would result in a margin of dumping that did not reflect the situation at any given moment in the period of investigation.
[15] *US – Stainless Steel* (Report of the Panel) (n 2) para 6.125.
[16] WTO, *European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Report of the Appellate Body* (1 March 2001) WT/DS141/AB/R.

| | |
|---|---|
| Tags | zeroing (first sentence), fair comparison (compatibility with zeroing)*, fair comparison (non-original investigation)* |

The findings are summarized in the main body of the thesis.

**DS189 panel report[17]**

| | |
|---|---|
| Short title | Argentina – Ceramic Tiles |
| Complainant | EC |
| Respondent | Argentina |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

**DS211 panel report[18]**

| | |
|---|---|
| Short title | Egypt – Steel Rebar |
| Complainant | Turkey |
| Respondent | Egypt |
| Tags | fair comparison (due allowance), fair comparison (unreasonable burden) |

The findings are summarized in the main body of the thesis.

**DS219 panel report[19]**

| | |
|---|---|
| Short title | EC – Tube or Pipe Fittings |
| Complainant | Brazil |
| Respondent | EC |

[17] WTO, *Argentina – Definitive Anti-Dumping Measures on Imports of Ceramic Floor Tiles from Italy – Report of the Panel* (28 September 2001) WT/DS189/R.
[18] WTO, *Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey – Report of the Panel* (8 August 2002) WT/DS211/R.
[19] WTO, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube Or Pipe Fittings from Brazil – Report of the Panel* (7 March 2003) WT/DS219/R.

| | |
|---|---|
| Tags | fair comparison (due allowance), zeroing (first sentence) |

The findings are summarized in the main body of the thesis. The questions on Article 2.4 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

Brazil also claimed that the EC has acted inconsistently with Article 2.4.1 ADA by not converting currencies using the rate of exchange on the date of sale in all cases: only export invoice value was converted based on daily exchange rates, while the conversion of allowances was not. The panel noted that the obligations concerning currency conversions in Article 2.4.1 does not apply to all conversions made in order to calculate adjustments under that provision, but only to the comparison between the normal value and the export price (that is, it applies *after* adjustments have been made).[20] The panel found that Brazil has failed to establish that Article 2.4.1 provides a legal basis for its claim, and did not examine the merits of Brazil's claim in this regard.[21]

**DS241 panel report[22]**

| | |
|---|---|
| Short title | Argentina – Poultry Anti-Dumping Duties |
| Complainant | Brazil |
| Respondent | Argentina |
| Tags | fair comparison (due allowance), fair comparison (unreasonable burden) |

The findings are summarized in the main body of the thesis. The questions on Article 2.4 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

One claim is that the authority violated Article 2.4.2 ADA by comparing the weighted average export price with only a weighted average statistical sample of normal value: the exporters have reported all relevant domestic sales data, yet the Argentinian authority did not take into account all domestic sales and only takes a statistical sample. This, according to the Complainant, is a case of an improper use of weighted average normal value. The panel looked to another ADA

[20] ibid para 7.199.
[21] ibid para 7.200.
[22] WTO, *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil – Report of the Panel* (22 April 2003) WT/DS241/R.

article, Article 2.2.1, to derive the meaning of normal value. Article 2.2.1 stated that domestic sales may be disregarded in determining normal value only if certain conditions are met.[23] The panel determined that "a weighted average normal value" is a weighted average of *all* domestic sales other than those which may be disregarded under Article 2.2.1 ADA. Thus, according to the panel, normal value should be established by reference to all domestic sales of the like product in the ordinary course of trade.[24] Since the Argentinian authority established weighted average normal values on the basis of statistical samples of domestic sales transaction instead of all domestic sales transactions (other than those it was entitled to exclude under Article 2.2.1 ADA), the panel held that the Argentinian authority has violated Article 2.4.2 ADA.[25]

**DS219 Appellate Body report[26]**

| | |
|---|---|
| Short title | EC – Tube or Pipe Fittings |
| Complainant | Brazil |
| Respondent | EC |
| Tags | |

This appeal did not entail an extensive discussion on claims relating to Article 2.4 ADA.

At the appellate stage, Brazil did argue that under Article 2.4.2 ADA, the EC could not have based its dumping analysis on the export prices relating to the period after the devaluation only. As the discussion on the article directly claimed (Article VI GATT and Article 1 ADA) has resolved Brazil's claim regarding the impact of the currency devaluation on the dumping determination, the Appellate Body did not consider it necessary to make a finding on the argument on Article 2.4.2 ADA.[27]

**DS244 panel report[28]**

[23] ibid para 7.272.
[24] ibid.
[25] ibid para 7.275.
[26] WTO, *European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil – Report of the Appellate Body* (22 July 2003) WT/DS219/AB/R.
[27] ibid paras 83-4.
[28] WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan – Report of the Panel* (14 August 2003) WT/DS244/R.

| | |
|---|---|
| Short title | US – Corrosion-Resistant Steel Sunset Review |
| Complainant | Japan |
| Respondent | US |
| Tags | fair comparison (non-original investigation), fair comparison (compatibility with zeroing) |

The findings are summarized in the main body of the thesis.

**DS244 Appellate Body report[29]**

| | |
|---|---|
| Short title | US – Corrosion-Resistant Steel Sunset Review |
| Complainant | Japan |
| Respondent | US |
| Tags | fair comparison (non-original investigation), fair comparison (compatibility with zeroing) |

The findings are summarized in the main body of the thesis.

**DS264 panel report[30]**

| | |
|---|---|
| Short title | US – Softwood Lumber V |
| Complainant | Canada |
| Respondent | US |
| Tags | fair comparison (due allowance), zeroing (first sentence) |

The findings are summarized in the main body of the thesis. The questions on Article 2.4 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

[29] WTO, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan – Report of the Appellate Body* (15 December 2003) WT/DS244/AB/R.
[30] WTO, *United States – Final Dumping Determination on Softwood Lumber from Canada – Report of the Panel* (13 April 2004) WT/DS264/R.

A claim related to Article 2.4 ADA was the matter of zeroing under Article 2.4.2 ADA. The facts at hand show that the US authority engages in a practice called "multiple averaging", in establishing the dumping margin. Multiple averaging is a subset of the weighted average-to-weighted average method[31] by which the authority sub-divides the product into groups first, and then conduct the weighted average-to-weighted average comparison on each group. In the case at hand, the authority engaged in multiple averaging on the basis of differing physical characteristic of the product. According to this panel, multiple averaging is *per se* allowed under the ADA for several reasons.[32]

First, the panel conducted a textual analysis, focusing on the word "comparable": to the panel, 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, but only to comparable export transactions.[33] Further, the panel considers itself as treaty interpreters who are obliged to assume that when the drafters included language in the treaty, they intended that language to have some meaning. To the panel, the addition of the word "all" also "plays an important role in the provision by ensuring that WTO members do not exclude relevant transactions from their comparisons."[34]

**DS264 Appellate Body report[35]**

| | |
|---|---|
| Short title | US – Softwood Lumber V |
| Complainant | Canada |
| Respondent | US |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

**DS312 panel report[36]**

[31] Besides the weighted average-to-weighted average method, the first sentence Article 2.4 provides for one other method, namely the transaction-to-transaction method.
[32] *US – Softwood Lumber V* (Report of the Panel) (n 30) para 7.202.
[33] ibid para 7.203.
[34] ibid para 7.204.
[35] WTO, *United States – Final Dumping Determination on Softwood Lumber from Canada – Report of the Appellate Body* (11 August 2004) WT/DS264/AB/R.
[36] WTO, *Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia – Report of the Panel* (28 October 2005) WT/DS312/R.

| | |
|---|---|
| Short title | Korea – Certain Paper |
| Complainant | Indonesia |
| Respondent | Korea |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

**DS294 panel report[37]**

| | |
|---|---|
| Short title | US – Zeroing (EC) |
| Complainant | EC |
| Respondent | US |
| Tags | fair comparison (non-original investigation), fair comparison (due allowance), fair comparison (compatibility with zeroing), zeroing (first sentence), zeroing (second sentence)* |

The findings are summarized in the main body of the thesis.

**DS322 panel report[38]**

| | |
|---|---|
| Short title | US – Zeroing (Japan) |
| Complainant | Japan |
| Respondent | US |
| Tags | zeroing (first sentence), zeroing (second sentence), fair comparison (compatibility with zeroing), fair comparison (non-original investigation) |

The findings are summarized in the main body of the thesis.

[37] WTO, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Report of the Panel* (31 October 2005) WT/DS294/R.
[38] WTO, *United States – Measures Relating to Zeroing and Sunset Reviews – Report of the Panel* (20 September 2006) WT/DS322/R.

**DS294 Appellate Body report**[39]

| | |
|---|---|
| Short title | US – Zeroing (EC) |
| Complainant | EC |
| Respondent | US |
| Tags | fair comparison, fair comparison (due allowance), zeroing (second sentence) |

The findings are summarized in the main body of the thesis.

**DS335 panel report**[40]

| | |
|---|---|
| Short title | US – Shrimp (Ecuador) |
| Complainant | Ecuador |
| Respondent | US |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

**DS322 Appellate Body report**[41]

| | |
|---|---|
| Short title | US – Zeroing (Japan) |
| Complainant | Japan |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing), zeroing (first sentence), zeroing (second sentence), fair comparison (non-original investigation) |

The findings are summarized in the main body of the thesis.

[39] WTO, *United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Report of the Appellate Body* (18 April 2006) WT/DS294/AB/R.
[40] WTO, *United States – Anti-Dumping Measure on Shrimp from Ecuador – Report of the Panel* (30 January 2007) WT/DS335/R.
[41] WTO, *United States – Measures Relating to Zeroing and Sunset Reviews – Report of the Appellate Body* (9 January 2007) WT/DS322/AB/R.

**DS344 panel report**[42]

| | |
|---|---|
| Short title | US – Stainless Steel (Mexico) |
| Complainant | Mexico |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing), zeroing (first sentence), zeroing (second sentence), fair comparison (non-original investigation) |

The findings are summarized in the main body of the thesis.

**DS343 panel report**[43]

| | |
|---|---|
| Short title | US – Shrimp (Thailand) |
| Complainant | Thailand |
| Respondent | US |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

**DS344 Appellate Body report**[44]

| | |
|---|---|
| Short title | US – Stainless Steel (Mexico) |
| Complainant | Mexico |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing), zeroing (second sentence) |

The findings are summarized in the main body of the thesis.

[42] WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Panel* (20 December 2007) WT/DS344/R.
[43] WTO, *United States – Measures Relating to Shrimp from Thailand – Report of the Panel* (29 February 2008) WT/DS343/R.
[44] WTO, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico – Report of the Appellate Body* (30 April 2008) WT/DS344/AB/R.

**DS350 panel report**[45]

| | |
|---|---|
| Short title | US – Continued Zeroing |
| Complainant | EC |
| Respondent | US |
| Tags | zeroing (first sentence), zeroing (second sentence)* |

The findings are summarized in the main body of the thesis. The questions on Article 2.4 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

**DS343 Appellate Body report**[46]

| | |
|---|---|
| Short title | US – Shrimp (Thailand) |
| Complainant | Thailand |
| Respondent | US |
| Tags | - |

The claims pertaining to Article 2.4 ADA was not made a subject of appeal.

**DS350 Appellate Body report**[47]

| | |
|---|---|
| Short title | US – Continued Zeroing |
| Complainant | EC |
| Respondent | US |
| Tags | zeroing (second sentence)* |

The findings are summarized in the main body of the thesis.

[45] WTO, *United States – Continued Existence and Application of Zeroing Methodology – Report of the Panel* (1 October 2008) WT/DS350/R.
[46] WTO, *United States – Measures Relating to Shrimp from Thailand – Report of the Appellate Body* (16 July 2008) WT/DS343/AB/R.
[47] WTO, *United States – Continued Existence and Application of Zeroing Methodology – Report of the Appellate Body* (4 February 2009) WT/DS350/AB/R.

**DS383 panel report**[48]

| | |
|---|---|
| Short title | US – Anti-Dumping Measures on PET Bags |
| Complainant | Thailand |
| Respondent | US |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

**DS397 panel report**[49]

| | |
|---|---|
| Short title | EC – Fasteners (China) |
| Complainant | China |
| Respondent | EC |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

**DS402 panel report**[50]

| | |
|---|---|
| Short title | US – Zeroing (Korea) |
| Complainant | Korea |
| Respondent | US |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

[48] WTO, *United States – Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand – Report of the Panel* (22 January 2010) WT/DS383/R.
[49] WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Panel* (3 December 2010) WT/DS397/R.
[50] WTO, *United States – Use of Zeroing in Anti-Dumping Measures Involving Products from Korea – Report of the Panel* (18 January 2011) WT/DS402/R.

**DS382 panel report**[51]

| | |
|---|---|
| Short title | US – Orange Juice (Brazil) |
| Complainant | Brazil |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing) |

The findings are summarized in the main body of the thesis.

**DS404 panel report**[52]

| | |
|---|---|
| Short title | US – Shrimp (Viet Nam) |
| Complainant | Viet Nam |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing) |

The findings are summarized in the main body of the thesis.

**DS397 Appellate Body report**[53]

| | |
|---|---|
| Short title | EC – Fasteners (China) |
| Complainant | China |
| Respondent | EC |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

[51] WTO, *United States – Anti-Dumping Administrative Reviews and Other Measures Related to Imports of Certain Orange Juice from Brazil – Report of the Panel* (25 March 2011) WT/DS382/R.
[52] WTO, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Report of the Panel* (11 July 2011) WT/DS404/R.
[53] WTO, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Report of the Appellate Body* (15 July 2011) WT/DS397/AB/R.

**DS405 panel report**[54]

| | |
|---|---|
| Short title | EC – Footwear (China) |
| Complainant | China |
| Respondent | EU |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis. The questions on Article 2.4 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

China claims that the EC has acted inconsistently with Article 2.4 ADA (among others). This claim arose from the selection, by the authority, of Brazil as the analogue country to account for China's non-market economy. China asserted that the "fair comparison" obligation in Article 2.4 ADA is independent and overarching. It quoted the Appellate Body on the DS264 case in stating that the scope of the fair comparison obligation is not exhausted by the general subject matter expressly addressed by paragraph 4, but rather informs all of Article 2. The EC argues that Article 2.4 ADA does not apply to the selection of analogue country. It is only once normal value has been determined, that the fair comparison obligation of Article 2.4 becomes operative. The EC points to the wording of that article that it contends assumes that a normal value already exists. According to the EC, the wording that assumes that a normal value already exists also implies that the scope or Article 2.4 ADA is limited.

The panel looked at Article 2.4 ADA and noted that nothing in that article suggests that the fair comparison requirement provides guidance with respect to the determination of the component elements (namely, export price and normal value).[55] It notes as well that the requirement to make a fair comparison in Article 2.4 ADA logically presupposes that normal value and export price have already been established.[56] The present panel cited the panel report on the case DS211 in stating that a straightforward consideration of the ordinary meaning of the article confirms that it has to do not with the basis for and basic establishment of the export price and normal value, but

[54] WTO, *European Union – Anti-Dumping Measures on Certain Footwear from China – Report of the Panel* (28 October 2011) WT/DS405/R.
[55] ibid para 7.263.
[56] ibid.

with the nature of the comparison of export price and normal value. The present panel also reasoned that, to require consideration of whether a "fair comparison" will result in the process of determining normal value introduces a circularity into the analysis, which is untenable: therefore Article 2.4 is intended precisely to deal with problems that arise in the comparison as a result of, among others, how normal value was established.[57] The present panel ultimately held that China has failed to demonstrate that the fair comparison requirement of Article 2.4 ADA established a general requirement of "fairness" which applies, *inter alia*, to the selection of an analogue country.[58]

**DS422 panel report[59]**

| | |
|---|---|
| Short title | US – Shrimp and Sawblades |
| Complainant | China |
| Respondent | US |
| Tags | zeroing (first sentence) |

The findings are summarized in the main body of the thesis.

**DS460 panel report[60]**

| | |
|---|---|
| Short title | China – HP – SSST (EU) |
| Complainant | EU |
| Respondent | China |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

[57] ibid para 7.264.
[58] ibid para 7.266.
[59] WTO, *United States – Anti-Dumping Measures on Certain Shrimp and Diamond Sawblades from China – Report of the Panel* (8 June 2012) WT/DS422/R.
[60] WTO, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SST") from the European Union – Report of the Panel* (13 February 2015) WT/DS460/R.

**DS460 Appellate Body report[61]**

| | |
|---|---|
| Short title | China – HP – SSST (EU) |
| Complainant | EU |
| Respondent | China |
| Tags | - |

The aspect relating to Article 2.4 ADA was not part of the appeal and therefore the report does not contain a discussion on Article 2.4 ADA.

**DS464 panel report[62]**

| | |
|---|---|
| Short title | US – Washing Machines |
| Complainant | Korea |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing), zeroing (second sentence), resort to second sentence Article 2.4.2 |

The findings are summarized in the main body of the thesis.

**DS473 panel report[63]**

| | |
|---|---|
| Short title | EU – Biodiesel |
| Complainant | Argentina |
| Respondent | EU |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

[61] WTO, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SST") from the European Union – Report of the Appellate Body* (14 October 2015) WT/DS460/AB/R.
[62] WTO, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Report of the Panel* (11 March 2016) WT/DS464/R.
[63] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina – Report of the Panel* (29 March 2016) WT/DS473/R.

**DS464 Appellate Body report[64]**

| | |
|---|---|
| Short title | US – Washing Machines |
| Complainant | Korea |
| Respondent | US |
| Tags | zeroing (second sentence), fair comparison (compatibility with zeroing), resort to second sentence Article 2.4.2 |

The findings are summarized in the main body of the thesis.

**DS473 Appellate Body report[65]**

| | |
|---|---|
| Short title | EU – Biodiesel |
| Complainant | Argentina |
| Respondent | EU |
| Tags | fair comparison (due allowance) |

The aspect of "fair comparison" under Article 2.4 ADA was made part of the appeal, but ultimately the Appellate Body found it unnecessary to rule on the appeal on the panel's ruling on Article 2.4 ADA. The Appellate Body's reservations about the panel's view that there is a "general proposition" is summarized in the main body of the thesis.

**DS471 panel report[66]**

| | |
|---|---|
| Short title | US – Anti-Dumping Methodologies (China) |
| Complainant | China |
| Respondent | US |
| Tags | zeroing (second sentence), resort to second sentence Article 2.4.2, resort to second sentence Article 2.4.2 |

[64] WTO, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea – Report of the Appellate Body* (7 September 2016) WT/DS464/AB/R.
[65] WTO, *European Union – Anti-Dumping Measures on Biodiesel from Argentina – Report of the Appellate Body* (6 October 2016) WT/DS473/AB/R.
[66] WTO, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China – Report of the Panel* (19 October 2016) WT/DS471/R.

The findings are summarized in the main body of the thesis.

**DS442 panel report[67]**

| | |
|---|---|
| Short title | EU – Fatty Alcohols (Indonesia) |
| Complainant | Indonesia |
| Respondent | EU |
| Tags | fair comparison (due allowance) |

The findings are summarized in the main body of the thesis.

**DS471 Appellate Body report[68]**

| | |
|---|---|
| Short title | US – Anti-Dumping Methodologies (China) |
| Complainant | China |
| Respondent | US |
| Tags | resort to second sentence Article 2.4.2 |

The findings are summarized in the main body of the thesis.

**DS442 Appellate Body report[69]**

| | |
|---|---|
| Short title | EU – Fatty Alcohols (Indonesia) |
| Complainant | Indonesia |
| Respondent | EU |
| Tags | fair comparison (due allowance) |

[67] WTO, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia – Report of the Panel* (16 December 2016) WT/DS442/R.
[68] WTO, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China – Report of the Appellate Body* (11 May 2017) WT/DS471/AB/R.
[69] WTO, *European Union – Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia – Report of the Appellate Body* (5 September 2017) WT/DS442/AB/R.

The findings are summarized in the main body of the thesis.

**DS534 panel report[70]**

| | |
|---|---|
| Short title | US – Differential Pricing Methodology |
| Complainant | Canada |
| Respondent | US |
| Tags | fair comparison (compatibility with zeroing), zeroing (second sentence), resort to second sentence Article 2.4.2 |

The findings are summarized in the main body of the thesis.

**DS494 panel report[71]**

| | |
|---|---|
| Short title | EU – Cost Adjustment Methodologies II (Russia) |
| Complainant | Russia |
| Respondent | EU |
| Tags | fair comparison (non-original investigation) |

The findings are summarized in the main body of the thesis.

[70] WTO, *United States – Anti-Dumping Measures Applying Differential Pricing Methodology to Softwood Lumber from Canada – Report of the Panel* (9 April 2019) WT/DS534/R.
[71] WTO, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint) – Report of the Panel* (24 July 2020) WT/DS494/R.

# Part 2:

# Article 6.8 ADA

### DS156 panel report[72]

| | |
|---|---|
| Short title | Guatemala – Cement II |
| Complainant | Mexico |
| Respondent | Guatemala |
| Tags | level of duty to cooperate |

The findings are summarized in the main body of the thesis.

### DS184 panel report[73]

| | |
|---|---|
| Short title | US – Hot-Rolled Steel |
| Complainant | Japan |
| Respondent | US |
| Tags | level of duty to cooperate, reasonable period |

The findings are summarized in the main body of the thesis.

### DS184 Appellate Body report[74]

| | |
|---|---|
| Short title | US – Hot-Rolled Steel |
| Complainant | Japan |
| Respondent | US |
| Tags | level of duty to cooperate, reasonable period |

[72] WTO, *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico – Report of the Panel* (24 October 2000) WT/DS156/R.
[73] WTO, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Panel* (28 February 2001) WT/DS184/R.
[74] WTO, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan – Report of the Appellate Body* (24 July 2001) WT/DS184/AB/R.

The findings are summarized in the main body of the thesis.

**DS189 panel report[75]**

| | |
|---|---|
| Short title | Argentina – Ceramic Tiles |
| Complainant | European Community |
| Respondent | Argentina |
| Tags | level of duty to cooperate |

The findings are summarized in the main body of the thesis. The questions on Article 6.8 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

In this case, the Complainant (the EC) argued that the Argentinian authority considered the information pertaining normal value and export price provided by Italian exporters on equal footing with information from other sources such as the petitioners and importers, and chose to rely on the information from such other sources. To the EC, the authority cannot pick and choose data from different sources in the establishment of the dumping margin, since that would render Article 6.8 and Annex II totally redundant. The EC also argued that paragraph 7 of Annex II explicitly recognises the hierarchy between primary and secondary sources, and that the primary source is the normal value and export price information supplied by the exporters concerned. The authority may only resort to other sources when the three conditions in Article 6.8 ADA are fulfilled. The EC also argued that the Argentinian authority never informed the exporters that their responses had been rejected, nor did it explain why the information was rejected, as required by paragraph 6 Annex II ADA.

Argentina advanced four bases for its decision to disregard certain information submitted by the exporters and to resort to the use of facts available. First, Argentina asserts that the exporters failed to provide complete non-confidential summaries of confidential information submitted by them, as required by Article 6.5.1 ADA. Second, Argentina contends that the exporters failed to provide sufficient documentation in support of the information provided in their questionnaire responses. Third, Argentina contends that the exporters failed to comply with the formal requirements of the questionnaire, such as requirements to translate materials into Spanish and to

[75] *EC – Tube or Pipe Fittings* (Report of the Panel) (n 19).

express value in US$. Finally, Argentina contends that the exporters failed to provide requested information within a reasonable period.

The panel noted that the authority failed to provide any evaluation of the facts on the record that could have formed the basis for its apparent decision to disregard in large part the information provided by the exporters. The panel considered that on that basis alone it could have reached the conclusion that the authority failed to perform an objective and unbiased evaluation of the facts, however for the sake of completeness it went on to discuss Argentina's arguments.[76]

As to the argument based on confidentiality, the panel concluded that the purpose of the non-confidential summaries provided for in Article 6.5.1 is to inform the interested parties so as to enable them to defend their interests, and not to enable the authorities to arrive at public conclusions. The facts did not show that the exporters did not respond fully to the authority's request for the declassification of the confidential information and failed to provide adequate non-confidential summaries thereof. Instead, it was found that the exporters did provide such detailed non-confidential summaries and declassified most of the confidential information concerning normal value and export price. Thus the authority was not justified in law of in fact in disregarding in large part the information from the exporters for reasons relating to the confidentiality of the information.[77] The panel also found that the authority never informed the exporters that their information was going to be rejected for this reason. Neither were the reasons for the rejection given in any published determinations.[78]

As to the argument based on the lack of documentation, the panel looked to Article 6.1 ADA as context. It provided that interested parties should be given notice of the information which the authorities require. Therefore, an investigating authority may not resort to facts available due to failure of a party to provide information that was not clearly requested.[79] The facts showed that the questionnaire was ambiguous regarding documentary evidence, and the panel held that the authority was not justified in disregarding in large part the information supplied by the exporters in this regard.[80] The panel also found that the authority never informed the exporters that their

[76] ibid para 6.92.
[77] ibid para 6.49.
[78] ibid para 6.50.
[79] ibid para 6.55.
[80] ibid para 6.66.

information was going to be rejected for this reason, and the exporters were not provided an opportunity to offer further explanations. Neither were the reasons for the rejection given in any published determinations.[81]

As to the argument based on the failure to comply with the formal requirements of the questionnaire, the panel looked at the facts. There was only one exporter which provided certain information in Italian lire rather than USD, and even then it provided the relevant exchange rates together with the information.[82] On the translation, the panel found that what was not translated were certain lines of the balance sheets. On the exporters which did not provide information under certain annexes of the questionnaire, the panel found that the questionnaire explicitly allowed the exporters not to provide such information if sufficient domestic sales exist. The panel concluded that unbiased and objective evaluation of these facts would have led the authority to the conclusion that these omissions do not amount to a refusal to provide necessary information, nor that exporters concerned can be considered to have significantly impeded the investigation.[83] The panel also found that the authority never informed the exporters that their information was going to be rejected for this reason, and the exporters were not provided an opportunity to offer further explanations. Neither were the reasons for the rejection given in any published determinations.[84]

The panel concluded generally that the authority acted inconsistently with Article 6.8 ADA in disregarding completely the exporters' information concerning export price and disregarded in large part the exporters' normal value information.[85] The authority also acted inconsistently with Article 6.8 and paragraph 6 Annex II by failing to inform the exporters why certain information was not accepted, failing to provide the exporters an opportunity to provide further explanations, failing to give the reasons for rejection in any published determinations.[86]

**DS206 panel report[87]**

| | |
|---|---|
| Short title | US – Steel Plate |

[81] ibid para 6.67.
[82] ibid para 6.70.
[83] ibid para 6.72.
[84] ibid para 6.74.
[85] ibid para 6.80.
[86] ibid.
[87] WTO, *United States – Anti-Dumping and Countervailing Measures on Steel Plate from India – Report of the Panel* (28 June 2002) WT/DS206/R.

| | |
|---|---|
| Complainant | India |
| Respondent | US |
| Tags | |

The questions on Article 6.8 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

The question at issue is whether a conclusion that some information submitted fails to satisfy the criteria of paragraph 3, and thus may be rejected, can in any case justify a decision to reject other information which, if considered in isolation, would satisfy the criteria pf paragraph 3. The panel considered that the answer is "[y]es, in some cases, but the result in any given case will depend on the specific facts and circumstances of the investigation at hand."[88]

The panel then looked at the facts of the case to see whether the criteria in paragraph 3 is indeed satisfied. The panel was of the view that, while certain of the information submitted was found to be unverifiable, or not timely submitted, or to have other flaws which made it difficult to use, no such conclusions are set forth with respect to the disputed information.[89] The panel concluded that the US authority acted inconsistently with Article 6.8 and paragraph 3 Annex II ADA in concluding, with respect to US sales price information, that necessary information was not provided and relying entirely on facts available in determining the dumping margin.[90]

Next, the panel handled the "as such" claim. India argued that US law requires resort to facts available in circumstances in which Article 6.8 and paragraph 3 Annex II ADA do not permit information submitted to be disregarded and determinations be based on facts available instead. A straightforward reading of the relevant laws by the panel, together with a review of court cases submitted to the panel by the parties, led the panel to conclude that while the US law permits a decision on the application of facts available that is inconsistent with Article 6.8 and paragraph 3 Annex II ADA, it does not require such a decision in any case.[91] The panel concluded that the US

[88] ibid para 7.62.
[89] ibid para 7.78.
[90] ibid para 7.79.
[91] ibid para 7.99.

laws cited by India are not, on their face, inconsistent with the US' obligations under Articles 6.8 and paragraph 3 of Annex II ADA.[92]

**DS211 panel report[93]**

| | |
|---|---|
| Short title | Egypt – Steel Rebar |
| Complainant | Turkey |
| Respondent | Egypt |
| Tags | level of duty to cooperate |

The findings are summarized in the main body of the thesis.

**DS241 panel report[94]**

| | |
|---|---|
| Short title | Argentina – Poultry Anti-Dumping Duties |
| Complainant | Brazil |
| Respondent | Argentina |
| Tags | level of duty to cooperate, reasonable period |

The findings are summarized in the main body of the thesis.

**DS268 panel report[95]**

| | |
|---|---|
| Short title | US – Oil Country Tubular Goods Sunset Reviews |
| Complainant | Argentina |
| Respondent | US |
| Tags | |

[92] ibid para 7.100.
[93] *Egypt – Steel Rebar* (Report of the Panel) (n 18).
[94] *Argentina – Poultry Anti-Dumping Duties* (Report of the Panel) (n 22).
[95] WTO, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Report of the Panel* (16 July 2004) WT/DS268/R.

The questions on Article 6.8 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

In this case, the Complainant (Argentina) contended that the US authority's conduct of an expedited sunset review violated Article 6.8 and Annex II ADA by applying facts available to one of the Argentinian exporters (Siderca), on the ground that the exporter had failed the adequacy test of US law that triggered the expedited sunset review. The US argued that its authority did not apply facts available with respect to Siderca: it applied facts available for Argentina on an order-wide basis for the likelihood determination.

In this case, Siderca had zero per cent share in the total imports of the subject product, therefore the expedited sunset review on the basis of facts available was conducted. The panel noted that the legal basis regarding the information to be used by the authority in an expedited sunset review where facts available are used[96] confirms that the authority applied facts available on an order-wide basis and not solely on Siderca.[97] The likelihood determination involved other Argentinian exporters, aside from Siderca, that had exported the subject product to the US during the relevant period. If anything, the panel is of the view that the impact of facts available was on these other Argentinian exporters, because by using facts available, the authority reached a likelihood determination for all Argentine exporters.[98] The panel ultimately found that the US authority did not act inconsistently with Article 6.8 and Annex II ADA in its use of facts available in this case.[99]

**DS268 Appellate Body report[100]**

| | |
|---|---|
| Short title | US – Oil Country Tubular Goods Sunset Reviews |
| Complainant | Argentina |
| Respondent | US |

[96] Section 351.308(f) USDOC Regulations, which reads in relevant part as follows:

Where the Secretary determines to issue final result of sunset review on the basis of facts available, the Secretary will normally rely on: (1) Calculated countervailing duty rates or dumping margins, as applicable, from prior Department determinations; and (2) Information contained in parties' substantive responses to the Notice of Initiation

[97] *US – Oil Country Tubular Goods Sunset Reviews* (Report of the Panel) (n 95) para 7.241.

[98] ibid.

[99] ibid para 7.245.

[100] WTO, *United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Report of the Appellate Body* (29 November 2004) WT/DS268/AB/R.

| | |
|---|---|
| Tags | |

The claim regarding Article 6.8 ADA was not made part of the appeal, and therefore the report did not contain discussions on that provision.

**DS295 panel report[101]**

| | |
|---|---|
| Short title | Mexico – Anti-Dumping Measures on Rice |
| Complainant | US |
| Respondent | Mexico |
| Tags | level of duty to cooperate, unexamined or unknown producers/exporters |

The findings are summarized in the main body of the thesis.

**DS312 panel report[102]**

| | |
|---|---|
| Short title | Korea – Certain Paper |
| Complainant | Indonesia |
| Respondent | Korea |
| Tags | level of duty to cooperate, reasonable period |

The findings are summarized in the main body of the thesis.

**DS295 Appellate Body report[103]**

| | |
|---|---|
| Short title | Mexico – Anti-Dumping Measures on Rice |
| Complainant | US |
| Respondent | Mexico |
| Tags | level of duty to cooperate, unexamined or unknown producers/exporters |

[101] WTO, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Report of the Panel* (6 June 2005) WT/DS295/R.
[102] *Korea – Certain Paper* (Report of the Panel) (n 36).
[103] WTO, *Mexico – Definitive Anti-Dumping Measures on Beef and Rice – Report of the Appellate Body* (29 November 2005) WT/DS295/AB/R.

The findings are summarized in the main body of the thesis.

**DS337 panel report[104]**

| | |
|---|---|
| Short title | EC – Salmon (Norway) |
| Complainant | Norway |
| Respondent | EC |
| Tags | reasonable period, unexamined or unknown producers/exporters, threshold issue - reliance on facts available |

The findings are summarized in the main body of the thesis.

**DS404 panel report[105]**

| | |
|---|---|
| Short title | US – Shrimp (Viet Nam) |
| Complainant | Viet Nam |
| Respondent | US |
| Tags | unexamined or unknown producers/exporters, threshold issue - reliance on facts available |

The findings are summarized in the main body of the thesis.

**DS405 panel report[106]**

| | |
|---|---|
| Short title | EU – Footwear (China) |
| Complainant | China |
| Respondent | EU |
| Tags | |

[104] WTO, *European Communities –Anti-Dumping Measure on Farmed Salmon from Norway – Report of the Panel* (16 November 2007) WT/DS337/R.
[105] *US – Shrimp (Viet Nam)* (Report of the Panel) (n 52).
[106] *EU – Footwear (China)* (n 54).

The questions on Article 6.8 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

In this case, the Complainant (China) claimed that the EU acted inconsistently with Article 6.8 ADA in an expiry review by failing to apply facts available to sampled EU producers who provided incorrect and misleading information or did not provide necessary information in their responses to the injury questionnaire. While China acknowledged that the word "may" in Article 6.8 allows and does not compel the resort to facts available, it also argued that the permissive language presumes that an authority would make its evaluation in an objective and impartial manner, so if an authority does not apply facts available to a domestic producer when it would have done so in the case of an exporter, then Article 6.8 is breached.

The panel was of the view that Article 6.8 merely allows the authority to make determinations on the basis of facts available, as it was evident that the use of the term "may" precludes the view that an authority is required to use facts available, even if the conditions in that provision are satisfied.[107] As to China's argument linking the use of facts available to the obligation of fairness and impartiality, the panel also disagreed. In this argument, China pointed to the "practice" of the EU authority in applying facts available to exporters, essentially arguing that the EU discriminates in the application of facts available between exporters on the one hand and domestic producers on the other hand. To the panel, the situation of the two groups (exporter and domestic producers) are different: information from exporters is used in the calculation of dumping margins, which is generally undertaken on an individual basis, while information from domestic producers is relevant to a determination of injury to the industry as a whole, not to the individual producer.[108] Therefore, even assuming there were such a practice as China pointed out, the panel did not agree that not applying the identical practice to domestic producers demonstrates a violation of Article 6.8 ADA.[109] The panel concluded that China failed to demonstrate that the EU acted inconsistently with Article 6.8 ADA in failing to apply facts available in the review at issue.[110]

[107] ibid para 7.816.
[108] ibid para 7.818.
[109] ibid.
[110] ibid para 7.821.

**DS414 panel report[111]**

| | |
|---|---|
| Short title | China – GOES |
| Complainant | US |
| Respondent | China |
| Tags | unexamined or unknown producers/exporters |

The findings are summarized in the main body of the thesis.

**DS414 Appellate Body report[112]**

| | |
|---|---|
| Short title | China – GOES |
| Complainant | US |
| Respondent | China |
| Tags | |

Claims regarding Article 6.8 ADA were not made part of the appeal, and therefore the report does not contain discussions of that provision.

**DS427 panel report[113]**

| | |
|---|---|
| Short title | China – Broiler Products |
| Complainant | US |
| Respondent | China |
| Tags | unexamined or unknown producers/exporters |

The findings are summarized in the main body of the thesis.

[111] WTO, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Report of the Panel* (15 June 2012) WT/DS414/R.
[112] WTO, *China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States – Report of the Appellate Body* (18 October 2012) WT/DS414/AB/R.
[113] WTO, *China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States – Report of the Panel* (2 August 2013) WT/DS427/R.

**DS440 panel report[114]**

| | |
|---|---|
| Short title | China – Autos (US) |
| Complainant | US |
| Respondent | China |
| Tags | unexamined or unknown producers/exporters |

The findings are summarized in the main body of the thesis.

**DS429 panel report[115]**

| | |
|---|---|
| Short title | US – Shrimp II (Viet Nam) |
| Complainant | Viet Nam |
| Respondent | US |
| Tags | threshold issue - reliance on facts available |

The findings are summarized in the main body of the thesis.

**DS454 panel report[116]**

**DS460 panel report[117]**

| | |
|---|---|
| Short title | China – HP-SSST (EU) |
| Complainant | EU and Japan |
| Respondent | China |
| Tags | unexamined or unknown producers/exporters |

The findings are summarized in the main body of the thesis.

[114] WTO, *China – Anti-Dumping and Countervailing Duty Measures on Certain Automobiles from the United States – Report of the Panel* (23 May 2014) WT/DS440/R.
[115] WTO, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Report of the Panel* (17 November 2014) WT/DS429/R.
[116] WTO, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan – Report of the Panel* (13 February 2015) WT/DS454/R.
[117] *China – HP – SSST (EU)* (Report of the Panel) (n 60).

**DS429 Appellate Body report[118]**

| | |
|---|---|
| Short title | US – Shrimp II (Viet Nam) |
| Complainant | Viet Nam |
| Respondent | US |
| Tags | |

Claims regarding Article 6.8 ADA were not made part of the appeal, so the report does not contain discussions of that provision.

**DS460 Appellate Body report[119]**

| | |
|---|---|
| Short title | China – HP-SSST (EU) |
| Complainant | EU and Japan |
| Respondent | China |
| Tags | |

In this case, the EU's appeal on Article 6.8 and paragraphs 3 and 6 Annex II ADA was conditional upon the Appellate Body reversing the panel's finding on the claim under another provision (Article 6.7 and paragraph 7 Annex I). The Appellate Body did not reverse that finding of the panel's, and the conditional appeal was not addressed.

**DS482 panel report[120]**

| | |
|---|---|
| Short title | Canada – Welded Pipe |
| Complainant | Chinese Taipei |
| Respondent | Canada |
| Tags | level of duty to cooperate |

[118] WTO, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam – Report of the Appellate Body* (7 April 2015) WT/DS429/AB/R.
[119] *China – HP – SSST (EU)* (Report of the Appellate Body) (n 61).
[120] WTO, *Canada – Anti-Dumping Measures on Imports of Certain Carbon Steel Welded Pipe from the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu – Report of the Panel* (21 December 2016) WT/DS482/R.

The findings are summarized in the main body of the thesis. The questions on Article 6.8 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

Chinese Taipei's second claim under Article 6.8 pertains the amount of duty for imports of new product models or types from two investigated and cooperative Chinese Taipei exporters using facts available. The amount of duty was determined as the difference between the export price and the export price increased by 54.2% (which is the same as that used for establishing the facts available duty rate for "all other exporters"). The panel noted Canada's acknowledgment that the exporters fully cooperated in the original investigation, and its authority was yet to investigate new product models. The panel remarked that, therefore, there is no basis for any determination that the Chinese Taipei exporters failed to provide any necessary information requested by the authority, thus failing the threshold of the use of facts available under Article 6.8 or Annex II ADA.[121]

Canada put forth several panel reports (*China – Autos (US), China – Broiler Products, China -GOES*) which, it argued, suggests that an authority may resort to facts available in situations where they act to the best of their ability to seek out all relevant information from interested parties. To the present panel, none of these cases support Canada's argument, because none of these cases allowed the use of facts available outside of the conditions under Article 6.8 ADA.[122] For instance, in *China – GOES,* the panel in that case remarked that although there is indeed a gap in the ADA regarding how dumping margins should be calculated for unknown exporter, Article 6.8 and Annex II are very explicit regarding the conditions that must exist before an authority may resort to facts available. The existence of a lacuna in the ADA does not mean that the conditions should be ignored in order to fill the gap.[123] Further, in *China – Autos (US),* although the panel in that case accepted that facts available could potentially be used to determine the all others rate for unknown exporters, the same panel also found that the authority had failed to comply with paragraph 1 Annex II in failing to specify in detail to the unknown exporters the information required from them for the determination of the residual anti-dumping rate.[124] Further still, in *China – Broiler Products*, the panel also insisted on compliance with paragraph 1 Annex II, finding

[121] ibid para 7.171.
[122] ibid para 7.173.
[123] ibid.
[124] ibid.

that the need for the relevant necessary information had been adequately communicated to interested parties.[125]

The panel ultimately found that the authority's use of fact available to determine the amount of anti-dumping duty imposed or collected on imports of new product models or types from investigated and cooperative exporters to be inconsistent with Article 6.8 and Annex II ADA.[126]

**DS493 panel report[127]**

| | |
|---|---|
| Short title | Ukraine – Ammonium Nitrate (Russia) |
| Complainant | Russian Federation |
| Respondent | Ukraine |
| Tags | |

The questions on Article 6.8 ADA which cannot be put into the thesis are summarized in the paragraphs that follow.

In this case, the Complainant (Russia) challenged under Article 6.8 and paragraphs 3, 5, and 6 Annex II ADA the Ukrainian authority's rejection of the reported gas cost of the investigated Russian producers, and its use of the surrogate price of gas instead, to calculate the cost of production of these exporters. Ukraine argued that its authority rejected the gas cost on substantive grounds under Article 2.2.1.1 ADA and did not take a decision to resort to facts available under Article 6.8. The panel observed that the investigation report did not suggest that the authority rejected the reported gas cost pursuant to Article 6.8 or Annex II ADA. The present panel has also made a finding elsewhere in the report that the rejection of the reported gas cost was inconsistent with Article 2.2.1.1.[128] The panel then pointed out that the finding under Article 2.2.1.1 does not mean that it can also find a violation with respect to a determination under Article 6.8, which was never made by the Ukrainian authority.[129] The panel ultimately found that Russia has failed to

[125] ibid.
[126] ibid para 7.176.
[127] WTO, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate – Report of the Panel* (20 July 2018) WT/DS493/R.
[128] ibid para 7.92.
[129] ibid para 7.197.

establish that the authority acted inconsistently with Article 6.8 and paragraphs 3, 5, and 6 Annex II ADA.[130]

**DS513 panel report[131]**

| | |
|---|---|
| Short title | Morocco – Hot-Rolled Steel (Turkey) |
| Complainant | Turkey |
| Respondent | Morocco |
| Tags | level of duty to cooperate |

The findings are summarized in the main body of the thesis.

**DS493 Appellate Body report[132]**

| | |
|---|---|
| Short title | Ukraine – Ammonium Nitrate (Russia) |
| Complainant | Russian Federation |
| Respondent | Ukraine |
| Tags | |

The finding under Article 6.8 ADA was not appealed and therefore the Appellate Body report did not contain a discussion on that provision.

**DS513 Appellate Body report[133]**

| | |
|---|---|
| Short title | Morocco – Hot-Rolled Steel (Turkey) |
| Complainant | Turkey |
| Respondent | Morocco |
| Tags | |

[130] ibid para 7.198.
[131] WTO, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey – Report of the Panel* (31 October 2018) WT/DS513/R.
[132] WTO, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate – Report of the Appellate Body* (12 September 2019) WT/DS493/AB/R.
[133] WTO, *Morocco – Anti-Dumping Measures on Certain Hot-Rolled Steel from Turkey – Report of the Appellate Body* (10 December 2019) WT/DS513/AB/R.

The finding under Article 6.8 ADA was not appealed and therefore the Appellate Body report did not contain a discussion on that provision.

**DS494 panel report[134]**

| | |
|---|---|
| Short title | EU – Cost Adjustment Methodologies II (Russia) |
| Complainant | Russian Federation |
| Respondent | EU |
| Tags | threshold issue - reliance on facts available |

The findings are summarized in the main body of the thesis.

**DS553 panel report[135]**

| | |
|---|---|
| Short title | Korea – Stainless Steel Bars |
| Complainant | Japan |
| Respondent | Korea |
| Tags | Level of duty to cooperate, threshold issue - reliance on facts available |

The findings are summarized in the main body of the thesis.

[134] WTO, *European Union – Cost Adjustment Methodologies and Certain Anti-Dumping Measures on Imports from Russia (Second Complaint) – Report of the Panel* (24 July 2020) WT/DS494/R.
[135] WTO, *Korea – Sunset Review of Anti-Dumping Duties on Stainless Steel Bars – Report of the Panel* (30 November 2020) WT/DS553/R.