



WORLD TRADE  
ORGANIZATION

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**UNITED STATES – CERTAIN METHODOLOGIES AND THEIR APPLICATION  
TO ANTI-DUMPING PROCEEDINGS INVOLVING CHINA**

AB-2016-7

*Report of the Appellate Body*

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### ABBREVIATIONS USED IN THIS REPORT

Abbreviation	Description
AFA Norm	Adverse Facts Available Norm
alleged target price	weighted-average price to the alleged target in a particular CONNUM
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
BCI	business confidential information
Additional Working Procedures on BCI	Additional working procedures adopted by the Panel for the protection of BCI, attached as Annex A-2 to the Panel Report
<i>Coated Paper</i> investigation	USDOC [A570-958] Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China
CONNUM	control number
CONNUM-specific weighted-average price	the weighted-average export price in a specific CONNUM
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
GATT 1994	General Agreement on Tariffs and Trade 1994
Nails test	Methodology used by the USDOC in anti-dumping investigations to identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods"
NME	non-market economy
<i>OCTG</i> investigation	USDOC [A570-943] Antidumping Duty Investigation of Oil Country Tubular Goods from the People's Republic of China
Panel	Panel in these proceedings
Panel Report	Panel Report, <i>United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China</i> , WT/DS471/R
PRC	People's Republic of China
SCM Agreement	Agreement on Subsidies and Countervailing Measures
<i>Steel Cylinders</i> investigation	USDOC [A570-977] Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China
third administrative review in <i>PET Film</i>	USDOC [A570-924] Antidumping Duty Administrative Review, 2010-2011, of Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China
three challenged investigations	<i>Coated Paper</i> , <i>OCTG</i> , and <i>Steel Cylinders</i> investigations
T-T	transaction-to-transaction
USCAFC	United States Court of Appeals for the Federal Circuit
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
USDOC Antidumping Manual	USDOC Enforcement and Compliance Antidumping Manual, Chapter 10: Non-Market Economies
USDOC Policy Bulletin No. 05.1	USDOC Import Administration Policy Bulletin, No. 05.1, Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
W-T	weighted average-to-transaction
WTO	World Trade Organization
W-W	weighted average-to-weighted average

## PANEL EXHIBITS CITED IN THIS REPORT

Exhibit No.	Short title (if any)	Description
CHN-1 revised		First expert statement by Professor Dr Peter Egger (26 February 2015)
CHN-2		First expert statement by Lisa Tenore (28 February 2015)
CHN-3	<i>Coated Paper</i> , targeted dumping memorandum	USDOC [A570-958] Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China, Final Targeted Dumping Memorandum (20 September 2010)
CHN-6	<i>OCTG</i> , post AD determination analysis: Tianjin Pipe	USDOC [A570-943] Antidumping Duty Investigation of Oil Country Tubular Goods from the People's Republic of China, Post Preliminary Determination Analysis of Targeted Dumping: Results for Tianjin Pipe (Group) Co. (2 March 2010)
CHN-23	USDOC Antidumping Manual	USDOC Enforcement and Compliance Antidumping Manual, Chapter 10 (2009): Non-Market Economies
CHN-64	<i>Coated Paper</i> , I&D memorandum	USDOC [A570-958] Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China, Issues and Decision Memorandum (20 September 2010)
CHN-66	<i>Steel Cylinders</i> , I&D memorandum	USDOC [A570-977] Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China, Issues and Decision Memorandum (30 April 2012)
CHN-77	<i>OCTG</i> , I&D memorandum	USDOC [A570-943] Antidumping Duty Investigation of Oil Country Tubular Goods from the People's Republic of China, Issues and Decision Memorandum (13 April 2010)
CHN-92		Oxford English Dictionary online, definition of "significant"
CHN-109	USDOC Policy Bulletin No. 05.1	Import Administration Policy Bulletin, No. 05.1, Separate-Rates Practice and Application of Combination Rates in Antidumping Investigations involving Non-Market Economy Countries (5 April 2005)
CHN-114	<i>Bicycles</i> , final AD determination	USDOC [A570-843] Antidumping Duty Investigation of Bicycles from the People's Republic of China, Notice of Final Determination (30 April 1996)
CHN-123	<i>Jiangsu v. United States</i>	USCIT, <i>Jiangsu Changbao Steel Tube Co., Ltd v. United States</i> , 884 F.Supp.2d 1295 (CIT 2012)
CHN-126	1996-1997 administrative review in <i>Sebacic Acid</i>	USDOC [A570-825] Antidumping Duty Administrative Review for Sebacic Acid from the People's Republic of China, Preliminary Results (9 April 1998)
CHN-132	<i>Huaiyin v. United States</i>	USCAFC, <i>Huaiyin Foreign Trade Corp. v. United States</i> , 322 F.3d 1369 (Fed. Cir. 2003)
CHN-134	<i>East Sea Seafoods v. United States</i>	USCIT, <i>East Sea Seafoods LLC v. United States</i> , 703 F.Supp.2d 1336 (CIT 2010)
CHN-148	<i>Hubbel Power Systems v. United States</i>	USCIT, <i>Hubbel Power Systems, Inc. v. United States</i> , 884 F.Supp.2d 1283 (CIT 2012)
CHN-163	<i>Peer Bearing v. United States</i>	USCIT, <i>Peer Bearing Co.-Changshan v. United States</i> , 587 F.Supp.2d 1319 (CIT 2008)
CHN-167	2011-2012 administrative review in <i>Shrimp</i>	USDOC [A570-893] Antidumping Duty Administrative Review for Frozen Warmwater Shrimp from the People's Republic of China, 2011-2012, Decision Memorandum (12 March 2013)
CHN-205	2012-2013 administrative review in <i>Aluminum</i>	USDOC [A570-967] Antidumping Duty Administrative Review for Aluminum Extrusions from the People's Republic of China, 2012-2013, Decision Memorandum (18 June 2014)

Exhibit No.	Short title (if any)	Description
CHN-272	2005-2006 administrative review in <i>Bags</i>	USDOC [A570-886] Antidumping Duty Administrative Review for Polyethylene Retail Carrier Bags from the People's Republic of China, 2005-2006, Preliminary Results (10 September 2007)
CHN-274	2006-2007 administrative review in <i>Bags</i>	USDOC [A570-886] Antidumping Duty Administrative Review for Polyethylene Retail Carrier Bags from the People's Republic of China, 2006-2007, Preliminary Results (9 September 2008)
CHN-298	2011 administrative review in <i>Furniture</i>	USDOC [A570-890] Antidumping Duty Administrative Review for Wooden Bedroom Furniture from the People's Republic of China, 2011, Decision Memorandum (1 February 2013)
CHN-313	2007-2008 administrative review in <i>Honey</i>	USDOC [A570-863] Antidumping Duty Administrative Review for Honey from the People's Republic of China, 2007-2008, Preliminary Results (23 December 2009)
CHN-433	2011-2012 administrative review in <i>Glycine</i>	USDOC [A570-836] Antidumping Duty Administrative Review for Glycine from the People's Republic of China, 2011-2012, Decision Memorandum (29 November 2012)
CHN-438	2005-2006 administrative review in <i>Tapered Roller Bearings</i>	USDOC [A570-601] Antidumping Duty Administrative Review for Tapered Roller Bearings and Parts Thereof, Finished or Unfinished, from the People's Republic of China, 2005-2006, Preliminary Results (26 March 2007)
CHN-439	2004-2005 administrative review in <i>Freshwater Crawfish Tail Meat</i>	USDOC [A570-848] Antidumping Duty Administrative Review for Freshwater Crawfish Tail Meat from the People's Republic of China, 2004-2005, Preliminary Results (10 October 2006)
CHN-441	2003-2004 administrative review in <i>Porcelain-on-Steel Cooking Ware</i>	USDOC [A570-506] Antidumping Duty Administrative Review for Porcelain-on-Steel Cooking Ware from the People's Republic of China, 2003-2004, Notice of Preliminary Results (22 December 2005)
CHN-487	2012-2013 administrative review in <i>Solar</i>	USDOC [A-570-979] Antidumping Duty Administrative Review for Crystalline Silicon Photovoltaic Cells, whether or not assembled into modules, from the People's Republic of China, 2012-2013, Decision Memorandum for Final Results (7 July 2015)
USA-23	<i>Steel Cylinders</i> , final AD Determination for Beijing Tianhai	USDOC [A570-977] Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China, Analysis of the Final Determination for Beijing Tianhai Industry Co., Ltd (30 April 2012)

## CASES CITED IN THIS REPORT

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<i>Argentina – Import Measures</i>	Appellate Body Reports, <i>Argentina – Measures Affecting the Importation of Goods</i> , WT/DS438/AB/R / WT/DS444/AB/R / WT/DS445/AB/R, adopted 26 January 2015
<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>Canada – Dairy (Article 21.5 – New Zealand and US II)</i>	Appellate Body Report, <i>Canada – Measures Affecting the Importation of Milk and the Exportation of Dairy Products – Second Recourse to Article 21.5 of the DSU by New Zealand and the United States</i> , WT/DS103/AB/RW2, WT/DS113/AB/RW2, adopted 17 January 2003, DSR 2003:I, p. 213
<i>Canada – Renewable Energy / Canada – Feed-in Tariff Program</i>	Appellate Body Reports, <i>Canada – Certain Measures Affecting the Renewable Energy Generation Sector / Canada – Measures Relating to the Feed-in Tariff Program</i> , WT/DS412/AB/R / WT/DS426/AB/R, adopted 24 May 2013, DSR 2013:I, p. 7
<i>Chile – Price Band System (Article 21.5 – Argentina)</i>	Appellate Body Report, <i>Chile – Price Band System and Safeguard Measures Relating to Certain Agricultural Products – Recourse to Article 21.5 of the DSU by Argentina</i> , WT/DS207/AB/RW, adopted 22 May 2007, DSR 2007:II, p. 513
<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 – Raw Materials</i>	Appellate Body Reports, <i>China – Measures Related to the Exportation of Various Raw Materials</i> , WT/DS394/AB/R / WT/DS395/AB/R / WT/DS398/AB/R, adopted 22 February 2012, DSR 2012:VII, p. 3295
<i>EC – Asbestos</i>	Appellate Body Report, <i>European Communities – Measures Affecting Asbestos and Asbestos-Containing Products</i> , WT/DS135/AB/R, adopted 5 April 2001, DSR 2001:VII, p. 3243
<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) (Article 21.5 – China)</i>	Appellate Body 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/AB/RW and Add.1, adopted 12 February 2016
<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 – IT Products</i>	Panel Reports, <i>European Communities and its member States – Tariff Treatment of Certain Information Technology Products</i> , WT/DS375/R / WT/DS376/R / WT/DS377/R, adopted 21 September 2010, DSR 2010:III, p. 933
<i>EC – Poultry</i>	Appellate Body Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/AB/R, adopted 23 July 1998, DSR 1998:V, p. 2031
<i>EC – Poultry</i>	Panel Report, <i>European Communities – Measures Affecting the Importation of Certain Poultry Products</i> , WT/DS69/R, adopted 23 July 1998, as modified by Appellate Body Report WT/DS69/AB/R, DSR 1998:V, p. 2089

Short Title	Full Case Title and Citation
<i>EC – Seal Products</i>	Appellate Body Reports, <i>European Communities – Measures Prohibiting the Importation and Marketing of Seal Products</i> , WT/DS400/AB/R / WT/DS401/AB/R, adopted 18 June 2014, DSR 2014:I, p. 7
<i>EC – Selected Customs Matters</i>	Appellate Body Report, <i>European Communities – Selected Customs Matters</i> , WT/DS315/AB/R, adopted 11 December 2006, DSR 2006:IX, p. 3791
<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 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>Guatemala – Cement I</i>	Appellate Body Report, <i>Guatemala – Anti-Dumping Investigation Regarding Portland Cement from Mexico</i> , WT/DS60/AB/R, adopted 25 November 1998, DSR 1998:IX, p. 3767
<i>Korea – Dairy</i>	Appellate Body Report, <i>Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products</i> , WT/DS98/AB/R, adopted 12 January 2000, DSR 2000:I, p. 3
<i>Mexico – Anti-Dumping Measures on Rice</i>	Appellate Body Report, <i>Mexico – Definitive Anti-Dumping Measures on Beef and Rice, Complaint with Respect to Rice</i> , WT/DS295/AB/R, adopted 20 December 2005, DSR 2005:XXII, p. 10853
<i>US – Carbon Steel</i>	Appellate Body Report, <i>United States – Countervailing Duties on Certain Corrosion-Resistant Carbon Steel Flat Products from Germany</i> , WT/DS213/AB/R and Corr.1, adopted 19 December 2002, DSR 2002:IX, p. 3779
<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, DSR 2014:V, p. 1727
<i>US – Continued Zeroing</i>	Appellate Body Report, <i>United States – Continued Existence and Application of Zeroing Methodology</i> , WT/DS350/AB/R, adopted 19 February 2009, DSR 2009:III, p. 1291
<i>US – Corrosion-Resistant Steel Sunset Review</i>	Appellate Body Report, <i>United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan</i> , WT/DS244/AB/R, adopted 9 January 2004, DSR 2004:I, p. 3
<i>US – Countervailing and Anti-Dumping Measures (China)</i>	Appellate Body Report, <i>United States – Countervailing and Anti-Dumping Measures on Certain Products from China</i> , WT/DS449/AB/R and Corr.1, adopted 22 July 2014, DSR 2014:VIII, p. 3027
<i>US – Large Civil Aircraft (2<sup>nd</sup> complaint)</i>	Appellate Body Report, <i>United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)</i> , WT/DS353/AB/R, adopted 23 March 2012, DSR 2012:I, p. 7
<i>US – Oil Country Tubular Goods Sunset Reviews</i>	Appellate Body Report, <i>United States – Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina</i> , WT/DS268/AB/R, adopted 17 December 2004, DSR 2004:VII, p. 3257
<i>US – Section 211 Appropriations Act</i>	Appellate Body Report, <i>United States – Section 211 Omnibus Appropriations Act of 1998</i> , WT/DS176/AB/R, adopted 1 February 2002, DSR 2002:II, p. 589
<i>US – Softwood Lumber V (Article 21.5 – Canada)</i>	Appellate Body Report, <i>United States – Final Dumping Determination on Softwood Lumber from Canada – Recourse to Article 21.5 of the DSU by Canada</i> , WT/DS264/AB/RW, adopted 1 September 2006, DSR 2006:XII, p. 5087
<i>US – Stainless Steel (Mexico)</i>	Appellate Body Report, <i>United States – Final Anti-Dumping Measures on Stainless Steel from Mexico</i> , WT/DS344/AB/R, adopted 20 May 2008, DSR 2008:II, p. 513
<i>US – Steel Safeguards</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Certain Steel Products</i> , WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R, adopted 10 December 2003, DSR 2003:VII, p. 3117
<i>US – Tuna II (Mexico) (Article 21.5 – Mexico)</i>	Appellate Body Report, <i>United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico</i> , WT/DS381/AB/RW and Add.1, adopted 3 December 2015

Short Title	Full Case Title and Citation
<i>US – Underwear</i>	Appellate Body Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/AB/R, adopted 25 February 1997, DSR 1997:I, p. 11
<i>US – Underwear</i>	Panel Report, <i>United States – Restrictions on Imports of Cotton and Man-made Fibre Underwear</i> , WT/DS24/R, adopted 25 February 1997, as modified by Appellate Body Report WT/DS24/AB/R, DSR 1997:I, p. 31
<i>US – Washing Machines</i>	Appellate Body Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/AB/R and Add.1, adopted 26 September 2016
<i>US – Washing Machines</i>	Panel Report, <i>United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea</i> , WT/DS464/R and Add.1, adopted 26 September 2016, as modified by Appellate Body Report WT/DS464/AB/R
<i>US – Wheat Gluten</i>	Appellate Body Report, <i>United States – Definitive Safeguard Measures on Imports of Wheat Gluten from the European Communities</i> , WT/DS166/AB/R, adopted 19 January 2001, DSR 2001:II, p. 717
<i>US – Zeroing (EC)</i>	Appellate Body Report, <i>United States – Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")</i> , WT/DS294/AB/R, adopted 9 May 2006, and Corr.1, DSR 2006:II, p. 417
<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
<i>US – Zeroing (Japan)</i>	Panel Report, <i>United States – Measures Relating to Zeroing and Sunset Reviews</i> , WT/DS322/R, adopted 23 January 2007, as modified by Appellate Body Report WT/DS322/AB/R, DSR 2007:I, p. 97



WORLD TRADE ORGANIZATION  
APPELLATE BODY

**United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China**

China, *Appellant*  
United States, *Appellee*

Brazil, *Third Participant*  
Canada, *Third Participant*  
European Union, *Third Participant*  
India, *Third Participant*  
Japan, *Third Participant*  
Korea, *Third Participant*  
Norway, *Third Participant*  
Russian Federation, *Third Participant*  
Saudi Arabia, *Third Participant*  
Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, *Third Participant*  
Turkey, *Third Participant*  
Ukraine, *Third Participant*  
Viet Nam, *Third Participant*

AB-2016-7

Appellate Body Division:

Bhatia, Presiding Member  
Ramírez-Hernández, Member  
Servansing, Member

## 1 INTRODUCTION

1.1. China appeals certain issues of law and legal interpretations developed in the Panel Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*<sup>1</sup> (Panel Report). The Panel was established on 26 March 2014 to consider a complaint by China<sup>2</sup> with respect to the consistency of certain United States measures 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).

1.2. Before the Panel, China raised three sets of claims in relation to certain methodologies used by the United States Department of Commerce (USDOC) in anti-dumping proceedings against China. These claims concerned: (i) the USDOC's use of the weighted average-to-transaction (W-T) methodology in three anti-dumping investigations and one administrative review; (ii) the USDOC's treatment of multiple economic operators from a non-market economy (NME) as a single NME-wide entity; and (iii) the manner in which the USDOC determines anti-dumping duty rates for NME-wide entities, as well as the level of such duty rates.<sup>3</sup>

1.3. In respect of the USDOC's use of the W-T methodology, China challenged: (i) several aspects of the USDOC's application of the "Nails test"<sup>4</sup> in three anti-dumping investigations involving

<sup>1</sup> WT/DS471/R.

<sup>2</sup> Panel Report, para. 1.3. See also Request for the Establishment of a Panel by China, WT/DS471/5 and Corr.1.

<sup>3</sup> Panel Report, para. 2.1.

<sup>4</sup> The Panel explained:

[T]he USDOC used what it called the Nails test to meet the requirements under the pattern clause of Article 2.4.2 to find a pattern of export prices which differ significantly among different purchasers or time periods. Under the Nails test, the USDOC sought to establish whether the pattern of export prices to an allegedly targeted purchaser or time period (alleged target) differed significantly from export prices to non-targeted purchasers or time periods (non-targets). ...

The Nails test consisted of two sequential stages. The first stage is referred to as the "standard deviation test" and the second stage is what [the Panel referred] to as the "price gap test". ... [T]he objective of the standard deviation test was to find a pattern of export prices which

exports of oil country tubular goods (*OCTG*)<sup>5</sup>, certain coated paper suitable for high-quality print graphics using sheet-fed presses (*Coated Paper*)<sup>6</sup>, and high pressure steel cylinders (*Steel Cylinders*)<sup>7</sup> from China (the three challenged investigations) on an "as applied" basis; and (ii) the USDOC's use of "zeroing" in the third administrative review of exports of polyethylene terephthalate film (*PET Film*)<sup>8</sup> from China on an "as applied" basis.<sup>9</sup>

1.4. With regard to the USDOC's treatment of multiple economic operators as one NME-wide entity, China raised both "as such" and "as applied" claims. The "as such" claims concerned what China termed the "Single Rate Presumption". China alleged that the USDOC operates on the presumption that all exporters from an NME country comprise a single entity under common government control, and that the USDOC assigns a single margin of dumping and a single anti-dumping duty rate to such entity. China further submitted that, in order to rebut the Single Rate Presumption and obtain an individually determined margin of dumping, an exporter has to prove, through the "Separate Rate Test", an absence of government control, both in law and in fact, over that exporter's activities. China's "as applied" claims concerned the USDOC's application of the Single Rate Presumption in 13 anti-dumping investigations and 25 administrative reviews involving Chinese exporters.<sup>10</sup>

1.5. Regarding the manner in which the USDOC determines anti-dumping duty rates for NME-wide entities, as well as the level of such duty rates, China raised both "as such" and "as applied" claims. China's "as applied" claims concerned the USDOC's determination of anti-dumping duty rates for the People's Republic of China (PRC)-wide entity in 13 anti-dumping investigations and 17 administrative reviews involving Chinese exporters.<sup>11</sup> Specifically, in relation to each of these determinations, China challenged: the USDOC's alleged failure to specify the information required to calculate a margin of dumping and to notify exporters accordingly; the USDOC's recourse to, and use of, facts available; and the level of the anti-dumping duty rates assigned to the PRC-wide entity. China's "as such" claims concerned the manner in which the USDOC uses facts available when determining the anti-dumping duty rates for non-cooperating NME-wide entities under what China referred to as the use of "Adverse Facts Available Norm" (AFA Norm<sup>12</sup>).<sup>13</sup>

1.6. In the Panel Report, circulated to Members of the World Trade Organization (WTO) on 19 October 2016, the Panel found that:

a. with respect to the USDOC's use of the W-T methodology in the three challenged investigations:

i. the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG* and *Coated Paper* investigations because of

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differed among different purchasers, regions or time periods within the meaning of the pattern clause of Article 2.4.2, whereas the objective of the price gap test was to find whether the differences identified under the standard deviation test were significant.

(Panel Report, paras. 7.3-7.4 (fns omitted))

<sup>5</sup> USDOC [A570-943] Antidumping Duty Investigation of Oil Country Tubular Goods from the People's Republic of China.

<sup>6</sup> USDOC [A570-958] Antidumping Duty Investigation of Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses from the People's Republic of China.

<sup>7</sup> USDOC [A570-977] Antidumping Duty Investigation of High Pressure Steel Cylinders from the People's Republic of China.

<sup>8</sup> USDOC [A570-924] Anti-Dumping Administrative Review, 2010-2011, of Polyethylene Terephthalate Film, Sheet, and Strip from the People's Republic of China.

<sup>9</sup> Panel Report, para. 2.2.

<sup>10</sup> Panel Report, para. 2.3. The specific anti-dumping investigations and administrative reviews challenged by China in this regard are listed in footnote 20 to paragraph 3.1.d of the Panel Report.

<sup>11</sup> Panel Report, para. 2.4. The specific anti-dumping investigations and administrative reviews challenged by China in this regard are listed in footnote 21 to paragraph 3.1.e of the Panel Report.

<sup>12</sup> Before the Panel, China described the precise content of the AFA Norm as follows:

[W]henver [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it.

(Panel Report, para. 7.422 (quoting China's opening statement at the second Panel meeting, para. 63 (emphasis original)))

<sup>13</sup> Panel Report, para. 2.4.

the fourth quantitative flaw with the Nails test, which led the USDOC to disregard non-target prices below the "alleged target price" under the price gap test<sup>14</sup>, and because of the first SAS programming error<sup>15</sup> that occurred in the application of the price gap test<sup>16</sup>;

ii. the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the three challenged investigations because of the USDOC's explanations under the second sentence of this provision, which were premised on the use of the W-T methodology with zeroing, and because of the USDOC's failure to provide an explanation as to why the transaction-to-transaction (T-T) methodology could not take into account appropriately the significant differences in the relevant export prices<sup>17</sup>;

iii. the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the three challenged investigations by applying the W-T methodology to all export transactions<sup>18</sup>;

iv. the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the three challenged investigations because the USDOC used zeroing in the dumping margin calculations when applying the W-T methodology<sup>19</sup>;

v. China had not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *Steel Cylinders* investigation because of the fourth quantitative flaw with the Nails test, which allegedly led the USDOC to disregard non-target prices below the alleged target price under the price gap test<sup>20</sup>;

vi. China had not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the three challenged investigations by reason of the first<sup>21</sup>, second<sup>22</sup>, and third<sup>23</sup> alleged quantitative flaws with the Nails test<sup>24</sup>;

vii. China had not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement because of the second alleged

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<sup>14</sup> The "price gap test" is explained in paragraphs 7.4 and 7.45-7.48 of the Panel Report, and in paragraph 5.8 below of this Report.

<sup>15</sup> The Panel noted that "[t]he first SAS programming error was that instead of comparing the alleged target price gap with the weighted average non-target price gap, as required under the price gap test, the USDOC compared the alleged target price gap with each of the individual non-target price gaps which made up this weighted average non-target price gap." (Panel Report, para. 7.50)

<sup>16</sup> Panel Report, para. 8.1.a.i.

<sup>17</sup> Panel Report, para. 8.1.a.ii.

<sup>18</sup> Panel Report, para. 8.1.a.iii.

<sup>19</sup> Panel Report, para. 8.1.a.iv.

<sup>20</sup> Panel Report, para. 8.1.a.v.

<sup>21</sup> With respect to the first alleged quantitative flaw, China contended before the Panel that the Nails test depended on the *assumption* that the examined export price data were either, in terms of statistics, normally distributed, or at least single-peaked and symmetric around the mean. (Panel Report, para. 7.56)

<sup>22</sup> With respect to the second alleged quantitative flaw, China contended before the Panel that the USDOC used a "one" standard deviation threshold under the standard deviation test. According to China, this was contrary to established statistical conventions, which require the use of a higher threshold. (Panel Report, para. 7.68)

<sup>23</sup> With respect to the third alleged quantitative flaw, China contended before the Panel that it concerned the USDOC's application of the price gap test. To China, this flaw related to the manner in which the USDOC calculated the weighted-average non-target price gap and the alleged target price gap and then compared them. (Panel Report, para. 7.75)

<sup>24</sup> Panel Report, para. 8.1.a.vi.

SAS programming error<sup>25</sup> that occurred in the application of the price gap test in the *OCTG* and *Coated Paper* investigations<sup>26</sup>;

viii. China had not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the three challenged investigations because of the alleged qualitative issues<sup>27</sup> with the Nails test<sup>28</sup>; and

ix. China had not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the three challenged investigations by finding the relevant "pattern" on the basis of purchaser or time period weighted-average export prices as opposed to individual export transaction prices<sup>29</sup>;

b. with respect to the USDOC's use of zeroing in the third administrative review in *PET Film*:

i. the United States acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because of the USDOC's use of zeroing in the dumping margin calculations when applying the W-T methodology<sup>30</sup>;

c. with respect to the Single Rate Presumption:

i. the six administrative review determinations<sup>31</sup> introduced by China at the Panel's first substantive meeting with the parties fell within the Panel's terms of reference<sup>32</sup>;

ii. the Single Rate Presumption constitutes a measure of general and prospective application, which is "as such" inconsistent with Articles 6.10 and 9.2 of the Anti-Dumping Agreement<sup>33</sup>;

iii. the United States acted inconsistently with Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the USDOC's application of the Single Rate Presumption in the 38 determinations challenged by China under these provisions<sup>34</sup>; and

iv. in light of the above findings with respect to the Single Rate Presumption<sup>35</sup>, the Panel exercised judicial economy and made no findings with respect to China's "as such" and "as applied" claims under the second sentence of Article 9.4 of the Anti-Dumping Agreement concerning the Single Rate Presumption<sup>36</sup>; and

<sup>25</sup> The Panel noted that, under the price gap test, the weighted-average non-target price gap was calculated by multiplying each individual non-target gap with its associated weight and dividing the total by the total weight associated with those gaps. The Panel explained that "[t]he second SAS programming error occurred in the multiplication of each individual gap with its associated weight." (Panel Report, para. 7.51)

<sup>26</sup> Panel Report, para. 8.1.a.vii.

<sup>27</sup> China contended before the Panel that the USDOC "did not consider the reasons for the identified differences in export prices forming the relevant pattern, as part of its enquiry into whether such differences were significant". (Panel Report, para. 7.105)

<sup>28</sup> Panel Report, para. 8.1.a.viii.

<sup>29</sup> Panel Report, para. 8.1.a.ix.

<sup>30</sup> Panel Report, para. 8.1.b.i.

<sup>31</sup> The specific administrative reviews are listed in paragraph 7.241 of the Panel Report.

<sup>32</sup> Panel Report, para. 8.1.c.i.

<sup>33</sup> Panel Report, para. 8.1.c.ii.

<sup>34</sup> Panel Report, para. 8.1.c.iii.

<sup>35</sup> See Panel Report, paras. 8.1.c.ii and 8.1.c.iii.

<sup>36</sup> Panel Report, para. 8.1.c.iv.

d. with respect to the AFA Norm:

i. the relevant four administrative review determinations introduced by China at the Panel's first substantive meeting with the parties<sup>37</sup> fell within the Panel's terms of reference<sup>38</sup>;

ii. China had not demonstrated that the AFA Norm constitutes a norm of general and prospective application and, consequently, there was no need to examine whether the AFA Norm fell within the Panel's terms of reference, or to address China's "as such" claims under Article 6.8 of the Anti-Dumping Agreement and paragraph 7 of Annex II thereto<sup>39</sup>; and

iii. in light of the above findings of inconsistency under Articles 6.10 and 9.2 of the Anti-Dumping Agreement in relation to the Single Rate Presumption<sup>40</sup>, the Panel exercised judicial economy and made no findings with respect to China's "as applied" claims under Articles 6.1, 6.8, 9.4, and paragraphs 1 and 7 of Annex II to the Anti-Dumping Agreement concerning the 30 determinations challenged by China under these provisions.<sup>41</sup>

1.7. In accordance with Article 19.1 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), and having found that the United States acted inconsistently with certain provisions of the Anti-Dumping Agreement and the GATT 1994, the Panel recommended that the United States bring its measures into conformity with its obligations under those Agreements.<sup>42</sup>

1.8. On 18 November 2016, China notified the Dispute Settlement Body (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<sup>43</sup> and an appellant's submission pursuant to Rule 20 and Rule 21, respectively, of the Working Procedures for Appellate Review<sup>44</sup> (Working Procedures).

1.9. On 19 November 2016, the United States requested the Appellate Body Division hearing this appeal to extend the time period for filing a Notice of Other Appeal and other appellant's submission, and as a consequence the time periods for filing appellees' and third participants' submissions, pursuant to Rule 16(2) of the Working Procedures. On 21 November 2016, the Division invited China and the third participants to comment on the United States' request. On 22 November 2016, China and the European Union submitted comments. On 22 November 2016, the Division issued a Procedural Ruling.<sup>45</sup> In its ruling, the Division came to the conclusion that strict adherence to the time periods set out in the Working Procedures would result in manifest unfairness in the particular circumstances of this case. Accordingly, the Division extended the time periods for filing a Notice of Other Appeal and other appellant's submission, if any; the appellee's submission(s); and the third participants' submissions.<sup>46</sup>

1.10. On 28 November 2016, the United States informed the Appellate Body, China, and the third participants that, "[i]n light of the need to focus this appeal on those issues necessary to assist the DSB in resolving this dispute, and ongoing concerns over the Appellate Body's workload and demands, [the United States had] decided not to file an other appeal".<sup>47</sup> On 16 December 2016,

<sup>37</sup> The specific administrative reviews are listed in footnote 752 to paragraph 7.389 of the Panel Report.

<sup>38</sup> Panel Report, para. 8.1.d.i.

<sup>39</sup> Panel Report, para. 8.1.d.ii. The Division notes that the Panel found, in paragraph 7.454 of its Report, that certain evidence put on the record by China demonstrated the precise content of the AFA Norm as described by China. (See also *supra*, fn 12)

<sup>40</sup> See Panel Report, para. 8.1.c.iii.

<sup>41</sup> Panel Report, para. 8.1.d.iii.

<sup>42</sup> Panel Report, para. 8.2.

<sup>43</sup> WT/DS471/8.

<sup>44</sup> WT/AB/WP/6, 16 August 2010.

<sup>45</sup> Contained in Annex D-1 of the Addendum to this Report (WT/DS471/AB/R/Add.1).

<sup>46</sup> The revised submission dates are set out in the Procedural Ruling. (See Annex D-1 of the Addendum to this Report (WT/DS471/AB/R/Add.1))

<sup>47</sup> On appeal, China raises a conditional challenge to the Panel's exercise of judicial economy with respect to China's "as applied" claims under Articles 6.1, 6.8, and paragraphs 1 and 7 of Annex II to the

the United States filed an appellee's submission.<sup>48</sup> On 9 January 2017, Brazil, Canada, the European Union, Japan, and Viet Nam each filed a third participant's submission.<sup>49</sup> On the same day, Norway; Russia; the Separate Customs Territory of Taiwan, Penghu, Kinmen, and Matsu; and Turkey each notified its intention to appear at the oral hearing as a third participant.<sup>50</sup> On 10 January 2017, Ukraine notified its intention to appear at the oral hearing as a third participant.<sup>51</sup> Subsequently, India and Korea each notified its intention to appear at the oral hearing as a third participant.<sup>52</sup>

1.11. By letter of 16 January 2017, 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 in 2017, scheduling issues arising from overlap in the composition of the Divisions hearing different appeals, the number and complexity of the issues raised in this and concurrent appellate proceedings, together with the demands that these appellate proceedings place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat.<sup>53</sup> By letter of 22 March 2017, the Chair of the Appellate Body informed the Chair of the DSB that the Appellate Body Report in these proceedings would be circulated no later than 11 May 2017.<sup>54</sup>

1.12. The oral hearing in this appeal was held on 27-28 February 2017. The participants and four of the third participants to this appeal (Brazil, Canada, the European Union, and Japan) made oral statements and responded to questions posed by the Members of the Appellate Body Division hearing the appeal.

1.13. On 16 February 2015, having been requested by the parties to do so, the Panel decided to adopt additional working procedures for the protection of business confidential information (BCI) (Additional Working Procedures on BCI).<sup>55</sup> No such request was received by the Appellate Body. At the beginning of the oral hearing in these appellate proceedings, the Presiding Member noted that, while the Panel record contains BCI, under the circumstances, the Division would assume that all information in this appeal shall be treated as confidential in accordance with Article 18.2 of the DSU. The Appellate Body has in the past highlighted the need to distinguish between "the general layer of confidentiality that applies in WTO dispute settlement proceedings, as foreseen in Articles 18.2 and 13.1 of the DSU" and "the additional layer of protection of sensitive business

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Anti-Dumping Agreement. China's challenge is conditional upon the Appellate Body reversing the Panel's findings that the USDOC acted inconsistently with Articles 6.2 and 9.2 of the Anti-Dumping Agreement by applying the Single Rate Presumption in relation to any of the 30 challenged determinations in which the USDOC determined a margin of dumping for the NME-wide entity. (China's appellant's submission, paras. 510-511) Given that the United States did not appeal the Panel's finding concerning the Single Rate Presumption, the condition to China's challenge is not met.

<sup>48</sup> Pursuant to Rules 16 and 22 of the Working Procedures.

<sup>49</sup> Pursuant to Rules 16 and 24(1) of the Working Procedures. The deadline for the filing of third participant's submissions, including executive summaries of those submissions, was 9 January 2017, 5 p.m. All third participants filing a submission did so within this deadline. Brazil and Viet Nam, however, omitted to file an executive summary along with their submissions. Brazil and Viet Nam subsequently filed their executive summaries on 9 January 2017 at 7.30 p.m. and 10 January at 9.30 a.m. respectively, each noting that the executive summary had mistakenly not been sent together with the submission. The Appellate Body has held that considerations of due process and "fairness and orderly procedure", as referred to in Rule 16(1) of the Working Procedures, require compliance with established time periods by all participants regarding the filing of submissions. (See Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 164) These considerations are also valid with respect to executive summaries of written submissions. In light of the foregoing, Brazil and Viet Nam's executive summaries are included in the Addendum to this Appellate Body Report.

<sup>50</sup> Pursuant to Rule 24(2) of the Working Procedures.

<sup>51</sup> Pursuant to Rule 24(4) of the Working Procedures.

<sup>52</sup> On 22 and 23 January 2017, India and Korea, respectively, submitted its delegation list for the hearing to the Appellate Body Secretariat and the participants and third participants in this dispute. For the purposes of this appeal, the Division has interpreted these actions as notifications expressing the intention of India and Korea to attend the hearing pursuant to Rule 24(4) of the Working Procedures.

<sup>53</sup> WT/DS471/9.

<sup>54</sup> WT/DS471/10.

<sup>55</sup> Panel Report, para. 1.9 and Annex A-2.

information that a panel may choose to adopt".<sup>56</sup> The Appellate Body has further emphasized that, "absent any request from the participants, procedures for additional protection of BCI do not apply in ... appellate proceedings."<sup>57</sup> In this dispute, no request for additional protection of BCI has been made on appeal. The Additional Working Procedures on BCI adopted by the Panel do not cover these appellate proceedings and therefore only the "general layer of confidentiality" under the provisions of the DSU applies.

## 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.<sup>58</sup> The Notice of Appeal and the executive summaries of the participants' claims and arguments are contained, respectively, in Annexes A and B of the Addendum to this Report, WT/DS471/AB/R/Add.1.

## 3 ARGUMENTS OF THE THIRD PARTICIPANTS

3.1. The arguments of the third participants that filed a written submission are reflected in the executive summaries provided to the Appellate Body<sup>59</sup>, and are contained in Annex C of the Addendum to this Report, WT/DS471/AB/R/Add.1.

## 4 ISSUES RAISED IN THIS APPEAL

4.1. With regard to the USDOC's application of the Nails test in the *OCTG, Coated Paper, and Steel Cylinders* investigations, the following issues are raised in this appeal:

a. in relation to the first and third alleged quantitative flaws with the Nails test:

i. whether the Panel erred in its interpretation and application of Article 2.4.2 of the Anti-Dumping Agreement in finding that China has not established that the United States acted inconsistently with this provision in the three challenged investigations by reason of the first alleged quantitative flaw with the Nails test;

ii. whether the Panel erred in its interpretation and application of Article 2.4.2 of the Anti-Dumping Agreement in finding that China has not established that the United States acted inconsistently with this provision in the three challenged investigations by reason of the third alleged quantitative flaw with the Nails test; and

iii. whether the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement in dismissing China's claim in respect of the first and third alleged quantitative flaws with the Nails test;

b. whether the Panel erred in its interpretation and application of Article 2.4.2 of the Anti-Dumping Agreement in finding that China has not established that the United States acted inconsistently with this provision in the three challenged investigations by not considering the reasons for the differences in export prices when determining whether those differences were qualitatively significant;

c. in relation to the USDOC's use of weighted-average export prices under the Nails test:

i. whether the Panel erred in its interpretation and application of Article 2.4.2 of the Anti-Dumping Agreement in finding that China has not established that the United States acted inconsistently with this provision in the three challenged

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<sup>56</sup> Appellate Body Reports, *China – HP-SSST (Japan) / China – HP-SSST (EU)*, para. 5.315; *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.3.

<sup>57</sup> Appellate Body Report, *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, para. 5.5.

<sup>58</sup> Pursuant to the Appellate Body 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).

<sup>59</sup> Pursuant to the Appellate Body 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).

investigations by determining the relevant "pattern" on the basis of weighted-average export prices, as opposed to individual export transaction prices; and

ii. whether the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement by failing to find that the USDOC's use of weighted-average export prices was inherently biased; and

d. whether the Panel erred in its interpretation of Article 2.4.2 of the Anti-Dumping Agreement by suggesting that comparison methodologies may be combined to establish dumping margins.

4.2. With regard to the AFA Norm, the following issues are raised in this appeal:

a. whether the Panel erred in finding that China has not demonstrated that the AFA Norm is a rule or norm of general and prospective application;

b. if the Appellate Body finds that the Panel erred, whether it can complete the analysis and find that the AFA Norm is a rule or norm of general and prospective application that can be the subject of an "as such" challenge in WTO dispute settlement; and

c. if the Appellate Body finds that the AFA Norm can be the subject of an "as such" challenge in WTO dispute settlement, whether it can complete the analysis and find that this measure is inconsistent "as such" with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.

## 5 ANALYSIS OF THE APPELLATE BODY

5.1. We first address China's claims raised on appeal under Article 2.4.2 of the Anti-Dumping Agreement regarding the USDOC's application of the Nails test and its use of the W-T methodology in the three challenged investigations. We then turn to China's claims on appeal regarding the AFA Norm.

### 5.1 China's claims pertaining to the USDOC's application of the Nails test and its use of the W-T methodology in the three challenged investigations

5.2. On appeal, China challenges certain findings of the Panel under Article 2.4.2 of the Anti-Dumping Agreement regarding the USDOC's application of the Nails test in the three challenged investigations. Specifically, China challenges the Panel's findings regarding: (i) the first and third alleged quantitative flaws with the Nails test<sup>60</sup>; (ii) China's claim pertaining to the consideration of certain qualitative factors when determining whether prices differ "significantly"; and (iii) the USDOC's use of weighted-average export prices to establish the existence of a "pattern". In addition, China claims that the Panel erred in suggesting that an investigating authority may combine comparison methodologies to establish margins of dumping. We first make a few observations regarding Article 2.4.2, as well as the Nails test that was applied by the USDOC in the three challenged investigations. We then address, in turn, the claims raised by China on appeal.

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<sup>60</sup> Before the Panel, China contended that, due to four quantitative flaws with the Nails test, the USDOC failed to find, in the three challenged investigations, that "the differences in export prices forming the pattern were significant, in a quantitative sense, as required under the pattern clause of Article 2.4.2". (Panel Report, para. 7.11) China's appeal is limited to the Panel's findings regarding the first and third of these alleged quantitative flaws.



### 5.1.1 Background

#### 5.3. Article 2.4.2 of the Anti-Dumping Agreement reads:

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

5.4. The first sentence of Article 2.4.2 provides for two *symmetrical* comparison methodologies that "shall normally" be used by investigating authorities to establish margins of dumping: (i) the weighted average-to-weighted average (W-W) methodology, whereby dumping margins are established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions; and (ii) the T-T methodology, whereby normal value and export prices are compared on a transaction-specific basis.<sup>61</sup> The second sentence of Article 2.4.2, in turn, provides for a comparison methodology that is *asymmetrical*: the W-T methodology, whereby a weighted average normal value is compared to prices of individual export transactions.<sup>62</sup> This methodology may be used if the following two conditions are met: first, "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods"; and, second, "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."<sup>63</sup> As the Appellate Body has recognized, "[t]he function of the second sentence of Article 2.4.2 is ... to enable investigating authorities to identify so-called 'targeted dumping' and to address it appropriately."<sup>64</sup>

5.5. China's claims on appeal under Article 2.4.2 are "as applied" claims that pertain to the three challenged investigations, namely, the *OCTG*, *Coated Paper*, and *Steel Cylinders* investigations. In these investigations, the USDOC applied the Nails test to establish whether there was "a pattern of export prices which differ significantly" among different purchasers or time periods within the meaning of the second sentence of Article 2.4.2.<sup>65</sup>

5.6. The Nails test consisted of two sequential stages that the USDOC would apply after receiving an allegation of "targeted dumping" by a domestic industry petitioner identifying an "alleged target".<sup>66</sup> First, the "standard deviation test" aimed at "find[ing] a pattern of export prices which differed among different purchasers, regions or time periods".<sup>67</sup> Second, the "price gap test" aimed at establishing whether the differences identified under the standard deviation test were significant.<sup>68</sup> Under both stages, the USDOC would conduct its initial analysis on a model basis,

<sup>61</sup> Appellate Body Report, *US – Washing Machines*, para. 5.15.

<sup>62</sup> Appellate Body Report, *US – Washing Machines*, para. 5.16.

<sup>63</sup> We refer to these two conditions as the "pattern clause" and the "explanation clause", respectively.

<sup>64</sup> Appellate Body Report, *US – Washing Machines*, para. 5.17. (fn omitted) See also Appellate Body Reports, *EC – Bed Linen*, para. 62; *US – Zeroing (Japan)*, para. 135; and *US – Stainless Steel (Mexico)*, paras. 122 and 127.

<sup>65</sup> Panel Report, para. 7.3. While the pattern clause also refers to a pattern of export prices which differ significantly among different regions, the USDOC did not find a pattern on that basis in the three challenged investigations. (Ibid., fn 40 thereto)

<sup>66</sup> Panel Report, para. 7.3 (referring to United States' first written submission to the Panel, para. 85) and para. 7.40 (referring to United States' first written submission to the Panel, para. 86).

<sup>67</sup> Panel Report, para. 7.4.

<sup>68</sup> Panel Report, para. 7.4.

with each model being assigned a control number (CONNUM).<sup>69</sup> The USDOC would examine only those CONNUMs that were sold to both the alleged target and the non-targets.<sup>70</sup>

5.7. The standard deviation test involved a two-step process.<sup>71</sup> The USDOC would first consider whether the weighted-average price to the alleged target in a particular CONNUM (the alleged target price) was below a benchmark price equal to one standard deviation below the weighted-average export price in that CONNUM (the CONNUM-specific weighted-average price).<sup>72</sup> Second, after repeating this exercise across all examined CONNUMs, if the volume of sales in CONNUMs where the alleged target price was below the CONNUM-specific weighted-average export price exceeded 33% of the total volume of the exporter's sales to the alleged target, the USDOC would move on to the price gap test.<sup>73</sup>

5.8. The price gap test itself also involved a two-step process.<sup>74</sup> First, the USDOC would calculate, on a CONNUM-specific basis, the alleged target price gap by considering the difference between the alleged target price and the next highest weighted-average non-target price. It would also calculate, for the same CONNUM, the weighted-average non-target price gap by considering the weighted average of the gaps between individual non-target weighted-average prices.<sup>75</sup> The USDOC would then consider whether the alleged target price gap exceeded the weighted-average non-target price gap. Second, after repeating this exercise across all examined CONNUMs<sup>76</sup>, if all CONNUMs where the alleged target price gap was wider than the weighted-average non-target price gap exceeded 5% of the total volume of the sales to the alleged target, the USDOC would conclude that the exporter passed the price gap test.<sup>77</sup>

5.9. Applying the Nails test in the three challenged investigations, the USDOC established the existence of "pattern[s] of export prices which differ[ed] significantly" among different purchasers in the *Coated Paper* investigation and among different time periods in the *Steel Cylinders* and *OCTG* investigations.<sup>78</sup> The USDOC then evaluated the difference between the dumping margins calculated using the W-W methodology (without zeroing) and those calculated using the W-T methodology (with zeroing).<sup>79</sup> The USDOC considered that there were differences in the dumping margins that showed that the W-W methodology "conceal[ed] differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the

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<sup>69</sup> Panel Report, para. 7.40 and fn 52 to para. 7.8.

<sup>70</sup> Panel Report, para. 7.40 (referring to United States' response to Panel question No. 109(a), (b), and (c), paras. 49-51; China's response to Panel question No. 109(c), para. 72; and First expert statement by Lisa Tenore (Panel Exhibit CHN-2), para. 8).

<sup>71</sup> For a more detailed description of the standard deviation test, see Panel Report, paras. 7.41-7.44.

<sup>72</sup> Panel Report, para. 7.41 (referring to United States' first written submission to the Panel, para. 97; and China's first written submission to the Panel, para. 68). In the three challenged investigations, the USDOC calculated a weighted standard deviation under the standard deviation test. Like the Panel, for ease of reference, we refer to this as "standard deviation". (Ibid., fn 135 to para. 7.42)

<sup>73</sup> Panel Report, para. 7.44 (referring to United States' first written submission to the Panel, para. 100; and China's first written submission to the Panel, para. 72). In calculating the total volume of the exporter's sales to the alleged target, the USDOC did not include sales volumes pertaining to CONNUMs that were not sold to both the alleged target and a non-target. (Ibid. (referring to United States' response to Panel question No. 109(a), para. 51))

<sup>74</sup> For a more detailed description of the price gap test, see Panel Report, paras. 7.45-7.48.

<sup>75</sup> Panel Report, para. 7.45 (referring to United States' first written submission to the Panel, para. 101; and China's first written submission to the Panel, para. 76). In calculating this weighted-average non-target price gap, the USDOC disregarded non-target prices that were lower than the alleged target price. (Ibid.)

<sup>76</sup> CONNUMs that did not pass the standard deviation test were not examined under the price gap test. (Panel Report, para. 7.48)

<sup>77</sup> Panel Report, para. 7.48 (referring to *Steel Cylinders*, I&D memorandum (Panel Exhibit CHN-66), p. 23; *Coated Paper*, I&D memorandum (Panel Exhibit CHN-64), p. 22; and *OCTG*, I&D memorandum (Panel Exhibit CHN-77), Comment 2). The USDOC did not include, in the total volume of the exporter's sales to the alleged target, sales volumes in those CONNUMs that were sold only to the alleged target but not to a non-target. (Ibid. (referring to United States' response to Panel question No. 109(b), para. 50))

<sup>78</sup> Panel Report, para. 7.5 (referring to United States' first written submission to the Panel, para. 106, in turn referring to *Coated Paper*, targeted dumping memorandum (Panel Exhibit CHN-3), p. 4; *Steel Cylinders*, final AD Determination for Beijing Tianhai (Panel Exhibit USA-23), Attachment 4, pp. 138 and 158; and *OCTG*, post AD determination analysis: Tianjin Pipe (Panel Exhibit CHN-6), p. 3).

<sup>79</sup> Panel Report, para. 7.6 (referring to United States' first written submission to the Panel, paras. 184-186).

targeted group with high-priced sales to the non-targeted group".<sup>80</sup> As a result, the USDOC applied the W-T methodology to all export transactions of the Chinese exporters involved in the three challenged investigations.<sup>81</sup>

### 5.1.2 The first and third alleged quantitative flaws

5.10. On appeal, China claims that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting its claim in respect of the first and third alleged quantitative flaws with the Nails test.<sup>82</sup> Moreover, China claims that the Panel failed to apply the proper standard of review under Article 17.6(i) of the Anti-Dumping Agreement.<sup>83</sup> Consequently, China requests us to reverse the Panel's findings pertaining to the first and third alleged quantitative flaws. China further requests us to complete the legal analysis and find that the USDOC acted inconsistently with the pattern clause in the three challenged investigations, by failing to find, through an objective and unbiased evaluation of the facts, "a pattern of export prices which differ significantly" within the meaning of the second sentence of Article 2.4.2.<sup>84</sup>

5.11. Addressing China's claim under Article 2.4.2 of the Anti-Dumping Agreement, the United States responds that China's appeal implicates the Panel's weighing and appreciation of evidence, which China should have challenged under Article 11 of the DSU.<sup>85</sup> It further argues that the Panel made no legal findings that we could review and that there are insufficient undisputed facts on the record for us to complete the legal analysis.<sup>86</sup> The United States also submits that China's arguments are baseless, and that China essentially requests that investigating authorities be required to adopt a specific mode of numerical analysis to identify a pattern.<sup>87</sup> Moreover, the United States submits that China's arguments under Article 17.6(i) of the Anti-Dumping Agreement lack merit.<sup>88</sup> Consequently, the United States concludes that we should uphold the Panel's findings concerning the first and third alleged quantitative flaws with the Nails test.<sup>89</sup>

5.12. We analyse China's claims under the second sentence of Article 2.4.2 and under Article 17.6(i) of the Anti-Dumping Agreement in turn below.

#### 5.1.2.1 Whether the Panel erred under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the first alleged quantitative flaw

5.13. The first alleged quantitative flaw with the Nails test relates to the standard deviation test applied by the USDOC in the three challenged investigations, which aimed at identifying whether there were export price differences among different purchasers or time periods.<sup>90</sup> Under that test, the USDOC determined, for each CONNUM considered, whether the alleged target price was below a benchmark price equal to one standard deviation below the CONNUM-specific weighted-average price.<sup>91</sup>

5.14. Before the Panel, China claimed that the Nails test, and more particularly the use of the one standard deviation threshold under that test, depended on the assumption that the examined

<sup>80</sup> Panel Report, para. 7.6 (quoting United States' first written submission to the Panel, para. 187, in turn quoting *Steel Cylinders*, I&D memorandum (Panel Exhibit CHN-66), p. 24); and referring to *Coated Paper*, I&D memorandum (Panel Exhibit CHN-64), pp. 23-24; and *OCTG*, I&D memorandum (Panel Exhibit CHN-77), Comment 2).

<sup>81</sup> Panel Report, para. 7.7 (referring to China's first written submission to the Panel, paras. 98-104, in turn quoting *OCTG*, I&D memorandum (Panel Exhibit CHN-77), Comment 2; *Coated Paper*, I&D memorandum (Panel Exhibit CHN-64), pp. 24-25; and *Steel Cylinders*, I&D memorandum (Panel Exhibit CHN-66), p. 24).

<sup>82</sup> China's Notice of Appeal, paras. 4-7; appellant's submission, paras. 70-72.

<sup>83</sup> China's Notice of Appeal, para. 8; appellant's submission, paras. 118 and 123.

<sup>84</sup> China's Notice of Appeal, paras. 9-10; appellant's submission, paras. 124-125.

<sup>85</sup> United States' appellee's submission, para. 69.

<sup>86</sup> United States' appellee's submission, para. 70.

<sup>87</sup> United States' appellee's submission, para. 115. See also para. 71.

<sup>88</sup> United States' appellee's submission, para. 72.

<sup>89</sup> United States' appellee's submission, para. 73.

<sup>90</sup> The price gap test was then used to determine whether the differences in export prices identified under the standard deviation test were significant. (See para. 5.8. above)

<sup>91</sup> See para. 5.7. above.

export price data were either, "in terms of statistics", normally distributed, or at least single-peaked and symmetric.<sup>92</sup> China submitted that the United States acted inconsistently with the pattern clause by applying the Nails test in the three challenged investigations without assessing whether the data were normally distributed, or at least single-peaked and symmetric.<sup>93</sup>

5.15. The Panel considered that the issues were whether the Nails test was of such a nature that it could only be used if the export price data were normally distributed, or single-peaked and symmetric, and, if so, whether the USDOC verified that the data in the three challenged investigations were so distributed.<sup>94</sup> In addressing the first of these two issues, the Panel considered China's argument that a large number of prices may be below the one standard deviation threshold when data are not normally distributed, or single-peaked and symmetric.<sup>95</sup> The Panel considered that this "would not necessarily preclude an investigating authority from finding that such low prices differ significantly from other higher prices".<sup>96</sup> The Panel also disagreed with China that such prices cannot form a pattern within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.<sup>97</sup> Finally, the Panel saw no correlation between the "supposed statistical problem" alleged by China and what the USDOC was trying to achieve through the standard deviation test.<sup>98</sup>

5.16. Based on the above, the Panel found that "China ha[d] not shown that the Nails test is of such a nature that it could only be used if the export price data were normally distributed or single-peaked and symmetric", and that it was therefore "irrelevant" that the USDOC did not verify whether the export price data in the three challenged investigations were so distributed.<sup>99</sup> Consequently, the Panel found that China had not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by reason of the first alleged quantitative flaw.<sup>100</sup>

5.17. On appeal, China claims that the Panel erred in failing to develop and apply a proper legal standard under the pattern clause.<sup>101</sup> Specifically, China argues that a test involving the concept of standard deviation, such as the Nails test, does not allow the authority to draw "valid conclusions" unless the data form a normal or a single-peaked and symmetrical distribution.<sup>102</sup> The United States responds that the Panel finding at issue is a factual finding<sup>103</sup>, and that China's appeal reveals that it is in fact challenging the Panel's weighing and appreciation of facts, in particular, evidence related to "the study of statistics", as well as to "the *Nails* test and how it operates".<sup>104</sup> The United States thus submits that we should dismiss China's claim as China should have but failed to raise a claim under Article 11 of the DSU.<sup>105</sup> Accordingly, the first question before us is whether China's claim pertaining to the first alleged quantitative flaw could be raised on appeal as a claim regarding the Panel's interpretation or application of Article 2.4.2 of the Anti-Dumping Agreement.

5.18. We recall that 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

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<sup>92</sup> Panel Report, para. 7.56 (referring to China's comments on the United States' response to Panel question No. 93, para. 3) and para. 7.57 (referring to China's response to Panel question No. 6(c), para. 45; and response to Panel question No. 6(a), para. 36).

<sup>93</sup> Panel Report, para. 7.56.

<sup>94</sup> Panel Report, para. 7.59.

<sup>95</sup> Panel Report, para. 7.62.

<sup>96</sup> Panel Report, para. 7.62.

<sup>97</sup> Panel Report, para. 7.63.

<sup>98</sup> Panel Report, para. 7.64.

<sup>99</sup> Panel Report, para. 7.67.

<sup>100</sup> Panel Report, para. 8.1.a.vi. See also para. 7.67.

<sup>101</sup> China's appellant's submission, para. 69.

<sup>102</sup> China's appellant's submission, para. 71.

<sup>103</sup> The United States argues that the Panel rejected China's claim on the basis that it had not established the factual premise of its claim, namely, that the Nails test depended on the assumption that the data were normally distributed, or single-peaked and symmetric. (United States' appellee's submission, paras. 80-81)

<sup>104</sup> United States' appellee's submission, paras. 87-88. See also para. 82.

<sup>105</sup> United States' appellee's submission, para. 96.

assessment of facts, and not both".<sup>106</sup> At the same time, the Appellate Body has recognized that it is often difficult to distinguish clearly between issues that are purely legal or purely factual, or are mixed issues of law and fact.<sup>107</sup> The Appellate Body has clarified, however, that "[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."<sup>108</sup> With these considerations in mind, we assess whether, as the United States contends, the Panel finding at issue is a factual finding and whether China is challenging the Panel's weighing and appreciation of evidence.

5.19. In its analysis of China's claim, the Panel considered that there was no textual basis in Article 2.4.2 to limit a pattern to "outliers".<sup>109</sup> The Panel also disagreed with "China's contention that where a large number of export transactions are made at prices that are one standard deviation below the CONNUM-specific weighted-average price, such prices cannot form the relevant pattern within the meaning of the pattern clause of Article 2.4.2."<sup>110</sup> The Panel considered, based on the text of the second sentence of Article 2.4.2, that a pattern, as properly understood under that provision, may be composed of a large number of transactions. On this basis, the Panel found that China had not shown that the Nails test could only be used if the export price data were normally distributed, or single-peaked and symmetric.<sup>111</sup> What the Panel ultimately found is that China had failed to show that the Nails test relied on an implicit assumption regarding the distribution of the export prices for that test to identify properly a pattern within the meaning of the second sentence of Article 2.4.2. This is a legal conclusion reached by the Panel in light of its interpretation of the pattern clause as allowing a pattern to be composed of a large number of transactions. In reaching this conclusion, the Panel addressed the legal issue of whether the USDOC failed to identify a pattern of export prices which differ significantly within the meaning of the second sentence of Article 2.4.2 because of the first alleged quantitative flaw in the three challenged investigations. Therefore, while we agree with the United States that the manner in which the Nails test operates and whether the Nails test is premised on an assumption that data are distributed in a certain manner involve factual considerations<sup>112</sup>, the Panel's finding regarding the first alleged quantitative flaw involves a legal characterization and addresses a legal issue under the second sentence of Article 2.4.2.

5.20. Turning to China's appeal, China submits that the USDOC would have had to examine the underlying price distribution to confirm that the distribution is normal, or single-peaked and symmetrical for the Nails test to be capable of establishing the existence of a pattern "in an objective and unbiased manner".<sup>113</sup> This is because, according to China, if the export price data distribution is neither normal nor single-peaked and symmetrical, the Nails test will lead to arbitrary conclusions as to the existence of a pattern.<sup>114</sup> Contrary to the United States' suggestion<sup>115</sup>, the essence of China's appeal is not to challenge the Panel's weighing and appreciation of evidence pertaining to certain statistical principles or the Nails test. What China takes issue with is the Panel's assessment of whether the Nails test applied by the USDOC in the three challenged investigations identified a pattern consistently with the second sentence of Article 2.4.2. Based on the foregoing, we consider that China's claim pertaining to the first alleged quantitative flaw should be treated as one concerning the Panel's interpretation and application of the second sentence of Article 2.4.2. We therefore reject the United States' contention that we

<sup>106</sup> Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.46 (quoting Appellate Body Report, *China – GOES*, para. 183, in turn quoting Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872 (emphasis original)).

<sup>107</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 872.

<sup>108</sup> Appellate Body Report, *EC – Fasteners (Article 21.5 – China)*, para. 5.46 (quoting Appellate Body Report, *China – GOES*, para. 183, in turn quoting Appellate Body Report, *EC – Hormones*, para. 132).

<sup>109</sup> Panel Report, para. 7.61.

<sup>110</sup> Panel Report, para. 7.63.

<sup>111</sup> Panel Report, para. 7.67. In its analysis, the Panel also considered that there was "no correlation between the supposed statistical problem highlighted by China, namely, that a large number of export price transactions will be one standard deviation below the CONNUM-specific weighted average export price when data are not normally distributed or single-peaked and symmetric and what the USDOC was trying to achieve through the use of the one standard deviation threshold, i.e. identify whether the weighted average export price to the alleged target was lower than the CONNUM-specific weighted average export price". (Ibid., para. 7.64)

<sup>112</sup> United States' appellee's submission, para. 94.

<sup>113</sup> China's appellant's submission, para. 71.

<sup>114</sup> China's appellant's submission, para. 93.

<sup>115</sup> United States' appellee's submission, paras. 87-88.

should dismiss China's claim because China should have but failed to raise a claim under Article 11 of the DSU.<sup>116</sup>

5.21. Having reached this conclusion, we address the merit of China's claim under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. We recall that the first condition set forth in the second sentence of Article 2.4.2 is that "the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods". In *US – Washing Machines*, the Appellate Body considered that a pattern is "[a] regular and intelligible form or sequence discernible in certain actions or situations".<sup>117</sup> Accordingly, there must be regularity to the sequence of "export prices which differ significantly" and this sequence must be capable of being understood.<sup>118</sup> In particular, the word "intelligible" excludes the possibility of a pattern merely reflecting random price variation.<sup>119</sup> This means that an investigating authority is required to "identify a regular series of price variations relating to one or more particular purchasers, or one or more particular regions, or one or more particular time periods to find a pattern".<sup>120</sup> Although the Appellate Body recognized that a pattern may be identified in a variety of factual circumstances, it considered that the relevant "pattern" for the purposes of the second sentence of Article 2.4.2 comprises prices that are significantly *lower* than other export prices<sup>121</sup>, as identified either among different purchasers, or among different regions, or among different time periods.<sup>122</sup> The Appellate Body concluded:

[A] "pattern" for the purposes of the second sentence of Article 2.4.2 comprises *all* the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly *lower* than those other prices, or *all* the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly *lower* than those other prices, or *all* the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly *lower* than those other prices.<sup>123</sup>

5.22. Under the second sentence of Article 2.4.2, it is the investigating authority that is tasked with establishing the existence of such a pattern. This provision, however, does not prescribe a particular method for identifying a pattern. We thus agree with the Panel that while the pattern clause "specifies *what* an investigating authority should find ... it does not prescribe *how* an investigating authority should make such a finding."<sup>124</sup> Accordingly, investigating authorities enjoy a margin of discretion regarding the methods or tools they wish to use in establishing the existence of a pattern. However, irrespective of the method used, investigating authorities are required to identify "a pattern of export prices which differ significantly among different purchasers, regions or time periods" within the meaning of the second sentence of Article 2.4.2 and consistently with their obligations under the Anti-Dumping Agreement.

5.23. China acknowledges that the USDOC was free to use statistical tools to identify a pattern in the three challenged investigations.<sup>125</sup> According to China, however, statistical tools cannot be applied in a way that is disconnected from the analytical framework in which they were developed, or in disregard of the assumptions on which they rest.<sup>126</sup> China argues that using a one standard deviation threshold, "according to statistics, should generate output of 15.87% of sales beyond the [one standard deviation] threshold".<sup>127</sup> By contrast, when the data distribution is not normal or single-peaked and symmetrical, large quantities of sales (sometimes more than 50%) may fall

<sup>116</sup> United States' appellee's submission, para. 96.

<sup>117</sup> Appellate Body Report, *US – Washing Machines*, para. 5.25 (quoting Panel Report, *US – Washing Machines*, para. 7.45). The participants agree with this definition. (China's appellant's submission, para. 82; United States' appellee's submission, para. 32)

<sup>118</sup> Appellate Body Report, *US – Washing Machines*, para. 5.25.

<sup>119</sup> Appellate Body Report, *US – Washing Machines*, para. 5.25 (referring to Panel Report, *US – Washing Machines*, para. 7.45).

<sup>120</sup> Appellate Body Report, *US – Washing Machines*, para. 5.32.

<sup>121</sup> Appellate Body Report, *US – Washing Machines*, para. 5.36.

<sup>122</sup> Appellate Body Report, *US – Washing Machines*, para. 5.34.

<sup>123</sup> Appellate Body Report, *US – Washing Machines*, para. 5.36. (emphasis original)

<sup>124</sup> Panel Report, para. 7.37. (emphasis original)

<sup>125</sup> China's appellant's submission, para. 88.

<sup>126</sup> China's appellant's submission, paras. 69 and 89.

<sup>127</sup> China's appellant's submission, para. 109.

below the one standard deviation threshold.<sup>128</sup> To China, the USDOC thus identified prices that were "quite *typical* of the relevant market, thereby undermining the exceptional nature of the W-T comparison methodology".<sup>129</sup> While acknowledging that a properly identified pattern under the second sentence of Article 2.4.2 may be composed of a large number of export transactions<sup>130</sup>, China takes issue with the fact that the Nails test "routinely" discerned large quantities of sales below the one standard deviation threshold.<sup>131</sup> China concludes that, if the export price data are not normally distributed, or single-peaked and symmetric, using a one standard deviation threshold will lead to "arbitrary conclusions" as to the existence of a pattern.<sup>132</sup> China specifies that its claim is rooted in the legal concepts of "pattern" and "significance" used in the pattern clause.<sup>133</sup>

5.24. The United States responds that nothing in the second sentence of Article 2.4.2 compels an investigating authority to undertake the particular kind of "statistical probability analysis" discussed by China, even if that authority chooses to use the concept of standard deviation.<sup>134</sup> Moreover, the United States argues that, under the Nails test, the USDOC was not engaging in a statistical analysis, and that it did not make statistical inferences.<sup>135</sup> Rather, according to the United States, the USDOC used the one standard deviation threshold as "a transparent, predictable, and objective metric to characterize an exporter's pricing behavior".<sup>136</sup>

5.25. As recalled above, a pattern may not reflect random price variation, in the sense that the sequence of "export prices which differ significantly" must be both regular and intelligible.<sup>137</sup> As the Appellate Body has noted, in agreement with the panel in *US – Washing Machines*, "[i]f particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period", and "[t]he price differences are 'regular' and 'intelligible' because they pertain only to that particular purchaser, region or time period."<sup>138</sup>

5.26. Regarding the term "significantly" in the pattern clause, China observes that, "with regard to statistics", the adjective "significant" is defined as "unlikely to have occurred by chance alone".<sup>139</sup> As the Appellate Body in *US – Washing Machines* noted, the adjective "significant" can be defined as "important, notable or consequential".<sup>140</sup> It thus suggests something that is more than just a nominal or marginal difference in prices.<sup>141</sup> As the Appellate Body also observed, "[u]nder the second sentence of Article 2.4.2, the something that must be important, notable, or consequential is the difference in export prices."<sup>142</sup> We consider, therefore, that the term "significantly" as used in the pattern clause should not be read as conveying the specialized statistical meaning suggested by China.

5.27. With these considerations in mind, we observe that neither the text of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement nor the context suggests how many export prices may fall within a pattern under the second sentence of Article 2.4.2 in proportion to the number of export prices outside the pattern. The second sentence of Article 2.4.2 does not specify whether a pattern can comprise only a small proportion of all transactions. Under that provision, the investigating authority is tasked with identifying prices that fall within the pattern because those

<sup>128</sup> China's appellant's submission, para. 109. As China further argues, "when the authority relies on a standard-deviation-based threshold without having tested for the shape of the underlying price distribution, an unknown number of export prices will fall below ... that threshold". (Ibid., para. 90)

<sup>129</sup> China's appellant's submission, para. 110. (emphasis original)

<sup>130</sup> China's response to questioning at the oral hearing.

<sup>131</sup> China's appellant's submission, para. 109. To China, this is "symptomatic" of a serious flaw. (Ibid.)

<sup>132</sup> China's appellant's submission, para. 93.

<sup>133</sup> China's appellant's submission, para. 83; response to questioning at the oral hearing.

<sup>134</sup> United States' appellee's submission, paras 117-122 and 129.

<sup>135</sup> United States' appellee's submission, para. 130.

<sup>136</sup> United States' appellee's submission, para. 133.

<sup>137</sup> Appellate Body Report, *US – Washing Machines*, para. 5.32.

<sup>138</sup> Appellate Body Report, *US – Washing Machines*, para. 5.34 (quoting Panel Report, *US – Washing Machines*, para. 7.46).

<sup>139</sup> China's appellant's submission, para. 83 (quoting Oxford English Dictionary Online, definition of "significant", <<http://www.oed.com/view/Entry/179569?redirectedFrom=Significant#eid>>, accessed 4 February 2015 (Panel Exhibit CHN-92)). (emphasis added)

<sup>140</sup> Appellate Body Report, *US – Washing Machines*, para. 5.62.

<sup>141</sup> Appellate Body Report, *US – Washing Machines*, para. 5.62.

<sup>142</sup> Appellate Body Report, *US – Washing Machines*, para. 5.62.

prices form a regular and intelligible sequence of "export prices which differ significantly" in that they differ significantly from other prices and pertain to one or more purchasers (or regions or time periods) as compared to the other purchasers (or regions or time periods). As set out above, the price differences are regular and intelligible because they pertain only to the "targeted" purchaser, region, or time period.<sup>143</sup> Moreover, as the Appellate Body has found, "the distinguishing factor that allows that authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly from the prices not in the pattern."<sup>144</sup>

5.28. We now turn to China's argument that the Nails test "routinely" discerned large quantities of export prices below the one standard deviation threshold.<sup>145</sup> Neither the text of the second sentence of Article 2.4.2 nor the context suggests the proportion of export prices that may fall below a given price threshold when the investigating authority is in the process of identifying a pattern within the meaning of that provision.<sup>146</sup> Under the second sentence of Article 2.4.2, prices in the pattern need to differ significantly from the prices not in the pattern.<sup>147</sup> We also recall that a "pattern" comprises *all* the export prices to one or more particular purchasers (or one or more regions or one or more time periods) which differ significantly from the export prices to the other purchasers (or regions or time periods) because they are significantly *lower* than those other prices.<sup>148</sup> In our view, that a large number of export prices may fall below the one standard deviation threshold does not necessarily preclude an investigating authority from finding that the export prices to the "target" (be it a purchaser, a region, or a time period) differ significantly from the other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2.

5.29. Assuming the export prices to the "target" are found to differ from the other export prices in a case where a large number of individual export prices fall below the one standard deviation threshold, the pattern clause also requires the investigating authority to determine whether these differences are significant. In addition, the second sentence of Article 2.4.2 requires that an explanation be provided as to why these differences cannot be taken into account appropriately by the use of a W-W or T-T comparison before an investigating authority may apply the W-T methodology. As the Appellate Body has stated, the explanation clause "contemplates that there may be circumstances in which targeted dumping could be adequately addressed through the normal symmetrical comparison methodologies".<sup>149</sup> Consequently, our understanding of the pattern clause does not undermine the exceptional nature of the W-T methodology.<sup>150</sup>

5.30. Finally, we note the Panel's statement that there is "no correlation" between the "supposed statistical problem" China highlighted and what the USDOC was trying to achieve.<sup>151</sup> The Panel distinguished between (i) the issue raised by China that a large number of *individual export prices* may fall below the one standard deviation threshold where the data distribution is not normal or single-peaked and symmetrical; and (ii) the objective of the standard deviation test as applied by the USDOC in the three challenged investigations, which was to identify on the basis of *weighted-average prices* whether the weighted-average export price to the alleged target was lower than the CONNUM-specific weighted-average price. As the Panel observed, "[t]he USDOC did not apply the Nails test to a data set which consisted of individual export transaction prices and did not seek to identify how many export transactions fell one standard deviation below the CONNUM-specific weighted average export price."<sup>152</sup> On appeal, China argues that the act of averaging reduces the number of data points, but "in no way affects how the underlying export prices are distributed".<sup>153</sup>

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<sup>143</sup> Appellate Body Report, *US – Washing Machines*, para. 5.34.

<sup>144</sup> Appellate Body Report, *US – Washing Machines*, para. 5.26.

<sup>145</sup> China's appellant's submission, para. 109.

<sup>146</sup> At the oral hearing, and in light of the Appellate Body report in *US – Washing Machines*, the United States agreed with the European Union that the "pattern transactions" are all of the export transactions to the alleged target, not all the export transactions that fall below the one standard deviation threshold.

<sup>147</sup> Appellate Body Report, *US – Washing Machines*, para. 5.26.

<sup>148</sup> Appellate Body Report, *US – Washing Machines*, para. 5.36. (emphasis original)

<sup>149</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 131. See also Appellate Body Report, *US – Washing Machines*, para. 5.18.

<sup>150</sup> Appellate Body Report, *US – Washing Machines*, para. 5.18. See also Appellate Body Reports, *US – Zeroing (Japan)*, para. 131; and *US – Softwood Lumber V (Article 21.5 – Canada)*, paras. 86 and 97.

<sup>151</sup> Panel Report, para. 7.64.

<sup>152</sup> Panel Report, para. 7.64.

<sup>153</sup> China's appellant's submission, para. 112.



It further argues that using averages "increase[ed] the likelihood that [alleged target] sales [would] be found below the one-standard-deviation threshold."<sup>154</sup> We see merit in China's allegation that, whether or not averages are used, the distribution of the underlying individual export prices itself does not change. We are also not excluding the possibility that a given distribution of individual export prices may make it more likely that the weighted-average price to the "target" falls below the one standard deviation threshold. However, as we considered above, the fact that a large number of export transactions are made at low prices and may fall below the one standard deviation threshold does not necessarily preclude an investigating authority from finding that the export prices to the "target" differ significantly from the other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2.

5.31. In sum, that a large number of export prices may fall below the one standard deviation threshold where the distribution of the export price data is not normal or single-peaked and symmetrical does not necessarily preclude an investigating authority from finding that the export prices to the "target" differ significantly from the other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2. Accordingly, we consider that China has not established that the standard deviation test as applied by the USDOC in the three challenged investigations is *only* capable of identifying prices that differ from other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2 where the distribution of the export price data is normal, or single-peaked and symmetrical. On this basis, we find that China has not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the first alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

#### **5.1.2.2 Whether the Panel erred under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the third alleged quantitative flaw**

5.32. The third alleged quantitative flaw with the Nails test relates to the price gap test applied by the USDOC in the three challenged investigations in order to determine whether the differences identified under the standard deviation test were significant.<sup>155</sup> As set out above, under that test, the USDOC would examine, on a CONNUM-specific basis, whether the alleged target price gap was wider than the weighted-average non-target price gap.<sup>156</sup>

5.33. Before the Panel, China submitted that, "in terms of statistics", in the case of any "peaked" data distribution with "tails", the gap between any two given prices located at the tail is inherently wider than the gaps at the peak.<sup>157</sup> Therefore, China argued, when the USDOC found the alleged target price gap, which was based on prices located at the tail, to be wider than the weighted-average non-target price gap, which was based on prices located nearer to the peak, it merely confirmed an "inherent feature of every peaked distribution with tails", rather than identifying export prices which differ significantly within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.<sup>158</sup>

5.34. The Panel considered that the first issue was whether it is factually correct that, in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the data distribution and the weighted-average non-target price gap was based on prices located nearer to the peak of that distribution.<sup>159</sup> The Panel stated that, "if [it found] this assumption to be factually correct, [it would] have to examine whether the USDOC acted inconsistently with the pattern clause of Article 2.4.2 because when it compared the alleged target price gap, based on prices located at the tail of the distribution, with the weighted average non-target price gap, based on prices nearer to the peak, it only confirmed an inherent feature of every peaked distribution with tails."<sup>160</sup>

<sup>154</sup> China's appellant's submission, para. 113.

<sup>155</sup> Panel Report, paras. 7.4 and 7.75.

<sup>156</sup> Panel Report, para. 7.75. See also para. 5.8. above.

<sup>157</sup> Panel Report, para. 7.75.

<sup>158</sup> Panel Report, para. 7.76 (quoting China's second written submission to the Panel, para. 43 (emphasis omitted by the Panel)).

<sup>159</sup> Panel Report, para. 7.78.

<sup>160</sup> Panel Report, para. 7.78.

5.35. After having explained the concepts of "peaks" and "tails"<sup>161</sup>, the Panel addressed China's argument that, if the export price data were "normally" distributed, the alleged target price would "by definition" be located at the tail of that distribution.<sup>162</sup> The Panel observed that China had presented evidence that, in the three challenged investigations, the export price data were not normally distributed or even single-peaked and symmetric. The Panel could therefore not conclude that the alleged target price was, as alleged by China, located at the tail of the distribution "by definition".<sup>163</sup> The Panel further considered that China did not show that, even though the export price data were not normally distributed in the three challenged investigations, the distribution still had a tail, and that the alleged target price was located at the tail.<sup>164</sup> The Panel concluded that "China ha[d] not shown that the assumption on which the third alleged quantitative flaw rests, which is that the alleged target price gap was based on prices located at the tail of the distribution of the export price data, is factually correct insofar as the three challenged investigations are concerned."<sup>165</sup> On this basis, the Panel rejected China's claim in respect of the third alleged quantitative flaw with the Nails test.<sup>166</sup>

5.36. On appeal, China submits that "the Panel was ... wrong to dismiss [its] argument that, even assuming the existence of a 'normal' distribution, USDOC's attribution of 'significance' to wider price gaps in the 'tail' of the price distribution compared to price gaps closer to the 'mean' merely confirmed an inherent feature of such distributions."<sup>167</sup> The United States responds that the Panel finding at issue is a factual finding<sup>168</sup>, and that China's appeal reveals that it is in fact challenging the Panel's weighing and appreciation of facts.<sup>169</sup> The United States thus submits that we should decline to rule on China's arguments because China should have but failed to raise a claim under Article 11 of the DSU.<sup>170</sup> Accordingly, the first question before us is whether China's claim pertaining to the third alleged quantitative flaw could be raised on appeal as a claim regarding the Panel's interpretation or application of Article 2.4.2 of the Anti-Dumping Agreement. In addressing this issue, we assess whether, as the United States contends, the Panel finding at issue is a factual finding and whether China is challenging the Panel's weighing and appreciation of evidence.

5.37. As set out in paragraph 5.35. above, the Panel rejected China's claim in respect of the third alleged quantitative flaw on the sole basis that China had not shown that it was "factually correct" that the alleged target price gap was based on prices located at the tail of the distribution of the export price data in the three challenged investigations.<sup>171</sup> In reaching this finding, the Panel did not examine the legal issue of whether the USDOC acted inconsistently with the pattern clause because, when it applied the price gap test in cases of peaked distributions with tails, the USDOC only confirmed an inherent feature of that type of distribution. In our view, the Panel's finding in respect of the third alleged quantitative flaw hinges on the Panel's assessment of China's factual allegations as to whether the alleged target price gap was based on prices located at a tail of a distribution in each of the three challenged investigations. In rejecting China's claim in respect of the third alleged quantitative flaw, the Panel nonetheless addressed the legal issue of whether

<sup>161</sup> As the Panel explained, normally distributed data, when graphically represented, take the shape of a bell. That bell has a single peak in the middle of the bell curve and two tails, one on the left and one on the right. In that type of distribution, the weighted average of all prices is at the peak. Also, most of the prices are concentrated at the peak, whereas fewer prices are located at the tail. The Panel further noted that "[b]oth parties agree that the gaps between any two given prices located at the tail of the distribution are wider than that at the peak of the distribution if there is normal or single-peaked and symmetric distribution." (Panel Report, paras. 7.79-7.80)

<sup>162</sup> Panel Report, para. 7.81.

<sup>163</sup> Panel Report, para. 7.81.

<sup>164</sup> Panel Report, para. 7.82.

<sup>165</sup> Panel Report, para. 7.82. See also para. 7.84.

<sup>166</sup> Panel Report, para. 7.84.

<sup>167</sup> China's appellant's submission, para. 72. (fns omitted)

<sup>168</sup> The United States asserts that the Panel rejected China's claim "without having to interpret and apply the pattern clause of Article 2.4.2 because China failed to establish the factual premise underlying its claim." (United States' appellee's submission, para. 99)

<sup>169</sup> The United States refers to China's arguments that: (i) the fact that the third quantitative flaw arises only when the price distribution has a left tail does not mean that China did not demonstrate that the assumption on which that flaw rests is factually correct; (ii) even if not normally distributed, the data for some of the CONNUMs had left tails; and (iii) in every case, either the first or third quantitative flaw or both arose, but there is no way to know which flaw arose in a given case, because the USDOC declined to examine the data distribution in the three challenged investigations. (United States' appellee's submission, paras. 102-104 (referring to China's appellant submission, paras. 115-116))

<sup>170</sup> United States' appellee's submission, para. 105.

<sup>171</sup> Panel Report, para. 7.84.

the USDOC failed to identify a pattern of export prices which differ significantly within the meaning of the second sentence of Article 2.4.2 because of this alleged flaw in the three challenged investigations.

5.38. On appeal, China claims that the Panel erred in dismissing its argument that the USDOC's attribution of "significance" to wider price gaps in the tail of price distributions compared to price gaps closer to the peak amounted to nothing more than a confirmation of an inherent characteristic as to the shape of distributions whose existence is implicitly assumed by the test itself.<sup>172</sup> In support of that claim, China argues that, *inter alia*, the "USDOC's failure to test the databases[,] to determine if the data were 'normally' distributed or had tails to the left of the mean, means that the conclusions reached by USDOC in every case were random (or arbitrary)."<sup>173</sup> In other words, China argues that, irrespective of the actual distribution of the data in the three challenged investigations and whether the relevant distributions had a left tail at which the alleged target price gap was located, the USDOC failed to identify a pattern of export prices which differ significantly because it failed to consider how the export prices were distributed. We thus understand the focus of China's claim to be that the USDOC had an obligation to verify, in the three challenged investigations, whether the data had a left tail and whether the alleged target price gap was based on prices located at that tail so as to avoid drawing random or arbitrary conclusions as to the existence of a pattern.

5.39. Accordingly, we understand China to take issue with the fact that the Panel assessed its claim by considering whether, as a matter of fact, in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the distribution<sup>174</sup>, instead of considering whether the USDOC had an obligation to verify how the data were distributed to identify properly a pattern within the meaning of the second sentence of Article 2.4.2. To us, whether the factual assessment conducted by the Panel was indeed relevant to make a finding under the second sentence of Article 2.4.2 in respect of the third alleged quantitative flaw is an issue that should be assessed under that provision. Specifically, the issue on appeal is whether the Panel erred under the second sentence of Article 2.4.2 in rejecting, on the basis of factual considerations pertaining to the distribution of the export price data in the three challenged investigations, China's claim that the USDOC failed to identify a pattern of export prices which differ "significantly". This closely relates to the legal issue that was before the Panel, namely, whether, because of the third alleged quantitative flaw in the three challenged investigations, the USDOC failed to identify a pattern of export prices which differ significantly within the meaning of the second sentence of Article 2.4.2. In light of the foregoing, we consider that China's appeal raises a legal issue under Article 2.4.2. We therefore reject the United States' contention that we should dismiss China's claim because China should have but failed to raise a claim under Article 11 of the DSU.<sup>175</sup>

5.40. Turning to the merit of China's claim, we recall China's argument that the "USDOC's failure to test the databases[,] to determine if the data were 'normally' distributed or had tails to the left of the mean, means that the conclusions reached by USDOC in every case were random (or arbitrary)."<sup>176</sup> The United States argues that China does not meet its burden of showing that the Nails test, as applied in the three challenged investigations, is inconsistent with Article 2.4.2.<sup>177</sup> Specifically, the United States takes issue with the fact that, to China, "the actual evidence in the underlying investigations about which it has pursued 'as applied' claims, [that is], the actual export sales data reported by respondent interested parties, does not matter."<sup>178</sup> It also argues that China has failed to support its argument by using facts from the administrative records of the three investigations that are the subject of its "as applied" challenges.

5.41. As set out earlier<sup>179</sup>, under the second sentence of Article 2.4.2, it is the investigating authority that is tasked with establishing the existence of a pattern. Whereas investigating authorities enjoy a margin of discretion as to how they wish to proceed in establishing the existence of a pattern, they are required to identify a pattern within the meaning of the

<sup>172</sup> China's Notice of Appeal, para. 7.

<sup>173</sup> China's appellant's submission, para. 116. See also para. 6.

<sup>174</sup> See Panel Report, para. 7.78.

<sup>175</sup> See United States' appellee's submission, para. 105.

<sup>176</sup> China's appellant's submission, para. 116. See also para. 6.

<sup>177</sup> United States' appellee's submission, paras. 140-142.

<sup>178</sup> United States' appellee's submission, para. 140.

<sup>179</sup> See para. 5.22. above.

second sentence of Article 2.4.2 and consistently with their obligations under the Anti-Dumping Agreement.

5.42. However, we recall that, in WTO dispute settlement, the burden of proof rests on the party that asserts the affirmative of a claim or defence. A complaining party will satisfy its burden when it establishes a *prima facie* case by putting forward adequate legal arguments and evidence. Therefore, a responding Member's measure is considered WTO-consistent unless sufficient evidence is presented to establish the contrary.<sup>180</sup> In the instant case, China has brought "as applied" claims pertaining to the three challenged investigations. It is thus for China to demonstrate *prima facie* that, because of the third alleged quantitative flaw, the USDOC failed to establish the existence of a "pattern of export prices which differ significantly" in the three challenged investigations within the meaning of the second sentence of Article 2.4.2.

5.43. On appeal, China emphasizes that "any randomly chosen pair of prices in the tail of a peaked distribution will, by definition, tend to display a bigger gap than a randomly chosen pair of prices near the peak."<sup>181</sup> This is because in "any peaked distribution of price data ... a large mass of prices occurs around the price at the peak, whereas only a few occurrences are found in the tails – because observations occur less frequently at those price levels."<sup>182</sup> China clarifies that the third alleged quantitative flaw arises in situations in which there is a tail to the left of the mean, irrespective of whether the data distribution is normal, or single-peaked and symmetrical. Conversely, where the relevant data distribution does not have a left tail, that particular flaw does not arise.<sup>183</sup>

5.44. As per China's submission, the third alleged quantitative flaw arises where the alleged target price gap is based on prices located at the left tail of the data distribution. We consider that, in light of China's "as applied" claim, China cannot successfully bring a claim of inconsistency with the second sentence of Article 2.4.2 unless it shows that the relevant data distributions in each of the three challenged investigations had a left tail and that the alleged target price gap was based on prices located at that tail. In our view, the Panel therefore correctly considered that "the third alleged quantitative flaw rests on the assumption that in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the distribution of the export price data and the weighted average non-target price gap was based on prices located nearer to the peak of that distribution."<sup>184</sup> The Panel found that China had not shown that this assumption is "factually correct insofar as the three challenged investigations are concerned"<sup>185</sup>, and rejected China's claim on this basis.<sup>186</sup> In light of our analysis above, we consider that this was sufficient ground for the Panel to reject China's "as applied" claim in respect of the third alleged quantitative flaw with the Nails test. Accordingly, the Panel did not err under Article 2.4.2 in rejecting China's claim because "China ha[d] not shown that the assumption on which the alleged third quantitative flaw rests, namely, that the alleged target price gap was based on prices located at the tail of the distribution in the three challenged investigations, is factually correct".<sup>187</sup>

5.45. In sum, the Panel considered that "the third alleged quantitative flaw rests on the assumption that in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the distribution of the export price data and the weighted average non-target price gap was based on prices located nearer to the peak of that distribution."<sup>188</sup> The Panel was correct in rejecting China's claim on the basis of its finding that China had not shown that this assumption is "factually correct insofar as the three challenged investigations are concerned".<sup>189</sup> Therefore, we find that China has not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 of the Anti-Dumping

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<sup>180</sup> See e.g. Appellate Body Reports, *Canada – Dairy (Article 21.5 – New Zealand and US II)*, para. 66; and *Chile – Price Band System (Article 21.5 – Argentina)*, para. 134.

<sup>181</sup> China's appellant's submission, para. 104 (referring to First expert statement by Professor Dr Peter Egger (26 February 2015) (Panel Exhibit CHN-1 revised), para. 62).

<sup>182</sup> China's appellant's submission, para. 104.

<sup>183</sup> China's appellant's submission, para. 102 and fn 24 to para. 72.

<sup>184</sup> See Panel Report, para. 7.78.

<sup>185</sup> Panel Report, para. 7.82.

<sup>186</sup> Panel Report, para. 7.84.

<sup>187</sup> Panel Report, para. 7.84.

<sup>188</sup> Panel Report, para. 7.78.

<sup>189</sup> Panel Report, para. 7.82.

Agreement in rejecting China's claim in respect of the third alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

### 5.1.2.3 Whether the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement

5.46. We now turn to China's claim that the Panel acted inconsistently with Article 17.6(i) of the Anti-Dumping Agreement in dismissing China's claim regarding the first and third alleged quantitative flaws.<sup>190</sup> The United States responds that China makes no effort to substantiate its claim under Article 17.6(i).<sup>191</sup> Specifically, the United States argues that "China does nothing to support its claim beyond referring back to the elaboration of its arguments concerning the interpretation and application of Article 2.4.2 of the [Anti-Dumping] Agreement, which were presented earlier in China's appellant submission."<sup>192</sup>

5.47. The first sentence of Article 17.6(i) provides that, "in its assessment of the facts of the matter, the panel shall determine whether the authorities' establishment of the facts was proper and whether their evaluation of those facts was unbiased and objective." Thus, a claim alleging an error of law or incorrect legal interpretation attributed to a panel is different from a claim that the "assessment of the facts of the matter" by that panel is inconsistent with Article 17.6(i). A claim under Article 17.6(i) must concern the panel's assessment of the facts of the matter and must involve a showing that the assessment is inconsistent with this provision. For this reason, a claim under Article 17.6(i) should not be made *merely* subsidiary to a claim that the panel erred in its application of a WTO provision. Moreover, the Appellate Body has cautioned that it "will not interfere lightly with [a] panel's exercise of its discretion" under Article 17.6(i).<sup>193</sup> Accordingly, "[a]n appellant must persuade [the Appellate Body], with sufficiently compelling reasons, that [it] should disturb a panel's assessment of the facts".<sup>194</sup> For a claim to succeed under Article 17.6(i), it is not sufficient for an appellant simply to disagree with the panel's weighing of the evidence, without substantiating the claim of error by the panel.<sup>195</sup>

5.48. In support of its claim under Article 17.6(i), China argues that, "in dismissing [its] arguments regarding the first and third quantitative flaws, the Panel failed to ensure that USDOC's establishment of the facts was proper; and by approving the Nails [t]est applied in the [three] challenged determinations, the Panel permitted USDOC to evaluate the relevant facts in a manner that fell short of being objective and unbiased."<sup>196</sup> In bringing its claim, China does not challenge the Panel's assessment of the facts pursuant to Article 17.6(i). China's claim is neither about the Panel's determination of whether the USDOC's establishment of the facts was proper, nor is it about the Panel's determination of whether the USDOC's evaluation of those facts was unbiased and objective. China appears merely to take issue with the Panel's dismissal of its claim in respect of the first and third alleged quantitative flaws with the Nails test. In particular, China does not advance any argument that is separate and different from its arguments concerning the alleged error in the Panel's interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. This does not suffice for us to find that the Panel failed to comply with Article 17.6(i).<sup>197</sup> For this reason, we find that China has not established that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement.

5.49. In light of all the considerations above, we uphold the Panel's finding, in paragraph 8.1.a.vi of its Report, that "China has not established that the United States acted inconsistently with

<sup>190</sup> China's appellant's submission, para. 118. See also para. 123.

<sup>191</sup> United States' appellee's submission, para. 150. Moreover, the United States contends that China's claim under Article 17.6(i) of the Anti-Dumping Agreement must fail because China should have raised a claim also under Article 11 of the DSU. (*Ibid.*, para. 149)

<sup>192</sup> United States' appellee's submission, para. 153 (referring to China's appellant's submission, para. 123).

<sup>193</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 169, in turn quoting Appellate Body Report, *US – Wheat Gluten*, para. 151).

<sup>194</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 125 (quoting Appellate Body Report, *EC – Bed Linen (Article 21.5 – India)*, para. 170).

<sup>195</sup> Appellate Body Report, *EC – Tube or Pipe Fittings*, para. 128.

<sup>196</sup> China's appellant's submission, para. 123.

<sup>197</sup> In reaching this conclusion, we do not need to address whether, as the United States contends, China's challenge should have proceeded also under Article 11 of the DSU.

Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG, Coated Paper and Steel Cylinders investigations*" insofar as this finding relates to the first and third alleged quantitative flaws with the Nails test.<sup>198</sup>

### 5.1.3 Qualitative issues

5.50. China claims that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement because it failed to recognize that investigating authorities are required to consider objective market factors in determining whether relevant pricing differences are "significant".<sup>199</sup>

5.51. The Panel found that, in determining whether export prices "differ significantly" within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, an investigating authority is not required to consider the reasons for the identified differences in export prices.<sup>200</sup> The Panel further disagreed with China that an investigating authority is required to examine whether the quantitatively significant differences in export prices examined under the pattern clause are unconnected with "targeted dumping".<sup>201</sup> The Panel clarified, however, that "the word 'significant', as used in the pattern clause ..., has a qualitative dimension in addition to a quantitative one" and that, accordingly, "purely larger quantitative or numerical differences cannot, in all factual circumstances, lead to the conclusion that the identified differences in export prices forming the relevant pattern are significant within the meaning of the pattern clause of Article 2.4.2, without regard to whether such differences are also qualitatively significant."<sup>202</sup>

5.52. The Panel considered that, "when an investigating authority examines whether observed quantitative differences in export prices forming the relevant pattern are qualitatively significant, that authority is required to consider how such export prices differ and not why they differ."<sup>203</sup> In this respect the Panel noted that, "[w]hen examining how export prices differ, the investigating authority may find that a given margin of difference in export prices, which are in mathematical or numerical terms, 'sufficiently great', are not 'worthy of attention' and hence not 'significant', in light of the circumstances surrounding an investigation, including most importantly the nature of the product under investigation and the relevant industry."<sup>204</sup>

5.53. The Panel thus concluded that "the USDOC was not required to consider the reasons for the differences in export prices forming the relevant pattern in order to determine whether those differences were qualitatively significant within the meaning of the pattern clause of Article 2.4.2" and, accordingly, "reject[ed] China's claim under the pattern clause of Article 2.4.2 in the three challenged investigations insofar as it relates to the alleged qualitative issues with the Nails test."<sup>205</sup>

5.54. China requests us to modify the Panel's interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and find that investigating authorities must consider qualitative factors when examining whether export prices "differ significantly" within the meaning of that provision.<sup>206</sup> According to China, although investigating authorities may not be required to consider an exporter's subjective motivation or intent behind the observed price differences<sup>207</sup>, they are required to consider relevant "objective market factors", such as seasonality or market-driven fluctuations in the costs of production.<sup>208</sup> China thus takes issue with the Panel's distinction between *how* and *why* prices differ and with the fact that the Panel focused on a narrow reading of the word "reasons" that was used by China. According to China, a distinction between *how* and *why* prices differ is meaningless, unless it is equated with a distinction between "objective market factors" and "subjective intent".<sup>209</sup> Moreover, the Panel should have recognized that China

<sup>198</sup> Having upheld this finding, we need not examine China's request for completion of the legal analysis.

<sup>199</sup> China's appellant's submission, para. 157. See also paras. 187-190.

<sup>200</sup> Panel Report, paras. 7.107-7.108.

<sup>201</sup> Panel Report, para. 7.109.

<sup>202</sup> Panel Report, para. 7.110.

<sup>203</sup> Panel Report, para. 7.111.

<sup>204</sup> Panel Report, para. 7.111.

<sup>205</sup> Panel Report, para. 7.114.

<sup>206</sup> China's appellant's submission, para. 188.

<sup>207</sup> China's appellant's submission, para. 163.

<sup>208</sup> China's appellant's submission, para. 157.

<sup>209</sup> China's appellant's submission, para. 179.

used the word "reasons" to refer to "objective reasons" – i.e. objective market factors – not the subjective intent of exporters.<sup>210</sup> China also highlights that, in its analysis, the Panel relied on the panel's findings in *US – Washing Machines*, which have since been reversed on appeal.<sup>211</sup> Turning to the Panel's finding that the United States did not act inconsistently with the second sentence of Article 2.4.2 with respect to the alleged qualitative issues with the Nails test, China requests us to reverse this finding by the Panel.<sup>212</sup>

5.55. The United States responds that China's proposed interpretation of the second sentence of Article 2.4.2 is at odds with the Appellate Body's findings in *US – Washing Machines* and is not supported by the text of that provision.<sup>213</sup> The United States argues that the Panel did not find, as China suggests, that investigating authorities are not required to consider "objective market factors" in determining whether relevant price differences are significant<sup>214</sup> and that China's alleged "objective market factors" are in fact "reasons" underlying the export price differences, which need not be taken into account by investigating authorities.<sup>215</sup> According to the United States, seasonality and market-driven fluctuations in the costs of production, unlike the "objective market factors" identified by the Appellate Body in *US – Washing Machines*, do not relate to how the export prices are different and whether the observed differences are significant in a qualitative sense. Rather, the United States contends, seasonality and costs fluctuations aim to assess whether there are reasons for export price differences other than "targeted dumping".<sup>216</sup> Finally, for the United States, China's criticism of the Panel Report for drawing support from the panel report in *US – Washing Machines* is baseless given that the Panel did not agree with the specific finding in that case that was subsequently reversed on appeal.<sup>217</sup>

5.56. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement states:

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.

5.57. In *US – Washing Machines*, the Appellate Body interpreted the term "significantly" in the pattern clause as having both quantitative and qualitative dimensions, and thus considered that assessing the extent of the differences in export prices in order to establish whether those export prices differ *significantly* for the purposes of the second sentence of Article 2.4.2 entails both quantitative and qualitative dimensions.<sup>218</sup> The Appellate Body reversed the panel's findings in *US – Washing Machines*<sup>219</sup>, to the extent that the panel had found that "a pattern of export prices which differ significantly among purchasers, regions or time periods" can be established "on the basis of purely quantitative criteria".<sup>220</sup>

5.58. In this dispute, the Panel found that "the word 'significant', as used in the pattern clause of Article 2.4.2, has a qualitative dimension in addition to a quantitative one."<sup>221</sup> Accordingly, the Panel stated that "purely larger quantitative or numerical differences cannot, in all factual circumstances, lead to the conclusion that the identified differences in export prices forming the relevant pattern are significant within the meaning of the pattern clause of Article 2.4.2, without regard to whether such differences are also qualitatively significant."<sup>222</sup> We agree with these

<sup>210</sup> China's appellant's submission, paras. 180 and 182.

<sup>211</sup> China's appellant's submission, paras. 161 and 176.

<sup>212</sup> China's appellant's submission, para. 190. See also paras. 156-158. The request for reversal itself is in paragraph 158 of China's appellant's submission.

<sup>213</sup> United States' appellee's submission, para. 217.

<sup>214</sup> United States' appellee's submission, para. 208.

<sup>215</sup> United States' appellee's submission, paras. 219-222.

<sup>216</sup> United States' appellee's submission, paras. 219-222.

<sup>217</sup> United States' appellee's submission, paras. 242-246.

<sup>218</sup> Appellate Body Report, *US – Washing Machines*, para. 5.63.

<sup>219</sup> See Panel Report, *US – Washing Machines*, paras. 7.52 and 8.1.a.ii. See also paras. 7.119.a and 8.1.a.v.

<sup>220</sup> Appellate Body Report, *US – Washing Machines*, para. 5.66.

<sup>221</sup> Panel Report, para. 7.110.

<sup>222</sup> Panel Report, para. 7.110.

statements by the Panel, to the extent that they are understood as suggesting that the term "significantly" in Article 2.4.2 implies that, in all circumstances, a qualitative analysis is also required. We do not read these statements by the Panel to suggest, as the panel in *US – Washing Machines* did<sup>223</sup>, that there may be circumstances in which a pattern of export prices which differ significantly within the meaning of Article 2.4.2 can be established on the basis of purely quantitative criteria. We therefore disagree with China that this Panel drew support from findings made by the panel in *US – Washing Machines*, which were subsequently reversed by the Appellate Body because that panel found that differences may be found to be significant based on purely quantitative criteria.<sup>224</sup>

5.59. China also contends that the Panel erred in the interpretation of the pattern clause, because it considered that an investigating authority is not required to take into consideration the "objective reasons" for the price differences in its qualitative analysis of whether export prices differ significantly. China equates these objective reasons underlying the differences in prices with the "objective market factors", which the Appellate Body in *US – Washing Machines* said must be considered in the qualitative assessment of significance.<sup>225</sup> China draws a distinction between objective reasons, which it contends should be considered under the pattern clause, and subjective intent or motivations, which need not be considered.<sup>226</sup> We disagree with China's characterization of the terms "objective reasons", "motivations", and "objective market factors".

5.60. In *US – Washing Machines*, the Appellate Body noted that the significance of price differences may be affected by "objective market factors", such as the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand.<sup>227</sup> These objective market factors, however, are relevant to the identification of a pattern within the meaning of Article 2.4.2, insofar as they affect the significance of the price differences and not because they provide reasons for the price differences. The Appellate Body clarified that the words "significantly" and "pattern" in the second sentence of Article 2.4.2 do not imply an examination into the cause of (or reasons for) the differences in prices and that the text of this provision does not impose an additional requirement to ascertain whether the significant differences found to exist are unconnected with "targeted dumping".<sup>228</sup> The Appellate Body noted, in this regard, that it used the phrase "cause of" the price differences or "reasons for" the price differences to refer to the issue of whether the investigating authority should consider if the price differences are the result of normal price fluctuations or reflect "targeting" conduct to establish the existence of a pattern.<sup>229</sup>

5.61. In addition, the Appellate Body considered that the text of the second sentence of Article 2.4.2 does not imply an examination of the motivation for, or intent behind, the differences in prices.<sup>230</sup> Therefore, while the pattern clause requires, in addition to a quantitative analysis, a qualitative analysis of the significance of price differences, it neither requires that an investigating authority ascertain the cause of (or objective reasons for) the price differences, nor does it require that an authority ascertain the motivation for (or intent behind) the differences in prices.

5.62. In *US – Washing Machines*, the Appellate Body distinguished between the above-mentioned "objective market factors" that affect the significance of price differences and the reasons for or cause of such price differences, which need not be considered under the pattern clause.<sup>231</sup> The scope and type of qualitative analysis under the pattern clause is informed by the text of the second sentence of Article 2.4.2, which refers to a pattern of export prices which differ "significantly". What is relevant to the pattern clause is the qualitative dimension of the "significance" of price differences, not an overall qualitative analysis of the pattern. An inquiry into the cause of, or reasons for, the price difference must thus be distinguished from a qualitative assessment of the "significance" of the price differences.

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<sup>223</sup> See Panel Report, *US – Washing Machines*, paras. 7.52 and 8.1.a.ii. See also paras. 7.119.a and 8.1.a.v.

<sup>224</sup> See China's appellant's submission, paras. 161 and 176.

<sup>225</sup> China's appellant's submission, paras. 180-181.

<sup>226</sup> China's appellant's submission, paras. 180-181.

<sup>227</sup> Appellate Body Report, *US – Washing Machines*, para. 5.63.

<sup>228</sup> Appellate Body Report, *US – Washing Machines*, para. 5.65.

<sup>229</sup> Appellate Body Report, *US – Washing Machines*, fn 173 to para. 5.57. (emphasis omitted)

<sup>230</sup> Appellate Body Report, *US – Washing Machines*, para. 5.65.

<sup>231</sup> Appellate Body Report, *US – Washing Machines*, para. 5.66.



5.63. We therefore disagree with China's suggestion<sup>232</sup> that the "objective reasons" for differences in prices correspond to the "objective market factors" that the Appellate Body in *US – Washing Machines* considered may be relevant to the qualitative assessment of whether differences are significant.<sup>233</sup> In that dispute, the Appellate Body considered that neither the objective reasons nor the motivations for differences in prices are relevant to the determination of whether export prices differ significantly within the meaning of Article 2.4.2.<sup>234</sup>

5.64. We further note that the Panel stated that, in examining whether price differences are qualitatively significant, an investigating authority "is required to consider how such export prices differ".<sup>235</sup> As the Panel further stated, in so doing, "the investigating authority may find that a given margin of difference in export prices, which [is] in mathematical or numerical terms, 'sufficiently great', [is] not 'worthy of attention' and hence not 'significant', in light of the circumstances surrounding an investigation, including most importantly the nature of the product under investigation and the relevant industry."<sup>236</sup> The Panel Report in this dispute, which was circulated prior to the Appellate Body report in *US – Washing Machines*, does not refer explicitly to "objective market factors" and does not list all the indicative objective market factors that the Appellate Body refers to in *US – Washing Machines*.<sup>237</sup> Nevertheless, the Panel's reference to "the circumstances surrounding an investigation" and to "the nature of the product under investigation and the relevant industry" make it clear that the Panel considered that a qualitative assessment of significance under the second sentence of Article 2.4.2 involves the consideration of factors such as those that the Appellate Body mentioned as examples of "objective market factors".

5.65. China further contends that "[t]he Panel failed to recognize that the qualitative factors to be considered are objective market factors, such as seasonal pricing cycles (seasonality) or market-driven fluctuations in the costs of production."<sup>238</sup> In China's view, "the quantitative difference between prices at the peak and the trough of a seasonal price cycle may *not* reveal prices that 'differ significantly' in the sense of Article 2.4.2, if the numerical difference is consistent with the regular seasonal fluctuations for the 'product under consideration' or 'the industry at issue'."<sup>239</sup> Moreover, China contends, "[a]nother relevant qualitative dimension that may have to be examined is where the 'industry at issue' is subject to a *secular decline in costs of production* over the course of the relevant time period, which may have a direct impact on the trend (or pattern) in prices for the product at issue."<sup>240</sup> The United States responds that requiring an investigating authority to consider seasonality or cost fluctuations to assess significance would mean requiring that authority to examine "the cause of (or reasons for) the differences in prices".<sup>241</sup> To the United States, seasonality and cost fluctuations go to *why* export prices differ; they do not provide information about *how* the export prices are different, and whether the observed differences are significant.<sup>242</sup>

5.66. We have disagreed<sup>243</sup> with China's contention that the notion of "objective market factors", which may be relevant to the qualitative analysis of the significance of price differences under Article 2.4.2, includes, what China calls, "objective reasons" for the price differences.<sup>244</sup>

5.67. Factors such as the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets are "objective market factors" relevant to an investigating authority's qualitative evaluation under the pattern clause to the extent that they speak to the "significance", or lack thereof, of the differences in export prices. In this respect, "objective market factors" may assist an investigating authority in determining

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<sup>232</sup> China's appellant's submission, para. 181.

<sup>233</sup> See Appellate Body Report, *US – Washing Machines*, para. 5.66.

<sup>234</sup> Appellate Body Report, *US – Washing Machines*, para. 5.66.

<sup>235</sup> Panel Report, para. 7.111.

<sup>236</sup> Panel Report, para. 7.111.

<sup>237</sup> See Appellate Body Report, *US – Washing Machines*, para. 5.66.

<sup>238</sup> China's appellant's submission, para. 157.

<sup>239</sup> China's appellant's submission, para. 169. (emphasis original)

<sup>240</sup> China's appellant's submission, para. 169. (emphasis original)

<sup>241</sup> United States' appellee's submission, para. 219 (quoting Appellate Body Report, *US – Washing Machines*, para. 5.65).

<sup>242</sup> United States' appellee's submission, para. 222.

<sup>243</sup> See para. 5.63 above.

<sup>244</sup> See China's appellant's submission, para. 180.

whether price differences are significant, understood as "important, notable or consequential".<sup>245</sup> In contrast, factors that provide reasons for price differences and explain whether such differences are connected or not to "targeted dumping" are not relevant to the qualitative evaluation of whether those price differences are significant within the meaning of the pattern clause.

5.68. Turning to China's arguments about market-driven fluctuations in the costs of production and seasonality, we observe, first, that a decline in the costs of production is not concerned with the significance of export price differences but rather with the very reasons for, or cause of, such differences. Price differences may be due to a decline in the costs of production rather than to "targeted dumping". We therefore do not agree with China that a decline in production costs should form part of the investigating authority's qualitative analysis in assessing the significance of price differences under the pattern clause. Regarding seasonality, to the extent that seasonal variations in the prices of goods explain why export prices vary over time periods, they relate to the "reasons" for the price differences and thus need not be considered under the pattern clause. Nevertheless, to the extent that seasonal price variations – which are inherent in the nature of a product, the industry at issue, or the market structure – speak to the significance, or lack thereof, of such price differences, they may be relevant to the qualitative assessment under the pattern clause of whether identified differences in export prices differ "significantly".

5.69. In concluding that the reasons for price differences are not relevant to the determination of whether export prices differ significantly, we are aware that the qualitative analysis in the second sentence of Article 2.4.2 may not end with the assessment of the significance of price differences under the pattern clause. The second sentence of Article 2.4.2 also requires investigating authorities to provide an explanation "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". While the reasons behind differences in export prices are not part of the qualitative analysis that is required under the pattern clause in order to establish whether such differences are significant, such reasons may be relevant to an investigating authority's explanation of why the differences in export prices cannot be taken into account appropriately by the use of either the W-W or the T-T methodology.<sup>246</sup>

5.70. In light of the above, we consider that the Panel did not err in its interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in finding that investigating authorities are not required to examine the reasons for the relevant differences in export prices<sup>247</sup>, or whether those differences are unconnected to "targeted dumping"<sup>248</sup>, in order to assess whether export prices differ "significantly". We also consider that, while it did not explicitly refer to "objective market factors", the Panel correctly concluded that an investigating authority should undertake a qualitative analysis of the significance of export price differences. We thus disagree with China's contention that the Panel erred in interpreting and applying the second sentence of Article 2.4.2 because it found that "investigating authorities [are not required] to consider objective market factors in determining whether relevant pricing differences are 'significant'".<sup>249</sup>

5.71. We therefore uphold the Panel's findings, in paragraphs 7.114 and 8.1.a.viii of its Report, that "the USDOC was not required to consider the reasons for the differences in export prices forming the relevant pattern in order to determine whether those differences were qualitatively significant within the meaning of the pattern clause of Article 2.4.2" and that, accordingly, "China has not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG, Coated Paper* and *Steel Cylinders* investigations because of the alleged qualitative issues with the Nails test".

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<sup>245</sup> Appellate Body Report, *US – Washing Machines*, para. 5.62.

<sup>246</sup> We note that the panel in *US – Washing Machines* found that "the explanation clause is needed because there may be factors other than targeted dumping that may cause export prices to differ" and that "[p]rice differences caused by factors other than targeted dumping may 'normally' be taken into account appropriately by one of the 'normal' comparison methodologies provided for in the first sentence of Article 2.4.2." (Panel Report, *US – Washing Machines*, para. 7.73) These findings by the panel in *US – Washing Machines* were not appealed.

<sup>247</sup> Panel Report, para. 7.108.

<sup>248</sup> Panel Report, para. 7.109.

<sup>249</sup> China's appellant's submission, heading IV.

#### 5.1.4 Use of averages in determining a "pattern"

5.72. We now turn to the Panel's examination of the USDOC's use of weighted-average export prices, under the Nails test applied in the three challenged investigations, to determine a "pattern" within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement.<sup>250</sup>

5.73. China appeals the Panel's finding that China had not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by determining the relevant pattern on the basis of averages, as opposed to individual export transaction prices.<sup>251</sup> Specifically, China claims that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 to the three challenged investigations because it found that this provision allowed the USDOC to determine a pattern on the basis of averages.<sup>252</sup> For China, the second sentence of Article 2.4.2 requires that a pattern be determined only on the basis of individual export prices, not average prices.<sup>253</sup> Furthermore, China contends that the USDOC's use of averages in the three challenged investigations was inherently biased because it increased the likelihood of finding a pattern under Article 2.4.2, and was thus inconsistent with this provision.<sup>254</sup> In this respect, China also contends that the Panel's evaluation of the USDOC's determination was contrary to the standard of review under Article 17.6(i) of the Anti-Dumping Agreement, because the Panel failed to find that the USDOC's use of averages was inherently biased.<sup>255</sup> China requests us to reverse the Panel's finding in paragraphs 7.128 and 8.1.a.ix of the Panel Report.<sup>256</sup> China also requests us to complete the analysis and find that the United States acted inconsistently with the second sentence of Article 2.4.2, in the three challenged investigations, by determining a pattern on the basis of averages, as opposed to individual export prices.<sup>257</sup>

5.74. The United States responds that the Panel did not err in its interpretation of the second sentence of Article 2.4.2 by finding that a pattern for purposes of this provision can be determined on the basis of averages.<sup>258</sup> To the United States, this provision does not prohibit the use of averages under the pattern clause.<sup>259</sup> The United States also contends that China's claim under Article 17.6(i) of the Anti-Dumping Agreement must fail because China's arguments are merely consequential of, or made redundant by, its substantive arguments under Article 2.4.2.<sup>260</sup> For these reasons, the United States requests us to reject China's claims.<sup>261</sup> Should we reverse the Panel's finding at issue, the United States submits that we would be unable to complete the analysis, given the lack of sufficient undisputed facts on the record.<sup>262</sup>

5.75. The Panel found that China had not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by finding a pattern on the basis of averages.<sup>263</sup> Examining the text of the second sentence of Article 2.4.2, the Panel concluded that this provision does not preclude an investigating authority from finding a pattern on the basis of averages. Rather, the Panel considered that Article 2.4.2 provides investigating authorities with

<sup>250</sup> As noted by the Panel, in the three challenged investigations, the USDOC used CONNUM-specific weighted-average export prices for each purchaser (in the *Coated Paper* investigation) and for each time period (in the *OCTG* and *Steel Cylinders* investigations) in both stages of the Nails test – i.e. the standard deviation test and the price gap test. (Panel Report, paras. 7.5 and 7.115) In this Report, we refer to the weighted-average export prices relied on by the USDOC in the three challenged investigations as "averages" or "average prices".

<sup>251</sup> China's appellant's submission, para. 126 (referring to Panel Report, paras. 7.115-7.128).

<sup>252</sup> China's appellant's submission, paras. 126-127, 133, 147, and 153.

<sup>253</sup> China's appellant's submission, paras. 127, 134, and 147.

<sup>254</sup> China's appellant's submission, paras. 128, 144-146, and 149-151.

<sup>255</sup> China's appellant's submission, paras. 133, 148, and 153.

<sup>256</sup> China's appellant's submission, paras. 154 and 630.

<sup>257</sup> China's appellant's submission, paras. 155 and 631.

<sup>258</sup> United States' appellee's submission, paras. 161-162, and 185.

<sup>259</sup> United States' appellee's submission, paras. 9 and 167. The United States submits that the focus in the second sentence of Article 2.4.2 is on the differences in export prices among different purchasers, regions, or time periods, not on individual export transactions *per se*. (Ibid., para 167) In addition, the United States contends that the average prices reflect the individual export prices, and that the examination of averages and of individual export prices are thus not mutually exclusive. (Ibid., paras. 161 and 172-173)

<sup>260</sup> United States' appellee's submission, paras. 188-191. Moreover, the United States contends that China's claim under Article 17.6(i) of the Anti-Dumping Agreement must fail because China should have raised a claim also under Article 11 of the DSU. (Ibid., para. 187)

<sup>261</sup> United States' appellee's submission, para. 196.

<sup>262</sup> United States' appellee's submission, paras. 198-202.

<sup>263</sup> Panel Report, paras. 7.128 and 8.1.a.ix.

discretion to determine a pattern on the basis of averages or individual export prices.<sup>264</sup> With respect to the question of whether the Nails test was biased towards finding a pattern under Article 2.4.2, the Panel considered that China's argument was based on the view that, by relying on averages, the USDOC failed to consider variations in the prices for the same purchaser or time period. Given that the Panel had found that the second sentence of Article 2.4.2 provided the USDOC with discretion to use individual export transaction prices or average prices when determining a pattern, the Panel did not believe that the USDOC's determination in the three challenged investigations could be considered biased simply because the method that it chose led to an outcome that was less favourable to exporters.<sup>265</sup>

5.76. Turning to our analysis, we first examine China's claim that the Panel erred in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Thereafter, we examine China's claim that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement.

5.77. The second sentence of Article 2.4.2 of the Anti-Dumping Agreement provides, in relevant part, that "[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".<sup>266</sup>

5.78. On its face, the text of the pattern clause does not prescribe a specific method for identifying a "pattern", in particular whether individual export transaction prices or average prices must be used. Rather, it specifies *what* an investigating authority must find before resorting to the W-T methodology, namely, "a pattern of export prices which differ significantly among different purchasers, regions or time periods". Thus, regardless of the particular method chosen, such method must be capable of identifying a pattern that is consistent with the requirements stipulated in the pattern clause. As explained earlier<sup>267</sup>, in the context of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, a "pattern" is a regular and intelligible form or sequence of "export prices which differ significantly". This means that there must be regularity to the sequence of prices and that this sequence must be capable of being understood.<sup>268</sup>

5.79. In Article 2.4.2 of the Anti-Dumping Agreement, the term "pattern of export prices" is followed by the phrase "which differ significantly". The Appellate Body has explained that the wording "prices which differ" indicates that the focus of the pattern is on the prices that are found to differ. Therefore, while an investigating authority would analyse the prices of all export transactions made by the relevant exporter or producer to identify a pattern, "the distinguishing factor that allows that authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly from the prices not in the pattern."<sup>269</sup>

5.80. The final part of the pattern clause specifies that a pattern involves export prices which differ significantly in relation to specified groups, namely, "among different purchasers, regions or time periods". The term "among" emphasizes membership of a group. Something belongs to a group when it shares certain common characteristics with the other members of that group or has some form of relationship with them.<sup>270</sup> Specifically in the context of the pattern clause, the term "among" serves to specify the parameters in relation to which "export prices which differ significantly" may be discerned – i.e. purchasers, regions or time periods.<sup>271</sup>

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<sup>264</sup> Panel Report, para. 7.124.

<sup>265</sup> Panel Report, para. 7.127.

<sup>266</sup> The second sentence of Article 2.4.2 of the Anti-Dumping Agreement also contains a second condition for the use of the W-T methodology, namely, that "an explanation [be] 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."

<sup>267</sup> See para. 5.21 above.

<sup>268</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.25 and 5.27. According to the Appellate Body, this understanding of a pattern excludes the possibility of a pattern merely reflecting random price variation. (Ibid., paras. 5.25 and 5.32)

<sup>269</sup> Appellate Body Report, *US – Washing Machines*, para. 5.26. See also Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

<sup>270</sup> Appellate Body Report, *US – Washing Machines*, para. 5.31.

<sup>271</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.30-5.31.

5.81. On the basis of the foregoing, the Appellate Body has explained that a "pattern" within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement comprises *all* of the export prices for one or more purchasers, regions, or time periods which differ significantly from, respectively, the export prices for the remaining purchasers, regions, or time periods because they are significantly lower than the prices in the latter group.<sup>272</sup>

5.82. We now turn to the question of whether the pattern clause requires the use of individual export transaction prices, as opposed to average prices, to determine the existence of a pattern. The finding of a pattern is not centred on the price relationship among the different export transactions falling within the pattern, i.e. the transactions to the "targeted" purchaser, region, or time period. Rather, the existence of a pattern depends on the price relationship *between* the prices for one group, i.e. the "targeted" transactions, and the prices for another group, i.e. the "non-targeted" transactions. As explained above, the distinguishing factor that allows an investigating authority to discern which export prices form part of the pattern is that the prices in the pattern differ significantly from the prices not in the pattern. In addition, the relevant difference is one "among" different purchasers, regions or time periods. As explained above, the term "among" in the pattern clause serves to specify the parameters in relation to which "export prices which differ significantly" may be discerned, i.e. purchasers, regions or time periods.<sup>273</sup> Thus, we consider that the pattern clause focuses on the price differences *among* different purchasers, regions or time periods; not the differences *within* the prices for the "targeted" purchaser, region, or time period.

5.83. We consider that this view is consistent with the function of the second sentence of Article 2.4.2, which is to allow investigating authorities to identify and address "targeted dumping".<sup>274</sup> As a result, an investigating authority may rely on prices of individual export transactions or average prices in order to find a pattern, provided that the pattern meets the requirements stipulated in the pattern clause. In this regard, we agree with the Panel's conclusion that the pattern clause provides investigating authorities with discretion in relation to whether a pattern determination is to be based on individual export transaction prices or average prices.<sup>275</sup>

5.84. China contends that a focus on individual export prices is consistent with the meaning of the term "pattern" in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. According to China, the term "pattern" suggests "a sufficient number of observations from which an intelligible form or arrangement amongst those events can be discerned".<sup>276</sup> China explains that, when prices are averaged, a large number of observations are collapsed into a single average price. According to China, this "reduces the investigating authority's ability to discern a pattern in the array of prices actually charged by an exporter, due to the absence of a sufficient number of observations from which an intelligible form or arrangement amongst those data can be discerned".<sup>277</sup> China considers that, to examine whether the observed prices form a pattern *among* different purchasers, regions or time periods, an investigating authority must properly account for the differences *within* the prices for a given purchaser, region, or time period.<sup>278</sup>

5.85. China's proposed definition of a pattern implies that "a sufficient number of observations" must exist *within* the prices for the "targeted" purchaser, region, or time period. As explained above, we consider that the pattern clause focuses on the price differences *among* different purchasers, regions, or time periods, not the differences *within* the prices for the "targeted" purchaser, region, or time period. Moreover, in our view, where *all* the relevant individual export transaction prices are averaged using weighted-average prices by purchasers, regions, or time periods, the differences within the prices for a given purchaser, region, or time period are accounted for in those averages.<sup>279</sup> In addition, a pattern determined on the basis of averages is still based on a collection of individual export prices that form a regular and intelligible form or sequence of export prices which differ significantly, in the sense that those prices pertain to one or more purchasers, regions, or time periods, and are significantly lower than the export prices for

<sup>272</sup> Appellate Body Report, *US – Washing Machines*, para. 5.36.

<sup>273</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.30-5.31.

<sup>274</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.17 and 5.28.

<sup>275</sup> Panel Report, paras. 7.123-7.124.

<sup>276</sup> China's appellant's submission, para. 142.

<sup>277</sup> China's appellant's submission, para. 142.

<sup>278</sup> China's appellant's submission, para. 143.

<sup>279</sup> See United States' appellee's submission, paras. 161, 172-173, and 182.

the remaining purchasers, regions, or time periods. We thus agree with the Panel that, when a pattern is determined through the use of averages, the pattern itself will consist of individual export transactions.<sup>280</sup> For these reasons, we disagree with China that the meaning of the term "pattern" supports the view that the use of averages is *a priori* prohibited by the pattern clause.

5.86. China also argues that finding a pattern solely on the basis of individual export transaction prices ensures parallelism between the pattern clause – one of the conditions to use the W-T methodology – and the application of the W-T methodology itself, i.e. the comparison between the weighted average normal value and "prices of *individual* export transactions".<sup>281</sup> For China, it would be incongruous to interpret the pattern clause as allowing an investigating authority to "overlook" the individual export transaction prices for purposes of determining a pattern, when "the very purpose of the second sentence is to authorize the investigating authority to focus on individual export prices when making a comparison with normal value."<sup>282</sup> In addition, China contends<sup>283</sup> that its interpretation of Article 2.4.2 is consistent with the Appellate Body's statements in *US – Zeroing (Japan)* that the term "individual export transactions" in the second sentence of Article 2.4.2 refers to "transactions that fall within the relevant pricing pattern"<sup>284</sup>, and in *US – Washing Machines* that the pattern in this provision "focuses on the 'targeted' transactions".<sup>285</sup>

5.87. We recall that the first part of the second sentence of Article 2.4.2, concerning the application of the W-T methodology, provides that "[a] normal value established on a weighted average basis may be compared to prices of *individual export transactions*".<sup>286</sup> The phrase "individual export transactions" appears only in this part of the second sentence.

5.88. The structure of the second sentence of Article 2.4.2 makes clear that this provision has two distinct parts serving different purposes.<sup>287</sup> The first part clarifies that a normal value may be compared to prices of "individual export transactions" in order to establish the existence of margins of dumping. This serves the purpose of distinguishing the W-T methodology from the normally applicable methodologies in the first sentence of Article 2.4.2. The second part of the second sentence deals with the conditions that have to be met for an investigating authority to have recourse to the W-T methodology. We are not convinced that the reference to "prices of individual export transactions" in the first part of the second sentence directly informs or limits *how* a pattern is to be identified in the second part of the second sentence. China's argument effectively imports the phrase "individual export transactions" into the pattern clause. Moreover, in our view, a pattern determined on the basis of average prices is nonetheless composed of individual export transactions to which the W-T methodology may be applied. In this respect, we agree with the United States that individual prices are not "overlooked" by an investigating authority when those prices are included in the calculation of averages.<sup>288</sup>

5.89. In addition, unlike China, we do not read the Appellate Body's statements in *US – Zeroing (Japan)* and *US – Washing Machines* as endorsing a parallelism between the identification of the pattern and the application of the W-T methodology to the "pattern transactions".<sup>289</sup> In *US – Washing Machines*, the Appellate Body explained that an

<sup>280</sup> Panel Report, para. 7.120.

<sup>281</sup> China's appellant's submission, para. 135 (referring to the first part of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement). (emphasis original)

<sup>282</sup> China's appellant's submission, para. 135.

<sup>283</sup> China's appellant's submission, paras. 138-141.

<sup>284</sup> Appellate Body Report, *US – Zeroing (Japan)*, para. 135.

<sup>285</sup> Appellate Body Report, *US – Washing Machines*, para. 5.28.

<sup>286</sup> Emphasis added. The Appellate Body has considered that the word "individual" in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement indicates that "the W-T comparison methodology does not involve all export transactions, but only certain export transactions identified individually". (Appellate Body Report, *US – Washing Machines*, para. 5.52 (referring to Panel Report, *US – Washing Machines*, para. 7.22)) The Appellate Body has read the phrase "individual export transactions" as referring to the universe of export transactions that justify the use of the W-T methodology, namely, the "pattern transactions". (Appellate Body Reports, *US – Washing Machines*, para. 5.52; *US – Zeroing (Japan)*, para. 135)

<sup>287</sup> For a similar view, see European Union's third participant's submission, para. 65.

<sup>288</sup> United States' appellee's submission, paras. 172-173.

<sup>289</sup> For ease of reference, we use the term "pattern transactions" to refer to those transactions that fall within the relevant pattern, and we use the term "non-pattern transactions" to refer to those transactions that do not fall within that pattern.

investigating authority has to consider all of the transactions of a given exporter or producer in order to identify a pattern of export prices that differ significantly among different purchasers, regions or time periods.<sup>290</sup> In *US – Zeroing (Japan)*, the Appellate Body explained that an investigating authority may apply the W-T methodology only to the individual export transactions that fall within the relevant pattern.<sup>291</sup> While the analysis under the pattern clause takes into account all export transactions of a given exporter or producer, the W-T methodology applies only to certain specific export transactions of that exporter or producer. We do not consider that any such parallelism between these two parts of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement – which serve different purposes – would require an investigating authority to determine a pattern under the pattern clause on the basis of individual export transaction prices, as opposed to average prices. Rather, as explained above, we consider that the pattern clause allows an investigating authority to rely on individual export transaction prices or average prices in order to find a pattern, provided that the pattern meets the requirements stipulated in the pattern clause.<sup>292</sup>

5.90. Moreover, China argues that an investigating authority that relies on averages is unable to discern a pattern focused on "targeted" transactions because the scope of a pattern differs depending on whether it is determined on the basis of individual export transactions or average prices.<sup>293</sup> The United States notes that China does not explain how the scope of a pattern might differ depending on whether individual prices or average prices are used in the analysis to determine a pattern.<sup>294</sup> We recall that, in *US – Washing Machines*, the Appellate Body explained that the "pattern" under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement includes *all* of the export prices for the "targeted" purchaser, region, or time period.<sup>295</sup> Thus, we disagree with China that, by relying on average prices, an investigating authority is unable to discern a pattern for the purposes of the second sentence of Article 2.4.2. This is because, regardless of whether an investigating authority relies on individual export transaction prices or average prices when determining the existence of a "pattern", the scope of the pattern will remain the same, namely, it will comprise *all* of the export prices for the "targeted" purchaser, region, or time period.

5.91. We now turn to China's contention that the Panel failed to take into account that the use of average prices in the Nails test reduced the variability of export prices across transactions and per purchaser.<sup>296</sup> We recall that, in relation to both stages of the Nails test, the USDOC used average prices for each purchaser in the *Coated Paper* investigation, and average prices for each time period in the *OCTG* and *Steel Cylinders* investigations.<sup>297</sup>

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<sup>290</sup> In *US – Washing Machines*, the Appellate Body explained that, "[i]n the context of identifying a pattern of export prices among, for example, different purchasers, an investigating authority would examine the prices of export sales made to one or more purchasers as compared to the prices of export sales made to the other purchasers." (Appellate Body Report, *US – Washing Machines*, fn 115 to para. 5.26) Thus, for purposes of determining a pattern under the pattern clause, an investigating authority must consider all of the transactions of a given exporter or producer to all purchasers, regions, or time periods. As noted above, while the authority would analyse the prices of *all* export sales made by the relevant exporter or producer, the distinguishing factor that allows that authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly from the prices not in the pattern. This determination, thus, is not focused on the price relationship among the different export transactions falling within the pattern. The Appellate Body then explained that the function of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is to allow investigating authorities to identify and address "targeted dumping". In this context, the Appellate Body stated that, "by comprising only the transactions found to differ from other transactions, the pattern focuses on the 'targeted' transactions." (Ibid., para. 5.28)

<sup>291</sup> In *US – Zeroing (Japan)*, the Appellate Body compared the universe of transactions to which the T-T methodology and the W-T methodology apply. The Appellate Body explained that the phrase "individual export transactions" in the first part of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement refers to the transactions that fall within the relevant pattern. In this respect, the Appellate Body observed that the universe of export transactions subject to the W-T methodology would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply. (Appellate Body Report, *US – Zeroing (Japan)*, para. 135)

<sup>292</sup> See para. 5.83. above.

<sup>293</sup> China's appellant's submission, para. 141 (referring to Appellate Body Report, *US – Washing Machines*, para. 5.28).

<sup>294</sup> United States' appellee's submission, para. 180.

<sup>295</sup> Appellate Body Report, *US – Washing Machines*, para. 5.36.

<sup>296</sup> China's appellant's submission, para. 144.

<sup>297</sup> Panel Report, paras. 7.5 and 7.115.

5.92. China considers that the USDOC's use of averages in the three challenged investigations was inherently biased because it systematically drew the one standard deviation threshold closer to the mean as compared to where the threshold would have been had the USDOC calculated it on the basis of individual export transaction prices.<sup>298</sup> China contends that, as a consequence of this bias, there was an increased likelihood that export sales to the "targeted" purchaser or within the "targeted" time period fell below the one standard deviation threshold. In turn, this increased the likelihood that the USDOC would find, in the three challenged investigations, the existence of a pattern under the second sentence of Article 2.4.2.<sup>299</sup> China contends that the Panel should have found that, by using average prices instead of individual export transaction prices, the USDOC introduced a bias towards finding a pattern, and thus failed to identify a pattern consistently with the second sentence of Article 2.4.2.<sup>300</sup>

5.93. The United States contends that China fails to demonstrate that the USDOC's application of the Nails test in the three challenged investigations was inconsistent with the second sentence of Article 2.4.2.<sup>301</sup> In addition, the United States contests the evidence provided by China to show that, in the three challenged investigations, the outcome was biased as a result of the USDOC's use of average prices.<sup>302</sup>

5.94. The Panel noted that China's argument that the Nails test was biased towards finding a pattern is based on China's view that, by relying on average prices, the USDOC failed to take into consideration the variations within the prices for each purchaser or time period. The Panel recalled its understanding that the pattern clause does not require the consideration of such variations; rather, it provides discretion to investigating authorities to choose between individual export transaction prices and average prices when determining a pattern. The Panel did not consider that "the USDOC's determination in the three challenged investigations could be considered biased, simply because the method that it chose led to an outcome which was less favourable to the exporters".<sup>303</sup>

5.95. As noted by the Panel<sup>304</sup>, China's arguments are directly related to China's view that the USDOC should have calculated the standard deviation "on an examination of individual export prices, as mandated by the treaty".<sup>305</sup> We have explained above that the second sentence in Article 2.4.2 provides investigating authorities with discretion to rely on individual export transaction prices or average prices in order to find a pattern, provided that this pattern meets the requirements stipulated in the pattern clause. For this reason, we agree with the Panel's finding that China has not established that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by establishing the relevant pattern on the basis of averages as opposed to individual export transaction prices.<sup>306</sup>

5.96. We note the Panel's statement that, even if it were true that the numerical value of the standard deviation would have been higher if the USDOC had relied on individual export transactions in the three challenged investigations, the Panel could not "find that the USDOC's determination was biased on that basis".<sup>307</sup> As explained above, Article 2.4.2 provides investigating authorities with discretion to rely on individual export transaction prices or average prices in order to find a pattern. Whether or not the exercise of the discretion may be considered biased will depend on the particular facts and specific circumstances of each case. Thus, to the extent that the Panel considered that China has not demonstrated that the USDOC's use of averages in the three challenged investigations was biased<sup>308</sup>, we agree with the Panel statement.

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<sup>298</sup> China's appellant's submission, para. 149. For China, mathematically, the act of averaging collapses multiple individual observations into a single observation. For this reason, China submits that averaging likely leads to a reduction in variability of export prices and, consequently, a lower standard deviation. (Ibid.)

<sup>299</sup> China's appellant's submission, paras. 150-151.

<sup>300</sup> China's appellant's submission, para. 153.

<sup>301</sup> United States' appellee's submission, para. 192.

<sup>302</sup> United States' appellee's submission, para. 200.

<sup>303</sup> Panel Report, para. 7.127.

<sup>304</sup> Panel Report, paras. 7.123 and 7.127.

<sup>305</sup> China's appellant's submission, para. 149.

<sup>306</sup> Panel Report, para. 8.1.a.ix.

<sup>307</sup> Panel Report, para. 7.127.

<sup>308</sup> In this respect, the Panel recalled that "China's argument that the Nails test suffered from a 'systematic bias' is based on its view that the USDOC failed to take into consideration price variations within purchasers or time periods because it aggregated all individual export transaction prices to a purchaser or time period to calculate a purchaser or time period average." (Panel Report, para. 7.127)



We note that our understanding of the Panel statement at issue is in line with the Panel's ultimate conclusion that "China has not established that the United States acted inconsistently with Article 2.4.2 ... [in the three challenged investigations] by finding the relevant pattern on the basis of purchaser or time period averages as opposed to individual export transaction prices."<sup>309</sup>

5.97. Finally, we turn to China's claim under Article 17.6(i) of the Anti-Dumping Agreement. China contends that the Panel's evaluation of the USDOC's determination was contrary to the standard of review under Article 17.6(i), because the Panel failed to find that the USDOC's use of averages was inherently biased.<sup>310</sup>

5.98. As explained earlier<sup>311</sup>, a claim under Article 17.6(i) of the Anti-Dumping Agreement must concern the panel's assessment of the facts of the matter and involve a showing that the assessment is inconsistent with this provision. Thus, a claim under this provision should not be made *merely* as subsidiary to a claim that the panel erred in its application of a WTO provision.

5.99. China claims that the Panel failed to comply with Article 17.6(i) because the Panel endorsed a WTO-inconsistent test that biased the outcome towards systematically increasing the likelihood of finding a pattern under Article 2.4.2 of the Anti-Dumping Agreement.<sup>312</sup> China contends that the USDOC's use of averages was inherently biased because it drew the one standard deviation threshold in the Nails test closer to the mean as compared to where the threshold would have been had the USDOC calculated it based on individual export transaction prices, as required by Article 2.4.2.<sup>313</sup> Although China explains in some detail its claim under Article 17.6(i), China does not identify, much less challenge, a specific instance of the Panel's assessment of the facts. Rather, it seems to us that China has mostly recast the arguments that it made before the Panel under Article 2.4.2. In addition, China does not advance any argument on appeal that is separate and different from its arguments concerning the alleged error in the Panel's interpretation of Article 2.4.2. Thus, we consider that China has not demonstrated that the Panel failed to comply with Article 17.6(i).

5.100. In sum, we consider that the existence of a pattern within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement depends on the price relationship between the "targeted" transactions, on the one hand, and the "non-targeted" transactions, on the other hand. The distinguishing factor that allows for the determination of a pattern is that the prices within the pattern differ significantly from the prices outside it. We also note that the relevant difference is one "among" different purchasers, regions, or time periods. For these reasons, we consider that an investigating authority may rely on individual export transaction prices or average prices in order to find a pattern, provided that this pattern meets the requirements stipulated in the pattern clause. In this case, like the Panel<sup>314</sup>, we consider that China has not demonstrated that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by determining the relevant pattern on the basis of average prices. In addition, by not advancing any argument that is separate and different from its arguments concerning the alleged error in the Panel's interpretation of Article 2.4.2, China has not demonstrated that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement.

5.101. We therefore find that the Panel did not err in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to the three challenged investigations when examining the USDOC's use of purchaser or time period averages under the Nails test. Furthermore, we find that China has not established that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement. Consequently, we uphold the Panel's finding, in paragraph 8.1.a.ix of its Report, that China has not established that the United States acted inconsistently with the second sentence of Article 2.4.2 in the three challenged investigations by determining the existence of a "pattern" on the basis of average prices, instead of individual export transaction prices.<sup>315</sup>

<sup>309</sup> Panel Report, para. 8.1.a.ix.

<sup>310</sup> China's appellant's submission, paras. 133, 148, and 153.

<sup>311</sup> See para. 5.47. above.

<sup>312</sup> China's appellant's submission, paras. 148 and 153.

<sup>313</sup> China's appellant's submission, para. 149.

<sup>314</sup> Panel Report, para. 8.1.a.ix.

<sup>315</sup> Having upheld this finding, we need not examine China's request for completion of the legal analysis.

### 5.1.5 Whether the Panel erred under Article 2.4.2 of the Anti-Dumping Agreement in suggesting that comparison methodologies may be combined to establish dumping margins

5.102. The Panel found that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by using zeroing under the W-T methodology in the three challenged investigations in calculating dumping margins for the concerned Chinese exporters.<sup>316</sup> In reaching this finding, the Panel added, in footnote 385 of its Report, that it was not suggesting that "the options under Article 2.4.2 for dumping determinations by investigating authorities are limited, as that would render the second sentence of Article 2.4.2 *inutile*".<sup>317</sup> The Panel added:

We are cognizant that where an investigating authority applies the [W-T] methodology to the export transactions falling within the pattern and one of the two normal methodologies to the export transactions falling outside the pattern, and the results of the calculations for the export transactions falling outside the pattern show negative dumping, it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2, not to let that negative dumping offset the dumping found within the pattern. We make this observation bearing in mind the objective of the [W-T] methodology which, as underlined by the Appellate Body, is to unmask targeted dumping.<sup>318</sup>

5.103. China appeals the Panel's interpretation, set out in footnote 385 of its Report, that "it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2, not to let ... negative dumping [found outside of a pattern] offset the dumping found within the pattern".<sup>319</sup> According to China, this interpretation is erroneous because it is premised on the understanding that an investigating authority may apply the W-T methodology to "pattern transactions" and the W-W or T-T methodology to "non-pattern transactions", and then combine the results of these comparison methodologies to establish dumping margins.<sup>320</sup> China argues that, in *US – Washing Machines*, the Appellate Body clarified that the second sentence of Article 2.4.2 permits the establishment of margins of dumping solely by applying the W-T methodology to a limited universe of export transactions, namely, the "pattern transactions".<sup>321</sup> China thus requests us to declare the Panel's statement in footnote 385 of its Report moot and of no legal effect.<sup>322</sup>

5.104. The United States does not object to this request.<sup>323</sup> In particular, the United States acknowledges that, in *US – Washing Machines*, the Appellate Body found that Article 2.4.2 does not permit the combining of comparison methodologies.<sup>324</sup>

5.105. In footnote 385 of its Report, the Panel considered that "it may be necessary, in order to give full meaning to the second sentence of Article 2.4.2", not to let a negative comparison result for "non-pattern transactions" offset a positive comparison result for "pattern transactions".<sup>325</sup> In *US – Washing Machines*<sup>326</sup>, the Appellate Body stated that, "[i]n keeping with its function of

<sup>316</sup> Panel Report, para. 7.220. See also para. 8.1.a.iv.

<sup>317</sup> Panel Report, fn 385 to para. 7.220. (emphasis original)

<sup>318</sup> Panel Report, fn 385 to para. 7.220.

<sup>319</sup> China's Notice of Appeal, para. 21 (quoting Panel Report, fn 385 to para. 7.220); appellant's submission, para. 191 (quoting Panel Report, fn 385 to para. 7.220).

<sup>320</sup> China's Notice of Appeal, para. 21; appellant's submission, para. 191.

<sup>321</sup> China's appellant's submission, para. 195 (referring to Appellate Body Report, *US – Washing Machines*, para. 5.122).

<sup>322</sup> China's Notice of Appeal, para. 22; appellant's submission, para. 197.

<sup>323</sup> United States' appellee's submission, para. 250.

<sup>324</sup> United States' appellee's submission, para. 249 (referring to Appellate Body Report, *US – Washing Machines*, paras. 5.124 and 5.130).

<sup>325</sup> In this context, the Panel relied on the panel's finding in *US – Washing Machines* that Article 2.4.2 allows an investigating authority to disregard the negative result obtained for the "non-pattern transactions" under the W-W or T-T methodology, when aggregating such result with those obtained in the calculations for the "pattern transactions" under the W-T methodology. (Panel Report, fn 385 to para. 7.220 (referring to Panel Report, *US – Washing Machines*, paras. 7.161-7.163 and 7.167))

<sup>326</sup> In *US – Washing Machines*, the Appellate Body was faced with the USDOC's practice of applying the W-T methodology to certain transactions and the W-W methodology to the remaining transactions and disregarding or setting to zero the intermediate comparison result arising from the W-W methodology if it was negative. This practice was referred to as "systemic disregarding". (Appellate Body Report, *US – Washing Machines*, paras. 5.78-5.79)

allowing an investigating authority to effectively address 'targeted dumping'<sup>327</sup>, the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by applying the W-T comparison methodology only to "pattern transactions", to the exclusion of "non-pattern transactions".<sup>328</sup> The Appellate Body considered that the "targeted dumping" identified from the consideration of "pattern transactions" would be "re-masked" if negative comparison results arising from "non-pattern transactions" were considered.<sup>329</sup>

5.106. The Panel, however, referred to "an investigating authority appl[ying] the [W-T] methodology to the export transactions falling within the pattern and one of the two normal methodologies to the export transactions falling outside the pattern".<sup>330</sup> To the extent that the Panel was suggesting that investigating authorities may combine the W-T methodology applied to "pattern transactions" with the W-W or the T-T methodology applied to "non-pattern transactions" in order to establish dumping margins, this does not accord with the conclusions of the Appellate Body in *US – Washing Machines*. There, the Appellate Body considered that the second sentence of Article 2.4.2 "does not provide for a mechanism whereby an investigating authority would conduct separate comparisons for 'pattern transactions' under the W-T comparison methodology and for 'non-pattern transactions' under the W-W or T-T comparison methodology, and exclude from its consideration the result of the latter if it yields an overall negative comparison result, or aggregate it with the W-T comparison results for the 'pattern transactions' if it yields an overall positive comparison result".<sup>331</sup> The Appellate Body thus concluded that, while "the second sentence allows an investigating authority to establish the existence of margins of dumping by comparing a 'normal value established on a weighted average basis' with 'pattern transactions' only", "Article 2.4.2 does not permit the combining of comparison methodologies for the purposes of establishing dumping and margins of dumping in accordance with the second sentence".<sup>332</sup>

5.107. As in *US – Washing Machines*, we consider that the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by applying the W-T methodology only to "pattern transactions" and that Article 2.4.2 does not permit the combining of comparison methodologies.<sup>333</sup> In circumstances where the requirements of the second sentence of Article 2.4.2 are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.<sup>334</sup>

5.108. In light of the above, we declare moot the Panel's statements, in footnote 385 of its Report, to the extent that these statements are premised on the erroneous understanding that Article 2.4.2 of the Anti-Dumping Agreement permits the combining of comparison methodologies to establish dumping margins.

## 5.2 The AFA Norm

5.109. In this section, we address China's claim of error on appeal in connection with the AFA Norm. Before the Panel, China contended that the AFA Norm is an unwritten rule or norm of general and prospective application that can be the subject of an "as such" challenge in WTO dispute settlement. China claimed that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.<sup>335</sup> China described the precise content of the AFA Norm in the following manner:

[W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to

<sup>327</sup> Appellate Body Report, *US – Washing Machines*, para. 5.109.

<sup>328</sup> Appellate Body Report, *US – Washing Machines*, para. 5.129.

<sup>329</sup> Appellate Body Report, *US – Washing Machines*, para. 5.109.

<sup>330</sup> Panel Report, fn 385 to para. 7.220.

<sup>331</sup> Appellate Body Report, *US – Washing Machines*, para. 5.123.

<sup>332</sup> Appellate Body Report, *US – Washing Machines*, para. 5.124.

<sup>333</sup> Appellate Body Report, *US – Washing Machines*, paras. 5.124 and 5.129.

<sup>334</sup> Appellate Body Report, *US – Washing Machines*, para. 5.130.

<sup>335</sup> Panel Report, paras. 7.397-7.399 and 7.416. AFA Norm stands for Adverse Facts Available Norm, which China alleges is a rule or norm of general and prospective application. (China's appellant's submission, para. 198)

determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it.<sup>336</sup>

5.110. Examining first whether the AFA Norm could be challenged "as such" in WTO dispute settlement, the Panel found that the AFA Norm is attributable to the United States<sup>337</sup>, and that its precise content corresponds to the description made by China.<sup>338</sup> The Panel found, however, that China had not demonstrated that the AFA Norm has general and prospective application, so that it could be challenged "as such" in WTO dispute settlement.<sup>339</sup>

5.111. China appeals the Panel's finding that China had not demonstrated that the AFA Norm constitutes a norm of general and prospective application.<sup>340</sup> China claims that the Panel erred in its articulation and application of the legal standard for establishing that a rule or norm has "prospective application". This is because, according to China, the Panel erroneously required "certainty" of future application for a rule or norm to be challenged "as such" in WTO dispute settlement.<sup>341</sup> China requests us to reverse the Panel's finding in paragraphs 7.479 and 8.1.d.ii of the Panel Report.<sup>342</sup> In addition, China makes two requests for completion. First, China requests us to complete the analysis and find that the AFA Norm constitutes a rule or norm of general and prospective application that can be challenged "as such" in WTO dispute settlement.<sup>343</sup> Second, China requests us to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.<sup>344</sup>

5.112. The United States responds that the Panel did not err in its articulation and application of the legal standard for establishing that a rule or norm has prospective application.<sup>345</sup> The United States submits that the Panel did not require that the future application of the alleged AFA Norm be demonstrated with "certainty" to establish whether it has prospective application.<sup>346</sup> To the United States, China's claim on appeal concerns the Panel's assessment of the facts and, accordingly, should have been brought under Article 11 of the DSU.<sup>347</sup> Finally, the United States requests us to reject both of China's requests for completion because: (i) China's claims under Article 6.8 and Annex II to the Anti-Dumping Agreement are outside the Panel's terms of reference; (ii) Appellate Body findings on the alleged AFA Norm would not contribute to a positive resolution of this dispute; (iii) the Appellate Body is not in a position to complete the analysis; and (iv) in any event, China's claims are without merit.<sup>348</sup>

5.113. We begin our analysis below by summarizing the relevant Panel findings concerning the AFA Norm. We then address the legal standard for establishing whether a rule or norm has "general and prospective application". Thereafter, we examine whether the Panel erred in its articulation and application of this standard. Finally, we address each of China's requests for completion.

### 5.2.1 Panel's findings

5.114. The Panel examined whether the AFA Norm constitutes a rule or norm of general and prospective application that can be challenged "as such" in WTO dispute settlement.<sup>349</sup> The Panel recalled that, for an "as such" challenge against a rule or norm of general and prospective application, the complaining Member must demonstrate: (i) that the alleged rule or norm is

<sup>336</sup> Panel Report, para. 7.422 (quoting China's opening statement at the second Panel meeting, para. 63 (emphasis original)).

<sup>337</sup> Panel Report, para. 7.456.

<sup>338</sup> Panel Report, paras. 7.454-7.455.

<sup>339</sup> Panel Report, paras. 7.477-7.479 and 8.1.d.ii.

<sup>340</sup> China's appellant's submission, paras. 202, 263, 380, and 636 (referring to Panel Report, paras. 7.457-7.479 and 8.1.d.ii).

<sup>341</sup> China's appellant's submission, paras. 212, 227-231, 270, 387, 393, 395-396, 399, and 414.

<sup>342</sup> China's appellant's submission, paras. 232, 395, 415, 437, and 636.

<sup>343</sup> China's appellant's submission, paras. 420, 436-437, and 637.

<sup>344</sup> China's appellant's submission, paras. 439, 509, and 637.

<sup>345</sup> United States' appellee's submission, paras. 314, 338-339, 342, 354, and 360-361.

<sup>346</sup> United States' appellee's submission, paras. 339-341.

<sup>347</sup> United States' appellee's submission, paras. 316 and 369-370.

<sup>348</sup> United States' appellee's submission, paras. 253, 255-257, 287, 371, 379, 387, 392, 399, 411-412, 416, 418, 431, and 438.

<sup>349</sup> Panel Report, para. 7.415.

attributable to the responding Member; (ii) the precise content of the alleged rule or norm; and (iii) that the alleged rule or norm has general and prospective application.<sup>350</sup> The Panel found that the AFA Norm is attributable to the United States.<sup>351</sup> The Panel also found that the 73 USDOC anti-dumping determinations put on the record by China demonstrate the precise content of the AFA Norm, as described by China.<sup>352</sup>

5.115. The Panel then examined whether the AFA Norm has general and prospective application. The Panel considered that a measure has "general application" to the extent that it affects an unidentified number of economic operators, including domestic and foreign producers.<sup>353</sup> In addition, the Panel explained that a measure has "prospective application" if it is intended to apply in future situations after its issuance.<sup>354</sup> In this regard, the Panel noted that, for a measure to have prospective application, it must provide the same level of security and predictability of continuation into the future typically associated with rules or norms.<sup>355</sup>

5.116. Turning to the evidence submitted by China, the Panel noted that the USDOC Enforcement and Compliance Antidumping Manual<sup>356</sup> (USDOC Antidumping Manual) provides that the NME-wide rate "may" be based on adverse facts available in certain situations.<sup>357</sup> According to the Panel, the permissive language used in the USDOC Antidumping Manual only recognizes the authority of the USDOC to base an NME-wide rate on adverse facts available; it does not express what approach the USDOC will or should adopt. The Panel thus considered that the USDOC Antidumping Manual does not support China's view that the AFA Norm has general and prospective application.<sup>358</sup> With respect to the three decisions of the United States Court of International Trade<sup>359</sup> (USCIT) relied upon by China, the Panel considered that they do not support China's contention that the AFA Norm has general and prospective application.<sup>360</sup>

5.117. In relation to the 73 USDOC anti-dumping determinations, the Panel noted that several of them refer to the USDOC's "practice" of selecting a rate for a "non-cooperating NME-wide entity" that is "sufficiently adverse" to ensure that the uncooperative party does not obtain a more favourable result by failing to cooperate than if it had fully cooperated.<sup>361</sup> The Panel also observed

<sup>350</sup> Panel Report, para. 7.419 (referring to Appellate Body Reports, *US – Zeroing (EC)*, para. 198; and *Argentina – Import Measures*, para. 5.104).

<sup>351</sup> Panel Report, para. 7.456. The Panel recalled that, according to China, the AFA Norm arises from acts or omissions of the USDOC. Given that the USDOC is an organ of the Government of the United States, the Panel concluded that the acts that give rise to the AFA Norm are attributable to the United States. (*Ibid.*, paras. 7.420 and 7.456)

<sup>352</sup> Panel Report, paras. 7.454-7.455. For the Panel, the 73 anti-dumping determinations put on the record by China show that, whenever the USDOC made a finding that an NME-wide entity failed to cooperate to the best of its ability, it adopted adverse inferences and, in determining the duty rate for the NME-wide entity, selected facts from the record that were adverse to the interests of such entity, and the exporters included within it. (*Ibid.*, para. 7.454) The Panel considered that the other two sets of evidence submitted by China – the USDOC Antidumping Manual (Panel Exhibit CHN-23) and excerpts from three USCIT decisions (Panel Exhibits CHN-134, CHN-148, and CHN-163) – did not support China's description of the precise content of the AFA Norm. (Panel Report, para. 7.455)

<sup>353</sup> Panel Report, para. 7.457 (referring to Appellate Body Reports, *US – Underwear*, p. 13, DSR 1997:I, p. 21; *EC – Poultry*, para. 113; and Panel Reports, *US – Underwear*, para. 7.65; *EC – Poultry*, para. 7.65; *EC – IT Products*, para. 7.159).

<sup>354</sup> Panel Report, para. 7.457 (quoting Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 172).

<sup>355</sup> Panel Report, para. 7.457 (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.182).

<sup>356</sup> Panel Exhibit CHN-23.

<sup>357</sup> Panel Report, para. 7.460 (referring to the USDOC Antidumping Manual (Panel Exhibit CHN-23) pp. 7-8)).

<sup>358</sup> Panel Report, paras. 7.461-7.462.

<sup>359</sup> USCIT decisions, *East Sea Seafoods v. United States* (Panel Exhibit CHN-134); *Hubbel Power Systems v. United States* (Panel Exhibit CHN-148); *Peer Bearing v. United States* (Panel Exhibit CHN-163).

<sup>360</sup> Panel Report, paras. 7.464-7.467. For the Panel, the USCIT's decisions in *Peer Bearing v. United States* and *Hubbel Power Systems v. United States* relate to the magnitude or level of anti-dumping duties, and not the process described in the AFA Norm. The Panel considered that the USCIT's decision in *East Sea Seafoods v. United States* acknowledges that adverse inferences have been used to calculate NME-wide margins up to present, but does not shed light on the prospective application of this method of calculation. (*Ibid.*, para. 7.464 (referring to *Peer Bearing v. United States* (Panel Exhibit CHN-163), p. 1327), para. 7.465 (referring to *Hubbel Power Systems v. United States* (Panel Exhibit CHN-148), p. 1288), and para. 7.466 (referring to *East Sea Seafoods v. United States* (Panel Exhibit CHN-134), p. 1354, fn 15))

<sup>361</sup> Panel Report, paras. 7.469 and 7.472.

that the USDOC described the selection of the highest margin in the petition or the highest rate calculated in any segment of the proceedings as a "practice", "standard practice", or "normal practice", which has consistently been upheld by the USCIT and the United States Court of Appeals for the Federal Circuit (USCAFC).<sup>362</sup> In each of the 73 determinations, the USDOC followed the same course of action: upon finding non-cooperation by the NME-wide entity, the USDOC drew adverse inferences and selected facts that were adverse to the interests of that entity and the exporters within it.<sup>363</sup> The Panel considered that, by referring to its practice in every determination, the USDOC's conduct reflected an invariable and standard approach whenever the USDOC found that an NME-wide entity failed to cooperate to the best of its ability.<sup>364</sup> The Panel also found it significant that there was no evidence of determinations made during a period of over 12 years in which the USDOC did not follow this practice.<sup>365</sup>

5.118. The Panel considered that the Appellate Body's reasoning in *Argentina – Import Measures* stands for the proposition that not every norm that may continue to be applied in the future can be considered, for that reason alone, a norm that is prospective in nature.<sup>366</sup> Rather, according to the Panel, the future application of a measure must achieve a "certain degree of security and predictability typically associated with rules or norms."<sup>367</sup> Thus, in the Panel's view, the relevant inquiry was whether the evidence on the record demonstrates, with the level of security and predictability "typically associated with rules or norms", that the AFA Norm will be applied generally and prospectively.<sup>368</sup>

5.119. The Panel agreed with China that the USDOC's treatment of non-cooperating NME-wide entities in these determinations reflects more than mere repetition of conduct.<sup>369</sup> In the Panel's view, "[t]his practice constitutes evidence that the USDOC has invariably engaged in that same conduct" and "it may even constitute evidence that the USDOC is likely to engage in the same conduct in the future".<sup>370</sup> Also, the Panel did not exclude that "the invariable application of the alleged AFA Norm over several years might create the expectation that, in a case where an NME-wide entity is found to be non-cooperating, the USDOC may, again, draw adverse inferences and select facts that are adverse to the interests of the entity and the exporters within it."<sup>371</sup> In addition, the Panel did "not disagree that prior practice may provide the USDOC with administrative guidance for future action."<sup>372</sup>

5.120. The Panel, however, was not persuaded that the practice reflected in the 73 anti-dumping determinations on the record was sufficient to demonstrate that the AFA Norm has prospective application.<sup>373</sup> This is because "it [did] not demonstrate that the USDOC *will* continue to follow the same course of action in the future."<sup>374</sup> The Panel also considered that "the fact that economic operators could reasonably expect the occurrence of certain conduct, or that the USDOC may find guidance in previous determinations, is insufficient to ascertain with the necessary level of security and predictability the prospective application of the alleged AFA Norm."<sup>375</sup> Consequently, the Panel considered that a finding that the USDOC's practice at issue has prospective application

<sup>362</sup> Panel Report, para. 7.469.

<sup>363</sup> Panel Report, paras. 7.471.

<sup>364</sup> Panel Report, paras. 7.469 and 7.472.

<sup>365</sup> Panel Report, para. 7.472.

<sup>366</sup> Panel Report, para. 7.474 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.181-5.182).

<sup>367</sup> Panel Report, para. 7.474. The Panel also referred to the Appellate Body's statement in *Argentina – Import Measures* that "nothing in the [p]anel's reasoning indicates that it considered the TRRs measure to have the same level of security and predictability of continuation into the future typically associated with rules or norms". (Ibid. (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.182))

<sup>368</sup> Panel Report, para. 7.476 (quoting Appellate Body Reports, *Argentina – Import Measures*, para. 5.182; and referring to Appellate Body Report, *US – Zeroing (EC)*, para. 198). See also Panel Report, paras. 7.470 and 7.472.

<sup>369</sup> Panel Report, para. 7.472.

<sup>370</sup> Panel Report, para. 7.475.

<sup>371</sup> Panel Report, para. 7.476.

<sup>372</sup> Panel Report, para. 7.476.

<sup>373</sup> Panel Report, para. 7.475.

<sup>374</sup> Panel Report, para. 7.475. (emphasis original)

<sup>375</sup> Panel Report, para. 7.476. The Panel also stated that the USDOC's practice emanating from these 73 determinations does not provide the level of security and predictability of continuation into the future typically associated with rules or norms. (Ibid., para. 7.475 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.182))

"would amount to speculation – albeit well-grounded – about the prospective application of the alleged AFA Norm; certainty thereof, however, is not supported by record evidence."<sup>376</sup> The Panel thus concluded that the evidence on the record does not support China's assertion that the AFA Norm has prospective application. In light of this finding, the Panel did not consider it necessary to assess whether the AFA Norm has general application.<sup>377</sup>

5.121. Having found that China had not demonstrated that the AFA Norm constitutes a norm of general and prospective application, the Panel did not examine whether this alleged norm is "as such" inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.<sup>378</sup>

## 5.2.2 Rules or norms of general and prospective application

5.122. China's appeal calls for us to examine the requirements for a measure to be considered a rule or norm of general and prospective application that can be the subject of an "as such" challenge in WTO dispute settlement. At the outset, we observe that Articles 3.3, 4.4, and 6.2 of the DSU refer to "measures" that are challenged in WTO dispute settlement. The Appellate Body has explained that, in principle, any act or omission attributable to a WTO Member can be a measure of that Member for the purposes of dispute settlement proceedings.<sup>379</sup> Thus, it is clear that a broad range of measures can be challenged in WTO dispute settlement.<sup>380</sup>

5.123. The specific measure at issue, whether it is written or unwritten, and how it is described, characterized, and challenged by a complainant, will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of the measure challenged.<sup>381</sup> The manner in which a complainant challenges a measure affects the type of analysis conducted in WTO dispute settlement and the possible recommendations and rulings of the DSB.

5.124. The Appellate Body has noted that the distinction between "as such" and "as applied" challenges neither governs the definition of a measure for purposes of WTO dispute settlement, nor defines exhaustively the types of measures susceptible to challenge.<sup>382</sup> Rather, this distinction serves as an analytical tool to facilitate the understanding of the nature of a measure at issue. Measures need not fit squarely within one of these two categories in order to be susceptible to challenge in WTO dispute settlement.<sup>383</sup> For example, in *US – Continued Zeroing*, the Appellate Body considered that the measure at issue was "ongoing conduct" that consisted of the continued use of the zeroing methodology in successive administrative reviews by which duties in each of the 18 cases identified were maintained.<sup>384</sup> In *EC and certain member States – Large Civil Aircraft*, the Appellate Body did not exclude the possibility that "concerted action or practice" could be susceptible to challenge in WTO dispute settlement.<sup>385</sup> In *Argentina – Import Measures*, the measure at issue comprised several individual trade-related requirements operating together as part of a single measure in pursuit of a "managed trade" policy. That measure was considered to have systematic and continued application.<sup>386</sup>

5.125. Thus, in WTO dispute settlement, a challenge may be raised with respect to measures that are neither individual instances of application of a measure, nor rules or norms of general and prospective application. A measure may share certain attributes with both. "Measures" need not be compartmentalized into categories in order to be challengeable in WTO dispute settlement. The

<sup>376</sup> Panel Report, para. 7.476.

<sup>377</sup> Panel Report, para. 7.476. See also paras. 7.477-7.479 and 8.1.d.ii.

<sup>378</sup> Panel Report, paras. 7.479 and 8.1.d.ii.

<sup>379</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 81.

<sup>380</sup> See Appellate Body Reports, *Guatemala – Cement I*, fn 47 to para. 69; *EC and certain member States – Large Civil Aircraft*, para. 794; and *Argentina – Import Measures*, paras. 5.106 and 5.109.

<sup>381</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.108 and 5.110.

<sup>382</sup> Appellate Body Reports, *US – Continued Zeroing*, para. 179; *Argentina – Import Measures*, para. 5.102.

<sup>383</sup> Appellate Body Reports, *US – Continued Zeroing*, para. 179; *Argentina – Import Measures*, para. 5.102.

<sup>384</sup> Appellate Body Report, *US – Continued Zeroing*, paras. 181 and 183.

<sup>385</sup> Appellate Body Report, *EC and certain member States – Large Civil Aircraft*, para. 794.

<sup>386</sup> Appellate Body Reports, *Argentina – Import Measures*, paras. 5.126, 5.141, 5.143, and 5.145-5.146.

term "measure" in Articles 3.3, 4.4, and 6.2 of the DSU is sufficiently broad to encompass various types of acts or omissions attributable to a WTO Member.

5.126. This appeal concerns an "as such" challenge to an unwritten rule or norm of general and prospective application. The Appellate Body has explained that the rationale for allowing challenges against measures "as such" is that "the disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade."<sup>387</sup> This objective "would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a panel ... irrespective of any particular instance of application of such rules or norms."<sup>388</sup>

5.127. When bringing an "as such" challenge against such a rule or norm, a complaining party must clearly establish that the rule or norm is attributable to the responding Member; the precise content of the rule or norm; and that the rule or norm has general and prospective application.<sup>389</sup> Ascertaining whether the rule or norm has general and prospective application is necessary because "as such" challenges seek to prevent the responding Member from engaging in certain conduct in general and in the future, as opposed to addressing particular instances of application that are occurring or have occurred. The Appellate Body has clarified that both written and unwritten measures can be the subject of a challenge in WTO dispute settlement.<sup>390</sup> When written rules or norms are challenged "as such", the precise content, attribution, as well as the general and prospective nature of the rule or norm may be readily discernible from the document itself, its official character, or the manner in which it was elaborated, adopted, or enacted. When an unwritten rule or norm is challenged "as such", a complainant will be required to adduce arguments and supporting evidence to demonstrate the precise content, attribution, and general and prospective nature of the rule or norm.

5.128. In the present dispute, the participants have not appealed the Panel findings concerning the precise content of the unwritten AFA Norm and that it is attributable to the United States.<sup>391</sup> We therefore focus our analysis on the elements of "general application" and "prospective application".

5.129. In *US – Zeroing (EC)*, the Appellate Body agreed with the panel that the measure at issue in that dispute – the zeroing methodology – had general and prospective application. The Appellate Body relied on, *inter alia*, the facts that the zeroing methodology was invariably applied for an extended period of time; that instances of non-application had not been identified; that it was part of a standard program; and that it reflected a deliberate policy.<sup>392</sup> In *US – Oil Country Tubular Goods Sunset Reviews*, the Appellate Body found that the United States' Sunset Policy Bulletin had "normative value" because it provided "administrative guidance" and created "expectations among the public and among private actors"; had "general application" because it was to apply to "all the sunset reviews conducted in the United States"; and had "prospective application" because it was "intended to apply to sunset reviews taking place after its issuance".<sup>393</sup> Therefore, while certain elements may contribute to demonstrating that a measure has both general and prospective application, other elements may speak more specifically to the general or prospective character of the measure.

5.130. We now turn to the meaning of "general application" of rules or norms that can be challenged "as such" in WTO dispute settlement. In so doing, we draw guidance from the term "general application" in Articles X:1 and X:2 of the GATT 1994.<sup>394</sup> The Appellate Body's reading of the term as it appears in those provisions is relevant to the notion of "general application" as it

<sup>387</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>388</sup> Appellate Body Report, *US – Corrosion-Resistant Steel Sunset Review*, para. 82. (fn omitted)

<sup>389</sup> Appellate Body Reports, *US – Zeroing (EC)*, para. 198; *Argentina – Import Measures*, para. 5.104.

<sup>390</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 193.

<sup>391</sup> See Panel Report, paras. 7.455-7.456.

<sup>392</sup> Appellate Body Report, *US – Zeroing (EC)*, paras. 201-204.

<sup>393</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187. (fn omitted)

<sup>394</sup> Article X:1 of the GATT 1994 refers to "[l]aws, regulations, judicial decisions and administrative rulings of general application", and Article X:2 of the GATT 1994 refers to "measure[s] of general application". In this respect, we observe that Article X of the GATT 1994 concerns the "[p]ublication and [a]dministration of [t]rade [r]egulations", which fall into the broader category of measures of general and prospective application that can be challenged in WTO dispute settlement.



characterizes rules or norms that can be the subject of an "as such" challenge in WTO dispute settlement. In *US – Underwear*, the Appellate Body interpreted the term "measures of *general application*"<sup>395</sup> in Article X:2 of the GATT 1994. It considered that, while the safeguard measure at issue "was addressed to particular, i.e. named, exporting Members ...[,] the measure did not try to become specific as to the individual persons or entities engaged in exporting the specified textile or clothing items to the importing Member and hence affected by the proposed restraint".<sup>396</sup> In *EC – Poultry*, the Appellate Body interpreted the phrase "[l]aws, regulations, judicial decisions and administrative rulings of *general application*"<sup>397</sup> in Article X:1 of the GATT 1994. It considered that, while a measure addressed to a specific company or applied to a specific shipment would not qualify as a measure of general application, a measure would be of general application to the extent that it "affects an unidentified number of economic operators".<sup>398</sup> We therefore consider that a rule or norm has "general application" to the extent that it affects an unidentified number of economic operators.

5.131. In relation to the meaning of "prospective application", we note that China and the United States disagree on the requirements for demonstrating that a measure has prospective application. China argues that a rule or norm has prospective application where conduct is likely, predictable, possible to anticipate, or can be reasonably expected to continue<sup>399</sup>, and that a complainant is not required to show with "certainty" that a measure will continue to apply in the future.<sup>400</sup> The United States contends that the prospective application of a measure is determined by examining "whether the measure in question was intended to apply in the future, including whether the measure reflects a deliberate policy that goes beyond mere repetition of conduct."<sup>401</sup>

5.132. The Appellate Body has explained that a rule or norm has "prospective application" to the extent that it applies in the future.<sup>402</sup> In this respect, we do not consider that in order to demonstrate prospective application, a complainant is required to show with "certainty" that a given measure will apply in future situations.<sup>403</sup> A complainant would not be able to show "certainty" of future application, because any measure, including rules or norms, written or unwritten, may be modified or withdrawn in the future. The mere possibility that a rule or norm may be modified or withdrawn, however, does not remove the prospective nature of that measure. Rather, where prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of factors. The existence of an underlying policy, which is implemented by the rule or norm, is a relevant element in establishing the prospective nature of that rule or norm.<sup>404</sup> In addition, the more frequent, consistent, and extended the repetition of conduct is, the more probative such conduct will be in revealing, together with other factors, such an underlying policy.<sup>405</sup> In this regard, the Appellate Body has explained that relevant evidence may include proof of the systematic application of the challenged rule or norm.<sup>406</sup> Where ascertainable, the design, architecture, and structure of the rule or norm may also be relevant in identifying the underlying policy and prospective nature of that rule or norm. In addition, the extent to which a particular rule or norm provides administrative guidance for future conduct and the expectations it creates among economic operators that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm.<sup>407</sup>

5.133. The examination of whether a rule or norm has general and prospective application may vary from case to case. We do not exclude that additional factors may be relevant in this assessment depending on the particular facts and specific circumstances of the case at hand.

<sup>395</sup> Emphasis added.

<sup>396</sup> Appellate Body Report, *US – Underwear*, p. 21, DSR 1997:I, p. 29.

<sup>397</sup> Emphasis added.

<sup>398</sup> Appellate Body Report, *EC – Poultry*, para. 113 (quoting Panel Report, *US – Underwear*, para. 7.65).

<sup>399</sup> China's appellant's submission, paras. 318 and 359.

<sup>400</sup> China's appellant's submission, paras. 318, 360, 364, and 367.

<sup>401</sup> United States' appellee's submission, para. 351.

<sup>402</sup> Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>403</sup> See China's appellant's submission, paras. 294 and 364.

<sup>404</sup> See Appellate Body Reports, *US – Zeroing (EC)*, paras. 201 and 204-205; and *US – Zeroing (Japan)*, paras. 85 and 88 (quoting Panel Report, *US – Zeroing (Japan)*, para. 7.52).

<sup>405</sup> See Appellate Body Reports, *US – Zeroing (EC)*, para. 204; and *US – Zeroing (Japan)*, para. 85 (quoting Panel Report, *US – Zeroing (Japan)*, para. 7.52).

<sup>406</sup> Appellate Body Report, *US – Zeroing (EC)*, para. 198.

<sup>407</sup> Appellate Body Report, *US – Oil Country Tubular Goods Sunset Reviews*, para. 187.

### 5.2.3 Whether the Panel erred in finding that China has not demonstrated that the AFA Norm is a norm of general and prospective application

5.134. China claims that the Panel erred in finding that it has not demonstrated that the AFA Norm is a norm of general and prospective application. According to China, the Panel erroneously required that a complaining party must demonstrate with "certainty" that a "rule or norm" will be applied in the future for it to have "prospective application" and thus be challengeable "as such" in WTO dispute settlement.<sup>408</sup> China contends that, across all types of measures that have been challenged in past disputes, including rules or norms of general and prospective application, panels and the Appellate Body have not adopted a "legal standard of 'certainty'"<sup>409</sup> in relation to either written or unwritten measures.<sup>410</sup> China also contends that the Panel's examination of the AFA Norm is at odds with the Panel's examination of the Single Rate Presumption.<sup>411</sup> This is because, in relation to the Single Rate Presumption, the Panel did not require China to demonstrate with "certainty" that this rule or norm will be applied in the future for it to have prospective application.<sup>412</sup> China observes that, in relation to the AFA Norm, the Panel recalled the Appellate Body's statement that an unwritten rule or norm must display the "requisite" or "necessary level of security and predictability of continuation into the future typically associated with rules or norms".<sup>413</sup> China contends that the Panel considered this "necessary level" to be "certainty".<sup>414</sup> China submits that, in reaching this conclusion, the Panel erred in the interpretation and application of Articles 3.3 and 6.2 of the DSU.<sup>415</sup>

5.135. The United States responds that the Panel did not rely on a "legal standard of 'certainty'" when examining the prospective nature of the alleged AFA Norm.<sup>416</sup> The United States observes that China's argument relies only on "one instance in which the Panel employed the word 'certainty' with respect to the alleged AFA Norm".<sup>417</sup> The United States submits that, in past disputes, establishing the prospective application of a rule or norm was done by examining "whether the measure in question was intended to apply in the future, including whether the measure reflects a deliberate policy that goes beyond mere repetition of conduct."<sup>418</sup> In the United States' view, the Panel applied the correct legal standard to determine the prospective application of the alleged AFA Norm. This is because the Panel considered that prospective application can be established to the extent that the articulation or application of a rule or norm demonstrates that it is intended to be applied in the future.<sup>419</sup> In addition, the United States contrasts the Panel's findings concerning the alleged AFA Norm with that of the Single Rate Presumption. The United States suggests that, "[i]n comparison to the evidence on the Single Rate Presumption, which the Panel found contained multiple sources articulating the prospective nature of the challenged measure, the lack of similar articulation of the alleged AFA Norm in any of the evidence advanced by China was key to the Panel's finding that the alleged norm does not possess prospective application."<sup>420</sup> The United States suggests that "China's grievance is essentially that the Panel did not find China's evidence to be sufficient to support its allegation".<sup>421</sup> Given that China has not brought a claim under Article 11 of the DSU, the United States requests us to "decline to rule on China's arguments".<sup>422</sup>

5.136. Before turning to China's claims concerning the AFA Norm, the Panel made findings concerning the Single Rate Presumption, which it determined to be a rule or norm of general and

<sup>408</sup> China's appellant's submission, paras. 212, 227-231, 270, 387, 393, 395-396, 399, and 414.

<sup>409</sup> China's appellant's submission, para. 360.

<sup>410</sup> China's appellant's submission, paras. 212, 229, and 360.

<sup>411</sup> The Single Rate Presumption is described in paragraph 1.4. of this Report.

<sup>412</sup> China's appellant's submission, para. 229.

<sup>413</sup> China's appellant's submission, para. 211.

<sup>414</sup> China's appellant's submission, paras. 211-212.

<sup>415</sup> China's appellant's submission, para. 202.

<sup>416</sup> United States' appellee's submission, para. 339.

<sup>417</sup> United States' appellee's submission, para. 339.

<sup>418</sup> United States' appellee's submission, para. 351. The United States submits that, when examining whether the measure in question was intended to apply in the future, panels and the Appellate Body have often relied on the responding Member's own characterization of the measure in question. (Ibid.)

<sup>419</sup> United States' appellee's submission, para. 340.

<sup>420</sup> United States' appellee's submission, para. 362 (referring to Panel Report, paras. 7.337 and 7.447 (fns omitted)).

<sup>421</sup> United States' appellee's submission, para. 314.

<sup>422</sup> United States' appellee's submission, para. 370.

prospective application challengeable "as such" in WTO dispute settlement.<sup>423</sup> Furthermore, in assessing whether the AFA Norm has prospective application, the Panel compared the evidence pertaining to the future application of the AFA Norm with its earlier findings regarding the Single Rate Presumption.<sup>424</sup> For this reason, we find it appropriate to consider the Panel's findings regarding the Single Rate Presumption in order to elucidate the Panel's understanding of when a rule or norm has prospective application.

5.137. The Panel considered that the USDOC Antidumping Manual and USDOC Policy Bulletin No. 05.1<sup>425</sup> support China's argument that the Single Rate Presumption has general and prospective application "as a practice or policy".<sup>426</sup> In addition, for the Panel, the USCAFC and USCIT decisions, and the anti-dumping determinations on the record show that the Single Rate Presumption forms part of a "USDOC policy".<sup>427</sup> Finally, the Panel observed that "any legal instrument, including laws and regulations, may be subject to repeal or amendment in the future", but that this "does not necessarily remove the general and prospective nature of such legal instruments at a given point in time".<sup>428</sup>

5.138. As noted earlier, a rule or norm has "prospective application" to the extent that it applies in the future.<sup>429</sup> A complainant, however, cannot be required to show with "certainty" that a rule or norm will apply in the future because any measure, including rules or norms, may be modified or withdrawn in the future, and this mere possibility does not remove the prospective nature of a measure. Rather, as explained above, where prospective application is not sufficiently clear from the constitutive elements of a rule or norm, it may be demonstrated through a number of factors. We consider that the Panel did not require China to demonstrate with "certainty" that the Single Rate Presumption will be applied in the future. This aspect of the Panel's assessment of the Single Rate Presumption is in line with our understanding of "prospective application", as explained earlier.

5.139. In relation to the AFA Norm, the Panel noted that the USDOC described the selection of the highest margin in the petition or the highest rate calculated as a "practice", "standard practice", or "normal practice", which has consistently been upheld by the USCIT and the USCAFC.<sup>430</sup> For the Panel, the fact that the USDOC referred to its practice in every determination indicates that the conduct reflected an invariable and standard approach whenever the USDOC found that an NME-wide entity failed to cooperate to the best of its ability.<sup>431</sup> The Panel considered that the USDOC's actions in these determinations reflect more than mere repetition of conduct.<sup>432</sup> In the Panel's view, this "may even constitute evidence that the USDOC is likely to engage in that same conduct in the future".<sup>433</sup> The Panel also did not exclude that "the invariable application of the alleged AFA Norm over several years might create the expectation" that the USDOC may again

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<sup>423</sup> Panel Report, para. 7.339.

<sup>424</sup> Panel Report, para. 7.467.

<sup>425</sup> USDOC Policy Bulletin No. 05.1 (Panel Exhibit CHN-109).

<sup>426</sup> Panel Report, para. 7.324. For the Panel, the repeated use of the term "will" in the USDOC Policy Bulletin No. 05.1 was indicative of conduct that will be applied in the future. (Ibid., para. 7.317) The Panel also considered that "the purpose of [the USDOC Antidumping Manual] is to provide USDOC officials with 'internal training and guidance' on the practices or current policies set out therein, including the Single Rate Presumption", and that these practices or policies are to be applied in all future anti-dumping proceedings involving NME countries. (Ibid., para. 7.322)

<sup>427</sup> Panel Report, para. 7.326 (referring to USCIT decisions, *Jiangsu v. United States* (Panel Exhibit CHN-123), pp. 1310-1312; *East Sea Seafoods v. United States* (Panel Exhibit CHN-134), p. 1354; and *Peer Bearing v. United States* (Panel Exhibit CHN-163), p. 1325; and USCAFC decision, *Huaiyin v. United States* (Panel Exhibit CHN-132), p. 1378), and para. 7.328 (referring to *Bicycles*, final AD determination (Panel Exhibit CHN-114), p. 19036; 1996-1997 administrative review in *Sebacic Acid* (Panel Exhibit CHN-126), p. 17368; 2005-2006 administrative review in *Bags* (Panel Exhibit CHN-272), p. 51590; and 2006-2007 administrative review in *Bags* (Panel Exhibit CHN-274), p. 52284).

<sup>428</sup> Panel Report, para. 7.323.

<sup>429</sup> Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>430</sup> Panel Report, para. 7.469.

<sup>431</sup> Panel Report, para. 7.472.

<sup>432</sup> Panel Report, para. 7.472.

<sup>433</sup> Panel Report, para. 7.475.

follow this course of action.<sup>434</sup> In addition, the Panel did "not disagree that prior practice may provide the USDOC with administrative guidance for future action."<sup>435</sup>

5.140. Relying on the Appellate Body's reasoning in *Argentina – Import Measures*, the Panel considered that not every norm that may continue to be applied in the future will amount to a prospective measure.<sup>436</sup> Rather, according to the Panel, the future application of a measure must meet a "certain degree of security and predictability typically associated with rules or norms".<sup>437</sup> Thus, in the Panel's view, it was required to assess whether the evidence on the record establishes that the future application of the AFA Norm achieves such a level of security and predictability.<sup>438</sup> In this respect, the Panel was not convinced that the practice reflected in the 73 anti-dumping determinations was sufficient to demonstrate prospective application of the AFA Norm<sup>439</sup>, because "it [did] not demonstrate that the USDOC *will* continue to follow the same course of action in the future."<sup>440</sup> The Panel further considered that the fact that economic operators could reasonably expect certain conduct, or that the USDOC may find guidance in previous determinations, is insufficient to establish the AFA Norm's prospective application with the necessary level of security and predictability.<sup>441</sup> Consequently, the Panel considered that, in relation to the AFA Norm, the evidence amounted to "speculation – albeit well-grounded – about the prospective application of the alleged AFA Norm; certainty thereof, however, is not supported by record evidence."<sup>442</sup>

5.141. We consider that, when compared to the Panel's analysis of the Single Rate Presumption, the Panel applied a different standard to examine the prospective nature of the AFA Norm. In relation to both measures challenged by China, the Panel concluded that there was evidence on record of a consistent and standard USDOC practice, over several years, in relation to anti-dumping proceedings involving NME countries. For the Single Rate Presumption, the Panel also noted that the USCAFC and USCIT decisions on the record considered the USDOC practice or policy to be "settled", "established and judicially affirmed", "not in conflict with the Statute", and "to some extent, sanctioned", "upheld", or "approv[ed by the USCAFC]".<sup>443</sup> For the AFA Norm, the Panel considered that the USDOC's actions reflect more than mere repetition of conduct<sup>444</sup>, and noted that the USDOC described the conduct at issue as having been consistently upheld by the USCIT and the USCAFC.<sup>445</sup> We note that the Panel considered that the amount of evidence revealing the USDOC's practice was higher in relation to the Single Rate Presumption when compared to the evidence concerning the AFA Norm. Notwithstanding the difference in the amount of evidence, the Panel required *something more* in relation to the legal standard applied to the AFA Norm. In that respect, the Panel considered that "the future application of a measure must achieve a certain degree of security and predictability typically associated with rules or norms."<sup>446</sup> The Panel, however, did not identify precisely what this level or degree is, or how a determination is to be made as to whether a rule or norm achieves it. The Panel then found that "certainty" of the prospective or future application of the AFA Norm was not supported by record evidence.<sup>447</sup> In

<sup>434</sup> Panel Report, para. 7.476.

<sup>435</sup> Panel Report, para. 7.476.

<sup>436</sup> Panel Report, para. 7.474 (referring to Appellate Body Reports, *Argentina – Import Measures*, paras. 5.181-5.182).

<sup>437</sup> Panel Report, para. 7.474.

<sup>438</sup> Panel Report, para. 7.476 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.182; and *US – Zeroing (EC)*, para. 198). See also Panel Report, paras. 7.470 and 7.472.

<sup>439</sup> Panel Report, para. 7.475.

<sup>440</sup> Panel Report, para. 7.475. (emphasis original)

<sup>441</sup> Panel Report, para. 7.476.

<sup>442</sup> Panel Report, para. 7.476.

<sup>443</sup> Panel Report, para. 7.326. (fns omitted)

<sup>444</sup> Panel Report, para. 7.472.

<sup>445</sup> Panel Report, para. 7.469.

<sup>446</sup> Panel Report, para. 7.474 (referring to Appellate Body Reports, *Argentina – Import Measures*, para. 5.182). The Appellate Body in *Argentina – Import Measures* did not purport to articulate the legal requirements for establishing the "prospective application" of a "rule or norm". Rather, the Appellate Body statement referred to by the Panel was made in the context of a claim under Article 11 of the DSU by Argentina pursuant to which the panel in that dispute would have "uncritically accepted the complainants' characterization of the content of the alleged TRRs measure and failed to ensure that its findings were based on the record evidence and supported by sufficient reasoning". (Appellate Body Reports, *Argentina – Import Measures*, para. 5.162)

<sup>447</sup> Panel Report, para. 7.476. In relation to the Single Rate presumption, the Panel did not require that China demonstrate with "certainty" that the measure will be applied in the future for it to have "prospective application". The Panel expressly noted that any legal instrument, including laws and regulations, may be

our view, the Panel's reasoning is circular because it suggests that the prospective application of a rule or norm would be found to exist if it corresponds to the level or degree of continuation into the future of a rule or norm.

5.142. In addition, as noted earlier, a complainant is not required to show with "certainty" that a given measure will apply in future situations for that measure to have prospective application. Thus, by requiring "certainty" of future application, the Panel's examination of the prospective nature of the AFA Norm is at odds with the legal standard for establishing the prospective application of a rule or norm.<sup>448</sup>

5.143. For the reasons above, we conclude that the Panel erred in finding that China has not demonstrated that the AFA Norm has "prospective application" and is therefore a norm of general and prospective application. Consequently, we reverse the Panel's findings in paragraphs 7.479 and 8.1.d.ii of its Report.

#### 5.2.4 China's request for completion – general and prospective application

5.144. Having reversed the Panel's finding that China has not demonstrated that the AFA Norm is a norm of general and prospective application, we turn to China's request for us to complete the analysis and find that the AFA Norm has general and prospective application. For China, the AFA Norm has general application as it does not relate to "specific economic operators, but rather to the general class of economic operators" that the USDOC could potentially include within an NME-wide entity.<sup>449</sup> China also contends that applying the correct legal standard to the relevant factual findings of the Panel demonstrates that the AFA Norm has prospective application.<sup>450</sup>

5.145. The United States responds that we should not complete the analysis and find that the alleged AFA Norm has general application, given the lack of necessary findings by the Panel and uncontested facts on the record.<sup>451</sup> In particular, the United States contends that the Panel Report lacks findings on the scope of application of the alleged AFA Norm, and that the evidence submitted by China was contested before the Panel.<sup>452</sup> In addition, the United States contends that the evidence before the Panel was insufficient to demonstrate that the alleged AFA Norm has prospective application.<sup>453</sup>

5.146. In previous disputes, the Appellate Body has completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of disputes.<sup>454</sup> The Appellate Body has done so where the factual findings in the panel report, undisputed facts on the panel record, and admitted facts provided it with a sufficient basis for conducting its own analysis.<sup>455</sup> The Appellate Body has declined to complete the legal analysis in light of the complexity of issues, the absence of full exploration of issues before the panel, and considerations pertaining to parties' due process rights.<sup>456</sup> Moreover, the Appellate Body has declined to complete the legal analysis where doing so was not required to resolve the dispute.<sup>457</sup>

5.147. In examining below whether the AFA Norm has general and prospective application, we also assess whether the conditions for us to complete the analysis are present in this dispute. We

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subject to repeal or amendment in the future, and this would not necessarily remove the prospective nature of that instrument. (Ibid., para. 7.323)

<sup>448</sup> Contrary to the United States' argument, we do not consider that China's claim concerns the Panel's assessment of the evidence and thus should have been brought under Article 11 of the DSU.

(See United States' appellee's submission, paras. 367-370) Rather, as explained above, we find error with the standard applied by the Panel to the AFA Norm.

<sup>449</sup> China's appellant's submission, para. 432.

<sup>450</sup> China's appellant's submission, paras. 416 and 419.

<sup>451</sup> United States' appellee's submission, paras. 416 and 418.

<sup>452</sup> United States' appellee's submission, paras. 425 and 431.

<sup>453</sup> United States' appellee's submission, paras. 361-364.

<sup>454</sup> See Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 1178; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 1351; and *EC – Asbestos*, para. 78.

<sup>455</sup> See Appellate Body Reports, *Australia – Salmon*, paras. 209, 241, and 255; *Korea – Dairy*, paras. 91 and 102; *US – Large Civil Aircraft (2<sup>nd</sup> complaint)*, para. 653; *US – Section 211 Appropriations Act*, para. 343; and *EC – Asbestos*, paras. 78-79.

<sup>456</sup> See Appellate Body Reports, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 5.224; and *EC – Seal Products*, paras. 5.63 and 5.69.

<sup>457</sup> Appellate Body Report, *US – Steel Safeguards*, para. 431.

first examine whether the AFA Norm has "general application". As noted earlier, a rule or norm will have "general application" to the extent that it affects an unidentified number of economic operators, instead of economic operators specified in that rule or norm.<sup>458</sup>

5.148. China contends that the AFA Norm has general application by relying on certain statements made by the Panel pertaining to the AFA Norm and the Single Rate Presumption. According to China, the AFA Norm concerns the USDOC's determination of the rate for an NME-wide entity that is identified by the USDOC through operation of the Single Rate Presumption.<sup>459</sup> China notes that the Panel found that, under the Single Rate Presumption, "the USDOC presumptively includes within the NME-wide entity *all* producers/exporters of a product under consideration in anti-dumping proceedings from a country that the United States considers to be a non-market economy."<sup>460</sup> In addition, referring to the 73 anti-dumping determinations it submitted to the Panel, China contends that the AFA Norm applies in all investigations and reviews that involve imports from an NME country.<sup>461</sup> China contends that the AFA Norm concerns the general class of economic operators that the USDOC could potentially include within an NME-wide entity.<sup>462</sup>

5.149. The United States contends that the alleged AFA Norm does not have general application because no evidence or findings demonstrate that it affects an unidentified number of economic operators.<sup>463</sup> The United States submits that the alleged AFA Norm merely "constitutes particular treatment accorded to the China-government entity in an antidumping proceeding involving uncooperative exporters or producers that are part of the China-government entity."<sup>464</sup>

5.150. Before the Panel, China described the precise content of the AFA Norm in the following manner:

[W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it.<sup>465</sup>

5.151. The Panel found that the 73 anti-dumping determinations on the record demonstrate the precise content of the AFA Norm as described by China. According to the Panel, these determinations show that, "whenever the USDOC made a finding that an NME-wide entity failed to cooperate to the best of its ability, it adopted adverse inferences and, in determining the duty rate for the NME-wide entity, selected facts from the record that were adverse to the interests of such entity, and the exporters included within it."<sup>466</sup>

5.152. The unappealed Panel finding concerning the precise content of the AFA Norm suggests that this norm is a measure of general application because it affects an unidentified number of economic operators. The AFA Norm is not addressed to specified economic operators, in the sense that the companies that will be subject to the AFA Norm can be identified independently of any specific application of this norm. In addition, we note that the description of the precise content of the AFA Norm does not impose any express limitation on the economic operators from an NME country that may be included within an NME-wide entity that is subject to the AFA Norm. This means, in our view, that any economic operator from an NME country may be included within such an NME-wide entity.

5.153. We also note the connection between the AFA Norm and the Single Rate Presumption. For the Panel, pursuant to the Single Rate Presumption, exporters in USDOC anti-dumping proceedings involving NME countries are presumed to form part of an NME-wide entity and are assigned a single anti-dumping duty rate, unless an exporter demonstrates, through the fulfilment

<sup>458</sup> See para. 5.130. above.

<sup>459</sup> China's appellant's submission, para. 429 (referring to Panel Report, para. 7.480).

<sup>460</sup> China's appellant's submission, para. 430 (referring to Panel Report, para. 7.361).(emphasis original)

<sup>461</sup> China's appellant's submission, para. 431 and fn 450 thereto.

<sup>462</sup> China's appellant's submission, para. 432.

<sup>463</sup> United States' appellee's submission, para. 377.

<sup>464</sup> United States' appellee's submission, para. 377.

<sup>465</sup> Panel Report, para. 7.422 (quoting China's opening statement at the second Panel meeting, para. 63 (emphasis original)).

<sup>466</sup> Panel Report, para. 7.454.

of the criteria set out in the Separate Rate Test<sup>467</sup>, an absence of *de jure* and *de facto* governmental control over its export activities.<sup>468</sup> The Panel found that the Single Rate Presumption has general application because it applies to all "NME exporters" involved in original investigations and administrative reviews conducted by the United States.<sup>469</sup>

5.154. We note that the application of the Single Rate Presumption may result in the establishment of NME-wide entities. In turn, these NME-wide entities will be subject to the AFA Norm where the USDOC finds that they have failed to cooperate to the best of their ability. Therefore, the AFA Norm would apply to the same group of economic operators subject to the Single Rate Presumption – namely, economic operators from an NME country involved in anti-dumping proceedings – whenever those economic operators do not demonstrate "an absence of *de jure* and *de facto* governmental control over [their] export activities"<sup>470</sup>, and do not cooperate in the anti-dumping investigation to the best of their ability.<sup>471</sup> Thus, we consider that the Panel's finding that the Single Rate Presumption is a measure of general application supports the conclusion that the AFA Norm is also a measure of general application.<sup>472</sup>

5.155. Finally, the 73 anti-dumping determinations put on the record by China also support the conclusion that the AFA Norm has general application. As noted above, the Panel considered that these determinations demonstrate the precise content of the AFA Norm as described by China.<sup>473</sup> We note that the 73 determinations covered a wide range of products, from saw blades to steel cylinders, paper, shrimps, furniture, and photovoltaic cells<sup>474</sup>, and that the specific companies that were deemed part of the NME-wide entity also varied greatly. In our view, the wide and varied coverage of these determinations is a further indicator of the general scope of the AFA Norm. This means that the AFA Norm is not limited to specified economic operators, but rather covers any economic operator that may be included within an NME-wide entity subject to the AFA Norm.

5.156. In light of the above, we conclude that, based on the findings in the Panel Report and undisputed facts on the Panel record, the AFA Norm has "general application" because it affects an unidentified number of economic operators.

5.157. We now turn to examine whether the AFA Norm has "prospective application". As noted earlier, a rule or norm will have "prospective application" to the extent that it applies in the future.<sup>475</sup> We also recall our above finding that a complainant is not required to show with "certainty" that a given measure will continue to apply in the future. Rather, where prospective application is not sufficiently clear from the constitutive elements of a rule or norm, it may be demonstrated by a number of factors. These include: the existence of an underlying policy that is implemented by the rule or norm; the systematic application of the challenged rule or norm; the design, architecture, and structure of the rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future.<sup>476</sup>

5.158. China identifies a number of findings by the Panel that it views as being sufficient to show that the AFA Norm has prospective application.<sup>477</sup> The United States responds that the evidence

<sup>467</sup> The Separate Rate Test is described in paragraph 1.4. of this Report.

<sup>468</sup> Panel Report, para. 7.311.

<sup>469</sup> Panel Report, para. 7.337.

<sup>470</sup> Panel Report, para. 7.311.

<sup>471</sup> Panel Report, para. 7.454.

<sup>472</sup> The group of economic operators subject to the Single Rate Presumption may not overlap entirely with the group of economic operators subject to the AFA Norm where certain economic operators demonstrate the absence of governmental control (and thus are excluded from the NME-wide entity), or where NME-wide entities are considered to cooperate in the anti-dumping proceedings to the best of their ability. In our view, even where the AFA Norm applies to a sub-group of the economic operators subject to the Single Rate Presumption, the AFA Norm would still apply to an unidentified number of economic operators because it is not possible to specify the economic operators affected by this norm outside the context of an application of the AFA Norm to a particular NME-wide entity.

<sup>473</sup> Panel Report, para. 7.454.

<sup>474</sup> See Panel Report, fns 875 and 876 to para. 7.444.

<sup>475</sup> Appellate Body Reports, *US – Oil Country Tubular Goods Sunset Reviews*, paras. 172 and 187; *US – Corrosion-Resistant Steel Sunset Review*, para. 82.

<sup>476</sup> See para. 5.132. above.

<sup>477</sup> China's appellant's submission, para. 419.

before the Panel was insufficient to demonstrate that the alleged AFA Norm has prospective application.<sup>478</sup>

5.159. We observe that, in the context of examining whether China had demonstrated the precise content of the AFA Norm, the Panel noted that, "[i]n the USDOC's view, selecting the highest margin from any segment of the proceedings [in cases of non-cooperation] 'reflects a common sense inference that the highest prior margin is the most probative evidence of current margins, because, if it were not so, the importer, *knowing of the rule*, would have produced current information showing the margin to be less'."<sup>479</sup> In the same context, the Panel also observed that, in several determinations, the USDOC referred to its "practice" of ensuring that the margin is "sufficiently adverse as to effectuate the purpose of the facts available rule to induce respondents to provide the [USDOC] with complete and accurate information in a timely manner".<sup>480</sup> In our view, these Panel statements mean that the AFA Norm implements, or is part of, an underlying policy. The implementation of an underlying policy is an element that supports the conclusion that the AFA Norm has prospective application.

5.160. The Panel also observed that, in several of the 73 USDOC anti-dumping determinations on the record, the USDOC described the selection of the highest margin in the petition or the highest rate calculated in any segment of the proceedings as a "practice", "standard practice", or "normal practice", which has consistently been upheld by the USCIT and the USCAFC.<sup>481</sup> We agree with the Panel that the USDOC's conduct amounted to more than mere repetition of conduct.<sup>482</sup> We also agree with the Panel that the invariable application of the AFA Norm during a period of over 12 years might create expectations for economic operators that the norm will continue to apply in the future, and that prior practice may provide the USDOC with administrative guidance for future actions.<sup>483</sup> As explained above, the systematic application of the challenged norm over an extended period of time, as well as the extent to which it provides administrative guidance for future conduct and creates expectations among economic operators, are all relevant factors that indicate the prospective application of a rule or norm.

5.161. We observe that, at the end of its analysis, the Panel introduced the requirement of "certainty" in relation to the prospective application of the AFA Norm. Purporting to apply this understanding to the facts in this dispute, the Panel stated that it was not persuaded that the practice reflected in the 73 anti-dumping determinations on the record is sufficient to demonstrate that "the USDOC *will* continue to follow the same course of action in the future."<sup>484</sup> The Panel then concluded that the USDOC's practice emanating from these 73 determinations does not provide the "level of security and predictability of continuation into the future typically associated with rules or norms."<sup>485</sup> We consider that the legal proposition advanced by the Panel at paragraphs 7.474-7.475 of its Report, as well as the tentative language and the conclusion in paragraph 7.476 of its Report<sup>486</sup>, reflect the "certainty" requirement in respect of

<sup>478</sup> United States' appellee's submission, paras. 361-364.

<sup>479</sup> Panel Report, para. 7.446. (emphasis added) The Panel identified instances where the USDOC referred to the fact that non-cooperating parties are "knowing of the rule." (See Panel Report, fn. 886 to para. 7.446 (referring to 2011-2012 administrative review in *Glycine* (Panel Exhibit CHN-433), p. 7; 2007-2008 administrative review in *Honey* (Panel Exhibit CHN-313), p. 68252; 2003-2004 administrative review in *Porcelain-on-Steel Cooking Ware* (Panel Exhibit CHN-441), p. 76029; 2005-2006 administrative review in *Tapered Roller Bearings* (Panel Exhibit CHN-438), p. 14080; and 2004-2005 administrative review in *Freshwater Crawfish Tail Meat* (Panel Exhibit CHN-439), p. 59436)) We note that, in addition to the exhibits mentioned by the Panel, the USDOC referred to the same phrase in three more determinations, namely, 2011-2012 administrative review in *Shrimp* (Panel Exhibit CHN-167), p. 8; 2012-2013 administrative review in *Aluminum* (Panel Exhibit CHN-205), p. 18; and 2011 administrative review in *Furniture* (Panel Exhibit CHN-298), p. 14.

<sup>480</sup> Panel Report, para. 7.445.

<sup>481</sup> Panel Report, paras. 7.469 and 7.472.

<sup>482</sup> Panel Report, para. 7.472. The Panel noted that "[t]he sample includes determinations covering a period of over 12 years, with the most recent determination dating from 7 July 2015 (the first administrative review in *Solar*)." (Ibid. (referring to 2012-2013 administrative review in *Solar* (Panel Exhibit CHN-487))

<sup>483</sup> Panel Report, paras. 7.475-7.476.

<sup>484</sup> Panel Report, para. 7.475. (emphasis original)

<sup>485</sup> Panel Report, para. 7.475.

<sup>486</sup> At paragraph 7.476 of its Report, we note that the Panel employed somewhat tentative language in its statements – namely, the terms "[w]e do not exclude", "[w]e ... do not disagree", "might" and "may". In particular, the Panel stated that it "[did] *not* exclude that the invariable application of the alleged AFA Norm over several years *might* create the expectation that, in a case where an NME-wide entity is found to be non-cooperating, the USDOC may, again, draw adverse inferences and select facts that are adverse to the



"prospective application" that the Panel applied to the AFA Norm. We have concluded above that the Panel erred by requiring China to demonstrate with "certainty" that the AFA Norm will be applied in the future. In our view, the final part of the Panel's analysis – where the erroneous "certainty" requirement is introduced – does not detract from the Panel's earlier analysis concerning the factors relevant to establishing "prospective application" as properly interpreted.

5.162. Thus, the Panel made certain findings and statements that lead to the conclusion that the AFA Norm has prospective application, namely, that the AFA Norm was consistently and systematically applied by the USDOC over an extended period of time, and that the AFA Norm implements an underlying policy, provides administrative guidance, and creates expectations among economic operators.

5.163. In light of the above, we conclude that, based on the findings in the Panel Report and undisputed facts on the Panel record, the AFA Norm has "prospective application" in the sense that it reflects a policy by the USDOC, it provides administrative guidance for future action, it generates expectations among economic operators, and it therefore will continue to be applied in the future.

5.164. In light of the unappealed Panel findings that the AFA Norm is attributable to the United States<sup>487</sup> and that its content corresponds to the description made by China<sup>488</sup>, and having found that the AFA Norm has both general and prospective application, we find that the AFA Norm is a rule or norm of general and prospective application that can be challenged "as such" in WTO dispute settlement.

#### 5.2.5 China's request for completion – Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement

5.165. Having found that the AFA Norm is a rule or norm of general and prospective application, we turn to China's request for us to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.<sup>489</sup> China argues that the AFA Norm prompts the USDOC to draw adverse inferences and select adverse facts as a response to a single factor – i.e. non-cooperation – without establishing that such inferences can reasonably be drawn and that such facts are the "best" information available in the particular circumstances.<sup>490</sup> China submits that the inferences that can reasonably be drawn from all of the facts and circumstances may be different from the inferences that might arise from non-cooperation alone.<sup>491</sup> For China, as a result of the AFA Norm, the USDOC overlooks relevant procedural circumstances<sup>492</sup>, fails to exercise special circumspection, and fails to select the best information available, as required by Article 6.8 and paragraph 7 of Annex II.<sup>493</sup>

5.166. The United States responds that the Appellate Body should dismiss China's request for completion because China's claims under Article 6.8 and Annex II are outside the Panel's terms of reference.<sup>494</sup> The United States additionally submits that the Appellate Body is not in a position to complete the analysis<sup>495</sup>, and that China's claims are without merit.<sup>496</sup> The United States also contends that Appellate Body findings on the AFA Norm would not contribute to a positive resolution of this dispute.<sup>497</sup>

5.167. We first turn to the United States' argument concerning the Panel's terms of reference. The United States submits that China's claims under Article 6.8 and Annex II are outside the Panel's terms of reference because paragraph 26 of China's panel request does not identify the

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interests of the entity and the exporters within it." The Panel also "[did] *not disagree* that prior practice *may* provide the USDOC with administrative guidance for future action." (Panel Report, para. 7.476) (emphasis added)

<sup>487</sup> Panel Report, para. 7.456.

<sup>488</sup> Panel Report, para. 7.454.

<sup>489</sup> China's appellant's submission, paras. 439, 509, and 637.

<sup>490</sup> China's appellant's submission, paras. 441 and 480.

<sup>491</sup> China's appellant's submission, paras. 483-485.

<sup>492</sup> China's appellant's submission, para. 442.

<sup>493</sup> China's appellant's submission, paras. 441, 497, and 507-508.

<sup>494</sup> United States' appellee's submission, paras. 255, 379, 387, and 392.

<sup>495</sup> United States' appellee's submission, paras. 256-257, 416, and 418.

<sup>496</sup> United States' appellee's submission, paras. 256, 399, 411-412, and 438.

<sup>497</sup> United States' appellee's submission, paras. 253 and 287.

precise obligations alleged to have been breached by the United States. Rather, it refers to an entire portion of the Anti-Dumping Agreement – namely, Annex II – that contains multiple obligations.<sup>498</sup>

5.168. The Appellate Body has explained that merely listing articles in the panel request may fall short of the standard in Article 6.2 of the DSU where the listed articles establish multiple distinct obligations.<sup>499</sup> In this respect, the Appellate Body has examined the narrative of a panel request when considering whether the panel request as a whole sufficiently identifies the particular obligations that form the legal basis of the complaint.<sup>500</sup>

5.169. We note that China's panel request alleges that "the United States fails to use the best information available and special circumspection when basing its findings on information from secondary sources."<sup>501</sup> We observe that paragraph 7 of Annex II to the Anti-Dumping Agreement contains similar wording providing that, "[i]f the authorities have to base their findings ... on information from a secondary source, ... they should do so with special circumspection." Paragraph 7 is the only paragraph in Annex II that concerns an investigating authority's obligation to exercise special circumspection when basing findings on information from a secondary source. Thus, we consider that the general reference by China to Annex II, together with the narrative included in its panel request, provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" that comports with the standard set forth in Article 6.2 of the DSU.

5.170. We now turn to China's claim under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. Article 6.8 provides:

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

5.171. Paragraph 7 of Annex II provides:

ANNEX II  
BEST INFORMATION AVAILABLE IN TERMS OF  
PARAGRAPH 8 OF ARTICLE 6

...

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

<sup>498</sup> United States' appellee's submission, paras. 255, 379-380, 387, 390, and 392.

<sup>499</sup> Appellate Body Reports, *Korea – Dairy*, para. 124; *China – Raw Materials*, para. 220. See also Appellate Body Reports, *EC – Fasteners (China)*, para. 598; and *US – Carbon Steel*, para. 130.

<sup>500</sup> Appellate Body Report, *US – Countervailing and Anti-Dumping Measures (China)*, paras. 4.25-4.30. The Appellate Body has noted that compliance with the requirements of Article 6.2 of the DSU must be determined on the merits of each case, having considered the panel request as a whole, and in light of attendant circumstances. (Appellate Body Report, *US – Carbon Steel*, para. 127. See also Appellate Body Reports, *EC and certain member States – Large Civil Aircraft*, para. 787; and *EC – Selected Customs Matters*, para. 168)

<sup>501</sup> Request for the Establishment of a Panel by China, dated 13 February 2014, WT/DS471/5, para. 26.

5.172. The Appellate Body has explained that, when relying on facts available, an investigating authority must use those facts available that reasonably replace the necessary information that an interested party failed to provide with a view to arriving at an accurate determination.<sup>502</sup> Ascertaining which "facts available" reasonably replace the missing "necessary information" calls for a process of reasoning and evaluation of all substantiated facts on the record.<sup>503</sup> In such a process, no substantiated facts on the record can be *a priori* excluded from consideration.<sup>504</sup> In addition, an investigating authority may be called upon to draw inferences from the evidence before it in order to reach a conclusion. The manner or procedural circumstances in which information is missing can be relevant to an investigating authority's use of "facts available".<sup>505</sup> Determinations under Article 6.8, however, must be based on "facts" that reasonably replace the missing "necessary information" in order to arrive at an accurate determination, and thus cannot be made on the basis of procedural circumstances alone.<sup>506</sup>

5.173. Article 6.8 provides that the provisions in Annex II shall be observed where an investigating authority resorts to the use of "facts available". Paragraph 7 of Annex II sets forth that, if the authorities have to base their findings on information from a secondary source, including information supplied in the application for the initiation of an investigation, they should do so with special circumspection and, where practicable, check the information from other independent sources at their disposal. The Appellate Body has considered that this provision is indicative that investigating authorities should undertake a process of reasoning and evaluation when selecting the facts available that reasonably replace the missing "necessary information" to arrive at an accurate determination.<sup>507</sup>

5.174. Given that the Panel neither explored nor made any findings in relation to whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II, we examine whether there are sufficient findings in the Panel Report and undisputed facts on the Panel record for us to conduct our own analysis.

5.175. We recall that the Panel found that the 73 anti-dumping determinations put on the record by China demonstrate the precise content of the AFA Norm as described by China.<sup>508</sup> Before the Panel, China described the precise content of the AFA Norm in the following manner:

[W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it.<sup>509</sup>

<sup>502</sup> Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, paras. 293-295; *US – Carbon Steel (India)*, para. 4.416. Given the similarities between the text of Article 12.7 of the Agreement in Subsidies and Countervailing Measures (SCM Agreement) and Article 6.8 of the Anti-Dumping Agreement and that both provisions permit an investigating authority, under certain circumstances, to fill in gaps in the information necessary to arrive at a conclusion as to dumping or subsidization and injury, we consider that the interpretation of Article 12.7 of the SCM Agreement developed by the Appellate Body in *Mexico – Anti-Dumping Measures on Rice* and *US – Carbon Steel (India)* is relevant to the understanding of the legal standard applied under Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement.

<sup>503</sup> Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Carbon Steel (India)*, para. 4.419.

<sup>504</sup> Appellate Body Reports, *Mexico – Anti-Dumping Measures on Rice*, para. 294; *US – Carbon Steel (India)*, para. 4.419.

<sup>505</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.420 and 4.422. Article 6.13 of the Anti-Dumping Agreement provides that investigating authorities "shall take due account of any difficulties experienced by interested parties", which includes interested parties that have not provided the "necessary information" referred to in Article 6.8 of the Anti-Dumping Agreement. The kinds of difficulties experienced by interested parties to be taken into account by an investigating authority in having recourse to Article 6.8 could relate to, *inter alia*, the nature and availability of the evidence being sought, the adequacy of protection accorded by an investigating authority to the confidentiality of information, the time period provided to respond, and the extent or number of opportunities to respond. (*Ibid.*, para. 4.422)

<sup>506</sup> Appellate Body Report, *US – Carbon Steel (India)*, paras. 4.422 and 4.468.

<sup>507</sup> Appellate Body Report, *US – Carbon Steel (India)*, para. 4.425. See also Appellate Body Report, *Mexico – Anti-Dumping Measures on Rice*, para. 289.

<sup>508</sup> Panel Report, para. 7.454.

<sup>509</sup> Panel Report, para. 7.422 (quoting China's opening statement at the second Panel meeting, para. 63 (emphasis original)).

5.176. As noted above, there are no findings by the Panel on whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II. In particular, the Panel did not explore much less make any findings concerning the process of reasoning and evaluation undertaken by the USDOC prior to selecting "facts available" to replace missing information.

5.177. On appeal, China argues that the AFA Norm prompts the USDOC to draw adverse inferences and select adverse facts as a response to non-cooperation alone.<sup>510</sup> The United States contends that nothing in the Panel Report suggests that the "USDOC is laboring under conditions that prevent it from selecting facts that constitute reasonable and reliable replacements for the missing information."<sup>511</sup> China's and the United States' arguments on appeal mostly concern whether the USDOC relied on non-cooperation as the only relevant procedural circumstance when resorting to "facts available". China and the United States do not sufficiently engage with the extent to which, under the AFA Norm, the USDOC selects facts that reasonably replace the missing "necessary information" in order to arrive at an accurate determination.

5.178. For an evaluation of the conformity of the AFA Norm with Article 6.8 and paragraph 7 of Annex II, we would need to examine the process of reasoning and evaluation of all substantiated facts on the record adopted by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information". In deciding whether we are able to complete the analysis, we take into consideration the absence of Panel findings and sufficient undisputed facts on the Panel record, as well as the arguments made by the participants on appeal. Under these circumstances, we are unable to evaluate the process that the USDOC undertakes for its selection of which "facts available" reasonably replace the missing "necessary information" with a view to arriving at an accurate determination.

5.179. For these reasons, we do not accede to China's request for us to complete the analysis in relation to whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. Therefore, we need not examine the United States' contentions that Appellate Body findings on the AFA Norm would not contribute to a positive resolution of this dispute, and that China's claims are without merit.<sup>512</sup>

## 5.2.6 Conclusion

5.180. In sum, a rule or norm has "general application" to the extent that it affects an unidentified number of economic operators. In addition, we consider that a rule or norm has "prospective application" to the extent that it applies in the future. In this respect, in order to demonstrate prospective application, a complainant is not required to show with "certainty" that a given measure will apply in the future. Rather, where prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of other factors: the existence of an underlying policy that is implemented by the rule or norm; the systematic application of the challenged rule or norm; the design, architecture, and structure of the rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future. We find that the Panel erred by requiring "certainty" of future application when examining whether the AFA Norm has "prospective application". Consequently, we reverse the Panel's findings, in paragraphs 7.479 and 8.1.d.ii of its Report, that China has not demonstrated that the AFA Norm is a norm of general and prospective application.

5.181. In relation to China's request for us to complete the analysis and find that the AFA Norm is a rule or norm of general and prospective application, we consider that the unappealed Panel finding concerning the precise content of the AFA Norm suggests that this norm is a measure of general application because it affects an unidentified number of economic operators. The AFA Norm does not impose any express limitations on economic operators from NME countries that may be included within NME-wide entities subject to the AFA Norm. The connection between the AFA Norm and the Single Rate Presumption also supports the conclusion that the AFA Norm has "general application". This is because the Panel found that the Single Rate Presumption is a measure of general application, and the AFA Norm applies to the same group of economic operators subject to the Single Rate Presumption whenever the economic operators fail to

<sup>510</sup> China's appellant's submission, paras. 441, 480, and 487.

<sup>511</sup> United States' appellee's submission, para. 403.

<sup>512</sup> See United States' appellee's submission, paras. 253, 256, 257, 287, 399, 411-412, 416, and 418.

demonstrate an absence of governmental control over their export activities and fail to cooperate in the anti-dumping investigation to the best of their ability. Moreover, the fact that the 73 anti-dumping determinations put on the record by China covered a wide range of products and companies is a further indicator that the AFA Norm has "general application". For these reasons, based on the findings in the Panel Report and undisputed facts on the Panel record, we find that the AFA Norm has "general application".

5.182. In addition, we consider that the Panel's findings concerning the AFA Norm mean that this norm will continue to be applied in the future by the USDOC. The Panel made statements demonstrating that the AFA Norm has "prospective application", namely, that the AFA Norm was consistently and systematically applied by the USDOC over an extended period of time, and that the AFA Norm implements an underlying policy, provides administrative guidance, and creates expectations among economic operators. For these reasons, based on the findings and statements in the Panel Report and our legal analysis, we find that the AFA Norm has "prospective application".

5.183. In light of the unappealed Panel findings that the AFA Norm is attributable to the United States<sup>513</sup>, and that its content corresponds to the description thereof made by China<sup>514</sup>, as well as our conclusions above that the AFA Norm has general and prospective application, we find that the AFA Norm is a rule or norm of general and prospective application that may be challenged "as such" in WTO dispute settlement.

5.184. In relation to China's request for us to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement, we consider that the general reference by China to Annex II, together with the narrative included in its panel request, provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" consistently with the standard of Article 6.2 of the DSU. The Panel, however, made no findings on whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. In particular, the Panel did not explore the process of reasoning and evaluation undertaken by the USDOC prior to selecting "facts available" to replace missing "necessary information". For an evaluation of the conformity of the AFA Norm with Article 6.8 and Annex II, we would need to examine the process of reasoning and evaluation undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information". In deciding whether we are able to complete the analysis, we have taken into consideration the absence of Panel findings and sufficient undisputed facts on the Panel record, as well as the arguments made by the participants on appeal. Under these circumstances, we are unable to evaluate the process undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information" with a view to arriving at an accurate determination. Consequently, we do not accede to China's request for completion of the analysis.

## 6 FINDINGS AND CONCLUSIONS

6.1. For the reasons set out in this Report, the Appellate Body makes the following findings and conclusions.

### 6.1 The USDOC's application of the Nails test and its use of the W-T methodology in the three challenged investigations

6.2. In relation to the first alleged quantitative flaw with the Nails test, we consider that the fact that a large number of export prices may fall below the one standard deviation threshold where the distribution of the export price data is not normal, or single-peaked and symmetrical does not necessarily preclude an investigating authority from finding that the export prices to the "target" differ significantly from the other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Accordingly, we consider that China has not established that the standard deviation test as applied by the USDOC in the three challenged investigations is *only* capable of identifying prices that differ from other export prices and form a pattern within the meaning of the second sentence of Article 2.4.2 where the distribution of the export price data is normal, or single-peaked and symmetrical. On this basis, we

<sup>513</sup> Panel Report, para. 7.456.

<sup>514</sup> Panel Report, para. 7.454.

find that China has not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the first alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

6.3. In relation to third alleged quantitative flaw with the Nails test, the Panel considered that "the third alleged quantitative flaw rests on the assumption that in the three challenged investigations, the alleged target price gap was based on prices located at the tail of the distribution of the export price data and the weighted-average non-target price gap was based on prices located nearer to the peak of that distribution."<sup>515</sup> The Panel was correct in rejecting China's claim on the basis of its finding that China had not shown that this assumption is "factually correct insofar as the three challenged investigations are concerned".<sup>516</sup> Therefore, we find that China has not established that the Panel erred in its interpretation or application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in rejecting China's claim in respect of the third alleged quantitative flaw with the Nails test as applied in the three challenged investigations.

6.4. We also find that China has not established that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement in relation to both the first and third alleged quantitative flaws with the Nails test.

a. Consequently, we uphold the Panel's finding, in paragraph 8.1.a.vi of its Report, that "China has not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG, Coated Paper* and *Steel Cylinders* investigations" insofar as this finding relates to the first and third alleged quantitative flaws with the Nails test.

6.5. In relation to the qualitative issues with the Nails test, we consider that the Panel did not err in its interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement in finding that investigating authorities are not required to examine the reasons for the relevant differences in export prices, or whether those differences are unconnected to "targeted dumping", in order to assess whether export prices differ "significantly". We also consider that, while it did not explicitly refer to "objective market factors", the Panel correctly concluded that an investigating authority should undertake a qualitative analysis of the significance of export price differences. We thus disagree with China's contention that the Panel erred in interpreting and applying the second sentence of Article 2.4.2 because it found that "investigating authorities [are not required] to consider objective market factors in determining whether relevant pricing differences are 'significant'".<sup>517</sup>

a. Consequently, we uphold the Panel's findings, in paragraphs 7.114 and 8.1.a.viii of its Report, that "the USDOC was not required to consider the reasons for the differences in export prices forming the relevant pattern in order to determine whether those differences were qualitatively significant within the meaning of the pattern clause of Article 2.4.2" and that, accordingly, "China has not established that the United States acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement in the *OCTG, Coated Paper* and *Steel Cylinders* investigations because of the alleged qualitative issues with the Nails test".

6.6. In relation to the USDOC's use of averages to establish the existence of a pattern in the three challenged investigations, we consider that the existence of a pattern within the meaning of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement depends on the price relationship between the "targeted" transactions, on the one hand, and the "non-targeted" transactions, on the other hand. The distinguishing factor that allows for the determination of a pattern is that the prices within the pattern differ significantly from the prices outside it. We also note that the relevant difference is one "among" different purchasers, regions, or time periods. For these reasons, we consider that an investigating authority may rely on individual export transaction prices or average prices in order to find a pattern, provided that this pattern meets the requirements stipulated in the pattern clause. In this case, like the Panel<sup>518</sup>, we consider that

<sup>515</sup> Panel Report, para. 7.78.

<sup>516</sup> Panel Report, para. 7.82.

<sup>517</sup> China's appellant's submission, heading IV.

<sup>518</sup> Panel Report, para. 8.1.a.ix.

China has not demonstrated that the United States acted inconsistently with Article 2.4.2 in the three challenged investigations by determining the relevant pattern on the basis of average prices. In addition, by not advancing any argument that is separate and different from its arguments concerning the alleged error in the Panel's interpretation of Article 2.4.2, China has not demonstrated that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement. We therefore find that the Panel did not err in its interpretation and application of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement to the three challenged investigations when examining the USDOC's use of purchaser or time period averages under the Nails test. Furthermore, we find that China has not established that the Panel failed to comply with Article 17.6(i) of the Anti-Dumping Agreement.

a. Consequently, we uphold the Panel's finding, in paragraph 8.1.a.ix of its Report, that China has not established that the United States acted inconsistently with the second sentence of Article 2.4.2 in the three challenged investigations by determining the existence of a "pattern" on the basis of average prices, instead of individual export transaction prices.

6.7. In relation to the Panel's statements in footnote 385 of the Panel Report, we consider that, as in *US – Washing Machines*, the second sentence of Article 2.4.2 of the Anti-Dumping Agreement allows an investigating authority to establish margins of dumping by applying the W-T methodology only to "pattern transactions" and that Article 2.4.2 does not permit the combining of comparison methodologies.<sup>519</sup> In circumstances where the requirements of the second sentence of Article 2.4.2 are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of "pattern transactions", while excluding "non-pattern transactions" from the numerator, and dividing the resulting amount by *all* the export sales of a given exporter or foreign producer.<sup>520</sup>

a. Consequently, we declare moot the Panel's statements, in footnote 385 of its Report, to the extent that these statements are premised on the erroneous understanding that Article 2.4.2 of the Anti-Dumping Agreement permits the combining of comparison methodologies to establish dumping margins.

## 6.2 The AFA Norm

6.8. We consider that a rule or norm has "general application" to the extent that it affects an unidentified number of economic operators. In addition, a rule or norm has "prospective application" to the extent that it applies in the future. In this respect, in order to demonstrate prospective application, a complainant is not required to show with "certainty" that a given measure will apply in the future. Rather, where prospective application is not sufficiently clear from the constitutive elements of the rule or norm, it may be demonstrated through a number of other factors: the existence of an underlying policy that is implemented by the rule or norm; the systematic application of the challenged rule or norm; the design, architecture, and structure of the rule or norm; the extent to which the rule or norm provides administrative guidance for future conduct; and the expectations it creates among economic operators that the rule or norm will be applied in the future. We find that the Panel erred by requiring "certainty" of future application when examining whether the AFA Norm has "prospective application".

a. Consequently, we reverse the Panel's findings, in paragraphs 7.479 and 8.1.d.ii of its Report, that China has not demonstrated that the AFA Norm constitutes a norm of general and prospective application.

6.9. In relation to China's request for us to complete the analysis and find that the AFA Norm is a rule or norm of general and prospective application, we consider that the unappealed Panel finding concerning the precise content of the AFA Norm suggests that this norm is a measure of general application because it affects an unidentified number of economic operators. The AFA Norm does not impose any express limitations on economic operators from NME countries that may be included within NME-wide entities subject to the AFA Norm. The connection between the AFA Norm and the Single Rate Presumption also supports the conclusion that the AFA Norm has "general application". This is because the Panel found that the Single Rate Presumption is a measure of

<sup>519</sup> Appellate Body Report, *US – Washing Machines*, para. 5.129.

<sup>520</sup> Appellate Body Report, *US – Washing Machines*, para. 5.130.

general application, and the AFA Norm applies to the same group of economic operators subject to the Single Rate Presumption whenever the economic operators fail to demonstrate an absence of governmental control over their export activities and fail to cooperate in the anti-dumping investigation to the best of their ability. Moreover, the fact that the 73 anti-dumping determinations put on the record by China covered a wide range of products and companies is a further indicator that the AFA Norm has "general application". For these reasons, based on the findings in the Panel Report and undisputed facts on the Panel record, we find that the AFA Norm has "general application".

6.10. In addition, we consider that the Panel's findings concerning the AFA Norm mean that this norm will continue to be applied in the future by the USDOC. The Panel made statements demonstrating that the AFA Norm has "prospective application", namely, that the AFA Norm was consistently and systematically applied by the USDOC over an extended period of time, and that the AFA Norm implements an underlying policy, provides administrative guidance, and creates expectations among economic operators. For these reasons, based on the findings in the Panel Report and our legal analysis, we find that the AFA Norm has "prospective application".

a. In light of the unappealed Panel findings that the AFA Norm is attributable to the United States<sup>521</sup>, and that its content corresponds to the description thereof made by China<sup>522</sup>, as well as our conclusions above that the AFA Norm has general and prospective application, we find that the AFA Norm is a rule or norm of general and prospective application that may be challenged "as such" in WTO dispute settlement.

6.11. In relation to China's request for us to complete the analysis and find that the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement, we consider that the general reference by China to Annex II, together with the narrative included in its panel request, provides "a brief summary of the legal basis of the complaint sufficient to present the problem clearly" consistently with the standard of Article 6.2 of the DSU. The Panel, however, made no findings on whether the AFA Norm is inconsistent with Article 6.8 and paragraph 7 of Annex II to the Anti-Dumping Agreement. In particular, the Panel did not explore the process of reasoning and evaluation undertaken by the USDOC prior to selecting "facts available" to replace missing "necessary information". For an evaluation of the conformity of the AFA Norm with Article 6.8 and Annex II, we would need to examine the process of reasoning and evaluation undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information". In deciding whether we are able to complete the analysis, we have taken into consideration the absence of Panel findings and sufficient undisputed facts on the Panel record, as well as the arguments made by the participants on appeal.

a. Under these circumstances, we are unable to evaluate the process undertaken by the USDOC for its selection of which "facts available" reasonably replace the missing "necessary information" with a view to arriving at an accurate determination. Consequently, we do not accede to China's request for completion of the analysis.

### 6.3 Recommendation

6.12. The Appellate Body recommends that the DSB request the United States 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 and the GATT 1994, into conformity with those Agreements.

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<sup>521</sup> Panel Report, para. 7.456.

<sup>522</sup> Panel Report, para. 7.454.



Signed in the original in Geneva this 11th day of May 2017 by:

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Ujal Singh Bhatia  
Presiding Member

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Ricardo Ramírez-Hernández  
Member

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Shree Baboo Chekitan Servansing  
Member

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