



**EUROPEAN COMMUNITIES – DEFINITIVE ANTI-DUMPING MEASURES ON
CERTAIN IRON OR STEEL FASTENERS FROM CHINA**

RECOURSE TO ARTICLE 21.5 OF THE DSU BY CHINA

AB-2015-7

Report of the Appellate Body

Table of Contents

1 INTRODUCTION	11
2 ARGUMENTS OF THE PARTICIPANTS	15
3 ARGUMENTS OF THE THIRD PARTICIPANTS	15
4 ISSUES RAISED IN THIS APPEAL	15
5 ANALYSIS OF THE APPELLATE BODY	17
5.1 Background	17
5.1.1 Overview of the original anti-dumping investigation	17
5.1.2 Overview of the review investigation	19
5.2 Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.....	21
5.2.1 The Panel's terms of reference.....	21
5.2.2 Whether the Panel erred in finding that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement	25
5.2.2.1 The Panel's findings.....	25
5.2.2.2 The "good cause" requirement under Article 6.5 of the Anti-Dumping Agreement	26
5.2.2.3 Whether the Panel erred in its treatment of Pooja Forge's request for confidential treatment of the information at issue	27
5.2.2.4 Whether the Panel erred in finding that the Commission "never" conducted an objective assessment of the good cause alleged by Pooja Forge.....	31
5.2.2.5 Whether the Panel erred in finding that there was an inconsistency in the arguments put forward by the European Union.....	33
5.2.2.6 Whether the Panel erred by not conducting its own analysis of the nature of the information at issue	34
5.3 Articles 6.4 and 6.2 of the Anti-Dumping Agreement.....	36
5.3.1 The Panel's terms of reference.....	36
5.3.2 Whether the Panel erred in finding that the European Union acted inconsistently with Articles 6.4 and 6.2 of the Anti-Dumping Agreement	38
5.3.2.1 The Panel's findings.....	39
5.3.2.2 Whether the Panel erred in finding that the information at issue was not confidential for the purposes of its analysis under Article 6.4 of the Anti-Dumping Agreement.....	40
5.3.2.3 Whether the Panel erred in finding that the information at issue was "relevant" to the presentation of the Chinese producers' cases	42
5.3.2.4 Whether the Panel erred in finding that the information at issue was "used" by the Commission in the review investigation	44
5.3.2.5 Whether the Panel erred in finding that the Chinese producers were not provided with "timely opportunities" to see the information at issue	45
5.4 Article 6.1.2 of the Anti-Dumping Agreement.....	46
5.4.1 The Panel's terms of reference.....	46
5.4.2 Whether the Panel erred in rejecting China's claim under Article 6.1.2 of the Anti-Dumping Agreement.....	48
5.4.2.1 The Panel's findings.....	48
5.4.2.2 Whether the Panel erred in finding that Pooja Forge was not an interested party in the review investigation at issue	49

5.5 Article 2.4 of the Anti-Dumping Agreement	52
5.5.1 The European Union's appeal under the last sentence of Article 2.4 of the Anti-Dumping Agreement.....	52
5.5.1.1 The Panel's findings.....	52
5.5.1.2 The procedural requirement of Article 2.4 of the Anti-Dumping Agreement	54
5.5.1.3 The European Union's claims under the last sentence of Article 2.4 of the Anti-Dumping Agreement.....	55
5.5.1.3.1 Whether the Panel erred in suggesting that the obligation under Article 2.4 of the Anti-Dumping Agreement differs based on the methodology used to determine normal values	56
5.5.1.3.2 Whether the Panel erred by turning the last sentence of Article 2.4 of the Anti-Dumping Agreement into a procedural obligation requiring the disclosure of "raw data"	58
5.5.1.3.3 Whether the Panel erred in finding that the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments.....	59
5.5.1.3.4 Whether the Panel erred in finding that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the information at issue	62
5.5.2 China's appeal regarding the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement.....	63
5.5.2.1 The Panel's findings.....	63
5.5.2.2 The fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement.....	65
5.5.2.3 Differences in taxation	67
5.5.2.3.1 Whether the Panel erred in finding that adjusting for differences in taxation would undermine the Commission's right to have recourse to the analogue country methodology.....	68
5.5.2.3.2 Whether the Panel erred in finding that the Chinese producers did not come forward with a substantiated request for an adjustment	69
5.5.2.3.3 New documents referred to by China on appeal	71
5.5.2.4 Other cost differences.....	71
5.5.2.4.1 Whether the Panel erred in finding that adjusting for differences in costs would undermine the Commission's right to have recourse to the analogue country methodology.....	72
5.5.2.4.2 Whether the Panel erred in finding that the Chinese producers did not come forward with substantiated requests for adjustments.....	74
5.5.2.4.3 Whether the Panel failed to make an objective assessment of the facts as required under Article 11 of the DSU	76
5.5.2.5 Differences in physical characteristics	77
5.5.2.5.1 The Panel's terms of reference	77
5.6 Article 2.4.2 of the Anti-Dumping Agreement.....	79
5.6.1 "[A]ll comparable export transactions" under Article 2.4.2 of the Anti-Dumping Agreement.....	80
5.6.2 Whether the Commission's exclusion of non-matching models from the dumping margin calculations is consistent with Article 2.4.2 of the Anti-Dumping Agreement.....	82
5.7 Articles 4.1 and 3.1 of the Anti-Dumping Agreement.....	86
5.7.1 The Panel's terms of reference.....	86

5.7.2 Whether the Panel erred in finding that the European Union acted inconsistently with Articles 4.1 and 3.1 of the Anti-Dumping Agreement	88
5.7.3 The definition of domestic industry in Article 4.1 of the Anti-Dumping Agreement.....	89
5.7.4 Whether the Commission's definition of the domestic industry in the review investigation is consistent with Article 4.1 of the Anti-Dumping Agreement.....	90
6 FINDINGS AND CONCLUSIONS.....	95

ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
Appellate Body Report	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
CCCME	China's Chamber of Commerce for Import and Export of Machinery and Electronic Products
China's Accession Protocol	Protocol on the Accession of the People's Republic of China, WT/L/432
CN	combined nomenclature contained in Annex 1 to Council Regulation (EEC) No. 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff, <i>Official Journal of the European Communities</i> , L Series, No. 30 (7 September 1987), p. 256
Commission	Commission of the European Union
DSB	Dispute Settlement Body
DMSAL	domestic sales listing
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EU	European Union
GATT 1947	General Agreement on Tariffs and Trade 1947
GATT 1994	General Agreement on Tariffs and Trade 1994
MET	market economy treatment
NME(s)	non-market economy(ies)
original panel	panel in the original proceedings
original panel report	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R
original investigation	Anti-dumping investigation on imports of certain iron or steel fasteners originating in China initiated by the European Commission through its Notice of Initiation dated 9 November 2007
Panel	Panel in these Article 21.5 compliance proceedings
Panel Report	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/RW
PCN(s)	product control number(s)
WA-WA	weighted average-to-weighted average
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

PANEL EXHIBITS CITED IN THIS REPORT

Panel Exhibit	Original Panel Exhibit	Short Title (if any)	Description
	CHN-1	Basic AD Regulation	Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against Dumped Imports from Countries not Members of the European Community, <i>Official Journal of the European Communities</i> , L Series, No. 56 (6 March 1996), pp. 1-20
	CHN-3	Basic AD Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on Protection against Dumped Imports from Countries not Members of the European Community (codified version), <i>Official Journal of the European Union</i> , L Series, No. 343 (22 December 2009), pp. 51-73 and Corrigendum
	CHN-14	Notice of Initiation	European Commission Notice of Initiation of an anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, <i>Official Journal of the European Union</i> , C Series, No. 267 (9 November 2007), pp. 31-35
	CHN-18	final disclosure	General Disclosure Document, AD525: Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Proposal to impose definitive measures, 3 November 2008
	CHN-28		Letter dated 7 November 2008 on behalf of Kunshan Chenghe and Ningbo Jinding to the European Commission concerning the Definitive Disclosure Document
	CHN-30		Letter dated 17 November 2008 on behalf of Kunshan Chenghe and Ningbo Jinding to the European Commission concerning the Definitive Disclosure Document: Request for Information II
	CHN-31		Letter dated 21 November 2008 from the European Commission to Van Bael & Bellis in response to Kunshan Chenghe's and Ningbo Jinding's request of 17 November 2008
	CHN-59		Letter dated 24 November 2008 on behalf of Kunshan Chenghe to the European Commission containing comments on the Definitive Disclosure Document
CHN-1	CHN-4	Definitive Regulation	Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 29 (31 January 2009), pp. 1-35
CHN-2			European Commission Notice regarding the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the <i>EC – Fasteners</i> dispute (DS397), <i>Official Journal of the European Union</i> , C Series, No. 66 (6 March 2012), pp. 29-31
CHN-3		Review Regulation	Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 275 (10 October 2012), pp. 1-22

Panel Exhibit	Original Panel Exhibit	Short Title (if any)	Description
CHN-5			Letter dated 30 May 2012 from the European Commission to interested parties including the disclosure document concerning normal value
CHN-6			Letter dated 13 June 2012 on behalf of Biao Wu to the European Commission in response to the Commission's letter of 30 May 2012
CHN-7			Letter dated 19 June 2012 on behalf of China's Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME) to the European Commission
CHN-8			Letter dated 12 June 2012 on behalf of Changshu to the European Commission requesting further information and clarification regarding the determination of normal value
CHN-9			Letter dated 12 June 2012 on behalf of Ningbo Jinding to the European Commission requesting further information and clarification regarding the determination of normal value
CHN-11			E-mail dated 26 June 2012 from the European Commission concerning CCCME, Biao Wu, and Jiashan
CHN-12			E-mail dated 21 June 2012 from the European Commission concerning Changshu and Ningbo Jinding
CHN-15			Letter dated 5 July 2012 from the European Commission to interested parties
CHN-17			R548: WTO Fasteners Implementation Review Note for the File dated 11 July 2012 on the Reclassification of Normal Value from one producer in India
CHN-20			Letter dated 17 July 2012 from the European Commission concerning the determination of normal value
CHN-21			Letter dated 19 July 2012 on behalf of CCCME and Biao Wu to the European Commission concerning, <i>inter alia</i> , disclosure documents
CHN-22		General Disclosure Document	General Disclosure Document, R548: Anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China: implementation of the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the EC – Fasteners dispute (DS397), 31 July 2012
CHN-23			Letter dated 20 August 2012 on behalf of CCCME and Biao Wu to the European Commission containing comments on the disclosure of 31 July 2012
CHN-24			Response to the European Commission's Anti-Dumping Questionnaire for producers in analogue countries of certain iron or steel fasteners, submitted by Pooja Forge in the original anti-dumping investigation
CHN-27			Letter dated 11 July 2012 on behalf of CCCME and Biao Wu to the European Commission concerning the disclosure of 5 July 2012
CHN-28			Comments dated 14 August 2012 on behalf of Ningbo Jinding on the disclosure of 31 July 2012
CHN-29			Comments dated 14 August 2012 on behalf of Changshu on the disclosure of 31 July 2012

Panel Exhibit	Original Panel Exhibit	Short Title (if any)	Description
CHN-30		Hearing Officer's Report	Report of the hearing of the European Commission held on 11 July 2012 concerning R548 Iron or steel fasteners originating in the People's Republic of China, 18 July 2012
CHN-33			Letter dated 13 June 2012 on behalf of Ningbo Jinding to the European Commission concerning the disclosure of 30 May 2012
CHN-34			Letter dated 13 June 2012 on behalf of Changshu to the European Commission concerning the disclosure of 30 May 2012
CHN-38			Council Regulation (EC) No. 1331/2007 of 13 November 2007 imposing a definitive anti-dumping duty on imports of dicyandiamide originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 296 (15 November 2007), pp. 1-17
CHN-39			Council Regulation (EC) No. 1659/2005 of 6 October 2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain magnesia bricks originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 267 (12 October 2005) pp. 1-14
CHN-40			Council Regulation (EC) No. 3386/93 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, <i>Official Journal of the European Communities</i> , L Series, No. 306 (11 December 1993) pp. 16-21
CHN-41			Council Regulation (EC) No. 1347/96 of 2 July 1996 imposing definitive anti-dumping duties on imports of unwrought pure magnesium originating in Russia and Ukraine and collecting definitively the provisional duty imposed, <i>Official Journal of the European Communities</i> , L Series, No. 174 (12 July 1996) pp. 1-10
CHN-42			Commission Regulation (EC) No. 492/2008 of 3 June 2008 imposing a provisional anti-dumping duty on imports of monosodium glutamate originating in the People's Republic of China, <i>Official Journal of the European Union</i> , L Series, No. 144 (4 June 2008) pp. 14-30
CHN-44			Calculations for Biao Wu
CHN-45			Calculations for Ningbo Jinding
CHN-46			Calculations for Changshu
EU-2			E-mail dated 3 July 2012 from Pooja Forge to the European Commission requesting information
EU-4			Cover letter to the General Disclosure Document dated 31 July 2012
EU-5			Letter dated 26 November 2014 from the European Commission to the Panel concerning Pooja Forge
EU-8			E-mail exchanges dated 2 July 2012 between the European Commission and Pooja Forge concerning request for information by Pooja Forge

CASES CITED IN THIS REPORT

Short title	Full case title and citation
<i>Australia – Salmon</i>	Appellate Body Report, <i>Australia – Measures Affecting Importation of Salmon</i> , WT/DS18/AB/R, adopted 6 November 1998, DSR 1998:VIII, p. 3327
<i>Brazil – Retreaded Tyres</i>	Appellate Body Report, <i>Brazil – Measures Affecting Imports of Retreaded Tyres</i> , WT/DS332/AB/R, adopted 17 December 2007, DSR 2007:IV, p. 1527
<i>China – Autos (US)</i>	Panel Report, <i>China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States</i> , WT/DS440/R and Add.1, adopted 18 June 2014
<i>China – GOES</i>	Appellate Body Report, <i>China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel from the United States</i> , WT/DS414/AB/R, adopted 16 November 2012, DSR 2012:XII, p. 6251
<i>China – HP-SSST (Japan) / China – HP-SSST (EU)</i>	Appellate Body Reports, <i>China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union</i> , WT/DS454/AB/R and Add.1 / WT/DS460/AB/R and Add.1, adopted 28 October 2015
<i>China – Rare Earths</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum</i> , WT/DS431/AB/R / WT/DS432/AB/R / WT/DS433/AB/R, adopted 29 August 2014
<i>EC – Bed Linen</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India</i> , WT/DS141/AB/R, adopted 12 March 2001, DSR 2001:V, p. 2049
<i>EC – Bed Linen (Article 21.5 – India)</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India – Recourse to Article 21.5 of the DSU by India</i> , WT/DS141/AB/RW, adopted 24 April 2003, DSR 2003:III, p. 965
<i>EC – Fasteners (China)</i>	Appellate Body Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/AB/R, adopted 28 July 2011, DSR 2011:VII, p. 3995
<i>EC – Fasteners (China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China</i> , WT/DS397/R and Corr.1, adopted 28 July 2011, as modified by Appellate Body Report WT/DS397/AB/R, DSR 2011:VIII, p. 4289
<i>EC – Fasteners (China) (Article 21.5 – China)</i>	Panel Report, <i>European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China</i> , WT/DS397/RW and Add.1, circulated to WTO Members 7 August 2015
<i>EC – Hormones</i>	Appellate Body Report, <i>EC Measures Concerning Meat and Meat Products (Hormones)</i> , WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998, DSR 1998:I, p. 135
<i>EC – Tube or Pipe Fittings</i>	Appellate Body Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/AB/R, adopted 18 August 2003, DSR 2003:VI, p. 2613
<i>EC – Tube or Pipe Fittings</i>	Panel Report, <i>European Communities – Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil</i> , WT/DS219/R, adopted 18 August 2003, as modified by Appellate Body Report WT/DS219/AB/R, DSR 2003:VII, p. 2701
<i>EC and certain member States – Large Civil Aircraft</i>	Appellate Body Report, <i>European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft</i> , WT/DS316/AB/R, adopted 1 June 2011, DSR 2011:I, p. 7
<i>Egypt – Steel Rebar</i>	Panel Report, <i>Egypt – Definitive Anti-Dumping Measures on Steel Rebar from Turkey</i> , WT/DS211/R, adopted 1 October 2002, DSR 2002:VII, p. 2667
<i>EU – Footwear (China)</i>	Panel Report, <i>European Union – Anti-Dumping Measures on Certain Footwear from China</i> , WT/DS405/R, adopted 22 February 2012, DSR 2012:IX, p. 4585

Short title	Full case title and citation
<i>Guatemala – Cement II</i>	Panel Report, <i>Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico</i> , WT/DS156/R, adopted 17 November 2000, DSR 2000:XI, p. 5295
<i>Korea – Certain Paper</i>	Panel Report, <i>Korea – Anti-Dumping Duties on Imports of Certain Paper from Indonesia</i> , WT/DS312/R, adopted 28 November 2005, DSR 2005:XXII, p. 10637
<i>Mexico – Corn Syrup (Article 21.5 – US)</i>	Appellate Body Report, <i>Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21.5 of the DSU by the United States</i> , WT/DS132/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6675
<i>US – 1916 Act</i>	Appellate Body Report, <i>United States – Anti-Dumping Act of 1916</i> , WT/DS136/AB/R, WT/DS162/AB/R, adopted 26 September 2000, DSR 2000:X, p. 4793
<i>US – Carbon Steel (India)</i>	Appellate Body Report, <i>United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India</i> , WT/DS436/AB/R, adopted 19 December 2014
<i>US – Hot-Rolled Steel</i>	Appellate Body Report, <i>United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan</i> , WT/DS184/AB/R, adopted 23 August 2001, DSR 2001:X, p. 4697
<i>US – Offset Act (Byrd Amendment)</i>	Appellate Body Report, <i>United States – Continued Dumping and Subsidy Offset Act of 2000</i> , WT/DS217/AB/R, WT/DS234/AB/R, adopted 27 January 2003, DSR 2003:I, p. 375
<i>US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS268/AB/RW, adopted 11 May 2007, DSR 2007:IX, p. 3523
<i>US – Shrimp (Article 21.5 – Malaysia)</i>	Appellate Body Report, <i>United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21.5 of the DSU by Malaysia</i> , WT/DS58/AB/RW, adopted 21 November 2001, DSR 2001:XIII, p. 6481
<i>US – Softwood Lumber V</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/AB/R, adopted 31 August 2004, DSR 2004:V, p. 1875
<i>US – Softwood Lumber V</i>	Panel Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada</i> , WT/DS264/R, adopted 31 August 2004, as modified by Appellate Body Report WT/DS264/AB/R, DSR 2004:V, p. 1937
<i>US – Tyres (China)</i>	Appellate Body Report, <i>United States – Measures Affecting Imports of Certain Passenger Vehicle and Light Truck Tyres from China</i> , WT/DS399/AB/R, adopted 5 October 2011, DSR 2011:IX, p. 4811
<i>US – Upland Cotton</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton</i> , WT/DS267/AB/R, adopted 21 March 2005, DSR 2005:I, p. 3
<i>US – Upland Cotton (Article 21.5 – Brazil)</i>	Appellate Body Report, <i>United States – Subsidies on Upland Cotton – Recourse to Article 21.5 of the DSU by Brazil</i> , WT/DS267/AB/RW, adopted 20 June 2008, DSR 2008:III, p. 809
<i>US – Zeroing (EC) (Article 21.5 – EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing") – Recourse to Article 21.5 of the DSU by the European Communities</i> , WT/DS294/AB/RW and Corr.1, adopted 11 June 2009, DSR 2009:VII, p. 2911
<i>US – Zeroing (Japan)</i>	Appellate Body Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/AB/R, adopted 23 January 2007, DSR 2007:I, p. 3

WORLD TRADE ORGANIZATION
APPELLATE BODY

European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China

AB-2015-7

Recourse to Article 21.5 of the DSU by China

Appellate Body Division:

European Union¹, *Appellant/Appellee*
China, *Other Appellant/Appellee*

Ramírez-Hernández, Presiding Member
Graham, Member
Servansing, Member

Japan, *Third Participant*
United States, *Third Participant*

1 INTRODUCTION

1.1. The European Union and China each appeals certain issues of law and legal interpretations developed in the Panel Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*² (Panel Report). The Panel was established pursuant to Article 21.5 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) to consider a complaint by China³ regarding the consistency with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (Anti-Dumping Agreement) and the General Agreement on Tariffs and Trade 1994 (GATT 1994) of measures taken by the European Union to comply with the recommendations and rulings of the Dispute Settlement Body (DSB) in the original proceedings in *EC – Fasteners (China)*.⁴

1.2. On 9 November 2007, the European Commission (Commission) issued a "Notice of Initiation"⁵ of an anti-dumping investigation on imports of certain iron or steel fasteners from China (original investigation). This original investigation resulted in the imposition of definitive anti-dumping duties on fasteners from China, which was notified through the "Definitive Regulation" of 26 January 2009.⁶

1.3. On 12 October 2009, China requested the establishment of a panel, and the original panel was established on 23 October 2009.⁷ Before the original panel, China challenged, *inter alia*, the WTO-consistency of the Definitive Regulation imposing anti-dumping duties on fasteners from China. In its report, which was circulated to Members of the World Trade Organization (WTO) on 3 December 2010, the original panel found that the European Union had violated certain provisions of the Anti-Dumping Agreement, in particular: (i) Articles 6.10 and 9.2 with respect to the

¹ This dispute began before the Treaty of Lisbon entered into force in December 2009, which, for WTO purposes, led to the replacement of the "European Communities" with the "European Union". For this reason, the case title in this dispute is *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, rather than *European Union – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*. As did the panel and the Appellate Body in the original proceedings, apart from the case title, the Panel referred throughout its Report to the responding party in this dispute as the European Union or the EU. We follow this practice in this Report.

² WT/DS397/RW, 7 August 2015.

³ Request for the Establishment of a Panel by China pursuant to Article 21.5 of the DSU, WT/DS397/18.

⁴ The recommendations and rulings of the DSB resulted from the adoption on 28 July 2011, by the DSB, of the Appellate Body report (WT/DS397/AB/R) and the panel report (WT/DS397/R) in *EC – Fasteners (China)*. In this Report, we refer to the panel that considered the original complaint brought by China as the "original panel" and to its report as the "original panel report".

⁵ European Commission, Notice of Initiation of an anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, *Official Journal of the European Union*, C Series, No. 267 (9 November 2007), pp. 31-35 (Original Panel Exhibit CHN-14).

⁶ Council Regulation (EC) No. 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, *Official Journal of the European Union*, L Series, No. 29 (31 January 2009), pp. 1-35 (Panel Exhibit CHN-1).

⁷ WT/DS397/3; WT/DS397/4.

treatment of individual exporters and producers in the calculation of margins of dumping under Article 9(5) of the "Basic AD Regulation"⁸; (ii) Articles 3.1 and 3.2 with respect to the assessment of the volume of dumped imports in the injury determination; (iii) Articles 3.1 and 3.5 with respect to the causation analysis of the injury determination; (iv) Articles 6.4 and 6.2 with respect to the failure of the Commission to disclose in a timely manner information regarding certain aspects of the normal value determination; (v) Article 6.5.1 with respect to non-confidential summaries of questionnaire responses; and (vi) Article 6.5 with respect to confidential treatment of certain information.⁹

1.4. The European Union and China both appealed certain issues of law and legal interpretations developed by the original panel. The Appellate Body report was circulated to WTO Members on 15 July 2011. The Appellate Body, in particular: (i) upheld, albeit for different reasons, the original panel's finding of inconsistency of Article 9(5) of the Basic AD Regulation with Articles 6.10 and 9.2 of the Anti-Dumping Agreement with respect to the treatment of individual exporters and producers in the calculation of margins of dumping; (ii) found the original panel to be in error by not finding a violation of Article 4.1 with respect to the definition of the domestic industry; (iii) upheld the original panel's findings of violation of Articles 6.4 and 6.2 with respect to the failure of the Commission to disclose in a timely manner information regarding certain aspects of the normal value determination; (iv) found that the original panel erred in respect of Article 2.4 and found instead that the Commission had failed to indicate to interested parties what information was necessary to ensure fair comparison; and (v) reversed the original panel's finding of violation of Article 6.5 regarding the confidential treatment of certain information and held instead that China had failed to substantiate its claim.¹⁰

1.5. On 28 July 2011, the DSB adopted the original panel and Appellate Body reports. On 19 January 2012, China and the European Union informed the DSB that they had agreed on a reasonable period of time for implementation of 14 months and two weeks as from 28 July 2011.¹¹ The reasonable period of time expired on 12 October 2012.

1.6. On 11 October 2012, the European Union informed the DSB that it had adopted certain measures necessary to comply with the recommendations and rulings of the DSB.¹² As regards the DSB's recommendations and rulings concerning the original investigation, which had resulted in the issuance of the Definitive Regulation, the European Union had initiated a review investigation.¹³ Through the "Review Regulation" of 4 October 2012¹⁴, the injurious dumping

⁸ Council Regulation (EC) No. 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community, *Official Journal of the European Union*, L Series, No. 56 (6 March 1996) (Original Panel Exhibit CHN-1) as repealed and replaced by, Council Regulation (EC) No. 1225/2009 of 30 November 2009, *Official Journal of the European Union*, L Series, No. 343 (22 December 2009), pp. 51-73, and Corrigendum, *Official Journal of the European Union*, L Series, No. 7 (12 January 2010) pp. 23-24 (Original Panel Exhibit CHN-3).

⁹ Original Panel Report, para. 8.2. In addition, the original panel found that the European Union had acted inconsistently with Articles 6.10, 9.2, and 18.4 of the Anti-Dumping Agreement, Article I:1 of the GATT 1994, and Article XVI:4 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement) with respect to Article 9(5) of the Basic AD Regulation. Further, in paragraph 8.3 of its report, the original panel rejected certain claims, in particular, finding that China had failed to establish that the European Union acted inconsistently with: (i) Articles 4.1 and 3.1 of the Anti-Dumping Agreement in respect of the definition of the domestic industry; and (ii) Article 2.4 of the Anti-Dumping Agreement in respect of the dumping determination. In paragraph 8.4 of its report, the original panel applied judicial economy with respect to certain other claims.

¹⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 624. The Appellate Body, however, declared moot and of no legal effect the original panel's finding that Article 9(5) of the Basic AD Regulation was inconsistent with Article I:1 of the GATT 1994.

¹¹ WT/DS397/14.

¹² WT/DS397/15/Add.3.

¹³ European Commission, Notice regarding the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the EC - Fasteners dispute (DS397), *Official Journal of the European Union*, C Series, No. 66 (6 March 2012), pp. 29-31 (Panel Exhibit CHN-2).

¹⁴ Council Implementing Regulation (EU) No. 924/2012 of 4 October 2012 amending Regulation (EC) No. 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, *Official Journal of the European Union*, L Series, No. 275 (10 October 2012) pp. 1-22 (Panel Exhibit CHN-3).

determined in the original investigation was confirmed, and revised anti-dumping duties at lower rates were imposed.

1.7. China, however, considered that the measure taken by the European Union through the Review Regulation to implement the DSB's recommendations and rulings in relation to the original investigation was inconsistent with various provisions of the Anti-Dumping Agreement and the GATT 1994.¹⁵ Thus, on 5 December 2013, China requested the establishment of a panel.¹⁶ The Panel was established by the DSB on 18 December 2013.¹⁷

1.8. Before the Panel, China claimed that certain aspects of the review investigation leading to the continued application of definitive duties on fasteners from China were inconsistent with Articles 2.4, 2.4.2, 3.1, 4.1, 6.1.2, 6.2, 6.4, 6.5, and 6.5.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

1.9. In the Panel Report, circulated to Members of the WTO on 7 August 2015, the Panel made the following findings:

- a. with respect to the European Union's claims regarding the Panel's terms of reference under Article 21.5 of the DSU, the Panel, for reasons stated in the Report, found that China's claims under: (i) Articles 6.5 and 6.5.1¹⁸; (ii) Articles 6.4. and 6.2¹⁹; (iii) Article 6.1.2²⁰; (iv) Article 2.4²¹; and (v) Articles 4.1 and 3.1²² of the Anti-Dumping Agreement were within its terms of reference;
- b. with respect to China's claim under Article 6.5 of the Anti-Dumping Agreement, the Panel found that the European Union acted inconsistently with that provision by treating the information on the list and characteristics of the products of the analogue country producer²³ (i.e. Pooja Forge) as confidential since the Commission never performed an objective assessment of whether the information at issue was confidential by nature, or whether good cause had been shown to justify its confidential treatment²⁴;
- c. with respect to China's conditional claim under Article 6.5.1 of the Anti-Dumping Agreement concerning the alleged failure of the Commission to ensure that Pooja Forge submit a non-confidential summary of the information at issue, the Panel found that it was not necessary to make a finding under that provision since it had already found a violation of Article 6.5 regarding the confidential treatment of the information at issue²⁵;
- d. with respect to China's claim under Article 6.4 of the Anti-Dumping Agreement, the Panel found that the European Union acted inconsistently under that provision by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, which information was not confidential within the meaning of Article 6.5, was relevant to the presentation of the Chinese producers' cases, and was used by the Commission²⁶;

¹⁵ Panel Report, para. 2.6.

¹⁶ WT/DS397/18.

¹⁷ Panel Report, para. 1.3.

¹⁸ Panel Report, para. 7.34.

¹⁹ Panel Report, paras. 7.78-7.80. Additionally, in paragraphs 7.85 and 7.86 of the Panel Report, the Panel rejected the European Union's jurisdictional objection that a part of China's claim was not within its terms of reference since it was not identified in China's panel request. However, this finding has not been appealed.

²⁰ Panel Report, paras. 7.114 and 7.115.

²¹ Panel Report, paras. 7.171, 7.233, and 7.239.

²² Panel Report, paras. 7.289 and 7.291.

²³ We recall that, due to the fact that market economy treatment (MET) was not granted to the Chinese producers in the original investigation, the Commission sought to determine the normal values on the basis of prices of fasteners sold in an appropriate surrogate (analogue) country, which in this case was India. The Commission identified two Indian companies, and one of them, Pooja Forge Ltd. (Pooja Forge), cooperated with the investigation and was considered to be the analogue country producer. (Appellate Body Report, *EC - Fasteners (China)*, fn 665 to para. 470)

²⁴ Panel Report, paras. 7.46, 7.50, and 8.1.i.

²⁵ Panel Report, paras. 7.50 and 8.3.

²⁶ Panel Report, paras. 7.92 and 8.1.ii.

- e. with respect to China's claim under Article 6.2 of the Anti-Dumping Agreement, the Panel found that the Commission, having denied the Chinese producers, access to information relevant within the meaning of Article 6.4, acted inconsistently with Article 6.2 since the Chinese producers did not have full opportunity to defend their interests²⁷;
- f. with respect to China's claim under Article 6.1.2 of the Anti-Dumping Agreement, the Panel found that Pooja Forge was not an interested party in the review investigation, and that China had failed to establish that the European Union acted inconsistently with the obligations under Article 6.1.2 by failing to ensure that the information provided by Pooja Forge concerning the list and characteristics of its products was made available promptly to the Chinese producers²⁸;
- g. with respect to China's claims under Article 2.4 of the Anti-Dumping Agreement, the Panel found that:
- i. the European Union acted inconsistently with that provision by failing to provide the Chinese producers with the information regarding the characteristics of Pooja Forge's products that were used in the determination of the normal values and which would have allowed the Chinese producers to request adjustments under Article 2.4²⁹;
 - ii. China had failed to establish that "by failing to compare the prices of the standard fasteners with the prices of standard fasteners in calculating dumping margins for the Chinese producers", the European Union acted inconsistently with Article 2.4³⁰; and
 - iii. China had failed to establish that by failing to make adjustments for differences that affected price comparability, namely, differences: (i) in taxation; (ii) in physical characteristics; and (iii) with regards to "easier access to raw materials", "use of self-generated electricity", and "efficiency and productivity", the European Union acted inconsistently with Article 2.4³¹;
- h. with respect to China's claim under Article 2.4.2 of the Anti-Dumping Agreement, the Panel found that the European Union acted inconsistently with that provision by not taking into consideration, in its dumping margin determinations, models exported by the Chinese producers that did not match any of the models sold by Pooja Forge³²; and
- i. with respect to China's claim under Articles 4.1 and 3.1 of the Anti-Dumping Agreement, the Panel found that the European Union acted inconsistently with Article 4.1 in defining the domestic industry in the review investigation on the basis of domestic producers that came forward in response to the Notice of Initiation issued in the original investigation since the definition suffered from a self-selection process that introduced a material risk of distortion.³³ The Panel also found that the European Union acted inconsistently with Article 3.1 since the Commission's injury determination was based on the data obtained from a wrongly defined domestic industry.³⁴

1.10. On 9 September 2015, the European Union notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Appeal and an appellant's

²⁷ Panel Report, paras. 7.94, 7.96, and 8.1.ii.

²⁸ Panel Report, paras. 7.119, 7.123, and 8.2.i.

²⁹ Panel Report, paras. 7.142, 7.148, and 8.1.iii.

³⁰ Panel Report, paras. 7.194 and 8.2.ii. This finding has not been appealed.

³¹ Panel Report, paras. 7.223, 7.230, 7.236, 7.250, 7.251, and 8.2.iii.

³² Panel Report, paras. 7.276 and 8.1.iv. In paragraphs 7.276 and 8.3 of its Report, the Panel refrained from addressing China's allegation of violation of Article 2.4 owing to the exclusion of models from the dumping determinations, since it had already found a violation of Article 2.4.2 of the Anti-Dumping Agreement.

³³ Panel Report, paras. 7.296, 7.299, and 8.1.v.

³⁴ Panel Report, paras. 7.299 and 8.1.v.

submission.³⁵ On 14 September 2015, China notified the DSB, pursuant to Articles 16.4 and 17 of the DSU, of its intention to appeal certain issues of law covered in the Panel Report and certain legal interpretations developed by the Panel and filed a Notice of Other Appeal and other appellant's submission.³⁶ On 28 September 2015, the European Union and China each filed an appellee's submission.³⁷ On 1 October 2015, Japan and the United States each filed a third participant's submission.³⁸

1.11. By letter dated 6 November 2015³⁹, the Chair of the Appellate Body notified the Chair of the DSB that the Appellate Body would not be able to circulate its Report in this appeal within the 60-day period pursuant to Article 17.5 of the DSU, or within the 90-day period pursuant to the same provision. The Chair of the Appellate Body explained that this was due to a number of factors, including the substantial workload of the Appellate Body, scheduling difficulties arising from overlap in the composition of the Divisions hearing appeals concurrently pending before the Appellate Body, the length of the submissions filed in this appeal, the number and complexity of the issues raised in this and concurrent appellate proceedings, and the shortage of staff in the Appellate Body Secretariat. The Chair of the Appellate Body estimated that the Report in this appeal would be circulated to WTO Members no later than Monday, 18 January 2016.

1.12. The oral hearing in this appeal was held on 10-11 November 2015. The participants and third participants made oral statements and responded to questions posed by the Appellate Body Division hearing the appeal.

2 ARGUMENTS OF THE PARTICIPANTS

2.1. The claims and arguments of the participants are reflected in the executive summaries of their written submissions provided to the Appellate Body.⁴⁰ The Notices of Appeal and Other Appeal, and the executive summaries of the participants' claims and arguments, are contained in Annexes A and B of the Addendum to this Report, WT/DS397/AB/RW/Add.1.

3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants are reflected in the executive summaries of their written submissions provided to the Appellate Body⁴¹, which are contained in Annex C of the Addendum to this Report, WT/DS397/AB/RW/Add.1.

4 ISSUES RAISED IN THIS APPEAL

4.1. With respect to the Panel's findings under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, the following issues are raised on appeal:

- a. whether the Panel erred in finding that China's claims under Articles 6.5 and 6.5.1 fell within its terms of reference (raised by the European Union);
- b. whether the Panel erred in finding that the European Union acted inconsistently with Article 6.5 because, in the review investigation, the Commission accorded confidential treatment to the information at issue, without objectively assessing whether Pooja Forge had shown "good cause" for such treatment (raised by the European Union); and

³⁵ Pursuant to Rules 20 and 21, respectively, of the Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010 (Working Procedures).

³⁶ Pursuant to Rule 23 of the Working Procedures.

³⁷ Pursuant to Rules 22 and 23(4) of the Working Procedures.

³⁸ Pursuant to Rule 24(1) of the Working Procedures.

³⁹ WT/DS397/23.

⁴⁰ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

⁴¹ Pursuant to the Appellate Body's communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" (WT/AB/23, 11 March 2015).

- c. in the event that the Appellate Body reverses the Panel's finding that the European Union acted inconsistently with Article 6.5, whether the European Union acted inconsistently with Article 6.5.1 in the review investigation as regards the Commission's alleged failure to ensure that Pooja Forge submit a non-confidential summary of its information in accordance with the requirements of Article 6.5.1 (raised by China).

4.2. With respect to the Panel's findings under Articles 6.4 and 6.2 of the Anti-Dumping Agreement, the following issues are raised on appeal:

- a. whether the Panel erred in finding that China's claims under Articles 6.4 and 6.2 fell within its terms of reference (raised by the European Union);
- b. whether the Panel erred in finding that the European Union acted inconsistently with Article 6.4 because, in the review investigation, the Commission failed to provide "timely opportunities" for the Chinese producers to see the information at issue (raised by the European Union); and
- c. whether, as a consequence of the alleged errors made by the Panel under Article 6.4, the Panel erred in finding that the European Union acted inconsistently with Article 6.2 (raised by the European Union).

4.3. With respect to the Panel's findings under Article 6.1.2 of the Anti-Dumping Agreement, the following issues are raised on appeal:

- a. whether the Panel erred in finding that China's claim under Article 6.1.2 fell within its terms of reference (raised by the European Union); and
- b. whether the Panel erred in finding that Pooja Forge was not an "interested party" in the review investigation at issue within the meaning of Article 6.11 of the Anti-Dumping Agreement, and that, therefore, the obligation under Article 6.1.2 to make information available promptly to interested parties did not apply to information provided by Pooja Forge (raised by China).

4.4. With respect to the Panel's findings under Article 2.4 of the Anti-Dumping Agreement, the following issues are raised on appeal:

- a. whether the Panel erred in finding that the European Union acted inconsistently with the last sentence of Article 2.4 because, in the review investigation, the Commission failed to provide the Chinese producers with certain information regarding the characteristics of Pooja Forge's products (raised by the European Union);
- b. whether the Panel erred in finding that China's claim under Article 2.4 in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs fell within its terms of reference (raised by the European Union);
- c. in the event that the Appellate Body reverses the Panel's finding that the European Union acted inconsistently with the last sentence of Article 2.4, whether the Panel erred in finding that the European Union did not act inconsistently with Article 2.4 by failing to make adjustments for differences in physical characteristics (raised by China); and
- d. whether the Panel erred in finding that the European Union did not act inconsistently with Article 2.4 as regards the Commission's failure to make adjustments for differences in taxation and differences in other costs, namely, differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee (raised by China).

4.5. With respect to the Panel's findings under Article 2.4.2 of the Anti-Dumping Agreement, the following issue is raised on appeal:

- a. whether the Panel erred in finding that the European Union acted inconsistently with this provision by excluding, in the Commission's dumping determinations, models exported by the Chinese producers that did not match any of the models sold by Pooja Forge (raised by the European Union).

4.6. With respect to the Panel's findings under Articles 4.1 and 3.1 of the Anti-Dumping Agreement, the following issues are raised on appeal:

- a. whether the Panel erred in finding that China's claims under Articles 4.1 and 3.1 fell within its terms of reference (raised by the European Union);
- b. whether the Panel erred in finding that the European Union acted inconsistently with Article 4.1 because the Commission defined the domestic industry on the basis of domestic producers that had come forward in response to the Notice of Initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating (raised by the European Union); and
- c. whether the Panel erred in finding that the Commission's injury determination, based on the data obtained from a wrongly-defined domestic industry, was inconsistent with Article 3.1 (raised by the European Union).

5 ANALYSIS OF THE APPELLATE BODY

5.1 Background

5.1.1 Overview of the original anti-dumping investigation

5.1. In the Notice of Initiation of an anti-dumping investigation on imports of certain iron or steel fasteners from China issued on 9 November 2007, the Commission specified that it intended to examine, on the basis of sampling, whether the domestic industry had suffered injury and further noted that, only those producers that had come forward within the timeline stipulated therein and were willing to be included in the injury sample, would be considered as cooperating.⁴² Out of approximately 300 domestic producers, 70 came forward in response to the Notice of Initiation.⁴³ The Commission excluded 25 of these 70 producers from the domestic industry definition for various reasons, one of which was the producers' expressed unwillingness to be a part of the injury sample.⁴⁴ Thus, 45 producers were found to constitute the domestic industry for purposes of the investigation. The producers that supported the complaint and cooperated with the Commission represented 27% of the total production of the like product in the European Union.⁴⁵

5.2. The Commission considered that the Chinese producers under investigation did not operate according to the principles of a market economy. Thus, the Commission resorted to the so-called "analogue country methodology"⁴⁶ for determining the normal values for the Chinese products under investigation. India was chosen as the analogue country.⁴⁷ The Commission, through its anti-dumping questionnaires, requested the Chinese producers and Pooja Forge to provide information on the product under investigation on the basis of product control numbers (PCNs),

⁴² Notice of Initiation (Original Panel Exhibit CHN-14), recital 5.1(a)(iii).

⁴³ Appellate Body Report, *EC – Fasteners (China)*, para. 428.

⁴⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 429.

⁴⁵ Original Panel Report, para. 7.143.

⁴⁶ Section 15(a) of China's Accession Protocol permits a WTO Member, in certain circumstances, to "use either Chinese prices or costs for the industry under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China" in "determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement". (Protocol on the Accession of the People's Republic of China, WT/L/432) Thus, the Commission's resort to the analogue country methodology arises from this provision. In this regard, we also recall the finding of the Appellate Body that the second *Ad Note* to Article VI:1 of the GATT 1994, in certain circumstances, "allows investigating authorities to disregard domestic prices and costs of ... an NME in the determination of the normal value and to resort to prices and costs in a market economy third country". (Appellate Body Report, *EC – Fasteners (China)*, para. 285)

⁴⁷ Panel Report, para. 7.9.

which were made up of six elements: (i) types of fasteners (by combined nomenclature (CN) code); (ii) strength/hardness; (iii) coating; (iv) presence of chrome on coating; (v) diameter; and (vi) length/thickness (the original PCNs).⁴⁸ However, Pooja Forge did not provide information categorized on the basis of the original PCNs in its questionnaire response. Subsequently, during a verification visit by the Commission, Pooja Forge provided a domestic sales listing (DMSAL) file that contained prices, quantities, an internal item code for each product sold, and a product description text string (e.g. M8X1.25X16 FLANGE SCREW) for about 80,000 transactions.⁴⁹ Pooja Forge also provided a non-confidential summary of its questionnaire response⁵⁰, as well as a company brochure, which, according to the Commission, contained information on product range, production process, and other company-sensitive details, such as production capacity and number of employees.⁵¹ Additionally, Pooja Forge identified the strength class for each of the products sold in the Indian domestic market.⁵²

5.3. Since the normal values for the Chinese producers were to be established on the basis of the information provided by Pooja Forge, and since Pooja Forge had failed to provide information on the basis of the original PCNs, the Commission could not make its comparison between the normal values and the export prices on the basis of the original PCNs. Therefore, the Commission resorted to the use of "product types" defined by two elements: (i) strength class; and (ii) the distinction between standard and special fasteners.⁵³ Although the Commission indicated in the "final disclosure"⁵⁴ in the original investigation that it had based the normal value determination on "product types", it did not specify the number or relevant characteristics of the product types or how they were determined.⁵⁵

5.4. The Chinese producers requested information concerning the "product types", asking in particular to "see a listing of such 'product types' and a linkage with the PCNs" that had been used for the normal value calculation.⁵⁶ This request was subsequently reiterated, stating that "it would still be very useful [to] have a listing simply of which type of fastener or which PCNs of Pooja [Forge] were matched with [their] PCNs."⁵⁷ One day before the deadline for submitting comments on the final disclosure, the Commission confirmed that "[t]he comparison was not made on the basis of the full PCN[s], but on part of the characteristics of the product, namely the strength class as well as the ... distinction between special and standard [fasteners]"⁵⁸ – i.e. the "product types". Referring to the Commission's belated confirmation, the Chinese producers once again stressed the importance of obtaining information concerning these "product types" in order to comment on the dumping determination, and reiterated that it was "moreover still unclear what characteristics were finally included for product differentiation purposes in the calculations".⁵⁹ Thereafter, the European Union issued the Definitive Regulation imposing anti-dumping duties which, as described in paragraph 1.2 above, was challenged by China in the original proceedings before the WTO as being inconsistent with the covered agreements.

⁴⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 470.

⁴⁹ Panel Report, para. 7.9.

⁵⁰ Response to the European Commission's Anti-Dumping Questionnaire for producers in analogue countries of certain iron or steel fasteners, submitted by Pooja Forge in the original anti-dumping investigation (Panel Exhibit CHN-24).

⁵¹ Panel Report, para. 7.9.

⁵² R548: WTO Fasteners Implementation Review, Note for the File dated 11 July 2012 on the Reclassification of normal value from one producer in India (Panel Exhibit CHN-17).

⁵³ Appellate Body Report, *EC – Fasteners (China)*, para. 471 (referring to Original Panel Report, para. 7.293).

⁵⁴ General Disclosure Document, AD525: Anti-dumping proceeding concerning imports of certain iron or steel fasteners originating in the People's Republic of China, Proposal to impose definitive measures, 3 November 2008 (Original Panel Exhibit CHN-18).

⁵⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 472 (referring to Original Panel Report, para. 7.485).

⁵⁶ Letter dated 7 November 2008 on behalf of Kunshan Chenghe and Ningbo Jinding to the European Commission concerning the Definitive Disclosure Document (Original Panel Exhibit CHN-28), para. 2.

⁵⁷ Letter dated 17 November 2008 on behalf of Kunshan Chenghe and Ningbo Jinding to the European Commission concerning the Definitive Disclosure Document: Request for Information II (Original Panel Exhibit CHN-30), para. 4.

⁵⁸ Letter dated 21 November 2008 from the European Commission to Van Bael & Bellis in response to Kunshan Chenghe's and Ningbo Jinding's request of 17 November 2008 (Original Panel Exhibit CHN-31), point (4).

⁵⁹ Letter dated 24 November 2008 on behalf of Kunshan Chenghe to the European Commission containing comments on the Definitive Disclosure Document (Original Panel Exhibit CHN-59), p. 4.

5.1.2 Overview of the review investigation

5.5. On 6 March 2012, the European Union issued a notice for the purposes of: (i) initiating the review investigation; and (ii) "inform[ing] interested parties of the manner in which the [DSB's] findings in regard to the measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China [would] be taken into account".⁶⁰ It is uncontested that in the review investigation the Commission did not issue a new notice of initiation asking domestic producers willing to participate in the investigation to come forward. Instead, the Commission re-defined the domestic industry on the basis of all EU producers that had come forward within the 15-day deadline prescribed in the Notice of Initiation of the original investigation, irrespective of their willingness to be a part of the injury sample.⁶¹ Thus, the newly defined domestic industry represented approximately 36% of the total production of the like product in the European Union.⁶²

5.6. In the review investigation, the Commission disclosed more information than it had given in the original investigation regarding "the product characteristics [that it had] found to be pertinent in the determination of the normal value[s]".⁶³ The record reflects that the Chinese producers then requested more information regarding: (i) the "product types" used for the determination of the normal values; and (ii) the characteristics of the products sold by [Pooja Forge], in particular, information regarding "the models of products sold" and "a table matching type-by-type the products sold by [Pooja Forge] and the products sold by [the Chinese producers]".⁶⁴ The Commission informed the Chinese producers that the models⁶⁵ sold by Pooja Forge were provided on a confidential basis and could not be disclosed.⁶⁶ Additionally, the Chinese producers requested that adjustments be made for: (i) differences in physical characteristics, namely, type of fastener; coating and use of chrome; diameter and length; traceability; standards; unit of defective rate; and hardness, bending strength, impact toughness, friction coefficient⁶⁷; as well as (ii) differences in efficiency of consumption of the raw material; in wire rod used for production; in electricity

⁶⁰ European Commission, Notice regarding the anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China, following the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the EC - Fasteners dispute (DS397), *Official Journal of the European Union*, C Series, No. 66 (6 March 2012), pp. 29-31 (Panel Exhibit CHN-2).

⁶¹ Panel Report, para. 7.296.

⁶² Review Regulation (Panel Exhibit CHN-3), recitals 112 and 115.

⁶³ Letter dated 30 May 2012 from the European Commission to interested parties including the disclosure document concerning normal value (Panel Exhibit CHN-5).

⁶⁴ Letter dated 12 June 2012 on behalf of Changshu to the European Commission requesting further information and clarification regarding the determination of normal value (Panel Exhibit CHN-8), pp. 5-6. See also Letter dated 13 June 2012 on behalf of Biao Wu to the European Commission in response to the Commission's letter of 30 May 2012 (Panel Exhibit CHN-6); Letter dated 12 June 2012 on behalf of Ningbo Jinding to the European Commission requesting further information and clarification regarding the determination of normal value (Panel Exhibit CHN-9).

⁶⁵ We note certain discrepancies in the terminology used in this dispute, in particular, in the usage of the term "model(s)". We note that the Commission, in Panel Exhibits CHN-11 and CHN-12, appears to have used the term "models" to mean specific products. This understanding is further reinforced by the fact that the Commission informed the Chinese interested parties that Pooja Forge did not want to disclose information on "models actually manufactured and sold". (Report of the Hearing with the Commission of 11 July 2012, 18 July 2012 (Panel Exhibit CHN-30), internal p. 5) We also note the usage of the term "model(s)" by the Panel. In particular, in making its findings under Article 2.4.2 of the Anti-Dumping Agreement, the Panel relied on, *inter alia*, the Appellate Body's ruling in *US – Softwood Lumber V*, where the Appellate Body indicated that the multiple averaging technique is performed by dividing the "like product ... into product types or models". (Appellate Body Report, *US – Softwood Lumber V*, para. 80) This would mean that the term "models" refers to different groupings of products determined by the investigating authority for the purpose of the weighted average-to-weighted average (WA-WA) comparison. The Panel, however, appears to have used the term "model(s)" to refer, at times, to the groupings of products (see e.g. Panel Report, para. 7.270) and, at other times, to specific products (see e.g. Panel Report, para. 7.144). For the purposes of this Report, unless otherwise indicated, we use the term "model" to refer to the different product groupings that the Commission used in the "multiple averaging" technique.

⁶⁶ E-mail dated 26 June 2012 from the European Commission concerning CCCME, Biao Wu, and Jiashan (Panel Exhibit CHN-11); E-mail dated 21 June 2012 from the European Commission concerning Changshu and Ningbo Jinding (Panel Exhibit CHN-12).

⁶⁷ Letter dated 13 June 2012 on behalf of Biao Wu to the European Commission in response to the Commission's letter of 30 May 2012 (Panel Exhibit CHN-6).

consumption; in use of self-generated electricity; in productivity per employee; and in reasonable profit level.⁶⁸

5.7. Following the comments of the Chinese producers, the Commission, after analysing the description text string of sales coding used by Pooja Forge (which was contained in the DMSAL file), framed and disclosed the "revised PCNs" based on the following elements: (i) the distinction between standard and special fasteners; (ii) strength class; (iii) coating; (iv) diameter (ranged into three equal bands); and (v) length (ranged into three equal bands), which it intended to use for the purposes of the normal value and dumping margin calculations⁶⁹ instead of the "product types" used in the original investigation. As the record further shows, the Chinese producers continued to seek clarification from the Commission with respect to the adjustments claimed by them and the confidential treatment of the information submitted by Pooja Forge. The Chinese producers requested the disclosure of "the list of normal value product types", indicating to which export PCN they were compared; disclosure of the sales code identifying diameter and length; and information regarding additional physical characteristics of the normal value product type, including chrome and coating.⁷⁰ The Commission reiterated that the description text strings were confidential and Pooja Forge did not want to disclose the "models" it had sold to its competitors.⁷¹

5.8. On 31 July 2012, as part of its final disclosure, the Commission issued the "General Disclosure Document" and gave the Chinese producers three weeks to submit comments.⁷² Along with the General Disclosure Document, the Commission provided company-specific disclosures, which revealed detailed dumping margin calculations.⁷³ We note that, in these calculation sheets, the transactions were organized by reference to the revised PCNs, including six letters (i.e. coating by codes A to N; use of chrome by yes or no and codes P or Q; type of fastener by codes PCN 0 to 9; strength by codes A to Y; diameter by codes S, M, and L; and length by codes S, M, and L). These disclosures indicated the characteristics of the products exported by the Chinese producers and those sold domestically by Pooja Forge as per the revised PCNs. When there was a match between export transactions and domestic transactions, the same was taken into account for the purposes of the dumping margin calculations. Export transactions for which there was no corresponding domestic transaction were excluded from the purview of the dumping calculations.

5.9. In their comments on the General Disclosure Document, the Chinese producers raised several issues regarding the obligation of the Commission to make a fair comparison between the normal values and the export prices, including, in particular: (i) the disclosure of "normal value product types"; (ii) the need for indications on how to substantiate requests for adjustments; (iii) the need for full disclosure on how adjustments had been made; and (iv) the obligation not to disregard any comparable export transactions in the calculation of the dumping margins.⁷⁴ The Chinese producers also elaborated on a number of adjustments that had been rejected by the Commission in the General Disclosure Document, in particular, adjustments for differences relating to: (i) access to raw materials; (ii) use of self-generated electricity; and (iii) efficiency and

⁶⁸ Letter dated 13 June 2012 on behalf of Ningbo Jinding to the European Commission concerning the disclosure of 30 May 2012 (Panel Exhibit CHN-33); Letter dated 13 June 2012 on behalf of Changshu to the European Commission concerning the disclosure of 30 May 2012 (Panel Exhibit CHN-34).

⁶⁹ Letter dated 5 July 2012 from the European Commission to interested parties (Panel Exhibit CHN-15); R548: WTO Fasteners Implementation Review, Note for the File dated 11 July 2012 on the Reclassification of normal value from one producer in India (Panel Exhibit CHN-17).

⁷⁰ Letter dated 11 July 2012 on behalf of CCCME and Biao Wu to the European Commission concerning the disclosure of 5 July 2012 (Panel Exhibit CHN-27).

⁷¹ Report of the Hearing with the Commission of 11 July 2012, 18 July 2012 (Panel Exhibit CHN-30), internal p. 5.

⁷² Cover letter to the General Disclosure Document dated 31 July 2012 (Panel Exhibit CHN-22); General Disclosure Document, R548: Anti-dumping measures in force on imports of certain iron or steel fasteners originating in the People's Republic of China: implementation of the recommendations and rulings adopted by the Dispute Settlement Body of the World Trade Organization on 28 July 2011 in the EC – Fasteners dispute (DS397), 31 July 2012 (Panel Exhibit EU-4).

⁷³ Calculations for Biao Wu (Panel Exhibit CHN-44); Calculations for Ningbo Jinding (Panel Exhibit CHN-45); Calculations for Changshu (Panel Exhibit CHN-46).

⁷⁴ Letter dated 20 August 2012 on behalf of CCCME and Biao Wu to the European Commission containing comments on the disclosure of 31 July 2012 (Panel Exhibit CHN-23).

productivity.⁷⁵ Thereafter, the European Union issued the Review Regulation, which, in China's request for the establishment of a panel, was identified as being the measure at issue that failed fully and correctly to implement the recommendations and rulings of the DSB in the original proceedings.⁷⁶

5.2 Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

5.2.1 The Panel's terms of reference

5.10. Before the Panel, the European Union argued that China was precluded from raising its claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in the compliance proceedings because it had already raised the same claims in the original proceedings and they were ultimately rejected by the Appellate Body.⁷⁷

5.11. The Panel found that, "in terms of its object, the present claim is distinct from the original claim."⁷⁸ The Panel clarified that "[t]he present claim concerns information on the 'list and characteristics' of the products sold by Pooja Forge, whereas the original claim was presented with respect to the entirety of Pooja Forge's questionnaire response but was pursued only with respect to information on [Pooja Forge's] product types."⁷⁹ In support of this conclusion, the Panel noted that the "list and characteristics" were not submitted in Pooja Forge's questionnaire response, but were submitted later on, in the DMSAL file and in the company brochure provided by Pooja Forge to the Commission during a verification visit in April 2008.⁸⁰

5.12. On appeal, the European Union claims that the Panel wrongly concluded that the claims made in the original and in the compliance proceedings took issue with different types of information.⁸¹ The European Union argues that, in the compliance proceedings, China took issue again with the same information, namely, Pooja Forge's "product characteristics", albeit using a different terminology.⁸² Therefore, the European Union contends that "[n]othing changed when compared with the facts as challenged by China in the original proceedings", and that China raises the "same claim against the same underlying facts in the context of the review investigation".⁸³

5.13. China responds that the claim by the European Union that the Panel erred in concluding that the objects of the claims in the original and compliance proceedings were different concerns the Panel's assessment of the facts and we should dismiss it as the European Union did not raise a claim under Article 11 of the DSU.⁸⁴ Moreover, China argues that, in the original proceedings, its claim under Article 6.5 was about "product types", not about "product characteristics" or the list of products.⁸⁵ China explains that "product types" is a term "that [was] used in the original dispute settlement proceedings to designate the 'product categories upon which the Commission based its comparison between normal value[s] and export prices' in the original investigation".⁸⁶ With the "list of products", China refers to the list of item codes in the DMSAL file⁸⁷, and, with the "characteristics", China refers to information regarding the characteristics of Pooja Forge's products concerning at least the type of coating, chrome, diameter, length, and types of fasteners.⁸⁸

5.14. The first question before us is whether the European Union's claim concerning the Panel's terms of reference under Articles 6.5 and 6.5.1 is such that it could only have been raised on

⁷⁵ Comments dated 14 August 2012 on behalf of Ningbo Jinding on the disclosure of 31 July 2012 (Panel Exhibit CHN-28); Comments dated 14 August 2012 on behalf of Changshu on the disclosure of 31 July 2012 (Panel Exhibit CHN-28).

⁷⁶ WT/DS397/18, para. 11.

⁷⁷ Panel Report, paras. 7.13 and 7.20.

⁷⁸ Panel Report, para. 7.30.

⁷⁹ Panel Report, para. 7.30. See also Original Panel Report, para. 7.524.

⁸⁰ Panel Report, paras. 7.31-7.33.

⁸¹ European Union's appellant's submission, para. 124.

⁸² European Union's appellant's submission, para. 132.

⁸³ European Union's appellant's submission, para. 133.

⁸⁴ China's appellee's submission, para. 41.

⁸⁵ China's appellee's submission, paras. 46 and 50.

⁸⁶ China's response to Panel question No. 12.a, para. 56. (emphasis omitted; fn omitted)

⁸⁷ China's appellee's submission, para. 50.

⁸⁸ China's appellee's submission, para. 50. See also China's response to Panel question No. 9, para. 47.

appeal under Article 11 of the DSU. We observe that whether the information whose confidential treatment was at issue in the original proceedings is the same as the information whose confidential treatment is at issue in these compliance proceedings may involve factual aspects, which we would not be able to review on appeal in the absence of a claim under Article 11 of the DSU. At the same time, ascertaining whether the information is the same will in this case determine whether the Panel had jurisdiction under Article 21.5 of the DSU to address China's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. In the light of this, we are of the view that the European Union's terms of reference claim should be treated as one concerning the application of the law to the facts, rather than a purely factual issue that should have been raised under Article 11 of the DSU.

5.15. Turning to the European Union's claim, we recall that, in *EC – Bed Linen (Article 21.5 – India)*, the Appellate Body stated that a complainant should not be allowed to raise claims in compliance proceedings that were already raised and dismissed in the original proceedings in respect of a component of the implementation measure that is the same as in the original measure.⁸⁹ However, in subsequent disputes, the Appellate Body clarified that the same claim with respect to an unchanged element of the measure can be re-litigated in Article 21.5 proceedings if, in the original proceedings, the matter was not resolved because, for instance, the Appellate Body was not able to complete the analysis.⁹⁰

5.16. To succeed in claiming that China could not raise its claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement before the Panel, the European Union needed to demonstrate that the claims are the *same* claims that were raised in the original proceedings, and that these claims were *resolved* in the original proceedings.⁹¹ We thus begin our analysis by considering whether the claims raised by China in these compliance proceedings under Articles 6.5 and 6.5.1 are the *same* claims that China raised in the original proceedings. Only if we conclude that these are in fact the *same* claims, shall we need to address the question of whether such claims were *resolved* in the original proceedings.

5.17. We agree with the Panel that the question to be answered in order to determine whether the claims raised in the original and in the compliance proceedings are the same claims is whether the "object" of the claims is the same.⁹² We understand the object of the claim to be the information that the Commission treated as confidential within the meaning of Article 6.5. In addressing this question, we briefly recall relevant findings made by the Panel.

5.18. In the original investigation, the questionnaire sent by the Commission to the Chinese producers and Pooja Forge required that information on the products be provided based on the original PCNs composed of six elements. However, Pooja Forge failed to provide the information in the detailed manner as was required under the original PCNs. The Chinese producers that had submitted the information according to the original PCNs, however, assumed that the Commission would conduct the comparison between the normal values and the export prices based on the original PCNs. In the final disclosure, the Commission informed the Chinese producers that it had not conducted the comparison based on the full PCNs, but rather on "product types", without at that stage providing any information as to those "product types" or

⁸⁹ Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, paras. 96 and 98. See also Appellate Body Report, *US – Shrimp (Article 21.5 – Malaysia)*, para. 96. In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body further clarified that a panel has jurisdiction under Article 21.5 in respect of new "claims against a measure taken to comply – that is, in principle, a new and different measure" and that "[t]his is so even where such a measure taken to comply incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply." (Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432)

⁹⁰ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210. For the same reasons, the Appellate Body has suggested that the same claim that was dismissed in the original proceedings due to an exercise of judicial economy could also be raised in the compliance proceedings. (See Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina)*, para. 148; and *EC – Bed Linen (Article 21.5 – India)*, fn 115 to para. 96)

⁹¹ Indeed, as the Appellate Body explained in *US – Upland Cotton (Article 21.5 – Brazil)*, the exclusion of jurisdiction for an Article 21.5 panel in respect of claims that are the same as claims raised in the original proceedings applies when such claims have been *resolved* in the original proceedings. (Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 210)

⁹² Panel Report, para. 7.30.

how they were determined.⁹³ The Commission thereafter clarified that these "product types" were made of two elements: strength class and the distinction between special and standard fasteners.⁹⁴

5.19. Thus, in the original investigation, the Commission treated as confidential⁹⁵ and did not disclose the "product types" it used to compare normal values and export prices for the purpose of determining the dumping margins until late in the proceedings and after repeated requests from the Chinese producers.⁹⁶ These "product types" were based on part of the elements of the original PCNs. The difference between using full PCNs, on the one hand, and using the "product types" identified by the Commission, on the other hand, was described by the Appellate Body in the original proceedings as follows:

[T]he PCNs include six elements further divided into 38 specifications, which could have resulted in hundreds of different combinations. Yet, the PCN characteristics and the product types overlap only with regard to one element, namely, the strength class.⁹⁷

5.20. In the review investigation, following the recommendations and rulings of the DSB that the European Union had acted inconsistently with Articles 6.4 and 6.2 of the Anti-Dumping Agreement by not providing a timely opportunity to the Chinese producers to see the information regarding the "product types", the Commission disclosed more precise information regarding the product characteristics that had been found to be pertinent in the determination of the normal values, including information about Pooja Forge's "product types" and certain characteristics of Pooja Forge's products, such as coating, length, and diameter. These disclosures led the Chinese producers to seek further information on the "product types" and the "precise and detailed characteristics" of the products sold by Pooja Forge⁹⁸, which the Commission stated were provided on a confidential basis and could not be disclosed.⁹⁹

5.21. It follows that the Commission never fully disclosed the relevant product information concerning the dumping calculations. The partial disclosures that were made in the original and in the review investigation prompted the Chinese producers to request further information that they considered relevant to their cases. The requests for further disclosure by the Chinese producers in the review investigation were prompted by, and based, on information that the Commission had initially treated as confidential. As such, these requests and the Commission's treatment of the information as confidential and its non-disclosure cannot concern the same information that the Commission treated as confidential in the original investigation.

5.22. Thus, the objects of China's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in the original and in the compliance proceedings are not the same. China's claims under Articles 6.5 and 6.5.1 in the original proceedings concerned the confidential treatment of all

⁹³ Appellate Body Report, *EC – Fasteners (China)*, paras. 470-472. See also Original Panel Report, para. 7.485.

⁹⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 475.

⁹⁵ In the original investigation, the Commission also treated as confidential all of the information contained in Pooja Forge's questionnaire response. This information, however, did not include the "list and characteristics" of Pooja Forge's products, which were submitted subsequently by Pooja Forge during the verification visit of April 2008 by providing, *inter alia*, the DMSAL file and the company brochure.

⁹⁶ In a letter dated 21 November 2008, the Commission replied to the request from Chinese producers stating:

The comparison was not made on the basis of the full PCN, but on part [sic] of the characteristics of the product, namely the strength class as well as the abovementioned distinction between special and standard products.

(Original Panel Report, para. 7.489 (quoting Letter dated 21 November 2008 from the European Commission to Van Bael & Bellis in response to Kunshan Chenghe's and Ningbo Jinding's requests of 17 November 2008 (Original Panel Exhibit CHN-31), p. 2 (emphasis added by the original panel))

⁹⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 498. We recall that the types of fasteners by CN code included in the original PCNs were replaced by the distinction between standard and special fasteners when the Commission decided to use the "product types" in the original investigation.

⁹⁸ Letter dated 12 June 2012 on behalf of Changshu to the European Commission (Panel Exhibit CHN-8), p. 5; Letter dated 12 June 2012 on behalf of Ningbo Jinding to the European Commission (Panel Exhibit CHN-9), p. 5; Letter dated 13 June 2012 on behalf of Biao Wu to the European Commission (Panel Exhibit CHN-6), pp. 3-4.

⁹⁹ Panel Report, paras. 7.70-7.74.

the information provided in Pooja Forge's questionnaire¹⁰⁰ and the "product types" (i.e. the strength class and the distinction between special and standard fasteners) that the Commission used to make the dumping calculations. China's claims under Articles 6.5 and 6.5.1 in the compliance proceedings concerned the confidential treatment of the list and characteristics of Pooja Forge's products, which the Chinese producers asked to see after the Commission had disclosed to them the "product types" and certain characteristics used in the price comparison in order to bring itself into compliance with the DSB's recommendations and rulings in the original proceedings under Articles 6.4 and 6.2 of the Anti-Dumping Agreement.

5.23. In addition to its finding that the claims at issue in the original and in the compliance proceedings were not the same, the Panel also noted that, in the review investigation, a fair amount of exchange of views took place between the Commission and the Chinese producers with respect to the confidentiality of the information regarding the list and characteristics of Pooja Forge's products. The Panel considered these communications between the Commission and the Chinese producers to be an indication that this particular issue was closely related to the debate regarding the consistency of the measure taken by the European Union to comply with the DSB's recommendations and rulings in the original proceedings.¹⁰¹ The European Union disagrees and contends that, since there were no DSB recommendations or rulings on the Article 6.5 claim with respect to information regarding Pooja Forge, the Commission "was not required to modify such a treatment in the context of the review investigation".¹⁰²

5.24. We recall that, in the original proceedings, the Appellate Body did not find a violation of Article 6.5. However, the measure that the Appellate Body did not find to be inconsistent with Article 6.5 is the same measure that it found to be inconsistent with Articles 6.4, 6.2, and 2.4, that is, the confidential treatment and the non-timely disclosure of information regarding the "product types". Therefore, the measure taken by the European Union to comply with Articles 6.4, 6.2, and 2.4 also addressed China's claims in the original proceedings under Article 6.5, in that it resulted in the disclosure of the same information that was the object of China's claim under Article 6.5 in the original proceedings.¹⁰³

5.25. To comply with the recommendations and rulings of the DSB that the European Union had acted inconsistently with Articles 6.4 and 6.2 by not disclosing the information on the "product types" on a timely basis, and with Article 2.4 by failing to indicate to the parties what information was necessary to ensure a fair comparison, the Commission disclosed certain information concerning the determination of normal values, including the "product types", as well as information about certain characteristics of Pooja Forge's products. As explained above, these disclosures led the Chinese producers to seek further information concerning the "product types" and the "precise and detailed characteristics" of the products sold by Pooja Forge¹⁰⁴, which the Commission responded had been provided on a confidential basis and could not be disclosed.¹⁰⁵

¹⁰⁰ This information did not include the "list and characteristics" of Pooja Forge's products that were provided in the DMSAL file and in the company brochure during the verification visit of April 2008.

¹⁰¹ Panel Report, fn 73 to para. 7.34.

¹⁰² European Union's appellant's submission, paras. 136-139, specifically para. 139. In particular, the European Union argues that "the fact that an issue was 'discussed' or even 'considered' in the context of a review investigation following the DSB's recommendations and rulings does not necessarily mean that there is a close nexus with the obligations arising for the responding Member from the original DSB's recommendations and rulings." (Ibid., para. 138)

¹⁰³ In the original proceedings, the Appellate Body reversed the original panel's finding that the European Union had acted inconsistently with Article 6.5 of the Anti-Dumping Agreement with respect to the confidential information submitted by Pooja Forge. The Appellate Body considered that China had failed to substantiate its claim that the confidential treatment of the information on product types submitted by Pooja Forge was improper, because it had asserted this claim late in the proceedings and only in response to questioning by the original panel. (Appellate Body Report, *EC – Fasteners (China)*, paras. 574-575) However, the Appellate Body upheld the original panel's finding that the European Union had acted inconsistently with Articles 2.4, 6.4, and 6.2 by not disclosing the information on the "product types" on a timely basis. (Ibid., paras. 505, 507, and 527)

¹⁰⁴ Letter dated 12 June 2012 on behalf of Changshu to the European Commission (Panel Exhibit CHN-8), p. 5; Letter dated 12 June 2012 on behalf of Ningbo Jinding to the European Commission (Panel Exhibit CHN-9), p. 5; Letter dated 13 June 2012 on behalf of Biao Wu to the European Commission (Panel Exhibit CHN-6), pp. 3-4.

¹⁰⁵ Panel Report, paras. 7.70-7.74.

5.26. Under these circumstances, the Commission's confidential treatment of the list and characteristics of Pooja Forge's products and their non-disclosure to the Chinese producers in the review investigation constitute an integral part of the measure taken to comply with the DSB's recommendations and rulings under Articles 6.4, 6.2, and 2.4 of the Anti-Dumping Agreement in the original proceedings, which comprises the disclosures made by the Commission aimed at providing the Chinese producers with information relevant to their cases. We are thus of the view that the claims raised in these compliance proceedings by China under Articles 6.5 and 6.5.1 concerning the Commission's confidential treatment of the information on the list and characteristics of Pooja Forge's products can be considered as claims against a measure taken to comply within the meaning of Article 21.5 of the DSU.

5.27. In the light of the above, and considering that the objects of the claims are not the same, it cannot be said that the claims raised by China under Articles 6.5 and 6.5.1 in the compliance proceedings are the same claims China had raised under these provisions in the original proceedings and that were dismissed by the Appellate Body. Moreover, the Commission's confidential treatment of the list and characteristics of Pooja Forge's products constitutes an integral part of the measure taken to comply with the DSB's recommendations and rulings in the original proceedings. We thus consider that the Panel did not err in finding that China's claims in these compliance proceedings under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement were within its terms of reference.

5.28. We, therefore, uphold the Panel's finding, in paragraph 7.34 of its Report, that China's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement were within the Panel's terms of reference.

5.2.2 Whether the Panel erred in finding that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement

5.29. We turn now to consider the European Union's appeal of the Panel's findings on the merits of China's claim under Article 6.5 of the Anti-Dumping Agreement. The Panel concluded that, in the review investigation, the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because the Commission accorded confidential treatment to information concerning the list and characteristics of Pooja Forge's products without conducting an objective assessment of whether such information was confidential by nature, or whether Pooja Forge had shown good cause for such treatment to be accorded to its information.¹⁰⁶ We begin with a brief overview of the relevant findings of the Panel under Article 6.5, followed by a brief review of the relevant legal standard before turning to address each of the European Union's discrete claims on appeal.

5.2.2.1 The Panel's findings

5.30. In support of its argument that Pooja Forge had shown good cause to justify the confidential treatment of the information at issue, the European Union relied on Pooja Forge's request for confidential treatment. This request is reflected in an e-mail to the Commission, dated 3 July 2012, which stated that "the list of the products sold by Pooja Forge cannot be provided because this information if disclosed, will give advantage to our competitor."¹⁰⁷ The Panel noted that the Commission had placed this e-mail on the confidential file of the investigation, to which the Chinese producers did not have access. The Panel considered that the Chinese producers were thus deprived of the opportunity to know of, and respond to, the particular "good cause" alleged by Pooja Forge for the confidential treatment of its information. In addition, the Panel considered that the e-mail contained "no more than a bald assertion" on the part of Pooja Forge and, therefore, did "not seem to support the argument that Pooja Forge [had] provided good cause to justify the confidential treatment" of the information at issue.¹⁰⁸

5.31. The Panel further noted the European Union's statement that there was "not much" on the record in the form of an explicit reference to the Commission's assessment of Pooja Forge's request, because the Chinese producers "never contested" the confidentiality of "Pooja Forge's

¹⁰⁶ Panel Report, paras. 7.44-7.46 and 7.50.

¹⁰⁷ Panel Report, para. 7.42 (quoting E-mail dated 3 July 2012 from Pooja Forge to the European Commission (Panel Exhibit EU-2)).

¹⁰⁸ Panel Report, para. 7.44.

product range" in the original investigation.¹⁰⁹ The Panel characterized this statement as an "admission", and considered that there was "no doubt" that the Commission "never performed" an objective assessment of whether the information at issue was confidential by nature, or whether good cause had been shown to justify its confidential treatment.¹¹⁰

5.32. Before concluding its analysis of China's claim under Article 6.5, the Panel noted that although the European Union had argued, in connection with China's claim under Article 6.5, that the information regarding the list and characteristics of Pooja Forge's products was confidential, the European Union had argued, in connection with China's claims under Articles 6.4 and 6.2, that some of this information was disclosed to the Chinese producers. For example, the European Union argued that, through a letter dated 5 July 2012, the Commission provided the Chinese producers with information regarding the characteristics of Pooja Forge's products, in particular on coating and diameter. In the Panel's view, this "undermine[d]" the European Union's contention that the information at issue was confidential and that good cause had been shown by Pooja Forge for its confidential treatment.¹¹¹

5.33. In the light of these considerations, the Panel found that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement in the review investigation.¹¹²

5.34. We recall below pertinent aspects of the legal standard under Article 6.5 that governs the confidential treatment of information in anti-dumping investigations.

5.2.2.2 The "good cause" requirement under Article 6.5 of the Anti-Dumping Agreement

5.35. Article 6.5 and footnote 17 thereto of the Anti-Dumping Agreement provides:

Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Such information shall not be disclosed without specific permission of the party submitting it.*

[*original fn] Members are aware that in the territory of certain Members disclosure pursuant to a narrowly-drawn protective order may be required.

5.36. Article 6.5 of the Anti-Dumping Agreement requires that, "upon good cause shown", investigating authorities treat as confidential information that is "by nature confidential", or that has been provided by parties to an investigation on a confidential basis. Article 6.5.1 requires that, for information that has been accorded confidential treatment, a non-confidential summary of that information be provided by parties submitting the confidential information, unless, in "exceptional circumstances", summarization is not possible. Where summarization is not possible, a statement of reasons as to why this is the case must be provided. Hence, Articles 6.5 and 6.5.1 accommodate the concerns of confidentiality, transparency, and due process by protecting information where good cause has been shown for confidential treatment, while providing an alternative method for its communication so as to satisfy the right of other parties to the investigation to obtain a reasonable understanding of the substance of the confidential information.¹¹³

5.37. Article 6.5 applies to both information that is confidential by nature, and information that has been submitted to authorities on a confidential basis.¹¹⁴ The Appellate Body has found that the

¹⁰⁹ Panel Report, para. 7.45 (quoting European Union's response to Panel question No. 6.b).

¹¹⁰ Panel Report, para. 7.46.

¹¹¹ Panel Report, para. 7.48.

¹¹² Panel Report, para. 7.50.

¹¹³ Appellate Body Report, *EC – Fasteners (China)*, para. 542.

¹¹⁴ In the original proceedings, the Appellate Body drew a distinction between these two categories of information, while noting that they may, in practice, overlap. Whether information is confidential "by nature" depends on the *content* of that information. By contrast, information submitted on a confidential basis is not necessarily confidential by reason of its content. Instead, confidentiality in this context arises from the

requirement to show "good cause" applies to both categories of information.¹¹⁵ The Appellate Body has further clarified that, as used in Article 6.5, "good cause" means a reason sufficient to justify withholding information from both the public and the other parties to the investigation, and that a showing of "good cause" involves a demonstration of a risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information.¹¹⁶

5.38. Thus, Article 6.5 prescribes "good cause" as a condition precedent for according confidential treatment to information submitted to an authority. In this regard, the Appellate Body considered in the original proceedings that, if information is treated as confidential by an authority without a showing of "good cause", the authority would be acting inconsistently with the obligations under Article 6.5.¹¹⁷

5.39. Investigating authorities and parties submitting information to them have distinct roles under Article 6.5. The Appellate Body has stated that it is for the party requesting confidential treatment of its information to furnish reasons justifying such treatment, but the authority must assess those reasons and determine, objectively, whether the submitting party has shown "good cause".¹¹⁸ The type of evidence and the extent of substantiation needed will depend on the nature of the information and the particular good cause alleged. An authority, in its assessment, must seek to balance the submitting party's interest in protecting its confidential information with the prejudicial effect that non-disclosure may have on the transparency and due process interests of other parties involved in the investigation. "[G]ood cause", within the meaning of Article 6.5, "cannot be determined merely based on the subjective concerns" of the party submitting the information at issue.¹¹⁹

5.40. The Appellate Body further considered in *China – HP-SSST (EU) / China – HP-SSST (Japan)* that a WTO panel, tasked with reviewing whether an authority has objectively assessed "good cause", is to do so on the basis of the investigating authority's published report and its related supporting documents, in the light of the nature of the information at issue, and the reasons given by the submitting party for its request for confidential treatment. In reviewing whether an authority has objectively assessed "good cause", it is not for a panel to engage in a *de novo* review of the record of the investigation and determine for itself whether the existence of "good cause" has been sufficiently substantiated by the submitting party.¹²⁰

5.41. With these considerations in mind, we turn now to examine the discrete claims raised by the European Union under Article 6.5.

5.2.2.3 Whether the Panel erred in its treatment of Pooja Forge's request for confidential treatment of the information at issue

5.42. In support of its claim that the Panel erred in finding that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement, the European Union advances a series of arguments that take issue with the Panel's treatment of Pooja Forge's request for confidential treatment. As noted above, this request is reflected in an e-mail to the Commission, dated 3 July 2012, in which Pooja Forge stated that "the list of the products sold by Pooja Forge cannot be provided because this information if disclosed, will give advantage to our competitor."¹²¹ The European Union asserts, first, that the Panel disregarded this e-mail on the misguided ground that it had been placed on the confidential file of the investigation, to which the Chinese producers did not have access.¹²² The European Union contends that, by "excluding" the information in the e-mail from its consideration, and limiting its analysis to the information "actually set forth or

circumstances in which the information has been provided to an authority. (Appellate Body Report, *EC – Fasteners (China)*, para. 536)

¹¹⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 537.

¹¹⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 537.

¹¹⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 539.

¹¹⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 539.

¹¹⁹ Appellate Body Reports, *China – HP-SSST (EU) / China – HP-SSST (Japan)*, para. 5.95 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 537).

¹²⁰ Appellate Body Reports, *China – HP-SSST (EU) / China – HP-SSST (Japan)*, para. 5.97.

¹²¹ Panel Report, para. 7.42 (quoting E-mail dated 3 July 2012 from Pooja Forge to the European Commission (Panel Exhibit EU-2)).

¹²² European Union's appellant's submission, para. 224.

specifically referenced in the determination at issue and available in the public record", the Panel acted inconsistently with Article 17.5(ii) of the Anti-Dumping Agreement.¹²³

5.43. At the outset, we recall that China had requested the Panel not to take Pooja Forge's e-mail into account in its analysis under Article 6.5 because it was not a part of the record of the investigation.¹²⁴ Subsequently, the European Union clarified that the e-mail at issue had been placed on the confidential, rather than public, file of the record of the investigation.¹²⁵ The Panel considered that the failure of the Commission to place the e-mail on the public file of the investigation deprived the Chinese producers of the opportunity to know of, and respond to, the "good cause" alleged by Pooja Forge for the confidential treatment of the information at issue. The Panel further stated that, "[i]n any case", the e-mail, "in terms of its contents", did not seem to support the argument that Pooja Forge had provided good cause to justify the confidential treatment of its information.¹²⁶ According to the Panel, the e-mail contains "no more than a bald assertion" on the part of Pooja Forge.¹²⁷

5.44. In our view, contrary to what the European Union appears to assert, the Panel did not "disregard" Pooja Forge's e-mail in its consideration of China's claim under Article 6.5. Instead, the Panel clearly engaged with the content of that e-mail and found that it contained "no more than a bald assertion", which, in the Panel's view, was insufficient to support the conclusion that Pooja Forge had shown good cause for the confidential treatment of the information at issue.¹²⁸ Accordingly, we do not agree with the European Union that the Panel excluded Pooja Forge's e-mail from its consideration of China's claim under Article 6.5 and, thereby, acted inconsistently with Article 17.5(ii) of the Anti-Dumping Agreement. At this stage of our analysis, we are merely disagreeing with the European Union's assertion that the Panel did not take Pooja Forge's e-mail into account in its analysis of China's claim under Article 6.5. We discuss at a later stage of our analysis the European Union's challenge to the Panel's finding that Pooja Forge's e-mail contained only a "bald assertion".¹²⁹

5.45. The European Union further challenges the Panel's statement that, because the e-mail from Pooja Forge had been placed on the confidential file of the investigation, the Chinese producers were deprived of an opportunity to know of, and respond to, the particular good cause alleged by Pooja Forge for the confidential treatment of the information at issue. The European Union contends that the evidence on the record contradicts the Panel's statement. In particular, the European Union relies on the "Hearing Officer's Report"¹³⁰ dated 18 July 2012, which, in the European Union's view, demonstrates that the Chinese producers, in fact, knew of, and had ample opportunity to respond to, the particular good cause alleged by Pooja Forge. The European Union contends that the Panel's finding that the Chinese producers were deprived of the opportunity to respond to Pooja Forge's request not only amounts to an error in applying Article 6.5 to the facts, but also falls short of the Panel's duty under Article 11 of the DSU.¹³¹

5.46. The Appellate Body has stated that, in most cases, the issue raised by a particular claim "will *either* be one of application of the law to the facts *or* an issue of the objective assessment of

¹²³ European Union's appellant's submission, para. 223.

¹²⁴ Panel Report, para. 7.43.

¹²⁵ European Union's response to Panel question No. 10, para. 46.

¹²⁶ Panel Report, para. 7.44.

¹²⁷ Panel Report, para. 7.44.

¹²⁸ Indeed, there appears to be an inconsistency in the arguments put forward by the European Union concerning the Panel's treatment of the e-mail from Pooja Forge. On the one hand, the European Union argues that the Panel erred by "disregarding" the e-mail in its consideration of China's claim under Article 6.5. Yet, on the other hand, the European Union claims that the Panel erred in finding that, in terms of its contents, the e-mail contains no more than a bald assertion on the part of Pooja Forge, which was insufficient to support the conclusion that good cause had been shown by Pooja Forge for the confidential treatment of the information at issue. (European Union's appellant's submission, paras. 224 and 226) Thus, the European Union challenges the substance of the Panel's assessment of the content of the e-mail, yet, at the same time, alleges that the Panel disregarded the e-mail in its consideration of China's claim. We note, in addition, that these claims are not framed as alternative claims.

¹²⁹ Panel Report, para. 7.44.

¹³⁰ Report of the hearing of the European Commission held on 11 July 2012 concerning R548 Iron or steel fasteners originating in the People's Republic of China, 18 July 2012 (Panel Exhibit CHN-30).

¹³¹ European Union's appellant's submission, paras. 224-225.

facts, and not both".¹³² Allegations implicating a panel's appreciation of the facts and evidence fall under Article 11 of the DSU¹³³, while "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision" is a question of legal characterization and, therefore, a legal question.¹³⁴ It seems to us that, essentially, the European Union takes issue with the Panel's appreciation of the evidence when it stated that, because Pooja Forge's e-mail to the Commission was placed on the confidential file of the investigation, the Chinese producers were deprived of the opportunity to know of, and respond to, the particular good cause alleged by Pooja Forge.¹³⁵ Thus, in our view, the European Union's claim implicates the Panel's appreciation of the evidence before it and, accordingly, we consider this claim under Article 11 of the DSU.

5.47. The European Union relies on the Hearing Officer's Report, which, in the European Union's view, demonstrates that the Chinese producers were aware of, and thus had an opportunity to respond to, the particular good cause alleged by Pooja Forge – i.e. that disclosure of the information at issue would confer an advantage to Pooja Forge's competitor. The Hearing Officer's Report reads, in relevant part, as follows:

The company considers the information as confidential and does not want to disclose it to competitors, in particular the information on models actually manufactured and sold as opposed to models that can potentially be manufactured. The Commission's practice is to proceed with extreme care. If the Commission is not satisfied that it is confidential, the information would normally be rejected and facts available would be used. In this particular case, the company has been again asked at this late stage and refused again to disclose. Therefore the Commission will stand by the company's request to treat the information as confidential.¹³⁶

5.48. In examining the passage of the Hearing Officer's Report on which the European Union relies¹³⁷, we see merit in China's contention that, on its face, the Hearing Officer's Report merely states that Pooja Forge did not wish to disclose its information to competitors without providing a specific reason as to why it wished not to do so.¹³⁸ In these circumstances, we do not consider that the Hearing Officer's Report put the Chinese producers on notice that Pooja Forge had requested confidential treatment for its information on the ground that disclosure of such information could confer a competitive advantage to its competitors. Instead, the above passage of the Hearing Officer's Report suggests that the Chinese producers may also have been under the impression that the Commission was according confidential treatment to the information at issue simply because Pooja Forge had "been again asked at this late stage" to disclose the information and "refused again to disclose".¹³⁹ In this regard, we note China's contention that the Chinese producers repeatedly complained to the Commission about the absence of a showing of "good cause" by Pooja Forge and, in response, the Hearing Officer noted that "the Indian producer accepted to cooperate only under the condition that all details concerning its company would remain confidential and reiterated this position in a recent communication."¹⁴⁰

5.49. In the light of the above, we do not consider that the Panel erred in its assessment of the facts merely because it did not refer to the Hearing Officer's Report, or attribute the same weight that the European Union attributes to that piece of evidence. As the Appellate Body has stated in previous disputes, "it is generally within the discretion of [a] [p]anel to decide which evidence it chooses to utilize in making findings"¹⁴¹, and the mere fact that a panel has not explicitly referred

¹³² Appellate Body Report, *China – GOES*, para. 183 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872 (emphasis original)).

¹³³ Appellate Body Report, *China – GOES*, para. 183 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 399; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 385; and *EC and certain member States – Large Civil Aircraft*, para. 1005).

¹³⁴ Appellate Body Report, *China – GOES*, para. 183 (quoting Appellate Body Report, *EC – Hormones*, para. 132).

¹³⁵ In particular, the European Union cites the Hearing Officer's Report as evidence that allegedly contradicts the Panel's finding.

¹³⁶ Hearing Officer's Report (Panel Exhibit CHN-30), p. 5.

¹³⁷ European Union's appellant's submission, para. 224.

¹³⁸ China's appellee's submission, para. 180.

¹³⁹ Hearing Officer's Report (Panel Exhibit CHN-30), p. 5.

¹⁴⁰ China's appellee's submission, para. 181 (quoting Letter dated 17 July 2012 from the Hearing Officer of the European Commission (Panel Exhibit CHN-20), p. 1).

¹⁴¹ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.78 (quoting Appellate Body Report, *EC – Hormones*, para. 135).

to each and every piece of evidence in its reasoning is insufficient to establish a violation of Article 11.¹⁴² Accordingly, we do not consider that the Panel exceeded the boundaries of its discretion as the trier of facts in finding that the Chinese producers were not aware of the particular good cause alleged by Pooja Forge for the confidential treatment of the information at issue. Thus, we find that the Panel did not act inconsistently with Article 11 of the DSU in this regard.

5.50. We turn now to consider the European Union's further claim that the Panel erred in finding that Pooja Forge's e-mail to the Commission requesting confidential treatment of the information at issue contained "no more than a bald assertion" on the part of Pooja Forge that did not seem to support the argument that Pooja Forge had provided good cause to justify the confidential treatment of its information.¹⁴³ The European Union contends that the Panel failed to follow the guidance of the Appellate Body in the original proceedings that "the type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular 'good cause' alleged."¹⁴⁴ According to the European Union, the Panel was required to examine whether, in the light of the nature of the information at issue and the particular good cause alleged by Pooja Forge, the statement contained in the e-mail was sufficient to establish that the Commission objectively assessed "good cause" for the purposes of Article 6.5 of the Anti-Dumping Agreement.

5.51. For its part, China recalls that, in the original proceedings, the Appellate Body emphasized that "good cause", within the meaning of Article 6.5, involves a demonstration of "the risk of a potential consequence, the avoidance of which is important enough to warrant the non-disclosure of the information" at issue.¹⁴⁵ Thus, China submits that, in the absence of such a risk being identified, there is no good cause shown by the party submitting information for confidential treatment. Noting the Appellate Body's finding that "[t]he type of evidence and the extent of substantiation an authority must require will depend on the nature of the information at issue and the particular 'good cause' alleged"¹⁴⁶, China asserts that this guidance becomes relevant once "the risk of a potential consequence" has been identified. China contends that, in the present case, Pooja Forge merely stated that the disclosure of certain information would "provide an advantage to a competitor", and that this does not establish a "risk of a potential consequence".¹⁴⁷ Thus, contends China, the Panel correctly found that Pooja Forge's request for confidential treatment contained "no more than a bald assertion".¹⁴⁸

5.52. We recall that the pertinent evidence before the Panel concerning the particular good cause alleged by Pooja Forge was contained in Pooja Forge's e-mail to the Commission in which Pooja Forge stated that "the list of the products sold by Pooja Forge cannot be provided because this information if disclosed, will give advantage to our competitor."¹⁴⁹ The European Union has not pointed to any evidence on the record of the investigation demonstrating that Pooja Forge had substantiated or explained *why* this was a potential risk or *why* the competitive advantage that allegedly could materialize from disclosure would be "significant" within the meaning of Article 6.5. Yet, as the Appellate Body found in the original proceedings, the requirement to show "good cause" for the confidential treatment of information under Article 6.5 applies to both categories of information that fall within the scope of Article 6.5, i.e. information that is confidential by nature and information that has been submitted on a confidential basis.¹⁵⁰

5.53. There is also no evidence *on the record of the investigation* of how the Commission arrived at the conclusion that the information concerning the list and characteristics of Pooja Forge's

¹⁴² Appellate Body Reports, *EC – Fasteners (China)*, paras. 441-442; *Brazil – Retreaded Tyres*, para. 202.

¹⁴³ European Union's appellant's submission, para. 226.

¹⁴⁴ European Union's appellant's submission, para. 226 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 539).

¹⁴⁵ China's appellee's submission, para. 185 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 537).

¹⁴⁶ China's appellee's submission, para. 186 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 539).

¹⁴⁷ China's appellee's submission, para. 185.

¹⁴⁸ China's appellee's submission, para. 186 (quoting Panel Report, para. 7.44).

¹⁴⁹ Panel Report, para. 7.42 (quoting E-mail dated 3 July 2012 from Pooja Forge to the European Commission (Panel Exhibit EU-2)).

¹⁵⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 537.

products was confidential by nature, and that Pooja Forge had shown good cause on this basis. However, before the Panel, the European Union sought to substantiate Pooja Forge's assertion that the information at issue was confidential by nature because its disclosure could confer an advantage on its competitor.¹⁵¹ In this regard, the European Union argues on appeal that it "explained repeatedly" to the Panel that there was "strong competition between Pooja Forge and the Chinese producers in the after-sales market in India", and that a "significant" risk existed "in view of the particularly competitive situation in the India market".¹⁵² Such substantiation of the particular good cause alleged by Pooja Forge is, however, lacking in Pooja Forge's request for the confidential treatment of the information at issue. Hence, the European Union's reference to the "strong competition between Pooja Forge and the Chinese producers in the after-sales market in India" constitutes *ex post* rationalization on the part of the European Union. In our view, it would have been incongruous with the applicable standard of review for the Panel to have determined whether the Commission had objectively assessed whether Pooja Forge had shown good cause for the confidential treatment of the information at issue on the basis of *ex post* rationales provided by the European Union in the course of the current WTO dispute settlement proceedings.

5.54. Moreover, in the light of the particular circumstances of this case as set forth above, the European Union's contention on appeal is that it was for the Panel to examine, *ab initio*, Pooja Forge's request for confidential treatment in the light of the nature of the information at issue and the particular good cause alleged by Pooja Forge. However, it is not a proper role for a panel to engage in such a review, as would have been required in this case. A panel does not comply with the applicable standard of review if, in the absence of an objective assessment by the investigating authority of the good cause alleged, it engages in a *de novo* review of evidence on the record of the investigation and determines for itself, or on the basis of subjective concerns of the submitting party, whether the request for confidential treatment is sufficiently substantiated and that good cause for such treatment objectively exists.¹⁵³

5.55. Thus, in the particular circumstances of this case, where substantiation of the particular good cause alleged by Pooja Forge was lacking in Pooja Forge's request for confidential treatment and in the Commission's published reports and related supporting documents, we do not consider that the Panel erred in finding that Pooja Forge's e-mail contained "no more than a bald assertion", which did not seem to support the argument that Pooja Forge had shown good cause to justify the confidential treatment of its information. Accordingly, we reject the European Union's claim in this regard.

5.2.2.4 Whether the Panel erred in finding that the Commission "never" conducted an objective assessment of the good cause alleged by Pooja Forge

5.56. The European Union further claims that the Panel acted inconsistently with its duty under Article 11 of the DSU in finding that the Commission never conducted an objective assessment of whether the information at issue was confidential by nature or whether good cause had been shown to justify its confidential treatment as required by Article 6.5 of the Anti-Dumping Agreement.¹⁵⁴ At the outset, we recall that the Panel had asked the European Union to explain, on the basis of the record of the investigation, the manner in which the Commission had assessed Pooja Forge's request for the confidential treatment of the information at issue. In response, the European Union stated that there was "not much explicit reference to the European Commission's assessment of Pooja Forge's request" in the record of the investigation because "[t]he Chinese exporting producers never contested this aspect of the investigation".¹⁵⁵ The Panel characterized the European Union's response as an "admission" and stated that there was no doubt that the Commission "never" conducted an objective assessment of whether the information at issue was confidential by nature or whether good cause had been shown by Pooja Forge to justify its confidential treatment.¹⁵⁶ Further, the Panel considered that the obligation under Article 6.5 for the Commission to conduct an objective assessment of whether Pooja Forge had shown good cause for

¹⁵¹ Panel Report, para. 7.14.

¹⁵² European Union's appellant's submission, para. 227.

¹⁵³ Appellate Body Reports, *China – HP-SSST (EU) / China – HP-SSST (Japan)*, para. 5.102.

¹⁵⁴ European Union's appellant's submission, paras. 229-235.

¹⁵⁵ Panel Report, para. 7.45 (quoting European Union's response to Panel question No. 6.b).

¹⁵⁶ Panel Report, para. 7.46.

the confidential treatment of the information at issue was not dependent upon the Chinese producers contesting such confidential treatment.¹⁵⁷

5.57. The European Union claims that the evidence on the record does not support the Panel's finding and that, in reaching this finding, the Panel failed to attribute proper weight to certain circumstances. As regards the evidence on the record, the European Union relies on a letter dated 26 November 2014 from the case-handler who had conducted the verification visit at Pooja Forge's premises in the course of the original investigation.¹⁵⁸ This letter was addressed to the compliance Panel and was prepared specifically for the purposes of the current WTO dispute settlement proceedings. In this letter, the case-handler avers that, at the time of the Commission's verification visit, Pooja Forge had requested that its company details be treated confidentially, and that Pooja Forge was "very much concerned about the treatment of its information in the investigation" because of "tough competition" with Chinese producers in the after-sales market in India.¹⁵⁹ In addition, the European Union relies on an e-mail from Pooja Forge to the Commission dated 2 July 2012, in which Pooja Forge confirmed that it did not wish to disclose its company details to interested parties, as "mentioned" during the verification visit that took place in 2008.¹⁶⁰

5.58. In response, China contends that the fact that Pooja Forge expressed concerns about the disclosure of its information is irrelevant to the question of whether the Commission conducted an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of that information. According to China, there is simply no evidence on the record that demonstrates that the Commission conducted such an assessment.¹⁶¹ Thus, for China, the Panel's finding that the Commission never conducted an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of its information was based on a proper analysis of the evidence on the record, in accordance with the Panel's mandate under Article 11 of the DSU.¹⁶²

5.59. Turning to our analysis, we note, as a preliminary matter, that the letter from the case-handler to the compliance Panel on which the European Union relies is not a part of the record of the investigation, but, instead, a document prepared specifically for the purposes of the current WTO dispute settlement proceedings. The Appellate Body has stated that a panel must examine whether the conclusions reached by the investigating authority are reasoned and adequate, and that such an examination must be critical and based on the information contained on the record and the explanations given by the authority in its published report.¹⁶³ Thus, the letter of the case-handler referred to above does not constitute evidence that the Panel could properly have relied on in determining whether the Commission had objectively assessed "good cause" for the purposes of Article 6.5 of the Anti-Dumping Agreement. Rather, the letter constitutes *ex post* rationalization by the European Union. In any event, this letter merely confirms that Pooja Forge had requested confidential treatment of its information on the basis that its disclosure could confer an advantage on its competitor. Pooja Forge's exchange of e-mails with the Commission on 2 July 2012 merely confirms the same. However, such evidence does *not* indicate whether and how the Commission engaged with the particular good cause alleged by Pooja Forge in according confidential treatment to the information at issue. Hence, we do not consider that this evidence calls into question the objectivity of the Panel's finding that the Commission never conducted an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue.

5.60. The European Union further faults the Panel for not attributing proper weight to certain circumstances in reaching its finding that the Commission never conducted an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue. In this regard, the European Union argues that the Panel did not attribute

¹⁵⁷ Panel Report, para. 7.46.

¹⁵⁸ European Union's appellant's submission, para. 230 (referring to Letter dated 26 November 2014 from the European Commission to the Panel (Panel Exhibit EU-5)).

¹⁵⁹ European Union's appellant's submission, fn 143 to para. 225 (quoting Letter dated 26 November 2014 from the European Commission to the Panel (Panel Exhibit EU-5)).

¹⁶⁰ European Union's appellant's submission, para. 230 (referring to E-mail exchanges dated 2 July 2012 between the European Commission and Pooja Forge (Panel Exhibit EU-8)).

¹⁶¹ China's appellee's submission, para. 208.

¹⁶² China's appellee's submission, para. 217.

¹⁶³ Appellate Body Report, *US – Carbon Steel (India)*, para. 4.311 (referring to Appellate Body Report, *US – Tyres (China)*, para. 123).

proper weight to the fact that there was no explicit reference to the Commission's assessment of Pooja Forge's request in the original determination because the "confidentiality of Pooja Forge's product range was a non-issue in the original investigation".¹⁶⁴ Moreover, the European Union contends that the Panel failed to attribute proper weight to the circumstance that the facts and events to which the European Union needed to refer in this case date back to 2008, and it had thus "understandably become rather difficult" for the European Union to locate specific documents in the paper version of the confidential file.¹⁶⁵

5.61. We recall that a panel's mandate under Article 11 of the DSU does not require it to accord to factual evidence of the parties the same meaning and weight as do the parties.¹⁶⁶ Moreover, the mere fact that a panel does not explicitly refer to each and every piece of evidence in its reasoning is insufficient to establish a claim of violation under Article 11.¹⁶⁷ Instead, for a claim under Article 11 to succeed, an appellant must explain why the evidence that it relies on is so material to its case that the panel's failure to address explicitly and rely upon that evidence has a bearing on the objectivity of the panel's factual assessment.¹⁶⁸ We do not consider that the circumstances to which the European Union alleges the Panel failed to attribute sufficient weight call into question the objectivity of the Panel's assessment. First, as regards the European Union's contention that the Panel failed to attribute proper weight to "the fact that the confidentiality of Pooja Forge's product range was a non-issue in the original investigation"¹⁶⁹, we agree with China that the Panel correctly found that "the duty to perform ... an assessment [under Article 6.5] was not dependent upon whether or not the underlying issue was contested by the Chinese producers in the investigation."¹⁷⁰ With regard to the European Union's contention that the Panel failed to attribute proper weight to the circumstance that it had become difficult for the European Union to locate specific documents in the paper version of the confidential file because the case dates back to 2008, we also agree with China that such a circumstance cannot excuse the fact that there was no evidence on the record as to whether and how the Commission assessed the particular good cause alleged by Pooja Forge in according confidential treatment to the information at issue.¹⁷¹

5.62. In the light of the above, we do not consider that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU, when it found that the Commission, contrary to the requirement of Article 6.5 of the Anti-Dumping Agreement, never conducted an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue. The Panel did not exceed the boundaries of its discretion as the trier of fact in reaching this finding. Accordingly, we see no merit in this claim of the European Union under Article 11 of the DSU.

5.2.2.5 Whether the Panel erred in finding that there was an inconsistency in the arguments put forward by the European Union

5.63. We recall that after finding that the Commission never conducted an objective assessment of "good cause" as required by Article 6.5 of the Anti-Dumping Agreement, the Panel considered that the European Union's contention that the information at issue was confidential, and that good cause had been shown for its confidential treatment, was undermined by the fact that the European Union had argued, in connection with China's claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement, that some of this information was disclosed to the Chinese producers, for example, in the Commission's General Disclosure Document.¹⁷² The European Union claims on appeal that the Panel's conclusion that the European Union acted inconsistently with Article 6.5 is in error, insofar as it rests on the Panel's statement that there was an inconsistency in the arguments presented by the European Union. The European Union argues that it is not logically inconsistent to argue that the entirety of certain information is confidential, whereas specific parts of that information are not equally confidential. Thus, contends the European Union, the Panel

¹⁶⁴ European Union's appellant's submission, para. 232.

¹⁶⁵ European Union's appellant's submission, paras. 232-233.

¹⁶⁶ Appellate Body Report, *Australia – Salmon*, para. 267.

¹⁶⁷ Appellate Body Reports, *EC – Fasteners (China)*, para. 442; *Brazil – Retreaded Tyres*, para. 202.

¹⁶⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 442.

¹⁶⁹ European Union's appellant's submission, para. 232.

¹⁷⁰ China's appellee's submission, para. 213 (quoting Panel Report, para. 7.46).

¹⁷¹ China's appellee's submission, para. 214.

¹⁷² Panel Report, para. 7.48 (referring to, *inter alia*, General Disclosure Document (Panel Exhibit CHN-22)).

incorrectly relied on a "non-existent" contradiction in the European Union's arguments in finding that the European Union acted inconsistently with Article 6.5.¹⁷³

5.64. After making its main findings¹⁷⁴, and "[b]efore leaving the issue of confidentiality"¹⁷⁵, the Panel underlined that the European Union's contention that the information at issue was confidential and that good cause had been shown for its confidential treatment was undermined by the European Union's argument, in connection with China's claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement, that some of this information was disclosed to the Chinese producers, for example, in the Commission's General Disclosure Document.¹⁷⁶ In our view, the Panel's statement that there was an inconsistency in the European Union's arguments constitutes *obiter dictum* that had no material bearing on its ultimate conclusion that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement. In this regard, we consider that the Panel's finding of a violation under Article 6.5 followed from its finding that the Commission had failed to conduct an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue. In the circumstances, we do not consider that the alleged error of the Panel in stating that there was an inconsistency in the arguments put forward by the European Union provides a basis for reversing the Panel's ultimate conclusion that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement.

5.2.2.6 Whether the Panel erred by not conducting its own analysis of the nature of the information at issue

5.65. The European Union contends that the Panel erred in concluding that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because the Panel found, without a proper analysis, that the information at issue was not confidential. In this regard, the European Union asserts that the Panel failed to conduct a proper analysis of the type and nature of the information at issue in determining whether such information was confidential for the purposes of Article 6.5. Noting that the Panel's conclusion under Article 6.5 was based on its finding that *the Commission* had failed objectively to assess whether Pooja Forge had showed "good cause" for the confidential treatment of its information, the European Union points out that *the Panel* did not, however, make any finding on the nature of the information at issue. In the European Union's view, the Panel was required to examine, separately, whether the information at issue could be considered as confidential by nature, but, instead, the Panel simply assumed that it was not.¹⁷⁷

5.66. China responds that the Panel focused its analysis under Article 6.5 on whether good cause had been shown by Pooja Forge and whether the Commission objectively assessed Pooja Forge's request for confidential treatment of its information. In China's view, the Panel correctly found that good cause had not been shown by Pooja Forge, and that the Commission did not conduct an objective assessment of whether good cause had been shown.¹⁷⁸ China submits that, in the absence of an objective assessment of "good cause" within the meaning of Article 6.5, information cannot be treated as confidential under that provision. Thus, contends China, the Panel correctly considered the information at issue as not requiring confidential treatment.¹⁷⁹

5.67. At the outset, we disagree with the European Union to the extent that it suggests that the Panel found that the information at issue was, in fact, not confidential by nature.¹⁸⁰ The Panel explicitly stated that it was not making such a finding.¹⁸¹ Instead, the Panel found that the

¹⁷³ European Union's appellant's submission, paras. 236-237 and 242-243.

¹⁷⁴ The Panel found that the particular good cause alleged by Pooja Forge for the confidential treatment of the information at issue was "no more than a bald assertion", which did not seem to support the argument that Pooja Forge had shown good cause to justify the confidential treatment of that information. Further, in the absence of evidence on the record of the investigation of the Commission's assessment of Pooja Forge's request for confidential treatment of the information at issue, the Panel found that the Commission never conducted an objective assessment of "good cause" within the meaning of Article 6.5. (Panel Report, paras. 7.44 and 7.46)

¹⁷⁵ Panel Report, para. 7.48.

¹⁷⁶ Panel Report, para. 7.48.

¹⁷⁷ European Union's appellant's submission, paras. 244-251.

¹⁷⁸ China's appellee's submission, para. 225.

¹⁷⁹ China's appellee's submission, para. 227.

¹⁸⁰ European Union's appellant's submission, para. 279.

¹⁸¹ Panel Report, para. 7.51.

European Union acted inconsistently with Article 6.5, and this finding was based on the Commission's failure to conduct an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue. The European Union suggests that this was an insufficient basis for the Panel's finding that the European Union acted inconsistently with Article 6.5. As we see it, the European Union's argument, in the circumstances of this case, is not in accordance with the Appellate Body's guidance under Article 6.5 as regards the role of a party requesting confidential treatment for information that it submits to an authority; the role of that authority in examining that request; and the role of a WTO panel in the event of a claim that the authority acted inconsistently with Article 6.5 by according confidential treatment to the information in the absence of "good cause" being shown by the party submitting the information.

5.68. We recall that it is for the party requesting confidential treatment for information that it considers to be confidential by nature, or that it submits on a confidential basis, to furnish reasons justifying such treatment. The role of the authority is to assess such reasons and determine, objectively, whether the submitting party has shown good cause for the confidential treatment of its information. In the event of a claim of violation of Article 6.5, a panel, tasked with reviewing whether an authority has objectively assessed the good cause alleged by the party submitting information to that authority, must examine this issue on the basis of the investigating authority's published report and its related supporting documents, in the light of the nature of the information at issue, and the reasons given by the submitting party for its request for confidential treatment.¹⁸²

5.69. The Panel, however, found that the Commission never conducted an objective assessment of whether the information at issue was confidential by nature or whether Pooja Forge had shown good cause on this basis for the confidential treatment of such information.¹⁸³ Having made that finding, it was not for the Panel to conduct a *de novo* review of whether the information at issue was confidential by nature or whether good cause had been shown by Pooja Forge. Thus, we do not agree with the European Union that the Panel erred by not conducting its own analysis of the nature of the information at issue for the purposes of its assessment of China's claim under Article 6.5. We therefore see no merit in the European Union's claim in this regard.

5.70. Having regard to the entirety of the Panel's analysis under Article 6.5 of the Anti-Dumping Agreement, it appears to us that the Panel's conclusion that the European Union acted inconsistently with Article 6.5 was based on two findings. First, the Panel found that the particular good cause alleged by Pooja Forge for the confidential treatment of the information at issue was no more than a bald assertion, which did not seem to support the argument that Pooja Forge had shown good cause to justify the confidential treatment of that information.¹⁸⁴ Second, the Panel found that the Commission never conducted an objective assessment of "good cause" within the meaning of Article 6.5.¹⁸⁵ We have reviewed these findings above and concluded that the Panel did not err in making them. These findings establish that the Commission acted inconsistently with Article 6.5 by according confidential treatment to the information at issue in the absence of an objective assessment of the particular good cause alleged by Pooja Forge.

5.71. In the light of the foregoing considerations, we uphold the Panel's finding, in paragraphs 7.50 and 8.1.i of its Report, that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement in the review investigation at issue.

5.72. We note that China has put forward a conditional appeal regarding the Commission's alleged failure to ensure that Pooja Forge submit a non-confidential summary of the information at issue in accordance with the requirements of Article 6.5.1 of the Anti-Dumping Agreement. This appeal is triggered in the event that we reverse the Panel's finding of a violation under Article 6.5, and find, instead, that the European Union acted consistently with that provision. Having upheld the Panel's finding under Article 6.5, the condition for addressing China's appeal under Article 6.5.1 has not

¹⁸² Appellate Body Report, *China – HP-SSST (EU) / China – HP-SSST (Japan)*, paras. 5.95 and 5.97.

¹⁸³ Panel Report, para. 7.46. We have found above that the Panel did not err in making this finding.

¹⁸⁴ Panel Report, para. 7.44.

¹⁸⁵ Panel Report, para. 7.46.

been met. Accordingly, we make no findings on China's conditional appeal under Article 6.5.1 of the Anti-Dumping Agreement.¹⁸⁶

5.3 Articles 6.4 and 6.2 of the Anti-Dumping Agreement

5.3.1 The Panel's terms of reference

5.73. Before the Panel, the European Union argued that China was precluded from raising its claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement in the compliance proceedings because these were claims that China could have raised but did not raise in the original proceedings, and that pertained to an unchanged aspect of the original measure that was separable from the measure taken to comply.¹⁸⁷

5.74. The Panel stated that, in deciding whether these claims could have been brought by China in the original proceedings, it would have to take into account the factual circumstances in the review investigation in which the claims were raised and examine the extent to which these circumstances also existed in the original investigation. The Panel observed that violations of the procedural obligations set forth in Articles 6.4 and 6.2 of the Anti-Dumping Agreement could occur multiple times during an investigation, depending on the piece of information that an interested party requests to see or the presentation that such a party wishes to make for the defence of its interests.¹⁸⁸ The Panel focused on the fact that, since the original investigation, the Commission had in its possession certain information regarding the list and characteristics of Pooja Forge's products, parts of which it provided to the Chinese producers for the first time in the review investigation. In the Panel's view, the disclosure of certain information in the review investigation led the Chinese producers to make requests for further information regarding the list and characteristics of Pooja Forge's products, the rejection of which gave rise to the present claims.¹⁸⁹

5.75. The Panel thus rejected the European Union's contention that these claims could have been but were not raised by China in the original proceedings. The Panel noted that, "[i]f an interested party is not aware of the existence of certain information on the investigation record, it cannot make a request to see that information or make presentations on that basis to defend its interests."¹⁹⁰

5.76. On appeal, the European Union claims that the Panel erred in considering that the information that China argues the Commission failed to disclose was "new" and hence was a "new" aspect of the measure taken to comply.¹⁹¹ The European Union contends that the list and characteristics of Pooja Forge's products was not a "new" aspect that was not present in the original investigation. In support of its contention, the European Union states, first, that, in the review investigation, the Commission based its determination on the data that Pooja Forge had provided in the original investigation¹⁹², and, second, that, in the review investigation, the Commission provided more precise information, but that "the information provided by Pooja Forge remained the same."¹⁹³

5.77. China responds that, in order to analyse whether it could have brought these claims in the original proceedings, it is not relevant whether the information relating to the list and characteristics of Pooja Forge's products was "new", that is to say, provided by Pooja Forge in the review investigation, or whether it was provided by Pooja Forge in the original investigation. Rather, China contends that what is relevant is the fact that the Chinese producers became aware

¹⁸⁶ Before the Panel, China's claim under Article 6.5.1 was conditional upon its claim under Article 6.5 of the Anti-Dumping Agreement. Thus, China requested the Panel to find that the European Union had acted inconsistently with Article 6.5.1 only if it found that the European Union had acted consistently with its obligation under Article 6.5. The Panel found that the European Union had acted inconsistently with Article 6.5 of the Anti-Dumping Agreement and, therefore, the condition for examining China's claim under Article 6.5.1 was not met. Accordingly, the Panel made no findings under Article 6.5.1 of the Anti-Dumping Agreement. (Panel Report, para. 7.50)

¹⁸⁷ Panel Report, paras. 7.57 and 7.62.

¹⁸⁸ Panel Report, para. 7.68.

¹⁸⁹ Panel Report, para. 7.77.

¹⁹⁰ Panel Report, para. 7.78.

¹⁹¹ European Union's appellant's submission, para. 149.

¹⁹² European Union's appellant's submission, para. 144.

¹⁹³ European Union's appellant's submission, para. 147.

of the existence of the information concerning the list and characteristics of Pooja Forge's products for the first time in the review investigation.¹⁹⁴

5.78. We begin our analysis by recalling that, in *US – Upland Cotton (Article 21.5 – Brazil)*, the Appellate Body stated that "[a] complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it could have pursued in the original proceedings, but did not."¹⁹⁵ In *US – Zeroing (EC) (Article 21.5 – EC)*, the Appellate Body found, however, that this is not the case for "new claims against a measure taken to comply – that is, in principle, a new and different measure" even if such measure "incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply".¹⁹⁶ In the Appellate Body's view, allowing such new claims in Article 21.5 proceedings would not jeopardize the principles of fundamental fairness and due process or provide a second chance to the complainant.¹⁹⁷

5.79. In the light of the jurisprudence, we examine below whether the claims raised by China in the compliance proceedings under Articles 6.4 and 6.2 could have been but were not raised in the original proceedings.

5.80. The Panel found, and we agree, that violations of the procedural obligations under Articles 6.4 and 6.2 of the Anti-Dumping Agreement could occur "multiple times" during an investigation, depending on the piece of information that an interested party requests to see or the presentation that such a party wishes to make for the defence of its interests.¹⁹⁸ In order to determine whether claims under Articles 6.4 and 6.2 could have been raised in the original proceedings it is not dispositive whether the underlying information that was in the possession of the investigating authority is unchanged or is not new, but rather whether the factual circumstances in the review investigation also existed in the original investigation.

5.81. As we have explained above, in the original investigation, the Commission did not disclose information about the "product types" in a timely manner. In the review investigation, in order to comply with the DSB's recommendations and rulings under Articles 6.4, 6.2, and 2.4 of the Anti-Dumping Agreement, the Commission disclosed information regarding the normal value determinations, including the "product types" (later replaced by the revised PCNs), as well as some information on certain characteristics of Pooja Forge's products. However, the Commission declined to disclose all of the information regarding the list and characteristics of Pooja Forge's products, which the Chinese producers were asking to see.¹⁹⁹ In the light of these facts, even if the underlying information is unchanged or is not new, the aspect of the measure that China challenges in these compliance proceedings has changed from the original proceedings considering that China is challenging a different episode of non-disclosure by the Commission, which concerns different aspects of Pooja Forge's product information.

5.82. Thus, the key question in addressing this issue on appeal is whether the Chinese producers were aware of the existence of this information in the original investigation and of its relevance to that investigation. That the Chinese producers may have been generally aware of the fact that the Commission had in its possession information concerning the list and characteristics of Pooja Forge's products may not be sufficient, in itself, to demonstrate that the producers could also have requested the disclosure of such information in the original investigation. In fact, even if the Chinese producers had been generally aware of this, they would not have requested the disclosure of such information if, due to the particular circumstances surrounding the original investigation, they were not aware of the relevance of this information. Thus, only if it can be demonstrated that the Chinese producers were aware of the existence of the information regarding the list and characteristics of Pooja Forge's products and of its relevance in the original investigation, could it be concluded that China could have claimed in the original proceedings that the non-disclosure of such information by the Commission amounted to a violation of Articles 6.4 and 6.2.

¹⁹⁴ China's appellee's submission, para. 80.

¹⁹⁵ Appellate Body Report, *US – Upland Cotton (Article 21.5 – Brazil)*, para. 211.

¹⁹⁶ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 432.

¹⁹⁷ Appellate Body Report, *US – Zeroing (EC) (Article 21.5 – EC)*, para. 427.

¹⁹⁸ Panel Report, para. 7.68.

¹⁹⁹ Panel Report, para. 7.74 (referring to Review Regulation (Panel Exhibit CHN-3), recital 57).

5.83. As discussed above in respect of Articles 6.5 and 6.5.1, the Chinese producers' requests to see information concerning the list and characteristics of Pooja Forge's products were prompted by the Commission's disclosures of the "product types" used in the dumping margin calculations. The Commission, however, never fully disclosed all the relevant product information, including the product list and characteristics, and the disclosures that were made in the original and in the review investigations prompted the Chinese producers to request further information that they considered relevant to their cases.²⁰⁰

5.84. We also recall that, in the original investigation, the Chinese producers expected the Commission to use the original PCNs to conduct the comparisons between the normal values and the export prices. When they were informed that the Commission would instead use "product types", they requested the disclosure of these "product types", which the Commission refused to do until late in the investigation. In the review investigation, the Commission made disclosures regarding the determination of normal values in the original investigation, including the "product types" used, as part of its implementation of the DSB's recommendations and rulings in the original proceedings. The Chinese producers considered these disclosures insufficient and sought further information on the "product types" and the "precise and detailed characteristics" of the products sold by Pooja Forge²⁰¹, which the Commission refused to disclose on grounds of confidentiality.²⁰²

5.85. The exchanges between the Commission and the Chinese producers in the review investigation suggest that the Chinese producers only became aware of the existence of the information at issue during the review investigation following partial disclosures made by the Commission. We, therefore, agree with the Panel that the claims China made before the Panel are not claims that it could have made in the original proceedings. China did raise claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement in the original proceedings, based on the information available – i.e. that the Commission had conducted the comparison based on "product types". The claims it raises in the compliance proceedings were prompted by the Commission's disclosures during the review investigation, which were made in order to implement the DSB's recommendations and rulings in the original proceedings.

5.86. Finally, the measure challenged by China in the compliance proceedings – i.e. the Commission's non-disclosure of the list and characteristics of Pooja Forge's products – can be characterized as an omission in the disclosures made by the Commission to comply with the DSB's recommendations and rulings under Articles 6.4, 6.2, and 2.4 of the Anti-Dumping Agreement. In disclosing certain information to comply with the DSB's recommendations and rulings in the original proceedings, the Commission failed to disclose other information – the list and all of the characteristics of Pooja Forge's products. This omission is the measure challenged by China in the compliance proceedings, and it constitutes an integral part of and is not separable from the measure taken to comply with the DSB's recommendations and rulings in the original proceedings.

5.87. In the light of the above, we consider that the claims that China has raised in these compliance proceedings under Articles 6.4 and 6.2 of the Anti-Dumping Agreement are not claims that China could have raised in the original proceedings.

5.88. We therefore uphold the Panel's finding, in paragraph 7.80 of its Report, that China's claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement were within the Panel's terms of reference.

5.3.2 Whether the Panel erred in finding that the European Union acted inconsistently with Articles 6.4 and 6.2 of the Anti-Dumping Agreement

5.89. We turn now to consider the European Union's appeal of the Panel's findings on the merits of China's claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement. We begin our

²⁰⁰ Panel Report, paras. 7.70-7.74.

²⁰¹ Letter dated 12 June 2012 on behalf of Changshu to the European Commission (Panel Exhibit CHN-8), p. 5; Letter dated 12 June 2012 on behalf of Ningbo Jinding to the European Commission (Panel Exhibit CHN-9), p. 5; Letter dated 13 June 2012 on behalf of Biao Wu to the European Commission (Panel Exhibit CHN-6), pp. 3-4.

²⁰² Panel Report, para. 7.74.

analysis with a brief overview of the relevant findings of the Panel under Articles 6.4 and 6.2 of the Anti-Dumping Agreement.

5.3.2.1 The Panel's findings

5.90. Before the Panel, China claimed that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement because the Commission failed to provide timely opportunities to the Chinese producers to see the information concerning the list and characteristics of Pooja Forge's products. China argued that the information at issue was used for the determination of normal values, was relevant to the presentation of the Chinese producers' cases, and was not confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement. Thus, by failing to provide timely opportunities for the Chinese producers to see such information, the European Union acted inconsistently with Article 6.4.²⁰³ China further claimed that, as a consequence of its violation of Article 6.4, the Commission also violated Article 6.2 of the Anti-Dumping Agreement by failing to provide the Chinese producers with a full opportunity to defend their interests on the basis of the information concerning the list and characteristics of Pooja Forge's products.²⁰⁴

5.91. The Panel recalled that information falling within the scope of Article 6.4 must: (i) be "relevant" to the presentation of interested parties' cases; (ii) not be confidential as defined in Article 6.5; and (iii) be "used" by the authorities in the anti-dumping investigation.²⁰⁵ The Panel further recalled that it had found that there was no evidence before the Commission justifying the confidential treatment of the information at issue, and that the Commission, therefore, acted inconsistently with Article 6.5 in according confidential treatment to that information. Hence, the Panel considered that, for the purposes of China's claim under Article 6.4, it would treat the information at issue as not confidential within the meaning of Article 6.5. Thus, the Panel considered that the second condition for the application of Article 6.4 had been met.²⁰⁶

5.92. Turning to the first condition – i.e. whether the information at issue was "relevant" to the presentation of the Chinese producers' cases – the Panel recalled that this question must be assessed from the perspective of the interested parties that have requested to see the information, rather than from the perspective of the investigating authority.²⁰⁷ Noting that the Chinese producers had requested to see the information concerning the list and characteristics of Pooja Forge's products, and that such requests were denied by the Commission on the basis that such information was confidential, the Panel considered that these requests demonstrated that, from the perspective of the Chinese producers, the information at issue was relevant to the presentation of their cases. Further, the Panel considered that the nature of the information at issue underlined its relevance to the presentation of the Chinese producers' cases because it concerned the determination of normal values, which, together with export prices, determined dumping margins. Accordingly, the Panel considered that the first condition for the application of Article 6.4 had been met.²⁰⁸

5.93. As regards the third condition, the Panel recalled that whether the Commission "used" the information at issue, within the meaning of Article 6.4, does not depend on whether the Commission specifically relied on that information in its determinations. Instead, the information should be considered as having been "used" by the Commission if it pertains to "a required step" in the anti-dumping investigation.²⁰⁹ Recalling that the information at issue had to do with the determination of normal values and dumping margins, the Panel considered that it was thus clear that the information at issue was used by the Commission in the review investigation. Accordingly, the Panel found that the third condition for the application of Article 6.4 had been met.²¹⁰

5.94. The Panel then turned to consider the European Union's argument that the information concerning the characteristics of Pooja Forge's products had been disclosed to the

²⁰³ Panel Report, para. 7.55.

²⁰⁴ Panel Report, para. 7.56.

²⁰⁵ Panel Report, para. 7.88 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142).

²⁰⁶ Panel Report, para. 7.88.

²⁰⁷ Panel Report, para. 7.89 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145).

²⁰⁸ Panel Report, para. 7.89.

²⁰⁹ Panel Report, para. 7.90 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147).

²¹⁰ Panel Report, para. 7.90.

Chinese producers in the general and company-specific disclosures that had been made available to the Chinese producers in accordance with the requirements of Article 6.9 of the Anti-Dumping Agreement.²¹¹ The Panel noted that Article 6.9 requires the disclosure of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Thus, such disclosure occurs towards the end of an investigation before a final decision is made. The Panel therefore considered that the final disclosure occurred "too late" to afford the Chinese producers an appropriate opportunity to use the information in the presentation of their cases.²¹² Accordingly, the Panel found that the Chinese producers were not provided timely opportunities to see the information at issue, contrary to the requirement under Article 6.4.²¹³

5.95. In the light of the foregoing considerations, the Panel concluded that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with timely opportunities to see the information at issue which was not confidential within the meaning of Article 6.5, and which was relevant to the presentation of the Chinese producers' cases and used by the Commission.²¹⁴ Turning to China's consequential claim under Article 6.2 of the Anti-Dumping Agreement, the Panel considered that accessing the information at issue would, potentially, have allowed the Chinese producers to request adjustments to their normal values, determined on the basis of Pooja Forge's prices, or to their export prices. Thus, the Panel found that, without seeing the information at issue, the Chinese producers could not be considered as having been provided a "full opportunity" to defend their interests within the meaning of Article 6.2.²¹⁵ Accordingly, the Panel found that the European Union acted inconsistently with Article 6.2 in the review investigation.²¹⁶

5.96. Having set forth the relevant findings of the Panel under Articles 6.4 and 6.2 of the Anti-Dumping Agreement, we turn now to examine the discrete claims raised by the European Union under these provisions.

5.3.2.2 Whether the Panel erred in finding that the information at issue was not confidential for the purposes of its analysis under Article 6.4 of the Anti-Dumping Agreement

5.97. As stated by the Panel, information falling within the scope of Article 6.4 of the Anti-Dumping Agreement must: (i) be "relevant" to the presentation of interested parties' cases; (ii) not be confidential as defined in Article 6.5 of the Anti-Dumping Agreement; and (iii) be "used" by the authorities in the anti-dumping investigation.²¹⁷ When information meets these criteria, Article 6.4 requires that investigating authorities provide "timely opportunities" for interested parties to see it. The Panel found that the information at issue met these criteria, and that the Commission had violated Article 6.4 by failing to provide the Chinese producers with timely opportunities to see it.²¹⁸

5.98. On appeal, the European Union claims that the Panel erred in finding that: (i) the information requested by the Chinese producers was "relevant" to the presentation of their cases; (ii) such information was not "confidential" within the meaning of Article 6.5; and (iii) the information at issue was "used" by the Commission in its calculation of dumping margins.²¹⁹ We begin our analysis with the European Union's claim that the Panel erred in finding that, for the purposes of its analysis under Article 6.4, the information at issue was not "confidential" within the meaning of Article 6.5.

5.99. The European Union argues that, in determining whether the information at issue was confidential within the meaning of Article 6.5, for the purposes of its analysis under Article 6.4, the Panel should not have relied on its finding that the Commission had accorded confidential

²¹¹ Panel Report, para. 7.91 (referring to European Union's first written submission to the Panel, para. 66; and response to Panel question No. 18.a).

²¹² Panel Report, para. 7.91.

²¹³ Panel Report, para. 7.91.

²¹⁴ Panel Report, para. 7.92.

²¹⁵ Panel Report, para. 7.94.

²¹⁶ Panel Report, para. 7.96.

²¹⁷ Panel Report, para. 7.88 (referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 142).

²¹⁸ Panel Report, para. 7.92.

²¹⁹ European Union's appellant's submission, para. 265.

treatment to this information in a manner that did not conform to the requirements of Article 6.5. In the European Union's view, the Panel was required to "carefully and separately" undertake an analysis of the information at issue in order to determine whether such information was confidential within the meaning of Article 6.5.²²⁰ The European Union contends that, by failing to conduct this examination and finding that the information at issue was not confidential for the purposes of Article 6.4, the Panel "fell victim to a logical *non sequitur*".²²¹

5.100. For its part, China contends that the reference in Article 6.4 to information that "is not confidential as defined in paragraph 5" means information that cannot be treated as confidential because the "conditions" set forth in Article 6.5 have not been fulfilled. Under Article 6.5, information which is by nature confidential or which is provided on a confidential basis by parties to an investigation shall, upon good cause shown, be treated as such by the authorities. Thus, in the absence of good cause shown by the submitting party, as determined pursuant to an objective assessment by the authority, information cannot be accorded confidential treatment, and such information would not be "confidential as defined in paragraph 5".²²² Thus, submits China, the Panel correctly considered the information at issue as not requiring confidential treatment for the purposes of its analysis under Article 6.4 of the Anti-Dumping Agreement.

5.101. At issue here is the meaning of the reference in Article 6.4 to information "that is not confidential as defined in paragraph 5". As we have explained above, Article 6.5 prescribes a showing of "good cause" by the party requesting confidential treatment of its information as a condition precedent for an investigating authority to accord such treatment. The treatment of information as confidential is, therefore, the legal consequence that flows from the establishment of good cause, as determined pursuant to an objective assessment by the authority reviewing a party's request for the confidential treatment of its information. Hence, in the absence of good cause being shown by the party submitting information, as determined pursuant to an objective assessment by the authority, there is no legal basis for the authority to accord confidential treatment to that information. In the light of our interpretation of Article 6.5, we consider that the reference in Article 6.4 to information "that is not confidential as defined in paragraph 5" is properly to be understood as excluding from the scope of Article 6.4 information that has been accorded confidential treatment *in accordance with* Article 6.5 – i.e. information for which good cause has been shown by the submitting party for confidential treatment, as determined pursuant to an objective assessment by the investigating authority.²²³ Conversely, if information has been accorded confidential treatment under Article 6.5 in a manner that does not conform to the requirements of that provision, there is no legal basis for according confidential treatment and such information would, for the purposes of Article 6.4, be considered as information "that is not confidential as defined in paragraph 5".

5.102. We do not agree with the European Union that, for the purposes of conducting an analysis under Article 6.4 of the Anti-Dumping Agreement, a panel must "carefully and separately" undertake an examination of the information at issue in order to determine whether such information is confidential within the meaning of Article 6.5.²²⁴ Article 6.5 requires an investigating authority to determine, pursuant to an objective assessment, whether the reasons furnished by the submitting party as to why its information should be accorded confidential treatment constitute "good cause" for the confidential treatment of that information. Thus, it is not the role of a panel to conduct a *de novo* review in order to determine for itself whether there is a legal basis for according confidential treatment to information submitted to an authority. In particular, we do not see a basis for converting an obligation imposed on investigating authorities, under Article 6.5, into an obligation on a panel conducting an analysis under Article 6.4. Instead, as stated above, if information has been accorded confidential treatment under Article 6.5 in a manner that does not comport with the requirements of that provision, there would be no legal basis for according confidential treatment to that information, and such information would, for the purposes of Article 6.4, be considered as information "that is not confidential as defined in paragraph 5".

²²⁰ European Union's appellant's submission, para. 278.

²²¹ European Union's appellant's submission, para. 276.

²²² China's appellee's submission, paras. 227-228.

²²³ We find further support for our interpretation in the equally authentic French and Spanish versions of Article 6.4 of the Anti-Dumping Agreement. In the French and Spanish versions of Article 6.4, the phrase "that is not confidential as defined in paragraph 5" is, respectively, "*qui ne seraient pas confidentiels aux termes du paragraphe 5*" and "*que no sea confidencial conforme a los términos del párrafo 5*". (emphasis added)

²²⁴ European Union's appellant's submission, para. 278.

5.103. In the light of the foregoing considerations, we do not agree with the European Union's contention that the Panel erred in treating the information at issue as not requiring confidential treatment for the purposes of its analysis under Article 6.4 of the Anti-Dumping Agreement.

5.3.2.3 Whether the Panel erred in finding that the information at issue was "relevant" to the presentation of the Chinese producers' cases

5.104. The European Union further claims that the Panel's finding that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement is in error because the Panel incorrectly found that the information at issue was "relevant", within the meaning of Article 6.4, to the presentation of the Chinese producers' cases. The European Union contends that, in finding that the information at issue was relevant to the presentation of the Chinese producers' cases, the Panel erred by relying on the fact that the Chinese producers had requested the information at issue from the Commission. In the European Union's view, the fact that an interested party requests certain information does not mean that such information is "relevant" within the meaning of Article 6.4. The European Union cautions that, under the Panel's approach, the scope of Article 6.4 would be determined unilaterally by any interested party, rather than by any objective concept of what is "relevant". As a result, "irrelevant requests" for information by interested parties that are not answered by authorities would be considered as triggering a violation of Article 6.4. The European Union submits that this does not constitute a reasonable interpretation of Article 6.4.²²⁵

5.105. The European Union further takes issue with the Panel's finding that the nature of the information at issue underlines its relevance to the Chinese producers' cases because such information concerned the determination of normal values and dumping margins. The European Union argues that, in determining whether information is "relevant" for the purposes of Article 6.4, an analysis of the type and nature of the requested information must be conducted thoroughly in order to determine compliance with the obligation under Article 6.4. According to the European Union, the Panel failed to conduct such an analysis. The European Union contends that, contrary to the Panel's assertions, the information concerning the list and characteristics of Pooja Forge's products did not directly concern the calculation of dumping margins.²²⁶

5.106. For its part, China recalls that, in the original proceedings, the Appellate Body found that "it is the interested parties, rather than the authority, who determine whether the information is in fact 'relevant' for the purposes of Article 6.4."²²⁷ In China's view, the repeated requests made by the Chinese producers to have access to certain information are indeed indications that such information was "relevant" to the presentation of their cases, within the meaning of Article 6.4.

5.107. Turning to our analysis, we consider, first, the European Union's argument that, in finding that the information at issue was, for the purposes of Article 6.4, "relevant" to the presentation of the Chinese producers' cases, the Panel erred by relying on the fact that the Chinese producers had repeatedly requested the information at issue from the Commission. We recall that Article 6.4 stipulates that an authority must provide "timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases". As China correctly notes, the Appellate Body confirmed in the original proceedings that the "possessive pronoun 'their' clearly refers to the earlier reference in that sentence to 'interested parties'."²²⁸ Therefore, whether an investigating authority "regarded the information ... to be relevant does not determine whether the information would in fact have been 'relevant' for the purposes of Article 6.4."²²⁹ Accordingly, we do not consider that the Panel erred in its analysis by considering whether the information requested by the Chinese producers was, from the perspective of these producers, "relevant" to the presentation of their cases within the meaning of Article 6.4.

5.108. We note that the European Union cautions that, under the Panel's approach, the scope of Article 6.4 would be determined unilaterally by any interested party, rather than by an objective

²²⁵ European Union's appellant's submission, para. 267.

²²⁶ European Union's appellant's submission, para. 268.

²²⁷ China's appellee's submission, para. 259 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 479, in turn referring to Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 146).

²²⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 479 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145).

²²⁹ Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 145.

concept of what is "relevant". This would mean, according to the European Union, that "irrelevant requests" for information by interested parties that are not answered by authorities would be considered as triggering a violation of Article 6.4. In the European Union's view, this would not be a reasonable interpretation of Article 6.4.²³⁰ However, the scope of Article 6.4 is not determined *solely* by reference to whether information is "relevant" to the presentation of an interested party's case. In order for information to be subject to the obligation under Article 6.4, such information must also "not be confidential within the meaning of [Article 6.5]", and must have been "used" by the investigating authority in the sense that it relates to "a required step in the anti-dumping investigation".²³¹ Information that is "relevant" from the perspective of the interested party requesting such information may not be subject to the obligation under Article 6.4 if such information was not "used" by the investigating authority – i.e. the information does not relate to a required step in the anti-dumping investigation. Similarly, although certain information may be relevant from the perspective of the interested party requesting it, such information may not fall within the scope of Article 6.4 if it has been accorded confidential treatment in accordance with the requirements of Article 6.5.

5.109. Thus, we do not consider that Article 6.4 requires an investigating authority to disclose information to an interested party merely because that party has requested such information in the belief that it is relevant to the presentation of its case. Certainly, a request from an interested party to see certain information should alert the authority that the party in question considers such information to be relevant to the presentation of its case. Bearing this in mind, the authority should then consider whether the information at issue should be disclosed to the party in the light of whether such information has been accorded confidential treatment in accordance with the requirements of Article 6.5, and whether such information was "used" within the meaning of Article 6.4, in the sense that the information relates to a required step in the anti-dumping investigation. For these reasons, we disagree with the European Union that the scope of Article 6.4 would be determined unilaterally by any interested party if the relevance of that information for the presentation of its case is to be determined from the perspective of that interested party.

5.110. The European Union further takes issue with the Panel's finding that the nature of the information at issue underlines its relevance to the Chinese producers' cases because such information concerned the determination of normal values and dumping margins. The European Union contends that, in determining whether information is "relevant" for the purposes of Article 6.4, an analysis of the type and nature of the requested information must be conducted thoroughly in order to determine compliance with the obligation under Article 6.4. According to the European Union, the information at issue did not concern the determination of normal values that would be compared with export prices to determine the dumping margins of the Chinese producers.²³² Hence, the European Union argues that the Panel erred in finding that the nature of the information at issue "underlined" that it was "relevant" to the presentation of the Chinese producers' cases, within the meaning of Article 6.4.²³³

5.111. In our view, the European Union's argument conflates the term "relevant" with the term "used" under Article 6.4 of the Anti-Dumping Agreement. Each of these terms play a role in demarcating the information that falls within the scope of the obligation in that provision. The Appellate Body has interpreted these terms in a manner that gives distinct meaning to each. The "relevance" of information, for the purposes of Article 6.4, must be examined from the perspective of the interested party that has requested that information. By contrast, whether such information has been "used" by the authority is to be examined by assessing whether the information is of a nature and type that relates to "a required step in the anti-dumping investigation".²³⁴

5.112. Nevertheless, we do not consider that the Panel erred in this case by examining the nature of the information at issue when determining whether such information was "relevant" within the meaning of Article 6.4. The Panel determined that information concerning the list and characteristics of Pooja Forge's products was relevant to the Chinese producers' cases by examining this issue from the perspective of these producers. Having found that these producers

²³⁰ European Union's appellant's submission, para. 267.

²³¹ Appellate Body Report, *EC – Fasteners (China)*, para. 479 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147).

²³² European Union's appellant's submission, para. 268.

²³³ European Union's appellant's submission, para. 266 (referring to Panel Report, para. 7.89).

²³⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 479 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147).

had repeatedly requested this information, the Panel correctly concluded that, for the purposes of Article 6.4, such information was "relevant for the presentation of their cases".²³⁵ That finding by the Panel is not called into question by the fact that the Panel subsequently considered that the nature of the information "underlines" its relevance.²³⁶

5.113. For the reasons expressed above, we do not consider that the Panel erred in finding that the information at issue was, for the purposes of Article 6.4 of the Anti-Dumping Agreement, "relevant" for the presentation of the Chinese producers' cases.

5.3.2.4 Whether the Panel erred in finding that the information at issue was "used" by the Commission in the review investigation

5.114. The European Union further claims that the Panel's finding that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement is in error because the Panel incorrectly found that the information at issue was "used" by the Commission, within the meaning of Article 6.4. In particular, the European Union takes issue with the Panel's statement that the information at issue "had to do" with the determination of normal values in the calculation of dumping margins for the Chinese producers.²³⁷ The European Union submits that the Panel erred by considering that the mere fact that information "relates" to a particular issue that is before the authority establishes that such information was "used" by that authority.²³⁸

5.115. According to the European Union, the information at issue "as a whole" – i.e. "Pooja Forge's internal codes and product description [text strings] as well as Pooja Forge's product range sold in India" – was proprietary and sensitive information that was by nature confidential as defined in Article 6.5 of the Anti-Dumping Agreement.²³⁹ The European Union asserts that this information "as a whole" – "as opposed to more specific parts of it" – was not used by the Commission in the review investigation at issue.²⁴⁰ The European Union explains that, in the context of the review investigation, the Commission engaged in an active and constructive dialogue with the Chinese producers. This resulted in the Commission going through, in greater detail, the information originally provided by Pooja Forge in the DMSAL file, and extracting from such information "as much as possible" to arrive at the revised PCNs that were ultimately used for the Commission's dumping determinations.²⁴¹ The European Union further explains that the information extracted by the Commission was "grouped into the product types in accordance with the revised PCNs".²⁴² This information, asserts the European Union, is what the Commission actually "used" in the dumping calculations and what was provided to the Chinese producers in the company-specific disclosures.²⁴³ The European Union asserts that "[a]ny other information that was provided by the Indian producer was, thus, not 'used' by the European Commission."²⁴⁴

5.116. In response, China highlights that whether information was actually relied on by the authority is irrelevant to the question of whether such information was "used" by that authority within the meaning of Article 6.4. In this regard, China notes that, in the original proceedings, the Appellate Body confirmed that determining whether information was "used" by the authority "depends on whether the information is related to a required step in the anti-dumping investigation".²⁴⁵ China contends that the European Union has itself acknowledged that the Commission "used" the information provided by Pooja Forge. In this regard, China points to the European Union's explanation that the Commission extracted from the DMSAL file as much information as possible in order to arrive at the revised PCNs, which were used in the

²³⁵ Panel Report, para. 7.89.

²³⁶ Panel Report, para. 7.89.

²³⁷ European Union's appellant's submission, para. 280 (quoting Panel Report, para. 7.90).

²³⁸ European Union's appellant's submission, para. 281.

²³⁹ European Union's appellant's submission, para. 282.

²⁴⁰ European Union's appellant's submission, para. 282.

²⁴¹ European Union's appellant's submission, para. 283.

²⁴² European Union's appellant's submission, para. 286.

²⁴³ European Union's appellant's submission, para. 286 (referring to Calculations for Biao Wu (Panel Exhibit CHN-44); Calculations for Ningbo Jinding (Panel Exhibit CHN-45); and Calculations for Changshu (Panel Exhibit CHN-46)).

²⁴⁴ European Union's appellant's submission, para. 283.

²⁴⁵ China's appellee's submission, para. 287 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 479, in turn quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147).

determination of normal values and dumping margins.²⁴⁶ China emphasizes that the information concerning the list and characteristics of Pooja Forge's products thus necessarily concerns the required step of the comparison between normal values and export prices because it was on the basis of this information that the Commission determined the revised PCNs.²⁴⁷

5.117. We recall that, in the original proceedings, the Appellate Body confirmed that whether information was "used" by the authority, within the meaning of Article 6.4, does not depend on whether the authority specifically relied on that information. Instead, "it depends on whether the information is related to 'a required step in the anti-dumping investigation'."²⁴⁸ Thus, Article 6.4 concerns information relating to "issues which the investigating authority is required to consider under the [*Anti-Dumping Agreement*], or which it does, in fact, consider, in the exercise of its discretion, during the course of an anti-dumping investigation".²⁴⁹

5.118. We consider that the European Union puts forward a very narrow reading of the term "used", within the meaning of Article 6.4, which does not comport with the Appellate Body's interpretation of that term in the original proceedings. Although all of the specific data provided by Pooja Forge concerning its products and their characteristics may not have been specifically relied on by the Commission in its determinations, the Commission extracted as much as possible from all of Pooja Forge's data in order to group the products at issue in accordance with the revised PCNs, and calculated dumping margins for the Chinese producers on this basis. As such, all of the information concerning the products sold by Pooja Forge and their characteristics was "used" by the Commission, within the meaning of Article 6.4, because it related to a "required step" in the investigation, i.e. the calculation of dumping margins.

5.119. In the light of the foregoing considerations, we consider that the Panel did not err in finding that the information at issue was "used" by the Commission in the review investigation at issue.

5.3.2.5 Whether the Panel erred in finding that the Chinese producers were not provided with "timely opportunities" to see the information at issue

5.120. On appeal, the European Union argues that the Panel erred in finding that the provision of information to the Chinese producers at the time when the company-specific disclosures were issued was too late to comply with the obligation under Article 6.4 of the Anti-Dumping Agreement. In this regard, the European Union points out that the Chinese producers were given three weeks to make comments on the disclosures, including the possibility of requesting adjustments.²⁵⁰ Moreover, the European Union asserts that by contrast with the original proceedings where the Appellate Body considered that providing one day to make comments and request adjustments was not sufficient to comply with the obligation under Article 6.4, the Panel in these compliance proceedings did not determine whether three weeks were sufficient for the Chinese producers to have made requests for adjustments in the context of the review investigation. The European Union submits that the Panel erred in this regard.²⁵¹

5.121. As the Panel found in its analysis of China's claims under Article 2.4 of the Anti-Dumping Agreement²⁵², and as discussed below in the context of the European Union's appeal of the Panel's findings under that provision, the company-specific disclosures relied on by the European Union did not disclose all of the data that the Chinese producers were requesting as regards Pooja Forge's products. Indeed, in its analysis of China's claim under Article 6.4, the Panel noted that "the European Union [did] not contest that the Chinese producers did request to see the information at issue and that it was not provided to them."²⁵³ Thus, because the Commission did

²⁴⁶ China's appellee's submission, para. 285 (referring to European Union's appellant's submission, para. 283).

²⁴⁷ China's appellee's submission, para. 289.

²⁴⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 479 (quoting Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 147).

²⁴⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 479 (quoting Panel Report, *EC – Salmon (Norway)*, para. 7.769).

²⁵⁰ European Union's appellant's submission, para. 287 (referring to Cover letter to the General Disclosure Document dated 31 July 2012 (Panel Exhibit EU-4)).

²⁵¹ European Union's appellant's submission, para. 287.

²⁵² Panel Report, para. 7.144.

²⁵³ Panel Report, para. 7.89.

not provide an opportunity for the Chinese producers to see "all" information that was "relevant to the presentation of their cases", the question of whether "timely opportunities" were provided, within the meaning of Article 6.4, was, in our view, a moot point that did not arise for consideration.

5.122. We further consider that the issue of whether "timely opportunities", within the meaning of Article 6.4, have been provided to interested parties to see information that falls within the scope of that provision must be determined on a case-by-case basis. Article 6.4 requires investigating authorities, "whenever practicable", to provide interested parties "timely opportunities" to see "all information" that is relevant to the presentation of their cases, that is not confidential for the purposes of Article 6.5, and that is used by the authority in the sense that it relates to a required step in the anti-dumping investigation. Thus, the obligation in Article 6.4 applies to a broad range of information that may relate to several required steps in an anti-dumping investigation. Hence, whether "timely opportunities" have been provided to see information for the purposes of Article 6.4 must be considered in the light of the circumstances of each case, taking into account the specific information at issue, the step of the investigation to which such information relates, the practicability of disclosure at certain points of the investigation vis-a-vis other points, and the stage of the investigation at which interested parties have made a request to see the information at issue. Thus, we disagree with the proposition that providing three weeks to exporters to comment on information within the scope of the obligation under Article 6.4 is insufficient, in all cases, to satisfy the requirement to provide "timely opportunities" to see such information.

5.123. In the light of the foregoing considerations, we uphold the Panel's finding, in paragraph 7.92 of its Report, that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with information concerning the list and characteristics of Pooja Forge's products, which was not confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement, was relevant to the presentation of the Chinese producers' cases, and was used by the Commission.

5.124. The European Union argues that the Panel's finding that the European Union acted inconsistently with Article 6.2 of the Anti-Dumping Agreement is in error for similar reasons "*mutatis mutandis*" as those argued by the European Union in the context of its claim under Article 6.4 of the Anti-Dumping Agreement.²⁵⁴ We recall that, after finding that the European Union acted inconsistently with Article 6.4 by failing to disclose to the Chinese producers the information concerning the list and characteristics of Pooja Forge's products, the Panel found, consequentially, that the European Union acted inconsistently with Article 6.2 by not providing a full opportunity for the Chinese producers to defend their interests on the basis of the information at issue.²⁵⁵ We have found above that the Panel did not err in finding that the European Union acted inconsistently with Article 6.4 in the review investigation at issue. Accordingly, we do not consider that the Panel erred in finding that, by failing to disclose the information at issue to the Chinese producers in accordance with Article 6.4, the European Union denied these producers a "full opportunity for the defence of their interests", in contravention of Article 6.2.

5.125. For the reasons expressed above, we uphold the Panel's finding, in paragraph 8.1.ii of its Report, that the European Union acted inconsistently with Articles 6.4 and 6.2 of the Anti-Dumping Agreement in the review investigation at issue.

5.4 Article 6.1.2 of the Anti-Dumping Agreement

5.4.1 The Panel's terms of reference

5.126. Before the Panel, the European Union argued that China was precluded from raising its claim under Article 6.1.2 of the Anti-Dumping Agreement in these compliance proceedings because this was a claim that China could have raised but did not raise in the original proceedings, and that pertained to an unchanged aspect of the original measure that was incorporated in, but separable from, the measure taken to comply.²⁵⁶

²⁵⁴ European Union's appellant's submission, para. 292.

²⁵⁵ Panel Report, para. 7.96.

²⁵⁶ Panel Report, paras. 7.101 and 7.106.

5.127. As it did in respect of Articles 6.4 and 6.2 of the Anti-Dumping Agreement, the Panel found that, because the Chinese producers were not aware of the information concerning the list and characteristics of Pooja Forge's products, China could not have brought a claim under Article 6.1.2 in the original proceedings to challenge the Commission's failure to make available that information promptly to the Chinese producers. The Panel also recalled that Pooja Forge provided information on coating only during the review investigation and, therefore, China could not have brought a claim under Article 6.1.2 in the original proceedings with respect to the disclosure of this information.²⁵⁷

5.128. On appeal, the European Union states that its claim regarding the Panel's terms of reference in respect of Article 6.1.2 of the Anti-Dumping Agreement is based on the same arguments *mutatis mutandis* as the claims it makes in respect of Articles 6.4 and 6.2.²⁵⁸ Article 6.1.2 and Article 6.4 require the disclosure of information, and the information that, as China argues, the Commission failed to disclose under these two provisions is the same. While Article 6.4 requires the disclosure of all information that is relevant to the parties' presentation of their cases, Article 6.1.2, for its part, requires the disclosure to interested parties of evidence presented in writing by any other interested party.

5.129. In the light of the facts that: (i) the European Union makes the same arguments under Article 6.1.2 that it makes under Articles 6.4 and 6.2; (ii) the underlying factual circumstances relevant to China's claims under Articles 6.4, 6.2, and 6.1.2, are the same; and (iii) in respect of the circumstances at issue in this dispute, Articles 6.4 and 6.1.2 impose the same disclosure obligations; we reach the same conclusions under Article 6.1.2 that we have reached under Articles 6.4 and 6.2. We thus consider that the claim China has raised under Article 6.1.2 in the compliance proceedings is not a claim that China could have raised in the original proceedings.

5.130. In addition, the European Union claims on appeal that, in concluding that China's claim under Article 6.1.2 fell within its terms of reference, the Panel acted inconsistently with Article 11 of the DSU. According to the European Union, contrary to the Panel's conclusion that Pooja Forge provided information on coating during the review investigation, what Pooja Forge actually did in the review investigation was merely to confirm information that the Commission had already obtained during the original investigation.²⁵⁹

5.131. In the original proceedings, the Appellate Body stated that "a participant claiming that a panel ignored certain evidence, and hence acted inconsistently with Article 11, must explain why the evidence is so material to its case that the panel's failure to address such evidence has a bearing on the objectivity of the panel's factual assessment."²⁶⁰ In the present dispute, the European Union has not demonstrated that the Panel's alleged error in concluding that Pooja Forge provided information on coating during the review investigation, rather than simply confirming information that it had already provided in the original investigation, is material to its case that the Panel erred in finding that the claim under Article 6.1.2 fell within its terms of reference.

5.132. As we have explained above in respect of Articles 6.4 and 6.2, the Panel's conclusion that China's claim under Article 6.1.2 fell within its terms of reference was not based on the fact that the information that the Commission declined to disclose in the review investigation was "new" as compared to the information that the Commission declined to disclose in the original investigation. Rather, the Panel based its findings on the fact that the Chinese producers became aware of this information only in the review investigation, so that China could not have brought the same claim under Article 6.1.2 in the original proceedings.

5.133. Thus, even assuming that, as the European Union contends, the information on coating had already been provided by Pooja Forge to the Commission in the original investigation, this fact alone has no bearing on the conclusion that the European Union has not demonstrated that the Chinese producers were aware, in the original investigation, of the existence and relevance of the information that is at the base of China's claim under Article 6.1.2 in the compliance proceedings.

²⁵⁷ Panel Report, para. 7.114.

²⁵⁸ European Union's appellant's submission, para. 154.

²⁵⁹ European Union's appellant's submission, paras. 156-157.

²⁶⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 499.

5.134. In the light of the above, we see no merit in the claim by the European Union that the Panel acted inconsistently with Article 11 of the DSU in finding that Pooja Forge had provided information on coating in the review investigation, rather than simply confirming information it had already provided in the original investigation.

5.135. We, therefore, uphold the Panel's finding, in paragraph 7.115 of its Report, that China's claim under Article 6.1.2 was within the Panel's terms of reference.

5.4.2 Whether the Panel erred in rejecting China's claim under Article 6.1.2 of the Anti-Dumping Agreement

5.136. We turn now to consider China's appeal of the Panel's findings on the merits of its claim under Article 6.1.2 of the Anti-Dumping Agreement. China claims that the Panel erred in rejecting its claim that the European Union acted inconsistently with Article 6.1.2 in the review investigation. China argues in this regard that the Panel erred in finding that Pooja Forge was not an "interested party" in the review investigation and that the obligation under Article 6.1.2 did not apply to information submitted by Pooja Forge.²⁶¹ China requests us to reverse this finding of the Panel and to find, instead, that the European Union acted inconsistently with Article 6.1.2 because the Commission failed to make the information concerning the list and characteristics of Pooja Forge's products available to the Chinese producers.²⁶² We begin our analysis by summarizing the Panel's findings under Article 6.1.2.

5.4.2.1 The Panel's findings

5.137. Before the Panel, China argued that the European Union acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement because the Commission failed to make the information concerning the list and characteristics of Pooja Forge's products available promptly to the Chinese producers. China argued that the obligation under Article 6.1.2 applied to this information because: (i) the information at issue was not confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement; and (ii) Pooja Forge was an interested party in the review investigation at issue.²⁶³

5.138. The Panel recalled that it had found that the Commission acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by according confidential treatment to the information concerning the list and characteristics of Pooja Forge's products. In the light of this finding, the Panel stated that it would proceed with its analysis under Article 6.1.2 on the basis that it had "not been established that this information had to be treated as confidential".²⁶⁴ Thus, the Panel considered that the only remaining issue for its consideration was whether Pooja Forge was an "interested party" in the review investigation.

5.139. The Panel noted that the first part of Article 6.11 of the Anti-Dumping Agreement sets forth a non-exhaustive list of entities that an authority is required to treat as "interested parties" in an anti-dumping investigation.²⁶⁵ The Panel explained that there was no dispute between the parties that Pooja Forge, an analogue country producer, is not one of the entities listed in the first part of Article 6.11. Noting China's argument that Pooja Forge was, nonetheless, an interested party in the light of its active participation in the investigation, and the significant amount of information that it had provided to the Commission, the Panel responded that the second part of Article 6.11 does not state that a party that submits significant information to the authority or that actively participates in an investigation automatically becomes an "interested party".²⁶⁶ However, the Panel considered that, because the second part of Article 6.11 states that Members are not precluded from allowing other domestic or foreign parties not mentioned in the first part of Article 6.11 to be included as interested parties in an investigation, this implies that an authority may allow an entity, such as an analogue country producer, to participate in an investigation as an interested party. The Panel added that it was logical to assume that such a decision would normally be made at the request of the party in question, and that, "[a]rguably", this party would

²⁶¹ China's other appellant's submission, para. 149.

²⁶² China's other appellant's submission, para. 183.

²⁶³ Panel Report, para. 7.116.

²⁶⁴ Panel Report, para. 7.116.

²⁶⁵ Panel Report, para. 7.117.

²⁶⁶ Panel Report, para. 7.118.

make such a request if it expects to be affected by the outcome of the investigation.²⁶⁷ According to the Panel, this is because gaining "interested party" status creates obligations and rights for such parties.²⁶⁸ For the Panel, this demonstrates that the decision to allow a party not specifically listed in Article 6.11 to be included as an interested party is an important one such that it is likely to appear on the investigation record. Noting that the record did not indicate that the Commission decided to include Pooja Forge as an "interested party" in the review investigation, the Panel found that Pooja Forge was, therefore, not an interested party in the investigation and, accordingly, that the obligation under Article 6.1.2 did not apply to evidence provided by Pooja Forge.²⁶⁹

5.140. Before concluding its analysis of China's claim under Article 6.1.2, the Panel turned to consider China's argument that, by finding, in the original proceedings, that Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement applied to Pooja Forge, the Appellate Body considered Pooja Forge to be an "interested party" in the original investigation. Noting China's reliance on footnote 780 of the Appellate Body report in the original proceedings²⁷⁰, the Panel considered that "[a]ll that the Appellate Body says is that the Commission had to accord the protection provided for in Articles 6.5 and 6.5.1 of the [Anti-Dumping] Agreement to the information provided by Pooja Forge."²⁷¹ For the Panel, the statement of the Appellate Body in footnote 780 of its report in the original proceedings, alone, did not suffice to conclude that Pooja Forge was an interested party in the original investigation, "or that the Appellate Body considered that it was".²⁷²

5.141. In the light of the foregoing considerations, the Panel rejected China's claim under Article 6.1.2 of the Anti-Dumping Agreement.

5.4.2.2 Whether the Panel erred in finding that Pooja Forge was not an interested party in the review investigation at issue

5.142. China appeals the Panel's findings under Article 6.1.2 of the Anti-Dumping Agreement on three main grounds. First, China contends that the Panel erred in its interpretation of the term "interested parties" in Article 6.11 of the Anti-Dumping Agreement. In particular, China faults the Panel for considering that whether an entity is an interested party depends on a decision of the investigating authority which must appear on the record of the investigation, and for stating that such a decision is made at the request of the party concerned. According to China, such a decision may "implicitly flow" from an examination of the record of the investigation, and the Panel, therefore, erred by not examining whether the Commission, implicitly, decided to treat Pooja Forge as an interested party.²⁷³ China submits that the fact that the Commission selected Pooja Forge as the analogue country producer and used its information to determine the normal values of the Chinese producers' products demonstrates that the Commission decided to treat Pooja Forge as an interested party.²⁷⁴

5.143. Second, China contends that the Panel erred in its interpretation and application of Article 6.1.2 by finding that the obligation contained therein applies only to those parties that are "interested parties" within the meaning of Article 6.11. China submits that, in the light of the

²⁶⁷ Panel Report, para. 7.119.

²⁶⁸ Panel Report, para. 7.119.

²⁶⁹ Panel Report, para. 7.119.

²⁷⁰ Footnote 780 to paragraph 540 of the Appellate Body's report in the original proceedings reads as follows:

We note, in this respect, the European Union's argument that the "good cause" requirement for confidential treatment of information in Article 6.5 does not apply to analogue country producers like Pooja Forge, because they do not fall within the definition of "interested parties" under Article 6.11 of the *Anti-Dumping Agreement* ... In the fasteners investigation, the Commission did not determine normal value on the basis of the information from Chinese producers and exporters, and decided to seek information from analogue country producers. The Indian company Pooja Forge participated in the investigation at the request of the Commission, and provided substantial amounts of information that was used as the basis for determining normal value. *In our view, the decision by the Commission to determine normal value based on information from an analogue country producer, and the participation of Pooja Forge in the investigation, require that Pooja Forge be afforded the protection of sensitive information upon "good cause" shown and the obligations of both Articles 6.5 and 6.5.1 apply.* (emphasis added)

²⁷¹ Panel Report, para. 7.122.

²⁷² Panel Report, para. 7.122.

²⁷³ China's other appellant's submission, para. 162.

²⁷⁴ China's other appellant's submission, para. 165.

"key role" played by Pooja Forge in the review investigation²⁷⁵ and the purpose of Article 6.1.2, Pooja Forge should be assimilated to an "interested party" presenting evidence under Article 6.1.2 and, thus, the information provided by this company should fall within the scope of Article 6.1.2.²⁷⁶ Accordingly, China faults the Panel for not examining whether Pooja Forge could be assimilated to an interested party presenting evidence for the purposes of Article 6.1.2.²⁷⁷

5.144. Third, China contends that the Panel erred in its interpretation of the Appellate Body's findings in the original proceedings. In this regard, China submits that the Panel's finding that Pooja Forge was not an interested party for the purposes of Article 6.1.2 is not reconcilable with the Appellate Body's finding that the obligation under Article 6.5.1 applies to Pooja Forge, despite the fact that this provision expressly refers to confidential information provided by "interested parties".²⁷⁸ Thus, in China's view, the Appellate Body's finding that Article 6.5.1 applied to Pooja Forge supports the conclusion that information submitted by Pooja Forge should also fall within the scope of the obligation under Article 6.1.2.

5.145. For its part, the European Union asserts that, contrary to a textual reading of Article 6.1.2, China is arguing that this provision does not apply only to "interested parties" within the meaning of Article 6.11, but also to all entities that China considers can be "assimilated to 'interested parties'".²⁷⁹ Moreover, the European Union points out that Article 6.11 states that a decision by a Member is required in order for an entity not listed in the first part of that provision to be included as an "interested party" in an anti-dumping investigation. According to the European Union, China did not point to any indications that the Commission had taken a decision to include Pooja Forge as an "interested party" in the review investigation. Thus, submits the European Union, the Panel correctly found that Pooja Forge was not an "interested party" for the purposes of Article 6.11 and that, accordingly, the obligation under Article 6.1.2 did not apply to information provided by Pooja Forge.²⁸⁰

5.146. Turning to our analysis, we recall that Article 6.1.2 of the Anti-Dumping Agreement provides as follows:

Subject to the requirement to protect confidential information, evidence presented in writing by one interested party shall be made available promptly to other interested parties participating in the investigation.

5.147. Article 6.1.2 makes clear that the obligation contained therein applies only to evidence presented in writing by "interested parties" in an anti-dumping investigation. The term "interested parties" for the purposes of the Anti-Dumping Agreement is, in turn, defined in Article 6.11 of that Agreement. Article 6.11 provides:

For the purposes of this Agreement, "interested parties" shall include:

- (i) an exporter or foreign producer or the importer of a product subject to investigation, or a trade or business association a majority of the members of which are producers, exporters or importers of such product;
- (ii) the government of the exporting Member; and
- (iii) a producer of the like product in the importing Member or a trade and business association a majority of the members of which produce the like product in the territory of the importing Member.

This list shall not preclude Members from allowing domestic or foreign parties other than those mentioned above to be included as interested parties.

²⁷⁵ China's other appellant's submission, para. 172.

²⁷⁶ China's other appellant's submission, para. 168.

²⁷⁷ China's other appellant's submission, para. 168.

²⁷⁸ China's other appellant's submission, para. 179 (referring to Appellate Body Report, *EC – Fasteners (China)*, fn 780 to para. 540).

²⁷⁹ European Union's appellee's submission, para. 154 (quoting China's other appellant's submission, para. 166).

²⁸⁰ European Union's appellee's submission, para. 152.

5.148. Article 6.11 consists of two parts. The first part contains a non-exhaustive list of entities that are *ipso facto* "interested parties" for the purposes of the Anti-Dumping Agreement. In this regard, the first part of Article 6.11 states that "interested parties" "shall *include*"²⁸¹ the entities listed therein, indicating that the list is illustrative, rather than exhaustive. In addition, the residual clause of Article 6.11 states that Members shall not be precluded "from allowing ... parties other than those mentioned" in the first part of Article 6.11 to be included as "interested parties".

5.149. In examining China's claim, the Panel considered that "the decision to allow a party not specifically listed in Article 6.11 to be included as an interested party is an important one such that it is likely to appear on the investigation record." The Panel then stated that "[n]owhere in the record is it indicated that the Commission decided to include Pooja Forge as an 'interested party' in [the review] investigation."²⁸² The Panel therefore concluded that Pooja Forge was not an "interested party" in the review investigation and, accordingly, that the obligation set forth under Article 6.1.2 of the Anti-Dumping Agreement "did not arise with respect to the evidence provided by this company".²⁸³

5.150. In considering whether the Commission allowed Pooja Forge to be an "interested party" in the investigation, we find the following factors to be pertinent. First, Pooja Forge participated in the investigation at the request of the Commission. Second, the Commission selected Pooja Forge as the analogue country producer for the purposes of the investigation and used its data to determine normal values and calculate dumping margins for the Chinese producers. Third, the Commission treated Pooja Forge like an investigating authority is required to treat an "interested party" in an investigation by, for example, requesting Pooja Forge to provide a non-confidential summary of information submitted in confidence, and verifying the information submitted by Pooja Forge. Hence, in the circumstances of this case, we do not agree with the Panel's statement that "[n]owhere in the record is it indicated that the Commission decided to include Pooja Forge as an 'interested party' in this investigation."²⁸⁴ Although there was no evidence on the record of a *formal declaration* of the Commission deeming Pooja Forge to be an "interested party" within the meaning of Article 6.11, the record of the investigation demonstrates that, by its actions in this particular case, the Commission treated Pooja Forge as an interested party in the review investigation at issue and, consequently, "allow[ed]" Pooja Forge "to be included as [an] interested part[y]", within the meaning of the residual clause of Article 6.11.

5.151. Our reasoning above is consistent with the findings of the Appellate Body in the original proceedings. In particular, the Appellate Body found that the obligations under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement applied to information submitted by Pooja Forge in the original investigation, despite the fact that Article 6.5.1 applies explicitly to "interested parties". In reaching this finding, the Appellate Body recalled that, in the original investigation, the Commission did not determine normal values on the basis of the information submitted by the Chinese producers, and decided to seek information from analogue country producers. The Appellate Body further recalled that Pooja Forge participated in the investigation at the request of the Commission, and provided substantial amounts of information that were used as the basis for determining normal values. Thus, the Appellate Body considered that "the decision by the Commission to determine normal value[s] based on information from an analogue country producer, and the participation of Pooja Forge in the investigation, require that Pooja Forge be afforded the protection of sensitive information upon 'good cause' shown and the obligations of both Articles 6.5 and 6.5.1 apply."²⁸⁵

5.152. In the light of the foregoing considerations, we reverse the Panel's finding, in paragraph 7.119 of its Report, that Pooja Forge was not an "interested party" in the investigation and that, therefore, the obligation set forth in Article 6.1.2 of the Anti-Dumping Agreement did not apply to evidence provided by Pooja Forge. Having reversed this finding of the Panel, we consider China's request that we find that the European Union acted inconsistently with Article 6.1.2

²⁸¹ Emphasis added.

²⁸² Panel Report, para. 7.119.

²⁸³ Panel Report, para. 7.119.

²⁸⁴ Panel Report, para. 7.119.

²⁸⁵ Appellate Body Report, *EC – Fasteners (China)*, fn 780 to para. 540.

because the Commission failed to make the information concerning the list and characteristics of Pooja Forge's products available to the Chinese producers.²⁸⁶

5.153. We recall that, subject to the requirement to protect confidential information, Article 6.1.2 requires that evidence presented in writing by one interested party be made available promptly to other interested parties participating in an investigation. We have found above that Pooja Forge was an interested party in the review investigation. Accordingly, evidence presented in writing by Pooja Forge falls within the scope of the obligation under Article 6.1.2, subject to the requirement to protect confidential information. Insofar as confidentiality is concerned, Article 6.1.2 must be read in the context of Article 6.5, which governs the treatment of confidential information. Thus, we read the term "[s]ubject to the requirement to protect confidential information" in Article 6.1.2 as excluding from the scope of that provision information that has been accorded confidential treatment by the authority in accordance with the requirements under Article 6.5. The Panel concluded that the European Union acted inconsistently with Article 6.5 as regards the Commission's confidential treatment of the information concerning the list and characteristics of Pooja Forge's products. We have upheld this finding of the Panel and further clarified that, in the absence of "good cause" being shown, there is no legal basis under Article 6.5 for according confidential treatment to information provided to authorities by parties to an investigation. Accordingly, we find that the information concerning the list and characteristics of Pooja Forge's products is not excluded from the scope of the obligation under Article 6.1.2. Thus, by not making this information available to the Chinese producers in the review investigation, the Commission acted inconsistently with Article 6.1.2. Therefore, we conclude that, in the review investigation at issue, the European Union acted inconsistently with Article 6.1.2.

5.154. In the light of the foregoing considerations, we reverse the Panel's finding, in paragraph 8.2.i of its Report, that China had not established that the European Union acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement in the review investigation at issue, and find, instead, that the European Union acted inconsistently with that provision because the Commission failed to make available to the Chinese producers information concerning the list and characteristics of Pooja Forge's products.

5.5 Article 2.4 of the Anti-Dumping Agreement

5.155. The European Union challenges the Panel's interpretation and application of the last sentence of Article 2.4 of the Anti-Dumping Agreement. For its part, China claims that the Panel erred in its interpretation and application of Article 2.4 as regards the fair comparison requirement under this provision.

5.5.1 The European Union's appeal under the last sentence of Article 2.4 of the Anti-Dumping Agreement

5.156. The Panel found that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values in the review investigation at issue.²⁸⁷ The European Union appeals this finding and argues that the last sentence of Article 2.4 merely requires that interested parties be informed of the "approach" adopted by an investigating authority for ensuring a fair comparison and of the characteristics of the "product groupings" used in the dumping determination.²⁸⁸

5.5.1.1 The Panel's findings

5.157. Before the Panel, China claimed that the European Union acted inconsistently with the last sentence of Article 2.4 of the Anti-Dumping Agreement, which requires investigating authorities to indicate what information is necessary to ensure a fair comparison, because the Commission failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that was essential for them to make adequate requests for adjustments.²⁸⁹ The European Union responded that the last sentence of Article 2.4 only requires

²⁸⁶ China's other appellant's submission, para. 183.

²⁸⁷ Panel Report, paras. 7.148 and 8.1.iii.

²⁸⁸ European Union's appellant's submission, para. 313.

²⁸⁹ Panel Report, paras. 7.125-7.129 and 7.134.

that interested parties be informed of the "approach" adopted by an investigating authority for ensuring a fair comparison, but does not require the disclosure of "raw data" or confidential information²⁹⁰, or that interested parties be in a position "to satisfy themselves of the accuracy of the information provided [to the investigating authority] by other interested parties or entities".²⁹¹ The European Union further contended that the requested information was eventually provided to the Chinese producers through the Commission's company-specific disclosures, where detailed dumping calculations indicated the characteristics of the products sold by Pooja Forge, as well as the export transactions that were matched with Pooja Forge's domestic transactions.²⁹²

5.158. The Panel began its analysis by recalling the original proceedings, where the Appellate Body found that "Article 2.4 obliges investigating authorities ... at a minimum, to inform the parties of the products or product groups used for purposes of the price comparison."²⁹³ The Panel also noted the Appellate Body's conclusion that, "because the Commission did not clearly indicate the product types used for purposes of price comparisons until very late in the proceedings, the European Union acted inconsistently with its obligations under Article 2.4 by depriving the Chinese producers of the ability to request adjustments for differences that could have affected price comparability."²⁹⁴

5.159. The Panel then turned to the review investigation at issue and stated that, "although the Chinese producers knew the basis on which the Commission grouped the products ... they did not know the specific product types of Pooja Forge with which their own product types were being compared."²⁹⁵ Having recalled its earlier finding that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with timely opportunities to see information concerning the list and characteristics of Pooja Forge's products, the Panel found that the Chinese producers did not know "whether the product types were grouped consistently with the revised PCNs" and "whether ... there were factors other than those included in the revised PCNs which could have justified further adjustments".²⁹⁶ Accordingly, the Panel concluded that the Chinese producers were deprived "of the opportunity to make informed decisions on whether to request adjustments" under Article 2.4.²⁹⁷

5.160. In addition, the Panel specifically addressed the company-specific disclosures containing the dumping calculations relied upon by the European Union. The Panel found that these calculations show how a particular product sold by Pooja Forge compares to each of the PCN characteristics but do not indicate what "particular model" sold by Pooja Forge was being compared with what "model" sold by the Chinese producers.²⁹⁸ The Panel thus concluded that the Chinese producers did not have a meaningful opportunity to request adjustments.²⁹⁹ The Panel further found that the dumping calculations did not satisfy the requirements of Article 2.4 because they were provided as part of the final disclosure, which conveys the essential facts under consideration with respect to the decision to impose definitive measures and is, therefore, sent to interested parties towards the end of an investigation.³⁰⁰ Finally, the Panel rejected the European Union's argument that the relevant information was confidential, by relying on its earlier finding that the Commission's confidential treatment of Pooja Forge's information was inconsistent with Article 6.5 of the Anti-Dumping Agreement.³⁰¹ In a footnote, the Panel added that, even if the information were confidential, some disclosure would have been required under Article 2.4, subject to the obligations set forth in Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement regarding the

²⁹⁰ Panel Report, para. 7.130.

²⁹¹ Panel Report, para. 7.131 (quoting European Union's first written submission to the Panel, para. 110).

²⁹² Panel Report, paras. 7.130 and 7.143 (referring to the European Union's second written submission to the Panel, para. 65).

²⁹³ Panel Report, para. 7.138 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 512).

²⁹⁴ Panel Report, para. 7.138 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 513).

²⁹⁵ Panel Report, para. 7.139.

²⁹⁶ Panel Report, para. 7.141.

²⁹⁷ Panel Report, para. 7.142.

²⁹⁸ Panel Report, para. 7.144.

²⁹⁹ Panel Report, para. 7.144.

³⁰⁰ Panel Report, para. 7.144.

³⁰¹ Panel Report, para. 7.145.

treatment of confidential information and the preparation of non-confidential summaries of such information.³⁰²

5.161. Based on the foregoing, the Panel considered that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values in the review investigation at issue.³⁰³ The Panel underlined that this finding was made in the context of an investigation where the analogue country methodology was used and where, consequently, the normal value was based on information obtained from a third source, rather than from the exporter under investigation.³⁰⁴ The Panel found, *inter alia*, that, in such an investigation, the investigating authority has "to endeavour to put the foreign producer on an equal footing with a producer in a normal investigation in terms of access to the information on the basis of which requests for adjustments may be formulated."³⁰⁵

5.5.1.2 The procedural requirement of Article 2.4 of the Anti-Dumping Agreement

5.162. Article 2.4 of the Anti-Dumping Agreement provides, in relevant part:

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. ... 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.³⁰⁶

5.163. Article 2.4 requires investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make due allowance, or adjustments, for differences affecting price comparability. The obligation to ensure a fair comparison "lies on the investigating authorities".³⁰⁷ As part of their investigation, they "are charged with comparing normal value and export price and determining whether there is dumping of imports."³⁰⁸ However, as the Appellate Body has explained, this does not mean that interested parties do not have a role to play in the process of ensuring a fair comparison.³⁰⁹ Rather, "exporters bear the burden of substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4."³¹⁰ As such, "[i]f it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment."³¹¹ However, the authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited."³¹²

5.164. The last sentence of Article 2.4, in turn, imposes an obligation on investigating authorities to "indicate to the parties in question what information is necessary to ensure a fair comparison"

³⁰² Panel Report, fn 200 to para. 7.145.

³⁰³ Panel Report, para. 7.148.

³⁰⁴ Panel Report, para. 7.149.

³⁰⁵ Panel Report, para. 7.149.

³⁰⁶ Fn omitted.

³⁰⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 487 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 178).

³⁰⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 487 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 178).

³⁰⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 488.

³¹⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 488 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

³¹¹ Appellate Body Report, *EC – Fasteners (China)*, para. 488 (referring to Panel Report, *Korea – Certain Paper*, para. 7.147).

³¹² Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

and "not [to] impose an unreasonable burden of proof on those parties". This provision thus adds a "procedural requirement" to the general obligation to ensure a fair comparison.³¹³

5.165. As the Appellate Body explained in the original proceedings:

[W]hereas the exporters may be required to "substantiate their assertions concerning adjustments", the last sentence of Article 2.4 requires the investigating authorities to "indicate to the parties" what information these requests should contain, so that the interested parties will be in a position to make a request for adjustments. This process has been described as a "dialogue" between the authority and the interested parties.³¹⁴

5.166. The Appellate Body further found that, "as a starting point for the dialogue between the investigating authority and the interested parties to ensure a fair comparison, the authority must, at a minimum, inform the parties of the product groups with regard to which it will conduct the price comparisons."³¹⁵

5.167. In addition, the Appellate Body explained the particular relevance of the procedural requirement under Article 2.4 in the context of an investigation where the normal value is established on the basis of data provided by an analogue country producer, rather than the exporter under investigation, by stating that:

[W]here the normal value is not established on the basis of the foreign producers' domestic sales, but is established on the basis of the domestic sales in an analogue country, the investigating authority's obligation to inform the interested parties of the basis of the price comparison is even more pertinent for ensuring a fair comparison. This is because foreign producers are unlikely to have knowledge of the specific products and pricing practices of the producer in an analogue country. Unless the foreign producers under investigation are informed of the specific products with regard to which the normal value is determined, they will not be in a position to request adjustments they deem necessary.³¹⁶

5.168. With this understanding in mind, we examine below the European Union's claims of error in respect of the Panel's interpretation and application of the last sentence of Article 2.4 of the Anti-Dumping Agreement.

5.5.1.3 The European Union's claims under the last sentence of Article 2.4 of the Anti-Dumping Agreement

5.169. On appeal, the European Union raises several claims under the last sentence of Article 2.4 of the Anti-Dumping Agreement. The European Union submits that the Panel erred in the interpretation of the procedural obligation set out in Article 2.4 in suggesting that this obligation differs based on the methodology used to determine normal values³¹⁷, and in finding that it

³¹³ Appellate Body Report, *EC – Fasteners (China)*, para. 489.

³¹⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 489 (quoting, respectively, Panel Reports, *EC - Tube or Pipe Fittings*, para. 7.158; and *Egypt – Steel Rebar*, para. 7.352). As the panel in *Egypt – Steel Rebar* explained:

Finally, we note the affirmative information-gathering burden on the investigating authority in this context, that it "shall indicate to the parties in question *what information is necessary* to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties" (emphasis added). In short, where it is demonstrated by one or another party in a particular case, or by the data itself that a given difference affects price comparability, an adjustment must be made. In identifying to the parties the data that it considers would be necessary to make such a demonstration, the investigating authority is not to impose an unreasonable burden of proof on the parties. Thus, the process of determining what kind or types of adjustments need to be made to one or both sides of the dumping margin equation to ensure a fair comparison, is something of a dialogue between interested parties and the investigating authority, and must be done on a case-by-case basis, grounded in factual evidence.

(Panel Report, *Egypt – Steel Rebar*, para. 7.352)

³¹⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 490.

³¹⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 491.

³¹⁷ European Union's appellant's submission, para. 329.

requires the disclosure of "raw data".³¹⁸ In addition, the European Union claims that the Panel erred in finding that the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments under this provision. In this context, the European Union argues that it complied with the Appellate Body's ruling in the original proceedings and with the procedural requirement of the last sentence of Article 2.4.³¹⁹ Finally, the European Union claims that the Panel erred when it found that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the product information submitted by Pooja Forge.³²⁰ We analyse each of these claims in turn below.

5.5.1.3.1 Whether the Panel erred in suggesting that the obligation under Article 2.4 of the Anti-Dumping Agreement differs based on the methodology used to determine normal values

5.170. The European Union claims on appeal that the Panel erred in the interpretation of the procedural obligation set out in Article 2.4 of the Anti-Dumping Agreement because it allegedly suggested that this obligation differs based on whether one or another permissible methodology is used to determine normal value.³²¹ The European Union argues that there is no legal basis in the Anti-Dumping Agreement or in China's Accession Protocol³²² for a finding that Article 2.4 imposes a "different and more far reaching disclosure obligation" when the analogue country methodology is used.³²³ We note that this claim is raised in relation to the Panel's statements in paragraph 7.149 of its Report, where the Panel accorded particular weight to the fact that, in the investigation at issue, the Commission relied on normal value data provided by a third party, rather than by the exporters under investigation.³²⁴ This paragraph of the Panel Report reads in relevant part:

In a normal investigation where the normal value is based on the foreign producer's own prices, the latter can participate meaningfully in the dialogue envisaged under Article 2.4 aiming to ensure a fair comparison between the normal value and the export price. In such an investigation, the foreign producer is well positioned to make informed decisions about the adjustments that it deems necessary for a fair comparison. By contrast, in an investigation, such as the one before us, where the normal value information is obtained from a third source, an issue arises as to the foreign producer's access to that information. Fair comparison is to be carried out between two prices, namely the normal value and the export price. Where the [Investigating Authority] uses the analogue country methodology, the foreign exporter will be left in the dark to the extent it does not have access to the normal value information. The [Investigating Authority's] task in such an investigation is to find ways to disclose as much information on normal value as the foreign producer would need in order to meaningfully participate in the fair comparison process. In other words, the [Investigating Authority] has to endeavour to put the foreign producer on an equal footing with a producer in a normal investigation in terms of access to the information on the basis of which requests for adjustments may be formulated.³²⁵

5.171. China responds that the European Union's reading of the Panel Report is erroneous. In China's view, the Panel found that the investigating authority needed to satisfy its obligation under the last sentence of Article 2.4 to the same extent as would be the case in an "ordinary" anti-dumping investigation.³²⁶ China further explains that, irrespective of the methodology used, "the exporters must be in a position to meaningfully request relevant adjustments in order to ensure a fair comparison."³²⁷ However, whereas, in an "ordinary" investigation, both the normal value and the export price are established on the basis of the data of the exporter under

³¹⁸ European Union's appellant's submission, paras. 296 and 314.

³¹⁹ European Union's appellant's submission, para. 317.

³²⁰ European Union's appellant's submission, para. 332.

³²¹ European Union's appellant's submission, para. 329.

³²² Protocol on the Accession of the People's Republic of China, WT/L/432.

³²³ European Union's appellant's submission, para. 329.

³²⁴ Referring to the Appellate Body report in *EC and certain member States – Large Civil Aircraft*, the European Union requests that, should we consider this paragraph of the Panel Report to be a mere statement, we reverse this statement. (European Union's appellant's submission, fn 234 to para. 329 (referring to Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 936))

³²⁵ Panel Report, para. 7.149.

³²⁶ China's appellee's submission, para. 342.

³²⁷ China's appellee's submission, para. 346.

investigation and the exporter is, therefore, "well positioned" to make informed decisions about adjustments, in an investigation involving an analogue country producer, the exporter is "left in the dark" to the extent that it does not have access to the normal value information.³²⁸ China concludes that the Panel was correct when looking at the procedural obligation under Article 2.4 in the light of the factual circumstance that the analogue country methodology was used.³²⁹

5.172. We agree that the fact that normal value is determined based on a methodology involving data of an analogue country producer does not affect the legal obligation imposed on investigating authorities under the last sentence of Article 2.4. In all anti-dumping investigations, "[t]he 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."³³⁰ As explained, this provision requires investigating authorities to indicate to the parties what information requests for adjustments should contain, so that the interested parties will be in a position to make such requests.³³¹ Depending on the factual circumstances at hand, this provision may require investigating authorities to provide certain information to parties requesting adjustments, in particular where the exporter under investigation is missing information pertaining to the normal value determined by the investigating authority because it is based on the domestic sales of an analogue country producer, rather than the exporter's own domestic sales. Therefore, as we have set out above, the procedural requirement under Article 2.4 is necessarily even more pertinent in the context of an investigation involving information from an analogue country producer. This, however, does not mean that the legal obligation under the last sentence of Article 2.4 is more far reaching when the analogue country methodology is used. Rather, this issue relates to the application of this provision to a particular factual background.

5.173. The Panel correctly underlined that its findings were made "in the context of a very particular factual situation" and it did not find that a different legal obligation applies under the last sentence of Article 2.4 where normal value is determined based on the data of analogue country producers³³², as the European Union suggests.³³³ In addition, we agree with the Panel's statement that, whereas in an "ordinary" investigation the exporter is well positioned to make informed decisions about necessary adjustments, the exporter may be missing information where the normal value is determined based on the domestic sales of an analogue country producer. As the Panel correctly found, in this case, "the foreign exporter will be left in the dark to the extent it does not have access to the normal value information."³³⁴ This is because, as was set out in the Appellate Body report in the original proceedings, the foreign producer is "unlikely to have knowledge of the specific products and pricing practices of the producer in an analogue country".³³⁵ We further agree with the Panel that investigating authorities have "to endeavour to put the foreign producer on an equal footing with a producer in a normal investigation in terms of access to the information on the basis of which requests for adjustments may be formulated".³³⁶ It is indeed essential that investigating authorities provide the information that is necessary "so that the interested parties will be in a position to make a request for adjustments".³³⁷ As the Appellate Body explained in the particular context of a normal value being determined based on the data of an analogue country producer, "[u]nless the foreign producers under investigation are informed of the specific products with regard to which the normal value is determined, they will not be in a position to request adjustments they deem necessary."³³⁸

5.174. In the light of the above, we reject the European Union's claim that the Panel erred in the interpretation of the procedural obligation set out in Article 2.4 of the Anti-Dumping Agreement because it allegedly suggested that this obligation differs based on whether one or another permissible normal value methodology is used.

³²⁸ China's appellee's submission, para. 343 (quoting Panel Report, para. 7.149).

³²⁹ China's appellee's submission, para. 345.

³³⁰ Article 2.4, last sentence of the Anti-Dumping Agreement.

³³¹ Appellate Body Report, *EC – Fasteners (China)*, para. 489.

³³² Panel Report, para. 7.149.

³³³ European Union's appellant's submission, para. 329.

³³⁴ Panel Report, para. 7.149.

³³⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 491.

³³⁶ Panel Report, para. 7.149.

³³⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 489.

³³⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 491.

5.5.1.3.2 Whether the Panel erred by turning the last sentence of Article 2.4 of the Anti-Dumping Agreement into a procedural obligation requiring the disclosure of "raw data"

5.175. We now turn to the European Union's contention that the Panel erred in its interpretation of the last sentence of Article 2.4 by turning the "fair comparison" requirement into a procedural provision requiring investigating authorities to disclose "raw data" and evidence to interested parties.³³⁹ In this context, the European Union argues that Article 2.4 does not impose specific obligations in terms of providing information to interested parties requesting adjustments and that Article 6 of Anti-Dumping Agreement is the relevant provision governing disclosure obligations.³⁴⁰

5.176. China responds that the European Union attempts to render the procedural obligation imposed under the last sentence of Article 2.4 meaningless when arguing that whether specific information should have been made available needs to be addressed exclusively under Article 6 of the Anti-Dumping Agreement.³⁴¹ The United States notes that, whereas the "transparency obligation" is found in Article 6, it is "reinforced" by the last sentence of Article 2.4.³⁴²

5.177. Article 6 of the Anti-Dumping Agreement contains detailed rules concerning, *inter alia*, the collection, confidential treatment, and disclosure of evidence in an anti-dumping investigation. It nonetheless remains that the last sentence of Article 2.4 of the Anti-Dumping Agreement may equally require investigating authorities to share certain information with interested parties. In this regard, we recall that the procedural obligation under Article 2.4 is limited to ensuring that interested parties are in a position to make requests for adjustments. By contrast, Article 6.4, for example, relates to the parties' right to see *all* non-confidential information relevant to the presentation of their cases and used by the investigating authority. It, therefore, applies to a broad range of information that is used by an investigating authority for the purposes of carrying out a required step in an anti-dumping investigation. Therefore, in the light of its limited scope, we are of the view that the procedural obligation under Article 2.4 does not render any of the disclosure obligations under Article 6 "redundant", as the European Union suggests.³⁴³

5.178. Moreover, we do not agree with the European Union that the Panel erred in finding that the last sentence of Article 2.4 requires the disclosure of "raw data".³⁴⁴ Whether or not a given piece of information should be shared with interested parties under the last sentence of Article 2.4 has to be made in the light of the specific circumstances of each investigation, not in the abstract. This is how the Panel proceeded when finding that, in the review investigation at issue, information on the characteristics of Pooja Forge's products needed to be shared with the Chinese producers for them to be in a position to request adjustments.³⁴⁵ We recall that, depending on the particular circumstances of the case, the last sentence of Article 2.4 may require an investigating authority to share certain information with interested parties to the extent that these parties require this information in order to make requests for adjustments.

5.179. We also note that the European Union argues that the Panel erred in the interpretation of the last sentence of Article 2.4 of the Anti-Dumping Agreement "by accepting China's approach that a fair comparison can only be made if the producers can verify and confirm themselves if an adjustment is required based on all of the information available to the investigating authority."³⁴⁶ However, the Panel made no such finding that interested parties should be able to verify the information provided by other parties to the investigating authority. Rather, the Panel examined whether the Chinese producers were in a position to request adjustments based on the information made available to them, or if the Commission should have provided them with additional information on the characteristics of Pooja Forge's products.³⁴⁷

³³⁹ European Union's appellant's submission, para. 296.

³⁴⁰ European Union's appellant's submission, paras. 305, 314, and 322-323.

³⁴¹ China's appellee's submission, para. 333 (quoting European Union's appellant's submission, para. 322).

³⁴² United States' third participant's submission, para. 34.

³⁴³ European Union's appellant's submission, para. 322.

³⁴⁴ European Union's appellant's submission, para. 296.

³⁴⁵ Panel Report, para. 7.141.

³⁴⁶ European Union's appellant's submission, para. 326.

³⁴⁷ See e.g. Panel Report, paras. 7.142, 7.144, and 7.149.

5.180. In the light of the foregoing, we find that the European Union has not established that the Panel erred in the interpretation of Article 2.4 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with this provision because the Commission failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products.

5.5.1.3.3 Whether the Panel erred in finding that the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments

5.181. The European Union claims that the Panel erred in finding that the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4 of the Anti-Dumping Agreement.³⁴⁸ According to the European Union, the Panel should have concluded that the European Union complied with the Appellate Body's ruling in the original proceedings and with the procedural requirement of Article 2.4 of the Anti-Dumping Agreement because, as the Panel acknowledged, the Chinese producers knew "the basis on which the Commission grouped the products" for the purposes of ensuring a fair comparison.³⁴⁹ The European Union explains that, in the original proceedings, the Commission was faulted for not having informed the Chinese producers sufficiently in advance of the two "product types" on the basis of which it had grouped the products, namely, the distinction between standard and special fasteners and the strength class.³⁵⁰ By contrast, in the review investigation, the Commission disclosed the product groups by informing the Chinese producers of the characteristics reflected in the revised PCNs.³⁵¹ The European Union adds that the company-specific disclosures, which were part of the final disclosure, showed how a particular product sold by Pooja Forge compared to each of the PCN characteristics and that this also suffices for a finding that the European Union complied with the procedural requirement of Article 2.4.³⁵²

5.182. China responds that, in the original proceedings, the Appellate Body referred to information on the product groups as the "starting point" of the dialogue under Article 2.4 of the Anti-Dumping Agreement.³⁵³ Further, China submits that the Commission should also have provided information on the "specific products" with regard to which the normal values were determined in the review investigation at issue³⁵⁴, which the Commission failed to do. In particular, China explains that the company-specific disclosures merely identified how the Chinese producers' fasteners had been grouped according to the revised PCNs and whether there existed an allegedly corresponding match in Pooja Forge's products, but did not provide the necessary information on the characteristics of Pooja Forge's products.³⁵⁵

5.183. As set out above, the Appellate Body found in the original proceedings that Article 2.4 obliges investigating authorities, at a minimum, to inform the parties of the "product groups" used for the purposes of the price comparison.³⁵⁶ Furthermore, where the normal value is established on the basis of the domestic sales in an analogue country, interested parties need to be informed of "the specific products with regard to which the normal value is determined".³⁵⁷ This will allow them to decide whether requests for adjustments regarding any differences affecting price comparability should be made.

5.184. The Panel noted that, in the review investigation, the Commission initially intended to base its dumping determination on the same two "product types" used in the original investigation, namely, the distinction between special and standard fasteners and the strength class.³⁵⁸ However, following the Chinese producers' comments and requests to see further information, the

³⁴⁸ European Union's appellant's submission, para. 317.

³⁴⁹ European Union's appellant's submission, para. 317 (quoting Panel Report, para. 7.139).

³⁵⁰ European Union's appellant's submission, para. 319.

³⁵¹ European Union's appellant's submission, para. 320.

³⁵² European Union's appellant's submission, para. 318.

³⁵³ China's appellee's submission, para. 323 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 490).

³⁵⁴ China's appellee's submission, para. 325 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 491).

³⁵⁵ China's appellee's submission, para. 334.

³⁵⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 490.

³⁵⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 491.

³⁵⁸ Panel Report, para. 7.139.

Commission decided to use the revised PCNs, based on the following product characteristics: the distinction between standard and special fasteners; strength class; coating; diameter; and length.³⁵⁹ The Commission disclosed the revised PCNs on the basis of which it grouped the products to conduct the comparison between the export prices and normal values. The Panel further noted that "the Commission rejected the Chinese producers' repeated requests to see the information regarding the characteristics of Pooja Forge's products."³⁶⁰

5.185. In addition to the revised PCNs, the Commission provided company-specific disclosures as part of the final disclosure, consisting of individual dumping margin calculations prepared for three Chinese producers.³⁶¹ The Panel found that the company-specific disclosures provided some but not all the information on Pooja Forge's products used to determine normal values. As the Panel explained:

[The] disclosures indicate the PCN characteristics of the products that were matched on the normal value and export price side but do not indicate which models were being compared. To follow on the EU's example ... the disclosure did indicate that Pooja Forge had sold e.g. a standard hexagon socket head screw, with chrome, with a strength class of 8.8 and small diameter and length. Contrary to what the European Union asserts, however, this does not show the characteristics of Pooja Forge's product with which the products of the Chinese producers were compared. It only shows how a particular product compares to each of the PCN characteristics taken into account in categorizing different product types. It does not show what particular model of Pooja Forge's products was being compared with what model sold by the Chinese producers.³⁶²

5.186. The European Union alleges that "the Panel misunderstood what the Commission actually disclosed."³⁶³ We recall that "[a]llegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU."³⁶⁴ The European Union's claim relates to the Panel's appreciation of the evidence and, therefore, should have been brought under Article 11 of the DSU. Yet, the European Union has not raised a claim under Article 11 of the DSU alleging that the Panel's review of the company-specific disclosures was inconsistent with its obligation to conduct an objective assessment of the facts. Thus, it is not for us to second-guess the Panel's conclusion resulting from its assessment of this evidence.

5.187. The European Union further contends that, since the Chinese producers had been informed of the revised PCNs, they knew the product characteristics used by the Commission and could have claimed the adjustments they deemed necessary.³⁶⁵ The European Union is of the view that the Chinese producers could have requested adjustments on the basis of other relevant characteristics – for example, if their transactions reflected such other characteristics³⁶⁶ – or if they only sold products that had or did not have particular characteristics that were reflected in the revised PCNs.³⁶⁷

5.188. Indicating which particular method is used to categorize the products for the purposes of price comparison is the starting point of the dialogue contemplated by the Appellate Body under Article 2.4 of the Anti-Dumping Agreement.³⁶⁸ In an anti-dumping investigation involving an analogue country producer, the exporters under investigation also need to be informed "of the specific products with regard to which the normal value is determined", or they will "not be in a position to request adjustments they deem necessary".³⁶⁹ We recall that, in an "ordinary"

³⁵⁹ Panel Report, para. 7.139 (referring to Review Regulation (Panel Exhibit CHN-3), recital 43). See also Letter dated 5 July 2012 from the European Commission to interested parties (Panel Exhibit CHN-15).

³⁶⁰ Panel Report, para. 7.139.

³⁶¹ Calculations for Biao Wu (Panel Exhibit CHN-44); Calculations for Ningbo Jinding (Panel Exhibit CHN-45); Calculations for Changshu (Panel Exhibit CHN-46).

³⁶² Panel Report, para. 7.144.

³⁶³ European Union's appellant's submission, para. 324.

³⁶⁴ Appellate Body Reports, *China – Rare Earths*, para. 5.173. (fn omitted)

³⁶⁵ European Union's appellant's submission, paras. 320 and 324.

³⁶⁶ European Union's appellant's submission, paras. 320 and 324. The European Union observes that the Chinese producers were successfully able to claim adjustments regarding "quality control" without seeing the "raw data" submitted by Pooja Forge. (*Ibid.*, para. 319)

³⁶⁷ European Union's appellant's submission, para. 324.

³⁶⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 490.

³⁶⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 491.

anti-dumping investigation, normal value is usually determined on the basis of the particular exporter's domestic sales. Therefore, the exporter under investigation would be expected to have the necessary knowledge of its own products used for establishing both the export price and the normal value. In such circumstances, once the exporter knows on which basis the comparison will be made (for example, once the PCNs are disclosed), that exporter can ascertain whether the product groups used adequately capture all differences affecting price comparability or if adjustments are necessary to account for certain differences that affect price comparability. As the Panel correctly stated, in investigations involving an analogue country producer, the normal value information is obtained from a third source. To the extent the exporters under investigation do not have access to the normal value information, they are "left in the dark" as to the adjustments they could request for differences that affect price comparability between the exported products and the products sold domestically by the analogue country producer.³⁷⁰

5.189. The factual circumstances mentioned above show that, in the investigation at issue, the Commission indicated to the Chinese producers the "product groups" that served as the basis for comparing the transactions by disclosing the revised PCNs. However, the Commission did not disclose all the information regarding the characteristics of Pooja Forge's products used for the purposes of the price comparison. In particular, the Commission did not indicate the "specific products" of Pooja Forge that were used to determine normal values, which would have enabled the Chinese producers to request the adjustments they deemed necessary. The Chinese producers might have been in a position to speculate about which adjustments were warranted by looking at their own products – for example, if their products had characteristics not accounted for in the revised PCNs. However, they could not know if such differences were relevant for a comparison with the prices of Pooja Forge's products or if there were any other relevant characteristics that Pooja Forge's products had which would have required an adjustment to ensure price comparability. We, therefore, agree with the Panel's finding that, "[b]y failing to provide the Chinese producers with the information regarding the characteristics of Pooja Forge's products which were used in determining the normal value[s] and which were then compared with the products of the Chinese producers, the Commission deprived these producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4."³⁷¹

5.190. Moreover, the European Union claims that the Panel erred insofar as it considered the final disclosure documents not to be a timely way of informing interested parties under Article 2.4 of the Anti-Dumping Agreement.³⁷² The European Union recalls that the dialogue between the Commission and interested parties had started prior to the final disclosure and argues that, not only were interested parties fully informed of the "product types" used by the Commission at the time of the company-specific disclosures, but they were also provided with sufficient time to comment.³⁷³ China, on the other hand, is of the view that the dialogue contemplated under Article 2.4 cannot appropriately take place "at the very end of the investigation", at a point in time where the dumping calculations have been made.³⁷⁴

5.191. As explained above, the Panel found that the company-specific disclosures do not indicate which "particular models" were being compared and correctly concluded that the Chinese producers thus could not have had a meaningful opportunity to request adjustments based on these disclosures.³⁷⁵ Having found that the disclosures at issue did not contain sufficient information to meet the requirements of the last sentence of Article 2.4 of the Anti-Dumping Agreement, the Panel was not required to address the question of whether such disclosures were made in a timely manner. Nonetheless, we recall that Article 6.9 of the Anti-Dumping Agreement provides that "[t]he authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures." This disclosure necessarily takes place towards the end of the investigation and at a time when the investigating authority has established and compared normal value and export price. By contrast, the dialogue under Article 2.4 of the Anti-Dumping Agreement necessarily starts in the early stages of an investigation and thus precedes the disclosure of essential facts under Article 6.9. An investigating authority should indeed indicate to the parties in

³⁷⁰ Panel Report, para. 7.149.

³⁷¹ Panel Report, para. 7.142.

³⁷² European Union's appellant's submission, para. 327.

³⁷³ European Union's appellant's submission, para. 328.

³⁷⁴ China's appellee's submission, para. 339.

³⁷⁵ Panel Report, para. 7.144.

question what information is necessary early enough in the investigation such that these parties can make requests for adjustments ensuring a fair comparison between normal value and export price before the dumping margin is determined. Therefore, in most cases, a disclosure under Article 6.9 of the Anti-Dumping Agreement will not fulfil the requirements of Article 2.4. However, whether information shared at the end of an on-going dialogue under Article 2.4 is timely enough to ensure a fair comparison between normal value and export price must be assessed on a case-by-case basis, by assessing whether interested parties had a meaningful opportunity to request adjustments in the light of the information shared by the investigating authority towards the end of that dialogue. Therefore, it cannot be excluded that, in some particular instances, a disclosure under Article 6.9 of the Anti-Dumping Agreement could fulfil the requirements of Article 2.4.

5.5.1.3.4 Whether the Panel erred in finding that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the information at issue

5.192. The European Union claims that the Panel erred in finding that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the information at issue.³⁷⁶ The European Union contends that such a non-confidential summary was in fact provided through the "product type information" disclosed as part of the final disclosure, and that the Commission struck a balance between protecting confidential information provided by Pooja Forge and disclosing the necessary information to the Chinese interested parties.³⁷⁷

5.193. China responds that Article 2.4 of the Anti-Dumping Agreement does not provide for a carve-out with respect to confidential information and that, consequently, the confidential character of the information cannot be an excuse for failing to comply with the requirement of Article 2.4.³⁷⁸ China also argues that, even if the information were confidential, *quod non*, the Commission could still meet its obligation under Article 2.4 through the use of non-confidential summaries.³⁷⁹

5.194. We have upheld above the Panel's finding that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because the Commission failed to conduct an objective assessment of whether Pooja Forge had shown "good cause" for the confidential treatment of the information at issue.³⁸⁰ We therefore find that the Panel did not err in rejecting the European Union's argument that the information at issue was protected from disclosure under Article 6.5 and, therefore, could not be disclosed under Article 2.4 of the Anti-Dumping Agreement by relying on its earlier finding that the Commission's confidential treatment of Pooja Forge's information was inconsistent with Article 6.5.³⁸¹

5.195. Moreover, the Panel was correct in finding that, even if the information were to be treated as confidential under Article 6.5, the obligation under Article 2.4 would still have required the Commission to make some disclosure to interested parties in order to allow them to make informed decisions regarding possible adjustments.³⁸² We recall that the fair comparison obligation under Article 2.4 lies on the investigating authority. As the Panel correctly found, where the normal value is determined on the basis of the domestic sales in an analogue country, the investigating authority has "to find ways to disclose as much information on normal value as the foreign producer would need in order to meaningfully participate in the fair comparison process."³⁸³ Therefore, even if the information had required confidential treatment pursuant to

³⁷⁶ European Union's appellant's submission, para. 332 (referring to Panel Report, fn 200 to para. 7.145).

³⁷⁷ European Union's appellant's submission, paras. 333-334.

³⁷⁸ China's appellee's submission, paras. 354-356.

³⁷⁹ China's appellee's submission, para. 357.

³⁸⁰ As we have further explained in paragraph 5.101, if information has been accorded confidential treatment under Article 6.5 in a manner that does not conform to the requirements of that provision, there is no legal basis for according confidential treatment to that information under another provision, such as Article 6.4 of the Anti-Dumping Agreement.

³⁸¹ Panel Report, para. 7.145.

³⁸² Panel Report, fn 200 to para. 7.145. The Panel noted that this disclosure would be subject to the obligations set forth in Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement regarding the treatment of confidential information and the preparation of non-confidential summaries of such information.

³⁸³ Panel Report, para. 7.149.

Article 6.5, the Commission would, under Article 2.4, have needed to make its best effort to disclose the information that was necessary for the Chinese producers to request adjustments. While such information could have been disclosed with the permission of Pooja Forge under Article 6.5, or via a non-confidential summary prepared by Pooja Forge pursuant to Article 6.5.1 of the Anti-Dumping Agreement³⁸⁴, it could also have been disclosed by other means for the purposes of Article 2.4, such as via a non-confidential summary prepared by the investigating authority.

5.196. On the basis of the foregoing, we find that the European Union has not established that the Panel erred in its interpretation or application of the last sentence of Article 2.4 of the Anti-Dumping Agreement.

5.197. We, therefore, uphold the Panel's finding, in paragraphs 7.148 and 8.1.iii of its Report, that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products that were used in determining normal values.

5.5.2 China's appeal regarding the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement

5.198. We turn now to consider China's appeal under Article 2.4 of the Anti-Dumping Agreement. China submits that the Panel erred in the interpretation and application of Article 2.4 in finding that the European Union did not act inconsistently with the fair comparison requirement under this provision in relation to the Commission's rejection of the Chinese producers' requests for adjustments based on: (i) differences in taxation; (ii) differences in certain costs; and (iii) differences in physical characteristics. In relation to its claim pertaining to differences in costs, China also submits that the Panel acted inconsistently with Article 11 of the DSU by focusing exclusively on one of the differences put forward by the Chinese producers, and by considering the available evidence on a piecemeal basis. We begin our analysis with a brief overview of the Panel's findings in relation to the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement. Thereafter, we set out our understanding of certain issues relating to the interpretation of this provision before examining, in turn, China's discrete claims on appeal with respect to differences in taxation, other costs, and physical characteristics.

5.5.2.1 The Panel's findings

5.199. Addressing first the alleged differences in taxation, the Panel noted that Pooja Forge imported most of its raw materials used to produce fasteners (i.e. wire rod), whereas the Chinese producers sourced their raw materials domestically.³⁸⁵ The Panel observed that "[t]he Commission resorted to the analogue country methodology because it determined that the Chinese producers subject to the investigation did not operate according to the principles of a market economy, including with respect to the price paid for domestic wire rod" and found that adjusting for differences in taxation "would undermine the Commission's right to have recourse to the analogue country methodology".³⁸⁶ The Panel added that, "once the [investigating authority] starts making adjustments for such cost differences, it will effectively be moving towards the costs in the investigated country that, at the outset of the investigation, was not considered to be a market economy."³⁸⁷ Moreover, the Panel found that, even if the Commission were under an obligation to consider making an adjustment for such differences in taxation, the Chinese producers did not come forward with a substantiated request for an adjustment.³⁸⁸

³⁸⁴ Article 6.5.1 of the Anti-Dumping Agreement provides:

The authorities shall require interested parties providing confidential information to furnish non-confidential summaries thereof. These summaries shall be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence. In exceptional circumstances, such parties may indicate that such information is not susceptible of summary. In such exceptional circumstances, a statement of the reasons why summarization is not possible must be provided.

³⁸⁵ Panel Report, para. 7.216.

³⁸⁶ Panel Report, para. 7.218.

³⁸⁷ Panel Report, para. 7.219.

³⁸⁸ Panel Report, paras. 7.220-7.221.

5.200. Turning to the alleged differences in physical characteristics, the Panel observed that China referred to two groups of characteristics: (i) those that were included in the original PCNs (i.e. coating, chrome, diameter and length, and types of fasteners); and (ii) those that were not included in the original PCNs (i.e. traceability, standards, unit of defective rate, hardness, bending strength, impact toughness, and friction coefficient).³⁸⁹ The Panel analysed China's claims with respect to each of the characteristics included in the original PCNs separately and rejected these claims on the basis that no showing had been made of differences affecting price comparability.³⁹⁰ As regards the characteristics not included in the original PCNs, the Panel rejected the European Union's contention that this claim did not fall within its terms of reference.³⁹¹ The Panel, however, found that China had failed to show that the Chinese producers made substantiated requests for adjustments.³⁹² The Panel further observed that China mainly took issue with the Commission's failure to provide information on the characteristics of Pooja Forge's products.³⁹³ According to the Panel, finding a violation of the fair comparison requirement under Article 2.4 because the Commission failed to provide information would have been speculative since it would have been based on the assumption that, had the Commission provided the necessary information, the Chinese producers would have made substantiated requests for adjustments.³⁹⁴

5.201. Finally, the Panel analysed China's claim pertaining to differences in other costs (i.e. differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee). After having found that this claim fell within its terms of reference³⁹⁵, the Panel focused its analysis on the alleged difference in electricity consumption, and concluded that, based on the evidence on the record, the Chinese producers had failed to demonstrate that the claimed differences affected price comparability.³⁹⁶

5.202. Turning to China's argument that the Commission had not provided sufficient information to the Chinese producers for them to substantiate further their requests for adjustments, the Panel noted that this issue concerned the procedural aspects of the fair comparison obligation³⁹⁷, in respect of which it had already found a violation of Article 2.4 by the European Union. Moreover, the Panel found that, "in an investigation against an NME where the analogue country methodology is used, claiming adjustments for alleged differences in costs would undermine the [investigating authority]'s recourse to that methodology."³⁹⁸ In this context, the Panel recalled that the Commission determined normal values based on Pooja Forge's data because "it considered [the Chinese] producers' prices not to reflect the market dynamics."³⁹⁹ The Panel further rejected China's argument that the Commission made similar adjustments in the past on the basis that the European Union disputed the existence of any "past practice" and that it was, in any view, not a factor that could be taken into account under Article 2.4 of the Anti-Dumping Agreement.⁴⁰⁰ The Panel also dismissed China's argument that because the Commission made an adjustment for differences in quality control in the original investigation, it should have accorded the same treatment to the cost differences at issue.⁴⁰¹ As the Panel found, the adjustment for quality control was made because, unlike the Chinese producers, Pooja Forge had quality control as an additional step in its production process. By contrast, the costs relied upon by China were incurred by both Pooja Forge and the Chinese producers.⁴⁰²

³⁸⁹ Panel Report, para. 7.224.

³⁹⁰ Panel Report, paras. 7.225-7.228 and 7.230.

³⁹¹ Panel Report, para. 7.233.

³⁹² Panel Report, para. 7.235.

³⁹³ Panel Report, para. 7.235.

³⁹⁴ Panel Report, para. 7.235.

³⁹⁵ Panel Report, para. 7.239.

³⁹⁶ Panel Report, paras. 7.242-7.243.

³⁹⁷ Panel Report, para. 7.244.

³⁹⁸ Panel Report, para. 7.245.

³⁹⁹ Panel Report, para. 7.245.

⁴⁰⁰ Panel Report, para. 7.246.

⁴⁰¹ Panel Report, paras. 7.247-7.249.

⁴⁰² Panel Report, para. 7.249.

5.203. Based on the foregoing, the Panel rejected China's claim that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because the Commission failed to make adjustments for differences affecting price comparability.⁴⁰³

5.5.2.2 The fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement

5.204. As we have set out above, Article 2.4 of the Anti-Dumping Agreement requires investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make due allowance, or adjustments, for differences affecting price comparability. Whereas the obligation to ensure a fair comparison lies on the investigating authorities, "exporters bear the burden of substantiating, 'as constructively as possible', their requests for adjustments reflecting the 'due allowance' within the meaning of Article 2.4."⁴⁰⁴ Accordingly, "[i]f it is not demonstrated to the authorities that there is a difference affecting price comparability, there is no obligation to make an adjustment."⁴⁰⁵ However, the authorities "must take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited".⁴⁰⁶

5.205. The fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, irrespective of the methodology used to determine normal value. In this context, we recall that Article 2.7 of the Anti-Dumping Agreement incorporates the second *Ad Note* to Article VI:1 of the GATT 1994.⁴⁰⁷ This provision, read in conjunction with Article 2.2 of the Anti-Dumping Agreement, has been understood to allow investigating authorities to disregard domestic prices and costs of an NME producer in the determination of normal value on the ground that a strict comparison with such prices may not be appropriate. As the Appellate Body has explained, while the second *Ad Note* to Article VI:1 refers to difficulties in determining price comparability in general, "the text of this provision clarifies that these difficulties relate exclusively to the normal value side of the comparison."⁴⁰⁸ As such, the second *Ad Note* offers flexibility only in respect of the determination of normal value. Section 15 of China's Accession Protocol, entitled "Price Comparability in Determining Subsidies and Dumping", contains a similar acknowledgment of the difficulties in determining price comparability in respect of imports from China.⁴⁰⁹ The Appellate Body has noted

⁴⁰³ Panel Report, para. 7.251.

⁴⁰⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 488 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

⁴⁰⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 488 (referring to Panel Report, *Korea – Certain Paper*, para. 7.147).

⁴⁰⁶ Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

⁴⁰⁷ The second *Ad Note* to Article VI:1 of the GATT 1994 reads:

It is recognized that, in the case of imports from a country which has a complete or substantially complete monopoly of its trade and where all domestic prices are fixed by the State, special difficulties may exist in determining price comparability for the purposes of paragraph 1, and in such cases importing Members may find it necessary to take into account the possibility that a strict comparison with domestic prices in such a country may not always be appropriate.

The Appellate Body has explained that this provision "appears to describe a certain type of NME, where the State monopolizes trade and sets all domestic prices" and that it "would thus not on its face be applicable to lesser forms of NMEs that do not fulfil both conditions, that is, the complete or substantially complete monopoly of trade and the fixing of all prices by the State". (Appellate Body Report, *EC – Fasteners (China)*, fn 460 to para. 285)

⁴⁰⁸ Footnote 460 to paragraph 285 of the Appellate Body report in *EC – Fasteners (China)* reads, in relevant part:

[T]he reference in the second *Ad Note* to Article VI:1 to a strict "comparison with domestic prices" not always being "appropriate" provides flexibility only in respect of the determination of normal value. The recognition of special difficulties in determining price comparability in the second *Ad Note* to Article VI:1 does not mean that importing Members may depart from the provisions regarding the determination of export prices and the calculation of dumping margins and anti-dumping duties set forth in the *Anti-Dumping Agreement* and in the GATT 1994. While the second *Ad Note* to Article VI:1 refers to difficulties in determining price comparability in general, the text of this provision clarifies that these difficulties relate exclusively to the normal value side of the comparison. This is indicated by the operative part in the third sentence of this provision, which only allows importing Members to depart from a "strict comparison with domestic prices". (emphasis original)

⁴⁰⁹ Section 15(a) of China's Accession Protocol provides:

In determining price comparability under Article VI of the GATT 1994 and the Anti-Dumping Agreement, the importing WTO Member shall use either Chinese prices or costs for the industry

that, according to Section 15(a) of China's Accession Protocol, if Chinese producers are not able to "clearly show" that market-economy conditions prevail in the industry at issue, "the importing WTO Member may use an alternative methodology that is not based on a strict comparison with domestic prices or costs in China, such as using surrogate third country or constructed normal value."⁴¹⁰ As the Appellate Body has found, "while Section 15 of China's Accession Protocol establishes special rules regarding the domestic price aspect of price comparability, it does not contain an open-ended exception that allows WTO Members to treat China differently for other purposes under the *Anti-Dumping Agreement* and the GATT 1994, such as the determination of export prices or individual versus country-wide margins and duties."⁴¹¹

5.206. We understand that, in this appeal, China does not challenge the methodology used by the Commission to determine normal values, which was based on the domestic prices of an analogue country producer. Nor does it challenge the use of India as the analogue country or Pooja Forge as the analogue country producer. China, however, argues that there is no legal basis in the *Anti-Dumping Agreement* or in China's Accession Protocol for a finding that Article 2.4 of the *Anti-Dumping Agreement* imposes a different and less stringent fair comparison obligation in investigations involving NME producers.⁴¹² The European Union does not dispute that the fair comparison requirement of Article 2.4 applies in the context of an investigation involving an analogue country⁴¹³, but argues that "the essence of the EU's analogue country methodology ... is to replace the entire data set of the exporter in the non-market economy country by the data set of a producer in an analogue market economy country", not to replace the distorted costs by market costs.⁴¹⁴ Accordingly, in such a situation, the Commission "does not adjust the prices or costs of the analogue country producers to take into account the difference in production methodologies, production factors or efficiencies between the analogue country producers and the producers of the exporting country".⁴¹⁵

5.207. As explained, the fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, including where normal value is determined on the basis of a surrogate third country. However, Article 2.4 of the *Anti-Dumping Agreement* has to be read in the context of the second *Ad Note* to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol. We recall that the rationale for determining normal value on the basis of the domestic prices of Pooja Forge was that the Chinese producers had not clearly shown that market economy conditions prevail in the fasteners industry in China.⁴¹⁶ Costs and prices in the Chinese fasteners industry thus cannot, in this case, serve as reliable benchmarks to determine normal value. In our view, the investigating authority is not required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs in the Chinese industry that were found to be distorted. Based on the foregoing, an investigating authority can reject a request for an adjustment if such adjustment would effectively reflect a cost or price that was found to be distorted in the exporting country in the normal value component of the comparison that is

under investigation or a methodology that is not based on a strict comparison with domestic prices or costs in China based on the following rules:

- (i) If the producers under investigation can clearly show that market economy conditions prevail in the industry producing the like product with regard to the manufacture, production and sale of that product, the importing WTO Member shall use Chinese prices or costs for the industry under investigation in determining price comparability;
- (ii) The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product.

⁴¹⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 286.

⁴¹¹ Appellate Body Report, *EC – Fasteners (China)*, para. 290. (fn omitted) The Appellate Body also stated that, "[l]ike the second *Ad Note* to Article VI:1 of the GATT 1994, Section 15(a) of China's Accession Protocol permits importing Members to derogate from a strict comparison with domestic prices or costs in China, that is, in respect of the determination of the normal value." (Ibid., para. 287)

⁴¹² China's other appellant's submission, paras. 16 *et seq.* and 71.

⁴¹³ European Union's appellee's submission, para. 22.

⁴¹⁴ European Union's appellee's submission, para. 66.

⁴¹⁵ European Union's appellee's submission, para. 67. However, according to the European Union, adjustments can be made in the case of a natural comparative advantage or for an additional step in the production process, for example, quality control, which reflects an additional cost element that results in quality differences. (European Union's response to questioning at the oral hearing)

⁴¹⁶ This is pursuant to China's Accession Protocol, Section 15(a)(ii).

contemplated under Article 2.4 of the Anti-Dumping Agreement. Accordingly, an investigating authority has to "take steps to achieve clarity as to the adjustment claimed"⁴¹⁷ and determine whether, on its merits, the adjustment is warranted because it reflects a difference affecting price comparability or whether it would lead to adjusting back to costs or prices that were found to be distorted in the exporting country.

5.208. With this interpretation in mind, we turn to China's claims on appeal in relation to each of the differences at issue, namely, differences in taxation, other costs, and physical characteristics.

5.5.2.3 Differences in taxation

5.209. We recall that Article 2.4 of the Anti-Dumping Agreement specifically refers to differences in taxation as differences for which adjustments may be required.⁴¹⁸ In addition, Article VI:4 of the GATT 1994 provides that "[n]o product of the territory of any Member imported into the territory of any other Member shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes."⁴¹⁹

5.210. As the Panel observed, Pooja Forge imported most of the raw materials needed to produce its fasteners, i.e. wire rod, whereas the Chinese producers bought their wire rod domestically.⁴²⁰ The Chinese producers' requests for an adjustment were based on the fact that Pooja Forge's domestic prices included import duties and other indirect taxes on the raw materials that were not included in the Chinese export prices. These are the differences in taxation at issue.⁴²¹ The Chinese producers also argued that, had they imported their raw materials, they would have benefited from a duty drawback for import duties paid on such inputs.⁴²²

5.211. The Commission rejected the Chinese producers' requests on the basis that: (i) the Chinese producers did not show that they would benefit from a non-collection or refund of the import duties paid on the raw materials; and (ii) the prices of the raw materials were found to be distorted in China and therefore could not serve as a basis for an adjustment. The Review Regulation reads, in relevant parts:

The raw material imported by the Indian producer was subject to the basic customs duty (5 % of assessable value) and the Customs Education Cess (3 % of the basic customs duty value plus the CVD amount). However, according to Article 2(10)(b) of the basic Regulation, such an adjustment for indirect taxes is claimable if the import charges borne by the like product and by material physically incorporated therein, when intended for consumption on the domestic market would not be collected or would be refunded when the like product is exported to the European Union. In the absence of a claim and evidence that exports from the above-mentioned exporting producers to the EU would benefit from a non-collection or refund of import charges on imports of raw materials (wire rod), the claim must be rejected. Furthermore, such an adjustment is not normally available when the exporting producer concerned, as is

⁴¹⁷ Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC - Tube or Pipe Fittings*, para. 7.158).

⁴¹⁸ Article 2.4 of the Anti-Dumping Agreement provides, in relevant part:

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.

⁴¹⁹ We see no derogation from these rules in Section 15 or elsewhere in China's Accession Protocol.

⁴²⁰ Panel Report, para. 7.216.

⁴²¹ Panel Report, para. 7.210 (referring to Letter dated 13 June 2012 on behalf of Ningbo Jinding to the European Commission concerning the disclosure of 30 May 2012 (Panel Exhibit CHN-33), p. 5; Letter dated 13 June 2012 on behalf of Changshu to the European Commission concerning the disclosure of 30 May 2012 (Panel Exhibit CHN-34), p. 5; and Letter dated 19 June 2012 on behalf of China's Chamber of Commerce for Import and Export of Machinery and Electronic Products (CCCME) to the European Commission (Panel Exhibit CHN-7), p. 8).

⁴²² Panel Report, para. 7.213 (referring to Letter dated 19 July 2012 on behalf of CCCME and Biao Wu to the European Commission (Panel Exhibit CHN-21), p. 10).

the case in this review, sources all its raw materials from domestic suppliers incurring therefore no import charge.

...

[T]he cost of the major raw material — steel wire rod — did not substantially reflect market values. It was found that the prices of the steel wire rods charged on the domestic market were significantly lower than those charged on other markets. Therefore, these distorted prices cannot be used as a basis for adjustment as requested by the said parties. In these circumstances, the Commission fails to see which additional information, in the view of the Chinese Chamber of Commerce and the exporting producer, could be provided to further substantiate [this request].⁴²³

5.212. The Panel rejected China's claim on the grounds that such an adjustment would undermine the Commission's right to have recourse to the analogue country methodology⁴²⁴ and that the Chinese producers did not substantiate their requests for an adjustment.⁴²⁵ On appeal, China claims that both of these findings by the Panel are in error.⁴²⁶ We analyse each of China's claims in turn below.

5.5.2.3.1 Whether the Panel erred in finding that adjusting for differences in taxation would undermine the Commission's right to have recourse to the analogue country methodology

5.213. China argues that the obligation that lies on investigating authorities to make necessary adjustments also applies in anti-dumping investigations involving NME producers.⁴²⁷ Moreover, China contends that, in the present case, making an adjustment for differences in taxation would not undermine the Commission's ability to resort to the analogue country methodology, because differences in taxation on raw materials are unrelated to the issue of the actual cost of such raw materials.⁴²⁸ Instead, according to China, the adjustment relates to the fact that import duties and other indirect taxes on raw materials are included in the domestic prices of Pooja Forge while they are not included in the Chinese export prices.⁴²⁹ China further explains that making an adjustment would only require the Commission to use Pooja Forge's data and not that of the Chinese producers.⁴³⁰

5.214. The European Union responds that the differences at issue are "directly related" to the reason for resorting to the analogue country methodology.⁴³¹ At the oral hearing, the European Union argued that the Chinese producers would source their raw materials internationally if the prices in China were not distorted⁴³², and that the market price for the raw materials in India includes import duties. Moreover, according to the European Union, whether the Chinese producers would have benefited from a duty drawback had they imported the raw materials, and whose cost data are being used to calculate the adjustment, are irrelevant to the issue of whether adjustments are warranted.⁴³³

5.215. The Panel correctly found that "the fact that the analogue country methodology was used does not relieve the Commission from the obligation to conduct a fair comparison as required under Article 2.4."⁴³⁴ However, we disagree with the Panel's approach, which was to find, in general terms and without more, that adjusting for differences in taxation "would undermine the Commission's right to have recourse to the analogue country methodology".⁴³⁵ This finding by the Panel is not compatible with the fair comparison requirement in Article 2.4, which applies in all

⁴²³ Review Regulation (Panel Exhibit CHN-3), recitals 80 and 100.

⁴²⁴ Panel Report, para. 7.218.

⁴²⁵ Panel Report, paras. 7.220-7.221.

⁴²⁶ China's other appellant's submission, para. 14.

⁴²⁷ China's other appellant's submission, para. 22.

⁴²⁸ China's other appellant's submission, para. 49.

⁴²⁹ China's other appellant's submission, para. 49.

⁴³⁰ China's other appellant's submission, para. 50.

⁴³¹ European Union's appellee's submission, para. 28.

⁴³² See also European Union's appellee's submission, para. 28.

⁴³³ European Union's appellee's submission, paras. 34-35.

⁴³⁴ Panel Report, para. 7.222. (fn omitted)

⁴³⁵ Panel Report, para. 7.218.

anti-dumping investigations and requires that "[d]ue allowance ... be made in each case, on its merits, for differences which affect price comparability". However, the investigating authority cannot be required to adjust for differences in costs between the NME producers under investigation and the analogue country producer where this would lead the investigating authority to adjust back to the costs that were found to be distorted.

5.216. The Panel did not review whether the Commission had established that the differences in taxation on raw materials were related to the issue of the price of domestic raw materials that was found to be distorted or whether an adjustment was merited because price comparability was affected under Article 2.4. In addition, the Panel found that, "once the [investigating authority] starts making adjustments for such cost differences, it will effectively be moving towards the costs in the investigated country that, at the outset of the investigation, was not considered to be a market economy".⁴³⁶ However, the Panel did not review whether the Commission's determination reflected an examination of whether or why it would have moved towards the distorted costs of the relevant industry in the exporting country by adjusting for these differences in taxation. Therefore, the Panel did not properly review whether the Commission "[took] steps to achieve clarity as to the adjustment claimed and then determine[d] whether and to what extent that adjustment [was] merited" as required under Article 2.4.⁴³⁷

5.217. The Commission found that the cost of steel wire rod did not reflect market values in China and, therefore, could not be used as a basis for the requested adjustment.⁴³⁸ The Commission's determination, however, does not reflect that the Commission analysed the relationship between the differences in taxation for which an adjustment was claimed by the Chinese producers and these distorted costs. In particular, the Commission's determination does not reflect a finding that, as the European Union suggests⁴³⁹, the Chinese producers would have sourced their wire rod internationally but for the distortion on the Chinese market, or that the price of wire rod in India would not be a market price if the import duties were to be removed. We, therefore, consider that the Commission's determination does not reflect that it assessed whether the requested adjustment was warranted or whether it would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison. The Commission, hence, failed to "take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment [was] merited" as required under Article 2.4 of the Anti-Dumping Agreement.⁴⁴⁰

5.218. Based on the foregoing, we find that the Panel erred in concluding that the Commission was not required to "consider making an adjustment due to [differences in taxation]" solely because the analogue country methodology was used in this investigation.⁴⁴¹ We further find that the Commission failed to assess properly whether the requested adjustment based on differences in taxation was warranted, or whether it would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison.

5.5.2.3.2 Whether the Panel erred in finding that the Chinese producers did not come forward with a substantiated request for an adjustment

5.219. China submits that the Panel erred in its application of Article 2.4 of the Anti-Dumping Agreement⁴⁴² in finding that, "[e]ven if the Commission were under an obligation to consider making an adjustment due to alleged differences in the taxation of wire rod in India, despite the fact that the analogue country methodology was used in the investigation, the facts on the record do not show that the Chinese producers showed to the Commission that this difference in taxation affected price comparability as prescribed under Article 2.4 of the [Anti-Dumping] Agreement."⁴⁴³ China recalls that Pooja Forge's domestic prices included an amount for import duties and other indirect taxes on wire rod that would not be included in its export prices, whereas Chinese export

⁴³⁶ Panel Report, para. 7.219.

⁴³⁷ Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC - Tube or Pipe Fittings*, para. 7.158).

⁴³⁸ Review Regulation (Panel Exhibit CHN-3), recital 100.

⁴³⁹ See *supra* para. 5.214.

⁴⁴⁰ Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC - Tube or Pipe Fittings*, para. 7.158).

⁴⁴¹ Panel Report, paras. 7.218-7.220.

⁴⁴² China's other appellant's submission, para. 52.

⁴⁴³ Panel Report, para. 7.220.

prices did not include any import duties and indirect taxes given that the Chinese producers sourced their wire rod domestically.⁴⁴⁴ China adds that, had the Chinese producers imported their wire rod, they would have been able to obtain an import-duty drawback.⁴⁴⁵ Accordingly, China submits that the Chinese producers demonstrated the existence of a difference in taxation that affects price comparability.⁴⁴⁶

5.220. The European Union argues that China should have brought a claim under Article 11 of the DSU given that China relies on an alleged error in the factual finding of the Panel that the Chinese producers failed to adduce sufficient evidence to substantiate their requests for an adjustment.⁴⁴⁷ The European Union further submits that China's claim is, in any view, without merit because the Commission made a "reasoned and reasonable decision" when refusing to make the requested adjustment.⁴⁴⁸ At the oral hearing, the European Union explained that the Chinese producers could not have provided any further information to substantiate their requests because they were requesting an adjustment that related to a distorted market.

5.221. First, we analyse whether China should have brought its claim under Article 11 of the DSU, as the European Union contends. We recall that, in most cases, the issue raised by a particular claim "will *either* be one of application of the law to the facts *or* an issue of the objective assessment of facts, and not both".⁴⁴⁹ While allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU⁴⁵⁰, by contrast, "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue' and is therefore a legal question."⁴⁵¹ In our view, China takes issue with the Panel's assessment of whether the Chinese producers' requests for an adjustment were sufficiently substantiated to meet the requirements of Article 2.4 of the Anti-Dumping Agreement. In other words, the issue is whether the differences for which an adjustment was requested affected price comparability such that the adjustment would be warranted to ensure a fair comparison. Therefore, this claim should be treated as a challenge of the Panel's application of Article 2.4 to the facts of this case.

5.222. Turning to the issue of whether the Chinese producers submitted a substantiated request for an adjustment, we recall that it is the producers under investigation that bear the burden of substantiating their requests "as constructively as possible".⁴⁵² The Commission rejected the Chinese producers' requests on the basis that they had not shown that their exports "would benefit from a non-collection or refund of import charges on imports of raw materials (wire rod)".⁴⁵³ As the Panel observed, the Commission "found it normal that the Chinese producers did not come forward with such evidence because they bought their raw materials from the Chinese market and therefore incurred no import duties."⁴⁵⁴ In the light of the above, the Panel concluded that the Chinese producers did not come forward with a substantiated request for an adjustment.⁴⁵⁵

5.223. At the oral hearing, the European Union argued that the Chinese producers could not have submitted further information to substantiate their requests for an adjustment because these requests were based on an erroneous premise that such an adjustment was permissible when the data of an analogue country producer is used to determine normal value.⁴⁵⁶ Indeed, in the Review Regulation, the Commission stated that it "fail[ed] to see which additional information, in the view

⁴⁴⁴ China's other appellant's submission, para. 54.

⁴⁴⁵ China's other appellant's submission, para. 54.

⁴⁴⁶ China's other appellant's submission, para. 55.

⁴⁴⁷ European Union's appellee's submission, para. 38.

⁴⁴⁸ European Union's appellee's submission, para. 41.

⁴⁴⁹ Appellate Body Report, *China – GOES*, para. 183 (quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872 (emphasis original)).

⁴⁵⁰ Appellate Body Report, *China – GOES*, para. 183 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 399; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 385; and *EC and certain member States – Large Civil Aircraft*, para. 1005).

⁴⁵¹ Appellate Body Report, *China – GOES*, para. 183 (quoting Appellate Body Report, *EC – Hormones*, para. 132).

⁴⁵² Appellate Body Report, *EC – Fasteners (China)*, para. 488 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

⁴⁵³ Review Regulation (Panel Exhibit CHN-3), recital 80.

⁴⁵⁴ Panel Report, para. 7.220 (referring to General Disclosure Document (Panel Exhibit CHN-22), recital 78).

⁴⁵⁵ Panel Report, para. 7.221.

⁴⁵⁶ European Union's response to questioning at the oral hearing.

of the Chinese Chamber of Commerce and the exporting producer, could be provided to further substantiate" the request for an adjustment given that "the prices of the steel wire rods charged on the domestic market were significantly lower than those charged on other markets" and therefore "[could] not be used as a basis for adjustment".⁴⁵⁷ Thus, the Commission's determination that the Chinese producers failed to substantiate their requests for an adjustment seems to have been based on the erroneous premise that this adjustment could not be made because certain prices were distorted in China and that, accordingly, it was not possible to substantiate the corresponding requests any further. For these reasons, we find that the Panel erred in the application of Article 2.4 of the Anti-Dumping Agreement when finding that the Chinese producers did not substantiate their requests for an adjustment. Consequently, we reverse the Panel's intermediate finding that "the Chinese producers did not come forward with a substantiated request for an adjustment for the alleged difference in taxation".⁴⁵⁸

5.224. In the light of the above, we reverse the Panel's finding, in paragraphs 7.223, 7.251, and 8.2.iii of its Report, in respect of differences in taxation, and find, instead, that, because the Commission's determination does not reflect an adequate assessment of the Chinese producers' requests for an adjustment for differences in taxation, the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

5.5.2.3.3 New documents referred to by China on appeal

5.225. The European Union requests us not to take into account documents referred to by China in its other appellant's submission that are not on the Panel record.⁴⁵⁹ In our analysis, we did not find it necessary to have recourse to the new documents referred to by China on appeal that did not form part of the Panel record. Therefore, we have not found it necessary to make any finding on the admissibility of these documents challenged by the European Union.

5.5.2.4 Other cost differences

5.226. Two of the Chinese producers requested the Commission to make adjustments for differences relating to "efficiency of consumption of raw material", "wire rod used for production", "consumption of electricity", "self-generated electricity", and "productivity".⁴⁶⁰ The Commission rejected these requests for adjustments on the basis that (i) no evidence had been adduced that these differences in costs would translate into differences in prices; and (ii) where an analogue country is used, prices and costs in the NME that are not the result of market forces are not to be taken into account. The relevant recital of the Review Regulation, quoted by the Panel, reads as follows:

Article 2(10) of the basic Regulation is referring to price and not cost. There was no evidence adduced by these parties that the alleged differences in cost translated into differences in prices. In investigations concerning economies in transition such as China, an analogue country is used when warranted to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces. Thus, for the purpose of establishing the normal value, a surrogate of the costs and prices of producers in functioning market economies is used. Therefore, these claims for adjustments taking into account the differences in cost of production are rejected.⁴⁶¹

5.227. Elsewhere in the Review Regulation, it is also explained that:

[N]one of the Chinese exporting producers received MET in the original investigation and their cost structure cannot be considered as reflecting market values that can be used as a basis for adjustments in particular with regard to access to raw materials. In

⁴⁵⁷ Review Regulation (Panel Exhibit CHN-3), recital 100.

⁴⁵⁸ Panel Report, para. 7.221.

⁴⁵⁹ European Union's appellee's submission, fn 48 to para. 51 (referring to China's other appellant's submission, fn 23 to para. 43, fns 24 and 25 to para. 45, fn 49 to para. 80, and fn 107 to para. 161).

⁴⁶⁰ Panel Report, para. 7.242 (quoting Letter dated 13 June 2012 on behalf of Ningbo Jinding to the Commission (Panel Exhibit CHN-33), pp. 5-6 and referring to Letter dated 13 June 2012 on behalf of Changshu to the Commission (Panel Exhibit CHN-34), pp. 5-6).

⁴⁶¹ Panel Report, para. 7.241 (quoting Review Regulation (Panel Exhibit CHN-3), recital 41).

addition, it should be noted that the production processes existing in the PRC were found to be comparable to the Indian producer's and the alleged differences were found to be very minor. In this case, the Indian producer was found to be competing with many other producers on the Indian domestic market, it is considered that its prices were fully reflecting the situation in the domestic market. As mentioned in recital 41 above, a surrogate of the costs and prices of producers in functioning market economies had to be used for the purpose of establishing the normal value.⁴⁶²

5.228. Having reviewed the evidence on the record, the Panel found that the Chinese producers failed to demonstrate that the alleged differences in costs affected price comparability⁴⁶³, and that "the [investigating authority] is not obligated to make adjustments to reflect such differences in costs in an investigation where the analogue country methodology is used."⁴⁶⁴ On appeal, China submits that both findings are in error.⁴⁶⁵ China also claims that the Panel failed to make an objective assessment of the facts as required under Article 11 of the DSU.⁴⁶⁶ We analyse each of China's claims in turn below.

5.5.2.4.1 Whether the Panel erred in finding that adjusting for differences in costs would undermine the Commission's right to have recourse to the analogue country methodology

5.229. In support of its claim that the Panel erred in finding that adjusting for differences in costs would undermine the Commission's right to have recourse to the analogue country methodology, China raises similar arguments to the ones already set out above regarding differences in taxation. In particular, China claims that the cost factors under consideration were unrelated to the alleged non-market conditions, and that making adjustments would have required the Commission to use data only from Pooja Forge.⁴⁶⁷ Consequently, China submits that, "[a]bsent any link between these differences and non-market economy conditions, it must be concluded that they relate to undistorted factors which call for adjustments under Article 2.4."⁴⁶⁸ To support this conclusion, China relies on an alleged "past practice" by the Commission to accept requests for adjustments in the context of investigations involving NMEs.⁴⁶⁹ China also argues that the differences in costs should be accorded the same treatment as the differences in quality control, for which the Commission made an adjustment in the original investigation.⁴⁷⁰

5.230. The European Union responds that raw material-related distortions and energy-related distortions are among the typical features of an NME.⁴⁷¹ As the European Union further explains, whether the Indian producer "did not have the same easy access to raw materials as Chinese producers have in the distorted Chinese economy"; "was less efficient in terms of its electricity consumption as it had to use self-generated electricity whereas the Chinese producers could benefit from a distorted electricity market"; or "was more efficient and productive per employee because it was run like a competitive enterprise" is irrelevant because these are the reasons why Pooja Forge was used as the benchmark to determine the normal values in the first place.⁴⁷² The European Union adds that a number of the Chinese producers relied on the Chinese raw material consumption, the Chinese electricity consumption, and the

⁴⁶² Review Regulation (Panel Exhibit CHN-3), recital 103. With respect to differences relating to access to raw materials, the Review Regulation also state, at recital 100:

[T]he cost of the major raw material – steel wire rod – did not substantially reflect market values. It was found that the prices of the steel wire rods charged on the domestic market were significantly lower than those charged on other markets. Therefore, these distorted prices cannot be used as a basis for adjustment as requested by the said parties. In these circumstances, the Commission fails to see which additional information, in the view of the Chinese Chamber of Commerce and the exporting producer, could be provided to further substantiate [this request] for adjustments.

⁴⁶³ Panel Report, para. 7.243.

⁴⁶⁴ Panel Report, para. 7.245.

⁴⁶⁵ China's other appellant's submission, para. 68.

⁴⁶⁶ China's other appellant's submission, para. 106.

⁴⁶⁷ China's other appellant's submission, paras. 83-84.

⁴⁶⁸ China's other appellant's submission, para. 83.

⁴⁶⁹ China's other appellant's submission, para. 88.

⁴⁷⁰ China's other appellant's submission, para. 89.

⁴⁷¹ European Union's appellee's submission, para. 64.

⁴⁷² European Union's appellee's submission, para. 65.

Chinese productivity when claiming adjustments, which indicates that China is attempting to undo the analogue country methodology.⁴⁷³

5.231. For the same reasons set out above in respect of China's claim regarding differences in taxation, we disagree with the Panel's approach, which was to find, in general terms and without more, that, "in an investigation against an NME where the analogue country methodology is used, claiming adjustments for alleged differences in costs would undermine the [investigating authority]'s recourse to that methodology" and that "the [investigating authority] is not obligated to make adjustments to reflect ... differences in costs in an investigation where the analogue country methodology is used."⁴⁷⁴ We recall that the investigating authority is required, under Article 2.4 of the Anti-Dumping Agreement, to make "[d]ue allowance ... in each case, on its merits, for differences which affect price comparability". Where the adjustment would have been otherwise warranted, it is only where it would lead the investigating authority to adjust back to the costs that were found to be distorted that the investigating authority cannot be required to adjust for differences in costs between the NME producers under investigation and the analogue country producer.

5.232. The Panel did not review whether the Commission had established that the differences in costs were related to prices that were found to be distorted or whether adjustments were merited because price comparability was affected under Article 2.4 of the Anti-Dumping Agreement. We note that, while the Panel stated that it was "not convinced" by China's arguments that the cost factors at issue were unrelated to any distorted costs⁴⁷⁵, it failed to assess whether the Commission had analysed each of the claimed adjustments to establish if they would reflect a distorted cost or price. Therefore, the Panel did not properly review whether the Commission "[took] steps to achieve clarity as to the adjustment claimed and then determine[d] whether and to what extent that adjustment [was] merited" as required under Article 2.4 of the Anti-Dumping Agreement.⁴⁷⁶

5.233. The Commission found that the "cost structure" of the Chinese producers could not "be considered as reflecting market values that can be used as a basis for adjustments in particular with regard to access to raw materials".⁴⁷⁷ The Commission's determination, however, does not reflect that it had analysed the relationship between each of the cost differences under consideration and the costs that were found to be distorted in China, and whether adjustments were merited on the basis that price comparability was affected under Article 2.4 of the Anti-Dumping Agreement. In particular, the Commission's determination does not reflect an assessment of whether energy prices were found to be distorted in China, as the European Union suggests⁴⁷⁸, and, for example, of whether making an adjustment on the basis that Pooja Forge used self-generated electricity rather than electricity from the grid would have led to adjusting back to distorted energy prices in China. We, thus, consider that the Commission's determination does not reflect that the Commission assessed whether the requested adjustments were warranted or whether they would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison. The Commission hence failed to take "steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment [was] merited" as required under Article 2.4 of the Anti-Dumping Agreement.⁴⁷⁹

5.234. Moreover, we do not agree with the distinction introduced by the European Union, and accepted by the Panel, between the cost differences at issue and the differences in quality control,

⁴⁷³ European Union's appellee's submission, para. 66. In relation to differences in costs, the European Union also requests us not to take into account a document referred to by China in its other appellant's submission that is not on the Panel record (Ibid., fn 48 to para. 51 (referring to, *inter alia*, China's other appellant's submission, fn 49 to para. 80)) We have already dealt with this issue when addressing the European Union's claim that all of the new documents referred to by China for the first time on appeal should not be taken into account. As set out above, we have not found it necessary to make any finding on the admissibility of these documents. (See *supra*, para. 5.225)

⁴⁷⁴ Panel Report, para. 7.245.

⁴⁷⁵ Panel Report, para. 7.245.

⁴⁷⁶ Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC - Tube or Pipe Fittings*, para. 7.158).

⁴⁷⁷ Review Regulation (Panel Exhibit CHN-3), recital 103.

⁴⁷⁸ European Union's appellee's submission, para. 64.

⁴⁷⁹ Appellate Body Report, *EC – Fasteners (China)*, paras. 488 and 519 (quoting Panel Report, *EC - Tube or Pipe Fittings*, para. 7.158).

for which an adjustment was made by the Commission in the original investigation. The Review Regulation mentions that "the Commission already made an adjustment to the normal value to take into account quality control steps applied by the Indian producer which were not found for Chinese sampled producers."⁴⁸⁰ The Panel observed that "the reason why the Commission made an adjustment for differences regarding quality control was because Pooja Forge and the Chinese producers did not have the same step in their production processes", whereas "the cost factors for which adjustments were requested in the review investigation did not pertain to such a process" and "were incurred both by Pooja Forge and the Chinese producers".⁴⁸¹ Having drawn this distinction, the Panel reiterated that "making adjustment for differences in cost factors would have defied logic and rendered the use of the analogue country methodology meaningless."⁴⁸² We recall that, under Article 2.4 of the Anti-Dumping Agreement, due allowance shall be made for differences affecting price comparability. Accordingly, adjustments are to be made for differences affecting price comparability irrespective of whether the difference pertains to an "additional step" in the production process or to a step found to be carried out both by the analogue country producer and the NME producer.

5.235. Finally, we recall the Panel's findings that the alleged "past practice" of the Commission to adjust for differences in costs in investigations involving NMEs was not established and that it is, in any view, not a relevant factor under Article 2.4 of the Anti-Dumping Agreement.⁴⁸³ Irrespective of whether there is such an established "past practice", we note that the Commission has, in the past, made adjustments for certain differences in costs in the context of investigations involving NMEs.⁴⁸⁴

5.236. On the basis of the foregoing, we find that the Panel erred in concluding that the Commission was not required "to look at the cost factors" relied upon by the Chinese producers solely because the analogue country methodology was used in this investigation.⁴⁸⁵ We further find that the Commission failed to assess properly whether the requested adjustments based on differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee were warranted, or whether they would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison.

5.5.2.4.2 Whether the Panel erred in finding that the Chinese producers did not come forward with substantiated requests for adjustments

5.237. China submits that the Panel erred in the application of Article 2.4 of the Anti-Dumping Agreement when finding that the Chinese producers did not show that the cost differences at issue affected price comparability.⁴⁸⁶ China argues that, using all the evidence that was reasonably available to them, the Chinese producers demonstrated that the differences in costs of production

⁴⁸⁰ Review Regulation (Panel Exhibit CHN-3), recital 50.

⁴⁸¹ Panel Report, para. 7.249.

⁴⁸² Panel Report, para. 7.249.

⁴⁸³ Panel Report, para. 7.246.

⁴⁸⁴ Council Regulation (EC) No. 1331/2007 of 13 November 2007 imposing a definitive anti-dumping duty on imports of dicyandiamide originating in the People's Republic of China, *Official Journal of the European Union*, L Series, No. 296 (15 November 2007), pp. 1-17 (Panel Exhibit CHN-38), recitals 38 and 41; Council Regulation (EC) No. 1659/2005 of 6 October 2005 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain magnesia bricks originating in the People's Republic of China, *Official Journal of the European Union* L Series, No. 267 (12 October 2005), pp. 1-14 (Panel Exhibit CHN-39), recital 24; Council Regulation (EC) No. 3386/1993 of 6 December 1993 imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China, *Official Journal of the European Communities*, L Series, No. 306 (11 December 1993), pp. 16-21 (Panel Exhibit CHN-40), recital 9; Council Regulation (EC) No. 1347/96 of 2 July 1996 imposing definitive anti-dumping duties on imports of unwrought pure magnesium originating in Russia and Ukraine and collecting definitively the provisional duty imposed, *Official Journal of the European Communities*, L Series, No. 174 (12 July 1996), pp. 1-10 (Panel Exhibit CHN-41), recital 27; Commission Regulation (EC) No 492/2008 of 3 June 2008 imposing a provisional anti-dumping duty on imports of monosodium glutamate originating in the People's Republic of China, *Official Journal of the European Union*, L Series, No. 144 (4 June 2008), pp. 14-30, (Panel Exhibit CHN-42), recitals 35 and 39.

⁴⁸⁵ Panel Report, para. 7.245.

⁴⁸⁶ China's other appellant's submission, para. 92.

affected price comparability by providing an overview of the cost differences and explaining that the cost of production occupied a constant proportion of the price of Pooja Forge's products.⁴⁸⁷

5.238. The European Union agrees with the Panel's determination. It argues that China fails to point to any error of law under Article 2.4 of the Anti-Dumping Agreement⁴⁸⁸, and that it should have brought its claim under Article 11 of the DSU.⁴⁸⁹ The European Union also argues that the fact that the Chinese producers did not have more information to offer was immaterial to the Panel's determination.⁴⁹⁰ At the meeting with the parties, the Panel had asked the European Union what kind of evidence would have been required to show that the alleged differences in costs affect price comparability. The European Union responded that differences could be demonstrated to affect price comparability if evidence can be adduced that a natural comparative advantage exists.⁴⁹¹ The European Union also explained that "in this case the requests were not substantiated (and perhaps could not be substantiated based on any additional information) because they were based on the wrong premise that adjustments were required to reflect distorted prices."⁴⁹²

5.239. First, we analyse whether China should have brought its claim under Article 11 of the DSU, as the European Union contends. We have already explained that allegations implicating a panel's appreciation of facts and evidence fall under Article 11 of the DSU.⁴⁹³ By contrast, "[t]he consistency or inconsistency of a given fact or set of facts with the requirements of a given treaty provision is ... a legal characterization issue' and is therefore a legal question."⁴⁹⁴ In the instant case, China takes issue with the Panel's assessment of whether the Chinese producers' requests for adjustments were sufficiently substantiated to meet the requirements of Article 2.4 of the Anti-Dumping Agreement. In other words, the issue is whether the differences for which adjustments were requested affected price comparability such that the adjustments would be warranted to ensure a fair comparison. Therefore, this claim should be treated as a challenge of the Panel's application of Article 2.4 of the Anti-Dumping Agreement to the facts of this case.

5.240. Turning to the issue of whether the Chinese producers submitted substantiated requests for adjustments, we recall that they provided a comparative account of Pooja Forge's and their own costs with respect to each of the five differences upon which they relied on. They further explained "that Pooja Forge's cost of manufacturing amounted to 80% of the price of its finished product 'and that therefore any difference in costs would directly translate into the difference in price'."⁴⁹⁵ The Commission found that "[t]here was no evidence adduced by these parties that the alleged differences in cost translated into differences in prices" and addressed, in this context, the fact that an analogue country methodology is used so as to avoid basing the determination of normal value on distorted prices and costs.⁴⁹⁶ The Panel in turn found that, "while highlighting the differences between Pooja Forge and the Chinese companies in terms of the amounts incurred for each of these cost factors", the Chinese producers did not show how such cost differences affected price comparability.⁴⁹⁷ The Panel also found that the fact that "a company's cost of manufacturing

⁴⁸⁷ China's other appellant's submission, para. 99.

⁴⁸⁸ European Union's appellee's submission, para. 79.

⁴⁸⁹ European Union's appellee's submission, para. 75.

⁴⁹⁰ European Union's appellee's submission, para. 79.

⁴⁹¹ European Union's response to Panel question No. 40, para. 115.

⁴⁹² European Union's response to Panel question No. 40, para. 116. Recitals 100 and 103 of the Review Regulation (Panel Exhibit CHN-3) read, in relevant parts:

[T]hese distorted prices cannot be used as a basis for adjustment as requested by the said parties. In these circumstances, the Commission fails to see which additional information, in the view of the Chinese Chamber of Commerce and the exporting producer, could be provided to further substantiate these two requests for adjustments.

...

[N]one of the Chinese exporting producers received MET in the original investigation and their cost structure cannot be considered as reflecting market values that can be used as a basis for adjustments in particular with regard to access to raw materials.

⁴⁹³ Appellate Body Report, *China – GOES*, para. 183 (referring to Appellate Body Reports, *US – Upland Cotton*, para. 399; *US – Upland Cotton (Article 21.5 – Brazil)*, para. 385; and *EC and certain member States – Large Civil Aircraft*, para. 1005).

⁴⁹⁴ Appellate Body Report, *China – GOES*, para. 183 (quoting Appellate Body Report, *EC – Hormones*, para. 132).

⁴⁹⁵ Panel Report, para. 7.243 (quoting China's second written submission to the Panel, para. 253). (fn omitted)

⁴⁹⁶ Review Regulation (Panel Exhibit CHN-3), recital 41.

⁴⁹⁷ Panel Report, para. 7.242.

represents a certain percentage of the price of its final product does not, in itself, show a difference that affects price comparability."⁴⁹⁸ Furthermore, the Panel rejected China's argument that the Chinese producers were limited in what they could present given that they did not have access to Pooja Forge's data on the basis that China's claim "concerns the substantive aspects of the Commission's determination regarding fair comparison, and not whether the Chinese producers had the information that would have allowed them to make a substantiated request for an adjustment."⁴⁹⁹

5.241. As set out above, under Article 2.4 of the Anti-Dumping Agreement, the Chinese producers had to substantiate their requests for adjustments "as constructively as possible".⁵⁰⁰ As we have explained above, the Commission's determination in the Review Regulation seems to associate the absence of evidence that the differences in costs affected price comparability with the fact that certain costs were distorted in China.⁵⁰¹ Stating that certain costs were distorted in China does not address the issue of whether the requests for adjustments were sufficiently substantiated. Moreover, the European Union acknowledged before the Panel that "the requests were not substantiated (and perhaps could not be substantiated based on any additional information) because they were based on the wrong premise that adjustments were required to reflect distorted prices."⁵⁰² As per the European Union's own submission, the Chinese producers failed to substantiate their requests for adjustments because such adjustments could not be made given that certain prices were distorted in China and that, accordingly, the corresponding requests could not be substantiated. For these reasons, we find that the Panel erred in finding that the Chinese producers did not substantiate their requests for adjustments. Consequently, we reverse the Panel's intermediate finding that "the Chinese producers failed to show that the alleged differences in costs affected price comparability" and, thus, failed to come forward with substantiated requests for adjustments.⁵⁰³

5.242. In the light of the above, we reverse the Panel's finding, in paragraphs 7.250, 7.251, and 8.2.iii of its Report, in respect of the cost differences at issue, and find, instead, that, because the Commission's determination does not reflect an adequate assessment of the Chinese producers' requests for adjustments for differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee, the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

5.5.2.4.3 Whether the Panel failed to make an objective assessment of the facts as required under Article 11 of the DSU

5.243. China submits that the Panel acted inconsistently with Article 11 of the DSU by focusing exclusively on differences in terms of efficiency in electricity consumption when addressing China's claim that the Commission should have made adjustments for differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee.⁵⁰⁴ In addition, China claims that the Panel acted inconsistently with Article 11 of the DSU by considering pieces of evidence in isolation from each other in respect of these alleged differences.⁵⁰⁵ Having reversed the Panel's finding on the basis that the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement, we see no need to make a separate finding under Article 11 of the DSU as to whether the Panel, as argued by China, failed to make an objective assessment of the facts in reaching its findings.

⁴⁹⁸ Panel Report, para. 7.243.

⁴⁹⁹ Panel Report, para. 7.244.

⁵⁰⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 488 (quoting Panel Report, *EC – Tube or Pipe Fittings*, para. 7.158).

⁵⁰¹ Review Regulation (Panel Exhibit CHN-3), recitals 41 and 100.

⁵⁰² European Union's response to Panel question No. 40, para. 116 (quoting Review Regulation (Panel Exhibit CHN-3), recitals 100 and 103).

⁵⁰³ Panel Report, para. 7.243.

⁵⁰⁴ China's other appellant's submission, paras. 111-112.

⁵⁰⁵ China's other appellant's submission, para. 115.

5.5.2.5 Differences in physical characteristics

5.244. China conditionally appeals the Panel's finding that the European Union did not act inconsistently with the fair comparison requirement under Article 2.4 of the Anti-Dumping Agreement by rejecting the Chinese producers' requests for adjustments due to differences in physical characteristics, both included and not included in the original PCNs.⁵⁰⁶ China submits that we need to consider this claim on appeal only in the event that we reverse the Panel's finding concerning the European Union's claim under the last sentence of Article 2.4 of the Anti-Dumping Agreement.⁵⁰⁷ Having upheld the Panel's finding that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with information regarding the characteristics of Pooja Forge's products used in determining normal values, the condition upon which this appeal of China rests is not met and we need not address this claim raised by China. However, the European Union challenges the Panel's finding that China's claims with respect to physical characteristics not included in the original PCNs were within its terms of reference. We address this claim raised on appeal by the European Union below.

5.5.2.5.1 The Panel's terms of reference

5.245. Before the Panel, the European Union argued that China was precluded from raising its claim under Article 2.4 of the Anti-Dumping Agreement in the compliance proceedings in respect of adjustments relating to physical characteristics not reflected in the original PCNs because this was a claim that China could have raised but did not raise in the original proceedings. The European Union did not raise this as a procedural objection but pointed out that, since jurisdiction is a matter that has to be examined on the Panel's own initiative, it would not object if the Panel found this aspect of the claim to be outside its terms of reference.⁵⁰⁸

5.246. The Panel found that the claim was within its terms of reference as the issue could not have been raised in the original investigation. The Panel noted that the Chinese producers' requests to make adjustments based on physical characteristics not reflected in the original PCNs (such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness, and friction coefficient) were made on response to the new information disclosed by the Commission in the review investigation. Since nothing on the record of the original investigation showed, nor did the European Union argue, that these alleged cost differences were discussed in the original investigation, the Panel found that this aspect of China's claim was within its terms of reference.⁵⁰⁹

5.247. On appeal, the European Union argues that the Panel erred in finding that this claim by China fell within its terms of reference. The European Union contends that this is a claim that China could have raised but did not raise in the original proceedings. In the European Union's view, the Panel wrongly focused its analysis on whether the alleged differences were "discussed" in the original investigation.⁵¹⁰ The European Union argues that, considering that the Chinese producers raised the special/standard distinction as an issue affecting price comparability in the original investigation and that this issue was outside the original PCNs, "[t]hey could have also raised the same requests for adjustment with respect to non-PCNs elements which affected price comparability", but did not do so.⁵¹¹

5.248. China responds that the relevant issue is whether it could have raised the same claim in the original proceedings, rather than whether the Chinese producers could have made requests for adjustments during the original investigation.⁵¹² Noting that the alleged differences in physical characteristics had not been discussed in the original investigation, and that no factual findings

⁵⁰⁶ China's other appellant's submission, para. 131 *et seq.*

⁵⁰⁷ China's other appellant's submission, para. 123.

⁵⁰⁸ Panel Report, paras. 7.204 and 7.231 (referring to European Union's second written submission to the Panel, para. 156).

⁵⁰⁹ Panel Report, para. 7.233.

⁵¹⁰ European Union's appellant's submission, para. 182.

⁵¹¹ European Union's appellant's submission, para. 182.

⁵¹² China's appellee's submission, para. 125.

were made in that respect, China argues that raising this claim in the original proceedings was simply impossible.⁵¹³

5.249. We observe that China raised claims concerning the special/standard distinction in the original proceedings under Articles 2.1 and 2.6 ("likeness") and under Articles 3.1 and 3.2 ("injury") of the Anti-Dumping Agreement.⁵¹⁴ In our view, the fact that a party raised an issue in respect of the likeness and injury determinations in the original proceedings cannot be determinative of whether a party is entitled to raise an issue that concerns the dumping determination in the compliance proceedings. In this respect, the fact that China had the elements to raise claims regarding the special/standard distinction in respect of the likeness and injury determinations does not indicate that China was also in a position to raise claims regarding other differences in physical characteristics not included in the original PCNs in respect of the dumping determination.

5.250. We further note that, in the review investigation, following the Commission's disclosures that conveyed further information regarding the characteristics of Pooja Forge's products, the Commission rejected the Chinese producers' requests to make adjustments for differences that allegedly affected price comparability concerning certain physical characteristics not reflected in the original PCNs, such as traceability, standards, unit of defective rate, hardness, bending strength, impact toughness, and friction coefficient.⁵¹⁵ As we have considered in respect of the claims made under Articles 6.5, 6.5.1, 6.4, 6.2, and 6.1.2 of the Anti-Dumping Agreement, the exchanges between the Chinese producers and the Commission in the review investigation demonstrate that the Chinese producers became aware of the information underlying the claims made in the compliance proceedings only during the review investigation. This is so because the Commission never fully disclosed all the information regarding the characteristics of Pooja Forge's products that were relevant to the dumping determination. We, thus, agree with the Panel that the absence in the record of the original investigation of any discussion on the impact on price comparability of physical characteristics not included in the original PCNs shows that this issue was unique to the review investigation and, therefore, could not have been raised in the original proceedings.⁵¹⁶

5.251. Moreover, we are of the view that the claim by China in these compliance proceedings under Article 2.4 of the Anti-Dumping Agreement not only could not have been raised in the original proceedings, but also challenges aspects that are intrinsically connected with, and form part of, the measure taken to comply, namely, the disclosures made by the Commission in the review investigation to comply with the DSB's recommendations and rulings under Article 2.4 in the original proceedings. Indeed, the Chinese producers requests for adjustments based on physical characteristics not reflected in the original PCNs were made in the review investigation and were based on the exchanges that they had with the Commission regarding Pooja Forge's product characteristics. The Commission's refusal to make such adjustments is connected with, and forms an integral part of, the measure taken to comply with the DSB's recommendations and rulings in the original proceedings, that is, the disclosures made by the Commission in the review investigation.

5.252. In the light of the above, we consider that the claim that China has raised in these compliance proceedings under Article 2.4 in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs is not a claim that China could have raised in the original proceedings.

5.253. We, therefore, uphold the Panel's finding, in paragraph 7.233 of its Report, that China's claim under Article 2.4 of the Anti-Dumping Agreement in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs fell within its terms of reference.

⁵¹³ China's appellee's submission, para. 126.

⁵¹⁴ Original Panel Report, paras. 7.279 and 7.324.

⁵¹⁵ Panel Report, paras. 7.199 and 7.233.

⁵¹⁶ Panel Report, para. 7.233.

5.6 Article 2.4.2 of the Anti-Dumping Agreement

5.254. In the review investigation at issue, the Commission used the weighted average-to-weighted average (WA-WA) methodology when comparing normal values with export prices in calculating dumping margins for the Chinese producers. The Commission made these comparisons in two steps. In the first step, it divided the product under investigation into product "models" and made model-specific comparisons of normal value and export price. In the second step, it aggregated such model-specific results in order to determine the margins of dumping for the investigated product. In both the first and second steps, the Commission excluded from the scope of its calculations those models that did not match with any of the models sold by Pooja Forge. Thus, when the Commission aggregated the results of the model-specific calculations in the second step, it divided the total amount of dumping by the total value of exports pertaining to the models for which individual calculations had been made in the first step. Exports that were excluded in the first step were also excluded in the second step from the denominator of the formula used to calculate the overall dumping margins for the investigated product.⁵¹⁷ Chinese producers objected to this calculation method, requesting that the Commission divide the total amount of dumping by the total value of all exports in the second step of its calculations. The Commission rejected this objection, stating that its method provided the most reliable basis on which to establish the level of dumping.⁵¹⁸

5.255. Before the Panel, China claimed that the European Union acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by leaving out of the dumping margin calculations the export transactions for which there was no match in the domestic sales of fasteners produced by Pooja Forge. According to China, since the Commission had found that "all models of fasteners exported from China to the European Union were 'like' the fasteners produced and sold by Pooja Forge in India", these products must be "comparable" within the meaning of Article 2.4.2.⁵¹⁹

5.256. The European Union disagreed, arguing that Article 2.4.2 requires that only "comparable" export transactions be taken into consideration in calculating dumping margins. The European Union argued that the Commission complied with Article 2.4.2 in the review investigation because it took into consideration only those models that matched with one of the models sold by Pooja Forge.⁵²⁰

5.257. The Panel found that the Commission's approach in calculating the dumping margins was inconsistent with Article 2.4.2. The Panel observed that dumping is defined in the Anti-Dumping Agreement as the situation where "a product" is introduced into the commerce of another country below normal value.⁵²¹ According to the Panel, the term "product" implies that the margin of dumping has to be calculated for a particular product as a whole.⁵²² Therefore, in the Panel's view, "a margin of dumping that excludes certain export transactions cannot be said to have been calculated for the investigated product as a whole."⁵²³ The Panel then stated that, since the Commission had determined that the fasteners produced by the Chinese producers and those produced by Pooja Forge were "like products", all transactions involving these fasteners necessarily had to be "comparable" within the meaning of Article 2.4.2.⁵²⁴

5.258. On appeal, the European Union argues that the Panel erred in its interpretation of the phrase "all comparable export transactions" contained in Article 2.4.2.⁵²⁵ The European Union

⁵¹⁷ Panel Report, para. 7.259.

⁵¹⁸ Panel Report, para. 7.260 (referring to Review Regulation (Panel Exhibit CHN-3), recitals 105 and 108-109).

⁵¹⁹ Panel Report, para. 7.254 (referring to China's first written submission to the Panel, paras. 420-421). China further argued that, by failing to take into account "all comparable export transactions" in its dumping margin calculations, the Commission also acted inconsistently with the obligation to conduct a fair comparison between the normal value and the export price, as required by Article 2.4. (Ibid.)

⁵²⁰ Panel Report, paras. 7.255-7.257. The European Union also submitted that such a methodology is not inconsistent with the fair comparison obligation set forth in Article 2.4. (Ibid., para. 7.261)

⁵²¹ Panel Report, para. 7.263 (quoting Article 2.1 of the Anti-Dumping Agreement).

⁵²² Panel Report, para. 7.264.

⁵²³ Panel Report, para. 7.265.

⁵²⁴ Panel Report, paras. 7.269-7.270.

⁵²⁵ According to the European Union, transactions relating to a large, coated and strong screw cannot be "comparable" to transactions relating to a small, uncoated and weak screw "just because they are 'like' products (i.e. fasteners)", since "that cannot be the meaning of the term 'comparable' in Article 2.4.2 of the [Anti-Dumping] Agreement." (European Union's appellant's submission, para. 355)

states that, if the drafters of the Anti-Dumping Agreement had wanted to provide that the weighted average normal value should be compared with *all export transactions*, they could have said so.⁵²⁶ The European Union submits that the "Commission excluded some export transactions from its dumping calculation, because including them would have resulted in inaccurate findings based on non-comparable transactions" and that "[t]his situation cannot be compared with the zeroing situation that the Panel based its analysis on."⁵²⁷ According to the European Union, in the zeroing cases, the Appellate Body was addressing "an entirely different issue: if models are developed that can be matched and the matching leads to a negative dumping margin, can those models be left out of the averaging exercise or be given a zero for purposes of determining the margin of dumping".⁵²⁸

5.259. China responds that the Panel correctly determined that the European Union acted inconsistently with Article 2.4.2. According to China, the phrase "all comparable export transactions" requires that "no export transaction may be left out when determining margins of dumping"⁵²⁹ and that "[a]ll types or models falling within the scope of a 'like product' must necessarily be 'comparable'".⁵³⁰ China also suggests that "the fact that all fasteners are like products does not necessarily mean that they are all *identical*".⁵³¹ However, according to China "[a]ll types of fasteners falling within the scope of 'like' product are able to be compared".⁵³² In China's view, while not all exported product types may be directly comparable to product types that are sold domestically, Article 2.4 of the Anti-Dumping Agreement requires an investigating authority to "take non-matching models into account by making the necessary adjustments to eliminate the effect of factors that affect price comparability".⁵³³

5.6.1 "[A]ll comparable export transactions" under Article 2.4.2 of the Anti-Dumping Agreement

5.260. Article 2.4.2 of the Anti-Dumping Agreement provides:

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.

5.261. In *EC – Bed Linen*, the Appellate Body stated that Article 2.4.2 explains "how domestic investigating authorities must proceed in establishing 'the existence of margins of dumping', that is, it explains how they must proceed in establishing that there *is* dumping."⁵³⁴ Article 2.4.2 explicitly requires that, where the WA-WA methodology is used, the existence of margins of dumping has to 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*".⁵³⁵ With regard to the meaning of this phrase, the Appellate Body found that, once an investigating authority has defined the product at issue and the "like product" on the domestic market, it cannot "at a subsequent stage of the proceeding, take the position that some types or models of that product [have] physical characteristics that [are] so different from each other that these types or models [are] not

⁵²⁶ The European Union's response to questioning at the oral hearing.

⁵²⁷ European Union's appellant's submission, para. 379.

⁵²⁸ European Union's appellant's submission, para. 358.

⁵²⁹ China's appellee's submission, para. 378 (quoting Appellate Body Report, *US – Zeroing (Japan)*, para. 124).

⁵³⁰ China's appellee's submission, para. 380 (quoting Appellate Body Report, *EC – Bed Linen*, para. 58).

⁵³¹ China's appellee's submission, para. 395. (emphasis original)

⁵³² China's appellee's submission, para. 395.

⁵³³ China's appellee's submission, para. 394 (quoting Panel Report, para. 7.272).

⁵³⁴ Appellate Body Report, *EC – Bed Linen*, para. 51. (emphasis original)

⁵³⁵ Emphasis added.

'comparable'.⁵³⁶ In that dispute, the Appellate Body considered that "[a]ll 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."⁵³⁷ The Anti-Dumping Agreement "concerns the dumping of a *product*, and ... therefore, the margins of dumping to which Article 2.4.2 refers are the margins of dumping for a *product*."⁵³⁸

5.262. The Appellate Body further explained that, "[t]his interpretation of the word 'comparable' in Article 2.4.2 is reinforced by the context of this provision."⁵³⁹ In particular, Article 2.4 sets forth a general obligation to make a "fair comparison" between export price and normal value and such a general obligation "applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'.⁵⁴⁰

5.263. The Appellate Body clarified in *US – Softwood Lumber V* that its findings in *EC – Bed Linen* should not be read to mean that an investigating authority may not use the practice of "multiple averaging", where the "like product" under consideration is divided "into product types or models for purposes of calculating a weighted average normal value and a weighted average export price for the transactions involving each product type or model or sub-group of 'comparable' transactions".⁵⁴¹ At the same time, the Appellate Body emphasized that "the term 'all comparable export transactions' means that a Member 'may only compare those export transactions which are comparable, but [] it must compare *all* such transactions"⁵⁴², and that, where an investigating authority has chosen to undertake multiple comparisons, the results of all of those comparisons must be taken into account in order to establish margins of dumping for the product as a whole.⁵⁴³ The reference to the "product as a whole" also reinforces the understanding that, once an investigating authority has defined the "like product", it cannot then exclude, from the comparison of normal value and export price, the exports of certain models or sub-groups in calculating dumping margins for the "like product" as a whole.

5.264. While certain models or sub-groups of the exported product may not be identical to models or sub-groups of the "like product" in the domestic market of the exporting country or of a third country, the investigating authority cannot exclude from the dumping margin calculations any transactions of models that fall within the scope of the "like product" as defined by the investigating authority. In this respect, we note that Article 2.4 provides, *inter alia*, that "[d]ue allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in ... physical characteristics, and any other differences which are also demonstrated to affect price comparability." Therefore, Article 2.4, which informs the interpretation of Article 2.4.2, requires that adjustments be made to provide for a fair comparison when an investigating authority compares models that present certain differences that affect price comparability. For example, in a case involving an analogue country, in which the analogue country producers make only certain sub-groups or models of the "like product", an investigating authority may have recourse to other methodologies, including using the price of the like product when exported to an appropriate third country or the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and profits.

5.265. In any event, an investigating authority cannot first define the "like product" and then exclude from the comparison between normal value and export price certain models of the like product exported for which it determines that there are no matching models sold by the analogue country producer. By failing to include the export transactions for which the investigating authority could not identify matching models on the normal value side, the investigating authority is also failing to take into account and measure the impact that the export transactions involving such models would have on the calculation of the overall dumping margins. This is not consistent with the requirement in Article 2.4.2 to take "all comparable export transactions" into account when calculating dumping margins for the like product as a whole. We also note that it is not possible to

⁵³⁶ Appellate Body Report, *EC – Bed Linen*, para. 58.

⁵³⁷ Appellate Body Report, *EC – Bed Linen*, para. 58.

⁵³⁸ Appellate Body Report, *EC – Bed Linen*, para. 51. (emphasis original)

⁵³⁹ Appellate Body Report, *EC – Bed Linen*, para. 59.

⁵⁴⁰ Appellate Body Report, *EC – Bed Linen*, para. 59.

⁵⁴¹ Appellate Body Report, *US – Softwood Lumber V*, para. 80. (fns omitted)

⁵⁴² Appellate Body Report, *US – Softwood Lumber V*, para. 86 (quoting Panel Report, *US – Softwood Lumber V*, para. 7.204 (emphasis original)).

⁵⁴³ Appellate Body Report, *US – Softwood Lumber V*, para. 98.

reconcile such exclusion of export transactions with the notion of "fair comparison", in Article 2.4, which provides context for Article 2.4.2 of the Anti-Dumping Agreement.

5.6.2 Whether the Commission's exclusion of non-matching models from the dumping margin calculations is consistent with Article 2.4.2 of the Anti-Dumping Agreement

5.266. We next consider whether the Commission's approach in establishing dumping margins for the Chinese producers in the review investigation was consistent with Article 2.4.2 of the Anti-Dumping Agreement. We begin by recalling certain factual aspects of the review investigation, which the Panel considered to be undisputed between the parties. The Panel observed:

In the review investigation at issue, the Commission followed the WA-WA methodology to compare the normal value with the export price in calculating dumping margins for the Chinese producers. The Commission made these comparisons in two steps. In the first step, it made model-specific comparisons; in the second step, it combined such model-specific results in order to determine the margin of dumping for the investigated product. In the first step, the Commission excluded from the scope of its calculations exports of models which did not match with any of the models sold by Pooja Forge. Therefore, such exports were not taken into consideration in the calculation of the amount of dumping. Nor were they taken into consideration in the second step of the Commission's calculations. When the Commission aggregated the results of model-specific calculations, it divided the total amount of dumping by the total value of exports pertaining to the models for which individual calculations were made in the first step. Exports that were excluded in the first step were also excluded from the denominator of the formula used to calculate the overall dumping margin for the investigated product.⁵⁴⁴

5.267. The Commission determined that the fasteners exported by the Chinese producers and the fasteners sold domestically by Pooja Forge (i.e. those used to determine the normal values) were "like products". In particular, the Definitive Regulation states:

[T]he fasteners produced and sold by the Community industry in the Community, fasteners produced and sold on the domestic market in the PRC and those produced and sold on the domestic market in India, which served as an analogue country, and fasteners produced in the PRC and sold to the Community are alike within the meaning of Article 1(4) of the basic Regulation.⁵⁴⁵

5.268. The Commission's approach of first determining that all fasteners are "like products"⁵⁴⁶, but then proceeding to exclude certain models sold by the Chinese producers on the basis that these models did not match with any of those sold by Pooja Forge, is not compatible with the requirement in Article 2.4.2 to establish margins of dumping by comparing the normal value with the price of "all comparable export transactions".⁵⁴⁷ The European Union argues that it "did not violate the requirement to fairly base the margins of dumping ... on all comparable export transactions" because it "excluded from the dumping margin determination those export sales transactions for which there was no comparable normal value transaction".⁵⁴⁸ In other words, "the

⁵⁴⁴ Panel Report, para. 7.259.

⁵⁴⁵ Definitive Regulation (Panel Exhibit CHN-1), recital 57.

⁵⁴⁶ We note that the Commission's definition of "like products" is not in dispute between the participants.

⁵⁴⁷ We note certain discrepancies in the terminology used in this dispute, in particular, in the usage of the term "model(s)". In particular, as indicated above, in making its findings under Article 2.4.2 of the Anti-Dumping Agreement, the Panel relied on, *inter alia*, the Appellate Body's finding in *US – Softwood Lumber V*, where the Appellate Body indicated that the "multiple averaging" technique is performed by dividing the "like product ... into product types or models". (Appellate Body Report, *US – Softwood Lumber V*, para. 80) This would mean that the term "models" refers to different groupings of products determined by the investigating authority for the purpose of the WA-WA comparison. The Panel, however, appears to have used the term "model(s)" to refer, at times, to the groupings of products (see e.g. Panel Report, para. 7.270) and, at other times, to specific products (see e.g. Panel Report, para. 7.144). For the purposes of this Report, unless otherwise indicated, we use the term "model" to refer to the different product groupings that the Commission used in the "multiple averaging" technique.

⁵⁴⁸ European appellant's submission, para. 347.

Commission excluded from the scope of its calculations exports of models which did not match with any of the models sold by Pooja Forge.⁵⁴⁹

5.269. At the same time, the Commission selected Pooja Forge as the analogue country producer and determined that fasteners produced by the Chinese producers and those produced by Pooja Forge were "like products" for the purposes of the investigation. Accordingly, when conducting a comparison between the weighted average normal value and the weighted average export price, Article 2.4.2 required the Commission to take into account all export transactions of all models of fasteners sold by the Chinese producers regardless of whether all exported models matched with models sold by Pooja Forge. Once the Commission had determined that these products fell within the scope of the "like product", it could not exclude from the comparison, based on alleged lack of "comparability", models for which no matching model sold by the analogue country producer could be identified.

5.270. Compliance with the requirements of Article 2.4.2 does not mean that the Commission had no other option than determining dumping margins based on comparisons of export price and normal value of different models of fasteners without making any adjustments. As the Panel noted, using the method of multiple averaging "minimizes, or even eliminates, the need to make adjustments for individual differences that are shown to affect price comparability".⁵⁵⁰ Furthermore, as we have noted above, Article 2.4 of the Anti-Dumping Agreement contains a general obligation to ensure a "fair comparison" between export price and normal value. As indicated above, this obligation provides context for Article 2.4.2, which is explicitly made subject to the provisions governing fair comparison in Article 2.4.⁵⁵¹ As also indicated above, Article 2.4 provides that due allowance shall be made, in each case, on its merits, for differences which affect price comparability, including differences in physical characteristics.

5.271. Thus, pursuant to Article 2.4, the Commission could have made adjustments in order to account for the differences that affected price comparability, when it calculated dumping margins based on multiple averaging, by matching models exported by the Chinese producers with models sold by the analogue country producer. We therefore agree with the Panel that if, in an investigation such as the one at issue, "there are certain exported models which do not match any of the models on the normal value side of the comparison, the [investigating authority] cannot simply exclude exports of such models from its dumping calculations."⁵⁵² In such a situation, the investigating authority has to take non-matching models into account by making the necessary adjustments to eliminate the effect of factors that affect price comparability.⁵⁵³

5.272. As noted above, the Commission could also have determined normal value based on alternative methodologies, such as those referred to in Article 2.2 of the Anti-Dumping Agreement (that is, a comparable price of the like product when exported to an appropriate third country, or a constructed value). However, given that the Commission determined "fasteners" to be the "like product", in order to respect the requirement in Article 2.4.2 to determine the dumping margins on the basis of a comparison of "all comparable export transactions", the Commission was required to take into account and compare normal value and export price for the like product, namely, "fasteners" as a whole, without excluding models exported by the Chinese producers from the calculation of the dumping margins, which could not be matched with those sold by Pooja Forge.⁵⁵⁴

5.273. The European Union argues that there is nothing "inherently unfair" about the Commission's approach, which "did not exclude any comparable transactions or otherwise sought to skew the averaging that followed the model-to-model comparison as had been the issue in the zeroing disputes".⁵⁵⁵ The European Union contends that the excluded models were left out of the equation entirely because "it considered this to be the most fair and reliable basis for establishing

⁵⁴⁹ European appellant's submission, para. 348.

⁵⁵⁰ Panel Report, para. 7.272.

⁵⁵¹ In *EC – Bed Linen*, the Appellate Body noted that "Article 2.4 sets forth a general obligation to make a 'fair comparison' between export price and normal value. This is a general obligation that, in our view, informs all of Article 2, but applies, in particular, to Article 2.4.2 which is specifically made 'subject to the provisions governing fair comparison in [Article 2.4]'." (Appellate Body Report, *EC – Bed Linen*, para. 59)

⁵⁵² Panel Report, para. 7.272.

⁵⁵³ Panel Report, para. 7.272.

⁵⁵⁴ This conclusion is also supported by the requirement in Article 2.4 to ensure a fair comparison between export price and normal value.

⁵⁵⁵ European Union's appellant's submission, para. 371.

the margins given the lack of complete matching."⁵⁵⁶ China, on the other hand, argues that "the Panel correctly found that Article 2.4.2 of the AD Agreement, read in the light of the 'fair comparison' obligation of Article 2.4, requires that all transactions related to like products are to be treated as 'comparable export transactions' and that due allowances should be made, where necessary, for differences affecting price comparability."⁵⁵⁷

5.274. The Commission followed the practice of "multiple averaging" by dividing the "like product" into models, and, as a first step, calculating a weighted average normal value and weighted average export price for each model. In this first step of its calculations, the Commission excluded models exported by the Chinese producers that were not sold by Pooja Forge. These models exported by the Chinese producers were also not taken into account in the second step of the Commission's calculations, where the Commission aggregated the results of the first step of its calculations and determined dumping margins for the "like product" as a whole. Yet, having chosen to undertake "multiple averaging", the Commission, in our view, was required to take into account "all comparable export transactions", and thus could not exclude export transactions of models that fell within the scope of the "like product", as defined by the Commission. It is also not relevant that, as the European Union contends, export transactions that were excluded in the first step of the calculations were also excluded in the second step from the denominator of the formula used to calculate the dumping margins for the investigated product.⁵⁵⁸ The result is the same – i.e. export transactions that fell within the scope of the "like product" that the Commission defined were excluded from the calculation of the dumping margins for the "like product" as a whole.

5.275. When an investigating authority elects to calculate a margin of dumping by comparing the weighted average normal value with the weighted average export price, Article 2.4.2 requires that "all comparable export transactions" be compared. In the light of the Commission's definition of the "like product" in the review investigation at issue, the Commission's approach does not comport with Article 2.4.2. Regardless of the impact of the Commission's approach to calculating dumping margins, excluding certain export transactions from the calculations is not consistent with the requirement in Article 2.4.2 to compare "all comparable export transactions" to the extent that this approach fails to ensure the comparison of models for the product as a whole. This approach is also difficult to reconcile with the notion of "fair comparison" in Article 2.4.

5.276. We further note that, having determined dumping margins while excluding the export transactions of non-matching models, the Commission nevertheless imposed anti-dumping duties on the Chinese producers for the product under consideration, namely, "fasteners" as a whole.⁵⁵⁹ The Appellate Body has found that, in order to meet the "fair comparison" requirement of Article 2.4, an investigating authority must treat the product under consideration as a whole for the purposes of determining dumping margins.⁵⁶⁰ In the anti-dumping determination at issue, the Commission, on the one hand, failed to calculate dumping margins for the product as a whole, while, on the other hand, it imposed the dumping duties commensurate with the dumping margins on the product as a whole. In this respect, we do not consider that the Commission's approach to calculating dumping margins, while excluding exports of Chinese models that did not match models sold by Pooja Forge from the dumping margin calculations, can be reconciled with the context of "fair comparison" under Article 2.4, which informs Article 2.4.2.

5.277. The European Union further relies on Article 6.10 of the Anti-Dumping Agreement in support of its contention that the Commission could exclude export transactions of non-matching

⁵⁵⁶ European Union's appellant's submission, para. 349.

⁵⁵⁷ China's appellee's submission, para. 393.

⁵⁵⁸ European Union's appellant's submission, para. 348.

⁵⁵⁹ For instance, the Review Regulation provides:

A comparison between export price and normal value was made on a weighted average basis only for those types exported by the Chinese exporting producer for which a matching type was produced and sold by the Indian producer. This was considered to be the most reliable basis for establishing the level of dumping, if any, of this exporting producer; to attempt to match all other exported types to closely resembling types of the Indian producer would have resulted in inaccurate findings. On this basis, it is correct to express the amount of dumping found as a percentage of those export transactions used in calculating the amount of dumping – this finding is considered to be representative for all types exported. The same approach was used in calculating the dumping margins of the other exporting producers.

(Review Regulation (Panel Exhibit CHN-3), recital 109 (emphasis added))

⁵⁶⁰ Appellate Body Report, *US – Softwood Lumber V*, para. 99.

models from the WA-WA comparison of normal value and export price. Article 6.10 stipulates the general rule that dumping margins must be calculated for each known producer or exporter of the product under consideration. However, where the number of exporters, producers, importers, or types of products involved is so large as to make such a determination impracticable, the investigating authority may limit its examination to a reasonable number of interested parties or products by using a statistically valid sample. According to the European Union, this provision demonstrates that the investigating authority is not obligated to include all export transactions involving the "like product" when calculating the dumping margins, even when no matching domestic sales exist.⁵⁶¹ China disagrees with the European Union and argues that Article 6.10 "allows for sampling – including of types of products – only as an exception to the obligation to determine an individual margin of dumping for each known exporter or producer".⁵⁶² China also argues that, "contrary to the European Union's position, nothing in that provision suggests that because of sampling certain export transactions can be excluded from the comparison under Article 2.4.2".⁵⁶³

5.278. We note that Article 6.10 deals with sampling of exporters, producers, importers or types of products, while Article 2.4.2 sets out the methodologies that an investigating authority may adopt in calculating dumping margins based on a comparison of export price and normal value. In this regard, the European Union has not argued that the Commission engaged in the sampling exercise contemplated in Article 6.10. The European Union has in fact acknowledged that "Article 6.10 deals with an entirely different situation, as the Panel noted."⁵⁶⁴ Instead, the European Union relied on Article 6.10 as "evidence of the fact that it is not so that in any and all circumstances all export transactions must be taken into consideration" when calculating margins of dumping.⁵⁶⁵ We agree with the European Union that, if an investigating authority elects to use sampling in accordance with Article 6.10, not all transactions will be taken into consideration when calculating dumping margins, since it is the very essence of sampling to consider only a part of the whole. However, we disagree with the European Union that Article 6.10 can be construed to inform the dumping margin calculation methodology under Article 2.4.2. Articles 6.10 and 2.4.2 serve different purposes. We see nothing in the text of Article 6.10 that would allow derogating from the requirements of Article 2.4 to ensure a "fair comparison" and of Article 2.4.2 to compare "all comparable export transactions".

5.279. The European Union finally argues that the approach taken by the Commission complies with the requirements of Article 2.4.2 because the export transactions of models for which a matching model could be found on the normal value side, and that were consequently included in the calculation of dumping margins, were both qualitatively and quantitatively representative of the product as a whole so as to ensure a fair comparison between comparable sales.⁵⁶⁶ The European Union argues, for instance, that "[o]n average between 75% to 98% of all of the main types of fasteners exported were matched with domestic sales and included in the dumping margin calculation."⁵⁶⁷

5.280. China responds that "the percentage of the exports that are taken into consideration in calculating dumping margins, either quantitatively or qualitatively, is not pertinent to the legal obligation under Article 2.4.2" because "this provision requires that all comparable export transactions be taken into account in calculating dumping margins."⁵⁶⁸ Moreover, China points out that the figures presented by the European Union are incorrect and that "the amount of transactions that have been compared varies between 54.03% and 62.39% of export sales in volume and between 52.9% and 62.59% of export sales in value."⁵⁶⁹

5.281. We note, therefore, that it is disputed between the participants whether the transactions that were compared remained representative of the product as a whole, in spite of the exclusions of the non-matching models. We have observed above that the requirement of Article 2.4.2 to compare all comparable export transactions means that the WA-WA comparison of normal value

⁵⁶¹ European Union's appellant's submission, paras. 366-369.

⁵⁶² China's appellee's submission, para. 410.

⁵⁶³ China's appellee's submission, para. 410.

⁵⁶⁴ European Union's appellant's submission, para. 368.

⁵⁶⁵ European Union's appellant's submission, para. 367.

⁵⁶⁶ European Union's appellant's submission, paras. 377-378.

⁵⁶⁷ European Union appellant's submission, para. 373.

⁵⁶⁸ China's appellee's submission, para. 414. (emphasis original)

⁵⁶⁹ China's appellee's submission, para. 417. (fn omitted)

and export price for the purposes of calculating dumping margins should be made for the product under consideration as a whole, which in the present case includes all exported models of fasteners. We have indicated above that the requirement of "fair comparison" in Article 2.4 provides contextual support for this interpretation of Article 2.4.2. It does not logically follow, however, that the European Union can satisfactorily demonstrate that the Commission's approach in calculating dumping margins is consistent with Article 2.4.2 by calling it a "fair comparison" because "the matching [was] made up of a number of main product types that were sold in very large quantities" such that "[o]n average between 75% to 98% of all of the main types of fasteners exported were matched with domestic sales and included in the dumping margin calculation."⁵⁷⁰ While Article 2.4 provides context to Article 2.4.2, the use of the WA-WA methodology will comply with the "fair comparison" requirement only to the extent that the investigating authority compares the export transactions relating to the product under consideration as a whole. However substantial the percentage of "matching" may have been, the Commission failed to take into consideration all export transactions involving all models exported by the Chinese producers in the dumping margin calculations.

5.282. In the light of the above, we uphold the Panel's finding, in paragraphs 7.276 and 8.1.iv of its Report, that the European Union acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by excluding, in its dumping determinations, the models exported by the Chinese producers that did not match with any of the models sold by Pooja Forge.

5.7 Articles 4.1 and 3.1 of the Anti-Dumping Agreement

5.7.1 The Panel's terms of reference

5.283. Before the Panel, the European Union argued that China was precluded from raising its claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement in the compliance proceedings because these were claims that China could have raised but did not raise in the original proceedings, and that the definition of the domestic industry was not an integral part of the measure taken to comply because the Commission treated this issue separately in the review investigation.⁵⁷¹

5.284. The Panel observed that China's claims under Articles 4.1 and 3.1 required it to examine "whether the Commission implemented the DSB recommendations and rulings consistently with the findings in the Appellate Body report in the original proceedings".⁵⁷² In the Panel's view, the statement in the original Notice of Initiation that only those producers willing to be part of the sample for the purposes of the injury determination would be considered as cooperating played a decisive role in the Commission's definition of the domestic industry in the review investigation. Such statement was an unchanged aspect of the original measure that became an integral part of the measure taken to comply.⁵⁷³

5.285. On appeal, the European Union contends that the Panel erred in finding that China's claims under Articles 4.1 and 3.1 fell within its terms of reference. The European Union contends that these claims by China concern an unchanged aspect of the measure that is separable from the measure taken to comply and that China could have raised these claims in the original proceedings, but it did not.⁵⁷⁴

5.286. The European Union argues that the Panel should have followed the guidance of the Appellate Body to make the necessary findings on its terms of reference, without having to examine the substance of China's claims.⁵⁷⁵ The European Union also asserts that the Panel erred when finding that the contested statement in the original Notice of Initiation became an integral part of the measure taken to comply. The European Union contends that, contrary to the Panel's assertion, the statement in the original Notice of Initiation that only those producers willing to be part of the sample would be considered as cooperating did not play a "decisive role" in the Commission's determination of domestic industry in the review investigation, because the

⁵⁷⁰ European Union's appellant's submission, para. 373.

⁵⁷¹ Panel Report, paras. 7.282 and 7.287.

⁵⁷² Panel Report, para. 7.289.

⁵⁷³ Panel Report, para. 7.290.

⁵⁷⁴ European Union's appellant's submission, para. 185.

⁵⁷⁵ European Union's appellant's submission, para. 187.

Commission employed the data already available from the original investigation and applied the method suggested by the Appellate Body to define domestic industry.⁵⁷⁶

5.287. China responds that, since there is a fundamental disagreement between the parties on what was required by the DSB's recommendations and rulings in the original proceedings, the Panel was correct in concluding that China's claims required it to examine whether the Commission implemented the DSB's recommendations and rulings consistently with the findings in the Appellate Body report in the original proceedings. China agrees with the Panel that its claims under Articles 4.1 and 3.1 go "to the very heart of a compliance panel's task ... and [fell] within [its] terms of reference".⁵⁷⁷

5.288. We disagree with the European Union that, in order to determine whether it had jurisdiction over China's claims under Articles 4.1 and 3.1, the Panel examined the "substance" of China's claims.⁵⁷⁸ Rather, in addressing the question of whether it had jurisdiction under Article 21.5 of the DSU, the Panel correctly considered the focus of China's claims to be whether the European Union's measure taken to comply with the DSB's recommendations and rulings under Articles 4.1 and 3.1 regarding the definition of the domestic industry is consistent with the relevant covered agreement.

5.289. China's claims under Articles 4.1 and 3.1 relate to a disagreement between the parties over the meaning and scope of the DSB's recommendations and rulings in the original proceedings. The European Union considers that all it had to do to comply was to re-define the domestic industry so as to include all the producers that had come forward by the deadline set forth in the original Notice of Initiation.⁵⁷⁹ By contrast, China considers that, by using the information provided by all the producers that had come forward in response to the original Notice of Initiation to re-define the domestic industry, the Commission failed to achieve compliance. In this respect, China observes that the Appellate Body found the same Notice of Initiation to be flawed in the original proceedings since it made inclusion in the domestic industry conditional upon the producers' willingness to be included in the injury sample.⁵⁸⁰ Such a disagreement on the scope of the DSB's recommendations and rulings in the original proceedings clearly could not have been addressed in the original proceedings. We agree with the Panel that this is exactly the type of disagreement that goes to the heart of a compliance panel's task under Article 21.5 of the DSU, and which it is called upon to resolve.⁵⁸¹

5.290. In these circumstances, it was not necessary for the Panel to engage in the exercise of determining whether China could have raised the same claims in the original proceedings and whether the aspect of the measure that was the focus of China's claims before the Panel was unchanged from the original proceedings and separable from the measure taken to comply. It is uncontested that the Commission did not issue a new notice of initiation in the review investigation and that China raised claims under Articles 4.1 and 3.1 in the original proceedings and obtained findings of inconsistency with these provisions. It was sufficient for the Panel to determine that the claims raised by China concern the consistency of the measure taken to comply with the DSB's recommendations and rulings and with the covered agreements. We thus see no merit in the argument by the European Union that the Panel erred because it did not determine its jurisdiction on these claims before examining the substance of the claims.

5.291. We, therefore, uphold the Panel's finding in paragraph 7.291 of its Report, that China's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement with respect to the definition of the domestic industry fell within its terms of reference.

5.292. Finally, we observe that a claim that a panel has exceeded its terms of reference, including under Article 21.5 of the DSU, cannot be regarded as a mere procedural objection. Indeed, a claim of this nature impugns a panel's assessment of its jurisdiction, and "[t]he vesting of jurisdiction in

⁵⁷⁶ European Union's appellant's submission, para. 195.

⁵⁷⁷ China's appellee's submission, para. 135 (quoting Panel Report, para. 7.289).

⁵⁷⁸ European Union's appellant's submission, para. 187.

⁵⁷⁹ European Union's appellant's submission, para. 405.

⁵⁸⁰ China's appellee's submission, para. 462.

⁵⁸¹ Panel Report, para. 7.289.

a panel is a fundamental prerequisite for lawful panel proceedings."⁵⁸² Any decision to raise such a claim must be taken judiciously, in particular given the serious consequences that flow from a finding that a matter is beyond the scope of a panel's jurisdiction under Article 21.5, namely, that the complainant would be able to obtain a ruling on that matter only by initiating dispute settlement proceedings afresh. In this regard, we are mindful that complainants should exercise their judgement as to whether it is fruitful to raise such claims, as well as whether, on appeal, it is fruitful to claim that a panel erred in finding jurisdiction in circumstances where the panel itself has rejected the same challenge to its jurisdiction on a reasoned basis. We also recall that, even when the parties to a dispute remain silent on issues that touch on the proper scope of the proceedings, panels and the Appellate Body cannot ignore such issues, but must deal with such issues in order to satisfy themselves that they have authority to proceed.⁵⁸³

5.7.2 Whether the Panel erred in finding that the European Union acted inconsistently with Articles 4.1 and 3.1 of the Anti-Dumping Agreement

5.293. The Panel found that the European Union acted inconsistently with Article 4.1 of the Anti-Dumping Agreement because the Commission defined the domestic industry on the basis of the domestic producers that had come forward in response to the Notice of Initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating.⁵⁸⁴

5.294. The Panel first recalled the Appellate Body's findings in the original proceedings regarding the definition of the domestic industry. As the Panel recalled, the Appellate Body noted that the 27% share in total production upon which the Commission relied was "'at the lower end of the spectrum' but that such a figure could suffice to establish 'major proportion' within the meaning of Article 4.1 provided [that this] definition '[did] not introduce material risks of distortion'".⁵⁸⁵ The Panel also referred to the Appellate Body's finding that "defining the domestic industry on the basis of willingness to be included in the sample ... imposed a self-selection process among the domestic producers that introduced a material risk of distortion."⁵⁸⁶

5.295. The Panel noted that, while none of the domestic producers that had come forward in the original investigation had been excluded from the definition of the domestic industry in the review investigation, "[t]he fact remained ... that the boundaries of the Commission's domestic industry definition were set by the notice of initiation of the original investigation."⁵⁸⁷ In the Panel's view, "this show[ed] that the self-selection, or the mixing of the definition of domestic industry and the establishment of an injury sample that the Appellate Body identified in connection with the original investigation, continued to exist in the review investigation."⁵⁸⁸

5.296. The European Union appeals the Panel's findings that, by defining the domestic industry on the basis of the domestic producers that had come forward in response to a notice of initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the Commission acted inconsistently with Article 4.1. According to the European Union, the Panel misunderstood the finding by the Appellate Body in the original proceedings that it was "the exclusion of domestic producers on the basis of their lack of willingness to be included in the sample [that] constituted a violation of Article 4.1".⁵⁸⁹ The European Union argues that "the problem identified in the original dispute where the universe of domestic producers was limited to those that could actually be examined for purposes of the injury determination was corrected in the Implementation Review"⁵⁹⁰, and that the Panel erred in failing to draw the "logical conclusion that the inclusion of such previously excluded producers thus brought the European Union into conformity with the Appellate Body's ruling".⁵⁹¹

⁵⁸² Appellate Body Report, *US – 1916 Act*, para. 54. See also Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

⁵⁸³ Appellate Body Report, *Mexico – Corn Syrup (Article 21.5 – US)*, para. 36.

⁵⁸⁴ Panel Report, para. 7.299.

⁵⁸⁵ Panel Report, para. 7.293 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 422).

⁵⁸⁶ Panel Report, para. 7.293 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 427).

⁵⁸⁷ Panel report, para. 7.296.

⁵⁸⁸ Panel report, para. 7.296.

⁵⁸⁹ European Union's appellant's submission, para. 394.

⁵⁹⁰ European Union's appellant's submission, para. 420.

⁵⁹¹ European Union's appellant's submission, para. 405.

5.297. China responds that an investigating authority has the obligation, under Article 4.1 of the Anti-Dumping Agreement, to define the domestic industry on the basis of a process that "does not give rise to a material risk of distortion".⁵⁹² According to China, "what the Appellate Body found problematic [in the original proceedings] was not simply the actual exclusion of certain producers but rather the link between the producer's willingness to be included in the sample and the definition of the domestic industry".⁵⁹³ The actual exclusion of certain domestic producers was "only one of the consequences of the fundamentally problematic approach adopted by the Commission in defining its domestic industry".⁵⁹⁴ China argues that the Panel rightly determined that because the Commission defined the domestic industry on the basis of the domestic producers that had come forward in response to the Notice of Initiation which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the European Union acted inconsistently with Article 4.1 of the Anti-Dumping Agreement.⁵⁹⁵ By relying on the original Notice of Initiation, the Commission did not, according to China, "cure the inconsistency caused by the link between the producer's willingness to be included in the sample and the definition of the domestic industry" that existed in the original investigation.⁵⁹⁶

5.7.3 The definition of domestic industry in Article 4.1 of the Anti-Dumping Agreement

5.298. Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" as referring to: (i) the domestic producers as a whole of the like products; or (ii) those producers whose collective output of the products constitutes a major proportion of the total domestic production of those products.⁵⁹⁷ In the original proceedings, the Appellate Body indicated:

By using the term "a major proportion", the second method focuses on the question of *how much* production must be represented by those producers making up the domestic industry when the domestic industry is defined as less than the domestic producers as a whole ... [but] Article 4.1 does not stipulate a specific proportion for evaluating whether a certain percentage constitutes "a major proportion".⁵⁹⁸

5.299. The Appellate Body indicated further:

The absence of a specific proportion does not mean, however, that any percentage, no matter how low, could automatically qualify as "a major proportion". Rather, the context in which the term "a major proportion" is situated indicates that "a major proportion" should be properly understood as a relatively high proportion of the total domestic production. ... "A major proportion" of such *total* production will standardly serve as a substantial reflection of the total domestic production. Indeed, the lower the proportion, the more sensitive an investigating authority will have to be to ensure that the proportion used substantially reflects the total production of the producers as a whole.⁵⁹⁹

5.300. In the original proceedings, the Appellate Body read the definition of domestic industry in Article 4.1 together with the requirement in Article 3.1 of the Anti-Dumping Agreement that the determination of injury "be based on positive evidence and involve an objective examination" of, *inter alia*, the impact of the dumped imports on domestic producers. An "objective examination" pursuant to Article 3.1 "requires that the domestic industry, and the effects of dumped imports, be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties' in the investigation".⁶⁰⁰ In this respect, "to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of

⁵⁹² China's appellee's submission, para. 436 (quoting Appellate Body Report, *EC – Fasteners (China)*, para. 419).

⁵⁹³ China's appellee's submission, para. 443.

⁵⁹⁴ China's appellee's submission, para. 443.

⁵⁹⁵ China's appellee's submission, para. 444.

⁵⁹⁶ China's appellee's submission, para. 443.

⁵⁹⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 411.

⁵⁹⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 411. (emphasis original; fn omitted)

⁵⁹⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 412. (emphasis original)

⁶⁰⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 414 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

producers of the like product."⁶⁰¹ Where a domestic industry is defined as a "major proportion" of the total domestic production, it follows that "the higher the proportion, the more producers will be included, and the less likely the injury determination conducted on this basis would be distorted."⁶⁰²

5.301. The Appellate Body recognized the difficulty of obtaining information regarding domestic producers, particularly in special market situations, such as fragmented industries with numerous producers. In such special cases, the term "a major proportion" in Article 4.1 provides an investigating authority with some flexibility to define the domestic industry. Nevertheless, while "what constitutes 'a major proportion' may be lower in the light of the practical constraints on obtaining information in a special market situation, an investigating authority bears the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of skewing the economic data and, consequently, distorting its analysis of the state of the industry."⁶⁰³

5.302. These findings by the Appellate Body suggest that there is an inverse relationship between, on the one hand, the proportion of producers represented in the domestic industry and, on the other hand, the absence of a risk of material distortion in the definition of the domestic industry and in the assessment of injury. We thus read the requirement in Article 4.1 that domestic producers' output constitute a "major proportion" as having both quantitative and qualitative connotations.

5.303. When the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that "substantially reflects the total domestic production" will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1.⁶⁰⁴ However, if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the qualitative element becomes crucial in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1. While, in the special case of a fragmented industry with numerous producers the practical constraints on an authority's ability to obtain information may mean that what constitutes "a major proportion" may be lower than what is ordinarily permissible, in such cases, the investigating authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion. An investigating authority would need to make a greater effort to ensure that the selected domestic producers are representative of the total domestic production by ascertaining that the process of the domestic industry definition, and ultimately the injury determination, does not give rise to a material risk of distortion.

5.7.4 Whether the Commission's definition of the domestic industry in the review investigation is consistent with Article 4.1 of the Anti-Dumping Agreement

5.304. The Panel found that the European Union acted inconsistently with Article 4.1 of the Anti-Dumping Agreement because, in the review investigation, the Commission defined the domestic industry on the basis of the domestic producers that had come forward in response to the Notice of Initiation of the original investigation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating.⁶⁰⁵

5.305. The Panel noted that, while none of the European producers that had come forward by the deadline set in the original Notice of Initiation were excluded from the revised definition of the domestic industry in the review investigation, the boundaries of the Commission's domestic industry definition were still set by the original Notice of Initiation, which stated explicitly that only those producers that had agreed to be part of the injury sample would be considered as cooperating. For the Panel, this showed that the Commission's domestic industry definition in the

⁶⁰¹ Appellate Body Report, *EC – Fasteners (China)*, para. 414.

⁶⁰² Appellate Body Report, *EC – Fasteners (China)*, para. 414.

⁶⁰³ Appellate Body Report, *EC – Fasteners (China)*, para. 416.

⁶⁰⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 419.

⁶⁰⁵ Panel Report, para. 7.299.

review investigation also continued to suffer from a self-selection process that introduced a material risk of distortion.⁶⁰⁶

5.306. On appeal, the European Union argues that the Appellate Body found in the original proceedings that it was the "exclusion from the definition of the domestic industry of domestic producers that indicated that they would not be willing to be part of the sample and to be verified [that] constituted a violation of the EU's obligations under Article 4.1 and 3.1".⁶⁰⁷ According to the European Union, when, in the review investigation, the Commission re-defined the domestic industry to include all the domestic producers that had come forward but had been excluded from the definition in the original proceedings, "the problem identified in the original dispute ... was corrected."⁶⁰⁸

5.307. China responds that the European Union's reading of the Appellate Body report in the original proceedings is based on an incorrect assumption that "it was only the actual exclusion of certain domestic producers that indicated their unwillingness to be part of the sample from the definition of the domestic industry that constituted a violation of the European Union's obligations under Articles 4.1 and 3.1."⁶⁰⁹ In China's view, it is the link between the producers' willingness to be included in the injury sample and the definition of the domestic industry that was found by the Appellate Body to give rise to a material risk of distortion.⁶¹⁰ The actual exclusion was only one of the consequences of the problematic approach adopted by the Commission in defining the domestic industry. The fact that the Commission did not issue a new notice of initiation, but instead maintained the original Notice of Initiation providing that only those producers willing to be included in the injury sample would be considered as cooperating, continued to give rise to a material risk of distortion in the review investigation.⁶¹¹

5.308. We recall that, in the original proceedings, the Appellate Body determined that the proportion, which the Commission originally relied upon to define the domestic industry, representing 27% of total domestic production, was at the "lower end of the spectrum" and "[could] hardly be considered a substantial reflection of the total".⁶¹² It further found that the Commission had failed to ensure that the domestic industry definition would not introduce a material risk of distortion to the injury analysis by relying on a minimum benchmark irrelevant to the issue of what constitutes "a major proportion", and by excluding certain known producers on the basis of a self-selection process among the producers.⁶¹³

5.309. The Appellate Body specifically rejected the Commission's reliance on the threshold of 25% in Article 5.4 of the Anti-Dumping Agreement in order to meet the requirement of "major proportion" in Article 4.1. It noted that the 25% benchmark in Article 5.4 "concerns the issue of standing" for the initiation of an investigation and "does not address the question of what constitutes 'a major proportion' in Article 4.1".⁶¹⁴

5.310. Moreover, the Appellate Body observed that the process used by the Commission to define the domestic industry "limited the definition of the domestic industry to those producers who 'fully cooperated in the investigation'".⁶¹⁵ Thus, the Appellate Body concluded that, "by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion."⁶¹⁶ In reaching this conclusion, the Appellate Body failed to see why "a producer's willingness to be included in the *sample* should affect its eligibility to be included in the *domestic industry*, which is a universe of producers that is by definition wider than the sample."⁶¹⁷

⁶⁰⁶ Panel Report, para. 7.296.

⁶⁰⁷ European Union's appellant's submission, para. 398.

⁶⁰⁸ European Union's appellant's submission, para. 420.

⁶⁰⁹ China's appellee's submission, paras. 442-443.

⁶¹⁰ China's appellee's submission, para. 443.

⁶¹¹ China's appellee's submission, para. 443.

⁶¹² Appellate Body Report, *EC – Fasteners (China)*, para. 422.

⁶¹³ Appellate Body Report, *EC – Fasteners (China)*, para. 422.

⁶¹⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 425.

⁶¹⁵ Appellate Body Report, *EC – Fasteners (China)*, para. 426.

⁶¹⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 427 (quoting Definitive Regulation, recital 114).

⁶¹⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 427. (emphasis original)

5.311. The Appellate Body concluded that "[t]he fragmented nature of the fasteners industry, however, might have permitted such a low proportion [27%] due to the impracticality of obtaining more information, provided that the process with which the Commission defined the industry did not give rise to a material risk of distortion."⁶¹⁸ It noted, however, that the Commission applied a minimum benchmark of 25% in defining what constituted "a major proportion of total domestic production", even though this benchmark does not address the standard of "a major proportion" or the practicality of achieving a higher proportion. Moreover, "by limiting the domestic industry definition to those producers willing to be part of the sample, the Commission excluded producers that provided relevant information."⁶¹⁹ In so doing, the Commission "reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination."⁶²⁰

5.312. In the review investigation, the Commission defined the domestic industry on the basis of those domestic producers that had come forward in response to the Notice of Initiation in the original investigation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating. The Commission thus included in the definition of the domestic industry all of the producers that had come forward by the deadline, including those producers that had originally been excluded because they were deemed not to cooperate. The Commission did not issue a new notice of initiation but relied, for the purposes of the review investigation, on the original Notice of Initiation.⁶²¹

5.313. We observe that the inclusion in the revised definition of the domestic industry of those producers that had come forward by the deadline but were excluded because they were not willing to be part of the sample increased the number of included producers from 45 to 70. We also note that the inclusion of these producers increased the proportion of total domestic production in the European Union from 27% in the original investigation to 36% in the review investigation.⁶²² While the proportion relied upon in the review investigation is higher, a proportion of 36% of the total domestic production remains low, even in the context of the fragmented fasteners industry. Moreover, this low proportion could not be considered as a "major proportion" within the meaning of Article 4.1, especially where the investigating authority relies on a process of defining the domestic industry that introduces a material risk of distortion and fails to ensure that the proportion of domestic producers selected is representative of the whole.⁶²³

5.314. In re-defining the domestic industry in the review investigation, the Commission did not issue a new notice of initiation but continued to rely on the Notice of Initiation issued in the original investigation, which stated that only those producers that agreed to be part of the injury sample would be considered as cooperating. As explained above, the Notice of Initiation in the original investigation conditioned the producers' eligibility to be included in the domestic industry on their willingness to be included in the injury sample and thus introduced a material risk of distortion in the process of the domestic industry definition. Therefore, by including in the revised definition of the domestic industry those producers that had come forward following the original Notice of Initiation, but were unwilling to be included in the injury sample, the Commission increased the proportion of domestic production from 27% to 36%. However, by relying on the same Notice of Initiation, the Commission did not eliminate the materially distortive effects on the composition of the group of domestic producers that had come forward resulting from that Notice which conditioned the eligibility to be included in the domestic industry on the willingness to be included in the sample.

5.315. According to the European Union, in the original proceedings the Appellate Body considered that it was the exclusion of the deemed non-cooperating producers that created a material risk of distortion. The European Union finds support for its argument in a sentence in paragraph 430 of the Appellate Body report in the original proceedings, which states:

[B]y limiting the domestic industry definition to those producers willing to be part of the sample, the Commission excluded producers that provided relevant information.

⁶¹⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 430.

⁶¹⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 430.

⁶²⁰ Appellate Body Report, *EC – Fasteners (China)*, para. 430.

⁶²¹ Panel Report, para. 7.296.

⁶²² Panel Report, para. 7.283. See also European Union's appellant's submission, para. 419.

⁶²³ Appellate Body Report, *EC – Fasteners (China)*, para. 422.

In so doing, the Commission reduced the data coverage that could have served as a basis for its injury analysis and introduced a material risk of distorting the injury determination.⁶²⁴

5.316. According to the European Union, the Appellate Body suggested that "the problematic approach in question was the exclusion of producers that provided relevant information."⁶²⁵ We disagree with the European Union's reading of this passage in the Appellate Body report in the original proceedings. We note that the quoted passage, on which the European Union relies, is located in the concluding paragraph of the subsection where the Appellate Body considered the relevance of the material risk of distortion in the definition of the domestic industry and the assessment of injury. First, we observe that the sentence cited by the European Union begins with "[m]oreover", thus suggesting that the reference to the actual exclusion of the producers is a consideration that the Appellate Body made in addition to others. Indeed, in the preceding sentences of paragraph 430, the Appellate Body cited the "low proportion" of 27% and the mistaken reliance under Article 4.1 on the 25% test applicable under Article 5.4 to standing as other elements in support of its reversal of the original panel's finding that the European Union's definition of the domestic industry was not inconsistent with Article 4.1. Second, while in paragraph 430 the Appellate Body summarizes certain key elements of its analysis, it developed its reasoning on what constitutes the material risk of distortion in the preceding paragraphs. It explained that a producer's willingness to be included in the injury sample should not affect its eligibility to be included in the domestic industry, which is a universe of producers that is by definition wider than the sample. By relying on this condition, the Notice of Initiation may have led to the exclusion of certain known producers on the basis of a self-selection process among those producers. As mentioned above, in those paragraphs, the Appellate Body explained that it was the link between the producers' willingness to be included in the injury sample and in the definition of the domestic industry that created the material risk of distortion, which, together with the low proportion relied upon by the Commission, rendered the definition of the domestic industry inconsistent with Articles 4.1 and 3.1.

5.317. We, therefore, disagree with the European Union that the Appellate Body found in the original proceedings that it was the exclusion of producers not willing to be included in the sample that created a material risk or distortion. Rather, the Appellate Body stated that, "by defining the domestic industry on the basis of willingness to be included in the sample, the Commission's approach imposed a self-selection process among the domestic producers that introduced a material risk of distortion."⁶²⁶ In other words, what generates a material risk of distortion is not the exclusion *per se* of the producers that had come forward and declined to be included in the sample; rather, it is the conditioning of inclusion in the domestic industry definition on the willingness to be included in the injury sample. Such condition set forth in the Notice of Initiation distorted the pool of producers that had come forward, including those producers that were not willing to be part of the sample. As the Appellate Body explained in the original proceedings, the distortion is caused by the fact that the definition of the domestic industry and the selection of producers for the injury sample are distinct steps that should not be confused. The domestic industry is a universe of producers that is by definition wider than the sample, which may be selected from the producers included in the domestic industry.⁶²⁷

5.318. The Notice of Initiation stating that only those producers willing to be included in the injury sample would be considered as cooperating did, in effect, create a distortion in the sense that domestic producers may not have come forward unless they considered themselves to be injured by the alleged dumping of the product under consideration. This Notice of Initiation, therefore, provided for a self-selection process that may have skewed the composition of the domestic industry in favour of injured producers that were more likely to come forward. Accordingly, it introduced a material risk of distorting the domestic industry definition used by the Commission for the purposes of the review investigation.

5.319. Defining the domestic industry by relying on producers' willingness to be included in the injury sample cannot be justified by the difficulty of obtaining information from a greater number of producers. In the original proceedings, the Appellate Body found that, in special market

⁶²⁴ Appellate Body Report, *EC – Fasteners (China)*, para. 430.

⁶²⁵ European Union's appellant's submission, para. 410. (emphasis omitted)

⁶²⁶ Appellate Body Report, *EC – Fasteners (China)*, para. 427.

⁶²⁷ Appellate Body Report, *EC – Fasteners (China)*, para. 427.

situations such as a fragmented industry with numerous producers, the practical constraints on an investigating authority's ability to obtain information regarding domestic producers may justify defining the domestic industry on the basis of a lower proportion than would be permissible in a less fragmented market.⁶²⁸ Nevertheless, even if it relies on a lower proportion, an investigating authority should not seek to rely exclusively or predominantly on those domestic producers that consider themselves to be injured and may thus be willing to be part of the injury sample. We recall that "objective examination" under Article 3.1 requires that the domestic industry, and the effects of dumped imports, "be investigated in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation".⁶²⁹ Where an investigating authority relies on a lower proportion of domestic producers to define the domestic industry in the case of fragmented industries, it is particularly important that the process used to select domestic producers does not introduce a material risk of distortion and that, therefore, the proportion of total production included in the domestic industry definition is representative of the total domestic industry.

5.320. The European Union also considers as "speculative" China's assertion that the language contained in the Notice of Initiation does not provide for sufficient incentive for producers to come forward.⁶³⁰ The European Union suggests, in this regard, that "[t]he 25 producers that came forward within the deadline but indicated that they would not be willing to be part of the sample clearly had a sufficient incentive to provide information ... notwithstanding the question on sampling."⁶³¹ We, however, find the European Union's argument in this regard to be unconvincing. The fact that 25 producers that were not willing to be included in the sample came forward in response to the original Notice of Initiation does not demonstrate that the language contained in the Notice was not a disincentive for other producers.

5.321. Furthermore, the Appellate Body in the original proceedings relied repeatedly on the concept of "material risk of distortion"⁶³², which suggests that a process of the domestic industry definition may be inconsistent with Articles 4.1 and 3.1 not only when distortion actually occurs, but also when the process in question risks or is susceptible to lead to distortion. In referring to a self-selection process that introduces a material risk of distortion, the Appellate Body focused on the distortive nature of the self-selection process rather than on its actual distortive results. In this respect, if a low proportion of domestic producers is selected for inclusion in the domestic industry based on a distortive self-selection process (i.e. a self-selection process that introduces a material risk of distortion), it cannot constitute a "major proportion" within the meaning of Article 4.1, regardless of whether the actual result of the process is distorted or not.

5.322. The European Union seeks to support its arguments by stating that, in defining the domestic industry, the Commission "applied a simple registration requirement not dissimilar from that of [China's Ministry of Commerce] that the panel in *China – Autos (US)* did not find problematic".⁶³³ However, we do not agree with the European Union's contention that the language contained in the Notice of Initiation can be equated to a simple registration requirement since the Notice does not only require domestic producers to register, but also makes their participation in the investigation (and therefore their inclusion in the domestic industry definition) contingent upon their willingness to be included in the sample for the purposes of assessing injury. It is this contingency upon the willingness to be included in the injury sample, which is different from a mere registration requirement, that introduces the risk of material distortion, and which together

⁶²⁸ Appellate Body Report, *EC – Fasteners (China)*, para. 415.

⁶²⁹ Appellate Body Report, *EC – Fasteners (China)*, para. 414 (quoting Appellate Body Report, *US – Hot-Rolled Steel*, para. 193).

⁶³⁰ European Union's appellant's submission, para. 419.

⁶³¹ European Union's appellant's submission, para. 419.

⁶³² Appellate Body Report, *EC – Fasteners (China)*, paras. 414, 419, 422, 427, and 430.

⁶³³ European Union's appellant's submission, para. 413. In *China – Autos (US)*, anti-dumping and countervailing duty investigations were initiated pursuant to notices of initiation, which stipulated that interested parties should register by a certain deadline in order to participate in the investigations. (Panel Report, *China – Autos (US)*, para. 7.185) The United States had argued that this registration requirement distorted the domestic industry definition since it "condition[ed] the inclusion of domestic producers in the domestic industry definition on a willingness to participate in [the Ministry of Commerce] injury investigations". (Ibid., para. 7.191) The panel in that dispute found that the United States' contention in this regard was "unconvincing" since a "registration process ... essentially requires interested parties to come forward by a deadline and make themselves known to the [investigating authority] to be considered part of the domestic industry". (Ibid., para. 7.214)

with the low proportion relied upon by the Commission, makes the definition of the domestic industry inconsistent with Articles 4.1 and 3.1.

5.323. The European Union also seeks reliance on the Appellate Body's findings in *US – Offset Act (Byrd Amendment)* pertaining to the interpretation of Article 5.4 of the Anti-Dumping Agreement.⁶³⁴ We note, however, that Article 5.4 serves a different purpose than Articles 4.1 and 3.1, since Article 5.4 is intended at ensuring that the application for initiation of an anti-dumping investigation is supported by a sufficiently large proportion of domestic producers such that an investigation is warranted. By contrast, the definition of the domestic industry in accordance with Articles 4.1 and 3.1 carries with it both quantitative and qualitative components, since the proportion relied upon should be representative of the domestic industry as a whole and be unbiased, without favouring the interests of any interested party, or group thereof. We therefore do not find it necessary to engage further with the European Union's arguments in this respect.⁶³⁵

5.324. In sum, in order to comply with the recommendations and rulings of the DSB in the original proceedings, the Commission re-defined the domestic industry in the review investigation on the basis of all the domestic producers that had come forward in response to the Notice of Initiation that it had issued in the original investigation. It, therefore, included those 25 producers that had been originally excluded from the definition of the domestic industry because they were not willing to be included in the injury sample.⁶³⁶ The proportion of domestic producers included in the domestic industry definition in the review investigation increased from 27% to 36% of the total domestic production but continues to represent a low proportion of total domestic production. Moreover, the Commission re-defined the domestic industry in the review investigation on the basis of the original Notice of Initiation, which indicated that only those producers that were willing to be included in the injury sample would be considered as cooperating (and therefore eligible for inclusion in the domestic industry definition). In so doing, the Commission continued to rely on a process linking the definition of the domestic industry to the producers' willingness to be included in the injury sample, and the original Notice of Initiation therefore continues to result in a self-selection process among domestic producers that hence introduces a material risk of distorting the domestic industry definition.

5.325. For these reasons, we uphold the Panel's findings, in paragraphs 7.299 and 8.1.v of its Report, that the European Union acted inconsistently with Article 4.1 of the Anti-Dumping Agreement because the Commission defined the domestic industry on the basis of the domestic producers that had come forward in response to the original Notice of Initiation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating; and that a domestic industry definition based on a self-selection process that introduces a material risk of distortion to the investigating authority's injury analysis would necessarily render the resulting injury determination inconsistent with the obligation to make an objective injury analysis based on positive evidence as laid down in Article 3.1 of the Anti-Dumping Agreement. We, therefore, also conclude that the Commission's injury determination, based on the data obtained from a wrongly defined domestic industry, is inconsistent with Article 3.1 of the Anti-Dumping Agreement.

6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body:

- a. with respect to Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement:
 - i. upholds the Panel's finding, in paragraph 7.34 of the Panel Report, that China's claims under Articles 6.5 and 6.5.1 were within the Panel's terms of reference;

⁶³⁴ European Union's appellant's submission, para. 417.

⁶³⁵ We also recall that, in the original proceedings, the Appellate Body found that the European Union incorrectly presumed that the 25% benchmark in Article 5.4 could be applied to the "major proportion" requirement of Article 4.1. (Appellate Body Report, *EC – Fasteners (China)*, para. 425) We believe that the European Union should not, once again, rely on (albeit different) findings pertaining to Article 5.4 in order to interpret the obligations contained in Articles 4.1 and 3.1.

⁶³⁶ Panel Report, para. 7.283. See also European Union's appellant's submission, para. 419.

- ii. finds that the Panel did not disregard Pooja Forge's request for confidential treatment in its analysis of China's claim under Article 6.5;
 - iii. finds that the Panel did not err in finding that Pooja Forge's request for confidential treatment contained no more than a "bald assertion" on the part of Pooja Forge;
 - iv. finds that the Panel did not err in finding that the Commission did not conduct an objective assessment of whether good cause had been shown by Pooja Forge for the confidential treatment of the information at issue;
 - v. finds that, in the circumstances of this case, the Panel did not err by not conducting its own analysis of the nature of the information at issue for the purposes of its assessment of China's claim under Article 6.5;
 - vi. upholds the Panel's finding, in paragraphs 7.50 and 8.1.i of the Panel Report, that the European Union acted inconsistently with Article 6.5 in the review investigation at issue; and
 - vii. finds that the condition for addressing China's conditional appeal under Article 6.5.1 has not been met and, accordingly, makes no findings under that provision;
- b. with respect to Articles 6.4 and 6.2 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraph 7.80 of the Panel Report, that China's claims under Articles 6.4 and 6.2 were within the Panel's terms of reference;
 - ii. finds that the Panel did not err in finding that, for the purposes of its analysis under Article 6.4, the information at issue was not to be regarded as "confidential" because the Commission accorded confidential treatment to that information without assessing whether Pooja Forge had shown "good cause" for such treatment within the meaning of Article 6.5;
 - iii. finds that the Panel did not err in finding that the information at issue was "relevant" to the presentation of the Chinese producers' cases within the meaning of Article 6.4;
 - iv. finds that the Panel did not err in finding that the information at issue was "used" by the Commission in the review investigation within the meaning of Article 6.4;
 - v. finds that the Panel did not err in finding that, as a consequence of the European Union's violation of Article 6.4, the European Union also acted inconsistently with Article 6.2; and
 - vi. upholds the Panel's findings, in paragraphs 7.92, 7.96, and 8.1.ii of the Panel Report, that the European Union acted inconsistently with Articles 6.4 and 6.2 in the review investigation at issue;
- c. with respect to Article 6.1.2 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraph 7.115 of the Panel Report, that China's claim under Article 6.1.2 was within the Panel's terms of reference;
 - ii. reverses the Panel's finding that Pooja Forge was not an "interested party" in the review investigation within the meaning of Article 6.11 of the Anti-Dumping Agreement, and finds, instead, that, in the circumstances of this case, Pooja Forge was an "interested party" in the review investigation, and the obligation under Article 6.1.2, therefore, applied to information provided by Pooja Forge; and
 - iii. finds that, because the Commission failed to disclose to the Chinese producers information provided by Pooja Forge concerning the list and characteristics of its

products, the European Union acted inconsistently with Article 6.1.2 in the review investigation;

- d. with respect to Article 2.4 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraphs 7.148 and 8.1.iii of the Panel Report, that the European Union acted inconsistently with Article 2.4 because the Commission failed to provide the Chinese producers with certain information regarding the characteristics of Pooja Forge's products that were used in determining normal values;
 - ii. reverses the Panel's findings, in paragraphs 7.223, 7.251, and 8.2.iii of the Panel Report, that the European Union did not act inconsistently with Article 2.4 because the Commission failed to make adjustments for differences in taxation, and finds, instead, that the European Union acted inconsistently with Article 2.4 with respect to differences in taxation;
 - iii. reverses the Panel's findings, in paragraphs 7.250, 7.251, and 8.2.iii of the Panel Report, that the European Union did not act inconsistently with Article 2.4 because the Commission failed to make adjustments for differences relating to access to raw materials, use of self-generated electricity, efficiency in raw material consumption, efficiency in electricity consumption, and productivity per employee, and finds, instead, that the European Union acted inconsistently with Article 2.4 with respect to these differences;
 - iv. upholds the Panel's finding, in paragraph 7.233 of the Panel Report, that China's claim under Article 2.4 in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs fell within its terms of reference; and
 - v. finds that the condition for addressing China's conditional appeal under Article 2.4 has not been met and, accordingly, makes no findings under that provision with respect to physical characteristics, both reflected and not reflected in the original PCNs;
- e. with respect to Article 2.4.2 of the Anti-Dumping Agreement:
- i. upholds the Panel's findings, in paragraphs 7.276 and 8.1.iv of the Panel Report, that the European Union acted inconsistently with Article 2.4.2 by excluding, in its dumping determinations, models exported by the Chinese producers that did not match any of the models sold by Pooja Forge in India; and
- f. with respect to Articles 4.1 and 3.1 of the Anti-Dumping Agreement:
- i. upholds the Panel's finding, in paragraph 7.291 of the Panel Report, that China's claims under Articles 4.1 and 3.1 with respect to the definition of domestic industry fell within its terms of reference;
 - ii. upholds the Panel's finding, in paragraphs 7.299 and 8.1.v of the Panel Report, that the European Union acted inconsistently with Article 4.1 because the Commission defined the domestic industry on the basis of domestic producers that came forward in response to the original Notice of Initiation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating; and
 - iii. upholds the Panel's consequential findings, in paragraphs 7.299 and 8.1.v of the Panel Report, that the Commission's injury determination, based on the data obtained from a wrongly defined domestic industry, was inconsistent with Article 3.1.

6.2. The Appellate Body recommends that the DSB request the European Union to bring its measures found in this Report, and in the Panel Report as modified by this Report, to be inconsistent with the Anti-Dumping Agreement into conformity with its obligations under that Agreement.

Signed in the original in Geneva this 11th day of December 2015 by:

Ricardo Ramírez-Hernández
Presiding Member

Thomas Graham
Member

Shree B.C. Servansing
Member
