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## RECENT WTO JURISPRUDENCE IN THE FIELD OF ANTI-DUMPING

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### Introduction

1. The Dispute Settlement System of the WTO recently rendered important Panel and Appellate Body Reports in the following four anti-dumping proceedings:

- I. EC – *Bed Linen* from India;<sup>1</sup>
- II. Thailand – *H-Beams* from Poland;<sup>2</sup>
- III. U.S. – *Steel Plate* from Korea;<sup>3</sup> and
- IV. U.S. – *Hot-Rolled Steel* from Japan.<sup>4</sup>

2. All Reports contain vital decisions, although the *Hot-Rolled Steel* Panel Report is still under appeal.<sup>5</sup> I will summarize the main findings of these Reports in this short Article; it will be understood that in view of space-constraints not all aspects can be discussed.

### I. EC – *Bed Linen* from India

3. In the *Bed Linen* appeal, three dumping issues were at stake, two of which will probably have a systemic impact on the calculation of dumping margins. A third issue was relatively case-specific and dealt with an unusual situation; the impact of the decision on that issue would normally be less widely felt. I will discuss these three dumping issues in turn. As a fourth point—not appealed—I will discuss the important decision of the Panel concerning *Developing Country Members*.

4. The first dumping issue concerned “zeroing” and was brought forward by the EC as *Appellant*. The second two dumping issues dealt with the operation of Article 2.2.2 (ii) and were brought by India as *Other Appellant*.

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<sup>1</sup> *European Communities – Anti-Dumping Duties On Imports Of Cotton-Type Bed Linen From India*. Report of the Panel of 30 October 2000, WT/DS141/R, and Report of the Appellate Body of 1 March 2001, WT/DS141/AB/R. Parties reached an Agreement pursuant to Article 21.3(b) of the DSU to implement the reports no later than 14 August 2001. See WT/DS141/10 of 1 May 2001.

<sup>2</sup> *Thailand – Anti-Dumping Duties on Angles, Shapes, and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*. Report of the Panel of 28 September 2000, WT/DS122/R, and Report of the Appellate Body of 12 March 2001, WT/DS122/AB/R.

<sup>3</sup> *United States – Anti-Dumping Measures on Stainless Steel Plate in Coils and Stainless Steel Sheet and Strip from Korea*. Report of the Panel of 22 December 2000, WT/DS179/R.

<sup>4</sup> *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*. Report of the Panel of 28 February 2001, WT/DS184/R.

<sup>5</sup> The Panel proceeding concerning *U.S.–Steel Plate* was not appealed. Parties reached an Agreement pursuant to Article 21.3(b) of the DSU to implement the report no later than 1 September 2001. See WT/179/5 of 1 May 2001.

### I.A Article 2.4.2 and the question of “Zeroing”

5. The EC appealed the finding of the Panel that it had acted inconsistently with Article 2.4.2 of the ADA by “zeroing” the “negative dumping margins” established for certain models or product types of cotton-type bed linen—the product under investigation—when calculating the overall rate of dumping for bed linen.

6. The practice of “zeroing”, as applied by the EC in the *Bed Linen* administrative proceeding, can briefly be described as follows: first, the EC identified with respect to the product under investigation—cotton-type bed linen—a certain number of different “models” or “types” of that product. Next, the EC calculated, for each of these models, a *weighted average* normal value and a *weighted average* export price. Then, the EC compared the weighted average normal value with the weighted average export price for each model. For some models, normal value was *higher* than export price; by subtracting export price from normal value for these models, the EC established a *positive* dumping amount for those models. For other models, normal value was *lower* than export price; by subtracting export price from normal value for these other models, the EC established a *negative* dumping amount for such model.<sup>6</sup> Thus, there is a positive dumping amount where there *is* dumping, and a negative dumping amount where there *is not*. The “positives” and “negatives” of the amounts in this calculation are an indication of precisely *how much* the export price is above or below the normal value. Having made this calculation, the EC then added up the amounts it had calculated for each model of the product, in order to determine an *overall* dumping margin for the product *as a whole*. However, in doing so, the EC’s computer program purposely treated any negative dumping amounts as zero—hence the use of the word “zeroing”. Then, finally, having added up the positive dumping amounts and the zeroes, the EC divided this sum by the cumulative total value of all the export transactions involving all types and models of that product. In this way, the EC obtained an overall margin of dumping for the product under investigation.

7. At the Panel stage it was held that:

“ . . . the European Communities acted inconsistently with Article 2.4.2 of the AD Agreement in establishing the existence of margins of dumping on the basis of a methodology which included zeroing negative price differences calculated for some models of bed linen.”<sup>7</sup>

8. The Appellate Body confirmed this finding. Towards this end it recalled that the *Anti-Dumping Agreement* concerns the dumping of a *product*, and that, therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*. It then recalled that of its own accord, the European Communities had clearly identified cotton-type bed linen as the *product* under investigation in this case. Having defined the *product* as it did, the EC was bound to treat that *product* consistently thereafter in accordance with that definition. Thus, it follows that, with respect to Article 2.4.2, the European Communities had to establish “the existence of margins of dumping” for the *product*—cotton-type bed linen—and not for the various types or models of that product.

9. Moreover, at issue was the first method set out in Article 2.4.2, under which “the existence of margins of dumping” must be established:

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<sup>6</sup> For these latter models, in other words, dumping had not occurred, as the *export price exceeded the normal value*.

<sup>7</sup> Panel Report, paragraph 6.119.

“ . . . on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions . . . ”

10. The AB held that under this method, the investigating authorities are required to compare the weighted average normal value with the weighted average of prices of *all* comparable export transactions. Here, the AB emphasized that Article 2.4.2 speaks of “all” comparable export transactions. The AB stressed that the Panel correctly noted that for those models, the European Communities counted “the weighted average export price to be equal to the weighted average normal value . . . despite the fact that it was, in reality, higher than the weighted average normal value.”<sup>8</sup> By “zeroing” the “negative dumping margins”, the European Communities, therefore, did *not* take fully into account the entirety of the prices of *some* export transactions, namely, those export transactions involving models of cotton-type bed linen where “negative dumping margins” were found. Instead, the European Communities treated those export prices as if they were less than what they were. This, in turn, inflated the result from the calculation of the margin of dumping. Thus, the European Communities did *not* establish “the existence of margins of dumping” for cotton-type bed linen on the basis of a comparison of the weighted average normal value with the weighted average of prices of *all* comparable export transactions—that is, for *all* transactions involving *all* models or types of the product under investigation.

11. Furthermore, the AB added that it was also of the view that a comparison between export price and normal value that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of “zeroing” at issue in this dispute—is *not* a “fair comparison” between export price and normal value, as required by Article 2.4 and by Article 2.4.2. In other words, the AB considered that the “zeroing” practice of the EC was not only inconsistent with Article 2.4.2, but also with the chapeau of Article 2.4. India however had only made a claim with respect to a violation of Article 2.4.2 and that was sufficient to establish the inconsistency.

12. The AB dismissed arguments of the EC that the word “comparable” was pivotal in Article 2.4.2 and allowed zeroing, or that the provision would otherwise not allow for countering targeted model-dumping. With respect to the word ‘comparable’ the AB noted that having defined the product at issue and the “like product” on the Community market as it did, the EC could not, at a subsequent stage of the proceeding, take the position that some types or models of that product had physical characteristics that were so different from each other that these types or models were not “comparable.” The AB noted that all types or models falling within the scope of a “like” product must necessarily be “comparable”, and export transactions involving those types or models must therefore be considered “comparable export transactions” within the meaning of Article 2.4.2. It is further remarkable that the EC’s basic anti-dumping Regulation<sup>9</sup> in fact literally copies the text of Article 2.4.2 without however the very word “comparable.” As regards the argument of targeted dumping the AB noted that Article 2.4.2 does not refer to such form of dumping. The AB even added that: if the EC had wanted to address, in particular, dumping of certain types or models of bed linen, it could have defined, or redefined, the *product* under investigation in a narrower way.<sup>10</sup>

13. Finally, the EC invoked a specific standard of review contained in Article 17.6(ii). This Article bestows deference to an importing country member in case the normal rules of Treaty interpretation would lead to more than one permissible interpretation of the ADA. However,

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<sup>8</sup> Panel Report, paragraph 6.115.

<sup>9</sup> Council Regulation (EC) No 384/96, on protection against dumped imports from countries not members of the European Community, published in *Official Journal* (1996) L56/1, as last amended by Council Regulation 2238/2000 of 9 October 2000, published in *Official Journal* (2000) L257/2.

<sup>10</sup> *Bed Linen AB* at paragraph 62.

the AB found that the Panel was not faced with a choice among multiple “permissible” interpretations that would have required it, under Article 17.6(ii), to give deference to the interpretation relied upon by the European Communities. Rather, the Panel was faced with a situation in which the interpretation relied upon by the EC was “impermissible.”<sup>11</sup>

14. While the impermissibility of zeroing has now been conclusively established for the main rule of Article 2.4.2, as it operates under a prospective system of dumping margin calculations, it is perhaps also important to specify in some detail what this decision does not automatically seem to mean or imply:

- (a) The Report does not address the question of zeroing for a dumping margin calculation using the second main rule under Article 2.4.2, *i.e.* zeroing under the Transaction-to-Transaction method;
- (b) The Report does not clarify as to whether zeroing is still permitted under a retrospective anti-dumping duty system;<sup>12</sup> and
- (c) The Report does not specify as to whether zeroing is still permitted under the exception (second rule) of Article 2.4.2 (Weighted Average-to-Transaction). It seems likely that since a prohibition of zeroing under the exception would mathematically lead to an identical result as under the main rule, zeroing **is** logically permitted under the exception.<sup>13</sup> However, since the requirements for the application of the exception have remained unchanged, the Report should in theory **not** lead to more frequent use of the exception. Nevertheless, in countries or territories where—as a result of the Panel and AB Reports—the exception would *de facto* become the main rule, one may wonder whether it is time to re-write the requirements for invoking the exception.

#### **I.B Article 2.2.2(ii)**

15. The AB report addresses two further questions of interpretation of Article 2.2.2(ii). The first issue is whether the method of calculating amounts for Selling, General and Administrative expenses [hereinafter: SG&A] and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other exporter or producer. The second issue is whether, in calculating the amount for profits under Article 2.2.2(ii), a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade. While the first of these questions was perhaps rather case-specific, the second question was—similar to the question of zeroing—highly significant from a systemic point of view.

#### **I.B.1 Application of Article 2.2.2(ii) in case of one producer**

16. The first of the Article 2.2.2(ii) questions on appeal was whether the method for calculating amounts for SG&A and profits set out in Article 2.2.2(ii) may be applied where there is data on SG&A and profits for only *one* other exporter or producer.

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<sup>11</sup> *Bed Linen AB* at paragraph 65.

<sup>12</sup> It is likely that at some point in the future the USDOC may argue that while zeroing may not be permitted for its calculation of the *deposit* rate (the dumping margin for the imports in the coming year), zeroing is still permissible for its calculation of the *assessment* rate (determining how much duties were due for the past year). This would be in line with the door that the Appellate Body kept open in its footnote 30 as regards the issue of zeroing and the *collection* of duties.

<sup>13</sup> This would also be in line with *ATCs* where zeroing under WA-to-T was considered permissible.

17. The AB first recalls the text of Article 2.2.2(ii).<sup>14</sup> This text provides that, when the investigating authorities chose this method, the amounts for SG&A and profits must be calculated on the basis of:

“ . . . the weighted average of the actual amounts incurred and realized by other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin.”

18. The AB found that the phrase "weighted average" in Article 2.2.2(ii) precludes, in this particular provision, understanding the phrase "other exporters or producers" in the plural as including the singular case. To the AB, the use of the phrase "weighted average" in Article 2.2.2(ii) made it impossible to read "other exporters or producers" as "one exporter or producer." Accordingly the AB reversed the finding of the Panel, which was that the provision in question could also operate when information from only one producer was present.

### **I.B.2 Reading “ordinary course of trade” into the text of Article 2.2.2(ii)**

19. The second of the Article 2.2.2(ii) questions dealt with the the Panel's interpretation of Article 2.2.2(ii)—that is, whether in calculating the amount for profits pursuant to Article 2.2.2(ii), Members may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

20. The AB first turned to the text of the provision.<sup>15</sup> It noted especially that Article 2.2.2(ii) refers to “the weighted average of *the actual amounts incurred and realized* by other exporters or producers.” In referring to “the actual amounts incurred and realized”, it noted that this provision does not make any exceptions or qualifications. In its view, the ordinary meaning of the phrase "*actual amounts incurred and realized*" includes the *SG&A actually incurred*, and the *profits or losses actually realized* by other exporters or producers in respect of production and sales of the like product in the domestic market of the country of origin. The AB noted that there is no basis in Article 2.2.2(ii) for excluding *some* amounts that were actually incurred or realized from the “actual amounts incurred or realized.” It follows that, in the calculation of the “weighted average”, *all* of “the actual amounts incurred and realized” by other exporters or producers must be included, *regardless* of whether those amounts are incurred and realized on production and sales made in the ordinary course of trade or not. Thus, in its view, a Member is not allowed to exclude those sales that are not made in the ordinary course of trade from the calculation of the “weighted average” under Article 2.2.2(ii). The AB also found support for its interpretation in the context of the provision.<sup>16</sup>

21. Accordingly, the AB reversed the finding of the Panel in paragraph 6.87 of the Panel Report that, in calculating the amount for profits under Article 2.2.2(ii) of the *Anti-Dumping Agreement*, a Member may exclude sales by other exporters or producers that are not made in the ordinary course of trade.

22. The decisions of the AB regarding Article 2.2.2(ii) undoubtedly have important consequences for producing exporters who do not have domestic sales in the ordinary course of trade. While the decision that the “weighted average” requirement needs to be respected is rather fact-specific, it also sends the message that authorities should be meticulous in properly following the law, so that a constructed normal value is not improperly calculated but duly takes into account the precautions which the sub-options mandate for the use of secondary-

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<sup>14</sup> *Bed Linen AB* at paragraph 72.

<sup>15</sup> *Bed Linen AB* at paragraph 80.

<sup>16</sup> *Bed Linen AB* at paragraphs 81-83.

source data. The second decision regarding 2.2.2(ii) makes clear that where exporting producers who do not have their own domestic sales—or where exporters have such sales, but not in the ordinary course of trade (for example all at a loss)—authorities should be especially circumspect when imputing SGA & profit amounts from third parties: if authorities impute amounts under Article 2.2.2(ii), they may not unduly restrict these to sales in the ordinary course of trade.

### I.C Article 15: *Developing Country Members*

23. Ever since the Panel concerning *Brazilian Cotton Yarn*,<sup>17</sup> Members of the WTO generally assumed that Article 15 was a dead letter, in the form of a political declaration. The *Bed Linen* report shows that Article 15 does have a more serious meaning. Relevant excerpts of the Report speak volumes:

“ . . . the ‘exploration’ of possibilities must be actively undertaken by the developed country authorities with a willingness to reach a positive outcome.

... .

It does . . . impose an obligation to actively consider, with an open mind, the possibility of such a remedy prior to imposition of an anti-dumping measure that would affect the essential interests of a developing country.”<sup>18</sup>

24. The Panel went on:

“ . . . Pure passivity is not sufficient, in our view, to satisfy the obligation to ‘explore’ possibilities of constructive remedies, particularly where the possibility of an undertaking has already been broached by the developing country concerned. Thus, we consider that the failure of the EC to respond in some fashion other than bare rejection **particularly once the desire to offer undertakings had been communicated to it** constituted a failure to “explore constructive remedies”, and therefore concluded that the EC failed to act consistently with its obligations under Article 15 of the AD Agreement.” (Emphasis in original).<sup>19</sup>

25. Effectively, the Panel has blown new life into Article 15, and has given new hope to exporters in and Governments of Developing Country Members. Unfortunately, in some recent EC proceedings, these tender hopes have suffered some setbacks. While Article 15 is now recognized to have a meaning, certain other roadblocks have surfaced such as the ‘excuse’ that some (selected) products are as such not suitable for a price undertaking or only in such a fashion which is *de facto* meaningless. In practice therefore, the contrast remains between the treatment of Accession Countries and the treatment of Developing Country Members.<sup>20</sup>

<sup>17</sup> *EC – Imposition of anti-dumping duties on imports of Cotton Yarn from Brazil*, ADP/137 of 4 July 1995.

<sup>18</sup> *EC – Bed Linen* at 6.233.

<sup>19</sup> *EC – Bed Linen* at 6.238.

<sup>20</sup> To exporters in Accession Countries the EC typically offers, since the *Essen* Summit, price undertakings even *before* provisional disclosure. No such treatment is accorded to any other exporters.

## II. Thailand – H-beams from Poland

26. This AB report is important for three reasons. It sheds further light on Article 6.2 DSU, the role of confidential information, and the obligation to examine *all* factors in Article 3.4 ADA.

### II.A Article 6.2 DSU and the Specificity of Claims

27. First, the report provides further guidance on the degree of the specificity of claims that must be made in the request for establishment of a panel (per Article 6.2 of the DSU). Thailand had appealed from the Panel's finding that the request for the establishment of a panel submitted by Poland was sufficient to meet the requirements of Article 6.2 of the DSU, with respect to Poland's claims relating to Articles 2, 3 and 5 of the *Anti-Dumping Agreement*. Following earlier rulings in *Bananas*<sup>21</sup> (insistence on precision implying that Articles must always be mentioned) and *Korean Safeguards*<sup>22</sup> (in the case of Articles containing multiple obligations, mere mention of the Articles may not always be enough and depends, among others, on whether the ability of the respondent to defend itself was prejudiced), the AB now clarified that the Panel's partial reliance on what had been argued by Poland in the course of the administrative proceeding was misplaced.<sup>23</sup> The AB said this because there is not necessarily continuity between what interested parties may claim in the course of the administrative proceeding and what a government may claim in subsequent WTO dispute settlement proceedings.

28. *In casu* the AB ruled that Thailand's ability to defend itself had not been prejudiced in the circumstances of the case, among others, because Thailand had not asked the panel for a preliminary ruling on the sufficiency of Poland's request with respect to Articles 2 and 3 ADA. The absence of such Thai request appears to have been the key consideration for the determination of absence of prejudice. One may wonder why the Appellate Body—in the absence of a proper panel request—did not determine that the interests of Thailand *had* been prejudiced; but in this connection it appears that Poland—under the factual circumstances—could perhaps not have been more precise.<sup>24</sup> In any event, the AB once more encouraged, in *obiter dictum*, that parties be precise in identifying the legal basis of their complaint and noted that defending parties may always request further clarification on the claims raised in a request for establishment from the complaining party.<sup>25</sup>

### II.B Role of confidential information

29. A second important ruling concerned the role of confidential information used by the authorities in the course of an investigation, particularly in relation to Articles 3.1 and 17.6(i) ADA. The AB did not find anything in these provisions which would preclude panels reviewing the authorities' record, from taking into account confidential information not communicated to interested parties in the course of the administrative proceeding. Nevertheless, the AB noted that, on the other hand, both Article 6 and Article 12 imposed

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<sup>21</sup> *EC – Regime for the Importation of, Sale and Distribution of Bananas*, Appellate Body report of 9 September 1997, WT/DS27/AB/R, adopted 25 September 1997.

<sup>22</sup> *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, Appellate Body Report of 14 December 1999, WT/DS98/AB/R, adopted 12 January 2000.

<sup>23</sup> *Thailand – H-Beams AB*, paragraph 94, penultimate and last sentence.

<sup>24</sup> *Thailand – H-Beams AB*, paragraph 91 where the panel record is cited which shows that certain information, which Polish exporters had continuously asked for, was not provided until four months after Poland had submitted its request for the establishment of the Panel. In this connection the Appellate Body stated: "We are of the view that the lack of access to this information may have affected the precision with which Poland set out the claims in its panel request."

<sup>25</sup> *Thailand – H-Beams AB*, paragraph 97.

important procedural and due process obligations upon authorities, which might form the basis for claims.

30. Thus, the AB emphasized the strength of possible Articles 6 and 12 claims in pertinent cases.<sup>26</sup>

### **II.C All factors in Article 3.4 ADA**

31. Third, the AB confirmed that all fifteen Article 3.4 injury factors must be evaluated in all cases. While this approach had already been taken by a number of Panels<sup>27</sup>—as well as by the Appellate Body itself in the area of safeguards<sup>28</sup>—this is the first time that the Appellate Body confirmed the interpretation of this rule for the Agreement on Anti-Dumping. For this purpose the Appellate Body agreed with the Panel’s analysis in its entirety,<sup>29</sup> and noted that the Panel had, by means of a thorough textual and contextual analysis, clearly applied the customary rules of interpretation of public international law.<sup>30</sup>

### **III. U.S. – Steel Plate from Korea**

32. This case, typically referred to as *United States – Steel Plate*, in fact concerned two anti-dumping duty orders (*measures*) issued by the U.S. Department of Commerce [hereinafter: DOC]: one concerning *Certain Stainless Steel Plate in Coils* [hereinafter: *Plate*], and one concerning *Stainless Steel Sheet and Strip in Coils* [hereinafter: *Sheet*].<sup>31</sup> Korea presented one set of claims pertaining to both anti-dumping *measures*.<sup>32</sup> Where necessary, the Panel distinguished these claims pertaining to the two distinct measures (for example with respect to Korea’s claim under Article 2.4.1 and “double” currency conversions).

#### **III.A Article 2.4.1 and “double” currency conversions**

33. As a first, legal, conclusion the Panel stated that currency conversions are not required, and would thus not be permissible under Article 2.4.1, in instances where the prices being compared are already in the same currency.<sup>33</sup> Parties did not disagree with this premise but were in disaccord as to the facts pertaining to the conversions performed. The Panel therefore had to engage in a factual analysis, for the purpose of which it first had to distinguish between the factually distinct *Plate* and *Sheet* investigations.

34. After careful and thorough analysis the Panel concluded that in the *Plate* investigation the DOC had correctly engaged in a single conversion, from Won into Dollars—no double

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<sup>26</sup> However, Poland’s claim under Article 6 of the ADA did not meet the requirements of Article 6.2 of the DSU, and Poland had not made a claim under Article 12. See *Thailand – H-Beams AB*, paragraphs 109 and 110.

<sup>27</sup> E.g. Panel Report of 28 January 2000 concerning *Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States*, WT/DS132/R, adopted 24 February 2000, paragraph 7.128.

<sup>28</sup> Appellate Body Report of 14 December 1999, *Argentina – Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R, adopted 12 January 2000, paragraph 129.

<sup>29</sup> *Thailand – H-Beams AB*, paragraph 125.

<sup>30</sup> *Thailand – H-Beams AB*, paragraph 126.

<sup>31</sup> *Antidumping Duty Orders: Certain Stainless Steel Plate in Coils from Belgium, Canada, Italy, the Republic of Korea, South Africa and Taiwan (“Anti-Dumping Duty Order on Plate”)*, Federal Register Vol. 64, No. 98, at page 27757, and *Notice of Antidumping Duty Order: Stainless Steel Sheet and Strip in Coils from the United Kingdom, Taiwan and South Korea (“Anti-Dumping Duty Order on Sheet”)*, Federal Register Vol. 64, No. 143, at page 40556-40557.

<sup>32</sup> *United States–Steel Plate* at paragraph 3.1.

<sup>33</sup> *United States–Steel Plate* at paragraph 3.1. I.e. an unnecessary “double conversion” is not permitted.

conversion occurred. In *Sheet*, however, the Panel found that the DOC improperly treated domestic sales that were denominated in dollars as won sales. More specifically, the DOC in *Sheet* had converted dollar-denominated prices into won at one exchange rate and then converted these back into dollars at a different exchange rate. Since it was undisputed that in *Sheet* the export sales were in dollars—*i.e.* the same currency as in which the domestic sales were originally denominated—this led to the logical determination that the DOC in *Sheet* had acted inconsistently with Article 2.4.1.

35. With respect to these facts Korea had also brought a claim under Article 2.4 *chapeau*: fair comparison. In *Plate* this latter claim failed in the factual absence of a double conversion; with respect to these same facts in *Sheet* the Panel exercised judicial economy since it had already found that the DOC had acted inconsistently with Article 2.4.1.

36. Similarly, Korea also claimed that the conversions in *Plate* and *Sheet* were inconsistent with Article X:3(a) of GATT 1994 and Article 12:2 of the ADA. In short, these claims related to respective obligations to administer those laws and regulations in a uniform and reasonable manner and to set forth in sufficient detail the findings and conclusions reached on all issues of fact and law considered material by the investigating authorities. Again, in *Sheet* the Panel exercised judicial economy; in *Plate* it found that no such violations had occurred.<sup>34</sup>

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<sup>34</sup> For more detail concerning the—interesting—claim under Article X:3(a) I have to refer to the Panel report, paragraphs 6.46—6.55.

### III.B Article 2.4 Chapeau and the Treatment of Unpaid Sales

37. In both *Plate* and *Sheet*, one issue was the treatment of bad debt incurred because of bankruptcy of a customer. The issue had affected both the situation where a constructed export price was involved—and where the DOC had deducted the amount for unpaid sales from the price charged from the related importer to the first independent customer as part of the construction of the export price—as well as the situation of direct sales to independent customers where the DOC had deducted (an identical) amount for unpaid sales under Article 2.4 as an allowance affecting price comparability.

38. Turning first to the issue of the deduction of the amount for sales to independent customers. The panel held that the United States had acted inconsistently with its obligations under Article 2.4 chapeau by making allowances in respect of sales through unaffiliated importers, which were not permissible allowances for differences affecting price comparability. The U.S. had argued that the amount was a credit expense, which includes any bad debt that may result from the sale.<sup>35</sup> The Panel however stated that the phrase ‘difference in conditions and terms of sale’ cannot permissibly be interpreted to encompass an unanticipated failure of a customer to pay for sales.<sup>36</sup> Moreover, and although the U.S. did not (explicitly) argue this, the panel added that adjustment could also not be qualified as an adjustment for “other difference which are demonstrated to affect price comparability.”<sup>37</sup> The decisive criterion appears to have been whether the difference could reasonably have been anticipated and thus taken into account by the exporter when determining the price to be charged for the products in different markets or to different customers: if this is not the case it is not a difference which affects the comparability of *prices* within the meaning of article 2.4.<sup>38</sup>

39. The second question was whether DOC acted inconsistently with its obligations under the fourth sentence of Article 2.4 *chapeau* by making allowances in respect of sales through an affiliated importer which were not permissible allowances in the construction of the export price for costs incurred between importation and resale. In this connection the Panel considered that the amount deducted in the construction was not only incurred after the date of resale—which would not *per se* cause inconsistency<sup>39</sup>—but were entirely unforeseen as of that date: allowing such deduction would not result in a “reliable” export price in the sense of the price that would have been paid by the related exporter had the sale been made on a commercial basis.

40. In view of these two inconsistencies having been established the Panel did not consider it necessary to assess whether the actions of DOC also breached the more general “fair comparison” requirement under Article 2.4.<sup>40</sup>

### III.C. Article 2.4.2 and the question of “multiple averaging”

41. In the same *Steel* and *Plate* proceedings, the DOC had divided the period of investigation [hereinafter: POI] for the purpose of calculating the overall margin of dumping into two averaging periods to take into account the Korean won devaluation in the period November-December 1997, corresponding to the pre- and post-devaluation periods. The DOC had calculated a margin of dumping for each sub-period. When combining the margins

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<sup>35</sup> *United States–Steel Plate* at paragraph 6.74.

<sup>36</sup> *United States–Steel Plate* at paragraph 6.77.

<sup>37</sup> *United States–Steel Plate* at paragraph 6.79.

<sup>38</sup> *United States–Steel Plate* at paragraph 6.77, penultimate sentence.

<sup>39</sup> *United States–Steel Plate* at paragraph 6.100.

<sup>40</sup> *United States–Steel Plate* at paragraph 6.104.

of dumping calculated for the sub-periods to determine an overall margin of dumping for the entire POI, the DOC had treated the period November-December where the average export price was higher than the average normal value as a sub-period of zero dumping—where in fact there was *negative dumping* in that sub-period. The panel concluded that was not allowed under Article 2.4.2—although the Article did not prohibit multiple averaging as such—since there was no situation of a permissible determination of non-comparability in the sense of Article 2.4.2.<sup>41</sup> *I.e.* multiple averaging could be appropriate in cases where it would be necessary to “insure that comparability is not affected by differences in the timing of sales within the averaging periods in the home and export markets.”<sup>42</sup> The finding of the panel also makes sense in light of the findings of the Appellate Body report in *Bed Linen* on the impermissibility of *zeroing*. With respect to the issue of averaging the Panel was also confronted with claims under Articles 2.4.1 and Article 2.4 (“*fair comparison*”). The Panel found that these latter two Articles did not prohibit multiple averaging.<sup>43</sup>

### **III.D Claims under Articles X:3(a) of GATT 1994, Article VI of GATT 1994, and Articles 1, 6, and 12 of the ADA**

42. For the remainder of the claims—including alleged inconsistencies with Articles VI of GATT 1994 and 6 ADA—the Panel exercised judicial economy, except for those claims in *Plate* which it had already scrutinized and did not find inconsistent with Articles X:3(a) of GATT 1994 and Article 12 ADA.

### **IV. U.S. – Hot Rolled Steel from Japan**

43. This Panel Report offers important insights on two critical issues within anti-dumping: the use of ‘facts available’ and the question of whose home market sales should be used. For the sake of brevity I will, with due respect for the hard work of the Panel, omit the claims and findings with respect to injury and Article X:3 of GATT 1994.

#### **IV.A Article 6.8 and Use of ‘facts available’ [BIA]**

44. The first question in the case of the Japanese companies Nippon Steel Corporation (NSC) and NKK corporation was whether the USDOC acted inconsistently with Article 6.8 and the provisions of Annex II, in rejecting information that was actually submitted to it, and resorting to facts available instead. Both companies submitted the requested information concerning a weight conversion factor for their theoretical weight sales well after the deadlines for response to the questionnaires in which the information was requested had passed, but before the verification.

45. In deciding the matter the Panel found it significant that the information submitted past the deadline, but before the verification, was not new information concerning such matters as prices, costs, or adjustments that would require extensive verification.<sup>44</sup>

46. In the case of NSC the panel ruled that it was clear that the USDOC had rejected information that was actually submitted to it, albeit not before the deadline specified, despite the fact that the information was available with sufficient time to allow its verification and use in the calculation of NSC’s dumping margin. The Panel then held that in its view, based on the evidence before the USDOC at the time of the determination, an unbiased and objective

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<sup>41</sup> *United States–Steel Plate* at paragraph 6.124.

<sup>42</sup> *United States–Steel Plate* at paragraph 6.123.

<sup>43</sup> It may further be noted that although the inconsistency with Article 2.4.2 had already been established the Panel did not apply judicial economy with respect to this claim.

<sup>44</sup> *U.S. – Steel Products* para 7.55.

investigating authority evaluating that evidence could not have reached the conclusion that NSC had failed to provide necessary information within a reasonable period.<sup>45</sup> Thus, the Panel concluded that USDOC had acted inconsistently with Article 6.8 in applying facts available in making its determination of NSC's dumping margin.

47. In similar vein, the use of facts available was also ruled inconsistent in the case of NKK. Even though the information was provided after the deadline, the Panel again ruled that based on the information before it "*an unbiased and objective investigating authority evaluating that evidence could not have reached the conclusion that NKK had failed to provide necessary information within a reasonable period.*" Hence, use of facts available under Article 6.8 was not allowed for NKK either.

48. Further, there was the company Kawasaki Steel Corporation (KSC) with its related importer CSI. KSC did not provide the requested information regarding the resale prices and further manufacturing costs with respect to its sales through CSI. The question then arose whether USDOC was justified in applying facts available with regard to information not provided by KSC concerning CSI. Apparently, KSC could not get CSI into motion in providing the necessary information. In the view of the Panel the USDOC's conclusion that KSC failed to act to the best of its ability went far beyond any reasonable obligation to cooperate implied by paragraph 7 of Annex II. This conclusion of the USDOC was therefore deemed not justified and therefore inconsistent with Article 6.8 and Annex II paragraph 7 ADA.

49. The above-described determinations are landmark. The absolute nature of a deadline has been put in question, depending on the circumstances. For all practical purposes a curtail on the use of 'facts available' may help in making anti-dumping proceedings a less *Kafkaesque*-experience for the exporters who are subjected to it. It should be noted however that the case is still under appeal.

50. The Panel also found that U.S. law (section 735(c)(5) of the Tariff Act of 1930) was *on its face* inconsistent with Article 9.4 since it requires the consideration (*i.e.* inclusion) of dumping margins that are based in part on facts available in the determination of the weighted average duty for non-sampled producers as well.<sup>46</sup> According to the Panel this consideration should not be permitted because also a margin where only some element was established on the basis of facts available is a margin that is established under the circumstances of Article 6.8 and therefore cannot be taken into account under the weighted average duty under Article 9.4.<sup>47</sup> Apart from the inconsistency with Article 9.4 the Panel also ruled this U.S. Law to be inconsistent with Article 18.4 ADA and Article XVI:4 of the Marrakesh Agreement.

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<sup>45</sup> *U.S. – Steel Products* para 7.57.

<sup>46</sup> Previously, the Appellate Body had already confirmed that *also in the area of anti-dumping* a law can be challenged on its face; see U.S. 1916 Act (WT/DS162/AB/R). Such challenge of legislation on its face was already accepted in other areas; see, for example, the Panel proceeding concerning Section 301 (WT/DS152/R).

<sup>47</sup> *U.S. – Steel Products* paras 7.89, 7.90. The Panel states that it recognizes the problem of a potential vacuum in a situation where all dumping margins are partly based on facts available and can therefore not be used under the weighted average duty rate of Article 9.4. In fact, this was the situation in the case at hand where for all companies the USDOC had applied, in some form or element, Article 6.8. Hence, the question would be how the weighted average duty rate could then be calculated; the Panel stated that this was not impossible although the Agreement does not explicitly address the question (footnote 71). The Panel did not indicate what the implicit answer was or should be. In view of the interpretation of "*weighted average*" by the Appellate Body in *Bed Linen*, a vacuum could arguably also arise in a situation where all but one of the dumping margins in the sample are based on facts available (or all but one are zero or *de minimis*). Finally, the question may arise whether the situation where all margins are zero or *de minimis* also poses a legal vacuum; in view of the likely absence of

#### IV.B Use of whose home market sales

51. The Panel then addressed two questions that may have important consequences for producers with affiliated companies on the home market. Japan argued that the exclusion of domestic sales based on the “arm’s length” test, and the replacement of such sales by the re-sales of the affiliates to unrelated companies was inconsistent with the ADA. The Panel agreed with both claims.

##### IV.B.1 The ‘arm’s length’ or ‘99.5%’ test

52. The first question was whether the U.S. method for testing whether sales are in the ordinary course of trade on the basis of the 99.5% test is an appropriate basis for that decision. This test analyses whether prices to affiliated customers are more than 0.5% lower than prices to unaffiliated companies. If so, these lower priced sales will be found not in the ordinary course of trade. The panel determined that such a test was not a proper method to determine that sales were not in the ordinary course of trade. For example, under certain circumstances higher-priced sales could also not be in the ordinary course of trade but this was not envisaged by that test. In fact, the result of the test could only be that normal value remained the same or went up because sales to related companies that are on average lower-priced will be excluded through application of this test. Since, according to the Panel, this could only skew normal value upward,<sup>48</sup> the finding of dumping or of a higher margin of dumping would be more likely as a result of this test. According to the Panel this test did not rest on a permitted interpretation of the words ‘ordinary course of trade.’

##### IV.B.2 Sales by Related Parties

53. Potentially the most revolutionary decision of this Panel report was the finding that it is not permitted to use resale prices of affiliated companies to serve (in part) as the basis for normal value. In other words, the panel did not agree with the use of so-called ‘replacement-sales’, *i.e.* the sales *by* affiliated purchasers that replaced excluded sales *to* them, in the determination of normal value.

54. The Panel noted that while it might be true that these replacement sales were, in the broad sense, in the ordinary course of trade, they were not sales which may be taken into account in determining normal value for the companies for which dumping margins were being established, as they are not sales in the ordinary course of trade *of those companies*.<sup>49</sup> The Panel underlined this approach by referring to the overall structure of Article 2.<sup>50</sup> For example, while in case of a related importer it is explicitly permitted to take its re-sales and construct the export price, Article 2 does not contain a similar possibility on the domestic market side; the explicit mention of such possibility on the export side was therefore an indication that the absence of such possibility on the domestic side was advertent.<sup>51</sup> Accordingly, the replacement of excluded sales to affiliates by sales from affiliates to downstream purchasers was found not to be consistent with Article 2.1 ADA.

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injury *through dumped imports* the author’s view is that the short answer is ‘probably not’. In view of *U.S. – DRAMs*, report of 29 January 1999, WT/DS99/R, the detailed answer is likely more complex.

<sup>48</sup> In fact, the normal value could in theory also remain the same in a situation where the sales to related parties are made at the same price level as the sales to unrelated customers.

<sup>49</sup> *U.S. – Steel Products* at para 7.114.

<sup>50</sup> *U.S. – Steel Products* at para 7.115.

<sup>51</sup> Compare footnote 89 of *U.S. – Steel Products*.

55. This landmark decision of the Panel also directly seems to affect the single economic entity (SEE) theory as applied by EC authorities. This theory from the EC seems now to be no longer valid although it may be stressed that this Panel report is, at the time of writing, under appeal.